

# Institutional Arrangements for the Ocean: From Zero to Indefinite?

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## INTRODUCTION

When Professor Harry Scheiber asked me to address the subject of “institutional arrangements for the ocean,” it struck me that this matter keeps coming back. This does not mean that it is irrelevant or meaningless to continue to address it. Quite the contrary. Firstly, defending the role of international institutions has become more important as we see political ambitions to dismantle them or to undermine their work.<sup>1</sup> Secondly, the more time that passes since the adoption and subsequent entry into force of the United Nations Convention on the Law of the Sea, the more relevant the role and interaction of institutional arrangements for the ocean becomes. This is due to the multitude of arrangements established to address ocean-related matters. This development is not likely to languish.

I recall an international conference held twenty years ago at the Fridtjof Nansen Institute in Norway.<sup>2</sup> The 1998 conference, “Order for the Oceans at the Turn of a Century,” was held to mark the 40th anniversary of the Nansen Institute, but also to mark the United Nations-proclaimed International Year of the Ocean.<sup>3</sup> Since the Institute has an early history of cooperation with Berkeley Law’s Law of the Sea Institute, it is of particular interest to recall the Nansen

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DOI: <https://doi.org/10.15779/Z384T6F37W>

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1. The International Criminal Court is particularly targeted, but there are also other examples. See *African Union Backs Mass Withdrawal from ICC*, BBC NEWS (Feb. 1, 2017), <https://www.bbc.com/news/world-africa-38826073>; James Goldston, *Why John Bolton’s Diatribe against the International Criminal Court Is Misleading, Misguided, and Wrong*, OPEN SOC’Y FOUND. (Sept. 14, 2018), <https://www.opensocietyfoundations.org/voices/why-john-bolton-s-diatribe-against-international-criminal-court-misleading-misguided-and>; Andrew E. Kramer, *Russia Pulls Out of INF Treaty in ‘Symmetrical’ Response to U.S. Move*, N.Y. TIMES (Feb. 2, 2019), <https://www.nytimes.com/2019/02/02/world/europe/russia-inf-treaty.html>.

2. See *About the Fridtjof Nansen Institute*, FRIDTJOF NANSEN INST., <https://www.fni.no/about-fni/category291.html> (last visited June 1, 2019).

3. ORDER FOR THE OCEANS AT THE TURN OF THE CENTURY xiii (Vidas & Østreng eds., 1999).

Conference.<sup>4</sup> One of the main subjects addressed at that conference was “implementation through international institutions.”<sup>5</sup> Among those who spoke on this particular aspect were renowned lawyers, like the former Secretary-General of the International Seabed Authority (ISA), Satya Nandan,<sup>6</sup> as well as Judges Koroma,<sup>7</sup> Mensah,<sup>8</sup> and Vukas,<sup>9</sup> and Vladimir Golitsyn who, at that time worked for the United Nations.<sup>10</sup> Professor Bernard Oxman addressed the 1994 implementation agreement to the Law of the Sea Convention.<sup>11</sup>

Twenty years later, we can note that the number of institutions created under the Law of the Sea Convention remains the same; namely, the ISA,<sup>12</sup> the International Tribunal for the Law of the Sea,<sup>13</sup> and the Commission on the Limits of the Continental Shelf.<sup>14</sup>

Does this mean that nothing has changed? Certainly not.

Although there is no new comprehensive *institutional* regime for the ocean, other institutional and semi-institutional management structures and arrangements for the purpose of ocean governance have mushroomed. Scheiber and Paik recall that the “possibilities of new international institutions and the viability of regional approaches as an alternative to (or complimentary to) the universalist approach were subjects of intense discussion” but that “the new

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4. I take this opportunity to convey the warmest regards from Professor Davor Vidas, who knew David very well. We all share beautiful memories from an ILA Committee meeting in Lopud, Croatia, last year, when we met to discuss the issue of sea-level rise. We were glad to have Susan (Spencer) with us, too. I have a beautiful picture of Susan and David from that meeting—a meeting where law, art, and the natural environment were blended. For information on the Committee on International Law and Sea-Level Rise, see *Committees*, INT'L L. ASS'N, <http://www.ila-hq.org/index.php/committees> (last visited June 1, 2019).

5. ORDER FOR THE OCEANS AT THE TURN OF THE CENTURY, *supra* note 3, at 57–142.

6. Satya N. Nandan, *Legislative and Executive Powers of the International Seabed Authority for the Implementation of the Law of the Sea Convention*, in ORDER FOR THE OCEANS AT THE TURN OF THE CENTURY, *supra* note 3, at 73.

7. Abdul G. Koroma, *Implementation of the Law of the Sea Convention through Its Institutions: An Overview*, in ORDER FOR THE OCEANS AT THE TURN OF THE CENTURY, *supra* note 3, at 57.

8. Thomas A. Mensah, *The Role of Peaceful Dispute Settlement in Contemporary Ocean Policy and Law*, in ORDER FOR THE OCEANS AT THE TURN OF THE CENTURY, *supra* note 3, at 81.

9. Budislav Vukas, *Possible Role of the International Tribunal for the Law of the Sea in Interpretation and Progressive Development of the Law of the Sea*, in ORDER FOR THE OCEANS AT THE TURN OF THE CENTURY, *supra* note 3, at 95.

10. Vladimir Golitsyn, *Interrelation of the Institutions under the Law of the Sea Convention with Other International Institutions*, in ORDER FOR THE OCEANS AT THE TURN OF THE CENTURY, *supra* note 3, at 133.

11. See Bernard H. Oxman, *The 1994 Agreement relating to the Implementation of Part XI of the UN Convention on the Law of the Sea*, in ORDER FOR THE OCEANS AT THE TURN OF THE CENTURY, *supra* note 3, at 15 (addressing the agreement relating to the implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982).

12. See *About the International Seabed Authority*, INT'L SEABED AUTH., <https://www.isa.org.jm/authority> (last visited June 1, 2019).

13. See *The Tribunal*, INT'L TRIBUNAL FOR L. SEA, <https://www.itlos.org/the-tribunal/> (last visited June 1, 2019).

14. See *Commission on the Limits of the Continental Shelf*, UNITED NATIONS, [http://www.un.org/Depts/los/clcs\\_new/clcs\\_home.htm](http://www.un.org/Depts/los/clcs_new/clcs_home.htm) (last visited Feb. 22, 2019).

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forms in ocean regionalism and institutions that prevail at present were not fully anticipated three decades ago.”<sup>15</sup>

This is probably best reflected in the development of the annual United Nations General Assembly resolutions on *Oceans and the Law of the Sea*.<sup>16</sup> These resolutions date back to the early 1990s. The first resolution in 1993 noted the forthcoming entry into force of the Law of the Sea Convention.<sup>17</sup> It encouraged States to ratify, and, interestingly, requested the competent international organizations, the United Nations Development Programme, the World Bank, and other multilateral funding agencies, to intensify assistance to developing countries in their efforts to realize the benefits of the comprehensive legal regime established by the Convention.<sup>18</sup> The resolution also expressed some general concern about the status of the marine environment. All in all, it contained twenty-five paragraphs.

The Law of the Sea resolution adopted in 1998—the year of the Nansen Conference—was not much longer; it contained twenty-eight paragraphs.<sup>19</sup> But its contents signaled a new direction: it was now clearly recognized that different aspects of ocean space (management) are closely interrelated and need to be considered as a whole.<sup>20</sup> References are made to two current topics: namely, piracy and armed robbery at sea, as well as the initiative in UNESCO to commence the work on protection of underwater cultural heritage. What then followed is nothing short of an explosive expansion of the resolution. The most recent resolution from 2018 on Oceans and Law of the Sea is fifty-six pages long and contains 374 paragraphs.<sup>21</sup>

So, what has happened? And what does this have to do with institutional arrangements?

In short, much has happened and most of it has to do with the law, international cooperation, and institutional engagement.

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15. *Introduction to REGIONS, INSTITUTIONS, AND LAW OF THE SEA: STUDIES IN OCEAN GOVERNANCE 2* (Harry N. Scheiber & Jin-Hyun Paik eds., 2013).

16. See generally *Oceans and the Law of the Sea in the General Assembly of the United Nations*, UNITED NATIONS, [http://www.un.org/Depts/los/general\\_assembly/general\\_assembly\\_resolutions.htm](http://www.un.org/Depts/los/general_assembly/general_assembly_resolutions.htm) (last updated May 23, 2019).

17. G.A. Res. 48/28, ¶ 1 (Dec. 9, 1993).

18. *Id.* at ¶ 16 (“Requests the competent international organizations, the United Nations Development Programme, the World Bank and other multilateral funding agencies, in accordance with their respective policies, to intensify financial, technological, organizational and managerial assistance to the developing countries in their efforts to realize the benefits of the comprehensive legal regime established by the Convention and to strengthen cooperation among themselves and with donor States in the provision of such assistance[.]”).

19. G.A. Res. 53/32, ¶¶ 20, 22–23 (Nov. 24, 1998).

20. *Id.* at preambular ¶ 4.

21. G.A. Res. 73/124 (Dec. 11, 2018).

## I. BACKGROUND EXAMPLES OF COOPERATION ON MARITIME MATTERS

Maritime matters and maritime cooperation have been regulated since pre-Grotian times. Let us recall some of the classical maritime codes, such as the Sea Law of the Rhodians, the Rules of Oléron, the Consolato del Mare, the Wisby Rules, and the Hanseatic Rules.<sup>22</sup> Most of these codes pertained to trade and several contained dispute settlement clauses. Thus, both before and after the jurists de Vitoria (1509), Vázquez de Menchaca (1564), and Grotius (1609) published their treaties, States and entities active on the high seas always accepted that the common area needs some “rules of the road.” Political and technical realities have been the decisive force behind various early agreements, e.g., the multilateral 1884 Convention for the Protection of Submarine Telegraph Cables, adopted in Paris.<sup>23</sup> An important development was the early treaties that regulated naval warfare, for instance the 1856 Paris Declaration Respecting Maritime Law that aimed at protecting neutral flags and goods and clearly spelled out that privateering was and remained abolished.<sup>24</sup> The Paris Declaration was followed by other agreements and treaties on the law of naval warfare.<sup>25</sup> There were also a number of bilateral treaties that Great Britain concluded with other States in suppression of slave trade.<sup>26</sup> Often non-State actors, like private organizations, paved the way by identifying and suggesting regulations in maritime matters.<sup>27</sup>

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22. See A. PEARCE HIGGINS & C. JOHN COLOMBOS, THE INTERNATIONAL LAW OF THE SEA 23–27 (1943).

23. Convention for the Protection of Submarine Telegraph Cables, Mar. 14, 1884. See J. C. BANCROFT DAVIS & JOHN H. HASWELL, TREATIES AND CONVENTIONS CONCLUDED BETWEEN THE UNITED STATES OF AMERICA AND OTHER POWERS 1176–85 (1889).

24. Declaration Respecting Maritime Law, Apr. 16, 1856, <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Article.xsp?action=openDocument&documentId=473FCB0F41DCC63BC12563CD0051492D>.

25. See Convention for the Adaptation to Maritime Warfare of the Principles of the Geneva Convention, Aug. 22, 1864, T.S. 396; Convention for the Adaptation to Maritime Warfare of the Principles of the Geneva Convention, Oct. 18, 1907, T.S. 543. See also HIGGINS & COLOMBOS, *supra* note 22, at 18.

26. For a recent description, see Jean Allain, *The Nineteenth Century Law of the Sea and the British Abolition of the Slave Trade*, in 78 BRITISH YEAR BOOK OF INTERNATIONAL LAW 342, 357 (2007).

27. The International Law Association has repeatedly addressed maritime matters. One early example is the Draft Convention on Maritime Jurisdiction in Time of Peace, 1926. For that, and other examples, see *List of ILA Conferences 1873–2016*, INT'L L. ASS'N, [http://www.ila-hq.org/images/ILA/docs/ILA\\_Conferences\\_1873-2016.pdf](http://www.ila-hq.org/images/ILA/docs/ILA_Conferences_1873-2016.pdf) (last visited June 2, 2019). Likewise, the Institute of International Law, has addressed maritime matters since the start of its existence. See *Overview Resolutions English Version*, INST. INT'L L., <http://www.idi-iil.org/app/uploads/2018/07/Overview-Resolutions-Website-Final-EN.xlsx> (last visited June 2, 2019). Martin Davies has noted that “[t]he phenomenon of globalisation places increasing stress on legal institutions grounded in territorial sovereignty because of the transnational or non-territorial nature of so many of the legal issues of the Twenty-first century. Maritime law is a mature body of law that has long been accustomed to dealing with this tension, by shaping national laws to fit into informal transnational norms and by a process of informal co-operation between admiralty courts in jurisdictional terms.” Martin Davies, *Maritime Law, the Epitome of Transnational Legal Authority*, in BEYOND TERRITORIALITY: TRANSNATIONAL LEGAL AUTHORITY IN AN AGE OF GLOBALIZATION 327, 339 (Gunther Handl et al. eds., 2011).

Admittedly, the establishment of the ISA, the International Tribunal for the Law of the Sea, and the Commission on the Limits of the Continental Shelf were remarkable in the sense that they were the first institutional regimes established with the object and purpose of regulating, solving, and advising on maritime matters. However, they were not the first *institutions* aimed at regulating maritime matters or the management of ocean resources.

Let us recall two salient, but different, examples; namely, the International Whaling Commission, established in 1946,<sup>28</sup> and the International Maritime Organization (IMO), established in 1948.<sup>29</sup> The International Whaling Commission was set up under the International Convention for the Regulation of Whaling which was signed in Washington D.C. on December 2, 1946.<sup>30</sup> The preamble to the Convention recognizes “the interest of the nations of the world in safeguarding for future generations the great natural resources represented by the whale stocks” and states that its purpose is “to provide for the proper conservation of whale stocks and thus make possible the orderly development of the whaling industry.”<sup>31</sup> The purposes of the IMO are “to provide machinery for cooperation among Governments in the field of governmental regulation and practices relating to technical matters of all kinds affecting shipping engaged in international trade[.]” It is empowered to deal with administrative and legal matters related to these purposes.<sup>32</sup> The IMO is often held up as the brightest star of all specialized agencies of the United Nations. Since it began its work in 1958, the IMO has slowly but surely interpreted its mandate in a manner so as to respond to the current needs of the international community. It now addresses safety and security at sea, and environmental protection, and it is an important partner in support of the United Nation’s Sustainable Development Goals.<sup>33</sup> Even climate matters have found their way into the IMO curriculum.

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28. Presently eighty-nine countries are members. *See History and Purpose*, INT’L WHALING COMMISSION, <https://iwc.int/history-and-purpose> (last visited June 2, 2019); *Overview*, INT’L WHALING COMMISSION, <https://iwc.int/iwcmain> (last visited June 2, 2019).

29. The International Maritime Organization “is the United Nations specialized agency with responsibility for the safety and security of shipping and the prevention of marine and atmospheric pollution by ships. IMO’s work supports the UN SDGs.” *See Introduction* to IMO, INT’L MAR. ORG., <http://www.imo.org/en/About/Pages/Default.aspx> (last visited June 2, 2019). The IMO Convention entered into force in 1958. *See Introduction*, INT’L MAR. ORG., <http://www.imo.org/en/About/Conventions/Pages/Home.aspx> (last visited June 2, 2019); Convention on the International Maritime Organization, Mar. 6, 1948, 289 U.N.T.S. 3.

30. *See History and Purpose*, INT’L WHALING COMMISSION, <https://iwc.int/history-and-purpose> (last visited June 2, 2019).

31. International Convention for the Regulation of Whaling, Dec. 2, 1946, 62 Stat. 1716, 161 U.N.T.S. 72.

32. Convention on the International Maritime Organization, art. 1(a), Mar. 6, 1948, 289 U.N.T.S. 3.

33. It helps strengthen education, research, and capacity building through its university, the World Maritime University in Malmö, Sweden. *See About*, WORLD MARITIME UNIVERSITY, <https://www.wmu.se/who-we-are> (last visited June 2, 2019). The International Maritime Law Institute Malta offers advanced training, study, and research in international maritime law. *See About Us*, INT’L

Also, other organizations addressing maritime matters were established and acting at the time of the entry into force of the Law of the Sea Convention. The Commission for the Conservation of Antarctic Marine Living Resources stands out as the first organization that worked on the basis of an ecosystem approach.<sup>34</sup> A few Regional Fisheries Management Organizations had already been established, such as the Northwest Atlantic Fisheries Organization and the General Fisheries Commission for the Mediterranean. In fact, the cooperative management of fisheries had long since taken place at local and regional levels, both as a functional or geographical tool. The Common Fisheries Policy of the European Union is an example of a functional approach.<sup>35</sup>

Additionally, other agreements have had repercussions for ocean management, sometimes by preserving the classical high seas rights, and freedom of navigation in particular. The 1959 Antarctic Treaty serves as one such example.<sup>36</sup> The States that negotiated the Antarctic Treaty were well aware that they did not have the legal power to regulate the use of the high seas for nontreaty parties and therefore included a nonprejudicial clause to ensure “the rights, or the exercise of the rights, of any State under international law with regard to the high seas in the [Antarctic Treaty] area.”<sup>37</sup> The preamble of the International Seabed Treaty contains a similar clause.<sup>38</sup> Since then, nonprejudicial clauses can be found in the variety of agreements on Nuclear (Weapons) Free Zones that pertain to the maritime sphere, such as the Rarotonga Treaty.<sup>39</sup> The area of application of the Bangkok Treaty includes *inter alia* the exclusive economic zones of the parties to the treaty and the airspace over the

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MAR. L. INST., <https://www.imli.org/about-us/imo-international-maritime-law-institute> (last visited June 2, 2019).

34. See *About CCAMLR*, CCAMLR, <https://www.ccamlr.org/en/organisation> (last visited June 25, 2019).

35. The Common Fisheries Policy is a set of rules for managing European fishing fleets and for conserving fish stocks. See *The Common Fisheries Policy*, EUR. COMMISSION, [https://ec.europa.eu/fisheries/cfp\\_en](https://ec.europa.eu/fisheries/cfp_en) (last visited June 2, 2019). It is also worth recalling that the European Union has the exclusive competence to regulate the member States’ fisheries. For a description of the European Union’s actions with respect to marine governance, see Robin Churchill, *The European Union and the Challenges of Marine Governance: From Sectoral Response to Integrated Policy?*, in THE WORLD OCEAN IN GLOBALISATION: CLIMATE CHANGE, SUSTAINABLE FISHERIES, BIODIVERSITY, SHIPPING, REGIONAL ISSUES 395, 395–436 (Davor Vidas & Peter Johan Schei eds., 2011).

36. The Antarctic Treaty art. VI, Dec. 1, 1959, 402 U.N.T.S. 71. Parties to the Convention on the Conservation of Antarctic Marine Living Resources are bound by the same provision through Article IV of CCAMLR. Convention on the Conservation Treaties art. IV, May 20, 1980, 80 Stat. 271, T.I.A.S. No. 10240. For more information relating to the Antarctic Treaty System, see *Key Documents of the Antarctic Treaty System*, SECRETARIAT ANTARCTIC TREATY, [https://www.ats.aq/e/ats\\_keydocs.htm](https://www.ats.aq/e/ats_keydocs.htm) (last visited June 2, 2019).

37. The Antarctic Treaty art. VI, Dec. 1, 1959, 402 U.N.T.S. 71.

38. Treaty on the Prohibition of the Emplacement of Nuclear Weapons and Other Weapons of Mass Destruction on the Sea-Bed and the Ocean Floor and in the Subsoil Thereof, May 18, 1972, 955 U.N.T.S. 115.

39. South Pacific Nuclear Free Zone Treaty (the Rarotonga Treaty) art. 2, Aug. 6, 1985, 1445 U.N.T.S. 177.

continental shelf.<sup>40</sup> At the same time, the Bangkok Treaty provides that nothing in the treaty shall prejudice the rights or the exercise of these rights by any other States under the provisions of the convention.<sup>41</sup> Freedom of the high seas and rights of passage are explicitly mentioned in the Bangkok Treaty. The Pelindaba Treaty also contains a “non-prejudice” clause with respect to the rights or exercise of rights under the principle of the freedom of the seas.<sup>42</sup> Both treaties also have compliance mechanisms and impose obligations on the parties to cooperate with the International Atomic Energy Agency, another international organization.

In addition, the United Nations General Assembly has, on several occasions, adopted resolutions establishing zones of peace or nuclear-weapon-free zones in sea areas, for instance in the Indian Ocean and the Southern Hemisphere (the South Atlantic) and adjacent areas. With one exception—the Zone of Peace and Cooperation of the South Atlantic—none of these zones are mentioned in the annual Law of the Sea Convention resolutions. The matter is simply too sensitive.<sup>43</sup>

As mentioned earlier, in 1993, the United Nations General Assembly requested that the Secretary-General report back on the developments pertaining to the Law of the Sea Convention. The first report was presented in 1994<sup>44</sup> and has since been followed by annual reports. Through the reports, it became obvious that numerous institutions and organizations were involved in matters related to ocean affairs. The reports covered more and more ground: maritime safety and security, piracy, drug trafficking, migrants, protection of archaeological objects at sea, environmental protection, development, sharing of information, and hydrographical surveys. Even human rights,<sup>45</sup> rule of law, and climate change found their way into the reports. In effect, the annual resolutions

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40. Treaty on the Southeast Asian Nuclear Weapon-Free Zone (the Bangkok Treaty) art. 1(a), (b), Dec. 15, 1995, 1981 U.N.T.S. 129.

41. *Id.* at art. 2.

42. African Nuclear Weapon-Free-Zone Treaty (Treaty of Pelindaba) art. 2, ¶ 2 (Apr. 11, 1996).

43. The annual reports by the Secretary-General on the Law of the Sea do not have any references to nuclear-weapon-free zones. Very cautious reference to their existence is made in the 2018 Secretary-General’s report on disarmament. See U.N. SECRETARY-GENERAL, SECURING OUR COMMON FUTURE: AN AGENDA FOR DISARMAMENT 22 (2018).

44. U.N. Secretary General, *Law of the Sea: Report of the Secretary-General*, U.N. Doc. A/49/631 (Nov. 16, 1994).

45. The first time “human rights” were mentioned in such a report was in 1995. See U.N. Secretary General, *Law of the Sea: Report of the Secretary-General*, ¶ 76, U.N. Doc. A/50/713 (Nov. 1, 1995). The concept is not mentioned in the 1996 report and does not occur again until the 1998 report. The human rights perspective then crops up in a discussion about the link between human trafficking and the transporting of migrants by sea. See U.N. Secretary General, *Oceans and the Law of the Sea: Report of the Secretary-General*, ¶ 137, U.N. Doc. A/53/456 (Oct. 5, 1998). After that, the human rights aspect gradually begins to be incorporated into the reports. The 2008 report mentions “human rights” twelve times, the words “human” or “humanitarian” fifty-three times and “individuals” occurs ten times. See U.N. Secretary General, *Oceans and the Law of the Sea: Report of the Secretary-General*, U.N. Doc. A/63/63 (Mar. 10, 2008).

on oceans and the Law of the Sea contained a parallel inventory of all those institutions that are working with the issues, such as the Intergovernmental Oceanographic Commission of UNESCO, the World Meteorological Organization, the United Nations Office on Drugs and Crime, the United Nations High Commissioner for Refugees, the United Nations Environment Programme,<sup>46</sup> the International Labour Organization, and the FAO,<sup>47</sup> to mention but a few. The references to regional organizations and initiatives are plentiful. In recent years, we also find references to private institutions, businesses, and the civil society. The report mirrors the engagement of these nongovernmental associations. This engagement is further evidenced by the voluntary commitments registered at and since the comprehensive Ocean Conference in 2017.<sup>48</sup>

Throughout the resolution, we find emphasis, encouragement, and recognition of regional and functional cooperation, but also clear references to international law, including the Law of the Sea Convention. This is as far from the narrow perspective as possible. It is recognition of the fact that numerous institutions address maritime matters.<sup>49</sup> At the same time, the resolution identifies the General Assembly as *the* global institution having the competence to undertake such a review of the developments relating to oceans affairs and the Law of the Sea.<sup>50</sup> However, there is one implicit understanding: the resolutions do not address matters concerning disarmament or protective security rights

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46. The Regional Seas Program was launched in 1974. See *Why Does Working with Regional Seas Matter?*, UNITED NATIONS ENV'T PROGRAMME, <https://www.unenvironment.org/explore-topics/oceans-seas/what-we-do/working-regional-seas> (last visited June 3, 2019). Van Dyke claims that “the relative success of the Mediterranean and OSPAR programmes and to a somewhat lesser extent the Western Caribbean Program, are attributable in large to the involvement of nongovernmental/civil society organizations which bring ideas and information to these programmes and help set their agendas and thereby put pressure on the members to provide proper funding for needed activities.” Jon M. Van Dyke, *Whither the UNEP Regional Seas Programmes?*, in REGIONS, INSTITUTIONS, AND LAW OF THE SEA, *supra* note 15, at 89, 108–09.

47. On FAO, see Jean-François Pulvenis, *FAO, Ocean Governance, and the Law of the Sea*, in REGIONS, INSTITUTIONS, AND LAW OF THE SEA, *supra* note 15, at 111–28.

48. See *Registry of Voluntary Commitments*, UNITED NATIONS, <https://oceancconference.un.org/commitments/> (last visited June 3, 2019). Not all States welcomed the holding of an Ocean Conference in parallel with the ordinary General Assembly Law of the Sea meetings. Extensive discussions took place before resolution A/RES/70/226, United Nations Conference to Support the Implementation of Sustainable Development Goal 14, could be adopted, as well as before resolution A/70/303 setting the modalities for the Conference. See G.A. Res. 70/226 (Feb. 12, 2016); G.A. Res. 70/303 (Sept. 23, 2016). The Conference turned out to be successful and most States seem now to embrace it.

49. Lowe and Talmod have put together documents of the International Maritime Organization, of regional fisheries organizations, security-related documents, treaties concerning resource exploitation, environmental protection measures and much more, into the framework created by the Law of the Sea Convention. See *THE LEGAL ORDER OF THE OCEANS: BASIC DOCUMENTS ON LAW OF THE SEA* (Vaughan Lowe & Stefan Talmon eds., 1988). The compilation serves as evidence of the growing relevance for managing ocean matters. Still, and for very good reasons, it does only focus on purely maritime matters.

50. G.A. Res. 73/124, *supra* note 21, at ¶ 371.

since States are not prepared to relinquish their national security interest to the General Assembly. Disarmament regulations, confidence building measures, and the right to take enforcement measures at sea are matters kept close to the heart of each individual State.<sup>51</sup>

International law is one legal system, and the challenge facing the international community is to move ocean governance gradually into a more integrated and cross-sectorial system. This process is still evolving and steadily growing in importance for the international community.

## II. FUTURE PERSPECTIVES

Oceans management is partly universal, but also increasingly regionalized and “functionalized.” It makes sense; neither the General Assembly as a political organ nor the regional institutions have the capacity or mandate to address and regulate all issues relevant to the management of the oceans. It is far from likely that this development will be stopped or debarred. Occasionally, vague suggestions are made or voices are heard arguing in favor of a renegotiation of the United Nations Convention on the Law of the Sea. However, few, if any, have ever addressed institutional arrangements.

One of the main issues in the context of the ongoing negotiations on the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction (BBNJ) is that States will have to address whether or not there is a need for a new institutional *structure* to address matters relating to BBNJ and area-based management.<sup>52</sup> There are, in essence, three possibilities: (1) a new treaty regulating the management of BBNJ; (2) a middle-ground way through a treaty that establishes some sort of regulatory mechanism to assess, but not necessarily decide, what decisions are taken at a regional level; or (3) maintaining the current regulation, but enhancing cooperation.

It is essential to build from what we have. This is because the convention rests on two important pillars: cooperation and compulsory dispute settlement mechanisms. We must rethink what we refer to when we discuss institutional arrangements for the ocean. It is not likely that “one” institution can effectively deal with every aspect of ocean matters. They are simply too many and too complex to be dealt with by one institution. The fifty-six pages and 374

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51. For operational perspectives, see JAMES KRASKA & RAUL PEDROZO, INTERNATIONAL MARITIME SECURITY LAW (2013) and ROUTLEDGE HANDBOOK OF MARITIME REGULATION AND ENFORCEMENT (Robin Warner & Stuart Kaye eds., 2016).

52. See *Intergovernmental Conference on Marine Biodiversity of Areas Beyond National Jurisdiction*, UNITED NATIONS, <https://www.un.org/bbnj/> (last visited June 3, 2019). For a summary and analysis of the discussions, see generally Cymie R. Payne, *New Laws for the High Seas*, 46 ECOLOGY L.Q. 191, 37 BERKELEY J. INT'L L. 345 (2019).

paragraphs of the Oceans and the Law of the Sea resolution evidences this.<sup>53</sup> Management of ocean matters in the United Nations family alone is now so complex that a new interagency mechanism has been established, UN Ocean, that seeks to enhance the coordination, coherence, and effectiveness of competent organizations of the United Nations system and the ISA. It is clearly set out that this is to be done in conformity with the Law of the Sea Convention.<sup>54</sup>

This demonstrates that ocean matters cannot be regulated by maritime conventions only. In addition, it is worth repeating that threats to the ocean do not primarily stem from activities in the ocean, but are often land-based or derive from activities in the air.<sup>55</sup> An obvious example is sea-level rise, which is not due to activities at sea. But, the footprints in the ocean are difficult to erase, whether or not they come from land- or sea-based activities or remain from war, such as nuclear testing or the dumping of chemical and explosive substances.

While institutions other than those explicitly identified in the Law of the Sea Convention are paying more attention to ocean and maritime matters, it is likewise important to ensure that the balance achieved in the package deal that the convention aims at establishing is maintained. At the same time, this package deal needs to respond to the pressing need for clarifications and adaptations. The Part XI Implementation Agreement and the Fish Stocks Agreement do exactly that. Hopefully the future BBNJ instrument will do so as well.

Does this mean that there is a risk of legal fragmentation? This does not have to be the case, provided that the institutions and structures that we have established continue to be honored. The most important of these institutions and structures in this context are the compulsory dispute settlement procedures under the Law of the Sea Convention and the independent role of the ISA. But these institutions do not work in an ivory tower, isolated from the surrounding legal, political, environmental, scientific, and economic development realities. In a statement at the BBNJ meeting in New York, 2018, the Secretary-General of ISA stated that ISA, when setting up a regional scale environmental management plan, took into account relevant “scientific and technical guidance from CBD

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53. G.A. Res. 73/124, *supra* note 21. The resolution continues to grow year by year. In 2017 it contained 370 paragraphs on fifty-five pages. See G.A. Res. 72/73 (Jan. 4, 2018). The most recent Fish Stocks resolution is *only* 243 paragraphs and on forty pages. See G.A. Res. 73/125 (Jan. 15, 2019).

54. See Home, UN-OCEANS, <http://www.unoceans.org/home/en/> (last updated June 7, 2018). Some 24 UN agencies are part of the platform. *Id.*

55. Van Dyke, *supra* note 46, at 90 (“Only the Black Sea, the Mediterranean Sea, the Persian/Arab Gulf ROPME Sea Area, and the Southeast Pacific regions have protocols on land based pollution,” although not yet in force). See also 1974 Paris Conventions that also addresses land-based pollution of the marine environment—but this convention is superseded by the OSPAR Convention. *Id.* n.11. The original idea is to manage marine pollution now and use a multisectoral integrated ecosystem approach. The challenge is to move it to the next level, namely, sustainable development. See also Doris König, *Global and Regional Approaches to Ship Air Emissions Regulation: The International Maritime Organization and the European Union*, in REGIONS, INSTITUTIONS, AND LAW OF THE SEA, *supra* note 15, at 317.

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[Convention on Biological Diversity] processes.”<sup>56</sup> An even more prominent example is the decision by the ISA to seek guidance through a request for an advisory opinion of the Seabed Disputes Chamber of the International Tribunal for the Law of the Sea (“the Chamber”).<sup>57</sup> The advisory opinion that the ISA sought related to matters regarding responsibility and liability and required qualified interpretation of treaties. The Chamber heard oral statements from a number of States, and also from intergovernmental<sup>58</sup> and nongovernmental organizations.<sup>59</sup> In its advisory opinion, the Chamber relied not only on treaty law and international court cases, but also on the work of the United Nations International Law Commission. This, I believe, bears evidence of attempts for harmonious interpretation, but also of the very simple fact that neither the ISA nor the Chamber work in isolation. The law is and must be a functional tool that works in pace with the demands of the international community.

The establishment of a compulsory dispute settlement structure is a crucial institutional element in the Law of the Sea Convention. All 168 States that are parties to the Convention have voluntarily committed themselves to this compulsory dispute settlement mechanism.<sup>60</sup> This is reflected in the rise of cases in the International Tribunal for the Law of the Sea, the International Court of Justice, and various arbitration agreements. We also see cases relevant to the Law of the Sea in other fora, such as the European Court of Human Rights and in separate agreements to resort to arbitration. Also, national courts are frequently forced to address maritime matters from a wide range of perspectives. This development is likely to continue and increase. Hence, it becomes more and more important that all courts and tribunals are familiar with the Law of the Sea Convention framework and its checks and balances.<sup>61</sup>

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56. Michael W. Lodge, Secretary-General of the ISA, Statement at IGC1 BBNJ (Sept. 7, 2018), <https://ran-s3.s3.amazonaws.com/isa.org.jm/s3fs-public/documents/EN/SG-Stats/abmt-bbnj.pdf>.

57. Int’l Seabed Authority, *Decision of the Council of the International Seabed Authority requesting an advisory opinion pursuant to Article 191 of the United Nations Convention on the Law of the Sea*, ISBA/16/C/13 (May 6, 2010).

58. Intergovernmental Oceanographic Commission (IOC) of the United Nations Educational, Scientific and Cultural Organization (UNESCO). See *About Us*, INTERGOVERNMENTAL OCEANOGRAPHIC COMMISSION, <http://www.unesco.org/new/en/natural-sciences/ioc-oceans/about-us/> (last visited June 4, 2019).

59. International Union for Conservation of Nature. See *About*, INT’L UNION FOR CONSERVATION NATURE, <https://www.iucn.org/about> (last visited June 4, 2019).

60. Implementation Agreement is ratified by 150 States and the Fish Stocks Agreement by eighty-nine. The EU has ratified all three. See *Status of the United Nations Convention on the Law of the Sea, of the Agreement relating to the Implementation of Part XI of the Convention and of the Agreement for the Implementation of the Provisions of the Convention relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks as at 31 March 2018*, UNITED NATIONS (Mar. 31, 2018), [https://www.un.org/depts/los/reference\\_files/status2018.pdf](https://www.un.org/depts/los/reference_files/status2018.pdf).

61. The ILC work on the topic of identification of customary law aims at mitigating this challenge. See *Draft Conclusions on Identification of Customary International Law*, United Nations (2018), [http://legal.un.org/docs/?path=..ilc/texts/instruments/english/draft\\_articles/1\\_13\\_2018.pdf&lang=EF](http://legal.un.org/docs/?path=..ilc/texts/instruments/english/draft_articles/1_13_2018.pdf&lang=EF).

This also means that there is reason to be concerned when the agreed dispute settlement procedure is not respected, in other words, when States do not appear in the courts or before tribunals.<sup>62</sup> This sets a bad precedent and risks dismantling the system. At a minimum, States should appear or present their views in writing. It is for the courts and tribunals to decide whether or not they have jurisdiction, and it is the courts and tribunals that address the merits of a case before the court or the tribunal.

The most important challenge to the ocean and to our own survival is climate change. It affects and will continue to affect the oceans. As David Caron has said, both policy and law need to begin to anticipate the challenges ahead.<sup>63</sup> From an institutional perspective, this means that we must rely on structures adopted outside the context of the Law of the Sea, such as the Paris Agreement and the United Nations Framework Convention on Climate Change. The institutions must be buttressed, not dismantled. This should be born in mind as we move into the United Nations Decade of Ocean Science for Sustainable Development, starting in 2021. Addressing the ocean-climate nexus is unavoidable, as the discussions at the 2017 Oceans Conference,<sup>64</sup> the COP24 in Katowice, Poland in 2018, and at the Ocean Action Day in December 2018 have demonstrated.<sup>65</sup> The connection between climate change and the health of the oceans is slowly but surely reaching the high-level political agenda.<sup>66</sup> Scientists have known this since long before now.

## CONCLUSION

The negotiators of the 1982 Law of the Sea Convention foresaw not only that “the problems of ocean space are closely interrelated and need to be

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62. The Arctic Sunrise Arbitration and the South China Sea Arbitration may serve as examples of this. *See In re Arctic Sunrise Arbitration* (Neth. v. Russ.), Case No. 2014-02, Award on Jurisdiction, ¶ 72 (Perm. Ct. Arb. 2014), <http://www.pcacases.com/web/sendAttach/1325> (“Russia’s Declaration cannot create an exclusion that is wider in scope than what is permitted by article 29 8(1)(b).”); *In re South China Sea Arbitration* (Phil. v. China), Case No. 2013-19, Award (Perm. Ct. Arb. 2016), <https://pcacases.com/web/sendAttach/2086>.

63. David Caron, *Climate Change and the Oceans, in REGIONS, INSTITUTIONS, AND LAW OF THE SEA*, *supra* note 15, at 537. Caron refers to geoengineering and notes that the law is less clear in terms of possible geoengineering than in efforts to mitigate emissions from shipping and offshore oil activities. *See also* Tavis Potts & Clive Schofield, *Climate Change and Evolving Regional Ocean Governance in the Arctic, in REGIONS, INSTITUTIONS, AND LAW OF THE SEA*, *supra* note 15, at 437–66.

64. *Climate Action is Needed to Protect World’s Oceans*, UNITED NATIONS, <https://unfccc.int/news/climate-action-is-needed-to-protect-world-s-oceans> (last visited June 4, 2019).

65. *See Oceans Action Day at UNFCCC-COP24*, OCEAN POL’Y RES. INST. (Dec. 22, 2018), [https://www.spf.org/en/\\_opri/news/20181222.html](https://www.spf.org/en/_opri/news/20181222.html); *Oceans Action Day at COP 24*, IISD REPORTING SERV. (Dec. 8, 2018), <http://enb.iisd.org/climate/cop24/oceans-action-day/>.

66. For example, Belgium organized the High Level Conference on Climate Change and Oceans Preservation in Brussels in February 2019. *See Introduction, CLIMATE CHANGE & OCEANS PRESERVATION*, <https://climateoceans.eu> (last visited June 4, 2019).

considered as a whole,”<sup>67</sup> but also affirmed “that matters not regulated by this Convention continue to be governed by the rules and principles of general international law[.]”<sup>68</sup>

That takes us back to Hugo Grotius’s idea: no sovereignty over ocean spaces, but use them in common interest and cooperation. I believe that Grotius would have been pleased with the development of institutional cooperation that has replaced the grab-and-go practice of no responsibility or liability for the usurpation or damage made to the rights of other users. This would hopefully repress the “tragedy of the commons.”<sup>69</sup> Admittedly, there has been a territorialization of the sea since Grotius’s time.<sup>70</sup> In addition, economies, sciences, and technologies continue to advance and make various uses of the ocean even more possible. This is a kind of functionalization that States try to manage by maintaining the flag state regime or strengthening port state control.<sup>71</sup> But, to achieve a balanced and fair use of the ocean, the international community needs to establish just and fair collective management of the ocean. This is in essence a part of the Grotian idea of a sustainable global common.<sup>72</sup>

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67. United Nations Convention on the Law of the Sea preambular para., Dec. 10, 1982, 1833 U.N.T.S. 397.

68. *Id.*

69. For a brief description of the concept, see ELINOR OSTROM, GOVERNING THE COMMONS: THE EVOLUTION OF INSTITUTIONS FOR COLLECTIVE ACTION 2–3 (1990). For an interesting analysis, see Harry N. Scheiber, *The “Commons” Discourse on Marine Fisheries Resources: Another Antecedent to Hardin’s “Tragedy”*, 19 THEORETICAL INQUIRIES L. 489, 489–90 (2018).

70. Generally, on territorialization, see CHRISTOPHER R. ROSSI, SOVEREIGNTY AND TERRITORIAL TEMPTATION: THE GROTIAN TENDENCY (2017) and Bernard H. Oxman, *The Territorial Temptation: A Siren Song at Sea*, 100 AM. J. INT’L L. 830, 830 (2006).

71. See Cedric Ryngaert & Henrik Ringbom, *Introduction: Port State Jurisdiction: Challenges and Potential*, 31 INT’L J. MARINE & COASTAL L. 379, 380–81 (2016).

72. See ROSSI, *supra* note 70 (for a refreshing account of the Grotian tradition).

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