

What If the United Nations Convention on the Law of the Sea had Entered into Force Unamended

Business as Usual or Dystopia?

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Wenn es Wirklichkeitssinn gibt muß es auch Möglichkeitssinn geben¹

I. Introduction

The oceans, comprising the larger part of the surface of our planet, are currently governed by one basic legal framework, the United Nations Convention on the Law of the Sea.² The Convention was adopted in 1982 and entered into force in 1994 and is generally considered to be a success story, as it has received broad support from all interests represented in the Convention. The Convention continues to be hailed as the ‘Constitution for the Oceans’.³

On 16 November 1993, Guyana became the sixtieth state depositing its instrument of ratification,⁴ meaning that the Convention would enter into force on 16 November 1994. At the time, none of the major industrialised states had ratified the Convention. These states rejected its mining regime for the deep seabed beyond national jurisdiction (Area). That regime largely was inspired by the idea of the New International Economic Order (NIEO) that was propagated by developing states in the 1970s. To allow the participation of the industrialised states in the Convention, the Secretary General of the United Nations had been organising consultations concerning the adaptation of the regime for deep seabed mining since 1990. From the perspective of the developing states, that participation was required

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¹ Robert Musil, *Der Mann ohne Eigenschaften* (Rowohlt 1987) vol I, 16.

² (adopted 10 December 1982, entered into force 16 November 1994) 1833 UNTS 3.

³ At the same time, serious questions could be raised concerning the effectiveness of this regime in ensuring the sustainability of the oceans. See eg Group of Experts of the Regular Process, *The First Global Integrated Marine Assessment: World Ocean Assessment* (United Nations 2016). However, this has not led to broadly supported calls to overhaul the jurisdictional scheme contained in the Convention.

⁴ The term ‘ratification’ refers to all modalities through which states may become a party to the Convention. The current chronological lists of ratifications of, accessions and successions to the Convention and the related Agreements are available at (*United Nations Oceans and Law of the Sea*) <www.un.org/Depts/los/> accessed 18 August 2020. It lists Guyana as the fifty-ninth state ratifying the Convention. However, that list excludes Yugoslavia, which ratified the Convention on 5 May 1986 (see (1989) 14 *Law of the Sea Bulletin* 5).

for a viable mining regime to work. Only the major industrialised states had the capacity to engage in mining and create the benefits that would accrue to developing states under the Convention. From the perspective of the developed states, a widely accepted Convention provided a guarantee against unilateralism that might erode the freedoms of communication essential to international trade and maritime security. The consultations resulted in the adoption of an implementation agreement on Part XI of the Convention (Part XI Agreement), in July 1994,⁵ just months before the entry into force of the Convention in November of that year. Notwithstanding its name, the Part XI Agreement significantly amends the Convention's deep seabed mining regime, removing most NIEO aspects.⁶ Still, most governments accepted this outcome, and the Convention currently has 168 States Parties, including most industrialised states.

After 1994, the development of the law of the sea did not come to a halt. For instance, it has been necessary to take into account developments in international environmental law and advances in science and technology. Intensified use of the oceans has required a more detailed regulation of such diverse issues as transboundary fisheries, the protection of underwater cultural heritage, and marine genetic resources. Notwithstanding the expanding regulatory framework and calls (and actions) to amend the law set out in the Convention by individual states, the basic jurisdictional framework contained in the Convention has proven to be stable, in particular if the period between 1982 and the present is compared to developments in the period between 1945 and 1982.⁷

This chapter's analysis starts from the counterfactual that the consultations organised by the Secretary General did not result in the adoption of the Part XI Agreement prior to the entry into force of the Convention. This counterfactual is further considered in section II. Next, the chapter explores two counterfactual scenarios: 'Business as usual' and 'Dystopia'. The former scenario posits that the law of the sea would have developed largely in similar fashion as in the real world (section III). The scenario 'Dystopia' submits that a breakdown of the consultations on Part XI would have limited the participation in the Convention largely to the Global South (section IV), leading to a rift between the law as defined in the Convention and customary international law, increased tensions, and a failure to successfully deal with issues requiring a further elaboration of the law of the sea. The two scenarios are intended to sketch the range of possible futures of the law of the sea. After this *tour d'horizon*, section V assesses the likelihood of specific events included in both scenarios. Section VI provides some concluding reflections.

A detailed discussion on methodology is beyond the scope of this chapter. In writing it, I have taken into account the discussion in the introduction to this volume and literature on counterfactual argumentation in law and international relations.⁸ In particular, I have

⁵ Agreement relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982 (adopted 28 July 1994, entered into force 28 July 1996) 1836 UNTS 42.

⁶ The Part XI Agreement among others did away with the compulsory transfer of technology and production ceilings to protect land-based mining operations in developing states.

⁷ This framework regulates the rights and obligations of coastal states and other states in maritime zones and defines the extent of these zones. For an excellent overview in this respect see Philip Allot, 'Power Sharing in the Law of the Sea' (1983) 77 *American Journal of International Law* 1.

⁸ This concerns in particular Ingo Venzke, 'What If? Counterfactual (Hi)Stories of International Law' (2018) 8 *Asian Journal of International Law* 403; Olav Schram Stokke, *Disaggregating International Regimes: A New Approach to Evaluation and Comparison* (MIT Press 2012) 37–80; Richard Alan Barnes, 'Alternative Histories and Futures of International Fisheries Law' in Erik Molenaar and Richard Caddell (eds), *Strengthening International Fisheries Law in an Era of Changing Oceans* (Hart 2019) 25; Gregory Mitchell, 'Case Studies, Counterfactuals, and Causal Explanations' (2004) 152 *University of Pennsylvania Law Review* 1517.

sought to select a counterfactual that implies a minimal change of actual history and have populated the two scenarios with real-world fact patterns, while trying to determine how these patterns would play out under the scenarios.

II. The counterfactual: entry into force of the Convention prior to the adoption of the Part XI Agreement

The historical record suggests that the pace of ratification of the Convention played a significant role in brokering a deal on Part XI.⁹ Only in 1990, when it became evident that the Convention might enter into force in the near future, did the consultations on fundamental issues that had prevented the universal acceptance of the Convention get started.¹⁰ Although the G-77 had taken a conciliatory stance on adjusting certain less controversial aspects of the regime of deep seabed mining in the 1980s, the group at the same time had indicated that its willingness to discuss matters was ‘not meant to slow down the ratification process which must proceed on course’.¹¹ In other words, the entry into force of the Convention would not be postponed indefinitely if a compromise on Part XI did not materialise.¹²

At the start of 1990, the year the consultations on Part XI were initiated, the Convention had attracted forty-two of the sixty ratifications required to bring it into force. In October 1991, this figure already stood at fifty-one.¹³ In September 1992, the European Communities Council Presidency in a communication to the other member states of the European Communities expressed the concern ‘that entry into force of the [C]onvention as it stands may well close the window of opportunity created by the SGs informal consultations; effectively ending efforts to amend [Part XI] in order to permit participation by industrialised countries’.¹⁴ This concern was caused by the rumour that a number of states might be ratifying the Convention in connection with the tenth anniversary of the Convention’s adoption on 10 December 1992.¹⁵ Had these ratifications actually occurred—in reality there was just one ratification on 10 December 1992, by Uruguay—the Convention would have

⁹ In constructing the counterfactual, I have taken into account contemporary documents from the archives of the Ministry of Foreign Affairs of the Netherlands (MinBuZa).

¹⁰ For a good summary of developments in relation to Part XI after the adoption of the Convention in 1982 see Robin Churchill and Vaughan Lowe, *The Law of the Sea* (3rd edn, Manchester University Press 1999) 230–38.

¹¹ Statement of Zambia on behalf of the Group of 77 at the 1989 PrepCom (1990) 15 *Law of the Sea Bulletin* 54, 55.

¹² A message from the Netherlands Permanent Mission in New York to the Foreign Ministry from January 1993 reports the interest of the G-77 in an early entry into force of the Convention. Message nyvu019/520 of 25 January 1993 (MinBuZa, inventory number 00377, isn 397373 3).

¹³ The remark in n 4 on the ratification by Guyana is equally applicable to these figures.

¹⁴ CPE Message lonc1321/cpei7496 of 22 September 1992 (file number 49/05/41587, AIM-number dve/ara/01048); see also Message nyv13776 of 15 November 1993 (MinBuZa, inventory number 00377, isn 397373, 1); Message nyv1360 of 12 November 1993 (MinBuZa, inventory number 00377, isn 397373, 2). A similar concern was expressed in the United Nations General Assembly (UNGA). For instance, in 1992 an influential representative of a G-77th member state, observed:

[T]he problems with the international seabed regime, if not addressed in due time, have in the long run the potential of becoming a destabilizing factor of the legally binding effect of the Convention when it comes into force. We should therefore take advantage of the remaining time before the entering into force of the Convention to work out a compromise.

UN Doc. A/47/PV.83, 18.

¹⁵ CPE Message (n 14).

entered into force on 10 December 1993, before the consultations on Part XI would have been successfully concluded.¹⁶ This might well have closed the window of opportunity the consultations had opened.¹⁷ Not so much because states no longer would consider it worthwhile to pursue the goal of a universally adopted Convention, but rather because the feeling of urgency to do so would have been lost. In particular, due to the absence of imminent mining activities in the Area, a deal on Part XI could also be put together at a later point in time.¹⁸ States might have adopted a waiting attitude to see if others would make a first move. At the same time, developments in relation to the Convention and the law of the sea generally beyond the regime of deep seabed mining would take their course. Enter our alternative histories of the law of the sea. To allow a meaningful comparison, both scenarios look into the same issues. These issues are considered to represent major developments relating to the law of the sea. In order to avoid duplication and in light of the word limit for this chapter, explanatory footnotes and references in general are only included at the relevant point in one of the scenarios.

III. Scenario 1: business as usual

The entry into force of the Convention in December of 1993 closed the window of opportunity to reach agreement on the adjustment of Part XI. However, notwithstanding the limited participation in the Convention, due to the developed world's rejection of Part XI, it proved to be possible to arrive at a workable solution for deep seabed mining. Mining companies from industrialised states started operating under the conventional regime using developing States Parties to the Convention as sponsoring states.¹⁹ The reciprocating states' regimes, which developed states with an interest in seabed mining had developed in the 1980s as an alternative to Part XI, thus no longer posed a challenge to the Convention's mining regime.

One of the follow-ups to the Rio Earth Summit of 1992 was the United Nations Fish Stocks Conference, which was intended to elaborate the Convention's regime on straddling fish stocks and highly migratory fish stocks. In the years following the adoption of the Convention, these stocks had come under increased pressure due to the Convention's absence of specific regulation of fisheries on the high seas. Notwithstanding the fact that there was no prospect of the Convention being universally accepted, all states participating at the Fish Stocks Conference eventually agreed that a legally binding instrument on this

¹⁶ At the same time, the pending entry into force of the Convention might have sped up the consultations on the Part XI Agreement. A major breakthrough in the consultations, which was essential to achieving an acceptable compromise, had already been reached in August 1993.

¹⁷ Documents from the MinBuZa Archives also point to another threat to the timely conclusion of the negotiations. After the departure of Under-Secretary General of the United Nations Nandan in 1992, the UN Secretariat had been taking a wait and see attitude, posing the risk of the consultations being dragged out without any prospect for results. Message nyvi491/10864 of 28 May 1992 (inventory number 00325, isn 397372, 2). See also message nyvi167/4282 of 22 February 1992 (inventory number 00372, 1-3). Ambassador Nandan subsequently participated in the consultations in a different capacity, allowing him to play a crucial role in completing them successfully. This episode illustrates the significance of individuals in shaping events.

¹⁸ See also Jonathan I Charney, 'The United States and the Revision of the 1982 Convention on the Law of the Sea' (1992) 23 *Ocean Development and International Law* 279, 290-91, who outlines various options to amend Part XI after the entry into force of the Convention.

¹⁹ See also the text at (n 57).

matter was needed to avoid unilateral extension of coastal state jurisdiction, with its attendant conflicts between coastal states and states fishing on the high seas. The agreement was developed as an implementation agreement to the Convention, but states not party to the Convention were allowed to become a party to this Fish Stocks Agreement. The adoption of the Fish Stocks Agreement led to reinforcing cooperation in regional fisheries management bodies. Coastal states, as a consequence, refrained from further unilateral actions that might have threatened the balance of interest expressed in the Convention's provisions on fisheries in the exclusive economic zone and the high seas.

The limited participation in the Convention implied that the institutions set up under the Convention were underused. The Commission on the Limits of the Continental Shelf (CLCS), which is to issue recommendations to coastal states on the outer limits of the continental shelf beyond 200 nautical miles, had little business following a decision of the Meeting of States Parties to the Convention (SPLOS) that developing states would not have to meet the December 2003 deadline and could defer their submission for an indeterminate period of time.²⁰ The continued uncertainty about the outer limits of the continental shelf has not posed great challenges, as hydrocarbon activities beyond 200 nautical miles are only taking place in areas that undoubtedly are part of the continental shelf of coastal states. The International Tribunal for the Law of the Sea (ITLOS), with its seat in Rio de Janeiro, has had a very limited case load, as most disputes concerning the law of the sea that were submitted to compulsory settlement concerned at least one state that was not a party to the Convention. However, the International Court of Justice (ICJ) continued to play a role in interpreting the law of the sea in a manner that has unified the Convention and customary law. The Court had already started this development in the 1980s in its judgments dealing with the delimitation of maritime boundaries between neighbouring states.²¹

Another feature of the law of the sea that has been lauded by commentators is the array of institutional arrangements and the adoption of pragmatic approaches. The former had been envisaged by the drafters of the Convention, who had agreed on a light institutional framework under the Convention and otherwise included rules of reference allowing existing organisations to continue regulating (new) activities in the oceans, while working within the jurisdictional framework provided by the Convention and customary international law. This concerns both specialised agencies of the UN, including the Food and Agriculture Organization and the International Maritime Organization (IMO), and global treaties and regional seas conventions.²² The UN General Assembly (UNGA), comprising both the parties and non-parties to the Convention, has continued to play its coordinating role on oceans and law of the sea, and in its annual resolutions on oceans and law of the sea and fisheries has provided guidance to states and international organisations on how to deal with, *inter alia*, the detrimental effects of deep sea fisheries on vulnerable marine ecosystems. The UNGA also played a crucial role in initiating the negotiations on a more detailed regime on biodiversity in areas beyond national jurisdiction (ABNJ). Negotiations on a Protocol to the Convention on Biological Diversity (CBD),²³ which started in 2012, are well underway.

²⁰ The SPLOS has adopted a similar approach in the real world. See 'Issues with Respect to Article 4 of Annex II to the Convention' (*United Nations Oceans & Law of the Sea*) <www.un.org/Depts/los/clcs_new/issues_ten_years.htm> accessed 28 August 2020.

²¹ See also text at n 30.

²² See also text at n 48 and following.

²³ Convention on Biological Diversity (adopted 5 June 1992, entered into force 29 December 1993) 1760 UNTS 79.

The involvement of the CBD should not come as a surprise, as it had previously dealt with the four issue areas concerned: marine genetic resources, area-based management tools including marine protected areas, environmental impact assessments, and transfer of technology and capacity building.²⁴

In 2020, twenty-seven years after the entry into force of the Convention, it may be confidently concluded that the Convention, without achieving universality, has lived up to the promise of providing a viable framework for ocean governance.

IV. Scenario 2: dystopia

In 2020, twenty-seven years after the entry into force of the Convention in 1993, it may be concluded that the failure to achieve a compromise on Part XI has been detrimental to the regime governing the oceans. The limited participation in the Convention has led to a rift between the conventional regime as interpreted and applied by its mainly developing States Parties and customary international law, which provides the applicable law for about half of the international community of states. No doubt, this rift in large part is explained by the often-ambiguous formulations included in the Convention, which had been included to bridge the conflicting interests of different states. The States Parties to the Convention have interpreted these provisions in a way that favoured the interests of coastal states. Developed states have rejected the relevance of this exercise for customary international law. That development has been entrenched by a number of landmark judicial decisions. This can be illustrated by the decisions in *MV Darwin* and *MV Russel Wallace*.²⁵ In *MV Darwin* ITLOS confirmed the coastal state focus reflected in the practice of the States Parties to the Convention, and held *inter alia* that under the Convention the passage of warships through the territorial sea is subject to prior notification to the coastal state, a decision that was vehemently rejected by major maritime powers. The ICJ in *MV Russel Wallace* held that the navigation of foreign-flagged vessels in the exclusive economic zone under customary international law was not subject to the restrictions ITLOS had found to be applicable in interpreting the corresponding provisions of the Convention in *MV Darwin*.

The regime for deep seabed mining has continued to be one of the most divisive issues in the law of the sea. While developed states continue to rely on the reciprocating-states regime to justify mining operations as a high seas freedom, developing states have rejected that approach as being contrary to the principle of common heritage of mankind as recognised by the UNGA prior to the start of the Third United Nations Conference on the Law of the Sea (UNCLOS III) in 1973 and the *jus cogens* character of that principle.²⁶ In particular, the issuance of exploration licences by the International Seabed Authority (ISA) to companies for areas that overlapped with licence areas of the states participating in the reciprocating-states regime led to acrimonious accusations from both sides and dispelled any lingering hopes that a compromise on the regime for seabed mining might still be possible in the foreseeable future.

²⁴ This accords with the actual practice of the CBD.

²⁵ These counterfactual cases remain to be reported in our actual world.

²⁶ For an elaboration of these arguments see Churchill and Lowe (n 10) 232–35.

The international community was also unsuccessful in addressing unfinished business of UNCLOS III, at which the Convention was adopted. The Fish Stocks Conference, which was convened pursuant to a UNGA resolution in 1993 in the wake of the 1992 Rio Earth Summit, and included all UN member states, was unable to adopt a legally binding instrument.²⁷ States that were not parties to the Convention, including many distant-water fishing states, rejected this approach as they would have no control over the further development of the Convention, which would then provide the frame of reference for interpreting and applying an agreement on specific fish stocks. The bland compromise declaration that was adopted at the final session of the conference did little to strengthen the mandate of regional fisheries management organisations. Subsequent attempts by coastal states to extend their jurisdiction over fisheries on the high seas continue to this day and regularly result in incidents between coastal state law-enforcement officers and foreign-flagged vessels beyond the 200-nautical-mile limit.²⁸

Perhaps the most critical development in the law of the sea since 1993 was China's 2010 ratification of the Convention. While China, like the industrialised West, had previously refrained from ratifying the Convention, the move to a more assertive foreign policy in the middle of the 2000s led China to reappraise its position. China is by far the most powerful party to the Convention and the major funder of the Convention's institutions. China's participation in the Convention led to a further divergence between the Convention and customary law. States Parties generally were supportive of China's interpretation of the Convention's provisions bearing on the navigational and overflight rights of foreign armed forces in coastal state maritime zones. In reaction, the United States stepped up its Freedom of Navigation Program in the South China Sea and other areas critical to its military. The fear has been expressed that in the absence of a universally recognised legal framework, these incidents have the potential to escalate into major hostilities.

Attempts in the framework of the CBD and the UNGA to initiate a process to arrive at a comprehensive regime for biological diversity in ABNJ, which started in the first decade of this century, have gone nowhere. The States Parties to the Convention made the start of an intergovernmental conference conditional upon accepting that both the living and mineral resources of the Area are subject to the common heritage of mankind, which proved unacceptable to the states participating in the reciprocating-states regime, as well as to the European Union.

The adoption of the Convention in 1982 and the conciliatory stance on both sides until 1992 seemed to hold the promise of a universally accepted regime for the oceans that could be further elaborated through the concerted action of the international community. Today, in 2020, that hope has foundered, and it is generally accepted that the law of the sea is in a worse condition than at the start of UNCLOS III.

²⁷ In our actual world the form the instrument should take was also controversial. According to Schram Stokke '[w]hat tipped the balance was the eventual preference among influential states that had mixed interests for achieving a binding treaty': Olav Schram Stokke, 'Introduction' in Olav Schram Stokke (ed), *Governing High Seas Fisheries: The Interplay of Global and Regional Regimes* (OUP 2001) 7 (emphasis added). Documents in the MinBuZa Archive suggest that certain states eventually were prepared to accept a binding instrument due to the prospect of a widely ratified Convention, following the adoption of the Part XI Agreement. See Message of PV/ New York to DIO/JS of 18 August 1994 and Press Release of the Permanent Mission of Japan to the United Nations of 15 August 1994, both in file number 49/05/47180, AIM-number dve/ara/01662.

²⁸ The Netherlands delegation to the Fish Stocks Conference submitted that a failure to conclude the Agreement would have this result. Delegation Report No. 3 of 5 April 1994 (file number 49/05/47180, AIM-number dve/ara/01662, 2).

V. Assessing the scenarios

The two scenarios described in sections III and IV represent two extremes of an alternative history that branches off from our time-line as a result of the failure to reach agreement on Part XI of the Convention prior to its entry into force. The current section assesses the likelihood of the main events that are included in the two scenarios.

1. The Convention and customary international law

In the early 1990s, prior to our counterfactual entry into force of the Convention in December 1993, the Convention, apart from Part XI, largely reflected customary international law as regards the definition of maritime zones and their substantive regime, which provide the core of the Convention's constitutional framework.²⁹ Certain parts of the Convention, such as the substantive regime of the high seas and the continental shelf, were already included in 1958 Geneva Conventions, which at the time of their adoption reflected or subsequently became customary international law. In 1984, a Chamber of the ICJ had already declared that Part V of the Convention, containing the regime of the exclusive economic zone, which was one of the major innovations of the Convention, was 'regarded as consonant at present with general international law on the question.'³⁰ The definition of the continental shelf provided by the Convention, which is critical to preventing coastal state encroachment on the Area, was quite widely applied in state practice prior to the Convention's entry into force.³¹ In addition, no viable alternative for claiming coastal state seabed jurisdiction had been espoused in that period.³² Prior to our 1993 counterfactual, a clear recognition of the fundamental importance the international community attached to the Convention was provided by Chapter 17 of Agenda 21, adopted at the Rio Earth Summit in 1992.³³

It has to be asked whether, in our counterfactual world, the uniformity of the Convention and customary law would have been maintained, as has been the case in our actual world. The fact that most states considered the Convention to represent an acceptable compromise, as is also witnessed by the attempts in the 1980s and early 1990s to address the pending issues in relation to Part XI, might suggest an interest in protecting that compromise from being eroded. However, a number of considerations suggest that this conclusion should not be taken for granted.

²⁹ That situation has not changed subsequently. Robin R Churchill, 'The Impact of State Practice on the Jurisdictional Framework Contained in the LOS Convention' in Alex G Oude Elferink (ed), *Stability and Change in the Law of the Sea: The Role of the LOS Convention* (Martinus Nijhoff 2005) 142.

³⁰ *Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada/USA)* (Judgment) [1984] ICJ Rep 246 para 94.

³¹ See also Churchill (n 29) 136–39.

³² *ibid* 139.

³³ United Nations Conference on Environment and Development (UNCED), *Agenda 21: Programme of Action for Sustainable Development*, section 17.1, 'International law, as reflected in the provisions of the United Nations Convention on the Law of the Sea . . . sets forth rights and obligations of states and provides the international basis upon which to pursue the protection and sustainable development of the marine and coastal environment and its resources' (footnotes omitted).

It has been suggested that the absence of widespread ratification of the Convention would have led to state practice diverging significantly from the Convention in order to serve their particular interests, leading to controversy and uncertainty about the law.³⁴ This possibility is reflected in the idea of ‘creeping jurisdiction’, which implies that where issues requiring further regulation present themselves, coastal states, in particular, will seek to extend their sovereign rights or jurisdiction.³⁵ The fact that creeping jurisdiction remains an issue in our actual world, with a widely ratified Convention,³⁶ suggests that this issue would have presented itself with even greater force in our two scenarios.³⁷ In addition, as states would have yielded to ‘the temptation to adopt measures inconsistent with the Convention, their willingness and political ability to ratify it [would have] decline[d].’³⁸

Actual state practice indicates that states continue to have differing views on the interpretation of specific aspects of the Convention, such as the navigational regime of warships in coastal state maritime zones and the balance of rights between the coastal state and other states in the exclusive economic zone. To a large extent, the divide here is between developing and developed states. Had the developing states dominated the Convention, they likely would have pushed their agenda in interpreting and applying its provisions. Moreover, the States Parties to the Convention likely would have argued that customary international law did not accord maritime powers the same rights as the Convention. In that connection, States Parties could have referred to the package deal nature of Convention, implying that states cannot pick and choose specific elements from the Convention, while rejecting others.³⁹

The above considerations clearly suggest that the absence of widespread ratification carried the risk of destabilising the compromise contained in the Convention. This, in turn, would have led to uncertainty about the law in the relations between parties and non-parties to the Convention. The likelihood of increased incidents at sea involving disputes over the content of the law, in turn, could have undermined future cooperation in developing the law.

³⁴ See eg John R Stevenson and Bernhard H Oxman, ‘The Future of the United Nations Convention on the Law of the Sea’ (1994) 88 *American Journal of International Law* 488, 492; Barbara Kwiatkowska ‘Creeping Jurisdiction Beyond 200 Miles in the Light of the 1982 Law of the Sea Convention and State Practice’ (1991) 22 *Ocean Development & International Law* 153, 175–76. As Kwiatkowska observes in discussing jurisdictional creep of coastal states beyond the 200 nautical mile limit of the exclusive economic zone:

In view of the numerous actual and potential rights and interests of states beyond 200 miles, the entry of [the Convention] into force for the overwhelming majority of the international community would appear to provide the only sound guarantee of orderly development of interstate relations seaward of 200 miles.

ibid 176.

³⁵ See eg Kwiatkowska (n 34); Erik Franckx, ‘The 200-Mile Limit: Between Creeping Jurisdiction and Creeping Common Heritage?’ (2005) 48 *German Yearbook of International Law* 117.

³⁶ A recent example is provided by the negotiations at the UN on the regime for biodiversity in ABNJ. Coastal states have advanced the concept of ‘adjacency’ to further their interests, whereas this concept is not reflected in the Convention. See further, Alex G Oude Elferink, ‘Coastal States and MPAs in ABNJ: Ensuring Consistency with the LOSC’ (2018) 33 *International Journal of Marine and Coastal Law* 437.

³⁷ See also text after n 53.

³⁸ Stevenson and Oxman (n 34) 488.

³⁹ This idea was already expressed by Ambassador Koh, the President of UNCLOS III, at the closing session of the conference in December 1982. Tommy TB Koh, ‘A Constitution for the Oceans’ <www.un.org/depts/los/convention_agreements/texts/koh_english.pdf> accessed 22 August 2020.

2. Compulsory dispute settlement

The possibility of resorting to compulsory dispute settlement under Part XV of the Convention has been considered a critical aspect of its architecture. In the two scenarios presented above, courts and tribunals are seen as either safeguarding the uniformity of the Convention and customary law or contributing to their divergence. Different factors come into play in assessing the likelihood of these two options.

First, with a limited number of mainly developing States Parties to the Convention, the composition of ITLOS would have differed significantly from that of the ICJ, as the latter also has a significant representation of judges from developed states. If either of these fora would have been presented with issues that involved a divide between developed and developing states, different outcomes would indeed have been possible. ITLOS likely would have adopted a developing state perspective in interpreting the Convention, while the ICJ in applying customary international law could be expected to have taken into account the practice of developed states. It might be argued that such a divergence would have been unlikely, as ITLOS (and arbitral tribunals constituted under Annex VII of the Convention) would have had an even more limited caseload than is actually the case with a larger and more diverse participation in the Convention. Indeed, a number of high-profile cases might not have been settled under the Convention, such as *Chagos*,⁴⁰ *Arctic Sunrise*,⁴¹ and *South China Sea*.⁴²

However, the fact that ITLOS's Rules of Procedure provide for the possibility of issuing advisory opinions indicates that ITLOS could still have played an active part in shaping the law in the absence of contentious proceedings.⁴³ In our actual world, in an advisory opinion requested by the Sub-Regional Fisheries Commission, with a membership of Western African coastal states, ITLOS among others has elaborated on the duties of the flag state in relation to its vessels fishing in the exclusive economic zone of other states.⁴⁴ This example indicates that advisory opinions under our scenarios could have played an important role in interpreting the law. For instance, States Parties might have used this avenue to clarify the implications of the package deal nature of the Convention for the development of customary international law in order to reconfirm that non-parties would either have to accept the whole package, as interpreted by its States Parties, or have to refrain from seeking to profit only from those parts of the Convention that serve their interests.

⁴⁰ *Chagos Marine Protected Area Arbitration (Mauritius v UK)* Permanent Court of Arbitration (Award of 18 March 2015) (*Cour Permanente D'Arbitrage Permanent Court of Arbitration*) <<https://pca-cpa.org/en/cases/11/>> accessed 28 August 2020.

⁴¹ *The Arctic Sunrise Arbitration (Netherlands v Russia)* Permanent Court of Arbitration (Award on the Merits of 14 August 2015) (*Cour Permanente D'Arbitrage Permanent Court of Arbitration*) <<https://pca-cpa.org/en/cases/21/>> accessed 28 August 2020.

⁴² *The South China Sea Arbitration (The Republic of Philippines v The People's Republic of China)* Permanent Court of Arbitration (Award of 12 July 2016) (*Cour Permanente D'Arbitrage Permanent Court of Arbitration*) <<https://pca-cpa.org/en/cases/7/>> accessed 28 August 2020.

⁴³ The Convention itself does not explicitly refer to the advisory jurisdiction for the full tribunal, but the ITLOS has included such a provision in Rule 138. 'International Tribunal for the Laws of the Sea: Rules of the Tribunal' <www.itlos.org/fileadmin/itlos/documents/basic_texts/Itlos_8_E_17_03_09.pdf> accessed 28 August 2020.

⁴⁴ Request for Advisory Opinion submitted by the Sub-Regional Fisheries Commission (Advisory Opinion 2 April 2015) ITLOS Rep 2015, 4.

3. Participation in an unamended Convention

The scenario 'Business as usual' assumes that a number of developed states eventually would have become a party to the Convention. Indeed, particularly developed states without an interest in deep seabed mining might have gone down this road. These states would not have been directly affected by what the developed world considered to be the negative implications of an unamended Part XI. At the same time, being a party to the Convention would allow them to influence its future development more directly than being on the outside, including through participation in the Convention's institutions.⁴⁵

Developing States Parties to the Convention would also have had an interest in including developed states in the ambit of the Convention and, in that light, might have continued to take a conciliatory stance on deep seabed mining.⁴⁶ Broad participation in the Convention would have limited the risk of a competing regime for deep seabed mining from developing under customary law. It would also have ensured that the implementation of other parts of the Convention would have garnered widespread support, limiting the risk of destabilising the law of the sea due to the diverging practice of parties and non-parties. The suggestion that China might have become a party to the Convention to use it as a vehicle for advancing its interests would have been in line with the development of a more assertive Chinese foreign policy.⁴⁷ The exact impact of China would obviously have depended on the extent to which Western states would have ratified the Convention, offering a counterweight to China's impact on the development of the conventional law.

4. The frameworks for developing the law of the sea

The Convention sets up a number of bodies for implementing its provisions: the International Seabed Authority (ISA) in relation to deep seabed mining, ITLOS for dispute settlement, SPLOS primarily for dealing with the administration of the Convention, and CLCS for assisting states in establishing the limits of national jurisdiction beyond 200 nautical miles. Equally important, the Convention recognises that many aspects of its implementation require the involvement of competent organisations and other frameworks beyond the Convention's own institutional mechanisms.⁴⁸

For instance, shipping is considered in the framework of the IMO, while the protection and the preservation of the marine environment are considered in the framework of global conventions like the CBD, the Convention on Migratory Species,⁴⁹ and regional conventions such as the Convention for the Protection of the Marine Environment of the

⁴⁵ An internal memorandum of January 1994 to the Netherlands' Minister of Foreign Affairs submits that in case the consultations on Part XI were to fail, the Netherlands should consider ratifying the unamended Convention in consultation with its European partners, ie the other member states of the European Communities and the European Commission. Memorandum 043/94 of 17 January 1994, (file Mag.Loc. 70A-19-14 inventory nr 2360, 1-2); see also Letter of the Minister of Foreign Affairs of 1 February 1991 (file number 49/05/39969, AIM-nummer dve/ara/00797, 2).

⁴⁶ See also n 18.

⁴⁷ For the development of Chinese foreign policy in this period see eg Gideon Rachman, *Easternisation* (The Bodley Head 2016) 47–67; Henk Schulte Nordholt, *China & de Barbaren* (Querido 2015) 317–18.

⁴⁸ See, for instance, the reference in Parts IV, V, VII and XII of the Convention (n 2).

⁴⁹ Convention on the Conservation of Migratory Species of Wild Animals (adopted 23 June 1979, entered into force 1 November 1983) 1651 UNTS 355.

North-East Atlantic⁵⁰ or the Convention for the Protection and Development of the Marine Environment of the Wider Caribbean Region.⁵¹ These other frameworks generally seek to elaborate on the generally-worded obligations contained in the Convention, without adjusting its jurisdictional framework. For instance, the CBD provides that its parties 'shall implement this Convention with respect to the marine environment consistently with the rights and obligations of states under the law of the sea.'⁵² The significance of these institutions and instruments beyond the Convention's ambit is twofold. First, it indicates that to a large extent the further implementation of the Convention would have been guaranteed in the absence of universal participation in the Convention, even if the bodies set up under the Convention would not have been operating effectively. Specific issues are not taken up in these institutions and instruments because they have been charged to do so under the Convention, but because they fit under their mandate as defined by their membership.

Second, the fact that the mandate of those other institutions and instruments does not include the development of the jurisdictional framework of the law of the sea would have been an impediment to them directly challenging the balance of rights and interests contained in the Convention. Obviously, the latter consideration would have applied to a larger extent to global institutions and instruments, with a near-universal membership, representing the balance of interests that was also responsible for shaping the content of the Convention. Regional institutions and instruments, which more often than not will not reflect this balance of interests in their membership, might instead have been prone to expressing specific interpretations of the law diverging from the compromise contained in the Convention.⁵³

The two scenarios refer to some specific instances of the further implementation of the Convention. In the real world, the Fish Stocks Agreement⁵⁴ of 1995 is seen as an important complement to the Convention, which deals with high seas fisheries in a rather cursory manner. The Agreement in particular reinforces the role of regional fisheries management bodies. Following the adoption of the Fish Stocks Agreement, existing management bodies have adjusted their policies to bring them in line with the modern fisheries law principles contained in the Agreement. New regional bodies, which fill in gaps in fisheries management at the regional level, have taken a similar approach. Could the failure to conclude the Fish Stocks Agreement, as is posited in the scenario 'Dystopia', have led to a different result? No doubt, the Fish Stocks Agreement, being an expression of a broadly supported elaboration of the Convention, exerted a normative pull on the developments in fisheries management in the latter half of the 1990s and beyond in our actual world. However, at the same time, the Fish Stocks Agreement was part of a broader development in environmental and fisheries law.⁵⁵ That development was not based on the widespread adherence

⁵⁰ Convention for the Protection of the Marine Environment of the North-East Atlantic (adopted 22 September 1992, entered into force 25 March 1998) (1993) 32 ILM 1072.

⁵¹ Convention for the Protection and Development of the Marine Environment of the Wider Caribbean Region (adopted 24 March 1983, entered into force 11 October 1986) 1506 UNTS 157.

⁵² CBD (n 23) art 22(2).

⁵³ An example in the real world is the Galapagos Agreement. Framework Agreement for the Conservation of the Living Marine Resources of the High Seas of the South Pacific (adopted 14 August 2000) (2001) 45 Law of the Sea Bulletin 70. This agreement, concluded by Chile, Colombia, Ecuador, and Peru, accords coastal states rights in the high seas going beyond the Convention.

⁵⁴ 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 (adopted 4 August 1995, entered into force 11 December 2011) 2167 UNTS 3.

⁵⁵ See eg Francisco Orrego Vicuña, 'The International Law of High Seas Fisheries: From Freedom of Fishing to Sustainable Use' in Stokke (n 27) 32–35.

to the Convention and would also have taken place in its absence. On the other hand, the recognition expressed through the Fish Stocks Agreement that the jurisdictional balance between high seas fishing states and coastal states included in the Convention should not be tampered with, and which in our actual world has been broadly accepted, might have fared less well in an alternative world in which there was no such normative break on claims by coastal states to unilaterally manage transboundary stocks.⁵⁶

The scenarios also consider how the regime for biodiversity in ABNJ might have developed. In actuality, this regime is presently under consideration by an intergovernmental conference, which has been charged by the UNGA to negotiate what likely will become an implementation agreement under the Convention. Of the four issues under consideration in these negotiations, for the purposes of the present discussion the regime for marine genetic resources is most critical. It is highly likely that this issue also would have come to the fore under our counterfactual scenarios. The scientific and technological advances that made the potential value of these resources apparent would have occurred in any case. Continued disagreement over the regime of Part XI likely would have prevented this issue becoming the subject of negotiations on an implementing agreement under the Convention, as is explained in the scenario 'Dystopia'. At the same time, as the other scenario submits, this issue provides another example for which a framework beyond the Convention, in this case the CBD, might have provided an alternative.

The scenario 'Business as usual' submits that the UNGA remained pivotal in developing ocean governance. In our actual world, developing states have tried to give SPLOS an active role in reviewing the implementation of the Convention, while most developed states have resisted such attempts, referring to the mandate of the UNGA. The current compromise consists of the meeting discussing the report of the UN Secretary General on oceans and law of the sea that is also presented by the UNGA, without the meeting taking any concrete actions. The UNGA as a follow-up to the report adopts a resolution on ocean and law of the sea containing concrete calls for action. The divide between developing and developed states suggests that a SPLOS dominated by developing states might well have taken upon itself a more active role in reviewing the law of the sea, with a potential for straining the relationship with the UNGA and complicating cooperation within the UNGA.

5. Mining in the Area

In the 1980s, developed states set up an alternative regime for seabed mining outside of the Convention through the reciprocating-states regime. In that sense, seabed mining perhaps offered the only example of an activity with an alternative regime to that of the Convention with the support of the most directly interested states at that time. Whether that alternative provided the seeds for an escalating conflict is another matter. Until this day commercial mining in the Area has not yet materialised. It seems unlikely that states would be willing to force the argument on the applicable legal regime without a practical need to do so. Moreover, mining companies likely would have been interested in avoiding conflict over the legality of their operations. In that light, they might have wanted to look for options that

⁵⁶ See also Stevenson and Oxman (n 34) 498.

would not bring them into open conflict with ISA.⁵⁷ At the same time, Part XI was a critical issue to many developing states during the negotiations of the Convention. This might have made any challenge to the unamended Part XI regime likely a sensitive issue to the developing States Parties to the Convention and an ISA dominated by those same states. A conflict over Part XI could have become a catalyst in fuelling the discontent of the States Parties to the Convention over the rejection of the overall compromise reflected in it by the developed world.

6. Has the Convention's institutional framework made a difference?

Another way of looking at the present counterfactual is to inquire into the impact of the institutional framework of the Convention on the development of the law of the sea in our actual world, asking whether the absence or limited participation in that framework would have made a difference. The ISA is a key element to a functioning regime in the Area. The near-universal adherence to the Convention in our actual world in this respect compares favourably to the possible impact of developments on the ISA under our two scenarios. ITLOS and ad hoc tribunals under the Convention have made a significant contribution to the law on specific aspects.⁵⁸ That role likely would have been less pronounced under our scenarios, due to the more limited number of cases that would have been submitted to compulsory dispute settlement. However, as was explained in section V.2, ITLOS could have been used to pronounce on the law through advisory opinions. The role of SPLOS in the real world has been limited. One might say that its biggest contribution to the functioning of the Convention is its deferral to the UNGA in addressing current issues in the law of the sea. Our discussion indicates that SPLOS possibly might have performed less well on this latter point in our counterfactual world. The existence of the procedure to determine the limits of the continental shelf beyond 200 nautical miles involving the CLCS likely has made a difference. In our actual world, all relevant coastal states have spent considerable resources to comply with the requirements of the Convention and coastal states generally have acted upon the guidance the CLCS has provided to them. Limited use of the CLCS under our scenarios likely would have resulted in more expansive claims by coastal states, either by a(n) (overly) broad interpretation of relevant provisions of the Convention or by the introduction of new criteria allowing seaward extension of coastal state jurisdiction.

VI. Concluding observations

The preceding analysis suggests that the law of the sea might have developed differently had states failed to reach an agreement on the adjustment of Part XI of the Convention prior

⁵⁷ Mining companies are required to have a so-called sponsoring state to engage in mining under Part XI of the Convention (n 2) art 153. Only States Parties are entitled to act as such under the Convention (*ibid*). To avoid conflict with the ISA, and with the States Parties to the Convention, a company from a state that is not a party to the Convention could opt to operate under the Convention with a State Party as a sponsoring state. see also Charney (n 18) 288.

⁵⁸ See eg Vladimir Golitsyn, 'The Role of the International Tribunal for the Law of the Sea in Global Ocean Governance' in Stephen Minas and Jordan Diamond (eds), *Stress Testing the Law of the Sea* (Brill Nijhoff 2018) 11.

to its entry into force. However, one should at this point face the question of whether the Convention actually was 'too big to fail'. The Convention was the culmination of a process that could be said to have started at least in the 1950s with the first attempt by the United Nations to establish a comprehensive legal regime for the oceans. That regime, as agreed upon in 1958, was overtaken by developments in the 1960s that resulted in the negotiation of the Convention. Preparatory work started in 1969 and UNCLOS III convened between 1973 and 1982. The outcome was the first comprehensive law of the sea treaty. Although there were, and to this day remain, many minor differences over the interpretation of specific provisions of the Convention, the only 'deal breaker' was the regime for deep seabed mining contained in Part XI. Would the international community have been prepared to jeopardise the future of the Convention for an issue that at the time hardly showed any promise of commercial potential in the near future?⁵⁹ Perhaps not by design. However, our discussion suggests that the consultations on Part XI might have been stalled and developments might have slowly eroded the basis for a compromise. Still, it is unlikely that this would have resulted in a radically different law of the sea regime. First, there would not have been a comprehensive alternative law of the sea regime that differed radically from the Convention. Challenges would have focused on specific issues and the shift away from the Convention, had it occurred, would have been gradual. Secondly, the law of the sea is embedded in institutional frameworks and substantive rules beyond the Convention. These frameworks and rules probably would have guaranteed continued cooperation without a direct challenge to the Convention's jurisdictional framework. Finally, the law of the sea is made up of a number of individual regimes that have relatively little impact on each other. In that light, a challenge to one part of the Convention would not necessarily impact on other parts of the overall package. States may indeed purposely challenge a specific rule in such a way that has the promise of the least spillover.⁶⁰

Notwithstanding these cautionary notes, it seems likely that in our counterfactual world there would have been more conflicting claims involving coastal states and other states concerning such issues as navigation and fisheries resources, leading to less effective cooperation and higher transaction costs.

One may furthermore ask whether the developing states, by accepting the Part XI Agreement, lost their distinct voice. Were the ideals of development and distributive justice largely offered to ensure the participation of the developed world in the Convention? No doubt that has been the case, and in that sense the Convention has not delivered on the hopes the developing world entertained in the 1960s and 1970s. At the same time, it may be questioned whether these expectations were realistic to start with. The NIEO mostly found expression in one specific aspect of the Convention as adopted in 1982, mining in the Area, while most ocean resources remained beyond that regime.⁶¹ Moreover, mining in the Area has yet to deliver on its promise of an economic bonanza, if it ever will.

⁵⁹ See also Laurent Lucchini, '1996: Où en est le Droit de la Mer' (1997) 1 *Annuaire du Droit de la Mer* 17, 22.

⁶⁰ This may be illustrated by the development of the regime of the continental shelf. Reliance on this concept for claiming sovereign rights over the resources of the seabed allowed to differentiate that regime from claims over the superjacent waters and air space that might have affected existing freedoms of communication.

⁶¹ In that connection, it may also be noted that developed states have been the main beneficiaries of the newly developed exclusive economic zone, which gives individual states almost exclusive control over the living and non-living resources inside 200 nautical miles from their coast. Among the ten states with the largest exclusive economic zones are seven developed states. Churchill and Lowe (n 10) 178.

Considering alternatives to the actual history of the Convention allows gaining a better understanding of its contribution to the development of the law of the sea. This chapter demonstrates the complexity of developing such alternative scenarios. However, without a comparative yardstick against which to assess the Convention's contribution, pronouncements in that respect will remain speculative or at best be based on implicit assumptions.⁶²

⁶² See also Stokke (n 8) 41.