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The European Union and the United Nations Convention on the Law of the Sea

Esa Paasivirta*

*European Commission Legal Service, Brussels; University of Helsinki

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Esa Paasivirta

Abstract

This Essay comments on EU participation in UNCLOS and its implementation. It addresses first the nature of the EU as a contracting party and outlines the modalities for its participation. It then reviews the international implementation of the UNCLOS obligations and the implementation/status of the Convention under EU law.

KEYWORDS: UNCLOS, Convention, United Nations, Law of the Sea

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INTRODUCTION

The United Nations Convention on the Law of the Sea (“UNCLOS” or the “Convention”)¹ is the key legal framework for all activities in the oceans. On 9 June 2014, the Secretary-General of the United Nations, in opening the commemoration of the twentieth anniversary of the entry into force of the Convention, referred to the Convention as one of the most significant and visionary multilateral instruments of the twentieth century. He noted that most of the provisions of the Convention, usually referred to as the “Constitution

*European Commission Legal Service, Brussels; Ph.D. (Cambridge, UK); adjunct professor at University of Helsinki. The views expressed in this article are personal.

1. United Nations Convention on the Law of the Sea, Dec. 10, 1982, 1833 U.N.T.S. 3.

for the oceans,” are now widely recognized as reflecting customary international law.² This reflects a generally held view, including by the EU and its member States,³ which is to a large extent shared also by States not party to the Convention, notably the United States.⁴

The Convention is of critical importance for the peaceful use of the oceans. Its 320 articles and nine annexes cover almost all aspects of international law relating to the oceans. It takes largely a zonal approach to the law of the sea, including zones such as territorial sea, continental shelf, contiguous zone, exclusive economic zone, and high seas. Its comprehensive subject matter covers areas including freedom of navigation, utilization of resources, the protection and preservation of the maritime environment and international dispute settlement. Also, for States that are not parties to the Convention, notably the United States, it is the central instrument for ocean policy.⁵

UNCLOS was negotiated in the 1970s and early 1980s when major developments in the law of the sea took place. In particular, it was foreseen that the establishment of the 200 nautical mile Exclusive Economic Zones (“EEZ”) was to be confirmed in the Convention which triggered the necessity for the then the European Economic Community (“EEC”) to become a party to UNCLOS because of its exclusive competence in the area of fisheries management and conservation.

UNCLOS serves as an illustration, by now already a more general phenomenon, where the EU participates in international agreements as a contracting party. This follows ultimately from the

2. Convention on the Law of the Sea, Rep. on its 24th Sess., June 9–13, 2014, ¶ 14, U.N. Doc. SPLOS/277 (Jul. 14, 2014).

3. *EU Statement at United Nations General Assembly: Oceans and Law of Sea, Including Sustainable Fisheries* (Dec. 9, 2014), available at http://eu-un.europa.eu/articles/en/article_15840_en.htm (“The EU and its Member States continue to believe that this framework convention represents the constitution of the oceans, reflects customary international law and establishes the overarching legal framework within which all activities in oceans and seas must be carried out and wish that the goal of universal participation in this Convention will soon be met.”).

4. James E. Hickey Jr., *The United Nations Convention on the Law of the Sea*, in *OCEAN AND COASTAL LAW AND POLICY* 365, 365 (Donal C. Baur, Tim Eichenberg & Michael Sutton eds., American Bar Association, 2d ed. 2015 (forthcoming)).

5. See generally T.T.B. Koh, *Constitution for the Oceans*, in 1 *UNITED NATIONS CONVENTIONS ON THE LAW OF THE SEA 1982—A COMMENTARY* 11 (Nordquist, M.H. ed., 1985); Shirley C. Scott, *The LOS Convention as a Constitutional Regime for the Oceans*, in *STABILITY AND CHANGE IN THE LAW OF THE SEA: THE ROLE OF THE LOS CONVENTION* 26 (Alex G. Oude Elferink, ed., 2005); Hickey, *supra* note 4, at 365.

public powers conferred by its member States. The EU is not a State, but it participates in international agreements alongside States. This unique position is reflected in the provisions of UNCLOS. Referring to entities such as the EU which become parties to the Convention in accordance with its conditions, Article 1(2)(2) of UNCLOS provides that the Convention applies to them “mutatis mutandis” and the term “States parties” refers to them to that extent.

On the one hand, this implies that the EU is a holder of rights and obligations under the Convention. On the other hand, the conditions for its participation require that the EU inform the others of its competences. This is important since the EU member states are parties to the Convention as well. In this respect, UNCLOS forms a part of a common phenomenon known as “mixed agreements” in terms of EU language. UNCLOS is the first major multilateral convention of this kind.

This Essay comments on EU participation in UNCLOS and its implementation. It addresses first the nature of the EU as a contracting party and outlines the modalities for its participation. It then reviews the international implementation of the UNCLOS obligations and the implementation/status of the Convention under EU law.

I. EUROPEAN UNION PARTICIPATION IN UNCLOS

It is useful to recall that in the Third United Nations Conference on the Law of Sea (1973–1982) the then EEC was not a party to the negotiation of the Convention, but it was given an observer status in 1974. The EEC was not directly represented but its voice was heard through its member States, in particular the rotating presidencies provided that they managed to coordinate their positions.⁶ The European Commission, the executive body, felt that it was necessary for the EEC to become a party to the Convention. It has been estimated that had it not been for the exclusive Community competence in the area of fisheries, the EEC member States would not have fought the EEC to become party to the Convention.⁷ One of

6. BEN-JACOB DIEWITZ, *THE EUROPEAN UNION, ITS MEMBER STATES & THE LAW OF THE SEA: AN ASSESSMENT OF THE RELATIONSHIP BETWEEN THE EU AND ITS MEMBER STATES IN THE EUROPEAN EXTERNAL RELATIONS LAW PERTAINING TO THE UNITED NATIONS CONVENTION ON THE LAW OF THE SEA* 13–15 (unpublished Ph.D. thesis, University of Bristol, Mar. 2012).

7. *Id.* at 21–22.

the greatest achievements of the EEC and its member States was the “EEC clause” which permitted the Community to become a contracting party. While the EEC was not the only international organization which was an observer in the conference, it was clear from the beginning that it had a special status due to its exclusive competence whereby its member States could no longer act in an independent way.⁸ The Community participation in UNCLOS was far from a given. The United States in particular was concerned of the risk of double representation, which could lead to unjustifiably strong European influence. Finally the EEC member States convinced other States opposed to the EEC clause to accept such a clause in order to bind the member States fully to the Convention following from the conferral of competences.⁹ That clause is now contained in Article 305(1)(f) and Annex IX of the Convention.

A. Modalities of EU Participation

Article 305(1)(f) provides that the Convention is open for signature to international organization, in accordance with Annex IX. Annex IX contents are fairly detailed and tailor-made for the EU. Article 1 of Annex XI defines an international organization as “an intergovernmental organization constituted by states to which its member states have transferred competence over matters governed by the Convention, including competence to enter into treaties in respect of those matters.” More recent multilateral treaty practice refers to such an organization most often as a “regional economic integration organization” (“REIO”) even though the actual competences of an organization such as the EU are not anymore confined to economic matters. The key element is the emphasis on the conferral of competence from the member States to the organization, rather than using the traditional definition of an international organization as one based on an inter-state treaty and having international legal personality.

Annex IX sets out a number of conditions that apply for the participation of such an organization as a contracting party. Article 3 provides that the organization may deposit its instrument of formal confirmation (ratification) if a majority of its member States have deposit or have deposited their instruments of ratification. It provides

8. *Id.* at 21.

9. *Id.* at 27.

moreover that the instrument that it has deposited shall contain certain undertakings and declarations relating to the extent of its participation and rights and obligations as well as declarations and communications of its competences, which are laid down in Articles 4 and 5 respectively.

Article 4(1) requires that the organization accept that the rights and obligations of States under the Convention in respect of which competence has been transferred to it by the member States which are parties to the Convention. Article 4(3) specifies that member States shall not exercise competences which have been transferred to the organization and Article 4(4) aims to prevent kinds of double influence in providing that the participation of the organization shall “in no case entail an increase of the representation to which its member States which are States Parties would otherwise be entitled, including rights in decision-making.” Pursuant to Article 4(6), “[i]n the event of a conflict between the obligations of the an international organization under this Convention and its obligations under the agreement establishing the organization or any acts relating to it, the obligations under this Convention shall prevail.” This provision makes a difference between the internal law of the organization and the observance of the Convention known from Article 27 of the Vienna Convention on the Law of Treaties of 1969, to the effect that the organization cannot invoke its internal law justify its failure to observe the Convention.

Article 5(1) provides that the organization’s instrument of formal confirmation shall contain a declaration specifying the matters governed by the Convention “in respect of which competence has been transferred to the organization by its member States which are Parties to the Convention.”

Article 6 concerns responsibility and liability. Article 6(1) specifies that “[p]arties which have competence under Article 5 of this Annex shall have responsibility for failure to comply with obligations or for any other violation of this Convention.” Article 6(2) commits the organization and its member States to provide for information as to who has responsibility in respect of any specific matter. This is complemented by a kind of default clause which provides that failure to provide information within a reasonable time or provision of contradictory information shall result in joint and several liability.

When joining UNCLOS, the EU made the requisite declaration of competence.¹⁰ It contains a description of the different competences involved, namely exclusive Union competence (e.g., conservation and management of fishing resources and customs) and matters that fall within the shared competence of the Union and its member States (e.g., maritime transport, safety of shipping, and prevention of pollution). The EU declaration of competence states that “the scope and exercise of such Community competence are, by their nature, subject to continuous development” and the declaration will be completed or amended if necessary. No such formal amendment has been made or requested so far.

B. Participation of EU Member States

It follows from the nature of the Convention (internally a so-called mixed agreement) that the EU member States are contracting parties in respect of their national competences and, in their declarations at the time of ratification, refer to their membership in the EU. The EU and its member States often act largely as a group, which is visible in the Meetings of States Parties and the UN General Assembly in particular when making statements which are frequently done jointly.

Since both the EU and its member States participate in the Convention, it is of paramount importance that they act in a uniform manner maintaining the unity of the European Union. This necessitates regular coordination meetings, which are carried out both in Brussels and at the UN. This coordination is by now a well-established practice and is taken for granted by all participants on the EU side. This close coordination is ultimately guided by the EU law principle of sincere cooperation, established in the EU's founding Treaties.¹¹ From early on, this principle has been of paramount importance in all “mixed agreement” situations in maintaining cohesion and unity within the EU, and the European Court of Justice

10. See Council Decision 98/392, 1998 O.J. L 179, 129 (EC).

11. See Consolidated Version of the Treaty on European Union art. 4(3), 2010 O.J. C 83/01 at 18 (“Pursuant to the principle of sincere cooperation, the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties. The Member States shall take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union. The Member States shall facilitate the achievement of the Union’s tasks and refrain from any measure which could jeopardise the attainment of the Union’s objectives.”).

has played a significant role in elaborating the principle for multilateral contexts.¹²

II. IMPLEMENTATION OF UNCLOS UNDER INTERNATIONAL LAW

The implementation of UNCLOS is carried out both by the EU and/or its member States within their respective competences. As indicated above, the EU and its member States undertake to inform the others which among them is competent in a relevant subject matter. If this does not work, they run the risk of becoming jointly responsible vis-à-vis third parties for any breaches of Convention obligations. As the International Tribunal for the Law of the Sea (“ITLOS”) has recently recalled, other States may, pursuant to article 6, paragraph 2, of Annex IX to the Convention, request an international organization or its member States, which are parties to the Convention, for information as to who has responsibility in respect of any specific matter. Failure to do so within a reasonable time or the provision of contradictory information results in joint and several liability of the international organization and the member States concerned.¹³

The EU takes part in the implementation and further development of the Convention in the frameworks of the State Parties

12. *See* Opinion 1/94, [1994] E.C.R. I-5272 (stating that “where it is apparent that the subject-matter of an agreement or convention falls in part within the competence of the Community and in part within that of the Member States, it is essential to ensure close cooperation between the Member States and the Community institutions, both in the process of negotiation and conclusion and in the fulfilment of the commitments entered into. That obligation to cooperate flows from the requirement of unity in the international representation of the Community.”). More recently, it was confirmed that:

Member States are subject to special duties of action and abstention in a situation in which the Commission has submitted to the Council proposals which, although they have not been adopted by the Council, represent the point of departure for concerted Community action That is especially true in a situation such as that in the present case which is characterized . . . by a unilateral proposal which dissociates the Member State in question from a concerted common strategy within the Council and was submitted within an institutional and procedural framework such as that of the Stockholm Convention Such a situation is likely to compromise the principle of unity in the international representation of the Union and its Member States and weaken their negotiating power with regard to the other parties to the Convention concerned.

Commission v. Sweden, Case C-246/07, [2010] E.C.R. I-03317 ¶ 74–103.

13. *See* Request for an Advisory Opinion Submitted by the Sub-Regional Fisheries Commission (“SRFC”), Advisory Opinion of 2 Apr. 2015, available at https://www.itlos.org/fileadmin/itlos/documents/cases/case_no.21/advisory_opinion/C21_AdvOp_02.04.pdf.

Meetings as well as the UN General Assembly. They constitute but related frameworks and they differ in composition. Participation in UNCLOS also implies that the EU is subject to the Convention dispute resolution mechanisms as further provided therein.

A. The Meetings of State Parties and the UN General Assembly

UNCLOS established a “light” institutional framework for addressing the implementation of the Convention. A central body is the Meeting of States Parties (“SPLOS”), which receives a report of the UN Secretary General, in its function as the depository, addressing “issues of a general nature.”¹⁴ The EU participates in the SPLOS meetings in its full rights as a contracting party, while especially the United States acts in its capacity as observer as it is not a contracting party.

The SPLOS acts under a fairly narrow mandate under Article 319 of UNCLOS. It reviews the recent developments under the Convention and provides a possibility to react to these developments. It also addresses administrative/budgetary matters concerning different bodies established under the Convention, and it decides on the appointment of judges to the ITLOS. Amongst other parties, the EU participates in these meetings on a regular basis along with its member States.

A regular agenda item in recent SPLOS meetings has concerned the administrative functioning of the Commission on the Limits of the Continental Shelf (“CLCS”).¹⁵ It is a technical treaty body, consisting of scientists, established under UNCLOS (Article 76(8) and Annex II).¹⁶ The CLCS’s task is to give recommendations to coastal States on matters related to the establishment of the outer limits of their continental shelf beyond 200 nautical miles. The limits of the shelf established by a coastal State on the basis of these recommendations shall be final and binding. The large number of State submissions in recent years, altogether seventy-seven submissions, has resulted in a

14. United Nations Convention on the Law of the Sea, Art. 319(2)(a), Dec. 10, 1982, 1833 U.N.T.S. 3.

15. Convention on the Law of the Sea, Rep. of the 24th Meeting of States Parties, 14 July 2014, U.N. Doc. SPLOS/277, available at http://www.un.org/ga/search/view_doc.asp?symbol=SPLOS/277.

16. Bjorn Kunoy, *The Terms of Reference of the Commission on the Limits of the Continental Shelf: A Creeping Legal Mandate*, 25 LEIDEN J. INT’L L. 109 (2012).

significant workload for the Commission.¹⁷ Within the EU, these are typically matters which fall primarily within the competence of the EU member States, since they basically concern State borders. Several EU member States, including the United Kingdom, France, Spain, Ireland, and Denmark have made such submissions.

At the same time, the UN General Assembly plays a role in respect of matters concerning the development of the law of the sea, and it partly also addresses issues relating to the Convention. There is some overlap concerning subject matter and perhaps even competition between these different bodies. Yet this has not led the parties of the Convention to fight over the role of the General Assembly on issues that could be addressed in SPLOS and both bodies continue addressing the law of the sea issues on a regular basis.¹⁸

The EU has an observer status in the General Assembly, since 2011 it can participate in the work of the official UN meetings in enhanced terms.¹⁹ In practice, given that most General Assembly resolutions are prepared in informal consultations, the EU can take part in the consultations despite its observer status.²⁰ Regarding the work of certain sub-bodies under the General Assembly, notably the so-called Open-ended Informal Consultative Process on Oceans and the Law of the Sea (“ICP”), established in 1999, participation is more open and covers *inter alia* “all parties to the Convention” which, in the case of the EU, is a way to attempt to bridge the traditional division between UN members and mere observers.²¹ That the

17. For the list of submissions and recommendations that have been done so far, see the information of the UN Secretariat. U.N. Div. for Ocean Affairs and the Law of the Sea, Submissions, through the Secretary-General of the United Nations, to the Commission on the Limits of the Continental Shelf, pursuant to article 76, paragraph 8, of the United Nations Convention on the Law of the Sea of 10 December 1982, 13 April 2015, available at http://www.un.org/Depts/los/clcs_new/commission_submissions.htm.

18. See generally Tullio Treves, *The General Assembly and the Meetings of the States Parties in the Implementation of the LOS Convention*, in STABILITY AND CHANGE IN THE LAW OF THE SEA: THE ROLE OF THE LOS CONVENTION 55, 55 (Alex G. Oude Elferink ed., 2005).

19. See generally PEDRO ANTONIO SERRANO DE HARO, PARTICIPATION OF THE EUROPEAN UNION IN THE WORK OF THE UNITED NATIONS: GENERAL ASSEMBLY RESOLUTION 65/276 (CLEER, Working Paper 2012).

20. See Esa Paasivirta & Dominic Porter, *EU Coordination at the UN General Assembly and ECOSOC: A View From Brussels, A View from New York*, in THE UNITED NATIONS AND THE EUROPEAN UNION 35, 35 (Jan Wouters et al. ed., 2006).

21. G.A. Res. 54/33, ¶ 3(a), U.N. Doc. A/RES/54/33 (Jan. 18, 2000) (“The meetings will be open to all States Members of the United Nations, States members of the specialized agencies, all parties to the Convention . . .”).

General Assembly has reaffirmed its role relating to the development of the law of the sea is seen, for instance, in relation to the work concerning the conservation and sustainable use of marine biological diversity beyond areas of national jurisdiction. It is foreseen that the General Assembly takes a decision in its sixty-ninth session (2015) on the development of a new international instrument (so-called implementation agreement) under the UNCLOS.²²

The fact that law of the sea related issues are being addressed within two separate frameworks does not appear to have caused serious concern, at least amongst the large majority of parties and UN members. However, the General Assembly framework remains a definite concern for the EU, since it is not a UN member, but acts as an observer in that context and its position is not equal to the members. It remains an observer status, even though the conditions for the EU participation in the work of the UN have been improved in the recent years. This is unfortunate, but not easily changeable, since the General Assembly resolutions, while only formally recommendations, can influence the development of customary international law, and the EU is bound by customary law, including under its own Treaties as discussed below. These status-related concerns come to the fore especially when negotiating new agreements within the General Assembly framework, in accordance with its procedures. In such situations in particular it is fully justified to expect that the working methods are adjusted to be fully equal to all participants, including to all contracting parties to UNCLOS, and the EU is one of them.

B. Arbitration and Judicial Practice

UNCLOS participation also implies that a contracting party is subject to the comprehensive dispute resolution mechanism established under Article 287 of the Convention. This entails several different procedures, including the ITLOS, the International Court of Justice (“ICJ”), an arbitral tribunal constituted in accordance with Annex VII, and a special arbitration tribunal constituted in accordance with Annex VIII. The contracting parties can choose from these alternatives by making a declaration. Article 287(3) provides that a

22. U.N. GAOR, 69th Sess., General Assembly, U.N. Doc. A/69/L.29, ¶ 214 (Dec. 2014).

party to a dispute that is not covered by a declaration shall be deemed to have accepted arbitration in accordance with Annex VII.

The ICJ is not a possible option for dispute settlement in the case of the EU. This follows from the simple fact that the EU is not a state and thus it cannot be a party to the Statute of the ICJ, which is reserved for states only. This restriction applies even if a dispute would fall within the core competence areas of the EU. This reality was brought home in the *Fisheries Jurisdiction Case (Spain v. Canada)* in the ICJ, even though this case originated from the time preceding the entry into force of UNCLOS. This case was in fact within the area of EU fisheries policy and thus within the area of EU exclusive competence. It concerned the activities of Spanish fishing vessels close to the Canadian coast that were affected by changes in Canadian fisheries legislation. Theoretically, the claim could have been brought by the EU in another forum than the ICJ, which could well be the case today following the entry into force of UNCLOS. However, due to the reason of not having access to the ICJ, the only option at the time was clearly for Spain as the flag State to bring the claim against the Canadian Government. The claim was ultimately rejected by the ICJ for lack of jurisdiction. This followed from the fact that Canada had shortly before amended its optional clause for ICJ jurisdiction to the effect that it lacked the consent of the Canadian Government and was prevented from assuming jurisdiction in disputes concerning fisheries conservation and management.²³

The ICJ aside, other options for dispute settlement under Article 287 of UNCLOS would be ITLOS or special arbitration under Annex VIII, which is a dedicated arbitration procedure for certain areas

23. *Fisheries Jurisdiction (Spain v. Canada)*, 1998 I.C.J. 432, ¶ 61, 87 (Dec. 4). The dispute originated in 1994 from fishing activities off the Canadian coast in New Foundland partly belonging to high seas, located in the Grand Banks area covered by the North Atlantic Fisheries Organization ("NAFO"). The same year, Canada amended its Coastal Fisheries Protection Act to extend to part of the Grand Banks area. The Act also made it illegal for certain states to fish in the area, and in 1995 Spain and Portugal were added to that list. On May 10, 1994, Canada made a declaration, in accordance with Article 36(2) of the Statute of the ICJ, revoking its earlier declaration. The new declaration included a further reservation that excluded from the Court's jurisdiction "disputes arising out of or concerning conservation and management measures taken by Canada with respect to vessels fishing in the NAFO Regulatory area . . . and the enforcement of such measures." In March 1995 the Spanish flagged vessel *Estai* was intercepted by Canadian authorities in the Grand Banks area. The vessel was seized, and the master arrested for infringement of Canadian fishing regulations. The EU and Spain protested. On April 1995, an agreement was reached between the European Union and Canada removing Spain and Portugal from the list of states that were not allowed to fish in the area. The proceedings against *Estai* were discontinued. *Id.* ¶ 14, 18–22.

which require special expertise and fact-finding. However, for either of these options to apply it would require a declaration by the contracting party. In neither case has the EU made such a declaration either at the time of joining the Convention or thereafter.

It follows from above that the “default clause” in Article 287(3) of UNCLOS applies in the case of the EU. Pursuant to that provision, a party to a dispute that is not covered by a declaration in force shall be deemed to have accepted arbitration under Annex VII of UNCLOS. This option is therefore the option for the EU to be involved in a dispute either as a claimant or defendant under UNLCOS.

This has happened in two cases in the recent past, though in the end, both of them were settled amicably and thus there was no final decision.

In the *Swordfish Case (Chile v. European Community)*,²⁴ Chile initiated arbitration proceedings in 2000 pursuant to UNCLOS Annex VII and a Special Chamber of ITLOS was established to deal with the dispute. Chile invoked its unilaterally set conservation measures regarding highly migratory fish, challenging the EC’s freedoms on the high seas in an area adjacent to Chile’s exclusive economic zone. According to Article 116 of UNCLOS, all States have the right to ensure that their nationals can fish freely on the high seas while Article 64 sets a duty of cooperation between the coastal States and other States whose nationals fish in the region. The proceedings under UNCLOS followed immediately after the EC had submitted the dispute concerning Chile’s unilateral measures to the WTO requesting the establishment of a WTO panel (*Chile—Measures Affecting the Transit and Importation of Swordfish*). The EC complained of a violation of the GATT (Articles V and XI) by Chile as its measures prevented EC fishing vessels from unloading their swordfish in Chilean ports either to land or to transfer them to other vessels.²⁵ Chile’s defense, in turn, could rely on the general exceptions of the GATT (Article XX). There was no obvious reason to exclude the jurisdiction of the respective dispute resolution procedure in either case. However, no final decisions were reached on the merits and a potential conflict between the treaty regimes remained unresolved.

24. See Conservation and Sustainable Exploitation of Swordfish Stocks in the South-Eastern Pacific Ocean (*Chile v. European Community*), Case No. 7, Intl. Trib. on the Law of the Sea (2000).

25. WT/DS193/1 of 26 April 2000.

While the parallel disputes were pending, the parties went on to continue their bilateral negotiations and a final compromise was reached after nine years of negotiations. This resulted in a bilateral arrangement that permitted both parties' fishing activities of swordfish to continue within certain maximum limits and monitoring and providing for access to ports.²⁶ After several suspensions since 2001, the parties discontinued the ITLOS case in 2009 and the WTO case in 2010.²⁷

The EU has been more recently a party to another UNCLOS arbitration also involving interplay between UNCLOS and the WTO related to fixing fishing quotas and trade measures. This dispute originated in a dispute between the Faroe Islands (which are part of Denmark, but outside the EU) and the EU over the sharing of fishing quotas concerning Atlanto-Scandian herring. The stock has been managed through consultations amongst the relevant coastal States whose EEZ is visited by this fish during its migration cycle. In accordance with the sharing arrangements, it had been agreed that the share for the Faroe Islands was 5.16% of the Allowable Catch ("TAC"). In the coastal state consultations for the arrangements for 2013, the Faroe Islands refused to continue the current sharing arrangement. Instead the Faroe Islands announced that a new catch limit of 105,230 tonnes had been set unilaterally for the Faroese fleet, which represented 17% of the recommended TAC. The EU considered, *inter-alia*, that the Faroe Islands had failed its cooperation obligations under UNCLOS (Article 61(2), Article 63(1-2)) and notified the Faroe Islands of its intention to identify it as a country allowing unsustainable fishing. In responding to the Commission notification, the Faroe Islands denied having withdrawn from the consultations and argued that the EU had no right to use coercive measures, but did not indicate any intention to amend its unilateral decision. The Commission concluded that the Faroe Islands had not given sufficiently substantiated reasons for its unilateral quota or the lack of cooperation. In order to counter what was seen as over-exploitation of the stock, the EU adopted measures banning the import of fish or fishery products caught by vessels flying the flag of

26. Understanding concerning the conservation of swordfish stocks in the South Eastern Pacific Ocean, O.J. L 155/3 (June 22, 2010).

27. See Order 2009/1 of 16 December 2009, www.itlos.org; Joint Communication WT/DS193/4, G/L/367/Add.1 June 2010.

the Faroe Islands and the vessels were subjected to restrictions on the use of EU ports.²⁸

In 2013, in the face of the EU measures, Denmark, in respect of the Faroe Islands, initiated the *Atlanto-Scandian Herring Arbitration* under Annex VII of UNCLOS, under the auspices of the Permanent Court of Arbitration, alleging violation by the EU of its cooperation obligations under UNCLOS (Article 63(1)).²⁹ In parallel, the claimant initiated proceedings under the WTO dispute settlement to contest the GATT compatibility of the EU trade measures in *European Union—Measures on Atlanto-Scandian Herring*.³⁰

Outside those proceedings contacts between the two parties continued, and a settlement was reached. The Faroe Islands reduced significantly its quota (from 105,230 tonnes for 2013 to 40,000 for 2014). This, taken together with the quotas of the other coastal States, was not considered to undermine the conservation efforts of the EU, and the EU repealed its trade measures.³¹ Both cases were terminated in September 2014.

Reference should in addition be made to the ITLOS Advisory Opinion in *Case No. 21*³², given on April 2, 2015, to a request by the Sub-Regional Fisheries Commission (“SRFC”). The SRFC, a West-African fisheries organization involving seven member States, introduced a request for an ITLOS advisory opinion for four questions related to flag State liability for illegal, unreported and unregulated (“IUU”) fishing activities conducted within the EEZ of States other than the flag State. The Tribunal was also requested to address a question concerning liability in a situation where a fishing license is issued to a vessel within the framework of an international agreement with an international organization in order to know where the flag State or the international organization should be held liable for the

28. Commission Implementing Regulation (EU), No. 793/2012, OJ L 223, at 1 (Aug. 21, 2003).

29. See *In re Atlanto-Scandian Herring* (Den. in respect of Faroe Is. v. E.U.) P.C.A. Case 2013-30.

30. See Request for Consultations by Denmark in Respect of the Faroe Islands, *European Union—Measures on Atlanto-Scandian Herring*, WTO Doc. WT/DS469/1 (Nov. 7, 2013).

31. See Commission Implementing Regulation 896/2014, Establishing Measures in Respect of the Faroe Islands to Ensure the Conservation of the Atlanto-Scandian Herring, 2014 O.J. L 244/10.

32. See *Request for an Advisory Opinion Submitted by the Sub-Regional Fisheries Commission* (Apr. 2, 2015), available at <https://www.itlos.org/en/cases/list-of-cases/case-no-21/>.

violation of the fisheries legislation of the coastal State by the vessel in question. This third question was clearly addressed to the EU. The ITLOS Advisory Opinion gave the following operative reply to that third question:

172. The Tribunal holds that in cases where an international organization, in the exercise of its exclusive competence in fisheries matters, concludes a fisheries access agreement with an SRFC Member State, which provides for access by vessels flying the flag of its member States to fish in the exclusive economic zone of that State, the obligations of the flag State become the obligations of the international organization. The international organization, as the only contracting party to the fisheries access agreement with the SRFC Member State, must therefore ensure that vessels flying the flag of a member State comply with the fisheries laws and regulations of the SRFC Member State and do not conduct IUU fishing activities within the exclusive economic zone of that State.

174. Accordingly, only the international organization may be held liable for any breach of its obligations arising from the fisheries access agreement, and not its member States. Therefore, if the international organization does not meet its “due diligence” obligations, the SFRC Member States may hold the international organization liable for the violation of their fisheries laws and regulations by a vessel flying the flag of a member State of that organization and fishing in the exclusive economic zones of the SRFC Member States within the framework of a fisheries access agreement between that organization and such Member States.

This is in line with the EU observations. It was the first time that the EU participated in this kind of proceedings. The Commission, on behalf of the EU, had made written observations and appeared in the oral hearings. Certain EU member States had also made observations, primarily on the question of ITLOS jurisdiction, which was not addressed in the observations by the EU.

The ITLOS Advisory Opinion is significant for the development of international law doctrine concerning responsibility of international organizations. The interesting point of the ITLOS approach is that it relates the question of responsibility to the competence of the organization, instead of premising it on whether the illegal conduct (act or omission) can be attributed to the organization via the conduct of its “organs or agents.” The latter approach has been followed by the International Law Commission (“ILC”) in dealing with the rules

of attribution.³³ While this may be in line of a standard model of a “classical” international organization, it has been argued that that model is wholly inadequate in the case of a “regional integration organization” like the EU, which characteristically acts via the authorities of its member States implementing the decisions of the organization, and only sometimes and in certain areas through its own organs or agents.³⁴ The ITLOS Opinion was the first time when an international judicial body articulated in such clear terms the connection between responsibility and the competence of the organization.³⁵ The ITLOS Opinion contributes to further clarity of international law doctrine in the case of integration organizations such as the EU.

It may be noted that on the EU internal scene, following the inter-institutional disagreement as to which institution should decide on the submission of observations, the Council brought proceedings against the Commission in *Case C-73, Council v. Commission*,³⁶ arguing that it should have been for the Council to make the final decision to decide on the submission of EU observations, due to its policy-making role under the EU Treaties (Article 16 of the Treaty on European Union, (“TEU”)), while the Commission defends its prerogatives to represent the EU in legal proceedings (Article 355 of the Treaty on the Functioning of the European Union (“TFEU”). The case is pending before the EU Court of Justice.

The above international practice reflects that other States consider that when the EU acts within its competence areas it is also fully competent in international law to stand for its international responsibilities resulting from its international obligations. In this respect, the law of the sea practice complements and consolidates the practice in other areas, in particular the WTO dispute resolution practice. The EU participation in legal proceedings also reflects its commitment to the rule of law, which is an external policy objective

33. See Article 6 of the Draft Articles on the Responsibility of International Organizations (2011), prepared by the ILC and now contained in the UN General Assembly Resolution 66/100 adopted on 9 December 2011, available at http://www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/66/100/

34. This is referred to as “competence model” (in contrast to “organic model”) in Pieter-Jan Kuijper & Esa Paasivirta, *EU International Responsibility and Its Attribution: From the Inside Looking Out*, in *THE INTERNATIONAL RESPONSIBILITY OF THE EUROPEAN UNION* 35, 54 (Malcolm Evans & Panos Koutrakos eds., 2013).

35. As such this is compatible with the practice of the WTO. *See id.* at 60–63.

36. *See Case C-73/14, Council v. Comm’n*, [2014] E.C.R. 21.

set out in the EU founding treaties. It is provided therein, *inter-alia* that “the Union's action shall be guided by . . . the rule of law . . . and respect for the principles of . . . international law.”³⁷

III. IMPLEMENTATION OF UNCLOS UNDER EUROPEAN UNION LAW

A. Status of International Law Under EU Law

From early on, under the influence of the Court of Justice, EU law has been viewed as a separate or new legal order, as stated in the seminal cases *Van Gend & Loos* and *Costa v. Enel*.³⁸ The autonomous nature of EU law applies in particular in relation to international law, as recently highlighted in the EU Court's Opinion 2/13.³⁹

The view of EU law as an autonomous legal order calls for some organizing principles in relation to international law. The question is—to a certain extent—addressed in the EU's founding Treaties, and the EU judiciary has shaped the principles further. Basically, such questions of inter-system relations fall under constitutional law perspective and raise a series of different but inter-related issues. We will first address the question of international courts, as follow-up to the issues discussed in the previous section, and then address other relevant issues, for instance how international law affects the interpretation and validity of the internal EU law and the closely related issue of whether individuals can invoke international law in the EU courts.

Regarding the question of international courts, pursuant to Article 344 of TFEU, the EU member States “undertake not to submit a dispute concerning the interpretation and application of the Treaties

37. See TEU, *supra* note 11, art. 21.

38. See, e.g., Case 6/64, *Costa v. ENEL*, [1964] E.C.R. 585, 593–94; Case C 26/62, *Van Gend & Loos*, [1963] E.C.R. 1, 12.

39. In the Court's Opinion 2/13, slip op. (Dec. 18, 2014) concerning the EU Accession Agreement to the European Convention of Human Rights, the Court took a long view from its classic rulings—*van Gend & Loos*, *Costa v. Enel*—confirming that the Union law constitutes a separate legal order with its own institutions and specific character. In particular, it stated that an international agreement should not affect the allocation of the powers established in the Treaties and thus the autonomy of the EU legal system, the observance of which is for the Court to ensure. This entails that the member States cannot submit a dispute concerning the interpretation or application of the Treaties to any other dispute resolution. It also entails that it is not for an outside body to take final and binding decisions regarding the division of powers between the European Union and the member States.

to any method of settlement other than those provided for therein.” The commitment applies to mutual disputes between the EU member States relating to UNCLOS, which resulted in the *Mox Plant* judgment by the Court of Justice.⁴⁰ The dispute involved two EU member States, Ireland and the UK, and related to the Irish concerns about radioactive discharges from Mox Plant in Sellafield, UK being released in the Irish Sea. The Irish request led to the establishment of an UNCLOS arbitration tribunal (and another tribunal under the OSPAR Convention, though that aspect was not part of the case in the ECJ). The UNCLOS Tribunal brought the matter to the attention of the EU institutions and suspended its proceedings. On that basis, the Commission started infringement proceedings against Ireland for having violated exclusive jurisdiction of the ECJ in disputes between the Member States and the duty of loyal cooperation.

The Court of Justice, once seized by the Commission, was able to point to Article 282 of UNCLOS as preserving its exclusive jurisdiction and permitting it to take precedence over the other dispute resolution mechanisms of UNCLOS. It had no difficulty concluding that Ireland had violated its obligations of what is now Article 344 TFEU and Article 4(3) TEU relating to the duty for sincere cooperation.

The long-standing basic principle in the EU is that international treaties are an integral part of EU law. Today, this “monistic starting point” is reflected in Article 216(2) TFEU, which provides as follows: “Agreements concluded by the Union are binding upon the institutions of the Union and on its Member States.” While Article 216(2) says nothing on the status of customary international law, the practice of the EU judiciary has confirmed that also the customary law binds the EU.⁴¹

It follows from that and it is well established that the terms of internal EU law should be interpreted in conformity with its international obligations.⁴² This goes as far as saying that even when the Union itself would not be a contracting party to an international agreement, but all of its member States are, the provisions of Union's

40 Commission v. Ireland, Case C-459/03, [2006] E.C.R. I-04635.

41. Air Transp. Assoc. of Am. et al v. Commission, Case C-366/10, [2011] E.C.R. I-13755, ¶ 101.

42. In Case C-61/94 Commission v. Germany, the Court confirmed that “the primacy of international agreements concluded by the Community over provisions of secondary Community legislation means that such provisions must, so far as is possible, be interpreted in a manner that is consistent with those agreements.” [1996] ECR I-3989, at 52.

secondary law are interpreted by “taking into account” the international agreement.⁴³ Moreover, in accordance with EU legal doctrine, in so far as the Union is bound by the international obligations concerned, these obligations prevail over secondary legislation and may result in the invalidity of conflicting provisions of secondary legislation.⁴⁴ However, as noted later, the ability of individuals to invoke the provisions international agreements is subject to stringent conditions.

In Case C-286/90 *Poulsen*, a preliminary ruling from a Danish Court concerning EU conservation measures concerning Atlantic Salmon, the Court of Justice ruled that the EU must respect customary international law in the exercise of its regulatory power and therefore the relevant provisions must be interpreted and their scope determined in conformity with the relevant rules of the law of the sea. In that respect, it stated that “account must be taken of the Geneva Conventions of 29 April 1958 on the Territorial Sea and the Contiguous Zone (*United Nations Treaty Series*, vol. 516, p. 205), on the High Seas (*United Nations Treaty Series*, vol. 450, p. 11) and on Fishing and Conservation of the Living Resources of the High Seas (*United Nations Treaty Series*, vol. 559, p. 285), in so far as they codify general rules recognized by international custom, and also of the United Nations Convention of 10 December 1982 on the Law of the Sea It has not entered into force, but many of its provisions are considered to express the current state of customary international maritime law”⁴⁵ Furthermore, the Court considered that the EU prohibition was founded on an *erga omnes* obligation laid down in the 1958 Geneva Conventions on the Territorial Sea and on the High Seas as well as in the UNCLOS (which was not yet in force). The Court stated that “[i]n the light of the aims of the prohibition laid down in Article 6(1)(b) of the Regulation, this provision must be interpreted so as to give it the greatest practical effect, within the limits of international law.”⁴⁶ The *Poulsen* case has been considered significant

43. Most recently confirmed in Case C-537/11 *Manzi*, Judgment of the Court of Justice, Jan. 23, 2014, at 45–47 (not yet published). Reversely, that principle does not extend to a situation when only some of the member States are parties to an international agreement, since it would extend the scope of the international obligation to those member States which are not contracting parties, which would be incompatible with the principle of the relative effect of treaties (“*pacta tertiis nec nocent nec prosunt*”).

44. *Air Transp. Ass'n of America*, Case C-366/10, ¶¶ 49–51.

45. *Poulsen & Diva Corp. v. Commission*, C-286/90, [1992] E.C.R. I-06019, ¶ 10.

46. *Id.* ¶ 11.

as it gave far-reaching importance to the rules of customary international law in the EU order.⁴⁷

A more recent case which should be mentioned is the Court's decision in joint cases *C-103/12 and C-165/12, European Parliament and Commission v. Council ("Venezuelan Fishers")*,⁴⁸ which goes far beyond any international law compatible interpretation of EU law in a narrow sense, but it is an example of a broad international law based legal construction. The legal issue concerned the nature of an EU declaration and the internal decision-making procedures to be followed, involving the question of the role of the European Parliament. The case was brought against the Council's decision concerning approval of an EU declaration granting access to Venezuelan fishing vessels to conduct their activities in the EEZ off the coast of French Guyana, which forms part of EU waters. In the background, there was a difficulty to conclude a normal bilateral fisheries agreement with Venezuela, while it was considered necessary that the access to the waters rested on an international law based title. This led to an EU declaration addressed to Venezuela.⁴⁹ In accordance with Article 62(2) of UNCLOS, the coastal state may grant access to its surplus fishing resources only "through agreements or other arrangements." This raised a question regarding the use of normal treaty procedures, rather than a simple consultation which left little room for the Parliament. The Court agreed with the Parliament and the Commission, and considered that the full treaty making procedures, in the sense of Article 218(6) TFEU, should apply.

The Court took a broad approach to the concept of international agreement. It considered the text of the EU declaration and the overall pattern of exchanges between the EU authorities and Venezuela. This was done in the context UNCLOS provisions relating to the respective roles and responsibilities of the coastal state and the flag state. The Court stated that UNCLOS "provides the framework for the

47. See Sonja Boelaert-Suominen, *The European Community, the European Court of Justice and the Law of the Sea*, 23 INT'L J. MARINE & COASTAL L. 643, 692 (2008).

48. Judgment of the Court of Justice, Nov. 26, 2014 (not yet published).

49. As regards the form of a declaration, the Commission was originally inspired by the Nuclear Test Cases (*Australia v. France* and *New Zealand v. France (Merits)*), where the ICJ considered that the French unilateral statement to no longer conduct atmospheric nuclear tests which had taken place in the South Pacific Ocean was a legally binding international commitment. It stated that "[i]n announcing that the 1974 series of atmospheric test would be the last, the French government conveyed to the world at large . . . its intention effectively to terminate these tests." Nuclear Tests (*Austl. v. Fr.*) [1974] I.C.J. 253, ¶ 51 (Dec. 20).

European Union's policy choices in relation to that zone and determines, *inter alia*, the legal instruments and forms available to it in making those choices."⁵⁰ It was then for the coastal to enter into "agreements or other arrangements," as provided for in Article 62(2) of UNCLOS, for permitting access to the surplus fishing resources in its EEZ.⁵¹ The Court noted that an agreement may be based on several documents, and that individuals are not independent holders of rights under UNCLOS.⁵² Instead, it is for the flag state to exercise its responsibilities over the fishing vessels flying its flag. Taking into account all these elements, the EU declaration was construed as an offer to Venezuela, which required approval.⁵³ The Court looked thereafter at the behavior and exchanges involving Venezuelan authorities. The Court considered Venezuela's requests for fishing authorizations, failure to demand amendments to fishing conditions and even its expressed concern regarding the potential questioning of the declaration. These elements, taken together, led the Court to characterize the declaration as constituting an agreement for the purposes of the applicable EU procedures.⁵⁴

The Court's broader message to the question of access to EEZ seems to be that it is a matter of public policy and this should be reflected in the form of legal arrangements and procedures. It requires proper arrangements at the level of international law and it requires normal procedures of the legislature at the internal level, rather than procedures tailored to technical matters.⁵⁵

It is significant that Article 216(2) TFEU makes international agreements concluded by the Union binding, not only for its

50. Judgment of the Court 55.

51. *Id.* ¶ 59.

52. *Id.* ¶¶ 61, 63.

53. *Id.* ¶ 68.

54. *Id.* ¶¶ 69–73. Advocate General Sharpston reached the same conclusion but sounds amusingly pragmatic:

On balance, however, applying Article 218 TFEU by analogy appears to be the most workable solution, even if that conclusion requires stretching and squeezing the text of the provision because not each and every part can apply to unilaterally binding declarations in the same way as to an international agreement.

Opinion of Advocate General Sharpston, *European Parliament and Commission v. Council of the European Union*, Case C-103/12 and C-165/12, ¶ 123 (2014).

55. The Court concluded that the Council decision of approval of the declaration should be based on Article 43(2) TFEU, with ordinary legislative procedure, involving the Parliament as co-legislator, rather than Article 43(3) concerning decisions on "fishing opportunities" which are decided by the Council alone. *European Parliament and Commission v. Council of the European Union*, Case C-103/12 and C-165/12, ¶¶ 48–50 (2014).

institutions, but also for the member States. This means, for instance, that the EU law principle of sincere cooperation applies with regard to its international obligations and thus the member States are under the legal commitment to ensure the fulfillment of the obligations and to facilitate the achievement of the Union's tasks in that respect.⁵⁶ This is also important in order to avoid an issue concerning the EU's responsibility at the international level.

These elements open the way for the Commission to exercise its function as the "guardian" of the Treaties and ensure that the member States comply with the Union's international obligations. The Commission can bring infringement cases against the member States in case of non-compliance with international obligations, and has done so at least in some circumstances, even though this infrequently happens in practice.⁵⁷

The issue of whether individuals can invoke provisions of international agreements against conflicting EU secondary legislation (the doctrine of "direct effect") under the EU legal system has been subject to a vivid debate and comprehensive judicial practice.⁵⁸ If the parties have not determined this issue in the agreement itself, it is for the courts to decide. In that case, in accordance with the classic formula, this depends on whether the provision concerned contains a clear and precise obligation which is not subject to the adoption of any subsequent measure of implementation. In addition, attention is paid to the nature of the agreement as a whole, including for instance its institutional framework and derogations.⁵⁹ The nature of the agreement has turned out to be the decisive criterion in the case of multilateral agreements such as the WTO/GATT Agreement, which has not been considered to confer rights to individuals. Similar elements affecting the assessment of the nature of WTO/GATT have since been brought to bear on UNCLOS as reflected in the leading case *Intertanko* below.

56. TEU, *supra* note 11, at 18. For the consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union, see O.J. C 83 of 30 March 2010, available at <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=OJ:C:2010:083:FULL&from=en>.

57. Esa Paasivirta and Pieter Jan Kuijper, *Does One Size Fit All? The European Community and the Responsibility of International Organizations*, 36 NETH. Y.B. INT'L L. 169, 198–99 (2005).

58. On the development of the EU judicial practice, see PIET EECKHOUT, *EU EXTERNAL RELATIONS LAW* 331–35 (2d ed. 2012).

59. The best known elaboration of the doctrine is Case C-104/81 *Hauptzollamt Mainz v. Kupferberg*, [1982] E.C.R. 3641 at 20–26.

The Case C-308/06 *Intertanko v. Secretary of State for Transport* raised the issue of whether private litigants can invoke UNCLOS and Marpol Convention against the validity of allegedly conflicting rules of the Ship-Source Pollution Directive, 2005/35/EC. The case was brought to the Court of Justice for a preliminary ruling by the UK High Court of Justice. The Court confirmed the principle that the Community's international obligations prevail over its secondary legislation, but it held that the validity of the Directive could not be assessed by the two Conventions. While the Directive incorporated some of the provisions of the Marpol Convention, it could not be reviewed against that Convention since the Community was not a party to that Convention and it was therefore not binding on the Community. As regards UNCLOS, the private litigants were barred from invoking its provisions in particular because the Convention "does not establish rules intended" to apply directly to individuals and confer them rights that can be invoked against States. The Court referred to the "nature and broad logic" of the agreement, aiming primarily to codify and develop general international law relating to peaceful cooperation and seeking to strike a fair "balance" between the interests of coastal States and flag States. Following the *Intertanko* case, UNCLOS clearly belongs to a specific category of international agreements, along with the WTO/GATT Agreement, which are not considered to confer direct rights to individuals.

In so far as customary international law has been invoked in the EU judiciary, it has been done normally with regard to issues of interpretation, and only exceptionally as a basis to review the legality of EU legislation. Case C-366/10 *Air Transport Association of America v. Secretary for State of Energy and Climate Change*, a preliminary ruling request from the UK High Court, raised the question of whether the private parties, with headquarters in the United States, could rely on the customary law of the sea principle pursuant to which no State may validly purport to subject any part of the high seas to its sovereignty (and thus air space above it). This was aimed at challenging the validity of the Directive 2003/87/EC scheme for greenhouse gas emission allowance trading, as amended by Directive 2008/101/EC, so as to include aviation activities in that scheme. The Court, after noting that a principle of customary international law does not have the same degree of precision as a provision of an international agreement, went on in line with earlier case law stating that the judicial review must be limited to "manifest

errors of assessment concerning the conditions for applying those principles.”⁶⁰ The Court concluded in the end that the examination of Directive 2008/101/EC disclosed no fact of such kind to affect its validity. While this case did not involve UNCLOS in formal terms, the question from the referring national court concerning a particular principle of customary international law, the Court followed broadly the tenet of the above *Intertanko* case, in the sense that it applied a demanding test (“manifest error”) to the issue involving individuals relying on the international law of the sea to challenge the validity of EU secondary legislation. This stringent approach is all the more noticeable since the principle at stake corresponds to Article 89 of UNCLOS, which is the only provision where the Convention itself explicitly confirms the invalidity of any claims over its basic freedoms, here the freedom of the high seas.

B. Law of the Sea and the Geographic Scope of EU Law

The law of the sea is special in the sense that the rights and obligations are related to certain sea areas. UNCLOS itself takes a zonal approach to the sea and lays down the rules and principles, not only in relation to different activities as such, but to the rights and obligations that depend on where the activities take place. The Convention contains rules in respect to internal waters, territorial seas (Articles 2–32), contiguous zones (Article 33), the continental shelf (Articles 76–85), the exclusive economic zone (Articles 55–75), the high seas (Articles 86–120), the area of deep sea bed (Articles 133–191), international straits (Articles 34–45), and archipelagic waters (Article 46–54).⁶¹ International law relating to seas does not give States the same degree of power as permitted over its own territory. For instance, ships under another State’s flag enjoy innocent passage in territorial seas (Article 17).

These zones are relevant to the national legislature and the judiciary needs to interpret and construe laws by taking these aspects into account. The same applies to the EU legislature and judiciary. The EU legislature acts in principle either as a coastal state or a flag

60. *Air Transp. Assoc. of Am., Case C-366/10*, ¶ 110 (2011). The Court followed Case C-162/96 *Racke and Hauptzollamt Mainz*, which applied the manifest error test in a case where a private company invoked the customary principle of fundamental change of circumstances (*rebus sic stantibus*) against an agreement concluded by the Community. [1998] ECR I-03655 at 52.

61. For a useful overview, see Hickey, *supra* note 4.

state legislature subject to conditions and limitations under international law.

However, in the case of the EU, the scope of its legislation depends, in addition, on the territorial scope of the EU Treaties. In accordance with Article 52 TEU, the Treaties apply to the member States, without containing any definition of “EU area.”⁶² This is generally understood as referring to all the areas that are within sovereignty or jurisdiction of the member States, including maritime areas.⁶³ In this case, the territorial scope of application of EU legislation may extend to all areas and activities where the member States exercise full sovereignty or enjoy “sovereign rights.” EU law therefore normally applies to the member States’ inland, coastal, and territorial waters, as well as to the EEZ (within the limits of the enjoyed sovereign rights) and to the vessels flying the flag of a Member State. It is possible, however, that the intent of the legislature may sometimes be to limit the territorial application in some respects.⁶⁴

It suffices to give some examples. In Case C-6/04 *Commission of the European Communities v. United Kingdom of Great Britain and Northern Ireland*,⁶⁵ regarding the application of Directive

62. Some areas of the Member States are excluded or have a special status, as defined in Article 355 TFEU.

63. Advocate General Villaón described the point as follows:

As stated in Article 1 TEU, the European Union is the result of the desire of the States establishing it to attain their common objectives by conferring on it certain competences. Whether such competences belong to the Member States by virtue of their sovereignty or were originally the result of international law conferring a sovereign right is immaterial for the purposes of defining the limits of Union competences, as the Union will exercise precisely those competences conferred on it (Article 5 TEU), on the terms agreed in the Treaties, having regard to the content and extent of such competences when exercised by the States themselves prior to entering into the Union.

The determining factor in defining the scope of EU law is, therefore, the extent of the competences lawfully exercised by the Member States within the framework of international law. EU law will apply to whatever extent the Member States exercise official authority in the areas of competence conferred on the Union, subject to conditions established by EU law and irrespective of the source of the entitlement to the State competence transferred to the EU; in other words, irrespective of whether the source of the entitlement was State sovereignty itself (as recognised and protected by international law) or the conferral by the international community of a sovereign right.

Opinion of Advocate General Cruz Villalón, *A. Salemink v. Raad van bestuur van het Uitvoeringsinstituut werknemersverzekeringen*, Case C-347/10, ¶¶ 54-55 (2011).

64. *Aktiebolaget NN v. Skatteverket*, Case C-111/05, [2007] ECR I-2697, ¶ 53.

65. [2005] ECR I-907, ¶ 117.

92/43/EEC on the conservation of natural habitats and of wild fauna and flora, the Court confirmed that the Directive applied beyond the member States' territorial waters, in the EEZ and on the continental shelf where the UK exercised sovereign rights.

In Case C-111/05 *Aktiebolaget NN v. Skatterverket*,⁶⁶ involving the application of the Sixth VAT Directive to the laying and supply of submarine cables, the Court emphasized that the sovereignty of the coastal State over the continental shelf and the EEZ was merely functional and limited to the right to exercise the activities of exploration laid down in Article 56 and 77 of UNCLOS. To the extent that the supply and laying down of undersea cable was not included in the activities listed in those articles, that part of the operation carried out in the EEZ and the continental shelf is not within the sovereignty of the coastal State. Thus, those activities were not subject to VAT for the part of the transaction carried out in those two maritime zones.

In Case C-347/10 *A. Salemink v. Raad van bestuur van het Uitvoeringsinstituut werknemersverzekeringen*, the Court confirmed that work carried out on fixed or floating installations positioned on the Netherlands' continental shelf for prospecting and/or the exploitation of natural resources, is to be regarded as work carried out in the territory of the State for the purposes of applying EU law. It referred to the nature of the continental shelf as the natural prolongation of the land territory, as ruled by the ICJ in the North Sea Continental Shelf Cases, as well as to UNLCOS Article 77 (rights of the coastal State over the continental shelf) in conjunction with Article 80 (installations) and concluded:

A member State which takes advantage of the economic rights to prospect and/or exploit natural resources on that part of the continental shelf which is adjacent to it cannot avoid the application of the EU law provisions designed to ensure the freedom of movement of persons working on such installations.⁶⁷

CONCLUSION

The first part of this Essay described the EU participation in UNCLOS and its implementation under international law. The EEC was originally an observer in the UNLCOS negotiations and then became a contracting party to UNCLOS in respect of the public powers that its member States have conferred to it. For this it had to declare its competences related to the law of the sea, in order to

66. [2007] ECR I-2697, ¶ 59.

67. North Sea Continental Shelf Cases, [1969] I.C.J. 4, ¶ 9 (Feb. 20).

communicate and explain to other treaty partners its unique position in relation to the EU and the member States which are also UNCLOS contracting parties. Since then, the EU has participated in the implementation of UNCLOS, including two international arbitrations that were finally settled by way of negotiation. The EU has also taken part in the proceedings of the recent case ITLOS No. 21 concerning an advisory opinion in the area of IUU fishing activities. Though the EU is not a State, as a contracting party it acts alongside States on the basis of the public powers conferred to it by its member States. This has been recognized by other States, which now deal directly with the EU rather than indirectly via the member States, as shown for instance in the arbitration and judicial practice. The second part of the Article discussed the UNCLOS implementation under EU law, commenting on the ways it is integrated into the EU legal system and how the EU's legal and institutional principles and disciplines apply to the Convention. This internal implementation also reflects how the "EU law prolongation" operates in regard to the zonal approaches of the Convention.

The participation in UNCLOS may seem, as viewed from inside, an inevitable outcome of the internal developments of European integration. It would be impossible for the EU member States to participate in UNCLOS without the EU participation. This was clear already during the negotiations of the Third Law of the Sea Conference which led to the EU participation in UNCLOS as a contracting party. It is even clearer today. This should not, however, hide the fact that participation in the international law system, designed for States and by them, is rarely self-evident for others, even for an important global actor. It is however possible and UNLCOS is an important milestone.