

# The United Nations Convention on Law of the Sea

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## Introduction

The law of the sea is being developed along functional, rather than zonal, lines. Many of the more recent international agreements have been concerned not with particular zones but with particular uses of the sea such as pollution, fishing and navigation. Laws whether international or municipal, do not grow up in isolation, but influence and are moulded by politics, economics and geography of the 'real world' to which they apply.<sup>1</sup> This is particularly apparent in relation to the law of the sea. Especially during the 18<sup>th</sup> century and also the 19<sup>th</sup> century the high seas were open to anybody for liberal use.

In time to come with the development of the science & technology and with the increasing demand for resources for growing population the uses of the sea was multiplied in a large scale. Accordingly the law & order and the environment of the oceans were placed at a severe threat of violations and pollution. In response to such conflicts among the uses of the sea the third Conference on the Law of the Sea was convened by the UN and as a result the UNCLOS 111<sup>2</sup> was submitted

<sup>1</sup> R.R. Churchill and A.V. Lowe, *The Law of the Sea*, 3<sup>rd</sup> edition (1999), p2

<sup>2</sup> 'The United Nations Convention on law of the sea' is hereinafter sometimes referred to as 'UNCLOS 111' or 'UNCLOS' or 'the convention'. The late Ambassador Shirley Amarasinghe of Sri Lanka was the first President of the third United Nations Conference on the Law of the Sea.



for signatures at Montego Bay, in Jamaica on the 10<sup>th</sup> day of December 1982. The UNCLOS which broke new ground in international treaty law, came in to force on 16<sup>th</sup> November 1994 and gained universal recognition rapidly.

Since its adoption, the most significant additions to the corpus of UNCLOS law have come in the form of two ‘implementing’ agreements, the 1994 Agreement relating to Part XI,<sup>3</sup> and the 1995 UN Fish Stocks Agreement.<sup>4</sup>

### Consensus Procedure

Although the convention itself may reflect customary International Law the negotiations themselves reflected an important shift towards treaty drafting by consensus.<sup>5</sup> A large number of extremely complex and technical issues had to be negotiated at the conference which employed the method of active consensus in adopting the convention. The consensus<sup>6</sup> can be distinguished from unanimity and decisions taken without a vote; opposition; objection or by acclamation.

The General assembly set the tone with a resolution recognizing that the main issues such as territorial waters, the continental shelf, and the ocean floor beyond national jurisdiction are ‘closely linked together’ leading to the concept that they should all be treated as a package.<sup>7</sup> The rules of procedure in the convention enshrine this consensual approach.

On the other hand, it is observed that a vote

<sup>3</sup> Reproduced in UN *UN Convention on the Law of the Sea* (New York 1997). See Allan Boyle, *Further Developments of the Law of the Sea Convention : Mechanisms for Change, International & Comparative Law quarterly*, volume 54, Part 3, (July 2005), p564.

<sup>4</sup> 34 ILM 1542 (1995).

<sup>5</sup> Hugo Caminos, *Progressive Development of International Law and the Package Deal*, 79 AM, J.INT’LL, 871, (1985), Also see -Francesco Parisi –Catherine Seveenko, *Treaty Reservations and the Economics of Article 21(1) of the Vienna Convention*, pp30-35.

<sup>6</sup> As per G.Plant consensus has three main features –(a) it implies a general agreement, (b) it is not necessarily unanimous and (c) it is manifested without a vote.

<sup>7</sup> Hugo Caminos, above, pp 871,874

was taken finally for the adoption of the formal text of the convention. Therefore the theory of the consensus is said to have adopted only in portions of the convention.

### Maritime Zones and Rights of Navigation

One of the most fundamental achievements reached through UNCLOS was a consensus on the line separating national and international waters where all States can exercise freedom of navigation, which has become subject to contention among coastal States. UNCLOS established a 12-nautical mile territorial sea<sup>8</sup>, within which States are free to enforce any law, regulate any use and exploit any resource. The convention establishes the right of innocent passage<sup>9</sup> in the territorial sea, and guarantees rights of transit passage for ships and aircraft through and over straits used for international navigation. If not for the right of transit passage which is secured by the convention, over 100 straits<sup>10</sup> used for international navigation will have to be closed by the 12-nautical mile limitation.

In addition to the regime for the territorial sea, the contiguous zone<sup>11</sup> and the continental shelf<sup>12</sup>, a new concept of exclusive economic zone<sup>13</sup> (EEZ) has been embodied in part V of UNCLOS. The establishment of the 200-nautical mile EEZ has greatly benefited many coastal States. But with such exclusive rights, the responsibilities and obligations would be higher. For example, coastal States must adopt measures to prevent and reduce pollution, and to facilitate marine scientific research within the zone. UNCLOS encourages coastal States to make optimum use of fish stocks without risking depletion through over fishing, thus ensuring their long-term sustainability. At the same time, in EEZ certain important rights and freedoms, such as the freedom of navigation and over flight and laying of cables and pipelines, have been preserved for other States.

### Peace and Security for the Oceans and Seas

The American poet, Robert Frost once wrote, famously, that good fences make good neighbors. But when the neighbors are desperate as the Africans storming the concertina wire at Ceuta and Melilla, no fence is good enough<sup>14</sup>. According to the Italian Interior ministry, most of those illegal immigrants who come to Italy by sea still come via Libya and the numbers are rising dramatically. Joint naval patrols have been launched by Spain and Morocco jointly to minimize the illegal immigrants arriving in the Canary Islands. Clandestine boat traffic across the strait of Gibraltar is down as well.<sup>15</sup>

Nowadays, the community of nations is faced with a series of urgent and complex problems. Among them are organized crimes and acts of terrorism, environmental degradation and over-exploitation of fish stocks, piracy & armed robberies against ships, smuggling of migrants and illicit traffic in narcotic drugs and psychotropic substances or other goods are all criminal activities which can threaten the security and stability of States . Many of those problems can only be countered effectively by nations acting in concert. Another type of threat to peace and security can arise from competing claims by States to natural resources in the oceans, which often result in protracted maritime boundary disputes.

In view of combating the criminal acts, it is important to note the call by UNCLOS on States to cooperate in the repression of acts of piracy and the suppression of illicit traffic in narcotic drugs and psychotropic substances. The comprehensive framework established by UNCLOS for the regulation of all ocean space leads to an important contribution towards the strengthening of peace, security, cooperation and friendly relations among all Nations<sup>16</sup>. Naval forces are being employed in pursuit of the collective interest of the international

<sup>14</sup> Christopher Dickey, *At The Gates* , in *Newsweek* magazine published on 24<sup>th</sup> October 2005, pp 42,43

<sup>15</sup> See Christopher Dickey, above , p42 &43

<sup>16</sup> Part XII(articles 192 to 196 ) of the convention deals with Protection and Preservation of the Marine Environment

community, for purpose such as humanitarian relief, peacekeeping measures or enforcement operations designed to make economic sanctions effective. In addition, several other treaties have been adopted by the UN system in order to strengthen the international cooperation in suppression of smuggling of migrants and other unlawful acts.

Urgent action is , however, necessary to combat and suppress these ever increasing activities which is a threat to maritime peace and security.

### Settlement of Disputes

The balance of the law of the sea is now up for grabs. The question is whether that dynamic balance is to be left solely to the unilateral action of States and domestic bargaining process, or whether inerrant in the very complexity of that balance is the notion that some third party arbitration is necessary to police it<sup>17</sup> . Thus the UNCLOS broke new ground in international treaty law by establishing a compulsory settlement of disputes system<sup>18</sup>. However, it is important to recognize that those compulsory procedures are of secondary importance<sup>19</sup>. The section 1 of Part XV of the convention sets out the fundamental principles concerning dispute settlement.

States Parties when fail to reach a peaceful solution in their disputes arriving out of interpretation or application of UNCLOS, are obligated to refer the matter for settlement in accordance with the procedures contained in the Convention, and one such procedure is to recourse to the International Tribunal for the Law of the Sea (ITLOS). However in Bluefin Tuna case the specially appointed Arbitral Tribunal sustained, by majority vote, Japans contention that a provision of the 1993 convention excluded compulsory jurisdiction over disputes arising both under it and UNCLOS, effectively, preempting the UNCLOS dispute process.

With the growth of multilateral environmental



agreements, disputes over the primacy of competing dispute resolution fora will become increasingly important<sup>20</sup>. A question arises in determining the dispute resolution forum when the parties to the dispute are the parties both to relevant agreements with dispute resolution mechanisms and to UNCLOS.

### **Protection and Preservation of the Marine Environment**

The biggest threat the marine environment seems not due to oil spills at sea or ocean dumping, but due to human activities on land. Municipal, industrial and agricultural wastes and run-off produce pollutants that enter the marine and coastal environment. These include sewage, persistent organic pollutants, radioactive substances, heavy metals, oils, nutrients and litter.

UNCLOS assigns the fundamental obligation and responsibility of protecting and preserving the marine environment to all States, and requires them to take every necessary measure to prevent, reduce and control pollution of the oceans<sup>21</sup>. As far as the prescription of pollution standards is concerned, the convention makes no change in the traditional competence of *flag States* to prescribe their legislation for their vessels<sup>22</sup>. The legislative competence of the coastal States has been restricted by the convention,<sup>23</sup> but certain powers have been given to legislate for marine pollution from foreign vessels in the EEZ.<sup>24</sup> The powers given to the 'port States' could be considered as another breakthrough in the convention<sup>25</sup>.

The provisions of enforcement with respect to International pollution standards are necessary to be amended in view of adopting much more effective methods. The effectiveness of the coastal states jurisdiction minimizes through the practical aspect of the existing provisions. It is to be noted that the International Maritime Organization was supposed to make arrangements in improving the flag State enforcement of its conventions.

The oceans are being exploited as never before<sup>26</sup>. Most of the world's marine fishing areas have already reached their maximum potential for fish captures, with the majority of stocks already fully exploited.

IUU fishing (Illegal, unreported and unregulated fishing- is perpetrated both by vessels of States members of regional fisheries management organizations, in some circumstances flying flags of convenience, as well as by vessels of States not members of those organizations. Over the past few decades, the large population movements to coastal areas, coupled with a significant increase in economic activity, has greatly threatened marine habitats. In the process, important habitats to marine biodiversity have come under attack. Spawning and feeding grounds of marine species that are of crucial importance to world food security are being destroyed. Urgent measures have to be taken in this regard. The implementation and the compliance of the existing provision should be a main target of the International community and an effective mechanism for monitoring of such implementation and compliance should be established.

### **“Common Heritage” for the benefit of “Mankind as a Whole”**

The concept of 'Common Heritage of Mankind' was evolved to reconcile potential conflicts between the developed States and developing & technologically disadvantaged States in deep sea mining. The benefit of discovery of manganese nodules and other mineral resources led towards handful of developed States who advocated the equidistance principle aiming the lion's share. Finally, the part XI of the UNCLOS established extraordinary legal regime and it provided for an International Sea Bed Authority<sup>27</sup> to carry out all deep sea bed exploration and exploitation. The boundary of the international seabed area is the line of the outer limits of national continental shelves. The convention thus envisaged a 'parallel system', in which both the enterprise and individual states

and mining ventures would have exploited the sea bed side-by-side<sup>28</sup>. In 1994, the agreement relating to the implementation of the said Part XI was adopted. The 1994 Implementation Agreement is a very imaginative solution to a difficult problem, which demonstrates the flexibility of International law at its best<sup>29</sup>. Many States who had not ratified the UNCLOS III eventually became parties thereto by ratifying the 1994 agreement.

The convention only speaks about an appropriate mechanism that provides for the equitable sharing of financial and other economic benefits derived from the 'Area'. The rules in that regard are supposed to be laid down by the Authority and accordingly, the practical aspect of it would be subject to criticism. Furthermore, it is observed that the cost factor which delays many exploitations of sea bed resources, could be an adverse effect on implementation of the provisions of the convention against commercial mining.

Doug Bandow describes Part XI as being 'Orwellian' and asserts an increase in costs and depressed productivity resulting in the loss of the benefits of deep-sea mining<sup>30</sup>. Chathura Randeniya<sup>31</sup>, gives specific examples in that regard.<sup>32</sup>

### Marine Scientific Research

The research in the territorial sea was subjected to consent and the regulations of the coastal State by virtue of the Geneva Convention which laid down restrictions on marine research on the continental shelf as well. The developing countries had submitted that they would not be able to get the real benefit out of exploitation of resources without having proper control over the research in the relevant waters and also they had highlighted the danger of research vessels of powerful countries being engaged in espionage. The UNCLOS have satisfied most of such demands<sup>33</sup>

Effective measures to preserve the marine

environment and ensure sustainable use of ocean resources require extensive scientific research. In UNCLOS, the access to ocean areas for marine research has not been unduly restricted by way of extending the national jurisdiction. The freedom of scientific research in the high seas has been ensured by the convention<sup>34</sup>. By Article 256 all States will have the right for scientific research in the 'Area'.

Indeed, a remarkable progress, since the adoption of UNCLOS has been achieved in marine science, particularly in the field of marine biology<sup>35</sup>. Although the Convention recognizes the sovereignty of coastal States over their territorial sea – and also requires their prior consent for research within their exclusive economic zone and continental shelf – it nonetheless stipulates that consent for research for peaceful purposes should be granted under normal circumstances, and not be delayed or denied unreasonably.

### Conclusion

Needless to say, the new International economic order and the common heritage of mankind do not feature among the top priorities of the industrialized developed States. They are more interested in such matters as unrestricted rights of navigation through the territorial sea, straits and the new 200-mile EEZ<sup>36</sup>. As per Randeniya<sup>37</sup> the concept of common heritage has lost much of its practical value and that was the culminating effect of curtailing the ISA and the introduction of market principles. He further says that the elimination of the mandatory transfer of technology embodies a considerable loss to the NIEO<sup>38</sup>.

UNCLOS has further strengthened by a number of specialized multilateral treaties and programs of action<sup>39</sup>. Moreover, UNCLOS serves as the legal framework for inter-agency cooperation and coordination and requires, for its effective implementation, coordination and cooperation not only at the global level but also at the regional and national levels. Today, the



UNCLOS represents a monument to international cooperation in multilateral treaty-making on a scale and magnitude unprecedented in treaty history. To this day, it continues to provide the international community with a comprehensive and vital legal regime that fosters stability and order in the oceans<sup>40</sup>.

Therefore I am of the view that the framers have achieved, except for some matters as discussed above, their objectives to a larger extend.

There is no doubt that UNCLOS need not be interpreted as if it were a static instrument, cast in stone somewhere around 1982. Many of its terms are likely to be inherently evolutionary.<sup>41</sup>

There is no evidence that UNCLOS is likely to ossify or become obsolete in the immediate future, provided the parties continue to promote necessary developments within the framework of the Convention<sup>42</sup>.

The report of Swaminathan<sup>43</sup> Committee on Review of coastal Regulation Zone Notification 1991 in Sri-Lanka is also important to be considered in protecting and conserving the coastal environment.

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40 [www.un.org/Depts/los/convention-agreements.htm](http://www.un.org/Depts/los/convention-agreements.htm)

41 See Alan Boyle , above , p568 & 584.

42 Alan Boyle , above , p584.

43 Professor M. S. Swaminathan.