Book - Unit 2 - United Nations Convention on the Law of the Sea

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Site: UNITED NATIONS INFORMATION PORTAL ON MULTILATERAL ENVIRONMENTAL AGREEMENTS
Course: Introductory Course to the International Legal Framework on Marine Biodiversity
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1. Introduction

The rapid pace of technological development following, and in part triggered by, the Second World War, effectively disclosed the ocean's huge reserves of non-renewable resources, dramatically increased fishing effort, and led to a quickly expanding number of large vessels and volumes of hazardous cargo that traversed the oceans. This coincided with a growing global demand for resources, a widening awareness of environmental degradation, and a fundamental change in the nature and composition of the international community as a consequence of the process of decolonization and the Cold War.

Under these circumstances, the then-existing international law of the sea was regarded as inadequate. This was partly because it was unable to deal with some of the new issues and uses of the oceans that had emerged but also because it no longer reflected the needs and interests of the predominant part of the international community. This created considerable friction, which sometimes led to heated skirmishes (e.g., the 'cod wars' between Iceland and the United Kingdom between 1958 and 1976). The need for a legal order for the oceans that would be both general (relating to all ocean space) and comprehensive (for covering all uses and resources) was eventually widely recognized. After a lengthy process of negotiation, this need resulted in the adoption of the United Nations Convention on the Law of the Sea ("UNCLOS") on 10 December 1982. UNCLOS entered into force on 16 November 1994.

A Constitution for the Oceans

As a ‘Constitution for the Oceans,’ the Convention deals with a much broader range of issues than those related to marine biodiversity and sustainable fisheries, but those are not discussed in this chapter. UNCLOS is in many ways a framework convention that relies on implementation at the global and regional levels through various international organizations. In the sphere of vessel-source pollution, for example, this implementation mandate was entrusted to the International Maritime Organization (“IMO”) while fisheries were foreseen to be managed at the regional level through Regional Fisheries Management Organizations (“RFMOs”). Moreover, in view of the constantly changing needs and interests of the international community, UNCLOS would need to be amended or complemented by new international instruments. While some of these instruments adopted since 1982 are closely connected with the UNCLOS, for others this is less so.

Even though UNCLOS was intended to be a Constitution for the Oceans, this did not mean that it was cast in stone. It was understood that the needs and interests of the international community would be constantly changing and that UNCLOS had to be adjusted accordingly.

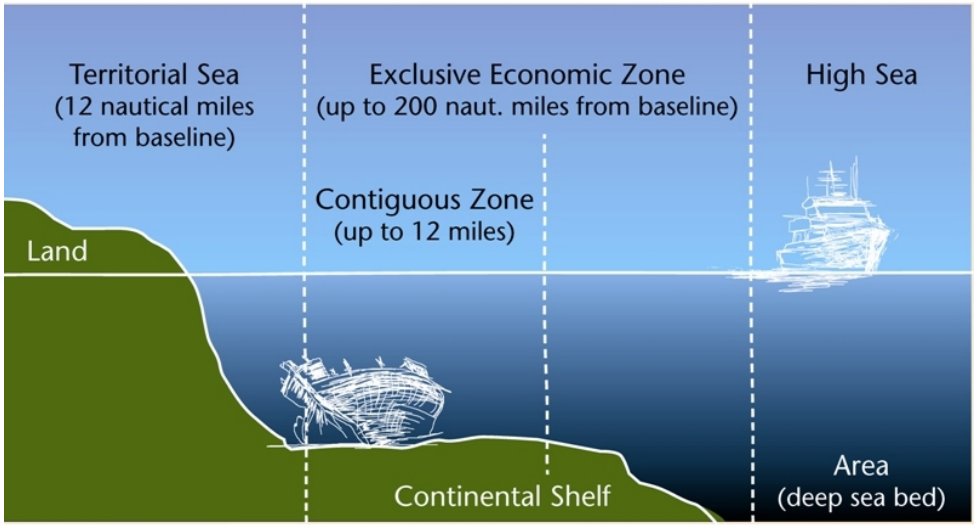
One such adjustment already took place before UNCLOS entered into force in 1994. The adjustment concerned the regime for the exploitation of the deep sea-bed in the area in part XI of UNCLOS. An important group of developed states that were expected to actually engage in such exploitation, including the United States, was dissatisfied with the regime. As these dissatisfied states were therefore unlikely to become parties to UNCLOS and would thereby effectively block universal acceptance and effectiveness, an Implementation Agreement was adopted in 1994 that met their concerns. This Agreement allowed for the current near-universal participation in UNCLOS.

2. Maritime Zones

The parts in UNCLOS have either a zonal scope or a thematic scope.

The zonal scope is used for part II ‘Territorial Sea and Contiguous Zone,’ part III ‘Straits used for International Navigation,’ part IV ‘Archipelagic States,’ part V ‘Exclusive Economic Zone,’ part VI ‘Continental Shelf,’ part VII ‘High Seas,’ and part XI ‘The Area.’

Of the remaining thematic parts, part XII ‘Protection and Preservation of the Marine Environment’ is particularly important.



Areas within national jurisdiction

International law recognizes that the “territory” of a state consists of the following components: the land (including islands and rocks), internal waters, territorial sea, archipelagic waters, and the subsoil below and the airspace above these. A state enjoys sovereignty within its territory but beyond that a state can only have less than sovereignty, for example sovereign rights, jurisdiction, rights or freedoms.

States can establish a territorial sea with a maximum breadth of 12 nautical miles (1 nautical mile = 1,852 kilometres) measured from the baselines along the coast, as provided in article 2. Archipelagic waters are the waters enclosed by drawing lines around groups of islands according to specific conditions as provided in article 47. A coastal state’s sovereignty within its territorial sea and archipelagic waters entitles it to all the living and non-living resources therein. It also gives the coastal state practically unlimited jurisdiction to prescribe and enforce its own laws and regulations with respect to all activities occurring therein, including those by foreign ships and aircrafts. The main exception to that jurisdiction is the right of innocent passage for ships of all states under article 17.

Coastal states are also entitled to an Exclusive Economic Zone (“EEZ”) with a maximum width of 200 nautical miles, measured from the baselines. In their EEZs, coastal states have sovereign rights for the purpose of exploring, exploiting, conserving and managing the living and non-living natural resources, and for other economic activities (articles 55-57). These resources include those in the water column, such as fish, and on or under the sea bed, for example abalone, oil and gas. In their EEZs coastal states also have jurisdiction for the protection and preservation of the marine environment but this can only be exercised by taking account of the freedoms of other states in the EEZ, for instance navigation, over flight, and the laying of sub-marine cables and pipelines.

In certain circumstances, coastal states have a continental shelf that extends beyond the EEZ, sometimes even beyond 350 nautical miles measured from the baselines (article 76). Over its continental shelf, a coastal state has sovereign rights for the purpose of exploring it and exploiting its natural resources, including relevant jurisdiction. These natural resources consist of the non-living resources of the sea-bed and subsoil together with sedentary species, such as clams and abalone, as provided in article 77.

Areas beyond national jurisdiction

The water column that is not part of the internal waters, territorial sea, archipelagic waters or EEZ, is called High Seas (article 86). All states enjoy the freedoms of the high seas in addition to the freedoms of scientific research, construction of artificial islands and fishing, except for sedentary species on a coastal state's juridical (legal) continental shelf as provided by articles 76 and 77.

The 'Area' is the sea-bed and ocean floor beyond the coastal states' legal continental shelves. The non-living mineral resources in the area are part of the common heritage of mankind and subject to an internationalized management regime as provided by articles 1(1)(1), 133 and 136.

3. Protection and preservation of the marine environment and the conservation and utilization of marine living resources

UNCLOS does not only grant rights but also imposes obligations. Whenever the Convention acknowledges or grants a right to states, whether in their capacity as flag state (the state where a ship is registered) or as a coastal state, it is commonly followed by an obligation for other states to respect these rights.

In addition, UNCLOS imposes obligations on states acting in their different capacities that are owed to the international community. The most important of these are obligations on the conservation and utilization of marine living resources, and on the protection and preservation of the marine environment.

General obligation

The obligations in UNCLOS on the protection and preservation of the marine environment are largely laid down in part XII.

It commences with article 192, which lays down a, by now, universally accepted legal norm: “states have an obligation to protect and preserve the marine environment.” This is immediately followed by the overarching objective of sustainable development, which requires a balancing of economic, social and environmental considerations for present and future generations. It reads: “states have the sovereign right to exploit their natural resources pursuant to their environmental policies and in accordance with their duty to protect and preserve the marine environment.”

Part XII does not define ‘their natural resources.’ To determine what these are and which states have sovereign rights or freedoms over them, it is necessary to go back to the zonal parts of UNCLOS.

In the EEZ

The obligations on the conservation and utilization of marine living resources are included in part V on the EEZ and Section 2 of part VII on the high seas, but (rather strangely) not in relation to sedentary species (article 68). Articles 61 and 62 contain obligations on conservation and utilization that apply to any category of species that occurs within a coastal State's EEZ.

Article 61 requires a coastal state to establish a Total Allowable Catch ("TAC") to ensure that the harvesting of living resources within the state's EEZ is aimed at producing the Maximum Sustainable Yield ("MSY") and does not lead to over-exploitation. Serious over-exploitation often leads to the collapse of stocks and thereby affects the mid- and long-term interests of present and future generations. These obligations also require the coastal state to gather a wide range of relevant data to ensure that the TAC is based on the best scientific evidence available. A TAC can take many forms, for instance a maximum amount of fish that can be caught, a maximum number of licensed ships or a fixed fishing season. In the context of this chapter, it is important to note that article 61 does not just deal with targeted fish. The TAC should take account of the interdependence of stocks. Therefore, the conservation measures of the coastal state are also required to take into consideration the effects of fisheries on associated species (by-catch) and dependent species (predator-prey relationships), as well as environmental factors. However, these obligations still fall short of a firm obligation to engage in the recently emerging holistic notion of ecosystem-based fisheries management.

Article 62 contains a type of obligation that is very different from that in article 61. Article 62 requires the coastal state to promote the objective of optimum utilization of the living resources in its EEZ. In case the coastal state has insufficient capacity to harvest the entire TAC, it must give other states access to the surplus of the TAC. The coastal state is normally given compensation, monetary or otherwise, for allowing other states to harvest the surplus. In addition, under article 62(4), a coastal state's sovereign rights in its EEZ allow the coastal state to require foreign ships that harvest the surplus in its EEZ to comply with a wide range of laws and regulations. The objective of optimum utilization was inserted with concerns of global food security in mind. However, there are currently very few stocks that are under-utilized. Article 62 recognizes that the objective of optimum utilization is "without prejudice to" article 61, meaning that the objective must give way to the obligation to conserve and avoid over-exploitation.

4. International cooperation regarding the management of marine living resources

Maritime boundaries only exist on maps. They do not impede the movement of marine species and they are also not drawn or negotiated with the range of distribution of marine species in mind. The need for states to cooperate in order to align their management of marine living resources with other states is therefore evident.

Articles 63-67 lay down regimes for international cooperation for various different categories of species whose ranges of distribution are not confined to a single coastal state's EEZ. These categories are: shared stocks within the EEZs of two or more coastal states under article 63(1), straddling stocks between EEZs and the high seas under article 63(2), the highly migratory species listed in Annex I to the UNCLOS that are presumed to occur both in the EEZ and the high seas, for instance tuna species under article 64, marine mammals under article 65, anadromous species, such as salmon, which spawn in rivers but spend most of their life in the marine environment under article 66, and catadromous species, such as certain eel species, which spawn in the ocean but spend most of their life in rivers under article 67.

Whereas the regimes for anadromous and catadromous species reserve harvesting for coastal states in their maritime zones and prohibit flag states to harvest these species on the high seas, the other regimes do not give preference to one or the other. They essentially require the states involved to cooperate either directly or through appropriate international organizations. Regional Fisheries Management Organizations are currently the most widely used vehicles for cooperative international management.

5. Pollution of the marine environment

Part XII deals with ‘pollution of the marine environment’. This term is defined in article 1(1)(4). Pollution as an activity is obviously very different from fishing. The object of fishing or hunting for marine mammals is expressly aimed at removing species from the natural environment. If unregulated, this intentional activity will therefore pose a risk to marine biodiversity. In addition, fishing activities may have side-effects that are not expressly intended, for instance by-catch of commercially uninteresting species that are discarded, or bottom trawling that has negative effects on the ecosystem. The actual object of pollution, on the other hand, is to get rid of substances or energy but not to cause environmental damage or pose a threat to marine biodiversity, even though it may have that effect.

While UNCLOS does not embrace the notion or objective of marine biodiversity, or even define ‘marine environment,’ the definition of ‘pollution of the marine environment’ encompasses “harm to living resources and marine life.” Whereas measures to prevent, reduce or control pollution of the marine environment are undeniably also beneficial to the protection and preservation of marine biodiversity, they are not often specifically designed for that purpose. Rather, these measures are intended to protect and preserve the marine environment in general.

Two provisions in part XII are exceptions to this general rule.

First, article 194(5) requires all states, when they take measures to prevent, reduce or control pollution of the marine environment, to "include those (measures) necessary to protect and preserve rare or fragile ecosystems as well as the habitat of depleted, threatened or endangered species and other forms of marine life." Measures would be required in relation to any source of pollution, for example pollution by ships through dumping and operational discharges, from land (through rivers) or from the exploitation of the non- living resources on the sea-bed.

Second, article 196(1) requires states to "take all measures necessary to prevent, reduce and control pollution of the marine environment resulting from ... the intentional or accidental introduction of species, alien or new, to a particular part of the marine environment, which may cause significant and harmful changes thereto." It seems that the words "resulting from" are intended to qualify the introduction of new or alien species as 'pollution of the marine environment' or at least that it be treated as such. Regardless of the correctness of this interpretation, article 196(1) clearly imposes an obligation on states to prevent, reduce and control significant and harmful changes to the marine environment caused by the introduction of new or alien species.

6. Institutional Arrangements

The UN General Assembly (UNGA) is the supreme governing body of UNCLOS. UNGA has established several bodies and processes to assist in the development and implementation of UNCLOS, such as:

- The United Nations Informal Open-ended Informal Consultative Process facilitates the annual review by the General Assembly of developments in ocean affairs and the law of the sea by considering the report of the Secretary-General on oceans and the law of the sea.
- The Ad Hoc Open-ended Informal Working Group to study issues relating to the conservation and sustainable use of marine biological diversity beyond areas of national jurisdiction (ABNJ) discussions focus on regulatory and governance gaps and instruments in the international framework and possible ways forward such as the adoption of an Implementing Agreement to UNCLOS addressing conservation and sustainable use of marine biodiversity in ABNJ.
- A regular process for the global reporting and assessment of the state of the marine environment, including socio-economic aspects was initiated at the World Summit on Sustainable Development in 2002. States agreed to establish by 2004 a regular process under the United Nations for global reporting and assessment of the state of the marine environment, including socio-economic aspects, both current and foreseeable, building on existing regional assessments. UNGA has commissioned the Regular Process to produce the first integrated global marine assessment of the world's oceans and seas by 2014.

The Division for Ocean Affairs and the Law of the Sea (DOALOS) of the United Nations Office of Legal Affairs, acts as secretariat of UNCLOS servicing UNGA in its consideration of the law of the sea and ocean affairs and liaises with State Parties and other international organizations. It is based in New York, USA.

Other bodies established by UNCLOS

Other bodies established by UNCLOS are:

- The Commission on the Limits of the Continental Shelf was established in Annex II of UNCLOS to consider the data and other material submitted by coastal States concerning the outer limits of the continental shelf in areas where those limits extend beyond 200 nautical miles and to provide scientific and technical advice.
- The International Seabed Authority an autonomous international organization organize and control activities in the Area, particularly with a view to administering the resources of the Area in accordance with Part XI of UNCLOS and the 1994 Agreement. Its headquarters are in Kingston, Jamaica.
- The International Tribunal for the Law of the Sea (ITLOS) is an independent judicial body that has jurisdiction over any dispute concerning the interpretation or application of UNCLOS that is submitted to it in accordance the provisions of the Convention. When a dispute arise, States are free to chose one of the four mechanisms provided in UNCLOS for the peaceful settlement of disputes: the International Tribunal for the Law of the Sea, the International Court of Justice, an arbitral tribunal, or a special arbitral tribunal. ITLOS is located in Hamburg, Germany.

7. Conservation and management of living resources in the High Seas

Articles 116-120 in Section 2 of part VII on the high seas contain the regime for the conservation and management of the living resources of the high seas, i.e., in Areas Beyond National Jurisdiction.

Article 116 recognizes the freedom of fishing on the high seas but makes this right explicitly subject to the obligation to respect the rights, duties and interests of coastal states under articles 63(2) and 64-67, the obligation to avoid over-exploitation and cooperation with other high seas fishing states. This regime therefore also applies to stocks whose range of distribution is confined to the high seas (discrete high seas stocks).

Article 119 repeats many of the obligations that are also laid down in article 61 on the EEZ. For instance, those on the objective of MSY, science-based management and taking account of the effects on associated and dependent species and environmental factors.

Towards a new international agreement

States are aware of the increasing pressure on the marine resources in areas beyond national jurisdiction and the need for more concrete measures to assure the conservation and sustainable use of marine biodiversity. Discussions on potential ways forward to complement the general obligations of UNCLOS, such as an Implementation Agreement under UNCLOS, have been held in the BBNJ since 2004. In 2011, the UNGA endorsed the recommendation of the BBNJ Working Group to structure discussions under a "package deal":

1. Marine genetic resources, including questions on the sharing of benefits;
2. Measures such as area-based management tools, including marine protected areas
3. Environmental impact assessments (EIAs);
4. Capacity-building and the transfer of marine technology.

In 2012, States agreed in Rio+20 to address, on an urgent basis, building on the work of the Ad Hoc Open-ended Informal Working Group and before the end of the 69th session of the General Assembly in August 2015, the issue of the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction, including by taking a decision on the development of an international instrument under the Convention. Soon after, the General Assembly in its Resolution 68/70 established the process and mandated the BBNJ Working Group to make recommendations to the Assembly on the scope, parameters and feasibility of an international instrument under the Convention.

8. Resolutions adopted by the UN General Assembly

UNGA Resolutions, which are not binding, are often used to guide States in addressing relevant international law and development issues. Good examples related to conservation of marine living resources are the UNGA Resolutions to regulate bottom fisheries.

In 2006, UNGA adopted the Resolution 61/105 calling upon states and competent regional bodies to implement four measures to regulate bottom fisheries, including technical assessment of impacts, and to ensure that if it is assessed that these activities would have significant adverse impacts, they are managed to prevent such impacts, or not authorized to proceed, identification and closure of vulnerable marine ecosystems, such as, seamounts, hydrothermal vents and cold water corals and regulation of vessels conducting bottom fisheries in areas beyond national jurisdiction. In practice, UNGA was banning bottom-trawling in areas identified as vulnerable marine ecosystems (VMEs).

UNGA reviewed progress and called upon States to effectively implement Resolution 61/105. In spite of the progress remaining to be made, these resolutions have played a significant role in triggering fisheries closures and in updating the mandates of and measures adopted by a number of RFMOs, as we will see in case study on bottom-trawling closures in the North Atlantic in the additional materials.