UNIT 3 READING GUIDE

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This guide raises questions and issues of principle that you should think about when you read the material. It highlights points that Professor Kingsbury may go over in class that are not necessarily apparent on the face of the reading. By thinking through these points while reading, you should be able to get more out of the material and the in-class discussion.

A preliminary reminder on the sources of international law

The generally recognized formal sources of international law are identified in Article 38 of the Statute of the International Court of Justice, which has its genesis in a provision of 1920, applicable to the Permanent Court of International Justice.

As you consider sources doctrine and Article 38 (discussed in Thirlway pp 95-108), you might like to think about the following questions:

- Does the reality of international legal tribunals, as dealt with in Unit 2, problematize the idea of judicial decisions as "subsidiary means for the determination of rules of law"?
- More generally, does the idea of "sources" still capture international law as it is practiced today? What theory of law is embedded in Article 38 of the ICJ Statute? In what way(s) does it reflect the "foreign office" model? What actors in the international field are empowered by it, and what is missing from it? What features of international law today, viewed through the "global governance" model, challenge the assumptions of Article 38?

I. Customary International Law

Rules of customary international law are constituted by two elements: an established, widespread, and consistent *practice* on the part of states, and a subjective element usually referred to as *opinio juris*. As you read the cases in this Unit, try to be aware of the different methodologies used to determine whether these elements are present.

What is your general reaction to the idea of *customary* international law? How closely does it accord with the basic notion of international law as a law that depends on state consent? What are the ramifications of customary international law for countries that have not been around long enough to contribute to the customary practice?

Studying customary international law in the context of the law of the sea provides an opportunity to see the tensions between treaty law and custom. While reading the materials try to be sensitive to these tensions: is customary international law a residual element of a previous era or is it still significant in the world of international law today? Could you detect a push towards "codification"? Is this tendency only evident in the move towards treaties or is it also present in the changing approaches towards customary rules?

In *Germany v. Denmark*, what is the Court's approach to specially affected states? Try and pay close attention to the relationship between treaties and custom which govern similar issues in the context of the law of the sea. What are the implications of the fact that a treaty – the 1958 Geneva Convention on the Continental Shelf – regulates some of the issues dealt with in this

case? How could a rule which was conventional in its origin become binding on states not party to the treaty? What are the elements the Court considers in its analysis of this question?

What are the implications of the ability to make reservations to the Article in question? Pay close attention to the definition of the requirement for state practice (paragraph 74, "extensive and virtually uniform") and that of *opinio juris* (e.g. paragraph 77, "the belief that this practice is rendered obligatory by the existence of a rule of law requiring it…a subjective element…"). The Court concludes its decision by setting "equitable principles". What factors should be taken into account? What approach to justice is embedded in these principles? Does the Court subject its own definition of the principles to the test of extensive practice and *opinio juris*?

Look at the dissenting opinion of Judge Lachs. What policy implications, especially for developing countries, emanate from his opinion when contrasted with the majority's articulation of the standard for custom? If his view prevails, what would it mean in the grand scheme of international relations?

In *UK v. Norway*, how does opposability give a first mover advantage? What would the result have been if France first showed concern about Norway's baselines? What is the scope for states to drive the creation of law? Is customary international law a way for the global community to get around the fact that there is no global legislature? Should 'majority' rule be the driving principle behind recognizing custom? (See Lachs dissent in *Germany v. Denmark*).

On the topic of developing countries and international law, can you think of the implications for a developing country of a strict persistent objector requirement versus a looser requirement? Could a poor, yet interested, state send a ship into seas which are distant from its territory? Should it matter that the state cannot object via practice? More generally, the case illuminates how the formation of customary rules poses a challenge to the administration of power in international relations. How does the Court address this challenge?

Review the Sketch Diagram of the Sea Claims Structure under the LOS Convention. How does this structure balance the tensions between the principle of sovereignty and other principles such as freedom of navigation, fishing or the principle of the rule of law? How do these tensions play out in the context of *international straits*; how were they dealt in the Black Sea episode? How does the centrality of *the principle of reciprocity* influence the form of regulation chosen by states in this field? How does the rationale of the EEZ address the *tragedy of the commons?*

Reading the controversy between Japan and New Zealand (in Charney, "The Persistent Objector Rule"), try to think how the persistent objector becomes a bargaining chip in this context. Pay attention to the concepts of jurisdiction – who has jurisdiction where over what – on a ship (exclusive flag state jurisdiction, unless treaties etc provide to the contrary – see proliferation security initiative), on the sea, 12 miles out? Continental shelf? EEZ?

II. Governance of Areas beyond National Jurisdiction: From Custom to Coordination

<u>The Commission on the Limits of the Continental Shelf</u>

The establishment of the Commission on the Limits of the Continental Shelf under the LOS Convention (hereinafter: the Commission) was intended to facilitate implementation of the LOS Convention. While relying upon the criteria and methodology defined in the Convention, the

work of the Commission requires scientific interpretation and expertise in areas that are not legal; the Scientific and Technical Guidelines adopted in 1999 are of a highly technical nature.

Review Arts 76-77 of the LOS Convention. Who are the members of the Commission? How are they elected? What are the Commission's functions? Who could participate in the decision-making? What are the implications of the Commission's recommendations? To what extent is it transparent? What are the tensions embedded in this regime between the foreign office model and the global governance model? Could we extend customary international law status to the role and position of the Commission? Could a non-party to the LOS Convention utilize the Commission? How do you think article 76(8) should be interpreted: Should the capacity of boundary-making be a sole prerogative of the state, in which case the Commission's role is to facilitate state decisions, or should the Commission be allowed a further role? What does "final and binding" mean – to whom are its decisions binding?

The article "Drawing Lines in Melting Ice" illuminates further the kind of "bargains" made, or political choices faced by, states with conflicting claims. How does the case of *Humane Society International Inc. v. Kyodo Senpaku Kaisha* problematize some of the conclusions of this article? What are the Japanese claims against the jurisdiction of the Australian Federal Court? How does the discussion over the jurisdiction of the Court illustrate the disaggregated state? Pay close attention to the identity of the actors involved (Kyodo, a private company incorporated in Japan, the Humane Society International Inc., the Australian and Japanese governments etc.) and the course of the proceedings (e.g. the attempt to use diplomatic channels). What are the procedural and practical challenges the Court faces? Do you find its solutions satisfying? How would you describe the Federal Court's involvement – is it engaging in dispute settlement or adjudication?

<u>Resources beyond National Jurisdiction</u>

While the LOS Convention establishes the legal framework for all activities in the oceans it does not specifically address issues relating to biodiversity. The different bodies covered in this subsection provide a cross-section of current attempts to address the need for a legal framework on biodiversity beyond national jurisdiction. Try to pay attention to the identity of the actors involved in the regulation of the set of issues under this heading. What particular challenges are at stake? How does the institutionalist logic address the problems of data-gathering and other coordination challenges? What would be the realist approach to these issues? What would be the arguments for and against an ex ante v. ex post policy? What are the considerations in favor of a universal framework and why would some actors favor a regional or a sectoral one?

Using the logics of institutionalism and realism try to analyze the battle over the regulation of genetic resources between developed and developing countries: Why do developing countries favor an international legally binding regime and why are developed countries opposed to it? What is industry's position? Try to think which form of global governance (CBD, WTO, WIPO, a regime under UNCLOS, regional regimes etc.) is potentially more favorable to which actor and why? Whose interests seem to be disregarded? How do these different positions play out in the stance adopted by various countries and groupings?

<u>Insights for a Climate Change Regime?</u>

How does the reality of climate change correspond with the distribution of wealth in the world? Does the Kyoto Protocol address these inequalities? In the discussion on genetic resources mentioned above, developing countries prefer an international binding regime. Conversely, in the

context of climate change, the Indian government chose a voluntary regime to decarbonize its economy. From the realist perspective of an anarchical world, what rational interest-based calculation would support its policy choices? Analyze India's behavior as part of a greater prisoners' dilemma – why has India abstained from 'locking in' its policies in a global institutionalized regime? Review the distinctive features of the Indian Clean Development Mechanism experience in light of the realist/institutionalist logics. Would you describe the Indian policy choices as based upon a foreign office or global governance model?

More generally, the discussion in this section raises difficult questions about how the global governance model allocates power and representation in an international system characterized by extreme imbalances. Are environmental policies an attempt of stronger countries using international law to shape the world according to their interests? Could the Indian approach be perceived as part of its struggle to maintain relevance in a highly competitive world? What would be possible critiques of this approach?