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**Informal Agreements and UNCLOS**

**Introduction**

1. In my oral evidence of 3 November 2021, I referred to the increasing use of informal agreements to deal with maritime security issues. This submission elaborates on informal agreements in addressing their relevance to UNCLOS; possible benefits; and the challenges they present.
2. The term 'informal agreements' refers to agreements that establish expected standards of behaviour in relation to specific issues but are legally non-binding. The agreements may be informal not only because the output is not binding, but also potentially because of the process of adoption (so not within an intergovernmental organization) or because of the participants (involving non-State actors potentially).<sup>1</sup>
3. There are many informal agreements operating as part of ocean governance and these agreements are typically encapsulated within the concept of a 'rules-based order'. Examples include:
  - a. The US-led Proliferation Security Initiative's Statement of Interdiction Principles;
  - b. The Food and Agriculture Organization's Code of Conduct for Responsible Fisheries and various International Plans of Action;<sup>2</sup>
  - c. Djibouti Code of Conduct in response to piracy off the Somali coast;<sup>3</sup>
  - d. IMO Guidelines on the Treatment of Persons Rescued at Sea;<sup>4</sup>

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<sup>1</sup> Joost Pauwelyn, 'Informal International Lawmaking: Framing the Concept and Research Questions' in Joost Pauwelyn, Ramses Wessel, and Jan Wouters (eds), *Informal International Lawmaking* (OUP 2012) 22.

<sup>2</sup> FAO, 'Code of Conduct for Responsible Fisheries' (1995); FAO, 'International Plan of Action for Conservation and Management of Sharks' (1999); FAO, 'International Plan of Action to Prevent, Deter, and Eliminate Illegal, Unreported and Unregulated Fishing' (2001).

<sup>3</sup> IMO, 'Code of Conduct concerning the Repression of Piracy and Armed Robbery against Ships in the Western Indian Ocean and the Gulf of Aden' (29 January 2009) IMO Doc C.102/14.

<sup>4</sup> (20 May 2004) IMO Res MSC.167(78).

- e. Code for Unplanned Encounters at Sea (CUES).<sup>5</sup>
4. These examples primarily relate to issues of maritime security, but informal agreements are endemic throughout all areas of ocean governance.<sup>6</sup>

### **Relevance of Informal Agreements for UNCLOS**

5. Informal agreements are pertinent to UNCLOS in different ways. First, UNCLOS anticipates their relevance by reference to 'generally agreed international rules and standards' in various provisions, primarily in relation to the protection of the marine environment. The 'standards' may include informal agreements with the consequence that a violation of an informal agreement is effectively a violation of the UNCLOS provision.
6. Second, informal agreements may potentially be used in different ways to inform the interpretation of UNCLOS provisions. Informal agreements may provide a modern context for interpreting certain terms<sup>7</sup> or may reflect subsequent practice that facilitates an interpretation of the treaty.<sup>8</sup>
7. Third, there are references to States showing due regard to 'other rules of international law' in exercising rights and performing duties in the exclusive economic zone (EEZ),<sup>9</sup> and that the sovereignty enjoyed by the coastal State in its territorial sea is also subject to 'other rules of international law'.<sup>10</sup> At present, it seems unlikely that informal agreements would fall into this category. Yet the jurisprudence on the interpretation of Article 2(3) to date has not provided certainty as to what falls within these references.<sup>11</sup>

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<sup>5</sup> Western Pacific Naval Symposium, 'Code for Unplanned Encounters at Sea: Version 1.0' (22 April 2014).

<sup>6</sup> The significance of these agreements for the law of the sea are explored in Natalie Klein (ed), *Unconventional Lawmaking in the Law of the Sea* (Oxford University Press, 2022).

<sup>7</sup> 'A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose' Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331, art 31(1) (VCLT).

<sup>8</sup> Account may be taken of 'any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation'. Ibid, art 31(3)(b).

<sup>9</sup> UNCLOS, Art 58(3).

<sup>10</sup> UNCLOS, Art 2(3).

<sup>11</sup> As evident in discussions in *Chagos Marine Protected Area Arbitration (Mauritius v United Kingdom)* (Award of 18 March 2015) PCA Case No 2011-03; *South China Sea Arbitration (Philippines v China)* (Award of 12 July 2016) PCA Case No 2013-19; and the dissenting opinion of Judge Robinson in '*Enrica Lexie (Italy v India)*' (Award of 21 May 2020) PCA Case No 2015-28.

## **Benefits of Informal Agreements**

8. States adopt informal agreements because they can usually be negotiated faster than treaties and they can potentially be amended or abandoned more easily than treaties. Informal agreements do not usually necessitate domestic legal processes comparable to those required for the ratification or implementation of treaties.
9. Informal agreements may be useful for participants to learn about how the agreed standards will operate and provide a basis for subsequently negotiating a formal agreement. For example, the non-binding Model Scheme on Port State Measures to Combat IUU Fishing laid the foundation for the adoption of a treaty, the 2009 Port State Measures Agreement. When there is less concern about enforcement and legal consequences, States may be willing to engage in more ambitious actions or deeper cooperation through an informal agreement.<sup>12</sup>
10. Non-state actors can be more readily involved in the negotiation and operation of informal agreements compared to treaties (or the development of customary international law). This participation is important where certain industries or other stakeholders are directly implicated in adhering to the agreed standards. For example, during the height of piratical attacks off the coast of Somalia, the shipping industry and seafarer unions were closely involved in the development of guidance and standards relating to responses to piracy (including the use of privately contracted armed security personnel).

## **Risks Associated with Informal Agreements**

11. There are also disadvantages and risks associated with informal agreements. First, informal agreements may be politically expedient and seen as a response to a problem but not ultimately resolve the key points of differences existing between the parties. The Declaration of Conduct of Parties in the South China Sea between ASEAN and China could be viewed in this light. The lack of legal consequences may provide lower

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<sup>12</sup> Gregory C Shaffer and Mark A Pollock, 'Hard vs. Soft Law: Alternatives, Complements, and Antagonists in International Governance' (2010) 94(3) *Minnesota Law Review* 706, 719.

motivations or incentives to adhere to the standards agreed. Little is thereby achieved from the existence of the informal agreement.

12. Second, informal agreements are unlikely to contribute to the development of customary international law.<sup>13</sup> Customary international law requires State practice and *opinio juris*, which entails evidence of a general practice accepted as law. As the agreements are intended not to be legally binding then they do not meet the requirements of *opinio juris* ('accepted as law'). States may still be held to their informal agreements, however, on the basis of estoppel. Such a situation arose in relation to the Lancaster House Undertakings between Mauritius and the United Kingdom, as determined by an arbitral tribunal constituted under Annex VII of UNCLOS in the *Chagos Marine Protected Area* arbitration.<sup>14</sup>
13. Third, the relevance of informal agreements for treaty interpretation is not assured. While suggested above that informal agreements may be used, there are situations where their relevance will be denied precisely because they are not legally binding,<sup>15</sup> or because they involve participants different to those parties to the treaty and may not mean strict standards of what counts as 'subsequent practice'.<sup>16</sup>
14. Finally, Shaffer and Pollack have observed that informal agreements may be 'antagonistic' to existing law.<sup>17</sup> They suggest that informal agreements may be adopted in the hope of undermining the foundations of existing formal law.<sup>18</sup> That approach could be problematic for the 'package deal' nature of UNCLOS and / or where some States still strongly support the existing rules therein. Kraska has also observed the risk to treaty or customary international law where existing legal obligations are included in informal agreements that describe those obligations as not formally binding.<sup>19</sup>

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<sup>13</sup> An attribute that may be perceived as an advantage in some settings.

<sup>14</sup> *Chagos MPA* (n 11) para 397.

<sup>15</sup> Negating their relevance for interpretation under Article 31(3)(c) of the VCLT, which allows for consideration of 'any relevant rules of international law applicable in the relations between the parties'.

<sup>16</sup> See International Law Commission, 'Draft conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties' (2018) *Yearbook of the International Law Commission*, vol II, Pt Two, Conclusion 10(3).

<sup>17</sup> Shaffer and Pollack (n 12) 712.

<sup>18</sup> *Ibid.*

<sup>19</sup> James Kraska, 'Maritime Confidence-building Measures for Navigation in the South China Sea' (2017) 32 *International Journal of Marine and Coastal Law* 268, 287-289, 291-292.

## Example and Conclusion

15. To illustrate some of the points made above, we can consider the CUES, which was adopted in 2014 by the professional chiefs of navies that participate in the Western Pacific Naval Symposium. Although the CUES has as its purpose 'establishing international standards', it is explicitly non-binding.<sup>20</sup> Yet, the CUES reflects many provisions from the International Convention for the Prevention of Collisions at Sea (COLREGS).<sup>21</sup> Are these obligations downgraded because of their inclusion in a non-binding instrument? The CUES also sets out more details as to conduct for navigational safety than is included in UNCLOS and the COLREGS in some instances—listing, for example, the types of conduct a 'prudent commander' would avoid.<sup>22</sup> Does that assist in interpreting requirements under UNCLOS to show due regard in the EEZ or on the high seas? The CUES only applies to warships. Consequently, maritime law enforcement vessels, including coast guard vessels, are not expected to adhere to the standards, which may be problematic in the context of incidents occurring in the South China Sea. Though perhaps the existence of the CUES allows for learning and the development of a binding, more comprehensive, agreement in the future?

16. Informal agreements serve many purposes and ultimately their specific advantages and disadvantages will depend on the settings in which they are used. The key point is that attention must be given not only to the content of any new agreements, but also to the form of the new agreement and full consideration given to the consequences of form as well as content.

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<sup>20</sup> CUES (n 5) para 1.1.1.

<sup>21</sup> (adopted 20 October 1972, entered into force 15 July 1977) 1050 UNTS 1976.

<sup>22</sup> CUES (n 5) para. 2.8.1.