

**DEFINING TERMS IN THE 1982 LAW OF THE SEA  
CONVENTION IV: THE LAST ROUND OF DEFINITIONS  
PROPOSED BY THE INTERNATIONAL LAW ASSOCIATION  
(AMERICAN BRANCH) LAW OF THE SEA COMMITTEE**

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**TABLE OF CONTENTS**

|      |  |     |
|------|--|-----|
| I.   | THE ABILA LOS COMMITTEE PROJECT.....   | 139 |
| II.  | THE ROLE AND RELATIONSHIP OF UNDERSTANDINGS,<br>DECLARATIONS, AND STATEMENTS APPENDED TO UNCLOS<br>AND THE ABILA LOS COMMITTEE DEFINITIONS PROJECT ..... | 143 |
| III. | ADDITIONAL PROPOSED DEFINITIONS FOR THE 1982 LAW OF THE<br>SEA CONVENTION .....  | 151 |
|      | A. “Appropriate international organization” or<br>“appropriate international organizations” .....  | 151 |
|      | 1. Discussion and analysis .....   | 151 |
|      | 2. Comments.....   | 153 |
|      | 3. Conclusions .....   | 153 |
|      | B. “Associated” or “dependent” species .....   | 156 |

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|  |     |
|--|-----|
| 1. Discussion and analysis .....   | 156 |
| 2. Comments.....   | 157 |
| 3. Conclusions .....   | 157 |
| C. “Competent international organization” or “competent international organizations” ..... | 158 |
| 1. Discussion and analysis .....   | 158 |
| 2. Comments.....   | 167 |
| 3. Conclusions .....   | 167 |
| D. “Due regard” .....  | 168 |
| 1. Discussion and analysis .....   | 168 |
| 2. Comments.....   | 174 |
| 3. Conclusions .....   | 174 |
| E. “Maximum sustainable yield” .....   | 177 |
| 1. Discussion and analysis .....   | 177 |
| 2. Comments.....   | 178 |
| 3. Conclusions .....   | 178 |
| F. “Optimum utilization” .....   | 179 |
| 1. Discussion and analysis .....   | 179 |
| 2. Comments.....   | 180 |
| 3. Conclusions .....   | 180 |
| G. “Regional” or “subregional” organization .....  | 180 |
| 1. Discussion and analysis .....   | 180 |
| 2. Comments.....   | 182 |
| 3. Conclusions .....   | 182 |
| IV. CONCLUSIONS.....   | 182 |

In a panel discussion at the 2004 annual meeting, the International Law Association (American Branch)<sup>1</sup> Law of the Sea Committee considered a handful of terms in the 1982 Law of the Sea Convention and its 1994 amending Agreement<sup>2</sup> for which the Convention does not

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1. Hereinafter ABILA. The ABILA Law of the Sea Committee is referred to hereinafter as the LOS Committee or the Committee.

2. United Nations Convention on the Law of the Sea, Dec. 10, 1982, 1833 U.N.T.S. 3 [hereinafter UNCLOS]; Agreement Relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982, July 28, 1994, (amending UNCLOS) [hereinafter 1994 Agreement]. See generally R.R. CHURCHILL & A.V. LOWE, THE LAW OF THE SEA 17-20 (3d ed. 1999) (discussing UNCLOS negotiations); 1 UNITED NATIONS CONVENTION ON THE LAW OF THE SEA 1982: A COMMENTARY 113-34 (Myron H. Nordquist ed., 1985) [hereinafter 1 COMMENTARY] (same). To date the U.N. law of the sea “package” is completed by the 1994 Agreement and the 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 & Highly Migratory Fish Stocks, Dec. 4, 1995, S. TREATY DOC. NO. 104-24, 2167 U.N.T.S. 3 [hereinafter

supply definitions. What may be the end of this project will come when the United States, which has not ratified or acceded to the Convention,<sup>3</sup> has the Convention and the Agreement on the U.S. Senate floor for advice and consent<sup>4</sup> after the Senate Foreign Relations Committee has favorably endorsed the agreements.<sup>5</sup> Although the Senate Foreign Relations Committee gave its endorsement during the 108th Congress,<sup>6</sup> pursuant to Senate rules, the Convention and Agreement returned to the Foreign Relations Committee at the end of the last Congressional session.<sup>7</sup> When they will be reported out again is less than clear.

In recommending Senate advice and consent, the Foreign Relations Committee appended over 25 understandings,<sup>8</sup> statements,

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Straddling Stocks Convention]. CHURCHILL & LOWE, *supra*, 19-22 (discussing the 1994 Agreement and Straddling Stocks Convention negotiations); S. TREATY DOC. NO. 104-24, at v-xvi (1998) (discussing the Straddling Stocks Convention).

3. See 2 UNITED NATIONS, MULTILATERAL TREATIES DEPOSITED WITH THE SECRETARY-GENERAL: STATUS AS AT 31 DECEMBER 2004 284-86, U.N. Doc. ST/LEG/SER.E/23, U.N. Sales No. E.05.V.3 (2005) [hereinafter 2 MULTILATERAL TREATIES]. As of Dec. 31, 2004, 147 States were parties to UNCLOS, 119 States were parties to the 1994 Agreement, and 52 States were parties to the Straddling Stocks Convention. *Id.* at 284, 322, 326.

4. *Cf.* U.S. CONST. art. II, § 2, cl. 2.

5. STANDING RULES OF THE SENATE, S. DOC. NO. 106-15, at Rule 30(1) (2000).

6. RICHARD LUGAR, UNITED NATIONS CONVENTION ON THE LAW OF THE SEA, S. EXEC. REP. NO. 108-10 at 1 (2004) [hereinafter S. EXEC. REP. NO. 108-10].

7. S. DOC. NO. 106-15, at Rule 30(2).

8. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 313 cmt. g (1987) [hereinafter RESTATEMENT] defines understandings as follows:

When signing or adhering to an international agreement, a state may make a unilateral declaration that does not purport to be a reservation. Whatever it is called, it constitutes a reservation in fact if it purports to exclude, limit, or modify [a] state's legal obligation. Sometimes . . . a declaration purports to be an "understanding," an interpretation of the agreement in a particular respect. Such an interpretive declaration is not a reservation if it reflects the accepted view of the agreement. But another contracting party may challenge the expressed understanding, treating it as a reservation which it is not prepared to accept.

*Id.* Whiteman's *Digest* defines understandings, declarations and statements:

"[U]nderstanding" is often used to designate a statement when it is not intended to modify or limit any of the provisions of the treaty in its international operation but is intended merely to clarify or explain or to deal with some other matter incidental to the operation of the treaty in a manner other than as a substantive reservation. Sometimes an understanding is no more than a statement of policies or principles or perhaps an indication of internal procedures for carrying out provisions of the treaty.

. . . "[D]eclaration" and "statement" are used most often when it is considered essential or desirable to give notice of certain matters of policy or principle, without an intention of derogating from the substantive rights or obligations stipulated in a treaty.

14 MARJORIE M. WHITEMAN, DIGEST OF INTERNATIONAL LAW § 17 (1970); *see also id.* § 21; ANTHONY AUST, MODERN TREATY LAW AND PRACTICE 101-02 (2000); 5 GREEN HAYWORD HACKWORTH, DIGEST OF INTERNATIONAL LAW § 479 (1943) (quoting *Draft Convention on the*

and conditions for the Convention and the 1994 Agreement.<sup>9</sup> The treaty is a “package deal” that only allows reservations when the

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*Law of Treaties, with Comment*, 29 AM. J. INT’L L. 663, 843 (Supp. 1935); FRANK HORN, RESERVATIONS AND INTERPRETATIVE DECLARATIONS TO MULTILATERAL TREATIES § 25.2 (1988); 2 CHARLES CHENEY HYDE, INTERNATIONAL LAW: CHIEFLY AS INTERPRETED AND APPLIED BY THE UNITED STATES § 519, at 1436 (2d ed. 1945); 1 OPPENHEIM’S INTERNATIONAL LAW, pt. 2, § 614, at 1241-43 (Robert Jennings & Arthur Watts eds., 9th ed. 1996); IAN SINCLAIR, THE VIENNA CONVENTION ON THE LAW OF TREATIES 52-54 (2d ed. 1984).

Before the Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331 [hereinafter Vienna Convention], an “impressive number” of writers had said that interpretative declarations, *i.e.*, understandings, or interpretive declarations in RESTATEMENT, *supra* § 313 cmt. g parlance, must be assimilated to reservations. HORN, *supra*, § 24.1, at 230. McNair’s *The Law of Treaties* did not examine understandings, declarations or statements, except in contexts of their amounting to international agreements or as options to a treaty. ARNOLD D. MCNAIR, THE LAW OF TREATIES 32 (2d ed. 1961). *See generally id.* at 7-15. Horn refers to unilateral declarations, statements or understandings as “interpretative declarations.” HORN, *supra*, §§ 24-27. The International Law Commission multilateral treaties project defines interpretative declarations:

“Interpretative declaration” means a unilateral statement, however phrased or named, made by a State or by an international organization whereby that State or that organization purports to specify or clarify the meaning or scope attributed by the declarant to a treaty or to certain of its provisions. . . . The character of a unilateral statement as a reservation or an interpretative declaration is determined by the legal effect it purports to produce.

Int’l Law Comm’n, *Text of Draft Guidelines on Reservations to Treaties Provisionally Adopted So Far by the Commission*, in Report of the International Law Commission: Fifty-fifth Session (5 May-6 June and 7 July-8 August 2003), at 168, U.N. Doc. A/58/10 (2003) [hereinafter 2003 ILC Rep.]. The ILC is researching the law of treaties related to multilateral reservations after receiving U.N. General Assembly endorsement for the project. *Id.* at 148 (citing G.A. Res. 48/31, U.N. Doc. A/RES/48/31 (Dec. 9, 1993); G.A. Res. 49/51, U.N. Doc. A/RES/49/51 (Dec. 9, 1994).

The RESTATEMENT discusses understandings in the U.S. practice context:

A treaty that is ratified or acceded to by the United States with a statement of understanding becomes effective in domestic law ([RESTATEMENT, *supra*] § 111) subject to that understanding. If no such statement is made, indication that the President or the Senate ascribed a particular meaning to the treaty is relevant to the interpretation of the treaty by a United States court in much the same way that the legislative history of a statute is relevant to its interpretation. *See [id.]* § 325, Reporters’ Note 5; § 326, Reporters’ Note 2.

Although the Senate’s resolution of consent may contain no statement of understanding, there may be such statements in the report of the Senate Foreign Relations Committee or in the Senate debates. In that event, the President must decide whether they represent a general understanding by the Senate and, if he finds that they do, must respect them in good faith.

RESTATEMENT, *supra*, § 314 cmt. d; *see also id.* § 303 cmt. d.

9. *Text of Resolution of Advice and Consent to Ratification*, in S. EXEC. REP. NO. 108-10, *supra* note 5, at 16-21 [hereinafter *Text*]. *See generally Summary of Key Provisions of the Convention and Implementing Agreement*, in S. EXEC. REP. NO. 108-10, *supra* note 5, at 2-6. For another analysis from the U.S. Executive perspective see United Nations Convention on the Law of the Sea, with Annexes, and the Agreement Relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea, with Annex, S. TREATY DOC. NO. 103-39 (1994) [hereinafter S. TREATY DOC. NO. 103].

Convention specifically permits them.<sup>10</sup> However, UNCLOS does allow understandings. It

does not preclude a State, when signing, ratifying or acceding to this Convention, from making declarations or statements, however phrased or named, with a view, *inter alia*, to the harmonization of its laws and regulations with the provisions of this Convention, provided that such declarations or statements do not purport to exclude or to modify the legal effect of the provisions of this Convention in their application to that State.<sup>11</sup>

The Foreign Relations Committee proposals for understandings, conditions, and declarations are subject to Senate floor action, including amendments, and perhaps recommittal to the Committee. Of course, the Senate can refuse advice and consent to the Convention with or without understandings, conditions, and declarations.

Although the U.S. Departments of State and Defense and witnesses testifying before the Foreign Relations Committee strongly endorsed the Convention,<sup>12</sup> debate over whether the United States should accede has erupted anew.<sup>13</sup> Even so, final Senate action may come in 2006. If the Senate approves the treaty and its protocol, the President is expected to exchange ratifications, after which the

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10. UNCLOS, *supra* note 2, art. 309. The Vienna Convention defines a reservation as “a unilateral statement, however phrased or named, made by a State, when signing, ratifying, accepting, approving or acceding to a treaty, whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State . . . .” Vienna Convention, *supra* note 8, art. 2(d). See also RESTATEMENT, *supra* note 8, §§ 313 cmt. a, 314 & cmts. a-c (repeating the Vienna Convention definition; defining and discussing U.S. international reservations practice); IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 584-87 (6th ed. 2003) [hereinafter BROWNLIE, PRINCIPLES]; MCNAIR, *supra* note 8, at 158-77; 1 OPPENHEIM’S INTERNATIONAL LAW, *supra* note 8, pt. 2, §§ 614-19, at 1241-48; SINCLAIR, *supra* note 8, at 51-82.

11. UNCLOS, *supra* note 2, art. 310 (referring to art. 309).

12. *Accession to the 1982 Law of the Sea Convention and Ratification of the 1994 Agreement Amending Part XI of the Law of the Sea Convention: Hearing Before S. Envtl. & Pub. Works Comm.*, 108th Cong. (2004), available at <http://www.state.gov/g/oes/rls/rm/2004/30723.htm> (statement of John F. Turner, Assistant Secretary of State for Oceans & International Environmental & Scientific Affairs) (reciting the Department’s reasons for advocating advice and consent and responding to arguments against ratification); see also S. EXEC. REP. NO. 108-10, *supra* note 5, at 23-187 (testimony); S. TREATY DOC. NO. 103-39, *supra* note 9, at v.

13. E.g., Editorial, *Bottom-of-the-Sea Treaty*, WALL ST. J., Mar. 29, 2004, at A18 (opposing advice and consent); Sen. Richard G. Lugar, Letter to the Editor, *Don’t Cut the Hawasers on Law of Sea Treaty*, WALL ST. J., Apr. 1, 2004, at A15 (Chair, U.S. Senate Foreign Relations Committee, predicting the failure of U.S. interests if UNCLOS is not ratified); Rhonda McMillion, *Troubled Waters*, A.B.A.J., June 2004, at 62 (expressing ABA support for UNCLOS); Editorial, *Rescuing the Law of the Sea*, N.Y. TIMES, Aug. 22, 2004, § 4, at 48 (advocating advice and consent).

Convention will be in force for the United States.<sup>14</sup> At that point the four 1958 law of the sea treaties,<sup>15</sup> upon which the United States has relied for nearly a half century along with customary rules,<sup>16</sup> will be superseded by UNCLOS for the United States and its UNCLOS treaty partners.<sup>17</sup>

14. Nothing requires a President to exchange ratifications after Senate advice and consent. See U.S. CONST. art. II, § 2, cl.2.

15. UNCLOS, *supra* note 2, art. 311(1). Unlike UNCLOS, the 1958 law of the sea treaties [hereinafter, collectively, 1958 LOS Conventions], which are still in force for states that are not UNCLOS parties, allow reservations to some or all of their terms. Convention on the Continental Shelf art. 12, Apr. 29, 1958, 15 U.S.T. 471, 499 U.N.T.S. 311 [hereinafter Shelf Convention] (allowing reservations at signature, ratification or accession but barring reservations to arts. 1-3); Convention on Fishing and Conservation of the Living Resources of the High Seas art. 19, Apr. 29, 1958, 17 U.S.T. 138, 559 U.N.T.S. 285 [hereinafter Fishing Convention] (allowing reservations at signature, ratification or accession but barring reservations to arts. 6-7, 9-12); Convention on the High Seas, Apr. 29, 1958, 13 U.S.T. 2312, 450 U.N.T.S. 82 [hereinafter High Seas Convention] (not excluding any articles from reservations); Convention on the Territorial Sea and the Contiguous Zone, Apr. 29, 1958, 15 U.S.T. 1606, 516 U.N.T.S. 205 [hereinafter Territorial Sea Convention] (same). See generally 2 MULTILATERAL TREATIES, *supra* note 3, at 265-82 (listing reservations, understandings, and objections to reservations to the 1958 LOS Conventions); UNITED STATES DEPARTMENT OF STATE, TREATIES IN FORCE: A LIST OF TREATIES AND OTHER INTERNATIONAL AGREEMENTS OF THE UNITED STATES IN FORCE ON JANUARY 1, 2005, at 419, 453-54 (2005) [hereinafter TIF].

16. Since 1983 the United States has recognized the navigational articles of UNCLOS as reflecting customary law. United States Oceans Policy, 19 WEEKLY COMP. PRES. DOC. 383 (Mar. 10, 1983). Commentators generally agree. RESTATEMENT, *supra* note 8, pt. V, introductory n.; *Annotated Supplement to The Commander's Handbook on the Law of Naval Operations*, 73 NAVAL WAR C. INT'L L. STUD. 1, para. 1.1 (1999) [hereinafter NWP 1-14M *Annotated*]; John Norton Moore, *Introduction*, in 1 COMMENTARY, *supra* note 3, at xxvii; Bernard H. Oxman, *International Law and Naval and Air Operations at Sea*, 64 NAVAL WAR C. INT'L L. STUD. 19, 29 (1991). But see 1 D.P. O'CONNELL, INTERNATIONAL LAW OF THE SEA 48-49 (I.A. Shearer ed., 1982) (researched through 1978, which may reflect thinking during UNCLOS's early drafting years); George K. Walker, *The Tanker War 1980-88: Law and Policy*, 74 NAVAL WAR C. INT'L L. STUD. i, 306 n.3 (2000) [hereinafter Walker, *The Tanker*].

17. UNCLOS, *supra* note 2, art. 311(1). This is consonant with the Vienna Convention. Vienna Convention, *supra* note 8, art. 59(1); see also RESTATEMENT, *supra* note 8, § 332(2); AUST, *supra* note 8, at 173-74, 181-83, 235-36; BROWNIE, PRINCIPLES, *supra* note 10, at 593; Int'l Law Comm'n, Report of the International Law Commission on the Work of the Second Part of Its Seventeenth Session (Monaco, 3-28 January 1966), U.N. Doc. A/6309/Rev. 1 (1966) [hereinafter 1966 ILC Rep.], reprinted in 2 UNITED NATIONS, Y.B. OF THE INT'L L. COMM'N at 252-53, U.N. Doc. A/CN.4/Ser.A/1966/Add. 1 (1966) [hereinafter 2 U.N., Y.B.]; MCNAIR, *supra* note 8, at 506-09; 1 OPPENHEIM'S INTERNATIONAL LAW, *supra* note 8, pt. 2, § 648, at 1299-1300; SINCLAIR, *supra* note 8, at 184; 5 UNITED NATIONS CONVENTION ON THE LAW OF THE SEA 1982: A COMMENTARY paras. 311.1-311.5, 311.11 (Shabtai Rosenne et al. eds., 1989) [hereinafter 5 COMMENTARY].

Aust and Lowe report some states' views that the 1958 LOS Conventions cannot be terminated because they lack denunciation clauses. AUST, *supra* note 8, at 234; A.V. Lowe, *The Commander's Handbook on the Law of Naval Operations and the Contemporary Law of the Sea*, 64 NAVAL WAR C. INT'L L. STUD. 109, 121 (1991) [hereinafter Lowe, *Commander's Handbook*]. But see 2 MULTILATERAL TREATIES, *supra* note 3, at 269 n.6, 278 n.3. This view

Debates over U.S. ratification, the law of treaties related to understandings, and the like apart, the LOS Committee project raises the separate issue of the relationship between commentator-developed definitions and States' declarations or understandings to the Convention. After Part I of this article discusses the Committee's methodology in deriving and refining definitions, Part II analyzes the role of definitions relative to States' declarations and understandings to the Convention. Part III publishes a final round of proposed definitions.<sup>18</sup>

## I. THE ABILA LOS COMMITTEE PROJECT

This *Journal* has previously recorded work on the ABILA LOS Committee project, as has the biennial ABILA *Proceedings*.<sup>19</sup> The definitions project began in 2001 with a September 4, 2001 *Initial*

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is largely moot as most 1958 treaty parties are UNCLOS and 1994 Agreement parties, with a major exception being the United States, and many, including the United States, are provisional parties under the 1994 Agreement. *Compare id.* at 284-86, 322-24 with TIF, *supra* note 15, at 419, 453-54 (Afghanistan, Burkina Faso, Cambodia, Central African Republic, Dominican Republic, Israel, Lesotho, Malawi, Swaziland, Thailand, and the United States are parties to one or more 1958 LOS Conventions but not UNCLOS). The 1958 LOS Conventions will remain in force for the United States and states party to them that are not UNCLOS parties. *See* 2 MULTILATERAL TREATIES, *supra* note 3, at 270 n.7, 276 n.7, 282 n.7. Commentators differ on the legal effect of a lack of a denunciation clause. *Compare* AUST, *supra* note 8, at 233-35, with RESTATEMENT, *supra* note 8, § 332(2), and BROWNLIE, PRINCIPLES, *supra* note 10, at 592-93, and MCNAIR, *supra* note 8, at 510-14, and 1 OPPENHEIM'S INTERNATIONAL LAW, *supra* note 8, pt. 2, § 647, at 1298-99, and SINCLAIR, *supra* note 8, at 186-88. The Vienna Convention does not allow denunciation unless it is established that the parties intended the possibility of denunciation or that the treaty's nature implies denunciation, and a twelve-month notice period is required in either case. Vienna Convention, *supra* note 8, art. 56. UNCLOS allows denunciation with one year's notice, but an international organization cannot denounce it if a member of the organization is a party. UNCLOS, *supra* note 2, art. 317(1); *id.* annex IX, art. 8(c)(i). *See generally* 5 COMMENTARY, *supra*, paras. 317.1-317.9, A.IX.11.

18. Part III publishes definitions and other material to which the LOS Committee has agreed as a *Tentative Draft*. Parts I and II are extracts from the 2004 *Tentative Draft*.

19. *See* George K. Walker, *Report of the Law of the Sea Committee; Defining Terms in the 1982 Law of the Sea Convention III: Analysis of Selected IHO ECDIS Glossary and Other Terms (Dec. 12, 2003 Initial Draft, Revision 1)*, 2003-04 PROC. AM. BRANCH INT'L L. ASS'N 187 [hereinafter Report, *Defining*]; George K. Walker, *Defining Terms in the 1982 Law of the Sea Convention III: The International Hydrographic Organization ECDIS Glossary*, 34 CAL. W. INT'L L.J. 211 (2004) [hereinafter Walker, *Definitions III*]; George K. Walker & John E. Noyes, *Definitions for the 1982 Law of the Sea Convention*, 32 CAL. W. INT'L L.J. 343 (2002) [hereinafter Walker & Noyes, *Definitions I*], reprinting George K. Walker, *Defining Terms in the 1982 Law of the Sea Convention (Sept. 4, 2001 Initial Draft) (Rev. 1, Jan. 22, 2002)*, 2001-02 PROC. AM. BRANCH INT'L L. ASS'N 154; George K. Walker & John E. Noyes, *Definitions for the 1982 Law of the Sea Convention – Part II*, 33 CAL. W. INT'L L.J. 191 (2003) [hereinafter Walker & Noyes, *Definitions II*].

*Draft* submitted for the 2001 annual meeting. Minor revisions were made, and *Revision 1* was published.<sup>20</sup> A further proposed revision, *Tentative Draft No. 1* (September 4, 2002, revised February 10, 2003), based on suggested revisions and updated citations, was submitted to the ABILA Law of the Sea Committee (LOS Committee, or Committee) for the 2002 annual meeting. At that meeting the Chair also presented 60 more proposed definitions, based on the *Consolidated Glossary of Technical Terms Used in the United Nations Convention on the Law of the Sea*, published by the International Hydrographic Organization (IHO) Technical Aspects of the Law of the Sea Working Group.<sup>21</sup> That analysis has been published with commentary by John E. Noyes.<sup>22</sup> In 2003, the Committee considered definitions in the IHO *Glossary of ECDIS-Related Terms*, which remains unpublished except on the IHO website; that analysis has also

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20. John E. Noyes, *Treaty Interpretation and Definitions in the Law of the Sea Convention: Comments on Defining Terms in the 1982 Law of the Sea Convention* (Sept. 4, 2001 Initial Draft) (Rev. 1, Jan. 22, 2002), 2001-02 PROC. AM. BRANCH INT'L L. ASS'N 175, reprinted in Walker & Noyes, *Definitions I*, supra note 19, at 367-83; George K. Walker, *Defining Terms in the 1982 Law of the Sea Convention* (Sept. 4, 2001 Initial Draft) (Rev. 1, Jan. 22, 2002), 2001-02 PROC. AM. BRANCH INT'L L. ASS'N 154, reprinted in Walker & Noyes, *Definitions I*, supra note 19, at 347-66.

21. Int'l Hydrographic Org. Technical Aspects of the Law of the Sea Working Group, *Consolidated Glossary of Technical Terms Used in the United Nations Convention on the Law of the Sea*, in International Hydrographic Bureau Special Publication No. 51, appendix I (1989), and United Nations Office for Ocean Affairs and the Law of the Sea, *Baselines 46-62* (1989) [hereinafter *Consolidated Glossary*], reprinted in NWP 1-14M *Annotated*, supra note 16, annex A1-5, at 51-77. The *Consolidated Glossary* has not been updated. E-mail from Steve Shipman, Professional Assistant (Hydrography), International Hydrographic Organization to George K. Walker, Professor of Law, Wake Forest University School of Law (Mar. 11, 2004) (on file with the author). The *Consolidated Glossary* was one of four sources for *Annex 1: Glossary of Technical Terms*, in CONTINENTAL SHELF LIMITS: THE SCIENTIFIC AND LEGAL INTERFACE 321-30 (Peter J. Cook & Chris M. Carleton eds., 2000) [hereinafter *Annex 1*]. Other sources for *Annex 1* were AMERICAN GEOLOGICAL INST., DICTIONARY OF GEOLOGICAL TERMS (Robert L. Bates & Julia A. Jackson, eds., 3d ed. 1984); AMERICAN GEOLOGICAL INST., GLOSSARY OF GEOLOGY (Julia A. Jackson, ed., 4th ed. 1997); ASS'N FOR GEOGRAPHIC INFORMATION & EDINBURGH UNIVERSITY, ONLINE DICTIONARY (1996, rev. 2005), at [http://www.agi.org.uk/POOLED/articles/bf\\_trainart/view.asp?Q=bf\\_trainart\\_156551](http://www.agi.org.uk/POOLED/articles/bf_trainart/view.asp?Q=bf_trainart_156551).

Since *Annex 1* represents consolidated thinking on definitions, Walker & Noyes, *Definitions II*, supra note 19, at 219-309, did not cite these publications separately. The chair thanks Professor Noyes for suggesting *Annex 1*. Insofar as can be determined, sources like Cook & Carleton's *Annex 1* do not reference the International Hydrographic Organization's *Glossary of ECDIS-Related Terms*. Int'l Hydrographic Bureau, *Glossary of ECDIS-Related Terms*, in SPECIFICATIONS FOR CHART CONTENT AND DISPLAY ASPECTS OF ECDIS, app. 3 (3d ed. Dec. 1997), at <http://www.iho.shom.fr/publicat/free/files/S52a3e3e.pdf>.

22. Walker & Noyes, *Definitions II*, supra note 19, at 219-324.



been published.<sup>23</sup> For 2004, the Committee considered terms submitted by a Committee member, and the Chair expanded research on them to include other, related terms.<sup>24</sup>

The research procedure followed by the ABILA LOS Committee began when the Chair circulated an *Initial Draft* for comment by Committee members and other interested individuals, such as other ABILA members who were not LOS Committee members but who wished to participate. Committee members then considered the *Initial Draft* and those comments at a Committee meeting during the ABILA annual meeting. When there were corrections, a revised *Initial Draft* sometimes followed. The Committee Chair then circulated a *Tentative Draft* among Committee members and other interested individuals for further comments. In general, a *Tentative Draft*, once approved by the Committee, is not subject to general discussion and wholesale revision until the end of the process unless the Committee wishes to do so for a particular term. A resulting *Final Draft*, combining the work of several years, may be published, in ILA materials, for example, for consideration by the general ILA membership and others, with an invitation to submit more comments. If, at the end of this stage, the Committee wishes to revisit and discuss a term, it will be placed on the Committee agenda for the next ABILA annual meeting, or it may be considered in correspondence. Since 2004 was the final year for considering UNCLOS terms for definition, a *Final Draft* will be circulated before the 2006 ABILA annual meeting. As with all ILA projects, the *Final Draft* will not necessarily represent any State's or international organization's practice, views, or policy unless that State or international organization chooses to adopt

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23. Report, *Defining*, *supra* note 19; Walker, *Definitions III*, *supra* note 19. Headquartered in Monaco, the International Hydrographic Organization (IHO) is organized under the Convention on the International Hydrographic Organization, May 3, 1967, 21 U.S.T. 1857, 751 U.N.T.S. 41. *See generally* CHURCHILL & LOWE, *supra* note 2, at 415-16. Its 62 member States as of January 1, 2004 include many maritime countries, e.g., the United States. TIF, *supra* note 15, at 430. Treaty succession principles for China, the former USSR and the former Yugoslavia, IHO members, may mean that even more countries are Convention parties. *Id.* at 404 & nn.1-5 (treaty succession issues for China, Federal Republic of Germany, German Democratic Republic, former USSR, former Yugoslavia; Ukraine already a party); *see also* Symposium, *State Succession in the Former Soviet Union and in Eastern Europe*, 33 VA. J. INT'L L. 253 (1993); George K. Walker, *Integration and Disintegration in Europe: Reordering the Treaty Map of the Continent*, 6 TRANSNAT'L L. 1 (1993).

24. *See* e-mail from Howard S. Schiffman, Assistant Professor of Law, New York University, to George K. Walker, Professor of Law, Wake Forest University School of Law (Nov. 11, 2003) [hereinafter Schiffman E-mail] (on file with author); *infra* Part III.

it in whole or part. This analysis method is similar to that which the ILA has employed elsewhere, such as in drafting the *Helsinki Principles of Maritime Neutrality*,<sup>25</sup> and also employed by the American Law Institute in developing the *Restatements* and by the International Institute of Humanitarian Law in preparing the *San Remo Manual*.<sup>26</sup>

Formats follow an English alphabetical order (e.g., “mile” ahead of “ocean space”). After reciting a term for definition, it is followed by Discussion and Analysis, including references to UNCLOS provisions, other treaties, such as the 1958 LOS Conventions, treatises, cases, and articles. Comments summarize correspondence from those who proposed terms. Conclusions end each entry. This *Initial Draft* will be blended into a *Final Draft* in which the terms considered in 2004 and those analyzed below in Part III will be interspersed among terms formerly considered. The project will not revisit terms UNCLOS defines;<sup>27</sup> it avoids definitions not consistent with the Convention, e.g., the difference between archipelagos as geographers define them and the meaning of “archipelago” in UNCLOS.<sup>28</sup> It will not enter debates on what are customary norms requiring no definition of terms<sup>29</sup> or the wisdom of ratifying UNCLOS.<sup>30</sup>

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25. Int'l Law Ass'n Comm. on Maritime Neutrality, *Final Report: Helsinki Principles on Maritime Neutrality*, in INTERNATIONAL LAW ASSOCIATION, REPORT OF THE SIXTY-EIGHTH CONFERENCE HELD AT TAIPEI, TAIWAN, REPUBLIC OF CHINA 24-30 MAY 1998, at 496-516 (1998) [hereinafter *Helsinki Principles*], reprinted in DIETRICH SCHINDLER & JIRI TOMAN, THE LAWS OF ARMED CONFLICTS 1425-30 (4th rev. ed. 2004) (less Commentaries).

26. See Salah El-Din Amer et al., *Explanation*, in SAN REMO MANUAL ON INTERNATIONAL LAW APPLICABLE TO ARMED CONFLICTS AT SEA 57, 61-67 (Louise Doswald-Beck ed., 1995) [hereinafter SAN REMO MANUAL].

27. E.g., UNCLOS, *supra* note 2, arts. 1(1)(1) (the Area), 2-3 (territorial sea), 8(1) (internal waters), 13(1) (low-tide elevation), 33 (contiguous zone), 46 (archipelago, archipelagic State), 53 (archipelagic sea lane), 55 (exclusive economic zone (EEZ)), 76 (continental shelf, continental margin), 121(1) (island), 122 (enclosed or semi-enclosed sea); see also Walker, *Definitions III*, *supra* note 19, at 224-25.

28. UNCLOS, *supra* note 2, arts. 46-48; see also Walker, *Definitions III*, *supra* note 19, at 229.

29. E.g., the now largely resolved debate on the customary maximum width of the territorial sea. See generally Walker, *The Tanker*, *supra* note 16, at 260-68.

30. See *id.* 305-06; *supra* notes 12-13 and accompanying text.

## II. THE ROLE AND RELATIONSHIP OF UNDERSTANDINGS, DECLARATIONS, AND STATEMENTS APPENDED TO UNCLOS AND THE ABILA LOS COMMITTEE DEFINITIONS PROJECT

Part II comments on the role and relationship of understandings, declarations, or statements States might file, or have filed, with respect to UNCLOS and the 1994 Agreement when they are considered with sources like the ABILA LOS Committee definitions project. There are important considerations on the place of commentator definitions.

Definitions that commentators research and publish as their work are a secondary source of law. They can provide content to primary sources, such as treaties, customary rules, general principles of law, and court or arbitral decisions.<sup>31</sup> Definitions may also be considered by analogy to subsequent practice under a treaty.<sup>32</sup> If LOS Committee definitions vary from other secondary sources, decision makers should weigh the ABILA LOS Committee definitions with other commentary to derive rules of law.<sup>33</sup> If a primary source, such as a treaty definition

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31. See Statute of the International Court of Justice, art. 38(1), June 26, 1945, 59 Stat. 1055, 156 U.N.T.S. 77 [hereinafter ICJ Statute]; RESTATEMENT, *supra* note 8, §§ 102-03; see also BROWNLIE, PRINCIPLES, *supra* note 10, at 3-29; 1 OPPENHEIM'S INTERNATIONAL LAW, *supra* note 8, pt. 1, §§ 8-17, at 23-52.

32. The Vienna Convention declares subsequent practice is an interpretation principle along with other factors. Vienna Convention, *supra* note 8, art. 31(3)(b); see also AUST, *supra* note 8, at 194-95; BROWNLIE, PRINCIPLES, *supra* note 10, at 602-05; 1 OPPENHEIM'S INTERNATIONAL LAW, *supra* note 8, pt. 2, § 632, at 1274-75; MCNAIR, *supra* note 8, at 424 (“[T]he relative conduct of the contracting parties after the conclusion of the treaty . . . has high probative value as to the intention of the parties at the time of its conclusion.”); Eduardo Jiménez de Aréchaga, *International Law in the Last Third of a Century*, 159 RECUEIL DES COURS 9, 42-43 (1978); G. G. Fitzmaurice, *The Law and Procedure of the International Court of Justice 1951-4: Treaty Interpretation and Other Treaty Points*, 33 BRIT. Y.B. INT'L L. 203, 223-25 (1957) (subsequent practice “superior” source to determine meaning); G.G. Fitzmaurice, *The Law and Procedure of the International Court of Justice: Treaty Interpretation and Certain Other Treaty Points*, 28 BRIT. Y.B. INT'L L. 1, 20-21 (1951). The 1966 ILC Report notes that Vienna Convention Conference negotiators rejected a proposed provision that “[a] treaty may be modified by subsequent practice in the application of the treaty establishing the agreement of the parties to modify its provisions.” 1966 ILC Rep., *supra* note 17, reprinted in 2 U.N., Y.B., *supra* note 17, at 236; see also RESTATEMENT, *supra* note 8, §§ 325(2) & cmt. c (rule that subsequent practice can modify treaty conforms to U.S. practice); BROWNLIE, PRINCIPLES, *supra* note 10, at 601 (article rejected at Conference adopting Vienna Convention); SINCLAIR, *supra* note 8, at 135-38 (subsequent practice can modify treaty terms); Richard D. Kearney & Robert E. Dalton, *The Treaty on Treaties*, 64 AM. J. INT'L L. 495, 523-25 (1970).

33. See *Sosa v. Alvarez-Machain*, 124 S.Ct. 2739, 2745, 2766-69 (2004) (Souter, J., joined by Stevens, O’Conner, Kennedy, Ginsburg, Breyer, JJ.). Justice Souter quotes *The Paquete Habana*, 175 U.S. 677 (1900), for cautionary use of scholars’ opinions, as evidence of the law:

in custom or practice under a treaty, or in the treaty itself, recites a different definition, the primary source should have priority.<sup>34</sup>

Where there is a conflict between a commentator definition and a definition in the U.N. Charter, a definition in a U.N. Security Council decision, or a *jus cogens*-supported definition, the Charter,<sup>35</sup> the definition in a decision,<sup>36</sup> or the *jus cogens*<sup>37</sup>-supported definition has priority. To be sure, commentators say that today *jus cogens* “has

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“[W]here there is no treaty, and no . . . custom[] [the Court looks] to the works of jurists and commentators, who by years of labor, research and experience, have made themselves peculiarly well acquainted with the subjects of which they treat. Such works are resorted to by judicial tribunals, not for the speculations of what their authors concerning what the law ought to be, but for trustworthy evidence of what the law really is.”

*Sosa*, 124 S.Ct. at 2767 (quoting *The Paquete Habana*, 175 U.S. at 700); see also *supra* note 31 and accompanying text.

34. See ICJ Statute, *supra* note 31, art. 38(1); see also *supra* notes 31, 33 and accompanying text. See generally RESTATEMENT, *supra* note 8, §§ 102-03.

35. U.N. Charter art. 103. Although U.N. Charter Article 103 declares Charter primacy over treaties and not custom or other sources, Charter definitions should prime secondary-source definitions like those the LOS Committee proposes. See also LELAND M. GOODRICH ET AL., CHARTER OF THE UNITED NATIONS 614-17 (3d ed. 1969); 1 OPPENHEIM'S INTERNATIONAL LAW, *supra* note 8, pt. 2, § 592, 1215-16; *supra* notes 31, 33 and accompanying text. See generally 2 THE CHARTER OF THE UNITED NATIONS 1292-1302 (Bruno Simma ed., 2d ed. 2002) [hereinafter 2 Simma].

36. See U.N. Charter, *supra* note 35, arts. 25, 48, 94(2), 103; see also GOODRICH ET AL., *supra* note 35, at 207-11, 334-37, 555-59, 614-17; 1 THE CHARTER OF THE UNITED NATIONS 454-62, 776-80 (Bruno Simma ed., 2d ed. 2002) [hereinafter 1 Simma]; 2 Simma, *supra* note 35, at 1174-79; W. Michael Reisman, Note, *The Constitutional Crisis in the United Nations*, 87 AM. J. INT'L L. 83, 87 (1993) (principles flowing from Council decisions pursuant to U.N. Charter arts. 25 & 103 are treaty law binding U.N. Members and override other treaty obligations). Article 103 does not apply to custom or *jus cogens* derived independently of a treaty, unless, however, Article 103 might be considered a *jus cogens* norm itself, and a *jus cogens* norm superior to other *jus cogens* norms, or its principles might be considered a norm that is superior to conflicting custom. See also ICJ Statute, *supra* note 31, art. 38(1); RESTATEMENT, *supra* note 8, §§ 102-03; *supra* notes 31, 33, 35 and accompanying text.

37. See Vienna Convention, *supra* note 8, pmbl., arts. 53, 64, 71. *Jus cogens* has uncertain contours. See generally RESTATEMENT, *supra* note 8, §§ 102 reporters' n.6, 323 cmt. b, 331(2), 338(2) (*jus cogens*'s content uncertain); BROWNLIE, PRINCIPLES, *supra* note 10, at 5, 488-90, 597-98 (same); T.O. ELIAS, THE MODERN LAW OF TREATIES 177-87 (1974) (same); 1 OPPENHEIM'S INTERNATIONAL LAW, *supra* note 8, pt. 1, § 2, at 7-8 (same); *id.* pt. 2, §§ 642, 653, at 1292-93, 1309-10 (same); MCNAIR, *supra* note 8, at 214-15 (same); SHABTAI ROSENNE, DEVELOPMENTS IN THE LAW OF TREATIES 1945-1986, at 281-88 (1989); 1 Simma, *supra* note 36, at 62 (dispute over self-determination as *jus cogens*); SINCLAIR, *supra* note 8, at 17-18, 218-26 (Vienna Convention, principles considered progressive development in 1984); G. I. TUNKIN, THEORY OF INTERNATIONAL LAW 148 (William E. Butler trans., 1974); Levan Alexidze, *Legal Nature of Jus Cogens in Contemporary Law*, 172 RECUEIL DES COURS 219, 262-63 (1981); John N. Hazard, *Soviet Tactics in International Lawmaking*, 7 DENV. J. INT'L L. & POL'Y 9, 22-25 (1977); Eduardo Jiménez de Aréchaga, *supra* note 32, at 64-67; Mark Weisburd, *The Emptiness of the Concept of Jus Cogens, As Illustrated by the War in Bosnia-Herzegovina*, 17 MICH. J. INT'L L. 1 (1995).

little relevance to the law of the sea,”<sup>38</sup> but that may change in the future. At least two Charter provisions, Articles 2(4) and 51, have been said to approach, or to have attained, *jus cogens* status.<sup>39</sup> Disputes continue as to these provisions’ content, such as the long-standing argument on whether individual and collective self-defense includes anticipatory self-defense,<sup>40</sup> or whether self-defense can be

38. CHURCHILL & LOWE, *supra* note 2, at 6.

39. Military & Paramilitary Activities (Nicar. v. U.S.), 1986 I.C.J. 14, 100-01 (June 27) (U.N. Charter art. 2(4) approaches *jus cogens* status); RESTATEMENT, *supra* note 8, §§ 102 cmts. h & k, 905(2) & cmt. g (same); 1 OPPENHEIM’S INTERNATIONAL LAW, *supra* note 8, pt. 1, § 2, at 7-8 (art. 2(4) a fundamental norm); Carin Kaghan, *Jus Cogens and the Inherent Right Self-Defense*, 3 INT’L L. STUD. ASS’N J. INT’L & COMP. L. 767, 823-27 (1997) (U.N. Charter art. 51 represents *jus cogens* norm); see Int’l Law Comm’n, Report of the International Law Commission, Fifty-Third Session (23 April-1 June and 2 July-10 August 2001), art. 21 & cmt. 1, art. 50 & cmts. 1-5, at 177, 333-34, U.N. Doc. A/56/10 (2001) [hereinafter 2001 ILC REP.], reprinted in JAMES CRAWFORD, THE INTERNATIONAL LAW COMMISSION’S ARTICLES ON STATE RESPONSIBILITY 166, 288-89 (2002) (referring to “fundamental substantive obligations” and appearing to give U.N. Charter art. 51 the same status as art. 2(4) when resolving the issue of conflict between them by saying that no art. 2(4) issues arise if there is a lawful self-defense claim); cf. Legality of Threat or Use of Nuclear Weapons, 1996 I.C.J. 226, 245 (July 8).

40. UNITED NATIONS, A MORE SECURE WORLD: OUR SHARED RESPONSIBILITY: REPORT OF THE SECRETARY-GENERAL’S HIGH-LEVEL PANEL ON THREATS, CHALLENGES AND CHANGE paras. 188-92 (2004) [hereinafter A MORE SECURE WORLD] (referring to the nuclear problem considered by WOLFGANG FRIEDMANN, THE CHANGING STRUCTURE OF INTERNATIONAL LAW 259-60 (1964)); LOUIS HENKIN, HOW NATIONS BEHAVE 141-45 (2d ed. 1979) [hereinafter HENKIN, NATIONS]; Oscar Schachter, *The Right of States to Use Armed Force*, 82 MICH. L. REV. 1620, 1633-35 (1984). The U.N. Charter art. 51 “allows a threatened State., according to long established international law, . . . to take military action as long as the threatened attack is *imminent*, no other means would deflect it and the action is proportionate.” A MORE SECURE WORLD, *supra*, para. 188. However, a State cannot purport “to act in anticipatory self-defense, not just preemptively . . . but also preventively.” *Id.* para. 189. The latter cases should be brought to the U.N. Security Council for possible action. *Id.* para. 190. Article 51 should not be rewritten or reinterpreted. *Id.* para. 192.

This approach is in line with advocates of a right of anticipatory individual and collective self-defense based on the Charter and customary law. 2001 ILC REP., *supra* note 39, art. 25 & cmt. 5, at 194, 196-97, reprinted in CRAWFORD, *supra* note 39, at 178-80 (recognizing anticipatory self-defense under the necessity doctrine); see also Legality of Threat or Use of Nuclear Weapons, 1996 I.C.J. 226, 245 (July 8); Military & Paramilitary Activities (Nicar. v. U.S.), 1986 I.C.J. 14, 94, 347-48 (June 27) (Schwebel, J., dissenting); STANIMAR A. ALEXANDROV, SELF-DEFENSE AGAINST THE USE OF FORCE IN INTERNATIONAL LAW 296 (1996); D.W. BOWETT, SELF-DEFENCE IN INTERNATIONAL LAW 187-93 (1958); TIMOTHY L.H. MCCORMACK, SELF-DEFENSE IN INTERNATIONAL LAW: THE ISRAELI RAID ON THE IRAQI NUCLEAR REACTOR 122-24, 238-39, 253-84, 302 (1996); MYRES S. MCDUGAL & FLORENTINO P. FELICIANO, LAW AND MINIMUM WORLD PUBLIC ORDER 232-41 (1961); WALTER GARY SHARP, SR., CYBERSPACE AND THE USE OF FORCE 33-48 (1999) (real debate is scope of anticipatory self-defense right; responses must be proportional); 1 OPPENHEIM’S INTERNATIONAL LAW, *supra* note 8, pt. 1, § 127, at 417-27; OSCAR SCHACHTER, INTERNATIONAL LAW IN THEORY AND PRACTICE 152-58 (1991); JULIUS STONE, OF LAW AND NATIONS: BETWEEN POWER POLITICS AND HUMAN HOPES 3-4 (1974); ANN VAN WYNEN THOMAS & A.J. THOMAS, JR., THE CONCEPT OF AGGRESSION IN INTERNATIONAL LAW 54-65

(1972); Richard W. Aldrich, *How Do You Know You Are At War in the Information Age?*, 35 HOUS. J. INT'L L. 223, 231, 248 (2000); Louis Rene Beres, *After the Scud Attacks: Israel, Palestine, and Anticipatory Self-Defense*, 6 EMORY INT'L L. REV. 71, 75-77 (1992); George Bunn, *International Law and the Use of Force in Peacetime: Do U.S. Ships Have to Take the First Hit?*, 39 NAVAL WAR C. REV. 69, 69-70 (1986); James H. Doyle, Jr., *Computer Networks, Proportionality, and Military Operations*, 76 NAVAL WAR C. INT'L STUD. 147, 151-55 (2002); Thomas M. Franck, *When, If Ever, May States Deploy Military Force Without Prior Security Council Authorization?*, 5 WASH. U.J.L. & POL'Y 51, 68 (2001); Christopher J. Greenwood, *Remarks, Neutrality, The Rights of Shipping and the Use of Force in the Persian Gulf War (Part I)*, 82 AM. SOC'Y INT'L L. PROC. 158, 160-61 (1988); Hans Kelsen, *Collective Security Under International Law*, 49 NAVAL WAR C. INT'L STUD. 1, 27 (1956); David K. Linnan, *Self-Defense, Necessity and U.N. Collective Security: United States and Other Views*, 1 DUKE J. COMP. & INT'L L. 57, 65-84, 122-23 (1991); Lowe, *Commander's Handbook*, *supra* note 17, at 127-30; James J. McHugh, *Forcible Self-Help in International Law*, 25 NAVAL WAR C. REV. 61, 61-86 (1972); Rein Müllerson & David J. Scheffer, *Legal Regulation of the Use of Force, in BEYOND CONFRONTATION: INTERNATIONAL LAW FOR THE POST-COLD WAR ERA* 93, 109-14 (Lori Fisler Damrosch et al. eds., 1995); John F. Murphy, *Commentary on Intervention to Combat Terrorism and Drug Trafficking, in LAW AND FORCE IN THE NEW INTERNATIONAL ORDER* 241, 241 (Lori Fisler Damrosch & David J. Scheffer eds., 1991) [hereinafter *LAW AND FORCE*]; W. Michael Reisman, *Allocating Competences to Use Coercion in the Post-Cold War World: Practices, Conditions, and Prospects, in LAW AND FORCE, supra*, at 26, 45; Horace B. Robertson, Jr., *Self-Defense Against Computer Network Attack Under International Law*, 76 NAVAL WAR C. INT'L L. STUD. 121, 140 (2002); Michael N. Schmitt, *Bellum Americanum: The U.S. View of Twenty-First Century War and Its Possible Implications for the Law of Armed Conflict*, 19 MICH. J. INT'L L. 1051, 1071 (1998); Abraham D. Sofaer, *Sixth Annual Waldemar A. Solf Lecture in International Law: Terrorism, the Law, and the National Defense*, 126 MIL. L. REV. 89, 95 (1989); Robert F. Turner, *State Sovereignty, International Law, and the Use of Force in Countering Low-Intensity Aggression in the Modern World*, 67 NAVAL WAR C. INT'L L. STUD. 43, 62-80 (1995); Claud Humphrey Meredith Waldo, *The Regulation of the Use of Force by Individual States in International Law*, 81 RECUEIL DES COURS 451, 496-99 (1952) (anticipatory self-defense permissible, as long as principles of necessity, proportionality observed); George K. Walker, *Information Warfare and Neutrality*, 33 VAND. J. TRANSNAT'L L. 1079, 1122-24 (2000); Ruth Wedgwood, *Responding to Terrorism: The Strikes Against Bin Laden*, 24 YALE J. INT'L L. 559, 565-66 (1999). My article, George K. Walker, *The Lawfulness of Operation Enduring Freedom's Self-Defense Responses*, 37 VALPARAISO L. REV. 489 (2003) [hereinafter Walker, *The Lawfulness*], says preemption "seems" equivalent to anticipatory self-defense, citing contradicting views of the day. *Id.* at 536. "Seems" is not the same as saying preemption and prevention are interchangeable, as William C. Bradford, wrote that I said. William C. Bradford, *"The Duty to Defend Them": A Natural Law Justification for the Bush Doctrine of Preemption*, 79 NOTRE DAME L. REV. 1365, 1368 n.13 (2004). Anticipatory self-defense and preemption may be the same, as Abraham D. Sofaer thought, and for which my page proofs cited him. Abraham D. Sofaer, *Iraq and International Law*, WALL ST. J., Jan. 31, 2003, at A10, cited in Walker, *The Lawfulness, supra*, at 536 n.198. I also cited Richard Falk to illustrate an opposing view. Richard Falk, *Pre-Emptive War Flagrantly Contradicts the UN's Legal Framework: Why International Law Matters*, THE NATION, Mar. 10, 2003, at 19, 20. The Valparaiso Law Review editors did not insert my qualifying phrase, "think so" for Sofaer as I indicated in final page proofs. Letter from George K. Walker to Andre Miksha, Editor-in-Chief, Valparaiso Law Review (Mar. 31, 2003) (on file with author). In any event I did not say that preemption and prevention are the same, but tried to present differing sides of a developing issue not directly relevant to allied and coalition operations in Afghanistan. Walker, *The Lawfulness, supra* at 536 & n.198. The preemption issue will be resolved after a time of interactive claim and counterclaim, much as the dispute over the territorial sea's

invoked only after an armed attack.<sup>41</sup> Charter Articles 2(4) and 51 are as relevant for LOS issues as they are for confrontations entirely on States' land territory.<sup>42</sup>

Because the Charter requires that U.N. Members agree to carry out their Charter obligations,<sup>43</sup> a recommendatory Security Council or General Assembly resolution would almost always have primacy over a Committee definition,<sup>44</sup> and certainly if a resolution recites a *jus cogens* or customary norm.<sup>45</sup> Where a resolution does not restate positive law, it should still be seriously considered along with secondary sources like the ABILA LOS Committee research. The Committee's reported research underscores its recognition of norms superior to the Charter,<sup>46</sup> as does UNCLOS:

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breadth has been resolved. See Myres S. McDougal, *The Hydrogen Bomb Tests*, 49 AM. J. INT'L L. 356, 357-58 (1955); *supra* note 29 and accompanying text.

41. Those arguing that anticipatory self-defense is unlawful in the Charter era include IAN BROWNLIE, *INTERNATIONAL LAW AND THE USE OF FORCE BY STATES* 257-61, 275-78, 366-67 (1963); 1 Simma, *supra* note 36, at 803-04; ANTHONY D'AMATO, *INTERNATIONAL LAW: PROCESS AND PROSPECT* 32 (1995); YORAM DINSTEIN, *WAR, AGGRESSION AND SELF-DEFENCE* 159-85 (3d ed. 2001); LOUIS HENKIN, *INTERNATIONAL LAW: POLITICS AND VALUES* 121-22 (1995) (a change in view from HENKIN, *NATIONS*, *supra* note 40, at 143-45, in 1979); PHILIP C. JESSUP, *A MODERN LAW OF NATIONS* 166-67 (1948); D.P. O'CONNELL, *THE INFLUENCE OF LAW ON SEA POWER* 83, 171 (1975); 2 L. OPPENHEIM, *INTERNATIONAL LAW* § 52aa, at 156 (H. Lauterpacht ed., 7th ed. 1952); AHMED M. RIFAAT, *INTERNATIONAL AGGRESSION* 126 (1979); NATALINO RONZITTI, *RESCUING NATIONALS ABROAD THROUGH MILITARY COERCION AND INTERVENTION ON GROUNDS OF HUMANITY* 4 (1985); Tom Farer, *Law and War*, in 3 *THE FUTURE OF THE INTERNATIONAL LEGAL ORDER* 15, 30, 36-37 (Cyril E. Black & Richard A. Falk eds., 1971); Yuri M. Kolosov, *Limiting the Use of Force: Self-Defense, Terrorism, and Drug Trafficking*, in *LAW AND FORCE*, *supra* note 40, at 232, 234; Josef L. Kunz, *Individual and Collective Self-Defense in Article 51 of the Charter of the United Nations*, 41 AM. J. INT'L L. 872, 878 (1947); Rainer Lagoni, *Remarks, Neutrality, the Rights of Shipping and the Use of Force in the Persian Gulf War (Part I)*, 82 AM. SOC'Y INT'L L. PROC. 161, 161-62 (1988); Jules Lobel, *The Use of Force to Respond to Terrorist Attacks: The Bombing of Sudan and Afghanistan*, 24 YALE J. INT'L L. 537, 541 (1999); Robert W. Tucker, *The Interpretation of War Under Present International Law*, 4 INT'L L.Q. 11, 29-30 (1951); see also Robert W. Tucker, *Reprisals and Self-Defense: The Customary Law*, 66 AM. J. INT'L L. 586 (1972) (states may respond only after being attacked).

42. See *infra* note 47 and accompanying text.

43. U.N. Charter, *supra* note 35, arts. 2(2), 2(5); see also 1 Simma, *supra* note 36, at 91-101, 136-39; GOODRICH ET AL., *supra* note 35, at 40-41, 56-58.

44. See U.N. Charter, *supra* note 35, arts. 10-11, 13-14, 33, 36-37, 39-41; see also RESTATEMENT, *supra* note 8, § 103(2)(d) reporters' n.2; SYDNEY D. BAILEY & SAM DAWS, *THE PROCEDURE OF THE UN SECURITY COUNCIL* 18-20, 266-67 (3d ed. 1998); BROWNLIE, *PRINCIPLES*, *supra* note 10, at 14; JORGE CASTANEDA, *LEGAL EFFECTS OF UNITED NATIONS RESOLUTIONS* 78-79 (Alba Amoia trans., 1969); 1 Simma, *supra* note 36, at 257-87, 298-326, 583-94, 616-43, 717-49; GOODRICH ET AL., *supra* note 35, at 111-29, 133-44, 257-65, 277-87, 290-314; 1 OPPENHEIM'S *INTERNATIONAL LAW*, *supra* note 8, pt. 1, § 16, at 48-49.

45. See *supra* notes 35-43 and accompanying text.

46. See, e.g., Walker, *Definitions III*, *supra* note 19, at 234.

In exercising their rights and performing their duties under this Convention, States Parties shall refrain from any threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the principles of international law embodied in the Charter of the United Nations.<sup>47</sup>

The foregoing principles for U.N. resolutions should also apply to pronouncements of other international governmental organizations whose resolutions apply to the law of the sea, such as the International Maritime Organization (IMO).<sup>48</sup> Mandatory resolutions, such as Security Council decisions, trump a commentary definition when they define terms. Non-mandatory resolutions also have primacy when they restate customary, treaty, or general principles norms. Even when they do not, they should be considered along with other secondary sources like the ABILA LOS Committee research. When a definition emerges from a non-governmental organization (NGO), it should be given weight according to the principles for the competing claims of scholars.<sup>49</sup> The Committee chose not to define anew terms already defined in the Convention.<sup>50</sup>

The Committee has also been sensitive to the possibility of another definition for a term in law of armed conflict (LOAC)

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47. UNCLOS, *supra* note 2, art. 301; *accord* Legality of Threat or Use of Nuclear Weapons, 1996 I.C.J. 226, 244 (July 8); 3 UNITED NATIONS CONVENTION ON THE LAW OF THE SEA 1982: A COMMENTARY paras. 87.9(i), 88.1-88.7(d) (Satya N. Nandan et al. eds., 1995) [hereinafter 3 COMMENTARY]; *see also* UNCLOS, *supra* note 2, art. 88; RESTATEMENT, *supra* note 8, § 521 cmt. b (citing U.N. Charter art. 2(4) and UNCLOS, *supra* note 2, arts. 88, 301 and referring to RESTATEMENT, *supra* note 8, § 905 cmt. g); *Helsinki Principles*, *supra* note 25, Principle 1.2, at 499, *reprinted* in SCHINDLER & TOMAN, *supra* note 25, at 1426; Bernard H. Oxman, *The Regime of Warships Under the United Nations Convention on the Law of the Sea*, 24 VA. J. INT'L L. 809, 814 (1984); John E. Parkerson, Jr., *International Legal Implications of the Strategic Defense Initiative*, 116 MIL. L. REV. 67, 79-85 (1987); Frank Russo, *Targeting Theory in the Law of Naval Warfare*, 40 NAVAL L. REV. 1, 8 (1992). *See generally* 5 COMMENTARY, *supra* note 17, paras. 301.1-301.6; Boleslaw A. Boczek, *Peaceful Purposes Provisions of the United Nations Convention on the Law of the Sea*, 20 OCEAN DEVEL. & INT'L L. 359 (1989).

48. Originally constituted as the Intergovernmental Maritime Consultative Organization (IMCO), the IMCO is now the IMO, with a different constitutive treaty, different organization and different procedures, etc. *Compare* Convention on the Intergovernmental Maritime Consultative Organization pmbl. Mar. 6, 1948, 9 U.S.T. 621, 289 U.N.T.S. 48 [hereinafter IMCO Convention], *with* Amendments to the Convention on the Intergovernmental Maritime Consultative Organization of March 6, 1948, Title of the Convention and Preamble, Nov. 14, 1975, 34 U.S.T. 497, 1276 U.N.T.S. 468 [hereinafter IMO Convention]. There were amendments to the Convention before and after the 1975 amendments. *See* 2 MULTILATERAL TREATIES, *supra* note 3, at 3, 11, 13, 15, 17, 19, 21, 23, 25; TIF, *supra* note 15, at 435-36; CHRISTIAN L. WIKTOR, MULTILATERAL TREATY CALENDAR 1648-1995, at 481 (1998).

49. *See supra* notes 31, 33 and accompanying text.

50. *See supra* note 27 and accompanying text.



situations, such as when UNCLOS and the 1958 LOS Conventions declare a separate standard of law through their “other rules” clauses,<sup>51</sup> which traditionally have meant that the 1958 and 1982 law of the sea treaties are subject to the LOAC in armed conflict situations.<sup>52</sup> Since the LOAC, the law of naval warfare and the law of neutrality in particular, rely in large part on primary sources, (*i.e.*, treaties, custom, and general principles)<sup>53</sup> a LOAC-based definition will have primacy over a Committee definition for the 1982 Convention, although circumstances might call for borrowing an LOS definition.<sup>54</sup> Similarly, self-defense situations might also call for a different definition that will have primacy because of the status of the right of individual and collective self-defense as a customary, Charter, and perhaps *jus cogens* norm.<sup>55</sup> As in the case of LOAC-governed situations, however, an LOS-based definition might be borrowed.<sup>56</sup>

The same principles should apply for definitions in reservations. UNCLOS does not generally allow reservations, statements, or

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51. This clause, sometimes stated slightly differently, appears throughout UNCLOS. *E.g.*, UNCLOS, *supra* note 2, pmb., arts. 2(3) (territorial sea); 19, 21, 31 (territorial sea innocent passage); 34(2) (straits transit passage); 52(1) (archipelagic sea lanes passage; incorporation by reference of arts. 19, 21, 31); 58(2), (3) (exclusive economic zone); 78 (continental shelf; coastal State rights do not affect superjacent waters, *i.e.*, territorial or high seas; coastal State cannot infringe or unjustifiably interfere with “navigation and other rights and freedoms of other States as provided for in this Convention”); 87(1) (high seas); 138 (the Area); 293(1) (court or tribunal having jurisdiction for settling disputes must apply UNCLOS and “other rules of international law not incompatible with [the] Convention”); 303(4) (archeological, historical objects found at sea, “other international agreements and rules of international law regarding the protection of objects of an archeological and historical nature”); *id.* annex III, art. 21(1) (prospecting, exploration, and exploitation contracts for the Area are governed by contract terms, the Area Authority rules, regulations, and procedures of UNCLOS Part XI, “and other rules of international law not incompatible with” UNCLOS); annex VI, arts. 23, 38(1) (incorporating UNCLOS art. 293).

52. The Committee settled on a definition for “other rules of international law” that includes a possibility that the phrase may mean law other than the LOAC, including the law of neutrality, in some situations. Walker, *Definitions III*, *supra* note 19, at 236.

53. See also NWP 1-14M *Annotated*, *supra* note 16, at xxxvii-xxxviii. SCHINDLER & TOMAN, *supra* note 25, remains the indispensable collection for reprints of these sources.

54. See, *e.g.*, SAN REMO MANUAL, *supra* note 26, paras. 12, 34, 44, 88, 106(c), & cmts. (application of UNCLOS’s “due regard” principle in law of naval warfare situations), *reprinted in* SCHINDLER & TOMAN, *supra* note 25, at 1157, 1160-61, 1167, 1169 (less commentaries); see also NWP 1-14M *Annotated*, *supra* note 16, para. 8.1.3, at 405-06; Horace B. Robertson, Jr., *The “New” Law of the Sea and the Law of Armed Conflict at Sea*, 68 NAVAL WAR C. INT’L L. STUD. 263, 297 (1995) [hereinafter Robertson, *The “New”*]; Walker, *The Tanker*, *supra* note 16, at 536-46; *infra* Part III.D (analysis of “due regard” in UNCLOS).

55. See U.N. Charter, *supra* note 35, arts. 51, 103; see also *supra* notes 35-36, 39-42 and accompanying text.

56. See *supra* note 54 and accompanying text.

declarations to change Convention rules, except where UNCLOS specifically permits them.<sup>57</sup> For treaties allowing reservations, they become part of the law of the treaty as much as the primary document, subject to the rules on multilateral conventions.<sup>58</sup> Therefore, the same rules that relate to treaty primacy, practice under treaties, and developing custom should apply to reservations, statements, or declarations to treaties.<sup>59</sup> However, definitions related to reservations, statements, or declarations can rise no higher than definitions related to treaty language.

Understandings, statements, or declarations not amounting to reservations should be on similar footing. When treaties permit understandings, statements, or declarations not amounting to reservations, they become part of the law of the treaty as much as the primary document and should be subject to analogous rules to those for reservations.<sup>60</sup> Therefore, the same rules relating to treaty primacy, practice under treaties, and custom and general principles should apply to properly appended understandings, statements, or declarations.<sup>61</sup> Definitions so related to the latter can rise no higher than definitions related to treaty language. An example might be the definition of “serious” act of pollution in the U.S. understandings and the ABILA LOS Committee definition in this project.<sup>62</sup>

A problem that may arise is that no source – a Security Council decision, other U.N. or other international organizations’ resolutions, a *jus cogens* norm, a primary source, a reservation if permitted by a treaty, an understanding, declaration, or statement if permitted by a treaty, or secondary sources – may offer guidance. It is here that the quality of the Committee analysis is critical. Hopefully, the Committee research and comment process will produce definitions to

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57. UNCLOS, *supra* note 2, arts. 309-10; *see also supra* notes 10-11 and accompanying text.

58. Vienna Convention, *supra* note 8, arts. 1(d), 19-23; *see also supra* notes 8-11 and accompanying text.

59. *See supra* notes 8-11 and accompanying text.

60. My article, George K. Walker, *Professionals’ Definitions and States’ Interpretative Declarations (Understandings, Statements or Declarations) for the 1982 Law of the Sea Convention* (forthcoming 2006), analyzes these issues in greater depth than is possible here; *see also supra* notes 8-11 and accompanying text.

61. *See supra* notes 31-34 and accompanying text.

62. *Compare Text, supra* note 9, § 3(11)(D), with Walker, *Definitions III, supra* note 19, at 259.

fill these kinds of voids<sup>63</sup> as well as add context to situations where there are definitions available in other, perhaps senior, sources.

### III. ADDITIONAL PROPOSED DEFINITIONS FOR THE 1982 LAW OF THE SEA CONVENTION

Seven new terms were proposed for definition in 2004: appropriate international organization or appropriate international organizations (plural); associated or dependent species; competent international organization or competent international organizations (plural); due regard; maximum sustainable yield; optimum utilization; and regional or subregional organization.<sup>64</sup> The same procedure, format, and limitations for previous drafts, such as not attempting to redefine terms that UNCLOS already defines, will be followed for these terms.<sup>65</sup> If there are no objections or corrections other than typographical errors and the like, it is proposed that these terms be integrated into a *Tentative Final Draft*, to include all terms the Committee has considered.<sup>66</sup>

#### A. “Appropriate international organization” or “appropriate international organizations.”

1. *Discussion and analysis.* UNCLOS, Article 64(1), refers to “appropriate international organizations” in the plural and to “appropriate international organization” in the singular:

1. The coastal State and other States whose nationals fish in the region for the highly migratory species listed in Annex I [of the Convention] shall cooperate directly or through appropriate international organizations with a view to ensuring conservation and promoting the objective of optimum utilization of such species throughout the region, both within and beyond the exclusive economic zone. In regions for which no appropriate international organization exists, the coastal State and other States whose nationals harvest these species in the region shall cooperate to establish such an organization and participate in its work.<sup>67</sup>

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63. See *supra* note 49 and accompanying text.

64. See Schiffman E-mail, *supra* note 24.

65. See Walker, *Definitions III*, *supra* note 19, at 218-20.

66. See *id.* at 228-69, Walker & Noyes, *Definitions II*, *supra* note 19, at 223-309, and Walker & Noyes, *Definitions I*, *supra* note 19, at 349-66, for these terms.

67. UNCLOS, *supra* note 2, art. 64(1).

UNCLOS, Article 65, also refers to “appropriate international organization” in the singular:

Nothing in this Part [V of the Convention] restricts the right of a coastal State or the competence of an international organization, as appropriate, to prohibit, limit or regulate the exploitation of marine mammals more strictly than provided in this Part. States shall cooperate with a view to the conservation of marine mammals and in the case of cetaceans shall in particular work through the appropriate international organizations for their conservation, management and study.<sup>68</sup>

UNCLOS, Article 143(3)(b) refers to “other international organizations as appropriate”:

3. States parties may carry out marine scientific research in the Area. States Parties shall promote international cooperation in marine scientific research in the area by:

...  
(b) ensuring that programs are developed through the Authority or other international organizations as appropriate for the benefit of developing States and technologically less developed states with a view to:

- (i) strengthening their research capabilities;
- (ii) training their personnel and the personnel of the Authority in the techniques and applications of research;
- (iii) fostering the employment of their qualified personnel in research in the Area . . . .<sup>69</sup>

UNCLOS, Article 297(3)(d), referring to disputes referred to compulsory procedures entailing binding decisions and limitations and exceptions to these procedures, provides that “[t]he report of the conciliation commission shall be communicated to the appropriate international organizations.”<sup>70</sup> UNCLOS, Annex VIII, Article 3(e), referring to special arbitration procedures for fisheries, environmental protection, marine scientific research, or navigation issues, refers to “appropriate international organization” in providing:

For the purposes of proceedings under this Annex, the special arbitral tribunal shall, unless the parties otherwise agree, be constituted as follows:

...  
(e) Unless the parties agree that the appointment be made by a person or a third State chosen by the parties, the Secretary-General of the United Nations shall make the necessary appointments within 30 days of receipt

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68. *Id.* art. 65.

69. *Id.* art. 143(3).

70. *Id.* art. 297(3).

of a request under subparagraphs (c) and (d) [of Article 3]. The appointments referred to in this subparagraph shall be made from the appropriate list or lists of experts referred to in [A]rticle 2 of this Annex and in consultation with the parties to the dispute and the appropriate international organization. The members so appointed shall be of different nationalities and may not be in the service of, ordinarily resident in the territory of, or nationals of, any of the parties to the dispute.<sup>71</sup>

Commentary for Article 64 suggests that “appropriate international organization” might mean the U.N. Food and Agriculture Organization (FAO), one of its regional fishery bodies, or fishery organizations not affiliated with the FAO like the International Commission for Conservation of Atlantic Tunas (ICCAT).<sup>72</sup> Commentary for Article 65 says:

There is no indication of what constitutes a competent international organization in these matters. Special arrangements regarding the conservation and utilization of whales in particular have been established under the International Whaling Commission. Failure to conserve stocks has also led to the application of other conventions to cetaceans.<sup>73</sup>

Article 297 preparatory works show this formula in a compromise draft for what became Article 297(d)(e): “The report of the conciliation commission shall be communicated to the appropriate global, regional or sub-regional intergovernmental organizations.”<sup>74</sup> UNCLOS, Article 63 refers to “appropriate subregional or regional organizations” in relation to “associated” species.<sup>75</sup>

A definition for “dependent” or “associated” species is proposed in Part III.B. A definition for “competent international organization” or “competent international organizations” is proposed in Part III.C. A definition for “regional” or “sub-regional” organization is proposed in Part III.G.

2. *Comments.* Howard S. Schiffman proposed the terms “appropriate international organization” or “appropriate international organizations.”<sup>76</sup> The Chair researched the terms.

3. *Conclusions.* This definition for “appropriate international organization” or “appropriate international organizations” is proposed:

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71. *Id.* annex VIII, art. 3.

72. See 2 UNITED NATIONS CONVENTION ON THE LAW OF THE SEA 1982: A COMMENTARY para. 64.9(c) (Satya N. Nandan et al. eds., 1993) [hereinafter 2 COMMENTARY].

73. *Id.* para. 65.11(b).

74. 5 COMMENTARY, *supra* note 17, para. 297.15(d).

75. UNCLOS, *supra* note 2, art. 63.

76. Schiffman E-mail, *supra* note 24.

“Appropriate international organization” or “appropriate international organizations,” as used in the 1982 LOS Convention, means that international organization or those international organizations typically associated by principles, purposes and functions with action required by a particular article of the Convention or its Annexes. The appropriate organization may be global, regional or sub-regional, depending on the circumstances of the particular issue, and may be an intergovernmental organization (IGO) organized pursuant to the U.N. Charter, an independent IGO, or a nongovernmental organization (NGO).

These proposed general definitions, which observers may rightly characterize as almost no definitions at all, follow from UNCLOS’s relatively scant preparatory works and from practical necessity.

For example, the FAO, cited in commentary for Article 64,<sup>77</sup> is organized under the Charter.<sup>78</sup> Article 64 commentary adds that IGOs subordinate to and independent from the FAO or were also considered.<sup>79</sup> The FAO Committee on Fisheries has been

the only intergovernmental forum in which fishery problems are examined periodically on a worldwide basis, and could, in some respects, be considered a global organization to which article 61 refers. Alongside this Commission [sic], there are a number of regional fishery bodies both inside and outside FAO, the activities of which are of more direct relevance to the actual management of fishery resources.<sup>80</sup>

Article 65 commentary, mentioning the International Whaling Commission,<sup>81</sup> is generic in its discussion, leading to the conclusion that its drafters did not intend a specific international organization.<sup>82</sup> The same can be said for the Article 297 preparatory works.<sup>83</sup> As an introductory commentary put it: “[i]t will usually appear from the

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77. 2 COMMENTARY, *supra* note 72, para. 64.9(c).

78. Constitution of United Nations Food and Agriculture Organization, Oct. 16, 1945, 60 Stat. 1886. There have been many amendments to the FAO Constitution. See Constitution of the United Nations Food and Agriculture Organization, Oct. 16, 1945, 12 U.S.T. 980 (composite text as amended to 1957); TIF, *supra* note 15, at 421-22; WIKTOR, *supra* note 48, at 440-41.

79. 2 COMMENTARY, *supra* note 72, para. 64.9(c).

80. *Id.* para. 61.12(e).

81. See International Convention for the Regulation of Whaling art. 3, Dec. 2, 1946, 62 Stat. 1716, 161 U.N.T.S. 72 (establishing the International Whaling Commission). The Convention has been amended often. See TIF, *supra* note 15, at 525; WIKTOR, *supra* note 48, at 461.

82. See 2 COMMENTARY, *supra* note 72, para. 65.11(b) (“in particular,” “other conventions”).

83. See 5 COMMENTARY, *supra* note 17, paras. 297.1-297.19.

context of the issue involved which international organization is competent for that particular purpose.”<sup>84</sup>

The practicality aspect of the proposed definition is that international organizations, whether organized and operating under the Charter or organized and operating independently outside the Charter umbrella as an IGO or an NGO, can change in function or organization or disappear, perhaps to be replaced by other organization or organizations. The International Maritime Organization (IMO) is a case in point. Originally organized as the Intergovernmental Maritime Consultative Organization (IMCO), the IMCO is now the IMO, with a different constitutive treaty, different organization, and different procedures.<sup>85</sup> If a definition would have named the IMCO as the “appropriate international organization” in 1948 when the IMCO Convention was signed, well before 1982, when the 1975 name change became effective,<sup>86</sup> the result might have been confusion, since the IMCO remained in existence for some states during the transition, and the IMO was the IGO for other situations.<sup>87</sup> This is a simplistic example; more fundamental issues can arise if, for example, an international organization “appropriate” at one time under UNCLOS changes its functions, while retaining its name, so that it is no longer “appropriate.” To name organizations thought “appropriate” invites almost instant obsolescence of a definition. Moreover, as the Article 64 and 65 commentary suggests, the Convention negotiators obviously had different international organizations in mind for different purposes of different UNCLOS provisions.

In LOAC-governed situations under the “other rules of international law” clauses in the Convention, a different definition may apply.<sup>88</sup> The same may be the situation if the Charter supersedes the Convention, or if *jus cogens* norms apply.<sup>89</sup>

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84. 2 COMMENTARY, *supra* note 72, para. INTRO.27.

85. Compare IMCO Convention, *supra* note 48, pmbli., with IMO Convention, *supra* note 48, Title of the Convention and Preamble. There were amendments to the Convention before and after the 1975 amendments. See 2 MULTILATERAL TREATIES, *supra* note 3, at 3, 11, 13, 15, 17, 19, 21, 23, 25; TIF, *supra* note 15, at 435-36; WIKTOR, *supra* note 48, at 481.

86. TIF, *supra* note 15, at 436 n.\*; see also *supra* note 85 and accompanying text.

87. See *supra* note 16 and accompanying text.

88. See *supra* notes 51-56 and accompanying text.

89. See Walker, *Definitions III*, *supra* note 19, at 232-36; *supra* notes 35-47, 51-56 and accompanying text.

B. “Associated” or “dependent” species.

1. *Discussion and analysis.* The phrases “associated species” and “associated or dependent species” are in UNCLOS, Article 61(4), dealing with conservation of living resources in the Exclusive Economic Zone (EEZ):

In taking such [coastal State-ensured proper conservation and management<sup>90</sup>] measures the coastal State shall take into consideration the effects on species associated with or dependent upon harvested species with a view to maintaining or restoring populations of such associated or dependent species above levels at which their reproduction may become seriously threatened.<sup>91</sup>

The phrase “associated species” is in UNCLOS, Article 63, also dealing with the EEZ:

1. Where the same stock or stocks of associated species occur within the exclusive economic zones of two or more coastal States, these states shall seek, either directly or through appropriate subregional or regional organizations, to agree upon the measures necessary to coordinate and ensure the conservation and development of such stocks without prejudice to the other provisions of this Part [V, provisions for the EEZ].

2. Where the same stock or stocks of associated species occur both within the exclusive economic zone and in an area beyond and adjacent to the zone, the coastal State and the States fishing for such stocks in the adjacent area shall seek, either directly or through appropriate subregional or regional organizations, to agree upon the measures necessary for the conservation of these stocks in the adjacent area.<sup>92</sup>

The phrase “associated or dependent species” is also in UNCLOS, Article 119, dealing with conservation of high seas living resources:

1. In determining the allowable catch and establishing other conservation measures for the living resources in the high seas, States shall:

(b) take into consideration the effects on species associated with or dependent upon harvested species with a view to maintaining or restoring populations of such associated or dependent species above levels at which their reproduction may become seriously threatened.<sup>93</sup>

Article 61, tracing its origin from Articles 1(2) and 2 of the 1958 Fishing Convention, “formulates the rights and duties” of coastal

90. See UNCLOS, *supra* note 2, art. 61(2).

91. *Id.* art. 61(4).

92. *Id.* art. 63.

93. *Id.* art. 119.



states with respect to the EEZ; Article 63 sets out part of the scope of those rights and duties.<sup>94</sup> Article 119 serves the same function as Article 61 does for the high seas and should be read together with Article 118's requirement that states cooperate in conserving and maintaining high seas living resources.<sup>95</sup> Though preparatory works and commentary on Articles 61, 63 and 119 say little about the definition of "associated" or "dependent" species, the phrases are related to interdependence of species:

[Article 61(4)] deals with one aspect of the interdependence of fish stocks in relation to the conservation of the living resources. It obligates the coastal State to take into consideration the effects mentioned. It is not, however, limited to that; there is interdependence with other species, especially marine mammals. Identical language is used in [A]rticle 119, paragraph 1(b).<sup>96</sup>

Commentary on Article 119 has the same theme.<sup>97</sup> A general proposed definition for Articles 61, 63 and 119, should focus on general interdependence of species, with particular reference to marine mammals. For example, the definition should contemplate known food chains among and between fish stocks to be conserved and other species of living resources of the seas.

2. *Comments.* Howard S. Schiffman proposed the terms "associated" or "dependent" species.<sup>98</sup> The Chair researched the term.

3. *Conclusions.* This definition for "associated" or "dependent" species is proposed:

"Associated" or "dependent" species, as used in the 1982 LOS Convention, arts. 61, 63 and 119, means species interdependent with fish stocks, including marine mammals interdependent with fish and other stocks, for example species that interlock among and between fish and other stocks to be conserved, such as the food chain among stocks and other species.

In LOAC-governed situations under the "other rules of international law" clauses in the Convention, a different definition

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94. 2 COMMENTARY, *supra* note 72, paras. 61.1-61.2.

95. 3 COMMENTARY, *supra* note 47, para. 119.7(a).

96. 2 COMMENTARY, *supra* note 72, para. 61.12(i).

97. *Compare id. with* 3 COMMENTARY, *supra* note 47, paras. 119.7(b), 119.7(d).

98. Schiffman E-mail, *supra* note 24.

may apply.<sup>99</sup> The same may be the situation if the Charter supersedes the Convention, or if *jus cogens* norms apply.<sup>100</sup>

C. “Competent international organization” or “competent international organizations.”

1. *Discussion and analysis.* The phrases “competent international organization” or “competent international organizations” appear in 9 of 17 Parts of UNCLOS: Article 22(3)(a), Part II, Territorial Sea and Contiguous Zone;<sup>101</sup> Articles 41(4)-(5), Part III, Straits Used for International Navigation;<sup>102</sup> Article 53(9), Part IV, Archipelagic States;<sup>103</sup> Articles 60(3)-61(5), Part V, EEZ;<sup>104</sup> Article 119(2), Part VII, High Seas;<sup>105</sup> Articles 197-223, Part XII, Protection and Preservation of the Marine Environment;<sup>106</sup> Articles 238-65, Part XIII, Marine Scientific Research (MSR);<sup>107</sup> Articles 266(1)-78, Part XIV, Development and Transfer of Marine Technology;<sup>108</sup> Article 297(1)(c), Part XV, Settlement of Disputes;<sup>109</sup> and Article 3(2), Annex II Commission on the Limits of the Continental Shelf.<sup>110</sup> Among the 1958 LOS Conventions, the phrase “competent international organizations” only appears in the High Seas Convention, Article 25:

1. Every State shall take measures to prevent pollution of the seas from the dumping of radioactive waste, taking into account any standards and regulations which may be formulated by the competent international organizations.
2. All States shall co-operate with the competent international organizations in taking measures for the prevention of pollution of the

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99. See *supra* notes 51-56 and accompanying text.

100. See Walker, *Definitions III*, *supra* note 19, at 232-36; *supra* notes 35-47, 51-56 and accompanying text.

101. UNCLOS, *supra* note 2, art. 23(3)(a).

102. *Id.* arts. 41(4)-(5).

103. *Id.* art. 53(9).

104. *Id.* arts. 60(3), 60(5), 61(2), 61(5).

105. *Id.* art. 119(2).

106. *Id.* arts. 197-202, 204(1), 205, 207(4), 208(5), 210(4), 211(1)-(3), 211(5)-211(6)(a), 212(3), 213-214, 216(1), 217(1), 217(4), 217(7), 218(1), 220(7), 222-223.

107. *Id.* arts. 238-239, 242(1), 243-244(2), 246(3), 246(5), 246(5)(d), 248, 249(1), 251-252, 252(b), 253(1)(b), 253(4)-(5), 254(1)-(4), 256-257, 262-263(3), 265.

108. *Id.* arts. 266(1), 268-269, 271-273, 275(1)-276(1), 278.

109. *Id.* art. 297(1)(c).

110. *Id.* annex II, art. 3(2).

seas or air space above, resulting from any activities with radio-active materials or other harmful agents.<sup>111</sup>

Review of commentaries on these provisions reveals different international organizations are considered the “competent international organization[s]” for different articles. The generic meaning for “international organization” is not clear; a proposal to define “international organization” as an intergovernmental organization, following the Vienna Convention on the Law of Treaties definition, was not adopted.<sup>112</sup>

The meaning of the plural expression will clearly be dependent upon time, place and circumstance (an observation equally applicable to the singular expression in [A]rticle 223). It also allows States to interact with different international intergovernmental organizations in given circumstances. The meaning of the singular expression, however, is more circumscribed. In dealing with applicable rules, standards and recommended practices and procedures, the expression “*the* competent international organization” is frequently encountered in articles adopted by the both the Second Committee and the Third Committee, [dealing with navigation and safety rules], and this normally refers to the International Maritime Organization (IMO). Elsewhere in the Convention, however, the singular expression refers to whichever international organization is competent in the circumstances. It was generally understood in the [Law of the Sea] Conference, in both the Second Committee and the Third Committee, that the IMO is “the competent international organization” with regard to the prevention, reduction and control of vessel-source pollution . . . ; dumping at sea; the safety of navigation and routing systems; and the design, construction, equipment and manning of vessels. Similarly the International Atomic Energy Agency (IAEA) is the competent international organization with respect to radioactive substances.<sup>113</sup>

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111. High Seas Convention, *supra* note 15, art. 25.

112. 4 UNITED NATIONS CONVENTION ON THE LAW OF THE SEA 1982: A COMMENTARY para. XII.17 (Myron H. Nordquist et al. eds., 1991) [hereinafter 4 COMMENTARY] (referring to Vienna Convention, *supra* note 8, art. 2(i)).

113. *Id.* (footnotes omitted) (*inter alia* citing Statute of International Atomic Energy Agency, Oct. 26, 1956, 8 U.S.T. 1093, 276 U.N.T.S. 3). The IMO “has a wide competence in matters affecting shipping and has adopted a detailed and technical approach to its work. Its committees . . . have played a prominent role in drawing up regulations concerning navigation and pollution.” CHURCHILL & LOWE, *supra* note 2, at 23. Over 40 IMO-drafted treaties and protocols, many widely accepted by states, are in force. *See generally id.* at 264-77, 333, 339-56; 2 D.P. O’CONNELL, THE INTERNATIONAL LAW OF THE SEA 771-80, 831-37, 997-1015 (I.A. Shearer ed., 1984) [hereinafter 2 O’CONNELL]. The IAEA sponsored the Convention on Civil Liability for Nuclear Damage, May 21, 1963, 1977 U.N.T.S. 266. CHURCHILL & LOWE, *supra* note 2, at 23, 362-63.

Commentaries on specific UNCLOS provisions bear out this general statement.<sup>114</sup>

“The IMO is recognized as the only international organization responsible for establishing and adopting measures on an international level concerning the routing of ships” in territorial sea innocent passage,<sup>115</sup> the subject of Article 22(3)(a).<sup>116</sup> The same is true for routing systems designated by IMO for straits transit passage, the subject of Articles 41(4)-41(5),<sup>117</sup> and for archipelagic sea lanes passage, where IMO designates sea lanes and routes, the subject of Article 53(9).<sup>118</sup> For aircraft exercising rights of archipelagic overflight, Article 53(9) does not apply; the International Civil Aviation Organization (ICAO) Rules of the Air apply to these flights.<sup>119</sup> The IMO is also recognized as the competent international organization for Articles 60(3) and 60(5),<sup>120</sup> dealing with removing artificial islands, installations and structures, and safety zones around them.<sup>121</sup> UNCLOS, Article 208, which requires coastal states to “adopt laws and regulations to prevent, reduce and control pollution of the marine environment,” refers to Article 60.<sup>122</sup> UNCLOS, Article 246(5)(c), which addresses EEZ and continental shelf MSR, also refers to Article 60.<sup>123</sup>

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114. In addition to UNCLOS, to the extent merchant ship crews’ working conditions affect navigational safety, International Labor Organization-sponsored treaties could have an impact. CHURCHILL & LOWE, *supra* note 2, at 270; 2 O’CONNELL, *supra* note 113, at 831.

115. 2 COMMENTARY, *supra* note 72, para. 22.8(d); *see also* CHURCHILL & LOWE, *supra* note 2, at 95 n.59. The non-suspendable innocent passage regime of arts. 17-32, and therefore the IMO as the competent international organization to establish and adopt sea lanes, applies to straits used for international navigation but excluded from straits transit passage under UNCLOS, Article 38(1), or those straits used for international navigation between a part of the high seas or an EEZ and a foreign State’s territorial sea; *cf.* 2 COMMENTARY, *supra* note 72, paras. 45.1, 45.8(a)-45.8(c).

116. *See* UNCLOS, *supra* note 2, art. 22(3).

117. *Id.* art. 41; 2 COMMENTARY, *supra* note 72, para. 41.9(c).

118. *Id.* art. 53; CHURCHILL & LOWE, *supra* note 2, at 106, 108, 127-28 (IMO the competent international organization); 2 COMMENTARY, *supra* note 72, paras. 53.1, 53.9(k).

119. 2 COMMENTARY, *supra* note 72, para. 53.9(k); *see also* CHURCHILL & LOWE, *supra* note 2, at 173-74.

120. 2 COMMENTARY, *supra* note 72, para. 60.15(f); *see id.* para. 60.15(h); *see also* CHURCHILL & LOWE, *supra* note 2, at 155, 167-68, 170.

121. UNCLOS, *supra* note 2, art. 60.

122. *Id.* art. 208; 2 COMMENTARY, *supra* note 72, para. 60.15(l); 4 COMMENTARY, *supra* note 112, para. 208.10(a).

123. UNCLOS, *supra* note 2, art. 246; 2 COMMENTARY, *supra* note 72, para. 60.15(m).

On the other hand, commentators note the different thrust of Articles 61(2) and 61(5),<sup>124</sup> dealing with “competent international organizations, whether subregional, regional or global,” for conservation and management measures and exchange of available scientific information, catch and fishing effort statistics, and other data relevant to conserving fish stocks:

In paragraph 2, the expression “competent international organization, whether subregional, regional or global” must be carefully distinguished from the expression “competent international organization” used in the articles . . . relating to navigation and protection and preservation of the marine environment. In those provisions, the expression normally refers to the [IMO]. . . . In dealing with the harmonization of references to subregional, regional and global organizations, . . . “except with respect to article 61,” the term “competent international organizations” is sufficient to refer to global organizations or to both global and other organizations . . .

The [FAO] is not in the same position with respect to fisheries[, conservation of which is within the ambit of Article 61]. The FAO Committee on Fisheries constitute[d, in 1993] the only intergovernmental forum in which fishery problems are examined periodically on a worldwide basis, and could, in some respects, be considered a global organization to which article 61 refers. Alongside this Commission, there are a number of regional fishery bodies both inside and outside FAO, the activities of which are of more direct relevance to the actual management of fishery resources.<sup>125</sup>

UNCLOS, Article 119(2)’s similar reference to “competent international organizations, whether subregional, regional or global,” in the context of high seas conservation of living resources,<sup>126</sup> must be read in the same light as the references in Articles 61(2) and 61(5); in other words, the primary reference should be to the FAO, along with regional fishery bodies inside and outside FAO.<sup>127</sup>

There are more references to “the competent international organization” or “competent international organizations” in UNCLOS Part XII, Protection and Preservation of the Marine Environment, than any other Part of the Convention.<sup>128</sup> First, as a general matter, Part XII

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124. “What is much less certain is whether the coastal State’s fishery management duties . . . in articles 61 and 62 have become part of customary law.” CHURCHILL & LOWE, *supra* note 2, at 290.

125. 2 COMMENTARY, *supra* note 72, para. 61.12(e) (citations omitted); *see also id.* para. 61.12(j); *cf.* CHURCHILL & LOWE, *supra* note 2, at 294-96.

126. UNCLOS, *supra* note 2, art. 119(2).

127. *See* 2 COMMENTARY, *supra* note 72, paras. 61.12(e), 61.12(j), 61.12(k); *cf.* CHURCHILL & LOWE, *supra* note 2, at 297-305, 313; 3 COMMENTARY, *supra* note 47, para. 119.7(e).

128. *See supra* notes 101-10 and accompanying text.

references to “competent international organizations” include global organizations or global and other organizations.<sup>129</sup> Second, however, if the singular “competent international organization” is used, the IMO has been considered “the competent international organization” with regard to prevention, reduction, and control of vessel-source pollution; dumping at sea; safety of navigation and routing systems; and design, construction, equipment and manning of vessels.<sup>130</sup> The IAEA has been considered “the competent international organization” with respect to radioactive substances.<sup>131</sup>

The first is true for references to “competent international organizations,” in the plural, in UNCLOS Article 197 commentary that mentions the IMO but does not exclude other organizations.<sup>132</sup> The same drafting pattern for “competent international organizations” appears in commentaries for UNCLOS Articles 198, 199, 200, 201, 204(1), 205 and 214,<sup>133</sup> but not in those for Articles 202, 210(4), 212(3), 216 and 222, and indirectly in Articles 207, 208 and 213 commentaries.<sup>134</sup> Article 200 commentary refers to the IMO and other organizations.<sup>135</sup> Article 212 commentary regarding atmospheric pollution refers to the ICAO.<sup>136</sup>

UNCLOS Articles 211(1), 211(2), 211(3), 211(5), and 211(6)(a), by contrast, refer to “the competent international organization” in the singular,<sup>137</sup> “the” organization meaning the IMO:

only one international intergovernmental organization – the International Maritime Organization – is competent for . . . establishing international rules and standards to prevent, reduce and control pollution of the marine environment from vessels, and for adopting, where appropriate, routing systems designed to minimize the threat of accidents which might cause pollution of the marine environment.<sup>138</sup>

However,

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129. See 4 COMMENTARY, *supra* note 112, para. XII.17, at 16.

130. *Id.* para. XII.17, at 15.

131. *Id.* para. XII.17; see also CHURCHILL & LOWE, *supra* note 2, at 333, 339-70, 394-96 (“The treaties concerned with pollution from ships were all adopted under the auspices of the [IMO] . . .”).

132. 4 COMMENTARY, *supra* note 112, para. 197.7 (“global or other organizations”).

133. *Id.* paras. 198.1, 199.1, 199.4-199.5, 200.6, 201.5, 204.7, 205.5, 214.7(a).

134. Compare *id.* para. 207.4 with *id.* para. 207.5; see *id.* para. 208.10(e) (referring to *id.* para. 207.5); *id.* para. 213.7(f) (referring to *id.* para. 207.7(d)).

135. *Id.* para. 200.1 (referring *inter alia* to IMCO, FAO).

136. *Id.* paras. 212.9(b)-212.9(c).

137. UNCLOS, *supra* note 2, arts. 211(1)-(3), 211(5), 211(6)(a).

138. 4 COMMENTARY, *supra* note 112, para. 211.15(d).

Regional organizations, whose specific competence in the part of the sea concerned is generally acknowledged and recognized, especially by the flag State, and whose decisions are compatible with the Convention, could assist in the implementation of the international rules and standards, the elaboration of regional rules and standards and the establishment of regional monitoring systems, the dissemination of information and the promotion of technical cooperation.<sup>139</sup>

Similarly, commentary for UNCLOS Article 217, referring thrice to “the competent international organization,”<sup>140</sup> says the IMO is the organization that establishes international rules and standards for vessel compliance with marine environmental pollution standards.<sup>141</sup> Article 218 commentary, also referring to “the competent international organization,” does not elucidate the rationale, however.<sup>142</sup> Article 220(7), by referring to “the competent international organization or as otherwise agreed,”<sup>143</sup> suggests cooperation “not only with IMO but also with [FAO] and the bodies associated with it.”<sup>144</sup>

Although UNCLOS Article 223 refers to “the competent international organization,”<sup>145</sup> that reference “does not imply that in principle only one international organization can be competent for the purposes of . . . [A]rticle [223]. It refers to that international organization which was the competent one for the purposes of that provision of the Convention on the basis of which the proceedings were instituted.”<sup>146</sup>

Thus, although there seems to be no negotiating history or commentary for a few UNCLOS Part XII provisions, data from the rest confirms the view that “the competent international organization” means the IMO and only the IMO, except in Article 220(7), where the qualifying phrase, “or as otherwise agreed,” signals a possibility of cooperation with other international organizations. Article 223 documentation, dealing with enforcement,<sup>147</sup> indicates UNCLOS negotiators did not mean to confine the meaning of “the competent

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139. *Id.* See generally *id.* paras. 211.2 (regarding the IMCO’s earlier work), 211.15(g) (regarding the IMO’s contact with States).

140. UNCLOS, *supra* note 2, art. 217.

141. 4 COMMENTARY, *supra* note 112, para. 217.8(b).

142. See *id.* paras. 218.1-218.7.

143. UNCLOS, *supra* note 2, art. 220(7).

144. 4 COMMENTARY, *supra* note 112, para. 220.1; see also *id.* para. 220.11(k).

145. UNCLOS, *supra* note 2, art. 223.

146. 4 COMMENTARY, *supra* note 112, para. 223.9(a). The IMO was reported to have considered “the need for special procedures for submitting evidence by the IMO in proceedings under . . . [A]rticle [223].” *Id.*

147. See UNCLOS, *supra* note 2, art. 223.

international organization” to IMO. For the phrase “competent international organizations” in Part XII, it seems reasonably clear that regional and sub-regional organizations are also meant.

There are equally as many references to “competent international organization” or “competent international organizations” in UNCLOS Part XIII, providing for MSR. The Part XII pattern of definition<sup>148</sup> for “competent international organizations” continues in Part XIII. They can include governmental and nongovernmental organizations. Part XIII’s use of the term “refer[s] to whichever organization or organizations are conducting marine scientific research.”<sup>149</sup> UNESCO’s Intergovernmental Oceanographic Commission (IOC) works with many such organizations, including working with the FAO on fisheries, the IAEA on protecting the marine environment, the IHO, the World Meteorological Organization (WMO), the United Nations Environment Program (UNEP) on ocean monitoring and marine pollution research and monitoring, regional groups like the *Comision Permanente del Pacifico Sur* and the International Commission for the Scientific Exploration of the Mediterranean Sea, and NGOs like the International Council for the Exploration of the Seas and the Scientific Committee on Oceanic Research, which is part of the International Council of Scientific Unions.<sup>150</sup> Commentaries for Articles 238,<sup>151</sup> 243,<sup>152</sup> 244,<sup>153</sup> 251,<sup>154</sup> 252,<sup>155</sup> 256,<sup>156</sup> 257,<sup>157</sup> 261,<sup>158</sup> and

148. See *supra* notes 129-32 and accompanying text.

149. 4 COMMENTARY, *supra* note 112, para. XIII.14.

150. *Id.*; see also CHURCHILL & LOWE, *supra* note 2, at 412, 415-19.

151. 4 COMMENTARY, *supra* note 112, para. 238.11(c) (listing the International Sea-Bed Authority, whose “competence is unequivocally established in UNCLOS art. 143,” the United Nations and its competent specialized agencies, the IAEA, the IOC, UNEP, and the possibility of NGOs).

152. *Id.* para. 243.7(b).

153. See *id.* paras. 244.4-244.6.

154. See *id.* para. 251.4 (“There is no indication of which organizations are ‘competent’ in this matter, but the [IOC] plays leading role in the implementation of article 251.”).

155. Cf. *id.* para. 252.9(a).

156. *Id.* para. 256.7(c) (noting that the reference to “competent international organizations” indicates that art. 256 applies to “any and all such organizations wishing to conduct [MSR] in maritime zones beyond national jurisdictional limits that are capable of doing so”).

157. See *id.* para. 257.6(b) & n.2 (referencing WMO programs).

158. *Id.* para. 261.5 n.2. The IMO Secretariat “has expressed the opinion that [the] ‘IMO would appear to be the most appropriate body for developing the international rules and standards to ensure safety at sea’” and that it should consult with the ICAO, the International Telecommunications Union (ITU), the IOC, the IHO, and other organizations. *Id.* (both citing and quoting INTERNATIONAL MARITIME ORGANIZATION, LEG/MISC/1, IMPLICATIONS OF THE UNITED NATIONS CONVENTION ON THE LAW OF THE SEA, 1982 FOR THE INTERNATIONAL



262<sup>159</sup> underscore the possible diversity of organizations. Commentaries for Articles 239, 242(1), 246, 248, 249(1), 253, 254 and 263 lack similar references;<sup>160</sup> however, given these articles' provenance within Part XIII's context,<sup>161</sup> where other commentaries note the variety of organizations that can participate, the same meaning for "competent international organizations" should attach to Articles 239, 242(1), 246, 248, 249(1), 253, 254 and 263.

Article 265 lacks the article "the" before "competent international organization."<sup>162</sup> There is no commentary on the omission,<sup>163</sup> since Article 265 refers to "the State or competent international organization authorized to conduct a marine scientific research project,"<sup>164</sup> Article 265's context<sup>165</sup> suggests that "competent international organization" in Article 265 does not mean the IMO as in other contexts,<sup>166</sup> but rather a particular international organization, whether global, regional or subregional, involved in an MSR project and subject to Article 265 interim measures issues.

Commentaries to UNCLOS, Part XIV, Development and Transfer of Marine Technology, follow the pattern of Parts XII and XIII for defining "competent international organizations." Commentaries to Articles 266(1),<sup>167</sup> 268,<sup>168</sup> 269,<sup>169</sup> 272,<sup>170</sup> 273,<sup>171</sup> 276,<sup>172</sup> and 278<sup>173</sup> note

MARITIME ORGANIZATION (IMO) para. 127 (1987), *reprinted in* 3 NETH. INST. FOR THE LAW OF THE SEA, INTERNATIONAL ORGANIZATIONS AND THE LAW OF THE SEA: DOCUMENTARY YEARBOOK 1987, 340, 388).

159. 4 COMMENTARY, *supra* note 112, paras. 261.5 n.2, 262.5 & n.3 (air safety under ICAO; safety at sea under IMO; internationally agreed warning signals under ITU); *see also supra* note 158.

160. 4 COMMENTARY, *supra* note 112, paras. 239.1-239.4, 242.1-242.10(d), 256.1-256.17(e), 248.1-248.8(h), 249.1-249.12(j), 253.1-253.13(f), 254.1-254.14(g), 263.1-263.8.

161. The Vienna Convention declares that a treaty must "be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose." Vienna Convention, *supra* note 8, art. 31(1). *See also* RESTATEMENT, *supra* note 8, § 325(1); AUST, *supra* note 8, at 187-91 (art. 31[1] recites basic rule, Vienna Convention, *supra*, art. 31(2) context principles for law of treaties); HORN, *supra* note 8, § 25.7, at 261-62; 1 OPPENHEIM'S INTERNATIONAL LAW, *supra* note 8, pt. 2, § 632, at 1271-75; MCNAIR, *supra* note 8, at 364-68, 380-81, 385; Kearney & Dalton, *supra* note 32, at 519-21.

162. *See* UNCLOS, *supra* note 2, art. 265.

163. *See* 4 COMMENTARY, *supra* note 112, para. 265.1-265.3.

164. UNCLOS, *supra* note 2, art. 265.

165. Vienna Convention, *supra* note 8, art. 31(1); *see also supra* note 161 and accompanying text.

166. *See supra* notes 115-23, 129-46 and accompanying text.

167. 4 COMMENTARY, *supra* note 112, para. 266.7(a) (noting that the phrase is "broad enough to embrace any international intergovernmental organization which is competent to render the requested assistance, whether by virtue of its general characteristics and sphere of activity, or . . . its regional association").

the variety of possible organizations. Commentaries for Articles 271 and 275 lack similar references;<sup>174</sup> however, given these provisions' provenance within Part XIV's context,<sup>175</sup> where other articles' commentaries note the variety of organizations that can participate, the same meaning for "competent international organizations" should attach to Articles 271 and 275.

Article 297(1)(c), in UNCLOS Part XV, Settlement of Disputes, refers to "a competent international organization."<sup>176</sup> There appears to be no commentary on this.<sup>177</sup> However, Article 297(1)(c) refers to "specified international rules and standards for the protection and preservation of the marine environment which are applicable to the coastal State and which have been established . . . through a competent international organization . . . in accordance with this Convention."<sup>178</sup> Under UNCLOS Part XII, Protection and Preservation of the Marine Environment, when "the competent international organization" is used, IMO is considered "the competent international organization" for prevention, reduction and control of vessel-source pollution; dumping at sea; safety of navigation and routing systems; and design, construction, equipment and manning of

168. *Id.* para. 268.5(e) (referencing the IMO's steps to implement art. 268(d).

169. *See id.* paras. 269.2-269.3 (suggesting that "competent international organizations" is a shorthand version of "cooperation at the international, regional and sub-regional levels").

170. *See id.* paras. 272.1-272.2 (suggesting that "competent international organizations" is a shorthand version of "organizations . . . in the field of transfer of technology . . . coordinat[ing] . . . any regional or international programmes"). UNCLOS art. 272 says that states "shall endeavour to ensure that competent international organizations coordinate their activities, including any regional or global programmes . . ." UNCLOS, *supra* note 2, art. 272.

171. 4 COMMENTARY, *supra* note 112, para. 273.9(e) ("[C]ompetent international organization' refers to any international organization which is competent in the circumstances present; in Part XIV, however, it does not have the same specific connotation that it has in Part XII.").

172. *See id.* paras. 276.5-276.6 (suggesting that "competent international organizations" is a shorthand version of "competent regional organizations, [and] international organizations").

173. *Id.* para. 278.4(a) ("Article 278 is addressed to 'competent international organizations,' both those referred to in Part XIII (articles 238 to 265) as well as those in Part XIV. It is not possible to indicate in general terms the competent international organizations which the article has in mind . . .").

174. *See id.* paras. 271.1-271.4, 275.1-275.4(b).

175. Vienna Convention, *supra* note 8, art. 31(1); *see also supra* note 161 and accompanying text.

176. *See* UNCLOS, *supra* note 2, art. 297(1)(c).

177. *See* 5 COMMENTARY, *supra* note 112, para. 297.12.

178. UNCLOS, *supra* note 2, art. 297(1)(c).

vessels.<sup>179</sup> The IAEA is considered the “competent international organization” for radioactive substances.<sup>180</sup> Since Article 297 refers to protection and preservation of the marine environment, and UNCLOS Part XII commentaries accord a meaning to “the competent international organization,” logically “a competent international organization” in Article 297(1)(c) should have the same meaning as “the competent international organization” in Part XII.

UNCLOS Annex II, Article 3(2) allows the Commission on the Limits of the Continental Shelf to cooperate with the IOC, IHO and “other competent international organizations.”<sup>181</sup> Article 3(2) commentary does not say whether “other” organizations might include regional, subregional, or nongovernmental organizations.<sup>182</sup> However, given the apparent construction of “the competent international organizations” as including these, it would be consistent to accord the same definition to Article 3(2).

Definitions for “appropriate international organization” or “appropriate international organizations” are proposed in Part III.A. A definition for “regional” or “sub-regional” organization is proposed in Part III.G.

2. *Comments.* Howard S. Schiffman proposed the terms “competent international organization” or “competent international organizations.”<sup>183</sup> The Chair researched the terms.

3. *Conclusions.* These definitions for “competent international organization” or “competent international organizations” are proposed:

“The competent international organization,” as used in the 1982 LOS Convention, arts. 22, 41, and 60, means the International Maritime Organization (IMO) or its successor. “The competent international organization,” as used in the Convention, art. 53, means the IMO or its successor with respect to ships’ navigation, and the International Civil Aviation Organization or its successor with respect to overflight.

“The competent international organization,” as used in the Convention, Part XII, means the IMO or its successor with respect to issues of preventing, reducing and controlling vessel-source pollution; dumping at sea; safety of navigation and routing systems; and design, construction, equipment and manning of vessels. The International Atomic Energy Agency or its successor is “the competent international organization” with respect to issues involving radioactive substances.

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179. See *supra* note 113 and accompanying text.

180. See *supra* notes 113, 131, 150-51 and accompanying text.

181. UNCLOS, *supra* note 2, annex II, art. 3(2).

182. See 2 COMMENTARY, *supra* note 72, para. A.II.10(c).

183. Shiffman E-mail, *supra* note 24.

In the Convention, art. 220(7), because of the qualifying clause, “unless otherwise agreed,” that follows “the international organization,” other international organizations may be involved.

In the Convention, art. 223, “the international organization” means that international organization which is the competent one for the purposes of art. 223, on the basis of which proceedings were instituted.

In the Convention, art. 265, “competent international organization” does not necessarily mean the IMO or its successor, but rather a particular international organization, global, regional, or subregional, involved in a marine scientific research project and subject to art. 265 interim measures issues.

“A competent international organization,” as used in the Convention, art. 297, has the same meaning as “the competent international organization” in the Convention, Part XII.

“Competent international organizations, whether subregional, regional or global,” as used in the Convention, arts. 61 and 119, means the Food and Agriculture Organization (FAO) as the “global” organization, or its successor; “subregional” or “regional” organizations mean subregional or regional fishery bodies, whether they are subject to FAO or its successor or independent of FAO or its successor.

“Competent international organizations,” as used in the Convention, Parts XII, XIII and XIV and Annex II, art. 3(2), means global, regional, and subregional international organizations.

The phrase “or its successor” accounts for a possibility, however remote, that IMO, FAO or other organizations may change in purposes, principles and functions, so that another international organization would be considered “the international organization” in the future.

In LOAC-governed situations under the “other rules of international law” clauses in the Convention, a different definition may apply.<sup>184</sup> The same may be the situation if the Charter supersedes the Convention, or if *jus cogens* norms apply.<sup>185</sup>

#### D. “Due regard.”

1. *Discussion and analysis.* The phrase “due regard” appears in UNCLOS, Articles 27(4), 39(3)(a), 56(2), 58(3), 60(3), 66(3)(a), 79(5), 87(2), 142(1), 148, 161(4), 162(2)(d), 163(2), 167(2), 234, and 267 and in Appendixes II, Article 2(1) and IV, Articles 5(1) and 5(2).<sup>186</sup> Article 87(2) declares that the high seas freedoms listed in

184. See *supra* notes 51-56 and accompanying text.

185. See Walker, *Definitions III*, *supra* note 19, at 232-36; *supra* notes 35-47, 51-56 and accompanying text.

186. UNCLOS, *supra* note 2, arts. 27(4), 39(3)(a), 56(2), 58(3), 60(3), 66(3)(a), 79(5), 87(2), 142(1), 148, 161(4), 162(2)(d), 163(2), 167(2), 234, 267; *id.* appendix II, art. 2(1); *id.* appendix IV, arts. 51(1)-(2).

Article 87(1) (*inter alia* freedoms of navigation, overflight, fishing (subject to Articles 116-20), and scientific research (subject to Parts VI and XIII, governing MSR) and freedoms to lay submarine cables and pipelines (subject to UNCLOS Part VI, governing the continental shelf) and to construct artificial islands and other installations permitted under international law (subject to Part V)<sup>187</sup> “shall be exercised by all States with due regard of the interests of other States in their exercise of the freedom of the high seas, and also with due regard for the rights under [the] Convention with respect to activities in the Area.”<sup>188</sup> This UNCLOS due regard rule applies, under Convention Articles 1(1), 3, 33, 55, 58, 76(1), 78, 121, and 135 to high seas areas claimed by coastal states as part of their contiguous zones, continental shelves or EEZs, or those high seas otherwise under Area cognizance, except as otherwise governed by the Convention (*e.g.*, in Articles 56(3), 58(3), 60(3), 66(3)(a), 142(1), 148, and 234).<sup>189</sup> The High Seas Convention, Article 2, similarly listing high seas freedoms, declares that they “shall be exercised by all States with reasonable regard to the interests of other States in their exercise of the freedom of the high seas.”<sup>190</sup> The High Seas Convention reasonable regard rule applies, under Article 24 of the Territorial Sea Convention, Article 3 of the Shelf Convention, and Article 1 of the Fishing Convention, to high seas areas claimed by a coastal state as part of its contiguous zone, continental shelf, or fishery zone.<sup>191</sup> The Convention on International Civil Aviation requires states parties, when issuing regulations for their state aircraft, to have “due regard” for civil aircraft navigation safety.<sup>192</sup>

Commentary for UNCLOS, Article 87(2) explains “due regard”:

[T]he requirement of “due regard” is a qualification of the rights of States in exercising the freedoms of the high seas. The standard of “due regard” requires all States, in exercising their high seas freedoms, to be aware of and consider the interests of other States in using the high seas, and to

187. *Id.* art. 87(1).

188. *Id.* art. 87(2).

189. *Cf.* 3 COMMENTARY, *supra* note 47, para. 87.9(m).

190. High Seas Convention, *supra* note 15; *see also* Fisheries Jurisdiction (U.K. v. Ice.), 1974 I.C.J. 3, 22, 29 (July 25, 1974) (holding that art. 2 and the rest of the High Seas Convention are generally declaratory of established principles of international law); *see also* RESTATEMENT, *supra* note 8, §§ 521(3), 514 reporters’ n.3.

191. *See* Shelf Convention, *supra* note 15, art. 3; Fishing Convention, *supra* note 15, art. 1(1); Territorial Sea Convention, *supra* note 15, art. 24(1).

192. Convention on International Civil Aviation art. 3(d), Dec. 7, 1944, 61 Stat. 1180, 15 U.N.T.S. 295; *see also* RESTATEMENT, *supra* note 8, § 521 cmt. d.

refrain from activities that interfere with the exercise by other States of the freedom of the high seas. As the ILC[, which prepared drafts of the 1958 LOS Conventions,] stated in its Commentary in 1956, “States are bound to refrain from any acts that might adversely affect the use of the high seas by nationals of other States.” The construction in paragraph 2 recognizes that all States have the right to exercise high seas freedoms, and balances consideration for the rights and interests of all states in this regard.<sup>193</sup>

Article 87(2)’s “due regard” formulation evolved from the High Seas Convention, Article 2 “reasonable regard” language, through an intermediate draft phrase of “due consideration.”<sup>194</sup>

UNCLOS Article 79(5) requires that states laying submarine cables or pipelines “shall have due regard to cables or pipelines already in position.”<sup>195</sup> The High Seas Convention, Article 26(3) has a similar provision, requiring states laying cables or pipelines to “pay due regard” to those already in position on the seabed.<sup>196</sup> States exercising the high seas freedom to lay pipelines and cables, besides having due regard for other states in those states’ exercise of their high seas freedoms, must also have due regard for cables and pipelines already on the seabed.

UNCLOS Article 27(4), governing arrests aboard a foreign ship in territorial sea passage, requires that “local authorities shall have due regard to the interests of navigation . . . .”<sup>197</sup> This language is similar

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193. 3 COMMENTARY, *supra* note 47, para. 87.9(l) (footnote omitted); *see also* NWP 1-14M *Annotated*, *supra* note 16, para. 2.4.3 & n.65, at 131-32 (stating that “reasonable regard” of the High Seas Convention, and the “due regard” standards of UNCLOS “are one and the same and require any using nation to be cognizant of the interests of the interests of others in using a high seas area, and to abstain from nonessential, exclusive uses which substantially interfere with the exercise of other nations’ high seas freedoms”); RESTATEMENT, *supra* note 8, § 521(3) (“reasonable regard”); BROWNLIE, PRINCIPLES, *supra* note 10, at 226; CHURCHILL & LOWE, *supra* note 2, at 206, 264; 1 O’CONNELL, *supra* note 16, at 57-58 (“reasonableness of competing uses”); 2 O’CONNELL, *supra* note 113, at 796, 798-99 (same, “due regard”); 1 OPPENHEIM’S INTERNATIONAL LAW, *supra* note 8, pt. 2, § 285, at 729 (“reasonable regard”; “weighting of freedoms may change with circumstances and with time”); Oxman, *The Regime*, *supra* note 47, at 837-38 (“due regard”); Robertson, *The “New,” supra* note 54, at 297 (“due regard”). NWP 1-14M *Annotated*, *supra* note 16, and SAN REMO MANUAL, *supra* note 26, adopted the due regard principle for LOAC situations. *See supra* note 54 and accompanying text.

194. 3 COMMENTARY, *supra* note 47, para. 87.9(l) n.32; *see also* CHURCHILL & LOWE, *supra* note 2, at 206.

195. UNCLOS, *supra* note 2, art. 79(5); *see also* 2 COMMENTARY, *supra* note 72, para. 79.8(e).

196. High Seas Convention, *supra* note 15, art. 26(3); *see also* 2 COMMENTARY, *supra* note 72, para. 79.2.

197. UNCLOS, *supra* note 2, art. 27(4); *see also* 2 COMMENTARY, *supra* note 72, para. 27.8(e).

to that in the Territorial Sea Convention, Article 19(4).<sup>198</sup> UNCLOS Article 39(3)(a), addressing duties of aircraft during straits transit passage, requires state aircraft to “at all times operate with due regard for the safety of navigation,”<sup>199</sup> a “principle applicable to the high seas generally.”<sup>200</sup> Under Article 234, in ice-covered areas, “[c]oastal States have the right to adopt and enforce nondiscriminatory laws and regulations for the prevention, reduction and control of marine pollution from ships within” their EEZ limits, but “[s]uch laws and regulations shall have due regard to navigation and the protection and preservation of the marine environment . . . .”<sup>201</sup>

Article 56(2) requires that “[i]n exercising its rights and performing its duties . . . in [its] exclusive economic zone, the coastal State shall have due regard to the rights and duties of other States . . . .”<sup>202</sup> Article 58(3) requires other states, in exercising their rights and performing their duties in the EEZ, *inter alia* “shall have due regard to the rights and duties of the coastal State . . . .”<sup>203</sup> Article 60(3) requires that a coastal state removing artificial islands, installations, or structures in its EEZ “shall . . . have due regard to fishing, the protection of the marine environment and the rights and duties of other States.”<sup>204</sup> Article 66(3)(a), regulating anadromous fish stocks, provides with respect to fishing beyond an EEZ’s outer limits, “States concerned shall maintain consultations with a view to achieving agreement on terms and conditions of such fishing giving due regard to the conservation requirements and the needs of the State of origin in respect of these stocks.”<sup>205</sup> Commentators note that “[t]he concept

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198. Compare UNCLOS, *supra* note 2, art. 19(4) with *id.* art. 27(4); see also 2 COMMENTARY, *supra* note 72, para. 27.2.

199. UNCLOS, *supra* note 2, art. 39(3)(a); see also 2 COMMENTARY, *supra* note 72, paras. 39.10(k)-39.10(l). State aircraft are not automatically subject to the Rules of the Air, promulgated by the ICAO, like civil aircraft. *Id.* State aircraft should normally comply with such safety measures and should always operate with due regard for safety of navigation, not merely aerial navigation. *Id.*

200. RESTATEMENT, *supra* note 8, § 521 cmt. d.

201. UNCLOS, *supra* note 2, art. 234; see also 4 COMMENTARY, *supra* note 112, paras. 234.1 (art. 234 is a *lex specialis*), 234.5(a), 234.5(e).

202. UNCLOS, *supra* note 2, art. 56(2).

203. *Id.* art. 58(3). See generally 2 COMMENTARY, *supra* note 72, paras. 56.4-56.5, 56.7.

204. UNCLOS, *supra* note 2, art. 60(3); see also 2 COMMENTARY, *supra* note 72, paras. 60.11, 60.14, 60.15(f); NWP 1-14M *Annotated*, *supra* note 16, para. 2.4.2, at 129-30.

205. UNCLOS, *supra* note 2, art. 66(3)(a). See generally 2 COMMENTARY, *supra* note 72, paras. 66.3-66.8, 66.9(c)-66.9(d).

of 'due regard' in the Convention balances the obligations of . . . the coastal State and other States within the EEZ."<sup>206</sup>

Article 142(1), in Part XI, which provides for the Area, requires that "[a]ctivities in the Area, with respect to resource deposits in the Area which lie across limits of national jurisdiction, shall be conducted with due regard to the rights and legitimate interests of any coastal State across whose jurisdiction such deposits lie."<sup>207</sup> Article 148 recites in part that "[t]he effective participation of developing States in activities in the Area shall be promoted as specifically provided for in this Part [XI], having due regard to their special interests and needs . . . ."<sup>208</sup>

Article 267 requires states, in promoting development and transfer of marine technology, must "have due regard for all legitimate interests, including, *inter alia*, the rights and duties of holders, suppliers and recipients of marine technology."<sup>209</sup> "[T]he expression 'due regard' . . . implies that all the relevant circumstances are to be taken into consideration."<sup>210</sup>

UNCLOS applies the due regard principle to Area governance and management and to the Commission on the Limits of the Continental Shelf. Article 161(4), providing for Area Authority Council membership, requires that "due regard should be paid to the desirability of rotation of membership."<sup>211</sup> Similarly, Annex IV, Article 5(1), in the Statute of the Enterprise for the Area, states that [i]n the election of the members of the [Enterprise Governing] Board, due regard shall be paid to the principle of equitable geographical distribution.<sup>212</sup> Article 5(2) requires that "due regard shall be paid to the principle of rotation of membership."<sup>213</sup> UNCLOS Article 162(2)(d) requires the Area Council to establish subsidiary organs, "with due regard to economy and efficiency"; and states that "due account" must be taken of the principle of equitable geographical

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206. J. ASHLEY ROACH & ROBERT W. SMITH, UNITED STATES RESPONSES TO EXCESSIVE MARITIME CLAIMS 175 (2d ed. 1996); see also RESTATEMENT, *supra* note 8, § 514, cmt. e & reporters' n.3; BROWNLIE, PRINCIPLES, *supra* note 10, at 202 ("delicate balancing process"); 1 OPPENHEIM'S INTERNATIONAL LAW, *supra* note 8, pt. 2, § 342, at 803; Robertson, *The "New," supra* note 54, at 285.

207. UNCLOS, *supra* note 2, art. 142(1).

208. *Id.* art. 148.

209. *Id.* art. 267.

210. 4 COMMENTARY, *supra* note 112, para. 267.3(b); see also *id.* paras. 267.1-267.2.

211. UNCLOS, *supra* note 2, art. 161(4).

212. *Id.* annex IV, art. 5(1).

213. *Id.* annex IV, art. 5(2).



distribution and special interests.<sup>214</sup> Article 163(2) allows the Council to increase the size of the Economic Planning Commission or the Legal and Technical Commission, but with “due regard to economy and efficiency.”<sup>215</sup> Article 167(2) requires that “due regard . . . be paid to the importance of recruiting [and retaining the Authority] staff on as wide a geographic basis as possible,” subject to the paramount consideration for “securing the highest standards of efficiency, competence and integrity.”<sup>216</sup> Annex IV, art. 7(3) echoes this standard.<sup>217</sup> Annex II, art. 2(1) requires members of the Commission on the Limits of the Continental Shelf to be elected from among Convention parties, “having due regard to the need to ensure equitable geographical representation . . . .”<sup>218</sup>

The *San Remo Manual* on the LOAC at sea has adopted “due regard” formulations for regulating belligerents’ rights and duties in naval warfare, to which the law of the sea is subject through UNCLOS’s and the 1958 LOS Conventions’ “other rules” clauses,<sup>219</sup> and neutrals’ rights and duties under the law of the sea.<sup>220</sup>

Commentators have noted another elusive term, “comity,” which has at least five meanings: a species of accommodation, not unrelated to morality but distinguishable from it; “a synonym for international law”; an “equivalent to private international law,” or in U.S. usage, conflict of laws; “a policy basis for, and source of, particular rules of conflict”; and “as the reason for and source of . . . international law.”<sup>221</sup> Comity and due regard may be considered related. An often-cited Supreme Court case said:

‘Comity,’ in the legal sense, is neither a matter of absolute obligation . . . nor of mere courtesy and good will . . . . [I]t is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and

214. UNCLOS, *supra* note 2, art. 162(2)(d).

215. *Id.* art. 163(2).

216. *Id.* art. 167(2).

217. Compare *id.* with *id.* annex IV, art. 7(3).

218. *Id.* annex II, art. 2(1); see also 2 COMMENTARY, *supra* note 72, para. A.II.10(b).

219. See *supra* notes 51-52 and accompanying text.

220. SAN REMO MANUAL, *supra* note 26, paras. 12, 34, 36, 88, 106(c), reprinted in SCHINDLER & TOMAN, *supra* note 25, at 1157, 1160-61, 1167, 1169 (less commentaries); see also *id.* para. 37 (“take care” to avoid damaging cables, pipelines not exclusively serving belligerent), reprinted in SCHINDLER & TOMAN, *supra* note 25, at 1161 (less commentaries); *supra* notes 54, 193 and accompanying text.

221. BROWNLIE, PRINCIPLES, *supra* note 10, at 28; see also RESTATEMENT, *supra* note 8, §§ 101 cmt. e, 403 cmt. a; 1 OPPENHEIM’S INTERNATIONAL LAW, *supra* note 8, pt. 1, § 17, at 50-52.

convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws.<sup>222</sup>

Whatever might be said about the nature of comity and its relationship with “due regard,” UNCLOS elevates “due regard” to a positive command of law in various of its articles. Thus although warships may exchange salutes on the high seas as a matter of courtesy and good will, they must exercise reciprocal due regard under UNCLOS or the High Seas Convention for each vessel’s high seas freedoms.

2. *Comments.* Howard S. Schiffman proposed the term “due regard.”<sup>223</sup> The Chair researched the term.

3. *Conclusions.* “Due regard” has two components. The first is awareness and consideration of either state interest(s) or other factor(s); the second is balancing the interest(s) or factor(s) into analysis for a decision. Although commentators have suggested that this should occur in a negotiation process,<sup>224</sup> perhaps leading to an agreement subsidiary to the Convention,<sup>225</sup> awareness, consideration, and balancing can occur in *ad hoc*, practical situations as well, such as meeting or overtaking situations among vessels on the high seas under UNCLOS Article 87. With that introductory thought, these definitions for “due regard” are proposed:

“Due regard,” as used in the 1982 LOS Convention, art. 87, is a qualification of the rights of states in exercising the freedoms of the high seas. “Due regard” requires all states, in exercising their high seas freedoms, to be aware of and consider the interests of other states in using the high seas, and to refrain from activities that interfere with the exercise by other states of the freedom of the high seas. States are bound to refrain from any acts that might adversely affect the use of the high seas by nationals of other states. Article 87 recognizes that all states have the right to exercise high seas freedoms, and balances consideration for the rights and interests of all states in this regard.

In Convention art. 79, “due regard” means that in addition to the due regard that a state laying pipelines or cables must show to others exercising high seas freedoms, that state must also be aware of and consider the interests of other states that have previously laid pipelines or cables and must balance the rights and interests of the state laying pipelines or cables against other states’ high seas freedoms and the rights and interests of other states with respect to cables or pipelines already laid.

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222. *Hilton v. Guyot*, 159 U.S. 113, 163-64 (1895).

223. Schiffman E-mail, *supra* note 24.

224. CHURCHILL & LOWE, *supra* note 2, at 206 (also suggesting third party dispute settlement).

225. See UNCLOS, *supra* note 2, arts. 311(2)-311(6); see also Walker, *The Tanker*, *supra* note 16, at 244-45. See generally 5 COMMENTARY, *supra* note 17, paras. 311.1, 311.4-311.8, 311.11.

In Convention art. 27(4), “due regard” means that a state conducting an arrest aboard a foreign ship in territorial sea passage must be aware of and consider the interests of other states whose ships are navigating in that territorial sea area and must balance the arresting state’s rights and interests against the rights and interests of states conducting territorial sea passage.

In Convention art. 39(3)(a), “due regard” means that a state aircraft in straits transit passage must at all times be operated with awareness and consideration of safety of navigation, by air and by other modes, in the strait. The state aircraft’s rights and interests in operating in straits transit passage must be balanced against the rights and interests of states in navigating the strait by air and by other modes.

In Convention art. 234, “due regard” means that in ice-covered areas that are part of a coastal state’s exclusive economic zone, that coastal state, in adopting and enforcing nondiscriminatory laws and regulations for preventing, reducing and controlling marine pollution from ships, must be aware of and consider the right to navigation and the protection and preservation of the marine environment in that ice-covered part of its exclusive economic zone. That coastal state must balance these laws and regulations against the rights and interests of other states to navigate, and the obligation under the Convention to protect and preserve the marine environment, in that ice-covered part of that coastal state’s exclusive economic zone.

In Convention art. 56(2), “due regard” means that a coastal state, in exercising its rights and performing its duties in its exclusive economic zone, must be aware of and consider the rights exercised by and the duties of other states in that coastal state’s exclusive economic zone. The coastal state must balance its rights and duties against the rights and duties of those other states in its exclusive economic zone.

In Convention art. 58(3), “due regard” means that other states, in exercising their rights and performing their duties, *inter alia* must be aware of and consider the rights exercised by and the duties of the coastal state in its exclusive economic zone. Other states must balance their rights and duties against the rights and duties of the coastal state in its exclusive economic zone.

In Convention art. 60(3), “due regard” means that a coastal state removing artificial islands, installations or structures in its exclusive economic zone must be aware of and consider the rights of other states in fishing, the protection of the maritime environment, and the rights and duties of other states, in that coastal state’s exclusive economic zone.

In Convention art. 66(3)(a), “due regard” means with respect to fishing beyond exclusive economic zone limits, states concerned that maintain consultations with a view to agreement on terms and conditions of such fishing must be aware of and consider the conservation requirements and needs of the state of origin in respect of art. 66-governed anadromous fish stocks. States concerned must place into the balance the conservation requirements and needs of the state of origin of these fish stocks in these consultations.

In Convention art. 142(1), “due regard” means that with respect to resource deposits in the Area which lie across limits of national jurisdiction, the Authority and other states mining or otherwise having an interest in Area resource deposits must be aware of and consider the rights and legitimate interests of any coastal state across whose jurisdiction such resource deposits lie. The Authority and those states must balance their interests against the rights and legitimate interests of those coastal states.

In Convention art. 148, “due regard” means when there is promotion of developing states’ participation in activities in the Area as the

Convention, Part XI provides, there must be awareness of and consideration of those developing states' special interests and needs. Those special interests and needs must be placed in the balance when developing states' participation in activities in the Area are promoted.

In Convention art. 267, "due regard" means that when states promote, develop and transfer marine technology, states must be aware of and consider all legitimate interests, including the rights and duties of holders, suppliers, and recipients of marine technology. Those legitimate interests, including the rights and duties of holders, suppliers and recipients of marine technology, must be placed in the balance when states promote development and transfer of marine technology. All relevant circumstances must be taken into consideration.

In Convention art. 161(4), "due regard" paid to the desirability of rotation of Area Authority Council membership means that those who decide on Council membership must be aware of and consider rotating Council membership. They must balance the rotation factor in considering other legitimate factors for Council membership.

In Convention Annex IV, art. 5(1), "due regard" paid to the principle of equitable geographical distribution in electing Area Enterprise Governing Board members means that those who decide on Board membership must be aware of and consider all legitimate factors, including equitable geographical distribution. They must balance the equitable geographical distribution factor when considering other legitimate factors for electing Board members.

In Convention Annex IV, art. 5(2), "due regard" paid to the principle of rotation of Board membership means that those who decide on Board membership must be aware of and consider rotating Board membership. They must balance the rotation factor in considering other legitimate factors for Board membership.

In Convention art. 162(2)(d), "due regard" to economy and efficiency means that decision makers must be aware of and consider economy and efficiency along with other legitimate factors. Economy and efficiency must be balanced with other legitimate factors.

In Convention art. 163(2), "due regard" to economy and efficiency means that the Area Council must be aware of and consider economy and efficiency along with other legitimate factors in increasing the size of the Area Economic Planning Commission and the Area Legal and Technical Commission. Economy and efficiency must be balanced with other legitimate factors.

In Convention art. 167(2) and in Convention Annex IV, art. 7(3), "due regard" paid to the importance of recruiting and retaining Authority staff on as wide a geographic basis as possible, subject to the paramount consideration for securing the highest standards of efficiency, competence and integrity, means that those who recruit and retain Authority staff must be aware of and consider the importance of recruiting and retaining Authority staff on as wide a geographic basis as possible, but subject to the paramount consideration for securing the highest standards of efficiency, competence and integrity. Recruiting and retaining on as wide a geographic basis as possible must be thrown into the balance along with the paramount consideration for securing the highest standards of efficiency, competence, and integrity.

In Convention Annex II, art. 2(1), "due regard" to the need to ensure equitable geographical representation means that states parties to the Convention, in electing members of the Commission on the Limits of the Continental Shelf, must be aware of and consider equitable geographic representation on the Commission. Equitable geographic representation

must be balanced against other legitimate factors in electing Commission members.

In LOAC-governed situations under the “other rules of international law” clauses in the Convention, a different definition may apply.<sup>226</sup> The same may be the situation if the Charter supersedes the Convention, or if *jus cogens* norms apply.<sup>227</sup>

### E. “Maximum sustainable yield.”

1. *Discussion and analysis.* “Maximum sustainable yield” appears in UNCLOS, Article 61(3), which deals with conservation of living resources of the EEZ:

Such [coastal state conservation and management measures] shall also be designed to maintain or restore populations of harvested species at levels which can produce the maximum sustainable yield, as qualified by relevant environmental and economic factors . . . , and taking into account fishing patterns, the interdependence of stocks and any generally recommended international minimum standards . . . .<sup>228</sup>

The term also appears in UNCLOS, Article 119(1), which deals with conservation of high seas living resources:

1. In determining the allowable catch and establishing other conservation measures for the living resources of the high seas, States shall:

(a) take measures which are designed, on the best scientific evidence available to the States concerned, to maintain or restore populations of harvested species at levels which can produce the maximum sustainable yield, as qualified by relevant environmental and economic factors, . . . and taking into account fishing patterns, the interdependence of stocks and any generally recommended international minimum standards . . . .<sup>229</sup>

The Fishing Convention, Article 2 provides:

[T]he expression “conservation of the living resources of the high seas” means the aggregate of the measures rendering possible the optimum sustainable yield from those resources . . . to secure a maximum supply of food and other marine products. Conservation programmes should be

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226. See *supra* notes 51-56 and accompanying text.

227. See Walker, *Definitions III*, *supra* note 19, at 232-36; *supra* notes 35-47, 51-56 and accompanying text.

228. UNCLOS, *supra* note 2, art. 61(3).

229. *Id.* art. 119(1)(a).

formulated with a view to securing in the first place a supply of food for human consumption.<sup>230</sup>

Commentary for Article 61(3) elucidates the meaning of “maximum sustainable yield”:

[Maximum sustainable yield] refers to the levels of [living resource] population abundance, the maintenance or restoration of which is one of the primary objectives of the conservation measures . . . taken by the coastal State. The English text [of Article 61(3)] uses . . . “as qualified” by various other factors, embracing relevant and economic aspects . . . The French text [of Article 61(3)]– “*eu égard*” (having regard to)– expresses the thrust of this provision.

. . . “[M]aximum sustainable yield” incorporates the concept of the allowable catch, and is central to article 61. References to the allowable catch are not yet common in national legislation, and there is no established practice for determining it. Most States manage their fisheries using a combination of biological and economic considerations. Where legislation is framed in biological terms, it is difficult to reach any conclusion as to the practical application of those criteria, above all because in many instances fish are caught in multi-species fisheries where it is virtually impossible to achieve simultaneously the maximum sustainable yield of the different species. Most major coastal States manage their fisheries to accomplish multiple economic and political objectives, while attempting through national measures (which may themselves originate in appropriate international bodies) to avoid serious overexploitation.<sup>231</sup>

Commentary for Article 119(1)(a) says the same definition for “maximum sustainable yield” as in Article 61(3) is meant for Article 119(1)(a).<sup>232</sup> It is a flexible concept.<sup>233</sup>

A definition for “optimum utilization” is proposed in Part III.F.

2. *Comments.* Howard S. Schiffman proposed the term “maximum sustainable yield.”<sup>234</sup> The Chair researched the term.

3. *Conclusions.* This definition for “maximum sustainable yield” is proposed:

“Maximum sustainable yield,” as used in the 1982 LOS Convention, arts. 61 and 119, means that level of abundance of population of a living resource which will assure maintaining or restoring that living resource. It is one of the primary objectives of conservation measures taken by a state.

230. Fishing Convention, *supra* note 15, art. 2.

231. 2 COMMENTARY, *supra* note 72, paras. 61.12(g)-61.12(h).

232. 3 COMMENTARY, *supra* note 47, para. 119.7(c).

233. 1 OPPENHEIM’S INTERNATIONAL LAW, *supra* note 8, pt. 2, § 334, at 796; *see also* 1 O’CONNELL, *supra* note 16, at 564-55.

234. Schiffman E-mail, *supra* note 24.

In LOAC-governed situations under the “other rules of international law” clauses in the Convention, a different definition may apply.<sup>235</sup> The same may be the situation if the Charter supersedes the Convention, or if *jus cogens* norms apply.<sup>236</sup>

#### F. “Optimum utilization.”

1. *Discussion and analysis.* “Optimum utilization” appears in UNCLOS, Article 62(1): “The coastal State shall promote the objective of optimum utilization of the living resources in the exclusive economic zone without prejudice to article 61.”<sup>237</sup> Article 61 establishes standards for conservation of EEZ living resources.<sup>238</sup> Commentary on UNCLOS, Article 62(1) discusses the origins of “optimum utilization”:

The only specific references to utilization in fishery proposals had called for the coastal State to “ensure the full utilization” . . . or “assure the maximum utilization” . . . . Those references differed from the obligation to “promote the objective” of optimum utilization, which contrasts considerably with “ensuring” that objective or “seeking” that objective on all occasions. . . . “[O]ptimum” also differs from “full” and “maximum,” and in biological and economic terms may suggest a lower level of utilization.<sup>239</sup>

The Fishing Convention, Article 2 provides:

[T]he expression “conservation of the living resources of the high seas” means the aggregate of the measures rendering possible the optimum sustainable yield from those resources . . . to secure a maximum supply of food and other marine products. Conservation programmes should be formulated with a view to securing in the first place a supply of food for human consumption.<sup>240</sup>

A definition for “maximum sustainable yield” is proposed in Part III.E.

235. See *supra* notes 51-56 and accompanying text.

236. See Walker, *Definitions III*, *supra* note 19, at 232-36; *supra* notes 35-47, 51-56 and accompanying text.

237. UNCLOS, *supra* note 2, art. 62(1).

238. See UNCLOS, *supra* note 2, art. 61; *supra* notes 228-33 and accompanying text.

239. 2 COMMENTARY, *supra* note 72, para. 62.16(b) (referring to documentation reprinted in paras. 62.3, 62.5); see also *id.* 62.16(c); 1 OPPENHEIM’S INTERNATIONAL LAW, *supra* note 8, pt. 2 § 335, at 797.

240. Fishing Convention, *supra* note 15, art. 2.

2. *Comments.* Howard S. Schiffman proposed the term “optimum utilization.”<sup>241</sup> The Chair researched the term.

3. *Conclusions.* This definition for “optimum utilization” is proposed:

“Optimal utilization,” as used in the 1982 LOS Convention, art. 62(1), means utilization of the living resources of the exclusive economic zone at a level of utilization that may be less than full or maximum utilization. Whether measured according to biological or economic terms, optimum utilization may be a lower level of utilization of the living resources of the exclusive economic zone. The art. 62(1) optimum utilization standard is subject to the rules of art. 61 concerning conservation of the living resources of the exclusive economic zone.

In LOAC-governed situations under the “other rules of international law” clauses in the Convention, a different definition may apply.<sup>242</sup> The same may be the situation if the Charter supersedes the Convention, or if *jus cogens* norms apply.<sup>243</sup>

### G. “Regional” or “subregional” organization.

1. *Discussion and analysis.* The phrase, “regional or subregional organizations,” appears in UNCLOS, Article 63, in Part V, governing the EEZ:

1. Where the same stock or stocks of associated species occur within the exclusive economic zones of two or more coastal States, these States shall seek, either directly or through appropriate subregional or regional organizations, to agree upon the measures necessary to coordinate and ensure the conservation and development of such stocks without prejudice to the other provisions of this Part.

2. Where the same stock or stocks of associated species occur both within the exclusive economic zone and in an area beyond and adjacent to the zone, the coastal State and the States fishing for such stocks in the adjacent area shall seek, either directly or through appropriate subregional or regional organizations, to agree upon the measures necessary for the conservation of these stocks in the adjacent area.<sup>244</sup>

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241. Schiffman E-mail, *supra* note 24.

242. See *supra* notes 51-56 and accompanying text.

243. See Walker, *Definitions III*, *supra* note 19, at 232-36; *supra* notes 35-47, 51-56 and accompanying text.

244. UNCLOS, *supra* note 2, art. 63.



Article 63 commentaries do not define “subregional” or “regional” organizations, but they underscore the importance of Article 63’s obligations to seek agreement, and list agreements, on these stocks.<sup>245</sup>

The phrase, “regional organizations,” appears in Article 66(5): “The State of origin of anadromous stocks and other States fishing these stocks shall make arrangements for the implementation of the provisions of this article, where appropriate, through regional organizations.”<sup>246</sup> Article 66 commentaries do not define “subregional” or “regional” organizations, but they underscore the importance of Article 63’s obligations to seek agreement, and list agreements, on this stock.<sup>247</sup>

The phrase, “subregional or regional fisheries organizations,” appears in Article 118, in Part VII, governing the high seas:

States shall cooperate . . . in the conservation and management of living resources in . . . the high seas. States whose nationals exploit identical living resources, or different living resources in the same area, shall enter into negotiations with a view to taking the measures necessary for the conservation of the living resources concerned. They shall, as appropriate, cooperate to establish subregional or regional fisheries organizations to this end.<sup>248</sup>

Although Article 118 commentary does not define “subregional” or “regional” fishing organizations, it illustrates their number and variety, and provides examples of bilateral and multilateral agreements to manage species or fish stock in a given region of the high seas.<sup>249</sup> Articles 4(1) and 6(3) of the Fishing Convention require States to participate in negotiations for agreements related to conserving high seas resources.<sup>250</sup>

Definitions for “appropriate international organization,” “appropriate international organizations,” “the competent international organization” and “competent international organizations” are proposed in Parts III.A and C. A definition for “associated and dependent species” is proposed in Part III.B.

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245. 2 COMMENTARY, *supra* note 72, paras. 63.12(a), 63.12(d); *see* CHURCHILL & LOWE, *supra* note 2, at 207-08, 293-96.

246. UNCLOS, *supra* note 2, art. 66(5).

247. 2 COMMENTARY, *supra* note 72, para. 66.9(c); *see* CHURCHILL & LOWE, *supra* note 2, at 207-08, 293-96.

248. UNCLOS, *supra* note 2, art. 118.

249. 3 COMMENTARY, *supra* note 47, paras. 118.7(c)-118.7(d). *See generally* CHURCHILL & LOWE, *supra* note 2, at 296-305.

250. Fishing Convention, *supra* note 15, arts. 4(1), 6(3) (requiring participation once any party to a dispute requests negotiations).

2. *Comments.* The Chair researched these terms in connection with “appropriate international organization,” “appropriate international organizations,” “competent international organization” and “competent international organizations,” terms proposed by Howard S. Schiffman.<sup>251</sup>

3. *Conclusions.* These definitions for “regional” or “subregional” organizations are proposed:

“Regional” or “subregional” organizations as used in the 1982 LOS Convention, art. 63, means that organization or those organizations below the global level typically associated by principles, purposes and functions with action required by particular articles of the Convention or its Annexes related to the exclusive economic zone, and may be an intergovernmental organization (IGO) or IGOs organized pursuant to the U.N. Charter, an independent IGO or independent IGOs, or a nongovernmental organization (NGO) or NGOs.

“Regional” organizations as used in the 1982 LOS Convention, art. 66, means that organization or those organizations below the global level typically associated by principles, purposes and functions with action required by particular articles of the Convention or its Annexes related to the exclusive economic zone, and may be an intergovernmental organization (IGO) or IGOs organized pursuant to the U.N. Charter, an independent IGO or independent IGOs, or a nongovernmental organization (NGO) or NGOs.

“Regional” or “subregional” fishing organizations as used in the 1982 LOS Convention, art. 118, means that organization or those organizations below the global level typically associated by principles, purposes and functions with action required by particular articles of the Convention or its Annexes related to fishing on the high seas, and may be an intergovernmental organization (IGO) or IGOs organized pursuant to the U.N. Charter, an independent IGO or independent IGOs, or a nongovernmental organization (NGO) or NGOs.

In LOAC-governed situations under the “other rules of international law” clauses in the Convention, a different definition may apply.<sup>252</sup> The same may be the situation if the Charter supersedes the Convention, or if *jus cogens* norms apply.<sup>253</sup>

#### IV. CONCLUSIONS

After reciting the ABILA LOS Committee’s research methodology in Part I of this article, Part II stated proposed principles for subordinating commentator definitions, like those of the ABILA

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251. Schiffman E-mail, *supra* note 24.

252. *See supra* notes 51-56 and accompanying text.

253. *See Walker, Definitions III, supra* note 19, at 232-36; *supra* notes 35-47, 51-56 and accompanying text.

LOS Committee, to definitions in the understandings, declarations, and statements that the Convention allows. These proposed definitions, insofar as they do not contradict primary sources (*i.e.*, definitions in an applicable treaty,<sup>254</sup> customary law, or general principles of law) should receive acceptance as a secondary source of law, to be considered alongside other secondary sources. Part III submitted a final group of terms for which the Committee proposes definitions. These proposed definitions, together with others developed since 2001, will be published in a *Tentative Final Draft*, probably in 2006.<sup>255</sup>

The Committee's work on definitions for UNCLOS appears close to ending. Undoubtedly, there will be a need for review of the Committee's work as the Convention proceeds toward worldwide acceptance as conventional and customary law and as new claims or cases arise. For now, the Committee's request is a final call for comments on this and its prior work. Committee members and others interested in this project are invited to submit final comments on these proposed definitions and proposed definitions published since 2001 at their earliest convenience. The Committee repeats its thanks for all prior submissions and comments.

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254. The Committee expressly limited its research to definitions that are not in UNCLOS; *see supra* note 27 and accompanying text.

255. *See generally supra* notes 19-24 and accompanying text.

