The Caribbean and the LOS Convention

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The International Seabed Authority (ISA) is an autonomous international organization established under the 1982 United Nations Convention on the Law of the Sea (UNCLOS) and the 1994 Agreement relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea (1994 Agreement). ISA is the organization through which States Parties to UNCLOS organize and control all mineral-resources-related activities in the Area for the benefit of mankind as a whole. In so doing, ISA has the mandate to ensure the effective protection of the marine environment from harmful effects that may arise from deep-seabed related activities. ISA which has its headquarters in Kingston, Jamaica, came into existence on 16 November 1994, upon the entry into force of UNCLOS.

REMARKS

By

The Honourable Mr Justice Winston Anderson, Judge of the Caribbean Court of Justice,

on the occasion of

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Introduction:

The topic on which I have been asked to speak is dauntingly broad. "The Caribbean and the Convention" immediately presents problems of definition, breadth and depth. The "Convention" may safely be taken to refer to the United Nations Convention on the Law of the Sea adopted in Montego Bay, Jamaica, in 1982 and which entered into force in November 1994.[1] This Agreement, which I also sometimes refer to as the "Montego Bay Convention" or the "Law of the Sea Convention" and which is intricately connected with other conventions, does not itself contain a definition of the Caribbean but Part IX is devoted to encouraging cooperation among States bordering enclosed or semi-enclosed seas. There is no doubt that the oceanographic characteristics of the wider Caribbean Sea fit the definition of a semi-enclosed sea[2] with the legal consequence that the 34 littoral states have obligations under the Convention to cooperate with each other in

[1] As at 11 January 2011, there were 161 parties to the Convention.

[2] Winston Anderson, *The Law of Caribbean Marine Pollution* (Kluwer Law International, 1997), p. 23; L Davidson and K Gjerde, 'Special Area Status for the Wider Caribbean Region under Annex I of the International Convention for the Prevention of Pollution from ships", a project supported by the Pew Charitable Trusts, the Marine Policy Center of the Woods Hole Oceanographic Institution and Greenpeace(1989).

their maritime activities. This definition of the Caribbean is useful and there are regional treaty-regimes relating to the law of the sea that are based upon it.[3]

In order to make this presentation manageable I propose to focus specifically on the relationship between the Convention and those states of the Caribbean which form the Caribbean Community ("CARICOM"), established by the Revised Treaty of Chaguaramas[4] particularly since one of the ways in which these states pursue their maritime interests is through dialogue, negotiation, and collaboration within the wider Caribbean region. Even then I must necessarily be selective in the topics I touch upon and the eclectic offerings of this paper largely reflect an attempt to update my own research interests which I had largely abandoned since my departure from academia.

My starting premise is that there is a symbiotic relationship between the CARICOM States and the United Nations Convention on the Law of the Sea. CARICOM expertise and participation in the Group of 77, led by the then Jamaica Solicitor-General, Dr. Kenneth Rattray, was instrumental in the negotiation and the crafting of the text of the Convention. It was as much as tribute to that contribution as to the centrality of Island States in the Law of the Sea that Montego Bay, Jamaica, was chosen for the adoption of this universally important Convention in 1982,[5] and that our host institution, the International Seabed Authority ("ISA") is sited here in Kingston, Jamaica.[6] Another CARICOM State, Guyana, would want me to remind you that the Convention entered into force in 1994 following the Guyanese ratification, which was the sixtieth.

[3] See United Nations Environment Programme Regional Seas Programme (Anderson, supra, chap. 2); Cf. Association of Caribbean States, *Convention Establishing the Association of Caribbean States* (ACS) 24 July 1994 in Cartagena de India, Colombia.

[4] The Treaty was signed on July 5, 2001 at the Twenty-Second Meeting of the Conference in Nassau, The Bahamas, and entered into force on January 1, 2006.

[5] The Convention entered into force on 16th November 1994.

[6] The inaugural session of the International Seabed Authority was held in Kingston in November 1994.

But the special relationship between CARICOM and the Convention goes beyond history. The Community comprises twelve small single-island or archipelagic states and three coastal states and the Convention plays, therefore, a critical role in the very definition of these states and in their assertion and usage maritime resources for their social and economic development. CARICOM States regard the Convention as the foundational framework for national, regional, and global regulation of use of ocean space and are active participants in the three major institutions established by the Convention, namely, the ISA, the International Tribunal on the Law of the Sea, and the Commission on the Limits of the Continental Shelf. Particularly as regards the use the dispute settlement arrangements, Caribbean States have provided opportunities for the rules in the Law of the Sea Convention to be been clarified and progressively developed, resulting in a further strengthening of the Convention.

I propose now to examine a few aspects of the special relationship between CARICOM and the Convention. As in any special relationship there is sometimes tension between the Caribbean and the Convention and I will try to identify some of these areas of tension as well as other areas where additional work is required.

Acceptance of the Convention:

The fifteen (15) Member States of CARICOM have all accepted the Montego Bay Convention starting with ratification by Jamaica in 1983 and culminating with ratification by Suriname in 1998. The year of acceptance of all CARICOM states are as follows: Antigua and Barbuda (1989); The Bahamas (1983); Barbados (1993); Belize (1983); Dominica (1991); Guyana (1993); Haiti (1996); Jamaica (1983); Montserrat (by UK,1997); St. Kitts and Nevis (1993); St. Lucia (1985);

St. Vincent and the Grenadines (1993); Suriname (1998); Trinidad and Tobago (1986). Unlike the European Union, CARICOM is not itself a party to the Convention, although the Revised Treaty does mention the Caribbean Sea.[7]

Article 309 of the Convention prohibits reservations and exceptions (except those expressly permitted by other articles of the Convention) and statements made under Article 310 cannot exclude or modify the legal effect of the provisions of the Convention. St. Vincent and the Grenadines, Trinidad and Tobago and the United Kingdom have entered various declarations with regard to the dispute settlement arrangements in the Convention pursuant to Article 310. Some CARICOM states have made more extensive declarations and statements under the Convention which, arguably, are not legally binding unless made in conformity with Articles 309 and 310. In the case of the Montserrat (*vide* the United Kingdom) the potentially offending declarations include those subordinating the Convention to national law; and those on baselines; navigational rights; and maritime rights in the various jurisdictional zones.

An intention to maintain idiosyncratic national policies is evident elsewhere within the wider (non-CARICOM) Caribbean. Some declarations preserve national law under which foreign vessels must pay for licences to fish in the EEZ (including for highly migratory species);[8] or that make acceptance of the compulsory dispute resolution arrangements contingent upon fulfillment of obligations of the prompt release of vessel and crew;[9] or make maritime delimitation contingent upon settlement of land disputes by other states;[10] or impose limitations on compulsory dispute

[7] Article 135 (1) (d); Article 141.

[8] Declaration of Costa Rica: "upon signature: The Government of Costa Rica declares that the provisions of the Costa Rican law under which foreign vessels must pay for licenses to fish in its exclusive economic zone, shall apply also to fishing for highly migratory species, pursuant to the provisions of articles 62 and 64, paragraph 2, of the Convention.

[9] See Declaration by Cuba.

[10] See Declaration by Guatemala. (note the potential conflict with decision in Guyana/Suriname, *post*).

arrangements contrary to the Convention.[11] Given the stated opposition of some Caribbean states to declarations and statements inconsistent with Article 310, the risk of exposure by these states to the law of international state responsibility would appear to be relatively high.

More difficult problems arise potentially in relation to the United States and Venezuela which have not yet accepted the Convention.[12] Presumably relations with these states are governed by customary international law but this does not necessarily mean that the rules of the Convention are irrelevant. *North Sea Continental Shelf* (1969) decided that rules of customary law may be generated by law-making treaties, and few would deny that the Montego Bay Convention is of a law-making nature. In *Nicaragua v United States*,[13] the ICJ confirmed that identical rules of law may exist independently in customary law and conventions. As far as the Convention is concerned, *Libya v Malta*[14] found that it was "incontestable" that the certain rules in the Convention had by practice of states, become part of customary law. The legal value of the practice of CARICOM States in issuing declarations refuting Venezuelan maritime claims in respect of Bird Rock in the northern Caribbean is yet to be evaluated.

Maritime jurisdiction:

An important contribution of the Convention is the allowance that it makes for the incorporation of maritime space into national jurisdiction. Among the most significant is the possibility of claiming archipelagic status and the assertion of a maximum of a 12-mile territorial sea and a 200-

[11] Cf. Declaration by Nicaragua.

[12] The fact that the United States has signed the Convention brings that State under the obligation not to act in a way that frustrates the object and purpose of the Convention.

[13] [1986] ICJ Rep. 14.

[14] [1985] ICJ Rep. 13.

mile exclusive economic zone or exclusive fisheries zone, and continental shelf. Given that some 90% of the circumference of the Caribbean Sea is enclosed by continental or island landmasses and that the diameter is probably just about the 400 nautical miles mark; it follows that these maximum claims would basically account for all of the wider Caribbean maritime space, leaving no space for application of international zones such as the high seas.

The potential for economic development represented by the incorporation of these maritime entitlements is enormous. The large marine ecosystem of the Caribbean Sea provides food and bio-chemicals and has also been put to variety of purposes such as recreational, educational, aesthetic, and inspirational uses. The reliance of Caribbean Island economies upon coastal tourism is well known, and increasingly the main driver to settlement of maritime boundaries has been interest in the exploration and exploitation of oil and natural gas. The Fisheries sector also makes an important contribution to social and economic development.

Following upon the terms of the global treaty the Caribbean legislation makes clear that Caribbean States enjoy complete sovereignty in the territorial sea and may exercise sovereign rights and jurisdiction in the exclusive economic zone or the exclusive fisheries zone. These States are thus enabled to exercise management decisions regarding exploring, exploiting and conserving natural resources; the establishment of installations and structures; marine scientific research; and protection and preservation of the environment within the maritime zones under their jurisdiction.

Even without the benefit of recent empirical research it seems fairly safe to suggest that legislation incorporating these entitlements and competences has been adopted by the overwhelming majority (if not the entirety) of the 34 or so States and Territories bordering the Caribbean Sea. All CARICOM States may be taken to have enacted such legislation; in some instances the maritime entitlements amount to several times the size of the territorial domain. In common law countries

within the grouping, Maritime Areas Acts or similar statutes were passed mainly between 1982 and 1992 first repealing the UK Territorial Waters Act of 1878 which proclaimed a 3-mile limit and then asserting the full jurisdiction available under the Montego Bay Convention. Archipelagic status has been claimed by Antigua and Barbuda, Jamaica, St. Vincent and the Grenadines, and Trinidad and Tobago, often preceded by studies demonstrating satisfaction of the technical requirements under the Convention.[15]

Caribbean litigation has confirmed the obligations of foreign states in respect of the activities of their vessels in the maritime zones of the coastal states. *Nicaragua v United States*[16] represents a classical application of the law of the sea to strengthen the rule of international law. In that case the ICJ held that mines placed by the United States into that part of the Caribbean Sea which fell within Nicaraguan internal waters and territorial sea could not be justified on the basis of innocent passage and therefore constituted a violation of Nicaraguan sovereignty. The Court conducted an exhaustive review of state practice and *opinio juris* in confirming that the basic legal concept of state sovereignty extended to the internal and territorial sea of every state and to the air space above its territory. It then said:

> "The duty of every State to respect the territorial sovereignty of others is to be considered for the appraisal to be made of the facts relating to the mining which occurred along Nicaraguas"s coasts. The legal rules in the light of which these acts of mining should be judged depends upon *where* they took place. The laying of the mines within the ports of another State is governed by the law relating to internal waters, which are subject to the sovereignty of the coastal state. The position is similar as regards mines placed in the

[15] See Limits in the Sea No. 25: Jamaica's Maritime Claims and Boundaries.
[16] [1986] ICJ Rep. 14.

territorial sea. It is therefore the sovereignty of the coastal state which is affected in such cases."

Extended continental shelves:

In recent times CARICOM States have reacted to the matter of claims to extended continental shelves. As is well-known, States may, under the Convention, claim the natural prolongation of their territory into the sea (the continental shelf) up to 200 nautical miles but in circumstances where this continental shelf went beyond 200 nautical miles states could claim up to an additional 150 miles provided certain technical standards of geology, geophysics and hydrography were met. The Convention established the deadline of May 2009 by which proof had to be submitted that these standards were satisfied.

At the meeting of the CARICOM Legal Affairs Committee in St. Lucia in 2006, the CARICOM Secretariat reminded Member States of the deadline for countries to file claims to oceanic territories along extending beyond 200 nautical miles from the respective baselines. Prior to 2006, the predominant policy position evident in the maritime boundary legislation was to postpone consideration of the issue. The legislation normally laid claim to a continental shelf of 200 nautical miles but contained a formula that allowed for an extension up to the edge of the continental margin. Antigua and Barbuda, Guyana, Jamaica, St. Kitts Nevis, St. Lucia, St. Vincent and the Grenadines, and Trinidad and Tobago were categorized has having presented such claims.[17] In the case of St. Lucia, the Maritime Areas Act 1984 contained relevant provisions in

[17] See: http://www.nationmaster.com/graph/geo_mar_cla_con_she-geography-maritime-claims-continental-shelf. accessed on Monday, March 21, 2011.

section 7. Having defined the continental shelf as comprising those areas of the seabed and subsoil of the submarine areas throughout the natural prolongation of the land territory of St Lucia, the legislation claim a maximum distance of nautical miles. However this claim is subject to section 7 (2) which provides that: "wherever the continental shelf margin extends beyond 200 nautical miles from the nearest point of the baseline of the territorial sea, the outer limits of the continental shelf shall be establish with all due regard to the requirements and limitations of international law relevant to the establishment and delineation of the continental shelf beyond that distance."

This formula is entirely consistent with the Convention inasmuch as it indicates that claims would be in accordance with international law but did nothing to produce the proof necessary by the deadline established. A review of the website of the Commission on the Limits of the Continental Shelf[18] suggests that only three CARICOM countries have made formal submissions to the Commission:[19] Barbados, Suriname, and Trinidad and Tobago. The claim by Barbados has already been considered by a sub-commission whose recommendations were accepted by full commission on 15 April 2010. The Commission recommended that Barbados proceeded to delineate the outer limits of the continental shelf on the basis of guidelines provided by the Commission and relevant provisions of the Convention.

In its recommendation to Barbados, the Commission was careful to state that "The establishment of the final outer limits of the continental shelf of Barbados may depend upon delimitation between States." This is consistent with the technical nature of work of the Commission in determining whether any coastal state satisfies the criteria for extension of its continental shelf

[18] See http://www.un.org/Depts/los/clcs_new/commission_submissions.htm accessed on Monday, March 21, 2011.
[19] CARICOM Study suggests that at least five Caribbean countries may have claims in this area:

beyond 200 m. This is also critical in establishing where national jurisdiction ends and international jurisdiction begins. However, the Commission‟s subjection of the technical factors to the legal and political ones regarding negotiations may also have been intended to respond the various submissions by other Caribbean states. In their separate *Note Verbale*, Suriname[20] and Trinidad and Tobago[21] both asserted that the recommendations of the Commission would be without prejudice to any bilateral delimitation issues with Barbados. In its *Note Verbale*, Venezuela[22] noted that although it was not a party to the Convention it had, in accordance with customary international law, it had rights over the continental shelf in the area covered by the submission of Barbados and accordingly the recommendations of the Commission would be without prejudice to the bilateral delimitation issues.

Fishing:

It appears that the fisheries sector makes a significant contribution to Caribbean development. A UWI Study[23] suggests that the sector provides for 504,913 jobs; US$1Billion in exports; and 7% of the protein consumed in the region. Much of this is clearly reflects the extended zones of maritime jurisdiction, although the intrusions from foreign fishing vessels have reportedly had negative impacts.

Outside of the zones, proper, that is on the high seas, the Montego Bay Convention has inspired significant limitations on the freedom to fish; the 1995 Straddling and Migratory Stocks

[20] Note Verbale No. 9509 dated 6 August 2008.
[21] Note Verbale No 173 dated 11 August 2008.
[22] Note Verbale Ref. No.: 00766 dated 9 September 2008.
[23] A CERMES Study accessed on the website of the Association of Caribbean States.

Agreement contains rules relating to conservation and management of these fish stocks. These rules are to be administered by the appropriate regional fisheries body:- in order to exercise the right to fish, States must become members of the organizations or arrangements and apply the conservation measures. If they do not do so they cannot fish for the stocks concerned. The 1995 Agreement also sets out the principles that should govern conservation and management of straddling and highly migratory stocks by the coastal state in its EEZ/EFZ.

A disappointing feature of regulatory regime in the region has been the limited participation in the 1995 Agreement for Implementing the Provisions of the Montego Bay Convention Relating to Straddling and Migratory Fish Stocks ("1995 STA") and relevant regional fisheries organizations. Of the fifteen CARICOM Member States only six have accepted the 1995 Straddling Stock Agreement: St. Lucia (1996), Bahamas (1997), Barbados (2000), Belize (2005), Trinidad and Tobago (2006), and St. Vincent and the Grenadines (2010). The International Commission for the Conservation of Atlantic Tuna (ICCAT) is responsible for the conservation of tunas and tuna-like species in the Atlantic Ocean and its adjacent seas; of the fifteen CARICOM Member States only five are contracting parties to ICCAT: Montserrat (1995), Trinidad and Tobago (1999), Barbados (2000), Belize (2005), and St. Vincent and the Grenadines (2006). There is some evidence that this limited participation has rebounded to the disadvantage of states in the insular Caribbean which are increasingly coming under the threat species within their maritime areas will be regulated without their input by international agencies. Regulation of the queen conch by the

International Convention on International Trade in Endangered Species ("CITES") is a classical case in point.[24] Admittedly almost all CARICOM States have now joined CITES.[25]

For nearly a decade, CARICOM countries have sought to establish a common fisheries policy based upon a mandate from the CARICOM Heads of Government in 2003. The Caribbean Regional Fisheries Mechanism ("CRFM") based in Belize is responsible for the development of the CFP but has been faced with several legal and technical difficulties. The legal opinion has been expressed that there is no international obligation for common management of the EEZ so that while a common fisheries regime may be highly desirable under UNCLOS, it was a decision within the realm of individual State sovereignty. This coupled with the accepted position that the Revised Treaty of Chaguaramas does not provide a specific mandate for a fisheries policy has been a disincentive to the efforts by the CRFM. There are also important unresolved question concerning participation by wider Caribbean States who are not members of CARICOM.

Navigation:

Along with fishing, navigation is the oldest use of the sea and remains one of the most important. Large ship-owning nations are hostile to any erosion of the rights of navigation and have taken every step conceivable to preserve the different navigational rights enjoyed by the ships of foreign states in the various zones of coastal states and on the high seas. Arguments have been mounted with respect to the use of the Caribbean Sea as the transportation route for shipment of various

[24] Winston Anderson, "Implementing MEAs in the Caribbean: Hard Lessons from Seafood and Ting" (2001) VOL 10 Issue 2 RECEIL 227.

[25] Only Haiti appears not to be a member.

cargoes, but the truth is that there is no clearly established basis in the Convention to prevent its use for such transportation.

The wording of some Caribbean legislation asserting maritime jurisdiction could give rise to certain legal difficulties. Under the Convention the coastal state does not have a completely free hand to determine the activities that takes place in its maritime zones; even as regards its territorial sea, the Montego Bay Convention makes clear that sovereignty "is to be exercised subject to this Convention and to other rules of international law." The sub-text here is that vessels of all States enjoy a right of innocent passage through the territorial sea. Archipelagic states are obliged to grant archipelagic sea lane passage. Transit passage exists through the straits between the Islands of the Caribbean Archipelago.

The problem arises from the fact that these limitations on jurisdiction are not necessarily repeated *verbatim* in all Caribbean maritime legislation. For example, within CARICOM may be found instances where legislation defines innocent passage through the territorial sea in ways that are more restrictive than under the Convention.[26] However, it is probably true to say that these inconsistencies reflect largely unintended tensions with the Convention.

A special problem arises in relation to the navigation of warships and submarines through territorial waters. It could be argued that warships are by their very nature represent a threat to the security of the coastal state and therefore their passage was *ipso facto*, not innocent. Although UNCLOS is inconclusive on the matter[27] the fact is that the Convention grants a right of innocent passage to submarines and at the time of the drafting of the agreement, as at present, all submarine are in fact warships. Legislation in some Caribbean states expressly attribute the right of innocent

[26] See examples given in Anderson, (supra). Fn. 2

[27] See Articles 17, 20.

passage to foreign war ships[28] but others exclude such ships from the regime of innocent passage, requiring the giving of prior consent[29] or the receipt of prior notice.[30] I believe it can be safely said that this requirement is honored more in the breach than observance.

There are measures that regional states may take in relation to navigational rights by foreign states but these are clearly more of a procedural nature and do not affect the underlying substantive right in respect of navigation. For example, when exercising their right of innocent passage the coastal state may insist that submarines and other underwater vehicles navigate on the surface and show their flags. Vessels must generally respect sea-lane designation and traffic separation schemes of the coastal states; in particular tankers, nuclear-powered ships and ships carrying nuclear or other inherently dangerous substances or materials may be required to confine their passage to such sea lanes. Vessels with ultra hazardous materials must also carry special documents and observe agreed precautionary measures.

Nuclear powered ships and ships carrying hazardous cargoes pose an inherent threat to the peace and good order of the coastal state but enjoy an express right of innocent passage. From this perspective, the controversy surrounding the shipment of weapons-grade material from Japan to the United Kingdom; or the shipments of nuclear waste from France to Japan by the Panama Canal-Caribbean Sea route may, in the present state of international law, be more political than legal.

[28] See e.g., section 10, Territorial Sea, Contiguous Zone, Exclusive Economic and Fishery Zones Act 1981 (Act 26 of 1981) of Dominica.

[29] Section 10 (2) Maritime Areas Act 1983 (Act No. 15 of 1983) of St. Vincent and the Grenadines.

[30] Section 6 (3), Maritime Boundaries Act 1977 (Act No. 10 of 1977) of Guyana.

It would appear that in order to exercise this competence CARICOM states require some prior notification of the passage of relevant vessels, which would appear to be contrary to the shroud of secrecy that now surrounds certain shipment though the Caribbean Sea. Whilst admittedly in the nature of a procedural right to information a breach by maritime states would nonetheless constitute a breach of international law.

The burgeoning cruise ship industry has given rise to questions concerning the extent and nature of the rights of CARICOM states in relation to the territorial sea and EEZ. Some 70% of all cruises take place in the North American region where the Caribbean Islands are the most popular destinations.[31] According to figures from the Caribbean Tourism Organization, in 2010 the region‟s cruise passenger arrivals amounted to 20 million as compared with just over one million in 1970.[32] American cruise lines in the Caribbean often depart from ports in the United States, mostly from Miami, whereas some United Kingdom cruise lines are said to base their ships out of Barbados for the Caribbean season, operating direct charter flights out of the UK and avoiding the sometimes lengthy delays at US Immigration. Admittedly the rights of the coastal state relate essentially to the exploitation of natural resources of the EEZ whereas other states have rights of navigation, over-flight, and the laying of submarine cables and pipelines. Cruising probably comes within the natural meaning of navigation but at least one Caribbean scholar has queried this and suggested that cruising may not be consistent with the literal meaning of innocent passage in the territorial sea. Whatever the strict legal answer to this question it may be that Caribbean States would choose to forego testing the point in the wider interest of other perceived benefits derived from the cruise industry.

[31] http://en.wikipedia.org/wiki/Cruise_ship

[32] http://www.onecaribbean.org/newsandmediacenter/mediareleases/listing.aspx?contentid=47DDFB2C-6948452B-9939-788DB554B720. Accessed Monday March 21, 2011.

Pollution:

With increased rights in the extended coastal areas have come additional responsibilities in respect of maritime usages. For Caribbean states the control of pollution and the protection and preservation of the marine environment within their jurisdiction is among the most challenging. Article 56 of the Convention confers on the coastal State jurisdiction with regard to the protection and preservation of the marine environment of the EEZ. This jurisdiction is exercisable in accordance with Part XII which imposes broad obligations upon all states to take measures to prevent, reduce and control pollution; to monitor and assess activities presenting potentially harmful effects; to cooperate on a global or regional basis; and to develop international rules and national legislation that regulate pollution from all sources. An important consideration is that the anti-pollution measures to be taken by the State are tied by a complex formula to internationally accepted rules and standards established through competent international organizations or diplomatic conferences. Several Caribbean scholars have suggested that this formula may require Caribbean States parties to the Montego Bay Convention to implement environmental standards in other conventions to which they may not be parties, such as conventions adopted by the International Maritime Organization (IMO). Assuming the correctness of this position, an assessment of CARICOM‟s response would have to be graded as "mixed". If this is correct then it would follow that there is much to be done. Whereas all Member States (except one)[33] appear to have accepted the flag ship International Convention for the Prevention of Pollution from Ships ("MARPOL"), only 9 appear to be parties to the Oil Pollution Preparedness, Response and

[33] Haiti

Cooperation Convention.[34] Participation drops off significantly where the parent IMO treaty is revised as in the case of the Protocol of 1997 to MARPOL.

Of course, non-participation in the specialist IMO treaty regimes would not necessarily indicate a breach of the Montego Bay Convention if the Member States nonetheless implemented the IMO treaty. Here, however, CARICOM maritime legislation is relatively weak; jurisdiction is claimed with regard to protection and preservation of the marine environment[35] but there are relatively few instances of the substantive exercise of that jurisdiction by regulating marine pollution. In this regard the Merchant Shipping (Oil Pollution) Act (Chapter 275) of The Bahamas, and the Shipping (Oil Pollution) Act (Cap. 296A) of Barbados[36] are outstanding.

Intertwined with the national legislation has been the attempt at regional protection of the marine environment. As indicated earlier, Part IX of the Montego Bay Convention is devoted to encouraging cooperation among States bordering the semi-enclosed Caribbean Sea; it specifically obliges cooperation in the implementation of their rights and duties to protect the marine environment. Use of the Caribbean Sea as the basis for regional cooperation and development has firm legal footing in the Cartagena Convention for the Protection and Development of the Marine Environment of the Wider Caribbean Region 1983[37] ("Cartagena Convention") which obliges contracting parties to take all appropriate measures in conformity with international law to prevent, reduce and control pollution.[38] The Cartagena Convention has been supplemented by three

[34] Antigua and Barbuda, Bahamas, Dominica, Guyana, Montserrat, Jamaica, St. Kitts and Nevis, St. Lucia, Trinidad and Tobago: http://www.imo.org/About/Conventions/StatusOfConventions/Documents/Status%20-%202011.pdf
[35] See e.g., section 12 (a) (b) (iii), Maritime Areas Act 1984 (No. 6) St. Lucia.
[36] 16/1994
[37] ILM 223 (1983), entered in force 11 October 1986
[38] Article 4.

protocols containing more detailed rules on protection of the Caribbean marine: the *Protocol on Co-operation in Combating Oil Spills in the Wider Caribbean Region*;[39] *Protocol Concerning Specially Protected Areas and Wildlife, 1990*;[40] and the *Protocol Concerning Land-Based Sources of Marine Pollution 1999*.[41] There are also established institutional arrangements, including two-yearly meeting of the contracting parties; and the discharge of the secretariat functions through the Regional Coordinating Unit (RCU) located in Kingston, Jamaica. However, the Cartagena regime appears to have lost some momentum: there have been few examples of oil spill contingency planning simulation exercises; the LBS Protocol entered into force only very recently (August 13, 2010) after a 11-year hiatus; and many CARICOM States still lack legislation to implementing the Cartagena agreements. A promising development is the approach taken in Trinidad and Tobago which implements several provisions of the Cartagena agreements through a general environmental statute: the Environmental Management Act 2000.

One important area in which there has been discussion over years is special areas designation status for the Caribbean under IMO Agreements. Under its MARPOL, for example, semienclosed seas may be designated "special areas" where "for technical reasons in relation to its oceanographic and ecological condition and to the particular character of its traffic the adoption of special mandatory methods for the prevention of pollution from ships is required." Such designation is available with regard to oil pollution (Annex I), pollution from noxious liquid substances in bulk (Annex II), and pollution from garbage (Annex V).

[39] ILM 240 (1983), entered in force 11 October 1986.
[40] *Yearbook of International Environmental Law* 441 (1990), entered into force 18 June 2000.
[41] http://www.cep.unep.org/pubs/legislation/lbsmp/final%20protocol/lbsmp_protocol_eng.html *(accessed Monday March 21, 2011).*

Several generations of scholars[42] have argued that the region satisfies the requirements for special areas designation under MARPOL; however, it is well known that a major obstacle to designation is the requirements for countries to provide adequate port reception facilities for receiving ship-generated wastes and to develop national legislation which enables enforcement of MARPOL.

As it regards Special Status under Annex V (disposal of garbage), a Regional Workshop held in Caracas, Venezuela in October 1990[43] determined that the threat to the region from garbage (particularly from the cruise ship industry associated with tourism) was significant enough to seek special area status. A resolution was drafted and submitted to the IMO"s MEPC in July 1991. It seems to have taken 19 years for the region to ensure that the garbage reception facilities were in accordance with MARPOL requirements. Recent information suggests IMO designation of the wider Caribbean Sea as a Special Area with effect from 1 May 2011.[44] From this date, by virtue of the designation, ships of all sizes are prohibited from the discharge of any waste materials except food waste, which may be discharged 12 nautical miles (3 nautical miles in the wider Caribbean) from land. In the words of Annex V Regulation 5 (2):

> *(a) disposal into the sea of the following is prohibited:*

[42] L Davidson and K Gjerde, 'Special Area Status for the Wider Caribbean Region under Annex I of the International Convention for the Prevention of Pollution from ships", a project supported by the Pew Charitable Trusts, the Marine Policy Center of the Woods Hole Oceanographic Institution and Greenpeace (1989)

[43] *See generally*, 'Developing countries of the Wider Caribbean: Wider Caribbean Initiative for Ship Generated Waste, Global Environmental Facility,' The World Bank, 1994. The information contained in this paragraph is largely derived from this document.

[44] See: http://www.westpandi.com/Publications/News/MARPOL---Annex-V---Wider-Caribbean-Region- Special-Area/ (accessed on Monday, March 21, 2011).

(i) all plastics, including but not limited to synthetic ropes, synthetic fishing nets, plastic garbage bags and incinerator ashes from plastic products which may contain toxic or heavy metal residues; and

(ii) all other garbage, including paper products, rags, glass, metal, bottles, crockery, dunnage, lining and packing materials;

(b) except as provided in subparagraph (c) of this paragraph, disposal into the sea of food wastes shall be made as far as practicable from land, but in any case not less than 12 nautical miles from the nearest land;

(c) disposal into the Wider Caribbean Region of food wastes which have been passed through a comminuter or grinder shall be made as far as practicable from land, but in any case not less than 3 nautical miles from the nearest land. Such comminuted or ground food wastes shall be capable of passing through a screen with openings no greater than 25mm

Davidson and Gjerde also argue for Annex I designation (oil).[45] In common with similar designation in the Mediterranean, Baltic, Black Sea, Red Sea and the Gulf Areas, permissible discharge standards of oil from ships would be the most stringent yet. Subject to minor and well-defined exceptions, all discharges would be prohibited. As they point out, Annex I special area status would enable the region to prohibit the discharge of oil and oily waste from all tankers and most other ships passing through the Caribbean Sea, Gulf of Mexico, and parts of the Atlantic

[45] L Davidson and K Gjerde, 'Special Area Status for the Wider Caribbean Region under Annex I of the International Convention for the Prevention of Pollution from ships", a project supported by the Pew Charitable Trusts, the Marine Policy Center of the Woods Hole Oceanographic Institution and Greenpeace (1989)

Ocean. Public awareness would also be heightened further. On the other hand, the view is emerging that Annex I designation might not be practically justifiable or economically feasible at this time. Restrictions on operational discharges within the relatively narrow area of the wider Caribbean sea is very stringent;[46] current contamination of Caribbean beaches tend to be the result of Atlantic discharges which are then distributed by wind and current patterns within the region.[47] Moreover, the requirement for reception facilities would constitute an even greater financial hurdle than in relation to garbage; the idea of floating reception facilities such as laid– up tankers and barges[48]has not be taken up. It may be said, therefore, that Article I designation is unlikely in the foreseeable future.

Dispute Settlement:

As is well-known, Part XV of UNCLOS establishes a system of compulsory dispute settlement. At the time of signature, ratification or accession (or any time thereafter) Contracting States must designate adoption of one of the following dispute settlement procedures: the International Tribunal on the Law of the Sea ("ITLOS") is established in accordance with Annex VI of UNCLOS; the ICJ, an arbitral tribunal constituted in accordance with Article VIII of UNCLOS; or a special arbitral tribunal constituted in accordance with Annex VIII of the UNCLOS. Where the state does not designate any one of these means then it is deemed to have designated arbitration in accordance with Annex VII. Where two or more states designate different means, the dispute will go to arbitration in accordance with Annex VII (unless the parties agree otherwise). There is broad jurisdiction under the UNCLOS. Basically, any dispute concerning the interpretation and

[46] Winston Anderson, *The Law of Caribbean Marine Pollution* (1997), at Chapter 3.
[47] *Ibid*, Chapter 1
[48] *Ibid*, at p. 2.

application of the LOSC is included. However, there are limitations in respect of some actions, notably, disputes in respect of the exercise of the rights and jurisdictions by a coastal state and some fisheries disputes.

The ITLOS enjoys special jurisdiction in some cases, for example, disputes concerning environmental damage caused in relation to exploration or exploitation of the „area" and in relation to prescribing provisional measures pending the constitution of an arbitral tribunal to which the dispute is to be submitted. The ITLOS has granted provisional measures pursuant to this jurisdiction in at least two cases.[49]

(a) Maritime Boundary Delimitation

It is understandable that Caribbean the use of the dispute settlement arrangements would relate primarily to maritime boundary delimitation because the region unsettled maritime boundaries are the most numerous and complex in the world.[50] Notwithstanding the existence of at least thirteen bilateral pacts on maritime delimitation[51] several scores of boundaries remain to be demarcated.

More surprisingly, CARICOM States, not normally active in international litigation, have been active participants under these dispute settlement arrangements with regard to the settlement of mutual maritime boundaries and this participation has been mutually beneficial both to the states and to the Convention. The States have been able to settle important legal disagreements in a manner that has not imperiled the regional integration movement and at the same time the rules in

[49] *Southern Bluefin Tuna (New Zealand v Japan; Australia v Japan)* 18 ILM 1624 (1999); *The Mox (Ireland v United Kingdom)* 41 ILM 405 (2002).

[50] See generally Lewis M. Alexander, Regionalism and the Law of the Sea: The Case of the Semi-enclosed Seas (1974) 2 OCEAN DEVELOPMENT AND INTERNATIONAL LAW, 151 at p. 158.

[51] Anderson, at p. 127.

the convention have been clarified and authority of the Convention asserted. The disputes in contemplated are those between Barbados and Trinidad and Tobago, and between Guyana and Suriname.

In *Barbados v Trinidad and Tobago* the Tribunal confirmed that as neither party had specified a choice of dispute resolution it had, as an Annex VII Tribunal, jurisdiction over the dispute. Further it clarified the circumstances in which there could be said to be a dispute between the parties. There was an obligation to negotiate for a reasonable period but it was clear, by the fact of the failure to reach an agreement on delimitation after five years and nine rounds of negotiations, and their failure even to agree on the applicable legal rules meant there was a dispute between them. The fact that the precise scope of the dispute had not been fully articulated[52] or the fact that negotiations could theoretically continue, did not preclude the existence of a dispute. The Tribunal confirmed that once negotiation had failed each party had a unilateral right to resort to the Convention‟s dispute settlement machinery without need to have a separate meeting on an exchange of views regarding mode of settlement. It said[53]:

> "That unilateral right would be negated if the States concerned had first to discuss the possibility of having recourse to that procedure, especially since in the case of a delimitation dispute the other State involved could make a declaration of the kind envisaged in Article 298(1)(a)(i) so as to opt out of the arbitration process. State practice in relation to Annex VII acknowledges that the risk of arbitration proceedings being

[52] For Barbados only matters that had been the subject of the negotiations were included whilst for Trinidad the dispute included delimitation of the outer limits of its continental shelf.

[53] Ibid. at paragraph 204.

instituted unilaterally against a State is an inherent part of the UNCLOS dispute settlement regime."

On the principles of maritime boundary delimitation, the Tribunal reaffirmed the trend towards a single maritime boundary to delimit overlapping exclusive economic zones and continental shelves. It reinforced the primacy of equidistance as a provisional line of demarcation that could be displaced by relevant circumstances, such as relative coastal lengths (proportionality) in order to ensure an equitable result. Resource-related criteria were to be treated more cautiously. Relying upon *Jan Mayen* and *Gulf of Maine* decisions, it was decided that fisheries were relevant but unlikely to influence delimitation except where catastrophic results would otherwise follow. In the present case the Tribunal found that the core contentions of traditional fisheries and catastrophic results had not been proved. The Tribunal decided that the pattern of fishing activity in the waters off Trinidad was not such as to warrant the adjustment of the provisional equidistance but that the disparity in the coastal frontages or lengths of the coasts warranted a displacement of the line northwards.

Another point of clarification related to the place of delimitation agreements with third states. The Tribunal found that the 1990 Trinidad-Venezuela Agreement was relevant. While not binding on Barbados[54], it did establish the southern limit of Trinidad and Tobago‟s entitlement to maritime areas. So that the Tribunal was bound to take into account this treaty, not as opposed in any way to Barbados or any other third country, but in so far as it determines what the maritime claims of

[54] This was both by reference to the principle of *res inter alios acta* and Article II (2) of the 1990 treaty states in fact that "no provision of the present Treaty shall in any way prejudice or limit … the rights of third parties".

Trinidad and Tobago might be. The areas given up in favor of Venezuela do not do not any longer appertain to Trinidad and Tobago, "and thus the Tribunal could not draw a delimitation line the effect of which would be to attribute to Trinidad and Tobago areas it no longer claims."[55]

Finally, the Tribunal reiterated the limits to its jurisdiction. Whilst the pattern of fishing activity is relevant to the task of delimitation in the way earlier described, the Tribunal found that it had no jurisdiction to rule on the rights and duties of the parties in relation to fisheries within the EEZ of one or other Party. Disputes over such rights and duties fall outside the jurisdiction of this Tribunal because Article 297(3)(a) of the Convention stipulated that a coastal State was not obliged to submit to the jurisdiction of an Annex VII Tribunal "any dispute relating to [the coastal State"s] sovereign rights with respect to the living resources in the exclusive economic zone", and Trinidad and Tobago had made plain that it did not consent to the decision of such a dispute by this Tribunal.[56] However the Tribunal found that the conduct and statements of the parties had created an obligation to negotiate in good faith the conclusion of an access agreement.

Unlike the *Barbados v Trinidad and Tobago*, which did not settle the fisheries dispute and whose maritime boundary delimitation did not cause any major shifts in the likely pattern of hydrocarbon exploration and exploitation, *Guyana v Suriname* was definitive. The Tribunal found that the presumption in favour of equidistance had not been displaced[57] and the course of its decisions

[55] Ibid. paragraph 347
[56] Ibid. paragraph 276.
[57] "After careful consideration the Tribunal accordingly concludes that the geographical configuration of the relevant coastlines does not represent a circumstance that would justify an y adjustment or shifting of the provisional equidistance line in order to achieve an equitable result." Tribunal's Award, para. 402.

made two points are worthy of mention as representing contributions to the development of the law of the Convention.[58]

First, in relation to jurisdiction the point was raised that there had been no settled land-boundary between the two adjacent states and that this had to be settled before the single maritime boundary could be established. But an Annex VII Tribunal had no jurisdiction to settle a land boundary and therefore had no jurisdiction to fix the maritime boundary. In fact, the Tribunal found that a 1936 British and Dutch Mixed Boundary Commission and the concordant practice of the parties over some 70 years had indeed established the boundary on the land from which the maritime boundary could be delimited. Accordingly, the mere fact that a Tribunal under the Convention has no jurisdiction to fix a land boundary does not prevent it from determining the merits of an argument that the starting point of the maritime boundary has not been established.
Secondly, the Tribunal commented on its jurisdiction with regard to the use of force by Suriname against the CGX oil exploration rig licenced by Guyana to operate in the disputed area. Rejecting the contention that it had no jurisdiction to adjudicate on alleged violations of the United Nations Charter and general international law, the Tribunal referred to Article 293 of the Convention which obliged it to apply both the convention, "and other rules of international law not incompatible with this convention." Furthermore, the more fact that the area was in dispute did not mean that State liability could not be implicated, particularly where the action mounted was more akin to the threat of military action rather than mere law enforcement activity. Even assuming wrongful action on

[58] See Sir Shridath Ramphal, Triumph for UNCLOS: The Guyana – Suriname Maritime Arbitration, A Compilation & Commentary (HANSIB, 2008), esp. at pp. 13-31.

the party licensing the operation of the rig, the Tribunal found that it was a well-established principle of international law that countermeasures may not involve the use of force.[59]

The expressed competence to adjudicate on violations of the United Nations Charter and general international law was, in the words of one commentator, "a powerful signal of the authority of UNCLOS (and of the Dispute Settlement provisions of Part XV in particular) in relation to the obligation of Parties to the Convention to settle disputes by peaceful means."[60] The same author continues the effect of the authoritative decision in removing the continuing dispute over maritime spaces and thereby opening up the resources of those areas for exploration and exploitation, as well as the clarification and strengthening of the rules dispute settlement represents a triumph for the CARICOM States and for the Montego Bay Convention.

(b) Prompt Release of Vessels

Caribbean states have initiated international litigation that has also led the way in judicial clarification of the freedom of navigation and other internationally lawful uses of the sea related to the freedom of navigation. The application brought St. Vincent and the Grenadines against Guinea in the *M/V Saiga*[61] provided the first opportunity for the dispute settlement regime to clarify the law regarding the prompt release of foreign vessels arrested by a coastal state and of the power to grant provisional measures. The application was originally made in accordance with Annex VII but subsequently both parties agreed that the dispute be transferred to the

[59] Ibid., para. 446.
[60] Ibid., para. 27
[61] Max Planck Yearbook of United Nations Law, 459 (1998).

International Tribunal on the Law of the Sea ("ITLOS"). The Tribunal confirmed that the requirement for promptness of release had a value itself and could prevail even in circumstances where no bond was posted where the bond was unreasonable or there was not provided for in the national law or where, as here, the coastal state had refused to discuss the question of the bond.

In acceding to the application by St. Vincent and the Grenadines, the Tribunal prescribed provisional measures requiring Guinea to refrain from taking or enforcing any judicial or administrative measure against the *M/V Saiga*, its Captain or Crew, or operators in respect of the incidents that had led to the dispute. Other provisional measures were couched in the form of recommendations for both parties to find arrangements and report to the Tribunal interim arrangements that would prevent the aggravation of the dispute.

Incidentally, the case is also well remembered for the scholarly contribution by the late Judge Edward Laing (of Belize) in his separate opinion. Judge Laing was of the view that as the question of the award of provisional measures had arisen early in the life of the Tribunal it was necessary to establish the governing rules that would guide the future work of the Tribunal in the law that it was to administer and proceeded to provide that guidance in some detail.[62]

Caribbean Sea as a Special Area for Sustainable Development:

A final aspect of the relationship between the Caribbean and the Convention worth mentioning is the initiative by the Association of Caribbean States to have to have the United Nations System recognize the Caribbean Sea as a "Special Area within the context of Sustainable Development."[63]

[62] Note written in style of English judgments rather than continental style used by the Tribunal in the main judgment which deemphasized the "reasoning" aspect of the decision.

[63] The Initiative appears to have begun at the II Summit of Association of Caribbean States in Santo Domingo in April 1999.

Although the notion of designating the Caribbean Sea as "a special area" has been discussed for generations[64] the ACS initiative, when tabled in 1999 appeared to have generated such some interest and momentum. This suggestion derives some support from several of the provisions in the Convention; particularly those dealing with the extensive competence of Caribbean States in the exclusive economic zones which cover all (or virtually all) the Caribbean Sea; the Part XII obligations to protect and preserve the marine environment; and the regional cooperation mandated by Part IX, already exemplified in the 1983 Cartagena Convention and Protocols, particularly the Protocol which allows designation and protection of special areas and wildlife. Designation of the Caribbean Sea as a special area under MARPOL also serves to *reinforce the global acknowledgement that the Caribbean Sea requires special protection because of* recognised technical reasons in relation to its oceanographical and ecological condition, and to the particular character of its traffic.

The initiative has stymied in negotiations at the UNGA.[65] A watered-downed Resolution was eventually adopted at the 87th Plenary and formally approved on 15 February 2000.[66] The

[64] The Declaration of Santo Domingo was adopted 9 June 1972 (when it was signed by 15 Caribbean States) and accepted the notion that the Caribbean Sea was a "patrimonial sea" which was later revived under the notion of the EEZ. This was questioned by Jamaica which preferred the idea of a "matrimonial sea". Whereas the patrimonial sea implied exclusive use of its marine resources by a bordering state, the matrimonial sea ensured the shared use of the Caribbean Sea and its rational management; *See* Oruno D. Lara, *Space and History in the Caribbean* (2006), at p. 127 *et seq*.

[65] The Resolution, drafted by Guyana and endorsed by a CARICOM Heads of Government Meeting in Trinidad in July 1999, was introduced at the Twenty-Second Session of the General Assembly (September 1999). *See* Permanent Secretary, Ministry of Foreign Affairs & Foreign Trade. 15/B57/9-15 (1999-10-18). *See*, for chronology of events, 3rd INFORMAL COFOR, New York Helmsely Hotel, September 26, 1999. It was supported by the Group of 77 and China but was rejected by some developed countries. The latter were concerned with (a) the legal implications of accepting the concept in relation to traditional rights of navigation through the Caribbean Sea, and (b) the precise parameters of the concept. In the latter regard, France, Japan, and the United States were concerned that the declaring of the Caribbean Sea as a special area was the first step towards obtaining a halt on the trans-shipment of nuclear waste and other hazardous cargoes through the region.

[66] 'Promoting an integrated management approach to the Caribbean Sea area in the context of sustainable development.' UNGA Res A/RES/54/225 (15 February 2000).

Resolution recognizes the importance of "an integrated management approach to the Caribbean Sea in the context of sustainable development" and encourages "further development of integrated management" taking account of Agenda 21 and the Barbados Programme of Action adopted at the SIDS Conference in 1994. The matter is again on the Agenda of the UNGA for its 2010 meeting but continues to be complicated by the differing maritime interests in the region illustrated by maritime boundary disputes, maritime transportation, exploitation of living and non-living resources, and the control of land-based and maritime pollution. There are also issues of networking and collaboration among the multiplicity of institutions having governance functions in the Caribbean Sea. Happily, the ACS is persisting in the effort with much of the work being done though its Caribbean Sea Commission.[67]

Conclusion:

Mr Chairman, in this brief excursus, I hope that I have said enough to support my starting premise, that there is symbiotic relationship between the Convention and the Caribbean, particularly the small states of the CARICOM region. The Convention has strengthened the maritime profile of these countries and enhanced their potential for economic advancement and the States have provided opportunities for clarification and authoritative assertion of the rules of the Convention. I am sure that the opportunities which collaboration with the ISA provides will open up even more promising vistas.

Thank you.

[67] The mission of the Commission is to safeguard the Caribbean Sea from all threats whether man made or natural.