1 Making the modern law of the sea: challenges and opportunities

1 The challenges of international law-making

The law of the sea is an important area of international law that regulates the uses of the world's seas and oceans. The law of the sea defines the jurisdiction of states over all kinds of maritime activities, including navigation, the exploitation of living and nonliving resources, the laying of cables and pipelines, and the conduct of marine scientific research. This book is not intended to explain in detail what substantive rights and obligations arise in this area of international law.[1] Rather, it is concerned with explaining and analyzing the process of how the law of the sea is created and how it can be adapted to meet modern challenges facing the international community.

Since very early in the history of the law of the sea, it has been recognized that no single state has an exclusive claim to the vast expanses of the oceans. Rather all states, whether they are coastal or landlocked, have been seen as having an interest in the sea and its resources.[2] Thus, McDougal and Burke describe how "the historic function of the law of the sea has long been recognized as that of protecting and balancing the common interests, inclusive and exclusive, of all peoples in the use and enjoyment of the oceans, while rejecting all egocentric assertions of special interests in contravention of the general community interest."[3] This remains true today. Modern attempts at making

[1] In this regard, see e.g. R. Churchill and V. Lowe, *The Law of the Sea* (3rd edn., Manchester University Press, 1997).
[2] The oceans could be classified as, what Weiler has called, a "common asset" of the international community; see J. Weiler, "The geology of international law – governance, democracy and legitimacy" (2004) 64 *ZaöRV* 547, at 556.
[3] M. S. McDougal and W. T. Burke, *Public Order of the Oceans* (Yale University Press, 1962) at 1.

the law of the sea have sought to establish an international regime of a truly global character that would be applicable to all states. This is perhaps clearest from the decision of the UN General Assembly in 1970 to convene the Third United Nations Conference on the Law of the Sea, where it was stressed that the conference should aim to "accommodate the interests and needs of all states"[4] and the results of the conference should ultimately be "generally acceptable"[5] to all members of the international community.

Yet creating a universal regime for the seas and oceans is complicated by the decentralized nature of the international legal system. Charney observes that "the traditions of the international legal system appear to work against the ability to legislate universal norms."[6] There is no global legislature that can impose rules on all relevant actors. As Pauwelyn notes, the international legal system has "essentially as many law-makers as there are states."[7]

The importance of states as law-makers is underlined by the fact that each of them is independent and sovereign. The sovereign equality of states is "a fundamental axiomatic premise of the international legal order"[8] and it follows from this principle that individual states cannot have rules or principles of international law imposed on them without their consent. The significance of consent in the international legal order was emphasized by the Permanent Court of International Justice in its judgment in the 1927 *SS Lotus Case* when it said:

> International law governs relations between independent States. The rules of law binding upon States therefore emanate from their own free will …[9]

The centrality of consent in the law-making process means that states can resist the imposition of rules that they perceive to be at variance

[4] *Reservation exclusively for peaceful purposes of the sea-bed and the ocean floor, and the subsoil thereof, underlying the high seas beyond the limits of present national jurisdiction and use of their resources in the interests of mankind, and convening of a conference on the law of the sea*, UNGA Resolution 2750C, December 17, 1970, preamble.
[5] Law of the Sea Convention, preamble.
[6] J. Charney, "Universal international law" (1993) 87 *Am. J. Int'l L.* 529, at 530.
[7] J. Pauwelyn, *Conflict of Norms in Public International Law* (Cambridge University Press, 2003) at 13.
[8] J. Kokott, "States, sovereign equality," in R. Wolfrum *et al.* (eds.), *Max Planck Encyclopedia of Public International Law* (Oxford University Press, Online Edition Updated August 2007) at para. 1.
[9] *The SS Lotus Case* (1927) PCIJ Reports, Series A, No. 10, at 18.

with their sovereign interests. This makes it much more difficult to establish regimes that create a common set of rules for all states.

At the beginning of the twenty-first century states are still retaining a tight grip on international law-making.[10] Yet the law of the sea presents an interesting example of the successful emergence of an international regime that is, to a large extent, accepted by all states. It is suggested that the creation of a universal legal order of the oceans has been significantly facilitated by the use of increasingly sophisticated law-making procedures involving international institutions. In this area of international law, as in others, international institutions of various kinds have played a central role in the law-making process. The growth in international institutions has not, however, led to new sources of international law. Few of these organizations have formal legislative powers that allow them to override the consent of individual states.[11] Rather, the significance of international institutions in this context lies in their ability to bring states together in a single forum and to facilitate the creation of the traditional sources of international law, namely treaties and customary international law.

In order to understand the contribution that international institutions have made to developing the law of the sea, it is first necessary to comprehend the potential for the traditional sources of international law to create universal norms. The following sections will provide a basic introduction to treaties and customary international law and their ability to create rules and principles that are binding on all states. The analysis will also consider what influence international institutions can have on law-making activities and how they can contribute to the creation of universal legal regimes.

2 Treaties as law-making instruments

Treaties are generally defined as international agreements in written form and governed by international law, whatever its particular designation.[12] Today, treaties are one of the most common tools for

[10] See generally A. E. Boyle and C. Chinkin, *The Making of International Law* (Oxford University Press, 2007) at 95.

[11] There may be some exceptional cases such as the United Nations Security Council, on which see e.g. E. Rosand, "The Security Council as global legislature: ultra-vires or ultra-innovator?" (2005) 28 *Fordham Int'l L. J.* 10.

[12] 1969 Vienna Convention on the Law of Treaties, Article 2(1)(a); 1986 Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations, Article 2(1)(a).

international law-making.[13] Hundreds of treaties are concluded every year by states and other international actors. What all treaties have in common is that they have been specifically negotiated to meet a particular need. As Tomuschat observes, "law-making by treaty is the only organized procedure for the conscious, rational positing of legal rules, at least at the universal level."[14]

The majority of multilateral treaties are today concluded under the auspices of international organizations or other institutional frameworks such as intergovernmental conferences. The increased involvement of international organizations in the negotiation of treaties has arguably had an impact on the treaty negotiation process by increasing the number of states and non-state actors involved in the process.[15] Moreover, international institutions are able to provide "a relatively stable negotiation forum that permits negotiators to continue their interaction beyond a single round of negotiations."[16] Indeed, the existence of a permanent organization means that delegates can build up relationships of mutual trust and respect, which may increase the chances of reaching agreement. The involvement of the secretariat of an international organization in the negotiation of a treaty may also offer advantages to the treaty-making process. The secretariat of an international organization can carry out what Alvarez calls "leadership functions" by:[17]

(1) promoting areas or topics on which collective treaty-making would be beneficial;
(2) mobilizing potential collaborators from both within and outside the organization;
(3) shaping the agenda by providing productive frameworks for negotiations;
(4) building consensus; and
(5) brokering compromise.

[13] Boyle and Chinkin, *The Making of International Law*, at 233.
[14] C. Tomuschat, "Obligations arising for states without or against their will" (1993) 241 *Recueil des Cours* 194, at 239. See also B. Simma, "From bilateralism to community interest in international law" (1994) 250 *Recueil des Cours* 221, at 323; A. D. McNair, "The functions and differing legal character of treaties" (1930) *Brit. Ybk Int'l L.* 100, at 101; Boyle and Chinkin, *The Making of International Law*, at 233.
[15] J. E. Alvarez, *International Organizations as Law-Makers* (Oxford University Press, 2005) at 276.
[16] *Ibid*., at 339. [17] *Ibid*., at 342.

These tasks can also be carried out not only by the secretariat, but also by other individuals working in an institutional capacity, such as the members of the bureau appointed by an international conference or the elected chair of an organ of an international institution.[18]

Although international institutions offer advantages to the treaty-making process, they cannot overcome the inherent limitations of treaties when it comes to the creation of universal international law. One cannot escape the fact that treaties are contractual instruments that depend upon the express consent of states before they become binding. According to the fundamental doctrine of *pacta tertiis nec nocent prosunt*, a treaty creates legal obligations only for states that become a party to it.[19] Thus, even if a state has been involved in the negotiation of a treaty, it will not become bound by its contents until it has individually consented. The International Law Commission has described the doctrine of *pacta tertiis* as "one of the bulwarks of the independence and equality of States,"[20] emphasizing its fundamental character as a principle of international law. The importance of the *pacta tertiis* principle is also stressed by McNair in his well-known work on the law of treaties where he says that "both legal principle and common sense are in favour of the rule … because as regards States which are not parties … a treaty is res inter alios acta."[21] It is therefore clear that treaties, regardless of their purpose, are not legislative instruments as the legal force of a treaty stems not from their adoption, but from the subsequent acceptance of states through signature, ratification or accession.[22]

There are some exceptions to the principle of *pacta tertiis* that may facilitate the wider application of a treaty beyond those states that have formally consented to be bound. When negotiating a treaty, states can, in certain circumstances, create rights and obligations for third states that are not formally a party to the treaty.[23] These exceptions to the

[18] See further Chapter 2.
[19] Article 34 of the Vienna Convention on the Law of Treaties provides that "a treaty does not create either obligations or rights for a third State without its consent." There are exceptions to this rule which will be discussed below.
[20] International Law Commission, "Draft articles on the law of treaties: report of the Commission to the General Assembly" (1966–II) *Ybk Int'l Law Commission* at 227.
[21] A. D. McNair, *The Law of Treaties* (Oxford University Press, 1961) at 309. See also Tomuschat, "Obligations arising for states without or against their will," at 242.
[22] See Vienna Convention on the Law of Treaties, Articles 11–17.
[23] The Vienna Convention defines a "third state" as "a State not party to a treaty"; Vienna Convention on the Law of Treaties, Article 2(1)(h).

pacta tertiis principle are recognized by Articles 35 and 36 of the Vienna Convention on the Law of Treaties.

Article 36 of the Vienna Convention provides that "a right arises for a third State from a provision of a treaty if the parties to the treaty intend the provision to accord that right either to the third State, or to a group of States to which it belongs, or to all States, and the third State assents thereto." According to this provision, there are two conditions that must be satisfied for a treaty to effectively create a right for a third state.

First, it must be shown that the parties to the treaty intended to create such a right. The principal means of identifying intention should be the text of the treaty itself and the normal rules of treaty interpretation apply.[24] It may also be appropriate to consider the *travaux préparatoires* where the text itself is ambiguous or obscure.[25] In either case, there should be a clear intention to confer a legally enforceable right on a third state, rather than simply bestow a benefit to that state. In the words of the Permanent Court of International Justice in the *Free Zones Case*, "it cannot be lightly presumed that stipulations favourable to a third State have been adopted with the object of creating an actual right in its favour."[26]

Secondly, it is made absolutely clear in Article 36 that the consent of the third state is still a necessary condition for the conferral of a right on it. At the same time, Article 36 says that consent shall be "presumed so long as the contrary is not indicated."[27] In other words, the third state will possess a right conferred on it by a treaty unless it expressly repudiates the right.[28] Thus, consent becomes a legal fiction insofar

[24] See C. Chinkin, *Third Parties in International Law* (Clarendon Press, 1993) at 33.
[25] Vienna Convention on the Law of Treaties, Article 32.
[26] *Free Zones of Upper Savoy and District of Gex Case* (1932) PCIJ Reports, Series A/B, No. 46, at 147. The Court goes on to say that "the question of the existence of a right acquired under an instrument drawn between other States is therefore one to be decided in each particular case: it must be ascertained whether the States which have stipulated in favour of a third State meant to create for that State an actual right which the latter has accepted as such."
[27] Vienna Convention on the Law of Treaties, Article 36.
[28] The commentary to Article 35 notes that the issue of consent in relation to third party rights is controversial and a treaty cannot impose a right on a third state because "a right can always be disclaimed or waived." According to the commentary, the text of Article 35 is intended to leave open the question of whether juridically the right is created by the treaty or by the beneficiary state's act of acceptance; International Law Commission, "Draft articles on the law of treaties: report of the Commission to the General Assembly," at 228–9.

as the conferral of rights on third states is concerned. If rights are claimed by a third state, Article 36(2) of the Vienna Convention specifies that the third state must comply with any conditions attached to that right.

Article 35 of the Vienna Convention governs the creation of obligations for third states under a treaty. It provides that "an obligation arises for a third state from a provision of a treaty if the parties to the treaty intend the provision to be the means of establishing the obligation and the third state expressly accepts that obligation in writing."

Once again, the importance of the intention of the parties to the treaty to create an obligation for a third state is stressed. As with the conferral of rights, intention can be deduced from the text of the treaty itself, or in the case of ambiguity or obscurity, from the *travaux préparatoires*.

Consent of the third state to that obligation is also a necessary requirement under Article 35. Yet, unlike the presumption of consent for the conferral of rights on third states, Article 35 specifies that a third state must expressly accept an obligation imposed on it by the treaty in writing.[29] This is a much stricter requirement that underlines the practical difference between conferring a right and an obligation on a third state. In practice, this means that the conferral of the obligation is itself the subject of a second "collateral" treaty between the third state on the one hand and the parties to the original treaty on the other hand.[30]

Whereas these two exceptions to the *pacta tertiis* principle allow some leeway for the application of treaties to third states, they are not without their own problems. For example, Chinkin notes that while the Vienna Convention draws a clear distinction between rights and obligations, "treaties, like any other form of agreement, characteristically incorporate both rights and duties as part of an interlocking bargain."[31] She

[29] There was much discussion about the form of consent to an obligation in the discussions of the ILC; see 733rd meeting to 735th meeting (1964-I) *Yearbook of the International Law Commission*, at 64–80. The condition that acceptance must be in writing was added at the Vienna Conference following a proposal by Vietnam; see I. Sinclair, *The Vienna Convention on the Law of Treaties* (Manchester University Press, 1984) at 101.

[30] International Law Commission, "Draft articles on the law of treaties: report of the Commission to the General Assembly," at 227.

[31] Chinkin, *Third Parties in International Law*, at 40.

therefore concludes that the application of these exceptions is often impracticable.[32]

A further exception to the *pacta tertiis* principle does not draw such a rigid distinction between rights and obligations for third states. The doctrine of objective regimes concerns the application of treaty regimes, comprising a number of interrelated provisions, to third states.[33] Early support for the existence of this doctrine is found in the judgment of the Permanent Court of International Justice in the *The SS Wimbledon Case*.[34] This case concerned a claim by the United Kingdom, France, Italy and Japan that Germany was under a duty to guarantee free access through the Kiel Canal under the terms of Part XII, Section VI of the 1919 Treaty of Versailles. The Court classified Part XII of the 1919 Treaty as a "self-contained regime"[35] and it held that its provisions, and in particular Article 380, created an international waterway "intended to provide easier access to the Baltic for the benefit of all nations of the world."[36] According to this decision, the effect of this part of the Treaty of Versailles was to create a set of rules that were applicable to all states, whether or not they were party to the treaty.

A version of the doctrine of objective regimes was originally included in the draft articles on the law of treaties prepared by Waldock, the fourth and final special rapporteur on the law of treaties to the International Law Commission (ILC). Waldock described a treaty as creating an objective regime:

> when it appears from its terms and from the circumstances of its conclusion that the intention of the parties is to create in the general interest general obligations and rights relating to a particular region, State, territory, locality, river, waterway, or to a particular area of sea, sea-bed, or air-space; provided

[32] *Ibid*.

[33] For a historical account of the doctrine, see P. Subedi, "The doctrine of objective regimes in international law and the competence of the United Nations to impose territorial or peace settlements on states" (1994) 37 *German Ybk Int'l L.* 162.

[34] *The SS Wimbledon Case* (1923) PCIJ Reports, Series A, No. 1.

[35] In *The SS Wimbledon Case*, the Permanent Court of International Justice held that the drafters of the Treaty of Versailles took care to place the provisions on the Kiel Canal in a special section, and in this sense the Court describes it as a "self-contained" regime; *ibid*., at 23–4.

[36] *Ibid*., at 22; the Court continues, "under its new regime, the Kiel Canal, must be open, on a footing of equality, to all vessels, without making any distinction between war vessels and vessels of commerce, but on one express condition, namely, that these vessels must belong to nations at peace with Germany." For a comment on this case, see M. Ragazzi, *The Concept of International Obligations Erga Omnes* (Clarendon Press, 1997) at 24–7.

that the parties include among their number any State having territorial competence with reference to the subject matter of the treaty, or that any such State has consented to the provision in question.[37]

It can be seen from this explanation of the doctrine that it shares many common characteristics with the other exceptions to the *pacta tertiis* principle discussed above. The intention of the parties to create general rights and obligations, as well as the consent of any third states, are both requirements for the doctrine of objective regimes, as described by Waldock. In his proposed scheme, Waldock suggested that consent to an objective regime could be express or implied. His draft articles also suggested that a failure to oppose a treaty within a certain time limit amounted to tacit acceptance of an objective regime contained therein.[38]

Yet, the doctrine of objective regimes is not found in the Vienna Convention on the Law of Treaties. The ILC ultimately decided not to include the doctrine in its draft articles because it was unlikely to meet with the general acceptance of states.[39] One reason for this position was that the Commission considered that the doctrine implied a form of majoritarian law-making which is not easy to reconcile with the central role for consent in the law of treaties, as expressed through the principle of *pacta tertiis*.

Despite its absence from the Vienna Convention on the Law of Treaties, it does not follow that the doctrine of objective regimes no longer has any validity in international law. Sinclair, who acted as the independent expert to the Vienna Conference on the Law of Treaties, insists that "it must not be assumed that the deliberate decision of the Commission and the Conference not to make special provision for treaties creating 'objective regimes' in the series of articles on treaties and third states in the Vienna Convention on the Law of Treaties

[37] H. Waldock, "Third Report on the Law of Treaties" (1964-II) *Ybk Int'l L. Commission*, at 26.

[38] Draft Article 63(2). The idea of a deadline was only tentatively proposed by Waldock in order to remove doubts over the acceptance of an objective regime; see *ibid*., at 33.

[39] International Law Commission, "Draft articles on the law of treaties: report of the Commission to the General Assembly," at 231. Chinkin suggests that the doctrine of objective regimes was particularly controversial at the time of the ILC discussions because of the situation in Antarctica and the drafting of the Antarctic Treaty; see Chinkin, *Third Parties in International Law*, at 36.

constitutes a denial of the existence of this category of treaty."[40] Indeed, the doctrine can still find support in the writings of many commentators on the law of treaties.[41]

Nevertheless, it is clear from the writings on the subject that the doctrine of objective regimes was never intended to circumvent the ordinary requirements of treaty acceptance. In his commentary on the draft article, Waldock stresses that the doctrine does not cover "cases where the parties have a general treaty-making competence with respect to the subject-matter of the treaty but no greater competence than any other state; in other words, it excludes law-making treaties concerned with general international law or with areas not subject to the exclusive jurisdiction of any state."[42] Thus, the doctrine of objective regimes would not facilitate the creation of universal norms in a field of international law such as the law of the sea, which by definition is concerned with areas that are largely beyond the jurisdiction of any single state and where no state possesses any special competence.

Indeed, it can be asked whether any of these exceptions to the *pacta tertiis* principle can be applied to treaties that have been negotiated through multilateral institutions. The exceptions to the *pacta tertiis* principle evolved in the context of treaties concluded in the late nineteenth and early twentieth centuries. This was an era in which the most powerful states wielded significant authority and they were able to impose international settlements that affected many states, even though these other states may not necessarily have been involved in the negotiation process. For instance, in the *Free Zones Case* considered above, the Court was concerned with whether or not the small number of important states at the 1815 Congress of Vienna and later diplomatic gatherings had intended to confer on Switzerland a right to the withdrawal of the French customs barrier behind the political frontier. These conferences had largely excluded the smaller states. Thus, the exceptions to the *pacta tertiis* principle were necessary in order to give full effect to the treaty for third states. In contrast, as

[40] Sinclair, *The Vienna Convention on the Law of Treaties*, at 105–6. Cf. G. M. Danilenko, *Law-making in the International Community* (Martinus Nijhoff Publishers, 1993) at 63.

[41] See e.g. J. Brierly, *The Law of Nations* (Oxford University Press, 1963) at 326–7; Simma, "From bilateralism to community interest in international law," at 358–64; M. Shaw, *International Law* (6th edn., Cambridge University Press, 2008) at 930; Subedi, "The doctrine of objective regimes in international law"; A. Aust, *Modern Treaty Law and Practice* (Cambridge University Press, 2nd edn., 2007) at 258.

[42] Waldock, "Third Report on the Law of Treaties," at 33.