

# THE INEXORABLE RISE OF THE UNITED NATIONS CONVENTION ON THE LAW OF THE SEA WITHIN THE EUROPEAN LEGAL ORDER

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## INTRODUCTION

The United Nations Convention on the Law of the Sea (LOSC) codifies and develops the rules of international law pertaining to the use of ocean space and maritime activities.<sup>2</sup> The comprehensive nature of the LOSC, which is made up of 320 articles and nine annexes, covering nearly all aspects of ocean space including navigation rights, maritime boundaries, economic and resource-related activities, environmental protection, scientific research and the settlement of disputes, serves the European Union (EU) and its Member States well. The utility of the LOSC has been a steady and progressive development on the international and European legal landscape over the past three decades. Most significantly, the LOSC is considered today to be an integral part of the European legal order and it thus forms the principal framework for ensuring the peaceful use of maritime space both within and beyond the EU.<sup>3</sup> In this context, understanding the various factors and considerations that influence developments in EU law concerning this important international treaty is vital to our understanding of how the LOSC acts today as the overarching normative structure for the integrated and sustainable management of all maritime activities in the EU and how it advances new normative approaches to resource management such as an ecosystem-based management approach to marine environmental protection under the EU's Marine Strategy Framework Directive and Integrated Maritime Policy.<sup>4</sup>

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<sup>2</sup> United Nations Convention on the Law of the Sea, Montego Bay, 10 December 1982. In force 16 November 1994, 1833 UNTS 397.

<sup>3</sup> See *inter alia*: Case C-459/03 *Commission v. Ireland* [2006] ECR I-4635, para. 82 citing *inter alia*: Case C-344/04 *IATA and ELFAA* [2006] ECR I-403, para. 36.

<sup>4</sup> Directive 2008/56/EC of the European Parliament and of the Council of 17 June 2008 establishing a framework for community action in the field of marine environmental policy (Marine Strategy Framework Directive) OJ L 164/19, 25 June 2008. For commentary on this directive see R. Long, 'The EU Marine Strategy Framework Directive: A New European Approach to the Regulation of the Marine Environment, Marine Natural Resources and Marine Ecological Services', 29 *Journal of Energy and Natural Resources*

Accordingly, the purpose of this paper is to outline several factors that have contributed to the pre-eminent standing of the LOSC within the European legal order, namely: (I.) the flexible nature of the LOSC that addresses the divergent law of the sea interests of the Member States in a comprehensive and balanced manner; (II.) the sterling work undertaken by a specialist expert body within the European institutions, the recondite Working Party on the Law of the Sea (COMAR), in coordinating EU policy on many of the intractable and contentious issues that frequently permeate the law of the sea; (III.) the sophisticated approach to dispute settlement advanced by the LOSC and its relationship with the EU's own system of dispute settlement; (IV.) the manner in which the LOSC provides a solid normative basis that promotes a holistic approach to ocean governance underpinned by the ecosystem approach; and finally (V.) the LOSC as a plinth for future EU maritime leadership at global and regional levels.

First, however, it may be appropriate to commence by making a few brief remarks on the history and overall position of the LOSC in the hierarchy of sources of European law and to highlight its influence on some contemporary developments in the treaty and legislative architecture of the EU.

#### **AN INAUSPICIOUS START**

There is little doubt that the role of the EU in the progressive development and in the implementation of the law of the sea has evolved tremendously in recent years and has moved steadily away from the inauspicious part played by the then European Economic Community (EEC) at the Third United Nations Conference on the Law of the Sea (UNCLOS III). As may be recalled, the EEC had observer status as one of the 19 intergovernmental organizations with legal personality that participated at the conference, but there is a considerable body of commentary that now suggests that the EEC delegation never realized its full potential in the treaty-making

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*Law*, No.1, 2011, 1-45; A. Trouwborst, H. Harm, 'Comparing European Instruments for Marine Nature Conservation: The OSPAR Convention, the Bern Convention, the Birds and Habitats Directives, and the Added Value of the Marine Strategy Framework Directive' 20 *European Energy and Environmental Law Review*, No. 4, 2011, 129-149; L. Juda 'The European Union and the Marine Strategy Framework Directive: Continuing the Development of Ocean Use Management', 41 *ODIL*, 2010, 34-54; S. Apitz *et al.*, 'European Environmental Management: Moving to an Ecosystem Approach' 2 *Integrated Environmental Assessment and Management*, No. 1, 2006, at 80-85. On the EU's maritime policy, see *inter alia*: An Integrated Maritime Policy for the European Union, COM (2007) 575 final of 10 October 2007 and SEC (2007) 1278 of 10 October 2007; and Commission Staff Working Document, SEC (2007) 1278, Brussels, 10 October 2007. On ecosystem-based management, see R. Long, 'Legal Aspects of Ecosystem-Based Marine Management in Europe', in: Chircop, McConnell, Coffen-Smout (eds.), *Ocean Yearbook*, 26. (Boston/Leiden: Brill Academic Publishers, 2012), pp. 417-484.

process as a special interest group.<sup>5</sup> This was mainly because the 10 Member States which then made up the EEC had divergent views on many key aspects of the draft LOSC, such as the regime that applied to seabed mining, and thus were unable to adopt a common position on any of the substantive and procedural matters before the conference, apart from advocating the right that

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<sup>5</sup> See M. Nordquist *et al.*, *United Nations Convention on the Law of the Sea 1982: A Commentary*, Vol. 1, p. 84. For an analysis of the interests of the various EEC Member States see M. Hayes, *The Law of the Sea Convention: The Role of the Irish Delegation at the Third UN Conference*, (2011). On the EEC and the Convention, see *inter alia*: D. Vignes, 'The EEC and the Law of the Sea', in: H. Lay, R. Churchill, M. Nordquist, K. Simmonds, J. Welch (eds.), *New Directions in the Law of the Sea*, (1973), pp. 335-347; A. Koers, 'Participation of the European Economic Community in a New Law of the Sea Convention', 73 *AJIL*, (1979), 426-441; P. Daillier, 'Les Communautés Européennes et le droit de la mer', 83 *RGDIP*, 1979, 417-475; K. Simmonds, 'The Community's Participation in the U.N. Law of the Sea Convention', in: O'Keefe, Schermers (eds.), *Essays in European Law and Integration*, (1982), pp. 179-191; J.F. Buhl, 'The European Economic Community and the Law of the Sea', 3/4 *ODIL* 1982, 181-200; T. Treves, 'The United Nations Law of the Sea Convention of 1982: Prospects for Europe', in: *Conference Papers Greenwich Forum IX, Britain and the Sea*, (1984), pp. 166-182; C. Archer, 'Supranatural Ocean Management: the Case of the EC' in: Koers, Oxman (eds.), *The Convention on the Law of the Sea*, (Proceedings of the Law of the Sea Institute, 7th Annual Conference, Oslo, 1983), pp. 520-543; T. Treves, 'The EEC and the Law of the Sea: How Close to One Voice?', 12 *ODIL*, 1983, 173-189; F. Weiss, 'UNCLOS and the EEC: Some Legal Problems', in: Butler (ed.), *The Law of the Sea and International Shipping*, (1985), pp. 69-103; D.J. Devine, 'Le caractère indivisible de la convention sur le droit de la mer et les implications de la signature pour la Communauté Economique Européenne et ses Etats Membres', 304 *RDMC*, 1987, 95-100; L. Kramer, 'Le déversement des déchets en mer et le droit communautaire', 318 *Revue du marché commun*, 1988, 334-337; K.R. Simmonds, 'The European Economic Community and the New Law of the Sea', 218 *Recueil des Cours de l'Académie de Droit International*, No. VI, 1989, 9-166; A.H.A. Soons, 'The Position of the EEC towards the LOS Convention', in: *Proceeding of the 84th Annual Meeting of the American Society of International Law 1990*, *ASIL*, 1991, 278-283; B. Kwiatkowska, A.H.A Soons, 'The Role of the European Economic Community in Ocean Affairs Development in the Light of the 1982 United Nations Law of the Sea Convention', in: *The African Society of International and Comparative Law*, Proceedings of the 3rd Annual Conference, (Arusha, 1991), pp. 127-143; H. Da Fonseca-Wollheim, 'The European Community and the Law of the Sea Convention', in: Miles, Treves (eds.), *The Law of the Sea: New Worlds, New Discoveries*, Proceedings of the Law of the Sea Institute 26th Annual Conference, (Genoa, 1992), pp. 170-188; E. Hey, A. Nollkaemper, 'Implementation of the LOS Convention at Regional Level: European Community Competence in Regulating Safety and Environmental Aspects of Shipping', 10 *International Journal of Marine & Coastal Law*, 1995, 281-300; E. Hey, 'The European Community, the Law of the Sea and Accountability: An Ever Changing and Challenging Relationship', in: Evans, Malcolm (eds.), *Aspects of Statehood and Institutionalism in Contemporary Europe*. EC/International Law Forum II. (1997), pp. 277-300; D. Anderson, 'European Initiatives with Special reference to the European Union', in: Kusuma-Atmudja, Mensah, Oxman (eds.), *Sustainable Development and Preservation of the Oceans: The Challenges of UNCLOS and Agenda 21*, Proceedings of the Law of the Sea Institute, 29th Annual Conference, (Denpasar, 1995), pp. 700-713; D. Vignes, 'La Communauté Européennes dans le domaine du droit général de la mer', in: Treves, Pineschi (eds.), *The Law of the Sea. The European Union and Its Member States*, (1997), pp. 7-26; C. Nordmann, 'Regional Organisations: The European Community and the Law of the Sea Convention', in: Vidas, Østreng (eds.), *Order for the Oceans at the Turn of the Century*, (1999), pp. 355-363; R. Baratta, 'Overlaps between European Community Competence and European Foreign Policy Activity', in: Cannizzaro (ed.), *The European Union as an Actor in International Relations*, (2002), pp. 51-75; T. Treves, 'The European Community and the Law of the Sea Convention: New Developments', in: Cannizzaro (ed.), *The European Union as an Actor in International Relations*, (2002), pp. 279-296; T. Treves, 'The European Community and the European Union and the Law of the Sea: Recent Developments', 48 *IJIL*, 2008, 1-20; T. Treves, 'The European Community and the Settlement of Disputes under the UN Law of the Sea Convention', in: *Estudios de derecho internacional en homenaje al professor Ernesto J. Rey Caro*, (2002), pp. 355-362.

the EEC should ultimately become party to the LOSC.<sup>6</sup> Most notably, six EEC Member States abstained when the draft Convention was finally put to a vote, after nine years of lengthy and complex negotiations, on 30 April 1982.<sup>7</sup>

In spite of this outcome, the inclusion of Annex IX in the LOSC enabled the European Community (EC) to sign the treaty on 7 December 1984 as soon as the majority of its Member States had become signatories and it remains *pro tem* the sole international organization to have done so.<sup>8</sup> The EC signed the Agreement on Part XI in 1994 and deposited its instrument of formal confirmation for both the LOSC and the Agreement on Part XI with the Secretary-General of the United Nations in 1998.<sup>9</sup> This instrument contained an important and frequently-cited declaration indicating the competence that the Member States had transferred to the Community under the European treaties in matters governed by the LOSC and the Agreement on Part XI, such as competence with regard to the conservation and management of sea fisheries resources, as well as a more general declaration under Article 310 of the LOSC concerning fishing activities outside of the Exclusive Economic Zone.<sup>10</sup> The latter was an issue of concern to the EC at that particular time in light of the protracted dispute with Canada over high seas fisheries in the north-east Atlantic.<sup>11</sup> As noted in the declaration on the transfer of competence, the scope and the exercise of EC competencies are, by their nature, subject to continuous development and the Community reserved the right to complete or amend this declaration where necessary.<sup>12</sup> Although this declaration of competence has not been amended since its initial submission, the Court of Justice of the EU has, nonetheless, emphasized in several important cases concerning the relationship between international law and EU law the ambulatory nature of EU competences in relation to

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<sup>6</sup> There were nine Member States in the EEC during the course of the UNCLOS negotiations, namely: Belgium, Denmark, the Netherlands, Luxembourg, France, Italy, Germany, Ireland and the United Kingdom. Greece became a Member State in 1981 prior to the EC signing the Final Act of the LOSC the following year.

<sup>7</sup> Member States abstaining were Belgium, the Federal Republic of Germany, Italy, Luxembourg, the Netherlands, and the United Kingdom. Spain, Hungary, Poland, Bulgaria, Czechoslovakia, the German Democratic Republic also abstained and later became members of the EEC. In total, 130 countries voted in favour, four against (Israel, Turkey, the United States and Venezuela) and there were 17 abstentions.

<sup>8</sup> Article 306 of the LOSC and article 3 of Annex IX provide that an international organization may deposit its instrument of formal confirmation if the majority of its Member States are parties to the LOSC. See K. Simmonds, 'The Community's Declaration upon Signature of the UN Convention on the Law of the Sea', 23 CML Rev. 1986, 521-544. See also L. Lijnzaad, "Declarations of Competence in the Law of the Sea, a Very European Affair," in this volume.

<sup>9</sup> Council Decision 98/392 of 23 March 1998, OJ L 179/1, 23 June 1998.

<sup>10</sup> Annex II of Council Decision 98/392. See COM (97) 37 final.

<sup>11</sup> See P. Curran, R. Long, 'Unilateral Fishery Law Enforcement: the Case of the *Estai*', 5 *Irish Journal of European Law*, 1995, 123-163.

<sup>12</sup> Declaration made pursuant to Article 5 (1) of Annex IX to the LOSC and to Article 4 (4) of the Agreement, OJ L 179/1, 23 June 1998.

matters covered by the LOSC.<sup>13</sup> Furthermore, it is important to keep in mind that the Court of Justice of the European Union is the only European institutional body that can make an authoritative determination about the attribution of EU competence in relation to matters covered by the LOSC.<sup>14</sup> As is well known, knowledge of the precise attribution of competence within the European Union is essential for third states and international bodies in order for them to make a determination regarding responsibility and liability in relation to a violation of the LOSC, as well as to allow them to invoke the dispute-settlement procedures that are prescribed therein.<sup>15</sup>

In marked contrast to UNCLOS III, the EC played a prominent role in the negotiation of the UN Fish Stocks Agreement, which it signed in 1996 and subsequently deposited its instrument of ratification and the declaration of competence with the Secretary General of the United Nations in 2003.<sup>16</sup> Speaking *una voce*, the Community and its 15 Member States ratified this Agreement simultaneously.<sup>17</sup> The thumbprint of the EC is reflected on many of the substantive provisions of the UN Fish Stocks Agreement such as the provisions on the legal status of the precautionary principle, the biological unity of fish stocks, and the various functions attributed to regional fisheries management organizations.<sup>18</sup>

#### **THE STATUS OF THE LOSC WITHIN THE EUROPEAN LEGAL ORDER**

The LOSC is binding on the EU and the 28 Member States and many of its provisions form an integral part of the EU legal order.<sup>19</sup> As a result of the division and attribution of various competencies between the EU and the Member States, the LOSC is sometimes classified as a 'mixed agreement' in the unique terminology of the EU. In the hierarchy of sources of EU law, it ranks below the primary sources of EU law such as the Treaty on European Union and the Treaty on the Functioning of the European Union as well as the general principles of EU law, and above

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<sup>13</sup> Case C-459/03 *Commission v. Ireland* [2006] ECR I-4635. Discussed further below.

<sup>14</sup> See R. Churchill, J. Scott, 'The MOX Plant Litigation: The First Half Life', 53 *International and Comparative Law Quarterly*, 2004, 643-676 at 664-5.

<sup>15</sup> Articles 6 and 7 of Annex IX to the LOSC.

<sup>16</sup> Council Decision 98/414 of 8 June 1998, OJ L/189/14, 3 July 1998. The LOSC and Agreement on Part XI entered into force for the EC on 1 May 1998.

<sup>17</sup> Article 2 (2) of Council Decision 98/414.

<sup>18</sup> See C. Nordmann, 'Regional Organisations: The European Community and the Law of the Sea Convention', in: Vidas, Østreng, see note 5, p. 362.

<sup>19</sup> Article 216 (2) of the TFEU. C-459/03, *Commission v. Ireland (Mox Plant)* [2006] ECR I-4635, para. 82; Case C-308/06 *The Queen on the Application of Intertanko and Others v. Secretary of State for Transport*, [2008] ECR I-4057, para. 53.

secondary legislation such as EU regulations, directives and decisions.<sup>20</sup> In view of its primacy, all secondary legislation must be interpreted in conformity with the LOSC.<sup>21</sup>

These attributes of the LOSC within the European legal order do not distinguish it to a large extent from the ever-expanding array of international agreements that are binding on the EU. When we take a closer look, however, it is evident that the LOSC has had a profound influence on the shape and substance of many other international agreements that have been concluded by the EU with third countries and with international organizations, which touch many aspects of maritime affairs. In the interest of brevity it is not possible to canvas this influence fully and certainly not over the period of the past 30 years. Suffice to note here, for the purpose of illustrating this point, that in the 12-month period 2011-2012, reference is made to the LOSC *en passant* in more than a dozen instruments pertaining to the EU's external policy including, *inter alia*: the Council Decision approving the Convention on the Conservation and Management of High Seas Fishery Resources in the South Pacific Ocean;<sup>22</sup> the Protocol to the Fisheries Agreement with Mozambique and a proposed Protocol to the Agreement with Guinea-Bissau;<sup>23</sup> the annual Regulation setting fishing opportunities for fish stocks;<sup>24</sup> the Council position on the draft Regulation concerning the Agreement on the General Fisheries Commission for the Mediterranean;<sup>25</sup> the Regulation on the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the EU which has an important international dimension in that it codifies, among other matters, the principle of *non-refoulement*;<sup>26</sup> the proposal for EU accession to the 1994 Offshore Protocol to the Barcelona Convention;<sup>27</sup> the Commission Communication on future EU enlargement with specific reference to the Convention in the context of relations between Turkey and Cyprus, as well as in relation to territorial sea disputes between Greece and Turkey;<sup>28</sup> in the bilateral Agreement between the EU

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<sup>20</sup> Case 40/72 *Schröder KG v. Germany* [1973] ECR 125; Case C-61/94 *Commission v. Germany* [1996] ECR I-3989, para. 52; and Case C-311/04 *Algemene Scheeps Agentuur Dordrecht* [2006] ECR I-609, para. 25.

<sup>21</sup> The Court of Justice has held, however, that the LOSC does not have direct effect in EU law, Case C-308/06 *The Queen on the Application of Intertanko and Others v. Secretary of State for Transport*, [2008] ECR I-4057, discussed below.

<sup>22</sup> OJ L 67/1, 6 March 2012.

<sup>23</sup> OJ L 46/4, 17 February 2012; COM (2011) 603 final, 4 October 2011.

<sup>24</sup> OJ L 25/55, 27 January 2012.

<sup>25</sup> OJ C 345 E/1, 25 November 2011.

<sup>26</sup> Regulation No. 1168/2011 amending Regulation No. 2007/2004 OJL 304/1, 22 January 2011.

<sup>27</sup> COM (2011) 690 final, 27 October 2011.

<sup>28</sup> COM (2011) 666 final, 12 October 2011.

and Mauritius on maritime piracy;<sup>29</sup> and in the draft directive pertaining to the Maritime Labour Convention 2006.<sup>30</sup>

Most noticeably, the influence of the LOSC appears to be increasingly pervasive in EU secondary legislation concerning fisheries and the protection of the marine environment, most notably. Take, for example, the draft regulation on the future Common Fisheries Policy (CFP) which provides that one of the principles governing future fisheries agreements with third countries is that Union vessels shall only catch the surplus of the allowable catch determined by the third country in accordance with the obligation set down in Article 62(2) of the LOSC.<sup>31</sup> Similarly, the Marine Strategy Framework Directive notes the obligation placed on the EU and the Member States under the LOSC not to cause transboundary damage to the marine environment.<sup>32</sup> The latter instrument is fully consistent with the letter and spirit of Part XII of the LOSC, which sets out the scheme for the protection and preservation of the marine environment, in that it requires the attainment of good environmental status of all European marine waters by 2020 at the latest.<sup>33</sup> One of the maritime sectors where we can observe the dynamic nature of EU law, in light of the obligations that are set down in the LOSC, is in the area of offshore oil and gas legislation. As is well known, the coastal State is vested with the exclusive right under international law to construct artificial islands, installations and structures on the continental shelf for the purpose of exploring and exploiting seabed hydrocarbons.<sup>34</sup> In the EU, this sector has traditionally been regulated at the national level in the Member States. This approach has changed in response to the *Deepwater Horizon* disaster in the United States and the EU has adopted a new directive setting down minimum requirements for industry and national authorities involved in offshore oil and gas operations.<sup>35</sup> This directive applies to all offshore oil and gas installations, subsea installations and connected infrastructure in sea areas under the sovereignty and jurisdiction of the Member States, and establishes minimum requirements for preventing major accidents in offshore oil and gas operations and limiting the consequences of such accidents.

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<sup>29</sup> OJ L 254, 30 September 2011. On piracy see discussion below.

<sup>30</sup> COM (2012) 134 final, 23 March 2012.

<sup>31</sup> Article 41 of the draft Regulation of the European Parliament and Council on the CFP, COM (2011) 425 final, 13 July 2011. Entered into force on 1 January 2013.

<sup>32</sup> Recital 17, Directive 2008/56/EC.

<sup>33</sup> Article 1, Directive 2008/56/EC.

<sup>34</sup> Articles 60, 77, 80, 81, 246(5)(b) of the LOSC. On the legal status of the continental shelf, see *North Sea Continental Shelf* cases, ICJ Reports 1969, 3 et seq., para. 19.

<sup>35</sup> Directive 2013/30/EU of 12 June 2013 on safety of offshore oil and gas operations and amending Directive 2004/35/EC, OJ L 178/66, 28.06.2013. COM (2011) 688 final, 27 October 2011. See also M. Nordquist and A. Fausser, "Offshore Drilling in the Outer Continental Shelf: International Best Practices and Safety Standards in the Wake of the *Deepwater Horizon* Explosion and Oil Spill," in this volume.

In summary, the LOSC has had a profound influence on the substance and form of the regulatory architecture of the EU. As will be seen below, this is facilitated by many factors that have contributed to its success and importance within the European legal order. For the purpose of this paper, it is now proposed to outline four contributory factors and to give some contemporary examples on how the LOSC continues to shape the law and policy of the EU in relation to a very broad sweep of maritime and oceanic activities.

### ***I. The LOSC as a Flexible and Comprehensive Instrument***

Over the past three decades, the LOSC has proved to be remarkably flexible and well capable of dealing with the problems that have arisen in relation to the law of the sea within and outside of the EU. The size and nature of this task should not be underestimated as the 28

EU Member States represent an extraordinary spectrum of interests in relation to maritime affairs including: major and minor maritime powers; broad continental shelf States; States bordering international straits; geographically-disadvantaged States; States with high seas fishing interests; and States with overseas dependencies and global security interests, to name but a few.<sup>36</sup> Moreover, these national interests must often be reconciled with the broader global objectives of the EU as a supranational regional integration organization committed to the promotion of international trade and to the free flow of navigation and communications, as well as the progressive development of international law in general and the peaceful uses of the ocean in particular. Indeed, there appears to be few, if any, law of the sea issues, which do not impinge upon the interests of an EU Member State or the EU as a regional integration organization.<sup>37</sup> This picture is further complicated if one takes into account the concerns of Croatia in the Adriatic Sea, which became a full member of the EU in 2013,<sup>38</sup> as well as the views of Iceland, Serbia, Turkey (a non-party to the LOSC and its related agreements), and Macedonia and Montenegro, which may become EU Member States at some point in the future.

Undoubtedly, the diversity of Member State interests makes it difficult, at times, for the EU to formulate a precise position in relation to contentious issues concerning the law of the sea. This is often compounded by the close interrelationship of the various economic and resource-

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<sup>36</sup> See T. Treves, L. Pineschi (eds.), *The Law of the Sea, The European Union and its Member States*, (1997), p.2. For a more complete list of these interests see R. Long, 'Regulating Marine Scientific Research in the European Union: It Takes More Than Two to Tango', in: M. Nordquist, J. N. Norton Moore, A. Soons, H. Kim (eds.), *The Law of the Sea Convention: U.S. Accession and Globalisation*, (2012), pp. 428-490 at 430.

<sup>37</sup> For an overview of the EU's range of interests in maritime affairs see, COM (2007) 575 final.

<sup>38</sup> On the complexity of law of the sea issues in the Adriatic, see, for example, D. Vidas, *The UN Convention on the Law of the Sea, the European Union and the Rule of Law: What is Going on in the Adriatic Sea?*, (2008). See also B. Vukas, "Croatian Writers and State Practice in the Law of the Sea," in this volume.



related interests that are at stake. This, in turn, underlines the importance of the conceptual underpinnings of the LOSC as a ‘package deal’ that balances conflicting interests in an equitable manner.<sup>39</sup> The success of the LOSC is very much contingent upon the quality of the implementation measures that are adopted by the State Parties in the EU to give effect and to develop its provisions. In this regard, perhaps one weakness in the EU approach is the fragmented manner in which it has assumed its responsibilities in relation to the implementation of specific objectives of the LOSC and towards the implementation of a regime that ensures the long-term sustainability of fisheries, most notably.<sup>40</sup> There are many reasons for this failure including the cumbersome division of competence between the Member States and the EU which has, undeniably, contributed to this fragmentation and has made it difficult to achieve the sustainability targets agreed to at the World Summit on Sustainable Development in Johannesburg in 2002, as well as the obligations in relation to the conservation and management of fish stocks that are set down in the LOSC, the UN Fish Stocks Agreement, and the FAO Compliance Agreement. In recent years, however, we have seen a fundamental shift by the EU towards a more strategic approach to the management of fisheries and this is reflected in the new framework regulation for the common fisheries policy, which aims to achieve the target of maximum sustainable yield by 2015.<sup>41</sup> This strategic approach is also evident in many of the maritime governance initiatives that have been undertaken under the broad *chapeau* of the EU’s Integrated Maritime Policy in many areas including: employment, maritime spatial planning, integrated coastal zone management, ecosystem-based management, maritime surveillance, marine scientific research, sea-basin strategies, climate change, environmental protection, energy and resource related policies.<sup>42</sup> In addition, there have been significant developments in EU law concerning the development of Port State measures to combat illegal, unreported and unregulated fishing, as well as substandard shipping activities.<sup>43</sup> Again, it needs to be noted that many of these initiatives are influenced and informed, to a greater or lesser degree, by the LOSC and its associated agreements.

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<sup>39</sup> See B. Zuleta, *United Nations Convention on the Law of the Sea*, 1983, XIX et seq.

<sup>40</sup> See, *inter alia*: R.R. Churchill, D. Owen, *The EU Common Fisheries Policy*, 2010; R. Long, P. Curran, *Enforcing the Common Fishery Policy*, (2000).

<sup>41</sup> Art 2(2) of Regulation (EU) No 1380/2013 of the European Parliament and the European Council of 11 December 2013 on the Common Fisheries Policy, amending Council Regulations (EC) No 1954/2003 and (EC) No 1224/2009 and repealing Council Regulations (EC) No 2371/2002 and (EC) No 639/2004 and Council Decision 2004/585/EC, OJ L 354/22, 28.12.2013.

<sup>42</sup> Regulation No. 1255/2011, OJ L 321/9, 5 December 2011.

<sup>43</sup> Regulation No. 1005/2008 OJ L 286/1, 29 October 2008 as last amended by Commission Regulation No. 202/2011, OJ L 57/10, 2 March 2011. Directive 2009/16/EC, OJ L 131/57, 28 May 2009.

## ***II. The Unsung Role of COMAR in Coordinating Law of the Sea Related Matters in the EU***

The diversity and plurality of Member States' interests in relation to the law of the sea demands an intricate balancing act within the European institutions when it comes to the coordination of EU policy both internally with the Member States and at the level of external representation at international and regional organizations dealing with maritime affairs. Moreover, EU law-making and policy formulation is complex and it may therefore not be entirely appropriate to single out any particular European institutional body for its contribution in raising the profile of the LOSC both within and beyond the EU.

That being said, many contentious issues concerning the interpretation and implementation of the LOSC have been examined and resolved at a technical level within the European institutions by the Common Foreign and Security Policy (CFSP) Working Party on the Law of the Sea. This body is commonly referred to by its French acronym COMAR and is made up of law of the sea experts from the Member States, as well as representatives from the European Commission and the Council Secretariat. COMAR is chaired by the six-monthly presidency of the EU and is one of the preparatory bodies of the Foreign Affairs Council.<sup>44</sup> Significantly, as the LOSC is predominantly concerned with matters that are under Member State competence, it remains as one of few such groups chaired by the presidency as opposed to the High Representative of the Union for Foreign Affairs and Security Policy (Catherine Ashton is the current office holder) in the post-Treaty of Lisbon period. At the crucial technical level, COMAR makes a vital contribution to the coordination of EU policy on the law of the sea by preparing the EU position at various multilateral fora such as the Meetings of States Parties to the LOSC as well as other specialist bodies such as the United Nations Open-ended Informal Consultative Process on Oceans and the Law of the Sea.

The remit of COMAR is extensive and was originally set out in the 1998 Council Decision on the EC's approval of the LOSC and the Agreement on Part XI.<sup>45</sup> This remit includes, *inter alia*: the provision of advice on the compatibility of EU policies and regulatory measures with the LOSC and in with international law in general, either at the request of COREPER II or on its own initiative; preparing Council decisions and declarations relating to the LOSC and its related agreements; the preparation of draft EU positions within bodies set up under the LOSC; the coordination of the activities of the EU and the Member States in the International Seabed Authority and its constituent organs; consultations with the Member States and the drafting of

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<sup>44</sup> Annex II of Council Decision 2009/908/EU, OJ L 322/28, 9 December 2009.

<sup>45</sup> Annex III of Council Decision 98/392, OJ L 179/1, 23 June 1998.

common positions on the development of the law of the sea and its repercussions on EU foreign policy.<sup>46</sup>

In practice, the chair of COMAR (the rotating president) is required to draft position papers and statements which are then discussed and settled at COMAR. Indeed, the president acts as the head of the EU delegation at meetings of international fora—not however in her or his capacity as the president but in the capacity as chair of COMAR. Intensive EU coordination takes place prior and during the course of UN meetings and COMAR also operates regular and quick communication between its members from the Member States in the periods between meetings. One of the important tasks that COMAR undertakes on a regular basis is that it acts as a forum for exchanging views on developments in the law of the sea. Where there is agreement for external action on a particular matter COMAR has, in the past, decided that the president should make *démarches* to third countries on issues such as baselines, maritime security, and other matters of common concern to the Member States and the EU.

The workload of COMAR is considerable and much time is taken up with preparing the EU position on the annual United Nations General Assembly omnibus resolution on Ocean Affairs and the Law of the Sea, as well as more specific General Assembly resolutions on matters such as sustainable fisheries. In recent years, deliberations at COMAR have gone well beyond the regional implementation of the LOSC and have addressed many matters of global concern such as: piracy, the protection of marine biodiversity in areas beyond national jurisdiction, marine genetic resources, illegal migration by sea, marine debris, underwater cultural heritage, marine scientific research, Svalbard, the South China Sea, climate change, submarine cables and pipelines, freedom of navigation, ocean acidification, the establishment of high seas protected areas, the workload of the Commission on the Limits of the Continental Shelf (CLCS), the case law of the International Tribunal for the Law of the Sea (ITLOS), and EU policy on the Arctic region.<sup>47</sup>

The *modus operandi* of COMAR is typical of expert bodies within the European institutions and on occasion it has recourse to independent experts who advise on legal, technical and scientific aspects of the LOSC. As a matter of practice, decision-making within COMAR is consensual and much of the progress in raising the profile of the LOSC is derived from the quality of its expertise and input to the policy process within the European institutions. That said, the work of COMAR is not all plain sailing as there are many extraneous factors that make it

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<sup>46</sup> There is specific legal basis for declarations by international organizations under article 5(1) and (4) of Annex IX, and pursuant to articles 287 and 310 of the LOSC.

<sup>47</sup> The agenda for meetings of COMAR is available on the website of the Council of the European Union. See under <<http://www.consilium.europa.eu>>.

difficult to coordinate the position of the Member States or, indeed, that impede Member States from acting collectively at international or regional fora. Thus, for example, Member States are represented in three different regional groups (namely, the Western European and Others Group, the Eastern European Group, and Cyprus as part of the Asian Group) for the elections of persons to the institutions established under the LOSC, namely: CLCS and ITLOS.<sup>48</sup> In line with their national competence, Member States exercise their votes independently on such matters at the Meetings of State Parties to the LOSC and merely inform other Member States of their nominations at meetings of COMAR.

As COMAR operates as a CFSP working party the question of voting does not arise and all matters are agreed by common accord. Furthermore, there are no reported instances of where a Member State has acted at an international forum in contravention of what has been decided at a meeting of COMAR, or indeed where a Member State has adopted a unilateral position that is likely to impinge upon the provisions of an EU regulatory measure or the exercise by the EU of its exclusive or shared competence over a particular maritime matter. What is the position in EU law if such were to happen at an international forum? We do not have any case law that directly addresses this point relating to the mandate or actions of COMAR. In the *Greek IMO* case, however, we can see some parallels in so far as the Court of Justice ruled that positions adopted by Member States within the IMO had to be coordinated at EU level and that no Member State had the right to submit national positions to an international organization on matters coming within the scope of exclusive EU competence.<sup>49</sup> In relation to the contested matters before the Court concerning the creation of checklists and other tools for enhancing ship and port facility security, no such coordination had occurred at the EU Committee for Maritime Security (MARSEC).<sup>50</sup> The latter is a regulatory committee chaired by the Commission and is made up of representatives of the Member States and therefore needs to be distinguished very carefully from COMAR, which as mentioned previously is a CFSP Working Party with a different mandate within the European institutions and whose functions are dissimilar under EU law.<sup>51</sup>

### ***III. The Sophisticated Approach to Dispute Settlement Advanced by the LOSC***

The comprehensive and compulsory character of the provisions on dispute settlement in the LOSC has contributed to the effectiveness and coherence of the LOSC both at an internal level within the EU, and in relations between the EU and third countries. These provisions are at

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<sup>48</sup> See under <<http://www.un.org/depts/DGACM/RegionalGroups.shtml>>.

<sup>49</sup> Case C-45/07, *Commission v. Greece* [2009] ECR I-00701. See P. Boisson, *Compétences respectives de l'UE et des Etats membres en matière de sécurité maritime, Le droit maritime français* (2010), pp. 671-676.

<sup>50</sup> Case C-45/07, para. 28.

<sup>51</sup> Article 11 Regulation (EC) No. 725/2004, OJ L 129/12, 29 April 2004.

the very heart of the LOSC and allow sufficient latitude for the creative role of competent courts and tribunals,<sup>52</sup> including the EU's own system of dispute settlement. In this context, the relationship between international law and EU law on maritime matters is an intricate one.

As a starting point, the EU must respect international law in the exercise of its powers.<sup>53</sup> Indeed, much of the early case law of the Court of Justice concerned the division of competence between the EU and the Member States regarding the adoption of conservation and management measures under the common fisheries policy.<sup>54</sup> More recently, the Court has handed down some landmark decisions which have clarified essential matters pertaining to EU competence in relation to dispute settlement, as well as the rights of private parties to challenge EU legislation on the basis of the normative framework set down in the LOSC.

Briefly stated, the LOSC requires States Parties and the EU to resolve law of the sea disputes amicably.<sup>55</sup> As a matter of practice, the principal means for them to do so is by peaceful means in accordance with the provisions on the peaceful settlement of disputes in the Charter of the United Nations.<sup>56</sup> One of great strengths is that the LOSC provides considerable flexibility and allows State Parties and the EU to settle disputes by means other than those specified therein.<sup>57</sup> As a matter of practice, dispute settlement is more often than not achieved by means of a formal exchange of views, diplomacy and international negotiation.<sup>58</sup> Significantly, the parties to a dispute may involve a third party and resort to conciliation procedures in accordance with Annex V of the LOSC.<sup>59</sup> Should State Parties and the EU fail to settle their disputes amicably, the LOSC provides for compulsory procedures entailing binding decisions and allows Contracting Parties to choose between the ICJ, and ITLOS, as well as two forms of arbitral tribunals that are elaborated upon in the Annexes VII and VIII of the LOSC.<sup>60</sup> Again, this is an inherent strength as the heads of jurisdiction for the ICJ, ITLOS and Annex VII Arbitration are broad and extend to any

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<sup>52</sup> See T. Mensah, 'The Role of Peaceful Dispute Settlement in Contemporary Ocean Policy and Law', in: Vidas, Østreng, see note 5, pp. 81-94; B. 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: Vidas, Østreng, see note 5, pp. 95-104.

<sup>53</sup> Case C-286/90, *Anklagemyndigheden v. Peter Michael Poulsen and Diva Navigation Corp.*, [1992] ECR I-06019, para 9. Since cited in Case C-405/92 *Mondiet* [1993] ECR I-6133, paras 13-15; and Case C-162/96 *Racke* [1998] ECR I-3655, para. 45.

<sup>54</sup>For a review see S. Boelaert-Suominen, 'The European Community, the European Court of Justice and the Law of the Sea' 23 *International Journal of Marine & Coastal Law*, 2008, 643-713.

<sup>55</sup> Article 279, LOSC.

<sup>56</sup> Article 2(3) and 33(1), Charter of the United Nations.

<sup>57</sup> Article 280, LOSC.

<sup>58</sup> Article 283, LOSC.

<sup>59</sup> Article 284, LOSC.

<sup>60</sup> Article 287, LOSC.

international agreement related to the purpose of the LOSC.<sup>61</sup> The provisions on dispute settlement in the LOSC apply, *mutatis mutandis*, to the UN Fish Stocks Agreement.<sup>62</sup> The LOSC also provides a special regime relating to disputes concerning activities in the Area.<sup>63</sup> As is well known, certain categories of disputes are excluded from binding dispute settlement under the LOSC and it goes well beyond the limited scope of this paper to review these complex provisions in any great detail.<sup>64</sup> Suffice it to note here that these provisions concern *inter alia*: disputes concerning the exercise of coastal States' discretionary powers in relation to marine scientific research; disputes with regard to the exercise of discretionary powers in relation to living resources in the EEZ; disputes concerning delimitation and claims to historic waters; disputes concerning military activities and law enforcement activities; and disputes in respect of which the Security Council is exercising its functions. Irrefutably, the complex balance of interests reflected in these provisions has contributed to the general acceptance of the LOSC by the EU and the Member States. Furthermore, the diversity and plurality of methods for dispute settlement set down by the LOSC appear to be sufficiently robust and sophisticated to meet the needs of the EU and the Member States into the future.

That being said, the practice of the EU in relation to law of the sea dispute settlement also appears to be evolving steadily. At the time it lodged its instrument of formal confirmation in 1998, the EC declined to choose a specific dispute-settlement procedure under article 287 of the LOSC but undertook to keep this matter under review.<sup>65</sup> This accorded with the position taken by the majority of Member States that had ratified the LOSC at that particular time.<sup>66</sup> Moreover, the LOSC allows States Parties and the EU to amend their position at any time and to opt for a given procedure by means of a written declaration pursuant to Article 287(1).<sup>67</sup> This *qui vivra verra* approach has a number of inherent advantages in that it facilitates an informed choice by the EU in light of the operation of the dispute settlement provisions of the LOSC in practice.<sup>68</sup> Pending such a decision, disputes between the EU and third countries that are States Parties to the LOSC

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<sup>61</sup> Article 288(1)-(2), LOSC.

<sup>62</sup> Article 30(1), United Nations Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks.

<sup>63</sup> Articles 186-191, and Annex VI section 4, LOSC.

<sup>64</sup> Articles 297-299, LOSC.

<sup>65</sup> COM (97) 37 final. Preamble of Council Decision 98/392/EC.

<sup>66</sup> C. Nordmann, 'Regional Organisations: The European Community and the Law of the Sea Convention', in: Vidas, Østreng, see note 5, pp. 355-363.

<sup>67</sup> Ten Member States have made Declarations under Article 287 (1). DOALOS website, see under <<http://www.un.org/depts/los/index.htm>>.

<sup>68</sup> Speech Commissioner Borg, ITLOS, 2 September 2005.

must be submitted to arbitration in accordance with Annex VII as the default procedure.<sup>69</sup> In line with the internal division of EU competence, where the EU initiates a dispute settlement procedure as provided for by the LOSC or its related agreements, it is represented by the Commission.<sup>70</sup> Before taking any action, the Commission must consult with the Member States, taking into account the relevant procedural time limits.<sup>71</sup>

Although the EU is precluded from choosing the ICJ under the Statute of the Court,<sup>72</sup> recent practice suggests that the dispute-settlement provisions in the LOSC and the role of ITLOS, more specifically, are of prime importance to the EU in disputes with third countries that are party to the LOSC. Chile and the EU, for example, agreed to have recourse to a special chamber of ITLOS in a high-profile dispute concerning the conservation and management of swordfish stocks in the south-eastern Pacific in an area of the high seas that is adjacent to Chile's EEZ.<sup>73</sup> Parallel proceedings were initiated in the WTO and both sets of proceedings were suspended as soon as a Provisional Arrangement was agreed between the Parties in 2001.<sup>74</sup> Proceedings were suspended and remained so for several years to facilitate a diplomatic resolution of the dispute and after protracted negotiations, an out of court settlement was achieved that brought this dispute to a successful conclusion in 2008.<sup>75</sup>

The case is very significant for the EU for many reasons and two brief observations can be made here. First, the dispute raised a whole gamut of legal and technical issues which are indicative of the complexity that arises in contemporary fisheries disputes involving the EU and third countries including: the rights of coastal States; implementation of the UN Fish Stocks Agreement and the FAO Compliance Agreement; international trade law; market access; unilateral action by a coastal State; fisheries conservation and management measures of the living resources of the high seas; the effectiveness of multilateral arrangements including the role and functions of regional fisheries management organizations; bycatch; the protection and preservation of marine biodiversity; subsidies for the fishing industry; international cooperation;

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<sup>69</sup> Article 287(3), LOSC.

<sup>70</sup> Article 3 Council Decision 98/414/EC.

<sup>71</sup> *Ibid.*

<sup>72</sup> Article 34 of the Statute of the ICJ.

<sup>73</sup> Case concerning the Conservation and Sustainable Exploitation of Swordfish Stocks in the South-eastern Pacific Ocean (Chile/European Community) (removed from docket 17 December 2009). See *inter alia*: T. McDorman, 'The *Chile v. EC Swordfish Case*', 11 *Yearbook of International Environmental Law*, 2000, 585; M.A. Orellana, 'The Swordfish Dispute between the EU and Chile at the ITLOS and the WTO', 71 *NJIL*, 2002, 55-81; P. Stoll, S. Vönecky, 'The Swordfish Case: Law of the Sea v. Trade', 62 *ZaöRV*, 2002, 21-35.

<sup>74</sup> WTO Doc. WT/DS 193/2 and ITLOS Order of 15 March 2001.

<sup>75</sup> Understanding Concerning the Conservation of Swordfish Stock in the South Pacific. ITLOS adopted an Order of Discontinuance of the ITLOS case on 16 December 2009. The EU and Chile notified the WTO Dispute Settlement Body of the Discontinuance of the WTO case on 28 May 2010.

obligations *erga omnes*; the precautionary principle; compliance and enforcement; proliferation and multiplicity of mechanisms for international dispute resolution; and forum shopping, among many others issues. This case thus demonstrated that the settlement of law of the sea disputes involving the EU is seldom a straightforward matter as there are often many political and economic interests at play. Secondly, although there was no curial adjudication of this particular dispute on its merits, the proactive role of ITLOS in allowing the parties to accommodate each other's concerns was absolutely central to bringing this dispute to a satisfactory conclusion. This was formally acknowledged, subsequently, by the European Commissioner for Maritime Affairs and Fisheries.<sup>76</sup> This case can, therefore, be viewed as an example of how the mandatory system of dispute settlement set down in the LOSC and the role of ITLOS, in particular, serves as an important tool that facilitates constructive and preventative diplomacy on the part of the EU and a State Party to the LOSC that is not an EU Member State.<sup>77</sup> This, in itself, is a very positive development in international law and demonstrates that the institutional structures and procedures for dispute settlement under the 1982 LOSC are working well and that ITLOS is making a vital contribution to the process of peaceful settlement.

The importance of judicial mechanisms in the prevention and resolution of law of the sea issues can also be seen at an internal level within the EU. In this context, one feature that stands out is that the LOSC preserves the autonomy of the EU legal system and the methods of dispute settlement set down in the European treaties by allowing for the settlement of disputes by any peaceful means chosen by the parties, as well as by binding dispute settlement under general, regional or bilateral agreements.<sup>78</sup> An illustrative case that shines the spotlight on the complex issues that can arise in this regard arose in the *Mox Plant* case, which concerned the commissioning of a nuclear reprocessing facility at Sellafield in the United Kingdom, the international movement of radioactive materials, and the protection of the marine environment of the Irish Sea.<sup>79</sup> Dispute settlement under the LOSC was initiated by Ireland and ITLOS prescribed provisional measures pending the constitution of the Annex VII arbitral tribunal for the merits.<sup>80</sup> Significantly, the Tribunal held that the urgency of the situation and the short period before the constitution of the Annex VII arbitral tribunal did not require the prescription of provisional measures as sought by Ireland. Nonetheless, the Tribunal prescribed a provisional measure of its own on the grounds that the duty to cooperate is a fundamental principle in the prevention of

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<sup>76</sup> See note 68.

<sup>77</sup> For a similar analogy in relation to the role of the ICJ, see R.Y. Jennings, 'Presentation', in: Peck, Lee (eds.), *Increasing the Effectiveness of the International Court of Justice*, (1996), p. 79.

<sup>78</sup> Article 280 and 282, LOSC.

<sup>79</sup> *MOX Plant Case (Ireland v United Kingdom)* ITLOS Case No 10, 3 December 2001, 41 ILM, 2002, 405.

<sup>80</sup> ITLOS Order, 3 December 2001.



pollution of the marine environment under the LOSC. The measure required Ireland and the United Kingdom to cooperate and to enter into consultations with a view to exchanging further information, monitoring risks, and devising, “as appropriate, measures to prevent pollution of the marine environment which might result from the operation of the MOX plant”.<sup>81</sup> At the behest of the United Kingdom, the Annex VII tribunal subsequently suspended its proceedings on the merits phase in order to facilitate clarification of a number of jurisdictional issues pertaining to the precise extent of EU competence relating to matters covered by the LOSC.<sup>82</sup> In enforcement proceedings taken by the European Commission, the Court of Justice subsequently censured Ireland for breach of its duty of sincere cooperation under the European Treaties by initiating the dispute-settlement procedure laid down in the LOSC on matters falling within EC-shared competence and which were regulated by EC measures to a large extent.<sup>83</sup>

On the landscape of EU law, the *Mox Plant* case is very significant as the Court of Justice confirmed that the LOSC forms an integral part of the EU legal order and that it has exclusive jurisdiction to deal with disputes relating to the interpretation or application of the provisions in the LOSC that are within the scope of shared EU competence and to assess a Member State’s compliance with them.<sup>84</sup> The decision thereby clarifies the jurisdiction of the Court of Justice *vis-à-vis* other competent courts and tribunals in relation to dispute settlement under the LOSC.<sup>85</sup> The net result is that the EU’s own system of dispute settlement is part of the armory of mechanisms available for law of the sea dispute settlement at a regional level in the EU.<sup>86</sup> Again, this case demonstrates how the LOSC may be relied upon by Member States in environmental law of the sea disputes at a regional level within the EU as a matter of EU law and not as a question of international law. Furthermore, it underlines the importance of Article 282 of the LOSC which makes it possible to avoid a breach of the EU’s exclusive jurisdiction and ensures the preservation of the autonomy of the EU legal system which takes precedence over the dispute-settlement provisions in Part XV of the LOSC. Significantly, the approach taken by the Court of Justice to Article 82 differed fundamentally from the approach advanced by the Tribunal in so far as the latter were of the view that the rights and obligations under the OSPAR Convention, the

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<sup>81</sup> *Ibid.*

<sup>82</sup> Order No. 3, Suspension of Proceedings on Jurisdiction and Merits, 24 June 2003. See V. Roeben ‘The Order of the UNCLOS Annex VII Arbitral Tribunal to Suspend Proceedings in the Case of the MOX Plant at Sellafield: How Much Jurisdictional Subsidiarity?’, *73 Nordic Journal of International Law*, 2004, 223-245.

<sup>83</sup> Case C-459/03, *Commission v. Ireland (Mox Plant)* [2006] ECR I-4635.

<sup>84</sup> Case C-459/03, paras 123-128.

<sup>85</sup> See N. Lavranos, ‘The epilogue in the MOX plant dispute: An end without findings’, *8 European Law Reporter*, 2009, 117-121.

<sup>86</sup> Order No. 6, 6 June 2008.

EC Treaty and the Euratom Treaty have a separate existence from those under the LOSC, and therefore that this provision was inapplicable to the dispute submitted to the Annex VII arbitral tribunal.<sup>87</sup> For well-documented reasons, the decision of the Court of Justice has been subject to academic criticism on several grounds, including that it fetters the exercise of jurisdiction by international courts and tribunals, as well as on the basis that it is inconsistent with the previous practice of EC Member States regarding dispute settlement through international arbitration.<sup>88</sup> On the positive side, however, an important corollary of this decision that is seldom highlighted is that the EU may be subject to an action by a third State for the failure of a Member State to comply with the terms of an international agreement where the EU is a party to the said agreement and where the contested matter comes within the scope of EU competence.<sup>89</sup> This, in turn, opens the door for enforcement proceedings by the European Commission against a Member State for failure to comply with its international obligations. We will return to this issue below.<sup>90</sup>

Apart from the *Mox Plant* case, the Court of Justice has dealt with several cases concerning the applicability of international legal instruments in the Member States that are aimed at protecting the marine environment. An important milestone, and somewhat of a false dawn, appeared to have been reached in the *Étang de Berre* case when the Court ruled that a provision contained in the Protocol for the Protection of the Mediterranean Sea against Pollution from Land-based Sources has direct effect within the EU legal order, which means that the provisions in the Protocol may be invoked by interested parties before a national court in the Member States once certain conditions are satisfied concerning the clarity, precision and the wording of the particular treaty provision in question.<sup>91</sup> By conferring rights on individuals in national courts, this decision appeared to have opened the door to an effective means to ensure the implementation and enforcement of international environmental obligations including those that arise under international agreements.

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<sup>87</sup> Paras. 50 and 53, ITLOS Order, 3 December 2001.

<sup>88</sup> For commentary, see C. Semmelmann, 'Forum shopping between UNCLOS arbitration and EC adjudication—And the winner ... should be ... the ECJ!', 5 *European Law Reporter*, 2006, 234-241; N. Lavranos, 'Protecting its Exclusive Jurisdiction: the Mox Plant-Judgment of the ECJ', 5 *The Law and Practice of International Courts and Tribunals*, 2006, 479-493; P.J. Cardwell, D. French, 'Who decides? The ECJ's Judgment on Jurisdiction in the MOX Plant Dispute', 19 *Journal of Environmental Law*, 2007, 121-129; C. Romano, 'Commission of the European Communities v. Ireland', 101 *AJIL* 2007, 171-178; F. Chaltiel, 'Chronique de jurisprudence du Tribunal et de la Cour de justice des Communautés européennes. Institution et ordre juridique communautaire', 134 *Journal du droit international*, 2007, 607-608; N. Schrijver, 'Case C-459/03, Commission of the European Communities v. Ireland, Judgment of the Court of Justice (Grand Chamber) of 30 May 2006, [2006] ECR I-4635, (2010)7(3)', 47 *CML Rev.*, 2010, 863-878.

<sup>89</sup> P. Sands, J. Peel, A. Fabra and R. MacKenzie, *Principles of International Law*, (2012), p. 179.

<sup>90</sup> Article 258, Treaty on the Functioning of the European Union.

<sup>91</sup> Case C-239/03 *Commission v. France (Étang de Berre)* [2004] ECR I-9325.

Somewhat controversially, however, the Court subsequently held in the *Intertanko* case that the LOSC does not confer rights on individuals that can be relied upon by them to contest the validity of EU legislation.<sup>92</sup> This case arose in the context of a preliminary reference from the High Court (England and Wales) concerning the implementation of an EC Directive that made the discharge of vessel source polluting substances a criminal offence.<sup>93</sup> The claimants in the main proceedings, who represented the shipping industry, contended that several aspects of the directive did not comply with the LOSC and MARPOL 73/78. Although the Court acknowledged that provisions in the LOSC form an integral part of what was then EC law as well as the primacy of international agreements over EC secondary legislation, it, nonetheless, held that individuals are, in principle, not granted independent rights and freedoms by virtue of the LOSC and that “a ship’s international legal status is dependent on the flag State and not on the fact that it belongs to certain natural or legal persons”.<sup>94</sup> Accordingly, the Court concluded that the nature and the broad logic of the LOSC prevented the Court from being able to assess the validity of the applicable Directive in the light of the provisions therein.

Again, this decision of the Court has been subject to academic criticism on the grounds that it is difficult to reconcile with the previous decision in the *Étang de Berre* case. Further, it widens the exceptions to the general rule in EU law that international agreements concluded between the EU and third countries can be invoked by legal and natural persons within the European legal order under certain circumstances, namely, when they are clear and precise, unconditional and capable of creating rights for individuals.<sup>95</sup> In practice, this decision means that many international treaties cannot be relied upon by individuals in the national courts in the Member States to contest the validity of an EU legislative measure. Conversely, a number of commentators have pointed out that the decision seems to leave open the question as to whether a Member State can challenge EU legislation in light of the provisions set down in the LOSC and related agreements.<sup>96</sup> In general, this decision appears to undermine the efficacy of the LOSC within the European legal order in so far as it removes the possibility of national courts reviewing compliance by the EU with the right and duties set down therein. What is more, notwithstanding

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<sup>92</sup> Case C-308/06, see note 20.

<sup>93</sup> Directive 2005/35/EC on ship-source pollution and on the introduction of penalties for infringements OJ L 255/11, 30.9.2005; since amended by Directive 2009/123/EC OJ L 280/52 27 October 2009.

<sup>94</sup> Case C-308/06, paras 59-61.

<sup>95</sup> For commentary see *inter alia*: R.R. Churchill, D. Owen, *The EU Common Fisheries Policy*, (2010), pp. 315-316; E. Denza, ‘A note on Intertanko’, 33 EJIL, 2008, 870-879; J. Girard, ‘Droit communautaire’ *Revue juridique de l’environnement*, 2008, 410-413; S. Boelaert-Suominen, ‘The European Community, the Court of Justice and the Law of the Sea’ 23 *International Journal of Marine & Coastal Law*, No. 4, 2008, 699-713.

<sup>96</sup> P. Craig G. de Búrca, *EU Law: Text, Cases and Materials* (2011), pp. 350-351.

the fact that multilateral agreements are seldom concluded with the intention of conferring rights and duties on natural or legal persons, the rationale for this decision is clearly at odds with the underlying premise that the LOSC forms an integral part of the European legal order in so far as it does not share one of the key characteristics and principles of EU law, which is that the provisions of EU law are justiciable in European and national courts in the Member States once certain conditions are satisfied. As a matter of European law, the LOSC is clearly binding on the EU by virtue of article 216(2) of the Treaty on the Functioning of the EU. By imposing a test which is stricter than that imposed on EU in general, which is that the alleged direct effect must be consistent with the system and context of the treaty, the Court of Justice appears to be undermining its own strong integrative role and its traditional approach to the application of international law by virtue of EU law as a distinct legal system.

Despite these limitations, many of the judgments of the Court of Justice are innovative and have clarified the applicability of EU directives to activities that take place in the marine environment. In the landmark judgment concerning the pollution of the French coast by the oil tanker *Erika*, for instance, the Court in applying the ‘polluter pays principle’ brought heavy fuel oil discarded into the sea within the scope of the Waste Directive and held that the costs of cleaning up pollution damage can be imposed on the companies which created the waste, notably in their capacity as former holders or producers of the oil and on the basis that they had contributed to the risk of pollution.<sup>97</sup> The Court also held that the EC could not be bound indirectly as a non-party to the International Convention on Civil Liability for Oil Pollution Damage or the International Convention on the Establishment of an International Compensation Fund for Oil Pollution Damage by virtue of the general obligation of cooperation that arises under Article 235 (3) of the LOSC.<sup>98</sup>

Although, as seen above, the provisions in the LOSC do not have direct effect under EU law and though much of the case law concerns fisheries and environmental protection, the LOSC does, of course, touch and inform many other aspects of EU law including the fundamental rights of free movement of goods, persons and services. This can be seen in the recent case concerning a Dutch national who worked as a nurse and radiographer on a platform in the *Nederlandse Aardolie Maatschappij* gas field and his entitlement to invalidity benefit under the Dutch national compulsory insurance scheme after moving his residency to Spain.<sup>99</sup> The Court of Justice ruled that work carried out on an offshore installation on the continental shelf is to be regarded as work

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<sup>97</sup> Case C-188/07 *Commune de Mesquer v. Total France SA* [2008] ECR I- 4501.

<sup>98</sup> Case C-188/07, para. 85.

<sup>99</sup> Case C-347/10 *A. Salemink v. Raad van bestuur van het Uitvoeringsinstituut Werknemersverzekeringen*, 17 January 2012.

carried out in the territory of that State for the purpose of applying EU law.<sup>100</sup> Accordingly, the residency criterion in the Dutch social security legislation for offshore workers was contrary to the principle of freedom of movement of workers enshrined in EU law. In view of the transitory nature of the labour market for workers in the offshore industry, this decision is noteworthy as it ensures that workers on a fixed installation on the continental shelf are treated no differently from those working within the territory of a Member State.

One final point can be made on the grounds that a great deal has been written about the dispute settlement provisions in the LOSC and the judicial work of ITLOS in particular.<sup>101</sup> Less well known, perhaps, is the role played by the Court of Justice and the EU's own system of dispute settlement, which has a number of procedures for ensuring compliance with the law by Member States that far exceed the mechanisms that are available under the LOSC. Much of the onus rests with the European Commission to bring enforcement proceedings under the Treaty on the Functioning of the EU against a Member State for failure to uphold an EU obligation including obligations that arise under the LOSC.<sup>102</sup> Moreover, one inherent weakness in the EU system is that Member States rarely, if ever, bring enforcement actions against other Member States,<sup>103</sup> mainly because of the political nature of the EU and the tendency of Member States to resolve their disputes amicably. This partly explains why Ireland did not initiate proceedings against the United Kingdom in the Court of Justice when the Annex VII Tribunal formally terminated the *Mox Plant* case in 2008.<sup>104</sup> There are, nevertheless, several formidable mechanisms for ensuring compliance with EU law including the ultimate sanction of fiscal penalties under Article 260 of the Treaty on the Functioning of the EU and these have been applied with great effect by the Court of Justice in a number of cases concerning fisheries and the protection of the marine environment. Most notably, the Court penalized France with a lump sum of €20 million and €56 million for every six months that it remained non-compliant with EU

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<sup>100</sup> Case C-347/10, para. 35. The Court cited Case C-111/05 *Aktiebolaget NN* [2007] ECR I-2697, para. 59; Case C-37/00 *Weber* [2002] ECR I-2013, para. 36, and Case C-6/04 *Commission v. United Kingdom* [2005] ECR I-9017, para. 117.

<sup>101</sup> See *inter alia*: T.M. Ndiaye, R. Wolfrum, *Law of the Sea, Environmental Law and Settlement of Disputes: Liber Amicorum Judge Thomas A. Mensah*, (2007); N. Klein, *Dispute Settlement in the UN Convention on the Law of the Sea*, (2005); D. Rothwell and T. Stephens, *The International Law of the Sea* (2010), pp. 439-460; A. Boyle, 'Dispute Settlement and the Law of the Sea Convention: Problems of Fragmentation and Jurisdiction', 46 ICLQ, 1997, 37-54.

<sup>102</sup> Article 258 TFEU.

<sup>103</sup> Article 259 TFEU. Significantly, one of the few cases that reached judicial proceedings in the Court of Justice concerned a fisheries dispute, Case 141/78 *France v. UK* [1979] ECR 2923.

<sup>104</sup> There were a number of press reports that the *Mox Plant* was closed down in 2011 as a consequence of the Fukushima nuclear accident and the uncertainty that had arisen about the future of the nuclear industry in Japan. See *The Guardian*, (3 August 2011).

fisheries conservation measures under the CFP.<sup>105</sup> In similar proceedings, Spain was fined €625,000 per year for each per cent of inland waters that did not comply with the requirements of the EU directives on bathing water quality.<sup>106</sup> These decisions clearly demonstrate that the EU's system of dispute settlement has teeth and is well capable of contributing to the effectiveness of the LOSC in promoting sustainable fisheries and marine environmental protection. Indeed, many of the active Article 260 cases currently on the docket of the Court of Justice concern failure by Member States to meet the deadlines to transpose environmental and maritime transport directives.<sup>107</sup>

#### ***IV. The LOSC Provides a Solid Normative Basis for New Approaches***

The LOSC provides a solid normative basis for new approaches to ocean governance that are of paramount importance for the EU.

Chief among these is ecosystem-based management of the marine environment and the resources that it supports.<sup>108</sup> This approach has been described as “a strategy for the integrated management of land, water and living resources that promotes conservation and sustainable use in an equitable way”.<sup>109</sup> In this context, although there is no specific reference to this normative approach in the text of the LOSC,<sup>110</sup> many of the substantive provisions therein provides a vital and overarching framework for its practical application by States Parties and international bodies in relation to activities that take place in the marine environment. In particular, it should not be forgotten that there are many implicit references to ecosystem-based management in the LOSC including the preamble, which clearly acknowledges that the problems of ocean space are closely interrelated and need to be considered as a whole.<sup>111</sup> Similarly, the LOSC mandates cooperation on global and regional levels, as well as a science-based approach to decision making regarding uses and conservation of the marine environment.<sup>112</sup> Other implicit references to ecosystem-based management include the express obligation placed on State Parties to take into account the effects of fishery management measures on associated or dependent species.<sup>113</sup> They are also required to

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<sup>105</sup> Case C-121/07 *Commission v. France* [2008] ECR I-9159.

<sup>106</sup> Case C-278/01 *Commission v. Spain* [2003] ECR I-14141.

<sup>107</sup> COM (2011) 588 final.

<sup>108</sup> R. Long, ‘Legal Aspects of Ecosystem-Based Marine Management in Europe’ in: A. Chircop, M. L. McConnell, S. Coffen-Smout (eds.), *Ocean Yearbook*, 26, (Boston/Leiden: Brill Academic Publishers, 2012) pp. 417-484.

<sup>109</sup> Decision V/6 by the Conference of the Parties to the CBD at its Fifth Meeting, Nairobi, 15-26 May 2000, UNEP/COP/5/23. Available at: < <http://www.cbd.int/ecosystem> >.

<sup>110</sup> Y. Tanaka, *A Dual Approach to Ocean Governance*, (Farnham, Ashgate, 2008), pp. 78-82.

<sup>111</sup> 3<sup>rd</sup> Recital, Preamble, LOSC.

<sup>112</sup> Articles 197 and 204, LOSC.

<sup>113</sup> Article 61(2), LOSC.

adopt fisheries management measures on the basis of the best scientific evidence available and generally recommended international minimum standards.<sup>114</sup> A major step forward towards the implementation of this new normative tool in marine resource management is provided by Article 5 of the Fish Stocks Agreement, which makes express reference to the ecosystem approach in the management and conservation of straddling and migratory fish stocks.

Over the past decade, the EU has taken several policy measures and regulatory initiatives to implement the ecosystems approach in line with the objectives of the 2002 World Summit on Sustainable Development (WWSN) and the Johannesburg Plan of Implementation (JPOI).<sup>115</sup> In tandem, both the EU and the Member States have actively participated in the work of international bodies that have elaborated the legal and scientific parameters for the implementation of the ecosystem approach including the work of the United Nations Open-ended Informal Consultative Process on Oceans and the Law of the Sea, as well as many other expert consultations, including the one that led to the adoption of the 2001 Reykjavik Declaration on Responsible Fisheries in the Marine Ecosystem.

The EU has sought to implement the ecosystem approach through a wide and diverse range of policy initiatives and regulatory measures concerning three principal areas: fisheries conservation, marine habitat protection and pollution prevention. These include policy initiatives under the *chapeau* of the European Integrated Maritime Policy, as well as initiatives promoting marine spatial planning and integrated coastal zone management.<sup>116</sup> The regulatory measures include the Marine Strategy Framework Directive and by means of a broad range of fisheries conservation regulations under the common fisheries policy.<sup>117</sup> Additional impetus for the approach is obtained through the establishment of an elaborate network of protected areas to protect marine biodiversity under the Birds and Habitats Directives (commonly referred to as the NATURA 2000 network).<sup>118</sup> What is important to note for the purpose of this paper is that the LOSC remains the principal governance framework and jurisdictional model for these EU policy initiatives and regulatory measures as they apply to the maritime domain.

#### ***V. The LOSC as a Plinth for EU Leadership in Global Maritime Affairs***

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<sup>114</sup> Article 119, LOSC.

<sup>115</sup> COM (2006) 216 final, 22 May 2006.

<sup>116</sup> See note 108 *supra*.

<sup>117</sup> See note 4 *supra*.

<sup>118</sup> Council Directive 79/409/EEC of 2 April 1979 on the conservation of wild birds, O.J. L 103/1, 25 April 1979. Subsequently codified by Directive 2009/147/EC of the European Parliament and of the Council of 30 November 2009 on the conservation of wild birds OJ L 20/7, 26 January 2010. Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora OJ L 206/7, 22 July 1992. Consolidated version published on 1 January 2007.

Perhaps one of the best ways one can appreciate the inexorable rise of the LOSC within the European legal order is to highlight the way the EU has sought, in recent years, to use the LOSC as a solid regulatory plinth to strengthen its position as a global leader in maritime affairs.<sup>119</sup> Just three initiatives are mentioned here to illustrate some contemporary developments in this regard.

The EU is committed to promoting the universal ratification of the LOSC, and to ensuring that its diplomatic and legal relations with third countries continue to be governed by the provisions therein. This is evident in the Regulation on the programme for the further development of the EU's Integrated Maritime Policy, which among other matters, aims to facilitate the ratification and implementation of the LOSC by non-parties.<sup>120</sup> The international dimension of this policy and legislative programme is very much informed by the LOSC and is directed at fostering greater international collaboration with third countries with particular emphasis on countries that share sea basins with EU Member States in the Baltic Sea, the Mediterranean Sea, the Black Sea, and in the Atlantic.

The second development that has attracted the attention of the maritime community worldwide is the way the EU and the Member States have acted together in implementing a number of initiatives on maritime piracy in the Indian Ocean in a manner that is consistent with the obligations that arise under the LOSC.<sup>121</sup> More specifically, within the broader framework of the Common Defence and Security Policy, the EU established Operation ATALANTA to combat piracy and armed robbery off the coast of Somalia in 2008.<sup>122</sup> In March 2012, the mandate of this operation was extended by the Council to run to 2014 and, somewhat controversially, to include Somali internal waters and land territory.<sup>123</sup> This operation is part of the 'EU's Strategic Initiative for the Horn of Africa' and complements several international initiatives to combat piracy including the IMO-sponsored 'Djibouti Code of Conduct' and the 'Regional Strategy and Action Plan of the Eastern and Southern Africa-Indian Ocean Region'. Gauging the success of these initiatives is difficult, although a recent update from the European External Action Service suggests that more than 1,000 persons suspected of piracy are currently being prosecuted in over

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<sup>119</sup> COM (2009) 536 final.

<sup>120</sup> Article 2(e) Regulation No. 1255/2011, OJ L 321/1, 5 December 2011.

<sup>121</sup> Articles 101-103 LOSC.

<sup>122</sup> Council Joint Action 2008/851/CFSP, OJ L 301/33, 12 November 2008.

<sup>123</sup> Council Decision 2012/174/CFSP, OJ L 89/69, 27 March 2012. Importantly, this decision expressly prohibits the transfer of persons suspected of piracy to a third state in the region in a manner that is inconsistent with human rights law and with a view to ensuring that no one shall "be subjected to the death penalty, to torture or to any cruel, inhuman or degrading treatment". Article 12 of Joint Action 2008/851/CFSP as amended by Council Decision 2012/174/CFSP.



20 countries including the courts in EU Member States.<sup>124</sup> Much of the burden in relation to these prosecutions is borne by regional countries and, at the time of writing, the EU has concluded bilateral agreements on the conditions governing the transfer of suspected pirates and associated seized property from EU-led naval forces to the Seychelles and Mauritius, and is currently in the process of concluding a third agreement with Tanzania.<sup>125</sup> These are important components of the long-term EU policy, which is to build up the rule of law infrastructure in Somalia to address the underlying causes of piracy and armed robbery at sea.

The third initiative that is notable is the sustained effort the EU has made to promote the development of a new international regulatory framework for the protection of marine biodiversity in areas beyond national jurisdiction. This is an area where there is an obvious lacuna in the LOSC. Following a General Assembly Resolution on this matter,<sup>126</sup> the EU took the initiative on the world stage in 2008 by adopting a regulation to protect vulnerable marine ecosystems from adverse fishing activities in areas of the high seas not regulated by regional fisheries management organizations.<sup>127</sup> At the same time, the EU has actively participated in the work of the *Ad Hoc* Open-ended Informal Working Group to study issues relating to the conservation and sustainable use of marine biological diversity beyond areas of national jurisdiction. Conspicuously within this forum, and with some success, the EU has advocated for the development of a new multilateral agreement under the LOSC to address the sustainable use of biodiversity in areas beyond national jurisdiction and a range of other matters including: marine genetic resources, benefit sharing; spatial management measures; area-based management tools; environmental impact assessment; as well as capacity-building measures for developing states. The UNGA is scheduled to make further recommendations on this matter and additional workshops of the *Ad Hoc* Open-ended Informal Working Group are planned in the first half of 2013 to improve understanding of the issues and to clarify key questions.<sup>128</sup>

Finally, it should be noted that leading European scientists with the support of the the EU and its Member States are very active in contributing to the “World Ocean Assessment” and the Regular Process for Global Reporting and Assessment of the State of the Marine Environment. The outcome of this process and the results of the Assessment will be used by the EU and the Member States in making policy decisions regarding the sustainable use and development of

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<sup>124</sup> See ‘The EU fight against piracy in the Horn of Africa’, (March 2012), available at <<http://eeas.europa.eu/agenda/2012>>.

<sup>125</sup> OJ L 315/37, 2 December 2009 and OJ L 254, 30 September 2011.

<sup>126</sup> A/RES/61/105 of 8 December 2006.

<sup>127</sup> Regulation 734/2008, OJ L 201, 30 July 2008.

<sup>128</sup> A/RES/66/231 of 24 December 2011, paras. 167-168. See report of the *Ad Hoc* Open-ended Informal Working Group, 7-11 May 2012.

resources in the marine environment. Indeed, we can expect that the EU will adopt a global leadership role and follow-up on the results of the Assessment with firm legal actions and policy measures, similar to the regulatory approach taken in response to the results of the Intergovernmental Panel on Climate Change.

## CONCLUSION

The success of the LOSC in providing a stable and flexible framework governing uses of the sea and its contribution to the maintenance of peace and security in line with the general objectives of the Charter of the United Nations is no longer disputed in the EU. Much work remains to be done, nonetheless, and there is considerable scope for improvement in the way the EU and the Member States implement various aspects of the LOSC such as the provisions on marine scientific research.<sup>129</sup> Despite these limitations, few would dispute the fact that the LOSC has strengthened the application of the rule of law to offshore activities both within and beyond the EU over the past three decades. Moreover, the strategic importance of the LOSC to the EU has grown exponentially in light of several factors including the significance of international trade and shipping for the economic prosperity of Europe, as well as the diversity of offshore activities taking place in sea areas that come within the sovereignty and jurisdiction of the Member States.

When we now look back it is clearly evident that the gradual creep of EU competence over maritime matters is a manifest and perhaps inevitable feature of European law during this period. The unique nature of the EU itself and the role played by the various European institutional bodies, including the Court of Justice most notably, have contributed to this process. As we look forward, we can also see that the EU is faced with pressing challenges concerning the management of fisheries, climate change, and the regulation of new activities such as the offshore renewable energy sector, to name but a few. We can, therefore, expect to see that the LOSC and its related agreements will continue to shape and influence EU law as it applies to maritime activities over the coming decades. In this context, we can also expect to see greater convergence between EU law and the finer detail of international law as it applies to the sea, as well as a greater need for the European institutions to support the work of the various institutional bodies established under the LOSC including the ITLOS. Such an approach will contribute to the orderly

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<sup>129</sup> See *inter alia*: A. Soons, 'Regulation of Marine Scientific Research by the European Community and the Member States', 23 ODIL, 1992, 259-277; Long, see note 36.

and peaceful uses of ocean space in conformity with the principle of interdependence as codified in the LOSC.