Unilateral Interests of States, Common Interests of States and Interests of Mankind: From Coexistence to Cooperation in the 1982 UN Convention on the Law of the Sea

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1. From Coexistence to Cooperation in the 1982 UN Convention on the Law of the Sea

The 1982 UN Convention on the Law of the Sea (UNCLOS) has been described as one of the most significant and visionary multilateral conventional instruments of the 20th century. UN Secretary-General Ban Ki-moon remarked that UNCLOS establishes the legal framework within which all activities in the oceans and seas must be carried out and that it is characterised by its universal and unitary nature as well as being one of the most successful international treaties ever negotiated.[1] UNCLOS

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1. *UN Secretary-General's remarks at 30th anniversary of the UN Convention on the Law of the Sea*, 10 December 2021 at https://www.un.org/sg/en/content/sg/statement/2012-12-10/secretary-generals-remarks-30th-anniversary-un-convention-law-sea.

is an example of diplomatic multilateralism, often innovative, which has been able to reconcile the opposing interests of States in a long negotiation held in a historical period in which the political and economic balances and legal rules of the past were criticised by the newly independent States. It is also an example of regulatory multilateralism in that it defines a system of maritime spaces and rules applicable to activities at sea and to the protection of the marine environment with a universal scope that not only safeguards the particular interests of individual States but also the common interests of States. Multilateralism also results in a universalism that contemplates mechanisms for the conservation and management of marine resources on behalf of all mankind.

UNCLOS does not only guarantee the unilateral interests of States to exercise, on the one side, their sovereignty, sovereign powers and jurisdiction at sea and, in the other, the freedoms of the sea and it does not merely establish rights and obligations between States under reciprocity, but it also identifies and protects interests that are common to States and in certain cases interests of individuals as a whole.[2]

The protection of state common interests at sea dates far back into the past as the ancient rules on the repression of piracy attest. Already the Romans considered pirates *hostis humanis* generis with the aim of protecting maritime trade which was of common concern.

Nowadays the need to safeguard shared interests calls for cooperation between States particularly in maritime areas beyond national jurisdiction. The regime of the high seas under the 1982 Convention is typically characterized by duties of cooperation, from cooperation for the safety of life at sea to cooperation in contrasting the illicit traffic of drugs and psychotropic substances. Other duties have been provided for by other

2. Bruno Simma, 'From Bilateralism to Community Interests in International Law' (1994) in Recueil des Cours Vol. 250, 217, at 234 and Yoshifumi Tanaka, 'Protection of Community Interests in International Law: The Case of the Law of the Sea', in Armin Von Bogdandy, Bruno Simma (eds), 'Max Planck Yearbooks of United Nations Law' (2011) Vol. 15, 329 ff.

subsequent treaties such as the 1988 Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation of 1988 (with its 1988 and 2005 Protocols) and the 2000 Protocol against the Smuggling of Migrants by Land, Sea, and Air with reference respectively to terrorism at sea and smuggling of migrants by the sea.

These obligations to cooperate constitute an innovation in the regime of the high seas introduced by UNCLOS and complement the regime of coexistence of state individual interests in the various uses of the high seas that is guaranteed by Article 87(2). This provision balances the opposing interests of States through the so-called principle of "due regard". It implies that activities on the high seas must be exercised taking into consideration to the interests of other States in the exercise of the freedoms of the high seas and to the rights enshrined in the Convention with respect to the exploration and exploitation of deep-seabed resources.[3]

2. Common Interests of States and Cooperation in the Protection of the Marine Environment and the Sustainable Exploitation of Fisheries

The sector in which multilateral cooperation obligations are most widely enshrined by UNCLOS is the protection of the marine environment. Marine environment and its protection from pollution are no longer regarded as the object of States' individual rights and obligations, strictly reciprocal and mutual. On the contrary, the protection of the marine environment is considered as of general interest for the International

3. David J. Attard, Patricia Mallia, 'The High Seas', in David J. Attard (ed.), *The IMLI Manual of International Maritime Law. The Law of the Sea, Volume 1* (OUP, Oxford, 2014) 239 ff., at 244; Ida Caracciolo, 'Due diligence et droit de la mer', in Stefano Cassella (ed.), *Le standard de due diligence et la responsabilité internationale* (Pedone 2018), 163 ff.

Community. Therefore, any State, acting *uti universus*, namely on behalf of the International Community, is attributed certain jurisdiction against any other State that has polluted the marine environment, acting *uti singulus*; and, conversely, *erga omnes* obligations are imposed on all States to protect the marine environment against pollution.

Specifically, UNCLOS obliges States to protect and preserve the marine environment (Article 192) and to take, individually or jointly, all necessary measures to prevent, reduce and control pollution of the marine environment from any source (Article 194). The obligation to protect relates to any maritime zone: from areas under coastal State's sovereignty to areas under coastal State's sovereign powers and jurisdiction as well as the high seas, irrespective of the occurrence of transboundary effects. The obligation to cooperate, which can also be implemented through competent international organisations, aims at developing standards and procedures for the protection of the marine environment (Article 197). The 1982 Convention also establishes framework rules for typical cases of pollution: these are pollution from land-based sources (Article 207); from exploitation of the seabed (Article 208); from exploitation of the deep seabed (Article 209); by dumping (Article 210); from vessels (Article 211); and from and through the atmosphere (Article 212).[4]

Regarding pollution from vessels, it is worth highlighting that the 1982 Convention modifies the classic dichotomy between the flag State and the coastal State, giving enforcement jurisdiction also to the port State (Article 218). Thus, while it is for the flag State to exercise enforcement jurisdiction over vessels flying its flag which are responsible for pollution, irrespective of where the pollution was committed or produced, and while the coastal State has enforcement jurisdiction on foreign ships having polluted its territorial sea or exclusive economic zone, the port

4. Daud Hassan, Saiful Karim, *International Marine Environmental Law and Policy* (Routledge 2019).

State may undertake investigations and institute proceedings in respect of any discharge from any vessel in its ports which has polluted maritime areas outside its internal waters, territorial sea or exclusive economic zone (Article 218). In exercising these powers, the port State assumes the role of "organ" of the International Community in guaranteeing its common interest in the protection of the marine environment. In the event of pollution arising from maritime casualties all State are "delegated" to intervene on the high seas to avoid pollution also from foreign vessels (Article 221).[5]

Duties of cooperation are established by UNCLOS also in the field of fisheries. The 1982 Convention imposes two specific duties on States: a duty of conservation and a duty of cooperation both limiting the freedom of fishing (Articles 117 and 119). The establishment of such obligations is determined by the circumstance that, on the high seas, three different types of interests are opposed: the interests of the International Community in the conservation of the living resources of the high seas and the protection of the marine environment; the interests of individual States in the exploitation of these resources through the exercise of the freedom of fishing on the high seas, as enshrined in customary and conventional international law; and, finally, the interests of coastal States in the reasonable exploitation of these resources that does not harm the fishing activity carried out in their waters.

In addition to the duty of conservation, States on the high seas are subject to a duty of cooperation which is obligatory between States whose fishing boats exploit identical or different living resources in the same area. The concerned States shall negotiate with a view to adopting the measures necessary for the conservation of these resources (Articles 117 and 118). This obligation to cooperate in fishing on the high seas does not have a

5. Yoshifumi Tanaka (n 2).

merely programmatic value, since the refusal to accede to both international agreements on fishing on the high seas and to the relevant international organisations may constitute a breach of the general obligations of conservation and reasonable management of marine resources and of cooperation for these purposes, enshrined in the 1982 Convention.[6]

Different subsequent treaties have applied to illegal, unregulated or unreported fishing the modalities of control introduced by the UNCLOS for the protection of the marine environment, namely the concurrence between flag State, coastal State and port State control.[7] Here too, the dichotomy between flag State and coastal State is reinforced by the attributions of enforcement jurisdiction to the port State, which can carry out controls on catches and licenses, as well as adopt coercive measures to protect the common interest of all States in the conservation of marine living resources.

3. Interests of Mankind and State Cooperation in the Exploitation of Non-living Resources of the Area

UNCLOS enhances state cooperation also for the fulfilment of interests of individuals as a whole. In this perspective, the 1982 Convention defines

6. Olav Schram Stokke, *Governing High Seas Fisheries: The Interplay of Global and Regional Regimes* (OUP 2001); Umberto Leanza, Ida Caracciolo, *Il diritto internazionale: Diritto per gli Stati e diritto per gli individui. Parti speciali* (3rd ed., Giappichelli 2012) 263 ff.

7. Article 23 of the 1995 Agreement for the Implementation of the Provisions of the 1982 United Nations Convention on the Law of the Sea relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks and, most importantly, the 2009 Agreement on Port State Measures to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing.

and regulates the principle of the common heritage of mankind and the regime implementing that principle with the creation of the International Seabed Authority, competent to manage the exploration and exploitation of non-living resources of the Area and to distribute the results therefrom.[8]

Actually, UNCLOS acknowledges the progressive relevance of individuals, albeit collectively considered, in the field of natural resource management. This relevance has been generally translated into the awareness that the direct beneficiaries of natural resources are not States, as States-organisations, but rather all individuals, namely States-collectivities. This has led to the elaboration of a mechanism for the management of deep seabed non-living resources which could guarantee all mankind the enjoyment of their benefits. That mechanism is rooted in the principle of the common heritage of mankind, which testifies to the need and will of the entire universal community of individuals to correctly manage, protect and conserve its heritage, seen as the "inheritance" of past generations and the "wealth" of future ones. And in this sense, that principle is also at the basis for the emergence of the new principle of sustainable development.[9]

The application of this solidarity approach to the Area and its resources has taken place with many difficulties and with many perplexities

8. Marie V. Bourrel, Torsten Thiele, Duncan Currie, 'The common of heritage of mankind as a means to assess and advance equity in deep sea mining' (*Marine Policy*, 2016) <http://dx-.doi.org/10.1016/j.marpol.2016.07.017i> accessed 31 December 2021; Aline Jaeckel, 'Benefitting from the Common Heritage of Humankind: From Expectation to Reality' (2020) 35 Int'l J Marine Coastal L 660, 260 ss.; Yoshifumi Tanaka (n 2) 343 ff.

9. Umberto Leanza, Ida Caracciolo (n 6) 335; Fernanda Millicay, 'The Common Heritage of Mankind: 21st Century Challenges of a Revolutionary Concept', in Lilian C. Del Castillo, *Law of the Sea, from Grotius to the International Tribunal for the Law of the Sea: Liber Amicorum Judge Hugo Caminos* (Brill/Nijhoff 2015) 272 ff.; Chuanliang Wang, Yen-Chiang Chang, 'A new interpretation of the common heritage of mankind in the context of the international law of the sea' (2020) *Ocean & Coastal Management 191 (2020) 105191*, 1-7 <http://law.dlmu.edu.cn/lunwen20200414.pdf > accessed 31 December 2021.

regarding the rules contained in Part XI of UNCLOS, so much so that it was necessary to adopt an additional Agreement implementing Part XI and an Annex.[10] The adoption of the Implementing Agreement in 1994 allowed a rapid and general participation in the 1982 Convention by the industrialised States that had hitherto contested it.[11]

The regime envisaged in Part XI of the 1982 Convention, as amended by the Implementing Agreement, on the one hand establishes that the seabed, ocean floor and subsoil beyond the limits of national jurisdiction, and their resources constitute the common heritage of mankind (Article 136), and, on the other, seeks to reconcile the conflicting interests of industrialised and developing countries, the former being inclined to carry out their own research and exploitation activities, and the latter to make the exploitation of the seabed a first step in the New International Economic Order.[12] Both these interests have been then coordinated with those of the land-based producers of the metals that can be extracted from the nodules of the seabed, which were concerned that an intense extraction activity from the international seabed could have negative repercussions on the prices of their products, and with those of the import-

10. The expression common heritage of mankind was first used in the UNGA Resolution, *Declaration of Principles Governing the Sea-Bed and the Ocean Floor, and the Subsoil Thereof, beyond the Limits of National Jurisdiction*, A/RES/2749(XXV), 17 December 1970.

11. Unlike many of the other rules of the 1982 Convention, which, although formally in force since 1994, had long since been the subject of general *de facto* acceptance by almost all States, the provisions of Part XI not only did not give rise to any spontaneous observance, but on the contrary constituted an insurmountable obstacle to the participation of industrialised States in the Convention until the amendments introduced by the 1994 Implementing Agreement. See in this regard D.H. Anderson, David H. Anderson, 'Resolution and Agreement Relating to the Implementation of Part XI of the UN Convention on the Law of the Sea: A General Assessment' (1995) *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht*, 275-289, 275 ff <https://www.zaoerv.de/55_1995/55_1995_2_a_275_289.pdf> accessed 31 December 2021.

12. UNGA Resolution, *Declaration on the Establishment of a New International Economic Order*, A/RES/S-6/3201, 1 May 1974.

ing countries of these metals, which are interested, for opposite reasons, in a large extraction and a growing availability of the same minerals at a lower price. The compromise was reached by creating a new international organisation, the International Seabed Authority, and by outlining delicate relationships, outside the Authority, between its functions and competences and the rights of Member States and their companies, and within the Authority, in its structure, composition and decision-making system, as well as in the distribution of competences between them.[13]

In conclusion, UNCLOS has internationalised certain interests through the principle of the common heritage of mankind. In this way, rules on the coexistence of States are complemented by rules on cooperation, which do not connect individual benefits to the obligations assumed by States, but on the contrary the protection and preservation of some common goods. Consequently, the interest of mankind in sustainable development is achieved, not only from an economic point of view, with the aim of developing an efficient and equitable management of certain maritime zones, resources and goods of common interest.

Moreover, the distribution of benefits makes this internationalisation particularly innovative if compared to the traditional system of interstate relations. It introduces into international law a dimension of solidarity consisting in the effective sharing of material benefits on an equitable basis.[14] The principles of solidarity and equity have been also institutionalised in the UNCLOS with the creation of the International Seabed Authority, creating a system for the exploitation of resources of common interest that is still unique today, given that the 1979 Agreement Governing the Activ-

13. Umberto Leanza, Ida Caracciolo (n 6) 338-339.

14. Tullio Treves, 'Principles and Objectives of the Legal Regime Governing Areas Beyond National Jurisdiction', in Erik J. Molenaar, Alex G. Oude Elferink (eds.), *The International Legal Region of Areas Beyond National Jurisdiction: Current and Future Developments* (Martinus Nijhoff 2010), 7 ff.

ities of States on the Moon and Other Celestial Bodies, while describing them as the common heritage of mankind, does not go beyond this qualification and does not create a system that makes the principle effective.[15]

4. Future Scenario for the Protection of Common Interests at Sea: The Negotiation of an International Agreement on Marine Biodiversity beyond National Jurisdiction

Managing and preserving common interests of States continues to be an important thread in the law of the sea, as testified by the negotiation of an international legally binding instrument on the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction (BBNJ), arguably the most ambitious law of the sea treaty in decades, which seems to have entered its final stages.

Almost two-thirds of the ocean lies outside maritime zones under coastal States' sovereignty, sovereign powers and jurisdiction. These two-thirds include both the high seas and the Area whose non-living resources are subject to the common heritage of mankind regime. These areas are characterised by a very high level of marine biodiversity, much of which is still unknown to science. Although UNCLOS and other agreements and non-binding instruments contain standards for the protection of marine biodiversity, they are not deemed to offer a sufficient regime for marine biodiversity beyond areas of national jurisdiction. Therefore, at the 2012

15. Since the last decade of the 20th century, the principle has no longer been included in the agreements for which it was proposed. This was the case, for example, with the 1992 Framework Convention on Climate Change, where the problem of climate change is only qualified as a "common concern of humankind" even though Malta's original proposal was to use the concept of the common heritage of mankind (*ibid*, 336).

United Nations Conference on Sustainable Development (Rio +20), participating States committed to urgently address the issue of conservation and sustainable use of marine biological diversity in areas beyond national jurisdiction, including by taking a decision on the development of an international instrument under the UN Convention on the Law of the Sea.[16] An International Conference was convened in 2017 by the UN General Assembly and it started its works in 2018 which are still ongoing.[17]

The negotiating text on which the Intergovernmental Conference is working contains several critical points on a possible new regime for marine biodiversity beyond national jurisdiction on which delegations have not yet reached a shared approach.[18] These are the issues of benefit-sharing from marine genetic resources; management tools, including marine protected areas; environmental impact assessment; and capacity building and transfer of marine technology.

Marine genetic resources consist of the genetic material of marine organisms that may be of use to mankind. Marine scientific research on these resources could help develop new medicines or compounds for use in food or industrial processes.[19] Area-based management allows activities to be controlled in a comprehensive and integrated but also flexible manner, for example, by providing a greater degree of protec-

16. *The Future we want. Outcome Document of the UN Conference on Sustainable Development*, A/CONF.216/L.1, 19 June 2012, para. 162.

17. UNGA Resolution, *International legally binding instrument under the United Nations Convention on the Law of the Sea on the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction*, A/RES/72/249, 24 December 2017.

18. Vito De Lucia, 'A Very Quick Look at the Revised Draft Text of the new Agreement on Marine Biodiversity in Areas beyond National Jurisdiction', *EJIL: Talk!* (23 January 2020) <https://www.ejiltalk.org/a-very-quick-look-at-the-revised-draft-text-of-the-new-agreement-on-marine-biodiversity-in-areas-beyond-national-jurisdiction/> accessed 31 December 2021.

19. The negotiation issues concern the definition of genetic resources, whether and how access to resources should be regulated and whether the benefits derived from the use or commercialisation of resources should be shared and if so, according to which mechanisms.

tion to an area than to the adjacent one. There are various area-based management tools, ranging from sectoral (regulating one activity, e.g., fishing) to cross-sectoral (regulating all human activities in an area), including marine protected areas, which are generally used for biodiversity conservation. To function effectively they require the involvement, not easy to achieve, of existing bodies and organisations in the sector or region.[20] Also the environmental impact assessment for activities on the high seas is controversial. While there is agreement on the necessity of such an assessment, it is still to be decided when it would be necessary, what information should be included, how the cumulative impact of activities should be assessed and what role should be assigned to existing organisations in the assessment process. Finally, opposite views concern how to address the development of the marine scientific and technological capacity of developing States so that they can participate fully in the conservation and sustainable use of marine biodiversity.[21]

The above brief analysis highlights the complexity of the BBNJ negotiations, still characterized by many divergent positions. First and foremost, there is the contrast between northern and southern States over the application of the principle of the common heritage of mankind to genetic resources beyond national jurisdiction.[22] Similarly, one of the most difficult topics relates to the access to resources, where there is still

20. Lisa Eurén Höglund, 'Area-based Management Tools, Including Marine Protected Areas – Reflections on the Status of Negotiations', in Myron H. Nordquist, Ronàn Long (eds.), *Marine Biodiversity of Areas Beyond National Jurisdiction* (Brill/Nijhoff 2021) 90 ff.

21. Harriet Harden-Davies, *Towards a Capacity-Building Toolkit for Marine Biodiversity beyond National Jurisdiction*, in ibid., 231 ff.

22. Fran Humphries, Harriet Harden-Davies, 'Practical policy solutions for the final stage of BBNJ treaty negotiations', in *Marine Policy 122 (2020) 104214*, 1-7, 1 ff.; David Leary, 'Agreeing to disagree on what we have or have not agreed on: The current state of play of the BBNJ negotiations on the status of marine genetic resources in areas beyond national jurisdiction', in *Marine Policy 99(2019) 101016*, 21-29, 21 ff.

opposition between developed States, many of which favour a free access regime, and developing States which support the prior informed consent model set out in the 2010 Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization.[23] Similarly States disagrees on whether to include in the scope of application of the BBNJ agreement only the sampling of *in situ* genetic resources or also of ex situ genetic resources and *in silico* analyses, as well as the related question of the status of what is derived from such resources and whether to include in the benefit-sharing only monetary benefits (as argued by industrialised States) or also non-monetary benefits (as argued by G77 States among others).[24]

Many are the obstacles to the conclusion of an agreement on marine biological diversity beyond national jurisdiction, and it remains to be seen whether the signature of such an agreement will be followed by a large number of ratifications that will make possible not only the entry into force of the agreement, but also a wide subjective scope of application able to guarantee an effective uniform management of marine biodiversity at global level. However, it is worth noting that no State has challenged the principles and rules contained in UNCLOS. Indeed UNCLOS continues to be appreciated for being able to provide framework rules even to the most recent problems relating to the uses of the sea.

In conclusion, UNCLOS not only establishes a balanced set of rights and obligations and provides for forms of cooperation aimed at fostering activities at sea and the protection of the marine environment and the management of marine resources but also encourages States to develop and improve new forms of cooperation with regard new activities and

23. The Protocol is an implementing agreement of the 1992 Convention on Biological Diversity.

24. David Leary (n 22) 26 ff.

for the protection of new common state interests. The 1982 Convention have been fully analysed, interpreted, and commented for forty years however it still offers room for reflection on its application from different and new perspectives, such as marine biodiversity but also the sea level rise or the protection of the marine environment from plastic and microplastic.