In today's lecture, I hope to demonstrate a useful combination between theory and practice. The title of my presentation

The development of the law of the sea through UN Processes: The Case of Biodiversity in Areas Beyond National Jurisdiction

The topic is very much about the resolution of doctrinal questions through practice.

The process of making international law is notoriously nebulous and dependent on the interaction of various elements often with unclear effects. Oceans governance is particularly illustrative of the hazy process of international law-making. The lack of clarity persists notwithstanding the fact that the UN Convention on the Law of the Sea of 1982 (hereinafter the "Law of the Sea Convention" or the "Convention) is offered referred to as the constitution of the oceans and the framework for addressing all oceans-related issues.[1]

It is often assumed that, unlike the process and substance of customary international law, the process and substance of treaty law are much

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[1] See, e.g., Dire Tladi "Oceans Governance: A Regulatory Framework" in Pierre Jacquet, Rajendra K Pachauri and Laurence Tubiana (Eds.) *Oceans: The New Frontier* (2011) at 99. See also Kristina M Gjerde and Anna Rulska-Domino "Marine Protected Areas beyond National Jurisdiction: Some Practical Perspectives for Moving Ahead" (2012) 27 *International Journal of Marine and Coastal Law* 351 at 352. See also Richard A Barnes "Consolidating Governance Principles for Areas beyond National Jurisdiction" (2012) 27 *International Law Journal of Marine and Coastal Law* 261 at 273.

clearer and more definitive.[2] However, while the process of negotiating and adopting a treaty is itself relatively clear, the law emanating from such a treaty is often influenced by other processes, including interaction with other rules and norms of international law, fragmentation resulting from non-universal ratification, reservations, subsequent agreements relating to the treaty, subsequent practice as well as the potential for varying pronouncements exacerbated by the lack of unified judicial settlement system. All these causes of uncertainty potentially affect the content of the law of the sea. For example, the law of the sea is made up of a complex interaction and network of sources and institutions including, *inter alia,* the Law of the Sea Convention, the UN Convention on Biological Diversity of 1992, the International Maritime Organisation, two implementing agreements under Law of the Sea Convention[3] and various regional organisations with different competencies.[4] Moreover, while in principle Article 309 prohibits reservations except in so far as these "are expressly permitted by other articles of this Convention", Article 310 does allow declarations and several States have taken advantage of this provision to make declarations some of which could have the same effect as reservations.[5] Furthermore, Part XV of the Convention endorses three different and unrelated dispute settlement options, namely the International Court of Justice, the International

[2] See Mark W Janis *An Introduction to International Law* (1999) at 41. See also Akiho Shibata "International Environmental Lawmaking in the First Decade of the Twenty First-Century: The Form and Process" (2011) 54 *Japanese Yearbook of International Law* 28 at 34 and 35 who states: "From the inception of studies on international environmental law, it has been noted that custom as its source would play an essentially modest role and would be insufficient for responding to its needs, since international environmental law should establish a kind of regulatory system *equipped with defined standards* …[while] treaty has always been considered as the source *par excellence* for international environmental law, providing *a regulatory framework consisting of legally binding obligations of States*" (emphasis added).

[3] 1994 Agreement Relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982 and the 1995 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.

[4] On how some these can be seen as operating together see Tladi (above) n 1.

[5] See for a comprehensive list of all declarations www.un.org/Depts/los/convention_agreements/convention.htm (last accessed 6 June 2012).

Tribunal for the Law of the Sea and arbitration thus creating the possibility for conflicting interpretations.[6] With the interaction of all these processes, law-making in relation to oceans, though governed by a framework treaty, remains nebulous and continues to evolve.

The fluidity of the law and law-making process is aptly illustrated by the legal rules relating to the sustainable use and conservation of marine resources in areas beyond national jurisdiction, especially the deep seabed particularly in relation marine genetic resources and the legal regime applicable thereto.[7] Even under the Convention on the Law of the Sea, the answer to the question of the legal regime applicable to marine genetic resources remains less than clear. When one considers that different sources may be applicable and how these different sources interact, the complexities become pronounced.

State practice – which refers to any State behaviour including acts, omissions, statements, negotiations, treaty ratifications and votes on resolution[8] – plays a role both in the process of defining and making the law relating to the conservation and sustainable use of biodiversity in areas beyond national jurisdiction. In terms of defining the law, state practice is used by States to interpret and give content to the law,

[6] See Article 287 of the Convention.

[7] See for discussion Fernanda Millicay "A Legal Regime for the Biodiversity of the Area" in Myron H Nordquist, Thomas H Heidar and John N Moore (Eds.) *Law, Science and Ocean Management* (2007); Dire Tladi "Marine Genetic Resources on the Deep Seabed: The Continuing Search for a Legally Sound Interpretation of UNCLOS" 2008 *International Environmental Law and Diplomacy Review* 65; Dire Tladi "Genetic Resources, Benefit Sharing and the Law of the Sea: The Need for Clarity" 13 (2007) *Journal of International Maritime Law* 183. For a recent exposition of the arguments and counter-argument, see Petra Drankier, Alex G Oude Elferink, Bert Visser and Tamara Takács "Marine Genetic Resources in Areas beyond National Jurisdiction: Access and Benefit Sharing" (2012) 27 *International Journal of Marine and Coastal Law* 375, especially from 399 *et seq.*

[8] See generally for discussion of what constitutes practice Michael Byers *Custom, Power and the Power of Rules: International Relations and Customary international Law* (2001) at 133 *et seq.* especially at 134. See also John Dugard *International Law: A South African Perspective* (2005) at 29 and Ian Brownlie *Principles of Public International Law* (2003) at 6. See also the 2000 Report of the International Law Association on Customary International Law at 14 which observes that verbal acts "are in fact more common forms of practice than physical conduct".

whether the Law of the Sea Convention, some other treaty or customary international law relevant to the law of the sea. In the law-making process, state practice serves a function of advancing positions on what the law should be and also what the law should not be.

Today, I will consider, in the light of state practice, the contestation around the legal rules relating to the use and conservation of marine biodiversity in areas beyond national jurisdiction. The lecture centres around two separate issues. The first concerns the legal regime applicable to marine genetic resources on the deep seabed while the second relates to the legal rules relevant to measures for the conservation and preservation of the marine environment in areas beyond national jurisdiction. I begin by describing the two main areas of contestation relevant to the conservation and sustainable use of marine biodiversity in areas beyond national jurisdiction. I then proceed to consider the role of state practice in the evolution of the law relating the use and conservation of marine biodiversity in areas beyond national jurisdiction before providing some concluding observations.

II. The Convention and Marine Resources in Areas Beyond National Jurisdiction

The contested terrain in relation to biodiversity in areas beyond national jurisdiction concerns two separate but related issues. The first, and legally the most contentious, concerns the legal regime applicable to marine genetic resources on the deep seabed. The second issue concerns the adoption of measures for the preservation and conservation of the marine environment, including through the establishment of marine protected areas. The nature of the legal

contestation with respect to the marine genetic resources question concerns not only what the law should be, *lex ferenda,* but also what the law is, *lex lata.* The preservation and conservation question is concerned primarily with the need to develop the law – although, the line between what the law should be and what it is also becomes blurred in the posturing of States.

So let me begin by outlining the contestation around marine genetic resources question:

The contestation over which legal regime applies to marine genetic resources arises mainly from an ambiguity in the Law of the Sea Convention. The deep seabed beyond national jurisdiction, referred to as the "Area" in the Convention, is governed by Part XI of the Convention which establishes the deep seabed as the common heritage of mankind.[9] In a nutshell Part XI establishes a regime, complete with an international organisation, the International Seabed Authority, to ensure that the benefits from the exploitation of the resources on the deep seabed are shared by all humanity.[10]

Article 133 unambiguously provides that for "the purposes" of Part XI, the word "resources" means "all solid, liquid or gaseous mineral resources *in situ* in the Area at or beneath the seabed, including polymetallic nodules." This definition is clear and unambiguous and its application to the marine genetic resources question would imply that the regime established by Part XI was not applicable to marine genetic

[9] Article 1(1) of the Convention defines the "Area" as "the seabed and ocean floor and subsoil thereof, beyond the limits of national jurisdiction". See Article 136 which determines the Area to be the common heritage of mankind. To avoid confusion between "area" beyond national jurisdiction, marine protected "areas" and "Area", I use the "deep seabed" and not the "Area" throughout the article.

[10] See especially Article 130 of the Convention.

resources which, by definition, are biological and can therefore not be said to be "solid, liquid or gaseous mineral resources". However, this conclusion is complicated by the presence of another, equally clear and unambiguous provision of the Convention, namely Article 136 which provides that the "Area *and* its resources are the common heritage of mankind" (emphasis added). Thus, it is not just the resources, as defined in Article 136, which are the common heritage of mankind but also the deep seabed itself.

In the face of this ambiguity, different groups of States have advanced different narratives on the law applicable to marine genetic resources on the deep seabed.[11] On the one side of the divide, there is a group of States – the United States, Russia, Norway, Canada, Japan and Iceland – in whose view marine genetic resources on the deep seabed are governed by Part VII of the Convention (caveat: I have just attended a meeting at the UN where Iceland's position showed a radical shift, perhaps because the lead negotiator is now engaged to one of the G77 most vocal members?). While Part XI promotes the idea of the common heritage of mankind and benefit sharing, Part VII is the antithesis of this and promotes freedom of the seas and a "first come, first serve" approach – that is to say, those who can exploit benefit and those who cannot do not.[12] Another group of States, in particular the Group of 77 and China (hereinafter the "G77"), argue that marine genetic resources are governed by the common heritage of mankind principle. Between these two extremes, the EU rejects the idea of a common heritage of

[11] See for discussion Valentina Germani and Charlotte Salpin "The Status of High Seas Biodiversity in International Policy and Law" in Jacquet, Pachauri and Tubiana (above) n 1. See also the literature cited in footnote 7 above.

[12] See Article 87 of the Convention.

mankind, but suggests that a new benefit sharing model can be developed.

Those States that adopt the approach that Part VII, and not Part XI, applies to marine genetic resources on the deep seabed point, first and foremost, to the definition of resources in Article 133 which, on its face, excludes marine genetic resources. Additionally, even Article 140, which provides that "[a]ctivities in the Area … shall be for the benefit of mankind" qualifies this statement by "as provided for in this Part".[13] With respect to resources, by virtue of Article 133, Part XI is limited to mineral resources. If Part XI is not applicable to marine genetic resources on the deep seabed, so the argument goes, then Part VII must be applicable. Part VII, which governs the high seas, provides that the high seas are "open to all States".[14] Under these provisions of Part VII the resources of the high seas are available for exploitation by whoever is able to exploit them.

Compelling though the argument for the freedom of the high seas approach may be, particularly in the light of the clear text of Article 133, the approach does suffer from some flaws. First, even accepting that Part XI does not apply to MGRs, there is no a priori reason why Part VII should apply. Part VII lists a number of activities which are subject to the freedom of the high seas.[15] The exploitation of marine genetic resources is not included in the list.[16]

[13] Article 140(1) of the Convention.
[14] Article 87(1) of the Convention.
[15] *Id.*
[16] The list includes freedom of navigation, freedom of overflight, freedom to lay cables and pipelines, freedom to construct artificial islands and other installations, freedom of fishing and freedom of scientific research.

Second, the argument for freedom of the high seas ignores the fundamental logic of the Convention, namely that the regulation of various resources in the Convention, and the rights and obligations of States Parties in relation to such resources, is dependent on the maritime zone in which the resource is found and not on the nature of the resource. Part VII and the rights contained therein apply only to the high seas and not to the deep seabed.

It is thus safe to say that the differences of views between States on the legal regime applicable to marine genetic resources in areas beyond national jurisdiction cannot be resolved by reference to the text of the Convention. Moreover, the *trauvaux preparatoire* are unlikely to offer any assistance since, at the time of the negotiation of the Convention, it was assumed that the lack of sunlight in the deep seabed made life impossible. As a result the negotiators focused on mineral resources for which the prospects of exploitation seemed more likely.[17] In this respect there was very little discussion of the definition of resources in the course of the negotiations.[18] The practice of States, whether prior or subsequent to the adoption of the Convention, thus assumes a level critical of importance in the contestation over how the gaps are to be filled.

I proceed now to describe the contestation around the conservation question

[17] See Millicay (above) n 7 at 739. See also Drankier, Elferink, Visser and Takács (above) n 7 at 376.
[18] See Millicay (above) n 7 at 778 to 779 on the evolution of the definition.

The Law of the Sea Convention creates a general obligation on States Parties "to protect and preserve the environment".[19] While it recognises the right of States Parties to exploit marine resources, this right is made subject to the obligation to preserve and protect the marine environment.[20] Concretely, the Convention requires States to take measures, jointly or individually, to "prevent, control or reduce" pollution of the marine environment.[21] A central element of the Convention's approach to the protection and preservation of the marine environment is the obligation to cooperate.[22]

Over and above the general provisions on the protection and perseveration of the marine environment, specific parts of the Law of the Sea Convention governing specific maritime zones also create obligations to preserve and protect the environment.

While the Law of the Sea Convention contains a number of provisions on the conservation and preservation of the marine environment, questions have been asked about the environmental effectiveness of the Law of the Sea Convention.[23] It has been observed, for example, that the Convention has failed to "spell out sufficiently coherent obligations [on States Parties] to steward resources" of the oceans leading to the near collapse of fisheries.[24]

[19] Article 192 of the Convention.
[20] Article 193 of the Convention.
[21] See Articles 194, 195, 196, 207, 208, 209, 210, 211 and 212 of the Convention.
[22] Article 197 of the Convention.
[23] See for discussion Tladi (above) n 1.
[24] Richard Barnes "The Convention on the Law of the Sea: An Effective Framework for Domestic Fisheries Conservation?" in David Freestone, Richard Barnes and David Ong (Eds.) *The Law of the Sea: Progress and Prospects* (2006) at 233.

At the heart of the environmental problems in oceans governance is the Grotian principle of the freedom of the seas which is not only confirmed but entrenched in the Convention.[25] The freedom of the high seas effectively re-enacts Hardin's "tragedy of the commons" by allowing States (and vessels under their jurisdiction) to behave with few restrictions.[26] The vague general obligation to protect and preserve the environment as well as the call for self-regulation in Article 117 of the Convention are clearly not sufficient. In this respect, while States or groups of States could take measures for the conservation of the marine environment, as is called for in Article 117, such measures would only be applicable to the nationals of the cooperating States. At the same time a governance system that purports to mandate a State or group of States to legislate for the international community would not only be inconsistent with the general structure of international law but would be politically unacceptable to most States.

There is therefore a real need to develop a governance structure to support and enhance the Convention's conservation objectives.

I proceed now to describe practice in relation to both the marine genetic resources question and then conservation question. But first I briefly describe the importance of practice in relation to treaty norms

[25] Tladi (above) n 1 at 103.

[26] Garrett Hardin "The Tragedy of the Commons" (1968) 162 *Science* 1243. Hardin's "tragedy of the commons" postulates that finite resources in the "commons" or areas open to all will eventually be depleted if each actor is free to consume the resources without regulation. In other words, short-term interests will dictate overexploitation even though this is not in the interest of anyone's long-term interest.

The relevance of practice during the subsistence of a treaty can take different forms. In the first place, practice is a recognised tool of interpretation of treaties.[27] Article 31(3)(b) provides that subsequent practice in the application of a treaty, when establishing the agreement of parties as to its interpretation, shall be taken into account in the interpretation of the treaty. Second, the practice of States could lead to the crystallisation of a treaty provision into a norm of customary international law binding also on non-parties and perhaps possibly beyond the limited application of the treaty in question.[28] Such a new norm of CIL could be relevant either a competing rule to the treaty rule or in the interpretation of the treaty rule under Article 31(3)(c) of the VCLT. It has even been suggested that, in exceptional cases, subsequent practice could lead to the termination of a treaty provision.[29]

Finally, practice, regardless of whether it evolves into a norm of customary international law or not, can have an influence in any subsequent agreement to amend, supplement or implement the treaty provisions in question.[30]

I turn to consider Practice in Relation to the Marine Genetic Resources Question

[27] See Article 31 of the 1969 Vienna Convention on the Law of Treaties.
[28] See, e.g., para 71 of the judgement of the International Court of Justice in *North Sea Continental Shelf Cases (Federal Republic of Germany v Denmark; Federal Republic of Germany v the Netherlands)* 1969 *ICJ Reports* 3. See in the context of the law of the sea, Barnes (above) n 1 at 270.
[29] *Id.* at 61 *et seq.*
[30] The use by states of innovative interpretation of existing norms to influence the elaboration of new norms is considered by the author in a forthcoming publication, Dire Tladi "The Challenges and Opportunities in the Implementation of the Supplementary Protocol: Reinterpretation and Re-imagination" in Akiho Shibata (Ed) *The Nagoya-Kuala Lumpur Supplementary Protocol on Liability and Redress to Cartagena Protocol on Biosafety* (forthcoming, 2012).

Information about the actual practice of exploitation of marine genetic resources in areas beyond national jurisdiction is, at best, sketchy. The first reason for the difficulty of assessing actual practice for the purposes of interpretation is that most marine genetic resources are sourced from within territorial waters.[31] However, source organisms are often dispersed across different parts of the oceans, including areas beyond national jurisdiction.[32] What is apparent from the literature is that deep sea ecosystems including hydrothermal vents and polar oceans provide a hotbed of organisms "of biotechnological interest".[33] Thus, even with the sketchy information on the exploitation of marine genetic resources, it can be asserted that the exploitation of marine genetic resources in areas beyond national jurisdiction and the potential for even more exploitation is significant.

Another reason for the limits of information pertaining to actual exploitation is that the exploitation that does happen is conducted by entities from very few countries. It has been observed that "claims associated with marine genes originate from only 31 countries" and that of these, ninety percent originate from only ten countries "with 70% belonging to the top 3 countries".[34] These figures reveal the limits of actual practice in this area. First, while for the purposes of interpretation of the Law of the Sea Convention, the practice of the largest player, the United States, can perhaps be discounted as it is not a State Party to the Convention, it can hardly be ignored that two State Parties in the top ten

[31] Sophie Arnaud-Haond, Jesús M Arrieta and Carlos M Duarte "Global Genetic Resources: Marine Biodiversity and Gene Patents" (2011) 331 *Science* 1521 at 1521.
[32] *Ibid.*
[33] *Ibid.* See also Millicay (above) n 7 at 773 *et seq.* who provides examples of patented marine genetic resources including some sourced from the deep seabed.
[34] See Arnaud-Haond, Arrieta and Duarte (above) n 44 at 1521 The figures of patent claims origin that they present are startling: US (199), Germany (149) and Japan (128). The fourth country on the list is France with 34, followed by the UK (33), Denmark (24), Belgium (17), the Netherlands (13), Switzerland (11) and Norway (9).

States from which marine genetic resource patents originate (Japan and Norway) object to the application of the common heritage of mankind while not a single G77 and China country, the champions of the common heritage of mankind application – feature on the list.[35] On the other hand, given the vociferous objection of such a large bloc of countries, little conclusion on the state of the law can be drawn from the practice of the "top ten".

Indeed, precisely because the few known cases of exploitation are concentrated in few countries and not well-publicised, the G77 has used the only means available to it, diplomatic forums, to record an alternative practice, namely that the continued exploitation of marine genetic resources in areas beyond national jurisdiction is, under the current circumstances, inconsistent with international law.[36] The forums in which this has taken place has been mainly the General Assembly and its subsidiary bodies including the UN Open-ended Informal Consultative Process on Oceans and the Law of the Sea (hereinafter the "Informal Consultative Process") and the UN Ad Hoc Informal Working Group to Study Issues Relating to the Conservation and Sustainable Use of Marine Biological Diversity Beyond Areas of National Jurisdiction (hereinafter the "ad hoc Working Group"). However, the contestation has not been limited to the General Assembly and it has spilled over into other forums including forums of the Convention on Biological Diversity and the preparations for the Rio plus 20 World Summit on Sustainable Development.

[35] See the top ten list in the previous footnote.

[36] See, e.g., Statement on behalf of the G77 and China by Minister Holger Martisen, Permanent Mission of Argentina to the United Nations, to the UN Informal Consultative Process on Oceans and the Law of the Sea, New York, 20 June 2011.

The statements of the G77 have been fairly consistent in their approach to marine genetic resources in areas beyond national jurisdiction question in the General Assembly, in particular in the Informal Consultative Process and the ad hoc Working Group.[37] Needless to say, the few States supporting the freedom of the high seas as the applicable legal regime have also spoken to ensure that their narrative is reflected in the diplomatic forums. The various reports of the Co-Chairs of the ad hoc Working Group, for example, consistently reflect the divergence of views of States.[38]

The primary purpose of the G77 and China consistently raising this issue is precisely to spotlight the divergence of views in order to prevent the establishment of a practice that might be construed as establishing the agreement of the parties to the interpretation of the Law of the Sea Convention under Article 31(3)(b) of the Vienna Convention.

However, the G77 and China's insistence on highlighting the issue is not just for defensive purposes i.e. to prevent the entrenchment of an

[37] See, e.g., Statement on behalf of the G77 and China by Minister Holger Martisen, Permanent Mission of Argentina, during the Informal Consultative Process on Oceans and the Law of the Sea, 20 June 2011, New York (hereinafter "G77, ICP, 2011"); Statement on behalf of the G77 and China by Fernanda Millicay, Counsellor, Permanent Mission of Argentina to the United Nations, on the Fourth Agenda Item during the Ad Hoc Working Group on Marine Biodiversity in Areas Beyond National Jurisdiction, 1 June 2011, New York (hereinafter "G77, ABNJ2, 2011); Statement on behalf of the G77 and China by Minister Diego Limeres, Deputy Permanent Representative of the Mission of Argentina, during the Ad Hoc Working Group on Marine Biodiversity in Areas Beyond National Jurisdiction, 31 May 2011, New York (hereinafter "G77, ABNJ, 2011"). See also South African Statement on Behalf of the G77 and China during the Informal Consultative Process on Oceans and the Law, 15 June 2006, New York G77, ICP, 2006).

[38] See, e.g. para 14 of Recommendations of the Ad Hoc Working Group on Marine Biodiversity in Areas Beyond National Jurisdiction to the General Assembly and the Co-Chair's Summary of the Discussions of the Meeting held from 7 to 11 May 2012 (A/67/50); para 15 of the Recommendations of the Ad Hoc Working Group on Marine Biological Diversity in Areas Beyond National Jurisdiction to the General Assembly and the Co-Chair's Summary of the Discussions of the Meeting held from 31 may to 3 June 2011. See also para 71 and 72 of the Recommendations of the Ad Hoc Working Group to the General Assembly on Marine Biodiversity in Areas Beyond National Jurisdiction and the Co-Chair's Summary of the Discussions of the Meeting held from 1 to 5 February 2010 (A/65/68); para 36 of the Joint Statement of the Co-Chairpersons of the Ad Hoc Working Group on Marine Biodiversity in Areas Beyond National Jurisdiction, 28 April to 5 Ma7 2008 (A/63/79). See also paragraph 39 and 30 of the Co-Chairperson's Summary of Discussions of the Ad Hoc Working Group on Marine Biodiversity in Areas Beyond National Jurisdiction, 13 to 17 February 2006 (A/61/65).

alternative interpretation of the law. The insistence is also very much designed to advance a particular vision of the state of the law. Several statements of the G77 invoke other principles and sources of law which, the G77 argues, support the application of the common heritage of mankind principle to marine genetic resources on the deep seabed. The statement by Argentina, on behalf of the G77 and China, during the 2011 ad hoc Working Group is an apt example. The representative of Argentina said, and I quote:

> As established in General Assembly resolution 2749(XXV), *which is part of customary international law*, activities in the area "seabed and ocean-floor, and the subsoil thereof, beyond the limits of national jurisdiction" shall be carried out for benefit of mankind as a whole.[39]

Unquote

The invocation of GA Resolution 2749(XXV) has several implications. First, the resolution, and in particular, the voting pattern, itself reflects state practice to be taken into account in the interpretation of the Convention – the resolution was adopted by consensus, with 108 votes in favour, 14 abstentions and none against.[40] Second, if, as is suggested in the statement by Argentina, the resolution embodies customary international law, it should, in accordance with Article 31(3)(c) of the Vienna Convention, be used as a tool to interpret the Law of the Sea Convention. Moreover, beyond serving as an interpretative tool, if

[39] See G77 ABNJ 2011 (above) n 50 (emphasis added). See also G77 ABNJ2 2011 (above) n 50.
[40] On the voting record see para 230 of the Per Verbatim Records of the 1933rd Meeting of the General Assembly, 17 December 1970 (A/PV.1933)

GA Resolution 2749(XXV) is customary international law then it continues to apply and coexists with the Convention i.e. it has binding force independent of and even beyond the Convention.[41] Therefore, to the extent that the Convention is silent on the legal regime applicable to marine genetic resources on the deep seabed, then these would be covered by the existing customary international law which, as the argument goes, establishes the common heritage of mankind as the appropriate legal regime.

State practice in this area serves yet another function in addition to defining the current state of law. If there is, in fact, a governance gap not filled either by customary international law or the Convention, state practice can contribute to filling such a gap. The obvious way that this can occur is through the formation of a new norm of customary international law. However, given the contestations and the strongly held conflicting views of states the development of a *new* norm of customary international law is unlikely to emerge from practice in this area.[42] Nonetheless, the practice of States, even if not lacking in the necessary consistency and uniformity to form the basis of a norm of customary international law, can be used by states in support of particular positions during negotiations of new treaties.[43]

I turn now to Practice in Relation to Conservation and Preservation of the Marine Biodiversity

[41] See para 175 of the *Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v United States)* 1986 *ICJ Reports* 14.
[42] *Cf. Asylum Case (Colombia v Peru)* 1950 ICJ Reports 266 at 277
[43] See Tladi (above) n 43.

As mentioned above, the contestation in relation to the conservation and preservation issue has not been so much about what the content of the law is. The content and limits of the law are clear (more or less). The practice of States (and other actors),[44] in this area, has been aimed at two objectives. [45] First, the practice has focused on pushing the boundaries of the current law in order to create innovative applications of the Convention. Second, the practice has been aimed at producing an impetus for establishing new norms, preferably through the adoption of a new instrument. By and large, the charge for more effective conservation and preservation norms has been led by the EU.[46]

The precautionary principle provides an illustration of how practice, in its different incarnations, has contributed to developing conservation and preservation norms in the law of the sea. While the status of the precautionary principle under general international law remains in doubt, [47] it is clear that the Convention on the Law of the Sea does not make provision for a precautionary approach to conservation. Nonetheless, it would be hard to deny that, as a result of practice, precaution is part of the fabric of the law of the sea. Precaution is reflected, first and foremost, in the Fish Stocks Agreement – an implementing agreement

[44] While the focus of this paper is on state practice, non-state actors, especially Non Governmental Organisations, have played a significant role in the development of law in this area. On the influence of non-state actors on international (environmental) law see Thilo Marauahn "The Changing Role of the State" in Daniel Bodansky, Jutta Brunnée and Ellen Hey (Eds.) *The Oxford Handbook of International Environmental Law* (2007) and Peter J Spiro "Non-Governmental Organisations and Civil Societies" in Daniel Bodansky, Jutta Brunnée and Ellen Hey (Eds.) *The Oxford Handbook of International Environmental Law* (2007).

[45] For a detailed discussion of some of the initiatives discussed in this section see Gjerde and Rulska-Domino (above) n 1 and Tladi (above) n 1.

[46] See, e.g. EU Presidency intervention during the discussion of agenda 5 in the ad hoc Working Group on 28 April 2008 (on file with the author). See also EU Presidency Statement on the role of Area-Based Management Tools during the ad Hoc Working Group meeting on 29 April 2008.

[47] *Cf.* See judgement of the Court in *The Case Concerning Pulp Mills on the River Uruguay (Argentina v Uruguay),* ICJ Judgement of 20 April 2010. See especially the separate opinion Judge Cançado Trindade.

under the Law of the Sea Convention.[48] The precautionary principle, as reflected in the Fish Stocks Agreement, is generally accepted by States Parties and indeed non-States Parties as being part of the law of the sea and the practice of States implementing the Fish Stocks Agreement, invoking the precautionary approach in negotiations and supporting annual General Assembly resolutions on oceans and the law of the sea which consistently includes precaution, amounts to subsequent practice within the meaning of Article 31(3)(b) of the Vienna Convention.[49]

Developments in the area of bottom fishing provide yet another illustration of how practice has contributed to the evolution of the law of the sea in relation to marine biodiversity in areas beyond national jurisdiction. One of the most serious concerns for the state of the marine environment has been the enhancement in fishing technologies and the damage they can cause to the marine environment, in particular sensitive marine habitats. Concerned about the impact of bottom fishing, several States, in particular the small island States and some European States, pushed for regulation of bottom fishing. You should be aware that there is nothing in the Law of the Sea Convention or the Fish Stocks Agreement that places qualitative restrictions on fishing practices of states. However, through General Assembly resolutions, States have produced a catalogue of practice that could contribute towards the development of norms relating to the protection of vulnerable ecosystems from destructive fishing practices. [50] In 2004, in the omnibus resolution on oceans and the law of the sea, the General

[48] See Articles 5 and 6 of the 1995 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.

[49] See para 135, 156 and 173 of the GA Resolution on Oceans and the Law of the Sea A/Res/66/231; para 151 and 173 of the General Assembly Resolution on Oceans and the Law of the Sea A/Res/65/37 and para 133 and 150 of GA Resolution on Oceans and the Law of the Sea A/Res/64/71.

[50] See Tladi (above) n 1 at 108.

Assembly called on States "to urgently consider ways to integrate and improve … in accordance with the Convention …the management of risks to the marine biodiversity of seamounts, cold water corals, hydrothermal vents and certain other features."[51]

The efforts to deal with destructive fishing practices resulted in the adoption by the General Assembly of measures to combat destructive fishing practices in a 2006 resolution on fisheries.[52] First, the resolution called upon States "to take action immediately" to protect "vulnerable marine ecosystems, including seamounts, hydrothermal vents and cold water corals, from destructive fishing practices".[53] Additionally, and more importantly, the resolution called upon States to conduct environmental assessments of the impact that bottom fishing would have on vulnerable ecosystems before authorising bottom fishing and to prohibit vessels flying their flags from engaging in bottom fishing in areas having vulnerable marine ecosystems "unless conservation and management measures have been established to prevent significant adverse impacts."[54]

While the General Assembly reviews of the measures referred to above concluded that the measures had "not been fully implemented in all cases",[55] the adoption of such measures and the willingness of States to subject themselves to a review is a practice that cannot be ignored in the determination and interpretation of legal norms under the Convention

[51] Para 68 of General Assembly Resolution on Oceans and the Law of the Sea A/Res/59/24 (adopted by 141 votes in favour, one vote against and 17 abstentions).
[52] See Paras 80-93 of the General Assembly Resolution on Sustainable Fisheries, Including through the 1995 Fish Stocks Agreement and Related Instruments A/Res/61/105 (adopted by consensus).
[53] *Id.* at para 80.
[54] *Id.* at para 83.
[55] See, e.g. para 129 of the General Assembly Resolution on Sustainable Fisheries, Including through the 1995 Fish Stocks Agreement and Related Instruments A/Res/66/88 (adopted by consensus).

and international law. Indeed General Assembly Resolution 66/88, reviewing the implementation of the measures, calls for added effort in implementing those measures, including by closing areas to bottom fishing as necessary.[56] These resolutions and the support they garnered from states, constitute state practice. They form an important part of the law of the sea and contribute to the interpretation of the environmental norms in the Convention and related instruments. Moreover, these resolutions seem to contract the boundaries of the freedom of the high seas by potentially creating restrictions on the freedom to fish in a manner not contemplated by the Convention.

Efforts at advancing the cause of conservation and preservation and, as a consequence, eroding freedom of the high seas have perhaps been most evident in the practice of States relating to marine protected areas.[57] Marine protected areas in areas beyond national jurisdiction are fully consistent with the Convention on the Law of the Sea and can be seen as joint measures for the protection of the environment under, *inter alia,* Articles 194 and 197 of the Convention. However, flowing from the freedom of the high seas, the rules arising from the establishment of any marine protected area will only be binding on the States that established the marine protected area and the vessels flying their flags.[58] Some States, groups of States and other actors have sought to go around the freedom of the high seas by seeking international legitimacy for marine protected areas with a view to creating political pressure, if not a legal obligation, on third States to respect the rules of the relevant marine protected areas.

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[56] *Id.* at para 131.

[57] Marine protected areas can be loosely defined as marine area which has been reserved by law or other means for the purposes of conserving and protecting the environment therein.

[58] See generally P Dee Boersma and Julia K Parrish "Limiting Abuse: Marine Protected Areas, A Limited Solution" (1999) 31 *Ecological Economics* 287 at 289.

The principal way in which the marine protected areas agenda has been advanced is through inclusion of language in the General Assembly's annual oceans resolution. The World Summit on Sustainable Development's Plan of Implementation had, already in 2002, committed States to "promote the conservation and management of oceans" including by taking action to develop and "facilitate the use of diverse approaches and tools, including the ecosystem approach" and "the establishment of marine protected areas consistent with international law and based on scientific information, including a representative network by 2012".[59] The EU has relied on this language to ensure that the General Assembly resolutions on oceans consistently encourage the establishment of marine protected areas. The General Assembly, for example, has consistently called on States to "strengthen, in a manner consistent with international law, in particular the Convention, the conservation and management of marine biodiversity and ecosystems and national policies in relation to marine protected areas".[60] Similarly, the General Assembly has been consistent in reaffirming the need for States to "develop and facilitate the use of diverse approaches and tools for conserving and managing vulnerable marine ecosystems, including through the possible establishment of marine protected areas, consistent with international law as reflected in the Convention".[61] The General Assembly also perennially encourages States to make progress "towards the 2012 target for the establishment of marine protected

[59] Paragraph 32(c) of the 2002 Johannesburg Plan of Implementation if the World Summit on Summit on Sustainable Development.

[60] See, e.g. para 175 of A/Res/66/231; para 176 of A/Res/65/37 and para 152 of A/Res/64/71.

[61] See, e.g. para 176 of A/Res/66/231; para 177 of A/Res/65/37 and para 153 of A/Res/64/71. See also para 177 of A/Res/66/231 which recognises the work of the Biological Diversity Convention to develop criteria for the identification of "marine areas that require protection" in the light of objectives of the World Summit of Sustainable Development to "use diverse approaches and tools, such ecosystem approaches and the establishment of marine protected areas".

areas, including a representative network …".[62] While the language in the General Assembly resolutions has gone some way to mainstreaming marine protected areas, States concerned about the emergence of a legal obligation to respect marine protected established by third states have consistently ensured that references to marine protected areas are qualified by "consistent with international law, as reflected in the Convention". The effect of this qualifier is that the General Assembly's calls for marine protected areas have to be interpreted in the light of the principles of the Convention and international law, including the freedom of the high seas, which would insulate those not party to the establishment of the marine protected area from the obligation to respect any such marine protected area.

A second approach to obtaining international legitimacy for marine protected areas has been initiatives to obtain recognition of individual marine protected areas. The best example, although thus far unsuccessful, has been the Oslo Paris Convention (hereinafter "OSPAR").[63] In 2010 OSPAR established several marine protected areas beyond national jurisdiction in the North-East Atlantic Ocean.[64] During the negotiations for the 2010 and 2011 oceans resolutions respectively, Norway supported strongly by the EU, proposed language that would welcome the establishment of these marine protected areas. The language was rejected by some States precisely because of the fear that this could legitimise the marine protected areas established by

[62] See para 178 of A/Res/66/231; para 179 of A/Res/65/37 and para 155 of A/Res/64/71.

[63] 1992 Convention for the Protection of the Marine Environment of the North-East Atlantic. The parties to OSPAR are fifteen European states and the EU.

[64] See OSPAR Commission *2010 Status Report on the OSPAR Network of Marine Protected Areas* (2011) at 21. The marine protected areas established by OSPAR are: Charlie-Gibbs South Marine Protected Area, Milne Seamount Complex Marine Protected Area, Mid-Atlantic Ridge north of the Azores High Seas Marine Protected Area, Altair Seamount High Seas Marine Protected Area and Josephine Seamount Complex High Seas Marine Protected Area.

OSPAR and create an expectation that these marine protected areas and the rules flowing from them would be binding on all.

Another initiative designed to create legitimacy for a specific area of protection is the Sargasso Sea Alliance.[65] The initiative aims at the establishment of marine protected areas both within national jurisdiction (of Bermuda) and beyond national jurisdiction. The approach of the initiative is to use existing sectoral mechanisms to garner the required legitimacy and compliance with the marine protected area regime. If, for example, the Sargasso Sea Alliance could obtain the cooperation of the International Seabed Authority to close off mining in the relevant marine protected area, the International Maritime Organisation to identify the Sargasso Sea as Particularly Sensitive Sea Area with consequent restrictions on shipping activities in the area while also working with the relevant regional fisheries management organisations, the Sargasso Alliance would have a marine protected area which all members of the respective sectoral organisations would be obliged to respect.[66] The Sargasso Sea initiative is in its infant stages and only time will tell whether it will be successful and whether its successes could be duplicated elsewhere. But it does reflect an important example of how the boundaries of the law of the sea in relation to marine protected areas have been pushed through State practice.

All these initiatives, however, are short-term measures. The practices described above, while serving to push the boundaries of what is possible under the current law, are also aimed at establishing legitimacy

[65] See for further information on the Sargasso Sea Alliance the website of the initiative at www.sargassoalliance.org (last accessed 15 June 2012).

[66] For a comprehensive discussion of the said mechanisms see Gjerde and Rulska-Domino (above) n 1 at 358 *et seq.*

for the conservation and perseveration measures yet to be put in place. The ultimate objective of these measures would be the conclusion of a legally binding (and implemented) instrument which establishes a global process for the establishment of marine protected areas along with other conservation measures. It is here that the contestation of the legal regime for marine genetic resources intersects with the contestation for the conservation and preservation issue.

4. The Quest for an Implementing Agreement

There is a functional and a normative relationship between the marine genetic resources question and the conservation. The normative question is succinctly captured in 2010 statement of South Africa. In that statement, the representative of SA said:

"the common heritage of mankind principle is not solely about benefit sharing. [It] is just as much about conservation and preservation. The principle is about solidarity. Solidarity in the perseveration and conservation of a good we all share and therefore should protect. But also solidarity in ensuring that this good, which we all share, is for all our benefit."

The functional relationship, more relevant as an illustration of practice in the development of the law, arose from the important, if tenuous, relationship between the G77 and the EU.

The discussions on the governance of areas beyond national jurisdiction have been dominated by the contestations over conservation and

preservation measures in areas beyond national jurisdiction on the one hand and the question of the legal regime applicable to marine genetic resources in areas beyond national jurisdiction, on the other hand. The former has been championed by the EU while the latter has been championed by the G77 and China. With the G77 and China insisting that progress on the conservation and preservation issues would depend on the progress on the marine genetic resources question, the discussions appeared to be headed for a terminal impasse.

*The impasse is reflected in the constant restatement of both debates in the reports of the ad hoc Working Group.[67] The most recent report of the ad hoc Working Group is illustrative of the impasse.[68] On the area based-management tools, including marine protected areas, the report begins by stating that the "the importance of area-based management tools" was noted and that the view was expressed that marine protected areas "should be established".[69] The report also refers to the suggestion by some delegations to consider a process for the identification of marine protected areas in areas beyond national jurisdiction.[70] At the same time, however, the report refers to the position of some delegations that there was no multilaterally agreed legal regime for marine protected areas in areas beyond national jurisdiction and that the establishment of marine protected areas unilaterally or by a group of

[67] The marine genetic resources debate, for example, is reflected in paras 71 and 72 of Recommendations and Co-Chairs Summary of the ad hoc Working Group meeting of 2010 (above) n 51; paras 15, 16 and 17 of the Recommendations and Co-Chairs Summary of the ad Working Group meeting of 2011 (above) n 51; paras 36 and 37 of the Recommendations and Co-Chairs Summary ad hoc Working Group meeting of the 2008; The debate over conservation tools is reflected in, for example, paras 64,65,66 and 67 of the Recommendations and Co-Chairs Summary of the ad hoc Working Group meeting of 2010 (above) n 51; paras 26 and 27 of the Recommendations and Co-Chairs Summary of the Working Group meeting of 2008.

[68] Recommendations of the Ad Hoc Working on Marine Biodiversity in Areas Beyond National Jurisdiction to the General Assembly and Co-Chair's Summary of the Discussions of the Meeting held from 7 to 11 May 2012 (advance, unedited version, on file).

[69] *Id.* at para 19.

[70] *Id.* at para 21

States raised questions of the legitimacy of such marine protected areas.[71] Similarly divergent views on the legal regime applicable to marine genetic resources are reflected in the report.[72] The result of the impasse has been that the General Assembly has been able only to request States to consider the two issues in the context of the mandate of the ad hoc Working Group without providing any guidance on the direction that should be followed.[73]*

The dynamics changed in the ad hoc Working Group meeting of 2011 when the EU and the G77 joined forces in calling for an implementing agreement to address these contested issues. The alliance was a tenuous one mainly because it was built not on substance but on process. However, it did serve the important function of isolating the seven States – United States, Russia, Iceland, Norway, Canada and Japan – as the only States not willing to consider the elaboration of binding instrument to clarify and further develop the governance and legal principles applicable to marine biodiversity in areas beyond national jurisdiction.

The EU had, even before 2011, supported the idea of a new binding instrument to "further specify and implement" the provisions of the Convention on the Law of the Sea, in particular as it relates to conservation measures.[74] The G77, on the other hand was not fully in

[71] *Ibid.*
[72] *Id.* at paras, 14, 15 and 16.
[73] See, e.g. para 142 of A/Res/64/71 which calls for states to "further consider" the issue of "the relevant legal regime on marine genetic resources in areas beyond national jurisdiction". In para 148 of the A/Res/64/71 the General Assembly invites states "to further consider" the issue of "marine protected areas". See also para 91 of A/Res/61/222.
[74] See, e.g., para 12 of the EU Presidency intervention during the discussion of agenda 5 in the ad hoc Working Group on 28 April 2008 (on file with the author). See especially the EU Presidency Statement on the role of Area-Based Management Tools during the ad Hoc Working Group meeting on 29 April 2008 in which the EU argues that there is "a need for a global regime in this regard"

support of the idea of an implementing agreement. South Africa was the main driver within the G77 to call for an implementing agreement.[75] However, in the ad hoc Working Group meeting of 2011 the G77 agreed to support the call for an implementing agreement. With the G77 and China and the EU, with cautious support from States like Australia, Mexico and New Zealand, calling for an implementing agreement the seven objecting countries were forced to agree to initiate a process that *could* lead to the development of a binding instrument. The ad hoc Working Group recommended that

> A process be initiated, by the General Assembly, with a view to ensuring that the legal framework for the conservation and sustainable use of marine biodiversity in areas beyond national jurisdiction effectively addresses those issues by identifying gaps and ways forward, including through the implementation of existing instruments and the possible development of a multilateral agreement under the United Nations Convention on the Law of the Sea.[76]

The ad hoc Working Group further recommended that the process should address, inter alia, "marine genetic resources, including the question of sharing benefits, measures such as area-based management tools, including marine protected areas …" [77] This recommendation was taken up by the General Assembly which decided to initiate the process as recommended by the ad hoc Working Group

[75] See, statement of South Africa to the UN general Assembly on Oceans and the Law of the Sea, 4 December 2009. See also statement of South Africa during the ad hoc Working Group, 2 February 2010 (both on file with the author)
[76] Para 1 of the Recommendations and Co-Chairs Summary of the ad Working Group meeting of 2011 (above) n 51.
[77] *Ibid.*

i.e. a process that could lead to the elaboration of an implementing agreement.[78]

While the G77 and China and EU had hoped also to pursue the implementing agreement through the Rio plus 20 process,[79] Venezuela, due to its opposition to the Law of the Sea Convention, blocked a G77 position on the implementing agreement. In response, South Africa organised a group of like-minded countries which, supported by the EU, called for an implementing agreement. At the Rio plus 20 conference, world leaders took note of the work of work of the ad hoc Working Group and committed themselves to "address, on an urgent basis [and before the end of the 69th session of the General Assembly], the issue of the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction including by taking a decision on the international instrument under" the Law of the Sea Convention.[80]

This paragraph does not, in and of itself, create a mandate for the elaboration of an instrument. But what it does do is to endorse the process initiated by the General Assembly under the ad hoc Working Group and in this way contributes to the impetus to elaborate an instrument to address gaps in the conservation and sustainable use of marine biodiversity. The agreement reached in Rio is important also because it sets out that a decision on how to proceed should be made at the end of the 69th session – roughly in Northern summer of 2015. Within this period, state practice will play a crucial role in determining

[78] Para 167 of General Assembly resolution A/Res/66/231.

[79] The first draft of the Rio plus 20 outcome text included a paragraph, proposed by G77 and China and supported by the EU, going beyond paragraph 167 of A/Res/66/231 by actually committing to initiating a process "towards negotiation of an implementing agreement to" the Convention on the Law of the Sea. See para. 80 of the chair's zero draft of the Rio plus 20 Outcome Document (on file with author).

[80] Para 162 of the United Nations Conference on Sustainable Development Outcome Document, the Future We Want, A/Res/66/288 (Annex).

whether an implementing agreement should be elaborated and, if so, what the content of such an agreement should be.

IN CONCLUSION

The role and impact of state practice on the evolution of the law relating to marine areas beyond national jurisdiction has been varied. In the first place, state practice has been an interpretative tool used by States to advance their own positions about the content of existing rules. In the second place, through practice, States have sought to influence the development of new norms. While, due in large part to the strongly held contradictory positions, it is not possible to argue that state practice has resulted in an objectively accepted interpretation of existing international the practice of States has not been without effect.

The positions adopted by States have served, first and foremost, a defensive purpose preventing a particular interpretation from becoming authoritative or preventing the evolution of new norms in some instances. Thus, without the constant restatement of positions by the United States, Russia and others, it is conceivable that the notion that marine genetic resources on the deep seabed are governed by the common heritage of mankind could have taken hold. The reverse is true, i.e. but for the constant restatement of the G77 position, it is conceivable that the idea that marine genetic resources are governed by freedom of the high seas may have come to be accepted. Similarly, but for the restatement of positions by some delegations with respect to marine protected areas, the idea that a marine protected area established by a group of States in the high seas has to be respected by all States may have come to be accepted.

Practice, however, has led to the development of new rules, norms and standards in some very limited cases including the entrenchment of the precautionary principle as an important element of the law of the sea.

Finally the milestone achievement of initiating a process that *could* lead to an implementing agreement to regulate more equitably and sustainably marine areas beyond national jurisdiction was achieved through the continuous and collective efforts of States. As States embark upon what is likely to be a marathon process towards a possible implementing agreement, the practice of States will continue to be important, not only in determining whether an implementing agreement will be elaborated and adopted but also in defining the content of the norms in any such agreement.