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Cross-cutting Analyses

Legitimacy of International Law and the Exercise of Administrative Functions: The Example of the International Seabed Authority, the International Maritime Organization (IMO) and International Fisheries Organizations

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A. Introduction

It is possible to speak of international administration only if an international entity is truly exercising functions equivalent to States. While such cases are rare, as *Joseph Weiler*[1] emphasized in a different context, they do exist. One such case is the International Seabed Authority, which exercises legislative as well as executive functions concerning the international seabed (Area) and its resources. Furthermore, the legal regime on the international seabed comprises a fully elaborated system for the settlement of disputes available to public and private actors involved in the exploration and exploitation of mineral resources in the Area. The functions assigned to IMO and some fisheries organizations have not quite reached this level. Nevertheless one can observe that these organizations, too, prescribe binding rules, at least *de facto*. However, they lack the jurisdiction to enforce such rules directly; in that respect they are relying on the enforcement of States to enforce such rules acting under different capacities such as flag States or port States. One may consider these legal regimes as belonging to a multilevel system (Mehrebenensystem) where the prescriptive and executive functions are being vested in different entities.

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[1] J. H. H. Weiler, *The Geology of International Law – Governance, Democracy and Legitimacy*, 64 ZEITSCHRIFT FÜR AUSLÄNDISCHES ÖFFENTLICHES RECHT UND VÖLKERRECHT 548 *et seq.* (2004).

The following the contribution will examine why legitimacy is crucial for entities engaged in the exercise of exercising functions which may be qualified as international administrative law (B.) and whether the International Seabed (C.), the IMO (D.) and the North Atlantic Fisheries Organization (E.) as the ones are being particularly developed in this respect, possess such legitimacy.

B. Legitimacy in International Law

In recent years the question concerning the legitimacy of international law has been discussed quite intensively.[2] Different authors mean different things by the term legitimacy, although it mostly means to refer to the justification of authority; this notion being understood as the equivalent of having the power to take binding decisions, be they prescriptive or executive. Such decisions may be general or specific in nature, a distinction which may be of relevance to their legitimacy. Scholars have suggested a variety of approaches concerning the elements which may induce legitimacy for a particular authority. Theoretically they may be source, procedure, result-oriented or a combination thereof.

First, authority can be legitimated by its origin of power. An example is State consent to international treaties. International law proceeds from the assumption that States have the authority to negotiate and to adhere to international agreements and the duty to comply with such agreements. States which become parties to such agreements through this accept obligations *vis-à-vis* the other partners to that agreement, *de facto*, towards a larger community.

Second, authority can also be legitimate because it involves procedures considered to be adequate or fair.[3] Rules concerning the composition or establishment of an institution and its rules concerning the taking of decisions are to be seen from this point of view (procedural legitimacy). Procedure, or rather adhering to a pre-

[2] T. M. FRANCK, THE POWER OF LEGITIMACY AMONG NATIONS (1990); Mattias Kumm, *The Legitimacy of International Law: A Constitutionalist Framework of Analysis*, 15 EUROPEAN JOURNAL OF INTERNATIONAL LAW 907 (2004); THE LEGITIMACY OF INTERNATIONAL ORGANIZATIONS (J-M. Coicaud & V. Heiskanen eds., 2001); JACK L. GOLDSMITH & ERIK A. POSNER, THE LIMITS OF INTERNATIONAL LAW (2005); A. BUCHANAN, JUSTICE LEGITIMACY, AND SELF-DETERMINATION: MORAL FOUNDATIONS FOR INTERNATIONAL LAW (2004); H. L. HART, THE CONCEPT OF LAW (1961); T. M. Franck , *The Power of Legitimacy and the Legitimacy of Power: International Law in an Age of Power Disequilibrium*, 100 AMERICAN JOURNAL OF INTERNATIONAL LAW (AJIL) 88 (2006); Rüdiger Wolfrum, *Legitimacy in International Law, in* THE LAW OF INTERNATIONAL RELATIONS, LIBER AMICORUM HANSPETER NEUHOLD, 470 *et seq.* (A. Reinisch & U. Kriebaum eds., 2007).

[3] FRANCK (note 2), at 91 *et seq.* (emphasizing the "right process"); D. A. Wirth, *Reexamining Decision-Making Processes in International Environmental Law,* 79 IOWA LAW REVIEW 798 (1994) (pointing out that procedural integrity in itself is an important source of legitimacy for international law).

agreed procedure which is considered to be adequate and fair, thus has a legitimizing effect in international law as it has in national law.[4]

Finally, authority can be legitimated or delegitimized by the outcome of its decisions (substantive legitimacy). This is a crucial issue and one which deserves careful consideration. If a particular body, such as the Security Council or an international court or tribunal, although being established according to the applicable rules and taking decisions according to the established procedure, but does not achieve results that the community to which these decisions are addressed is considering these decisions to be adequate or fair, this may, in the long run, lead to an erosion of its legitimacy. In other words, an international organization's legitimacy is based on its procedural as well as its substantive legitimacy. The fate of the UN Human Rights Commission provides a useful example. The dissatisfaction of the international community with the performance of the UN Human Rights Commission has led to the establishment of the Human Rights Council, whose composition differs from the former Human Rights Commission. In this regard, it is of particular relevance that a member to the Human Rights Council may be expelled if it is violating internationally protected human rights significantly and systematically. However, having said that, it cannot and does not mean that the legitimacy of an international body should be judged merely as to whether its decisions are considered as being satisfactory by a State, a group of States or a community to which they are addressed. A further element of substantive legitimacy may be efficiency. However, this element should not be overrated. Frequently, the rules on decision making of organs provide for the protection of particular States or groups of States as provided for, for example, by Article 27 UN Charter. The inability to overcome this threshold is often, but wrongly, been considered as inefficiency.

A discussion on legitimacy of international law should proceed from international treaties, the primary source of international law. International treaty law is being developed on a consensual basis. States' representatives negotiate international rules which subsequently are adopted by the national institutions in a procedure designed by national law. Depending on the national system this may include parliamentarian approval. Thus, it is for the national law to ensure that there is a "legitimacy chain" justifying the implementation of international obligations based on a treaty through national institutions. As a matter of principle, one may say that – as far as consent-based international law is concerned – the legitimacy of the obligations deriving from the original consent is also to be established on the national level through nationally established mechanisms.

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[4] NIKLAS LUHMANN, LEGITIMATION DURCH VERFAHREN (1989, 2nd ed.).

In practical terms, consent of States can have two different meanings, namely a specific one referring to a particular obligation and a more general one referring to the establishment of a regime or a system of governance, combining prescriptive and executive functions, which – after having been set up by consent – develops a legal life of its own.[5] These two options are not as distinct as one may assume; rather, in practice they tend to blur into one another.

The consent of a State concerned will undoubtedly suffice if the obligation is a specific one and can be implemented by an isolated act or omission. The same is true even if the obligation is of a continuing nature and requires continuous activities or omissions. However, there remains the risk that the legitimizing effect of the original consent may be eroded over time. This would be particularly true if, due to changing circumstances, the burden of implementing this obligation significantly increased. Nevertheless, international law proceeds from the assumption that the originally valid consent provides legitimacy for continuous obligations. The mechanism to re-establish legitimacy if such obligation has, over time, become factually illegitimate is either through the mechanism of renunciation of the respective obligation or having recourse to the *clausula rebus sic stantibus*. In particular the latter is meant, within some limits, to re-adjust continuing legal obligations to the equilibrium originally envisaged by the parties.[6]

As will be seen below, the matter may become more problematic if States have agreed to establish a regime or system exercising prescriptive and executive and possibly adjudicative competences. Although the establishment of such a system or regime may be considered as being similar to continuing obligations, they constitute a particular challenge to the legitimizing effects of the original consent through which the regime or system has been established.[7]

It is widely accepted that international law has changed in the last decades in terms of its scope, impact on national law, addressees, and the procedures through which international norms are created and the value system upon which public international law is being based.[8] Of particular relevance is the fact that

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[5] D. Bodansky, *The Legitimacy of International Governance*, 93 AJIL 604 (1999).

[6] *See* G. DAHM, J. DELBRÜCK & R. WOLFRUM, I/3 VÖLKERRECHT 743 (2002, 2nd ed.).

[7] Weiler (note 1), at 557 *et seq*.

[8] *See* C. Tomuschat, *International Law: Ensuring the Survival of Mankind on the Eve of a New Century*, 281 GENERAL COURSE IN PUBLIC INTERNATIONAL LAW, RDC 63 *et seq*. (1999); B. Fassbender, *Der Schutz der Menschenrechte als zentraler Inhalt des völkerrechtlichen Gemeinwohls*, 30 EUROPÄISCHE GRUNDRECHTE-ZEITSCHRIFT 2 *et seq*. (2003).

international law increasingly directly addresses individuals as well as corporations.[9] Furthermore, international law is now increasingly being developed not only through international agreements but also by other, more flexible, means, specifically through the prescriptive and executive functions of international decision-making bodies.[10] International environmental law in particular has made use of the mechanism of further developing international law by decisions of Meetings of States Parties. The norms resulting therefrom are not merely of a technical nature but often constitute either additional obligations for States Parties, guidelines for individuals and corporations, or recommendations on national measures to be taken to accelerate the implementation of obligations already stipulated in the original treaty. Although the decisions are based upon an international treaty they are, as such, not necessarily treaties themselves.

The UN Security Council, referring to another example, not only interpreted its mandate broadly but also assumed new functions. Making use of its power under Chapter VII of the UN Charter, it has acted at least in two areas as an international legislator: in the fight against terrorism and in the prevention of the proliferation of weapons of mass destruction. The decisions require States to take action not only to deal with a particular incident but also to enact national legislation to tackle general problems in terrorism and the proliferation of weapons of mass destruction.[11]

These examples are indicative of a trend as far as the functioning of international decision-making bodies /mechanisms is concerned, one which has resulted in strengthening their functions *vis-à-vis* States. Certainly they remain institutions created by the will of national governments and act under their control. It is a different matter whether this control is exercised effectively.[12] Anyhow, none of them has yet reached the independence of the European Union with an equivalently broad mandate. Such control of international institutions rests, though, with the national governments, whereas national democratic legitimacy is based upon, at least in principle, the people's consent. Even if the democratic character of many member States is taken into account as well as the democratic values such international organizations may be built upon, the connection between

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[9] *See* A. Seibert Fohr & R. Wolfrum, *Die einzelstaatliche Durchsetzung von Mindeststandards gegenüber transnationalen Unternehmen*, 43 ARCHIV DES VÖLKERRECHTS 153 (2005).

[10] DEVELOPMENTS OF INTERNATIONAL LAW IN TREATY MAKING (R. Wolfrum & V. Röben eds., 2005).

[11] *See* S/RES/1373 (2001) of 28 September 2001 and S/RES/1540 (2004) of 28 April 2004.

[12] The Meeting of States Parties has, in some occasions, developed into such a control mechanism which not only covers budgetary matters but also matters such as a the exercise of functions and the recruitment of staff. This is ignored by those complaining about the increasing power of international bureaucracies.

people and international institutions remains a mediated and remote one. The broadening of the mandate of international institutions combined with a more effective decision-making process and, in particular, the strengthening of their secretariats (international bureaucracies,) results in enhancing their independence and correspondingly weakening the possibility of governments to control them, although their collective control is not put into question.[13]

Finally, the establishment of new institutions for the settlement of international disputes, the revival of existing ones and the creation of new mechanisms to monitor the implementation of international obligations should be mentioned. Such international courts, tribunals or compliance committees not only apply the respective instrument *stricto sensu* but also add explicitly or implicitly to the understanding of the norm in question. Taking into consideration that international law, treaty law as well as customary international law, is – by its very nature – less concrete, the contribution of these institutions to the corpus of international law should not be under estimated.

To summarize, three trends may be identified in the current development of international law. As far as the creation of norms is concerned, a shift of competences from the national to the international level is occurring. This shift may be characterized by the trends towards denationalization in favor of internationalization and deparliamentarization in favor of strengthening the role of the executive. Another trend is that increasingly individuals, including corporations, have become addressees of international law. Finally, the role of the judicial settlement of legal disputes has been strengthened. What is common to all these new trends is that the direct influence of national governments – and most notably of the national legislature – on the shaping of international law in general or international law decisions has been reduced; the chain of legitimacy connecting people to the international organization has been further mediated.

It is evident that such development increases the legitimacy dilemma. Exercising authority over individuals or corporations requires legitimacy which, in the absence of the traditional sources of international law, cannot be based fully on State consent.

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[13] Weiler (note 1), at 550 (referring to further examples). Weiler states "The regulatory regime is often associated with an international bureaucratic apparatus, with international civil servants, and, critically, with mid-level State officials as interlocutors. Regulatory regimes have a far greater "direct" and "indirect" effect on individuals, markets and more directly if not always visible as human rights, come into conflict with national social values."

What are the possible means to overcome the legitimacy dilemma? One should seek to rely on legal legitimacy, through which the continuing authority of the system or regime is connected to its original basis, namely State consent. The main element of legal legitimacy is that the respective institution keeps strictly within the limits of its mandate and follows the procedures set out for decision-making. A further means of providing legal legitimacy is strengthening the possibility of judicial review. This a logical consequence in light of the functions that international administration is assuming: if international institutions are taking over governmental tasks equivalent to those of national institutions and – as one should add – to the detriment of the latter, they should come under the same restrictions as national governance in States adhering to the principle of the rule of law. If, for example, an institution, such as the International Seabed Authority, assumes legislative competences or competences affecting the rights of individuals directly, such increase in power calls for a counter-balance through judicial review.

Since the primary issue regarding gap in the legitimacy chain was identified to be at the linkage between the international organization, and the national level, efforts should be undertaken to reinforce this linkage or – in other words – to make this linkage commensurate with the governmental authority exercised on the international level. Such need arises in all cases where prescriptive measures or individual acts are taken on the international level which replace otherwise possible equivalent legislative measures or decisions on the national level. Consent, The consent including the subsequent approval of the competent national institutions as the major source of legitimacy, is to be construed in a way that it covers the international commitment in its short as well as long term consequences.

A further option, less rooted in the traditional approach seeking legitimacy in the consent of States, may be to consider alternative mechanisms of legitimizing international governance not modeled on the blueprint of national democratic governance. As one such mechanism, one may consider a body of experts who are entrusted with making decisions, as opposed to a representative body of States. This mechanism is the one followed by the Legal and Technical Commission of the International Seabed Authority. Although this Commission formally has merely consultative power as far as the review of formal written plans is concerned, such recommendations may only be overturned by the Council by a qualified majority.

C. The International Seabed Authority: Objective and Functions

I. Introduction

The International Seabed Authority (the Authority) is the principal component of the deep seabed regime established by the United Nations Convention on the Law

of the Sea (the Convention). It was established pursuant to Part XI, Annexes III and IV of the Convention[14] in conjunction with the Agreement Relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea, 1994 (Implementation Agreement).[15] According to the Implementation Agreement, the establishment and function of the organs and the subsidiary bodies of the Authority are based on an evolutionary approach which has not yet been fully completed. The organization of the Authority and its functions, therefore, will grow in accordance with the development of deep seabed activities.

1. Objective, Functions, Institutional Set Up

The Authority is an international organization with legal personality on the international as well as on the national level. It enjoys privileges and immunities; its property, wherever located and by whomsoever held, is immune from search, expropriation, and all forms of seizure and writs of execution by way of administration or legislation.

Article 157 (1) of the Convention defines the Authority's objective as follows:

> The Authority is the Organization through which States Parties shall, in accordance with this Part [Part XI], organize and control activities in the Area, particularly with a view to administering the resources of the Area.[16]

Article 157 (1) of the Convention at first glance seems to be in conflict with article 137 of the Convention, which states that the Authority acts in the name of mankind as a whole. This may even be seen as a legitimacy conflict. How can it be that a group of States acts on behalf of mankind as a whole? This conflict is getting even more focused by the statement in article 157 (3) of the Convention that the Authority is based on the principle of sovereign equality of all its members.

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[14] United Nations Convention on the Law of the Sea (concluded 10 December 1982, entered into force 16 November 1994) 1833 UNTS 3.

[15] Agreement Relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982 (adopted 28 July 1994, entered into force provisionally 16 November 1994 and definitively 28 July 1996) UNGA RES. 48/263 (28 July 1994) UN Doc A/RES.48/263, 1836 UNTS 3.

[16] The "Area" is the deep seabed and ocean floor and subsoil thereof beyond the limits of national jurisdiction.

The conflict mentioned between the two articles in question exists, however, only in appearance. Article 137 of the Convention contains a specific objective and refers to the operation of the Authority – administration of the deep seabed in the general interest of mankind, thus including the interest of that part of mankind not represented by States in the Authority. Article 157 of the Convention, on the other hand, is aimed at establishing the Authority, and thus structures the decision-making process. The Convention and, accordingly, the International Seabed Authority has a broad membership and encompasses entities other than States. This very much reflects the idea that the Authority is meant to administer the Area and its resources for the benefit of mankind as whole, acknowledging that mankind may exist beyond the realm of States Parties.[17]

There is, nevertheless, no doubt that States are the main actors in this respect. On the contrary Article 137 of the Convention, on the other hand, is one of the cornerstones of the legal regime governing the administration of to govern the deep seabed. It reconfirms the common values system on which this legal regime is based, namely that the deep seabed and its resources are the common heritage of all mankind – compared to the particular interests of individual States – and that this principle is to provide guidance for the policies to be pursued by the International Seabed Authority in the exercise of its competences.

According to article 158 of the Convention, the Authority has three principal organs: the Assembly, the Council and the Secretariat. Its basic structure is thus not different than that of other international organizations. In addition, the Authority can also establish subsidiary organs. Some of the Council's subsidiary organs have already been explicitly referred to in the Convention and the Implementation Agreement. These include the Economic Planning Commission (article 163 (1) (a)), the Legal and Technical Commission (article 163(1)(b)), and the Finance Committee (Implementation Agreement, Annex Sec. 9). The Economic Planning Commission will only be established later. Article 158 (2) of the Convention names the Authority's Enterprise as a further organ. It has special status, its own legal personality, and will be in charge of its own organization (article 170 of the Convention). At the beginning, the Secretariat shall perform the functions of the Enterprise (Implementation Agreement, Annex, Sec. 2).

The Assembly is the plenary body and, as such, the supreme organ of the Authority (article 160 (1) of the Convention). Each member has one representative in the Assembly. It meets in regular annual sessions and in such special sessions as may be decided by the Assembly, or convened by the Secretary-General at the request of

[17] *See* Art. 305 of the Convention.

the Council or of a majority of the members of the Authority. Every State has one vote in the Assembly. Decisions on questions of substance are taken by a two-thirds majority of the members present and voting, provided that such majority includes the majority of the members participating in the session.

The Council is an organ with a limited membership. It consists of 36 members of the Authority (article 161 (1) of the Convention), elected by the Assembly. They must come from five different groups, four of which can be described as interest groups. The Implementation Agreement substantially modifies article 161 of the Convention. These modifications have resulted in the establishment of a chamber system – a term expressly used in Sec. 3 (9) (a), of the Annex to the Implementation Agreement. Four members represent the States which constitute the main consumers or importers of minerals produced from the categories of minerals derived from the area. One of these four must be a State from the Eastern European region, with the largest economy in that region in terms of gross domestic product, and another one must be the State, on the date of the entry into force of the Convention, having the largest economy in terms of gross national product (article 161 (1) (a), of the Convention, in connection with paragraph 15 (a) Implementation Agreement). Four other Council members are to be selected from those eight States which have made the largest investment in preparation for and in the conduct of activities in the Area, either directly or through their nationals (paragraph 15 (b) Implementation Agreement). Four further Council members must belong to the group of States which, based on their production figures, are major net exporters of categories of minerals to be derived from the area (paragraph 15 (c) Implementation Agreement). At least two of these States must be developing countries with economies considerably influenced by the export of such minerals. Another six members are to be taken from the group of developing countries, provided that these represent special interests. Special interests to be represented shall include those of States with large populations, States which are land-locked or geographically disadvantaged, island States which are major importers of the categories of minerals to be derived from the area, States which are potential producers of such minerals, and least developed States (article 161 (1) (d)). The discretionary power of the Assembly in electing the Council members within these categories is subject to certain restrictions. Before electing the members of the Council, the Assembly shall establish a list of countries fulfilling the criteria for membership for each category. Each group of such States shall be represented in the Council by those members nominated by that group (Implementation Agreement, Annex, Sec. 3). The final 18 members are to be chosen according to an equitable geographical distribution, the exceptional feature of which is not that these 18 seats should be geographically evenly distributed but that the Council as a whole should display an equitable geographical distribution. Every regional group shall have at least one seat in this category.

The Implementation Agreement significantly modifies the decision-making process. As a general rule, which applies to all organs of the Authority, decisions should be reached by consensus. If all efforts to reach a decision by consensus have been exhausted, the decision may be taken by voting. The Council has four different voting procedures for making decisions the 'Area' being the deep seabed and ocean floor and subsoil thereof beyond the limits of national jurisdiction.[18]

Decisions on questions of procedure shall be taken by a majority of members present and voting. Decisions on questions of substance shall be taken by a two-thirds majority of members present and voting, provided that such decisions are not opposed by a majority in any one of the Chambers. These clauses are likely to mitigate the influence of the group of developing countries, which are likely to have a two-thirds majority in the Council. However, given the different economic interests, one should not expect the developing countries to vote as a homogeneous bloc.

Additionally, there are several categories of policy questions which can only be decided by way of consensus. These include decisions concerning production policy leading to the reduction of deep seabed mining; recommendations to the Assembly of rules, regulations and procedures on the equitable sharing of financial and other economic benefits as well as the adoption and provisional application of rules, regulations and procedures; and, finally, amendments to Part XI. In addition, decisions which do not come under any other category but over which the Council may pass regulations must be adopted by consensus. The majority requirement can also only be reduced by way of consensus. Finally, the approval of plans of work (for mining activity) is subject to a special procedure; the majority required depends upon the decision taken by the Legal and Technical Commission. If that Commission recommends a plan of work, the Council is deemed to have approved it if a two-thirds majority of the members of the Council present and voting, including a majority in each of the chambers of the Council do not disapprove the plan. If the Commission, on the other hand, refuses a plan of work or does not take a decision, the Council may nevertheless approve it in accordance with the rules for decisions on questions of substance.

The division of the Authority's functions between the Assembly and the Council is highly complicated. The Implementation Agreement has resulted in strengthening

[18] The four different voting procedures include a vote by show of hands or a roll-call in the absence of voting by mechanical means and a non-recorded vote or a recorded vote in the case of voting by mechanical means. *See* Rule 60 in the Part X of the Rules of Procedure of the Council of the International Seabed Authority.

the Council. Basically, the Assembly is a legislative organ, ruling on the budget and determining the Authority's general policy (article 160 of the Convention), whereas the Council is described as the executive organ (article 162 of the Convention). One cannot say, however, that the Assembly actually has precedence over the Council. In many areas, the Council and the Assembly have to co-operate. Decisions of the Assembly on any matter for which the Council also has competence, or on any administrative, budgetary or financial matter, shall be based on the recommendation of the Council. If the Assembly disagrees with the Council, the matter shall be returned to the latter and reconsidered.[19] This occurs mainly in the field of law-making, as the respective rules and regulations are drawn up by the Council and the Legal and Technical Commission (the first – and in practice definitive – draft will come from the Preparatory Commission) and provisionally applied by the Council. The rules, regulations and procedures finally come into force after having been approved by the Assembly. The Council's main area of competence lies in authorizing the plans of work, which strictly regulate the deep seabed mining activities. These plans of work formally summarize all applicable requirements for a given mining activity. Such plans of work must be consistent with the framework of the Convention, the Implementation Agreement and the rules and regulations issued by the Authority.

The Secretariat (article 166 of the Convention) for the Authority and the status of the Secretary-General are not different from the basic model developed for other organizations. The Secretary –General is the chief administrator of the Authority. Its main task is the preparation of the meetings of the various organs. Although this is meant to be a service function he may exercise considerable influence on the conduct of activities of the Authority.

The Enterprise is the organ of the Authority through which it takes part in deep seabed activities. The term 'organ' as it is used in article 158 (2) of the Convention imprecisely defines its position in the Authority and the functions assigned to it. Its relationship with the Authority is similar to that of the Euratom Supply Agency to Euratom itself. The duties carried out by the Enterprise correspond to those of a privately-run enterprise. Basically, co-operation among States concerning deep seabed activities has been institutionalized in the Enterprise. The Enterprise has a Governing Board, a Director-General and a Secretariat. The Governing Board is to be composed of 15 members elected by the Assembly at the Council's recommendation for a period of four years according to the principle of equitable geographical distribution, and shall direct the Enterprise's the operations. The Director-General's duties are purely administrative and are subject to the

[19] Implementation Agreement, Annex, Sec. 3.

Governing Board's review. All in all, the Enterprise's organizational structure does not display any exceptional features and corresponds to the model of other international economic organizations.

2. Mandate of the Authority

Under the heading "Nature and fundamental principles of the Authority" article 157 of the Convention describes the mandate of the Authority. According to this article it is for the Authority to "*organize and control* activities in the area, particularly with a view *to administering* the resources of the Area."[20] By referring to organizing activities the Convention in fact refers to the prescriptive functions of the Authority. The prescriptive jurisdiction of the Authority includes the adoption of rules, regulations and procedures, for *inter alia*, the appropriate conduct of activities in the Area,[21] the protection of the marine environment,[22] the protection and conservation of natural resources of the Area,[23] and the protection of human life with respect to the activities in the Area.[24] The most essential regulatory function is the development of regulations governing activities in the Area. The Convention specifies some objective criteria concerning the operational face of the activities such as determination of the size of the Area, duration of operations, performance requirements, specification of categories of resources, etc. The Authority – in fulfilling these functions – does not confine itself to establishing regulations for harmonizing the activities concerning the deep seabed. In fact, the regulations envisage practical measures which entail far-reaching implications for the operator.

These regulations are fully enforced by the Authority itself.

Pursuant to article 162 (2) of the Convention, in July 2000 the Council of the Authority adopted by consensus and provisionally applied the Regulations on Prospecting and Exploration of Polymetallic Nodules in the Area. These regulations contain provisions on issues such as the conduct of prospecting, notification of prospecting activities to the Authority, application for a plan of work for exploration, conduct of exploration activities, term of the contract, rights of the

[20] Article 157 of the Convention, emphasis added.

[21] Art. 17 of Annex III to the Convention.

[22] Art. 145(a) of the Convention.

[23] Art. 145(b) of the Convention.

[24] Art. 146 of the Convention.

contractor, size of the exploration area, relinquishment of that area, responsibility and liability, training obligations, and obligations concerning the protection of the marine environment. The Assembly approved these regulations without amendments.[25] These regulations entered into force without having to be ratified by the States Parties. They are directly binding for States Parties and private operators engaged in deep seabed activities. They are implemented through the work contracts that operators have to negotiate and to accept before engaging in deep seabed activities.

However, the Authority's power to draft regulations is subject to certain restrictions. The Convention contains several restrictions, compliance with which is monitored by the International Tribunal for the Law of the Sea.

These regulations are binding for the Authority itself. This is of particular relevance for the negotiation and conclusion of work contracts. There is thus a hierarchy of norms which bears similarity to the hierarchy found in common to national public law: namely the Convention (the "constitutional level"), the regulations issued by the Authority (the "statutory level") and work contracts concluded between the Authority and potential operators (the "work contract level"). The Seabed Disputes Chamber of the International Tribunal on the Law of the Sea ensures that this hierarchy of norms is fully respected and implemented.

The Authority also exercises executive functions, it has the competence - and actually the obligation – to control that deep seabed mining activities are undertaken according to the rules as set out above. These supervisory functions, however, are shared between the States Parties and the Authority, with the States Party bearing the primary responsibility.

Article 139 (1) of the Convention stipulates that:

> States Parties shall have the responsibility to ensure that activities in the Area, whether carried out by States Parties, or state enterprises or natural

[25] ISPA/6/A/18, Annex: Selected decisions 6, 31; Basic texts 226-270. These regulations are sometimes referred to as the Mining Code, although they are only part of that Code because they deal only with one of the mineral resources of the deep seabed and do not deal with exploitation. For an evaluation of these regulations, *see* M. W. Lodge, *The International Seabed Authority's Regulations on Prospecting and Exploration for Polymetallic Nodules in the Area*, 20 JOURNAL OF ENERGY AND NATURAL RESOURCES LAW 270 *et seq.* (2002); R. Wolfrum, *Rechtsstatus und Nutzung des Tiefseebodens des Gebiets, in* HANDBUCH DES SEERECHTS, 333 (Wolfgang Graf Vitzthum ed., 2006); *See also* Michael C. Wood, *The International Seabed Authority: Fifth to Twelfth Session (1999-2006)*, 11 MAX PLANCK YEARBOOK OF UNITED NATIONS LAW 47 *et seq.*, 85 *et seq.* (2007).

> or juridical persons which possess the nationality of States Parties or are effectively controlled by them or their nationals, shall be carried out in conformity with this Part [Part XI].

In order to ensure that the States Parties comply with this obligation, article 153 (4) of the Convention grants the Authority the right to "exercise such control over activities in the Area as is necessary for the purpose of securing compliance with the relevant provisions of the Convention." This control function of the Authority is independent from the affirmative consent of the States Parties or the companies engaged in the deep seabed mining activities. The Authority has a right to take any measure in the framework of the Convention's provisions, including inspection of installations in the Area, which is necessary to ensure compliance. Furthermore, the Convention envisages the inclusion of provisions concerning the Authority's supervisory authority and criteria governing the specific the contract between the Authority and the applicant. This supervisory role may further be refined by regulations to be adopted by the Authority. In the event the State Parties concerned breach their obligations they are internationally liable or, if they are directly involved in deep seabed mining, they may loose their right to continue conducting deep seabed mining activities.

The same is true for natural or juridical persons. In case of breach of either the Convention or the terms of the contract, the license to undertake deep seabed mining may be suspended or terminated.[26] This sanction would have significant economic consequences. In lieu of the termination of the contract, the Authority may fine operators for willfully and persistently violating the fundamental terms of the contract or the applicable legal provisions. Such sanctions enacted *vis-à-vis* States Parties or natural or juridical persons may be reviewed by Seabed Chamber of the International Tribunal for the Law of the Sea.[27]

Finally, the Authority enjoys the right to carry out deep seabed mining through its own company (Enterprise). This competence is unparalleled, even though it is limited by the Implementation Agreement. Generally speaking, deep seabed mining activities may, in accordance with the Convention, be undertaken by the Authority (through Enterprise) as well as by States and private and State-owned entities. According to the Implementation Agreement, Enterprise shall conduct its

[26] Art. 18 Annex III, Convention on the Law of the Sea.

[27] Art. 18(3), Annex III, Convention on the Law of the Sea stipulates that sanctions may, as a matter of principle, be executed only after the operator in question had the opportunity to exhaust the legal remedies available.

initial deep seabed mining operations through joint ventures. The reference to 'initial deep seabed mining operations' indicates that, after a certain stage of development has been reached, Enterprise may undertake mining activities on its own, as originally contemplated at the Third UN Conference on the Law of the Sea. Initiatives for the establishment of joint ventures may come from Enterprise or a contractor, in particular one which has contributed a particular area to the Authority as a reserved area (banking system).[28]

3. Conclusions on the International Seabed Authority

The Authority is without question one of the prime examples which may be referred to as international administration. It exercises prescriptive as well as executive functions directly *vis-à-vis* States and natural and juridical persons. The Authority's legitimacy is based upon the original consent given by the States Parties in ratifying the Convention. The structure and the voting procedure of the Authority also provide legitimacy, in particular since the Authority has a plenary organ which is involved in legislating binding secondary rules. Equally the Meeting of States Parties to the Convention of the Law of Sea, which meets once a year and exercises supervisory functions, further contributes to the Authority's legitimacy. Finally, the elaborate dispute settlement procedure, which is open to States as well as natural and juridical persons, upholds the rule of law as far as the management of the deep seabed and its resources is concerned. It thereby contributes significantly to the legitimacy of this regime. Thus the international administration of the deep seabed does not have just one basis of legitimacy but several, which complement and reinforce each other.

D. International Maritime Organization

The International Maritime Organization (IMO) was established in 1948 (then Inter-Governmental Maritime Consultative Organization). According to article 1 of the IMO Convention, the main purpose of the organization is to provide machinery for cooperation among Governments in the field of governmental regulation and practices relating to technical matters of all kinds affecting shipping engaged in international trade, and to encourage the general adoption of the highest possible standards in matters concerning maritime safety (efficiency of navigation and prevention and control of marine pollution from ships).

Over the years the IMO has promoted the adoption of many Conventions, Protocols, and mandatory and non-mandatory codes and guidelines, the most

[28] On details, *see* Section 2 of the Annex to the Implementation Agreement.

important of which are the International Convention for the Safety of Life at Sea (SOLAS), the Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matters, and the International Convention for the Prevention of Pollution from Ships (MARPOL). The main bodies of the IMO are the Assembly, the Council and several Committees, in particular the Maritime Safety Committee and the Legal Committee.

The IMO has on that basis neither direct prescriptive nor executive functions that go beyond State consent. Nevertheless it exercises significant authority by promulgating international rules and standards concerning the safety of navigation, the safety of ships and the prevention of marine pollution from ships. Its role has been in particular enhanced by the Convention.[29] For example, according to article 211 of the Convention, States acting through the competent international organization (i.e., the IMO) shall establish 'international rules and standards to prevent, reduce and control pollution of the marine environment from vessels and promote the adoption, in the same manner, wherever appropriate, of routing systems designed to minimize the threat of accidents which might cause pollution of the marine environment.' States are, at the same time, obliged to adopt national laws and regulations concerning ships flying under their flag to prevent, reduce and control marine pollution from ships (Article 211 (2) of the Convention). Coastal States may take action against any violation of their national laws and regulations adopted in accordance with the Convention or applicable international rules and standards for the prevention, reduction and control of pollution (Article 220 (1) of the Convention). Equally, port States may enforce 'applicable international rules and standards established through the competent international organization' (Article 218 (1) of the Convention).

The above mentioned international conventions concerning the safety of ships and the protection of the marine environment developed under the auspices of IMO and with the impact from the latter have become applicable 'international rules and standards' as referred to in articles 218 and 220 of the Convention, after having been accepted by a significant number of States but not necessarily universally and not necessarily by the flag States of those ships against which they are enforced via the national law of the coastal State or the port state as the case may be. Te mechanism of such rules being enforced towards ships rests in the competences of the coastal States or the port States.

[29] *See* Implications of the United Nations Convention on the Law of the Sea for the International Maritime Organization, IMO Doc. LEG/MISC/3/Rev.1 (6 January 2003).

Although one cannot qualify such activities of the IMO as being purely legislative in nature, the IMO significantly determines the substance of the corresponding national laws implementing the rules developed under the IMO.

In addition, the dispute settlement mechanism of the Convention operates as a safeguard, so that national law does not go beyond such international rules and standards. The flag States of ships arrested or sanctioned by port States or coastal States may initiate proceedings under the Convention against national measures seeking to enforce higher standards.[30] In such a case the dispute settlement body will assess whether the national law provides a basis for the national measure taken and whether the national law as well as the measures taken conform to the applicable international rules and standards and are proportionate to the alleged offense. The Convention thus establishes a coherent system of norm setting through the interplay between prescriptive acts – international sources, the Convention and the international rules and standards established by the IMO and national law enforced by national organs – and an international judiciary.

The IMO has developed one further mechanism that can be considered to be of prescriptive nature. The IMO may, upon the request of a coastal State, designate particular sensitive sea areas (PSSA). This power has been granted to the IMO pursuant to Annex II to IMO Resolution A.927 (22). PSSAs are areas which need special protection because of their significance for recognized ecological, socio-economic or scientific reasons and their vulnerability to damage caused by international shipping activities. The legal basis for the IMO's having such power may be found in articles 192, 194 and 211 (1) of the Convention in conjunction with the consent of the coastal State concerned. If approved by the IMO, an area will be designated as a PSSA and the IMO will adopt one or more 'associated protective measures' that ships must follow in the PSSA. It is to be noted that the designation of a particular sensitive sea area has no binding effect whereas the 'associated protective measures' are mandatory.[31]

The type of measures that may be adopted is at the IMO's discretion. To date the IMO has prescribed ships routing measures and ships reporting systems under SOLAS, special areas under MARPOL and a range of other measures adopted through IMO resolutions. To the extent such measures have been based on existing

[30] The procedures are set forth in Part XV of the Convention on the Law of the Sea.

[31] *See* Revised Guidelines for the Identification and Designation of Particularly Sensitive Sea Areas, IMO Assembly Resolution A. 982(24), IMO Assembly 24th Session, adopted on 1 December 2005.

international agreements, the resulting restrictions imposed upon navigation are to be considered justified.[32]

So far, the IMO has established at least 10 PSSAs, one of which (the Western European Waters PSSA) covers the territorial sea and at least part of the exclusive economic zone from the southern maritime border of Portugal to the Shetland Islands. In this area traffic separation schemes and mandatory ships reporting systems are applicable.[33] Other PSSAs include the Great Barrier Reef, the Baltic Sea and the maritime areas around the Canary Islands, for example.

Here again binding international rules are being issued, having their legal basis in the consent of the coastal State in question, IMO resolutions and a general mandate in the Convention. The fact that PSSAs can only be established with the consent of the coastal State concerned is, in itself, not a sufficient legitimization since PSSAs also encompass exclusive economic zones. In these areas the coastal States have only a limited competence to prescribe and enforce measures against international navigation. The associated protective measures go beyond measures which could be prescribed and enforced unilaterally by coastal States. This is why cooperation with the IMO becomes necessary.

As indicated above, the IMO possesses neither direct prescriptive powers nor executive powers. Nevertheless, the IMO significantly shapes the development of the international rules on shipping and thereby indirectly materially influences respective national rules. The authority to establish PSSAs is based upon the IMO's internal rules, whereas the issuance of associated protective measures is based upon international agreements. Thus, the powers of the IMO are primarily derived from the Convention and other international agreements, as well as the consent of the States Parties concerned. However, this basis of legitimacy is being strained. So far, although the IMO has interpreted its mandate narrowly, refraining from acting at its discretion and prescribing broad measures, it is coming under pressure to act outside the scope foreseen in the Convention.[34]

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[32] *See* J. P. Roberts, T. Workman, B. M. Tsamenyi & L. Johnson, *The Western European PSSA proposal: a "politically sensitive sea area,"* 29 MARINE POLICY 431 (2005).

[33] *See* Particularly Sensitive Sea Areas (PSSA), (IMO ed., 2007 edition).

[34] For example, Australia's attempts to induce the IMO to prescribe mandatory pilotage in the Torres Strait, a measure which may not have a basis in the Convention. In detail: R. C. Beckman, *PSSAs and Transit passage – Australia's Pilotage System in the Torres Strait Challenges the IMO and UNCLOS*, 38 OCEAN DEVELOPMENT AND INTERNATIONAL LAW 325 *et seq.* (2007).

E. North Atlantic Fisheries Organization

International fisheries organizations have traditionally been established to co-ordinate fishing activities in particular areas or concerning particular species. In the middle of the 20th century these organizations clearly had neither prescriptive nor executive authority. However, in general terms their powers have been expanded. This expansion of power has two sources. First, there is the issue of overfishing and the associated sharp decline of certain fish stocks. Second, there is the legal source, namely, the Convention and the rules promulgated there under. It has become the task of the fisheries organizations to prescribe in detail the management and conservation measures to be undertaken. These secondary rules are based upon the treaty establishing the respective fisheries organization, which describes in detail the fisheries organization's prescriptive powers. By comparison, the executive powers of these organizations are limited; as far as enforcement is concerned, they rely on the States Parties.

The Conservation and Enforcement Measures[35] of the Northwest Atlantic Fisheries Organization (NAFO) is particularly advanced in this respect. Amongst other more traditional measures of inspections at sea, inspection in ports, monitoring on the basis of reports which are to be submitted, a licensing system, electronic tracking of fishing vessels etc., NAFO establishes a list of 'presumed IUU[36] activities'. This list is based upon information received by States Parties and includes vessels from States Parties as well as from non-States Parties. The States concerned are informed of the listing of the vessels under their flag and the reasons why these vessels have been listed. The consequence of such a listing is that the States Parties to the Convention must deny access of fishing vessels and all supporting vessels under this particular flag to their ports and to all services, except in cases of emergency. Furthermore, States Parties must prohibit the landing of fish, reflagging of the vessel, the change of crew, etc.[37] This listing procedure is similar to the one under the jurisdiction of the Security Council to suppress terrorism[38] and States whose flag has been listed may be delisted if they prove that they have effective control over fishing vessels flying their flag.

The listing mechanism works on two levels. Whereas the prescription of the applicable rules rests on the international level, enforcement is vested in the States.

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[35] Available at: http://www.nafo.int/fisheries/fishery/iuu/list.html.

[36] Illegal, unreported and unregulated fishing.

[37] *See* Art. 53 of the Conservation and Enforcement Measures.

[38] *See* Feinäugle, in this volume.

Recourse against the listing may be sought before the national courts of the State enforcing the listing.

The legitimacy of this mechanism rests on the consent by the States Parties to the Convention establishing the Northwest Atlantic Fisheries Organization and ultimately on the Convention, which calls for a close cooperation of States in the conservation and management of fishing resources. Since the enforcement measures are taken under the authority of the enforcing State, such measures enjoy the legitimacy of the relevant national law.

F. Conclusion

The three examples dealt with in this contribution show that legal regimes have developed which may be qualified as international administrative law, either as a single level system or as a multilevel system. These are not the prime examples referred to in the growing literature on this issue since many authors generally begin from a rather theoretical starting point. But it is unsustainable to assume the exercise of authority in international law without discussing whether such exercise really exists and what it entails and to build thereupon far reaching demands concerning changes in respect of international law or – even worth – to question the relevance of international law for the conduct of international relations.

Having said this it is equally evident that legal regimes which provide for an international administration must be scrutinized from the point of view of legitimacy. Given their particular functions it would not be sufficient to merely refer to the consent of States Parties to the constituent instrument, although this consent may (theoretically) cover all the measures taken under these regimes. Hence the chain of legitimacy needs to be a continuous one. The International Seabed Authority, having been set up for the administration of the Area, provides such a coherent system and therefore does not have a legitimacy deficit. The situation may differ in cases where traditional international organizations or institutions gradually assume international administrative functions as is the case with the IMO. The legal framework of these organizations and institutions should be reconsidered to strengthen the legitimacy of their measures, whether prescriptive or executive. However, the main task lies with the national legislator. It is for it to provide for an efficient and continuous chain of legitimacy in such cases.

Finally, NAFO demonstrates how the legitimacy of measures may be established or strengthened by having recourse to national law or in other words, by making use of the multilevel system where each level has its own chain of legitimacy and the two supplementing each other.

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