

World Oceans Day 2010 - Our oceans: opportunities and challenges

Roundtable discussion on the United Nations Convention on the Law of the Sea  
fifteen years after its entry into force

HOW EFFECTIVELY IS UNCLOS OPERATING AS THE LEGAL FRAMEWORK FOR THE OCEANS AND  
THE SEAS, PARTICULARLY ON THE CONSERVATION AND SUSTAINABLE USE OF MARINE  
BIODIVERSITY, INCLUDING MARINE GENETIC RESOURCES?

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Though the preservation and conservation of the specific components of marine biodiversity<sup>1</sup> are not specifically addressed in the UNCLOS, as a framework convention, it has set out the spatial and functional legal regimes of ownership and obligations over all aspects of oceans use. It has provided the mandate to coastal states to enact and implement laws to protect their maritime territory and its marine environment in accordance with their national economic and social needs (cf. article 193<sup>2</sup>)

In the spatial regime, particularly on the territorial sea, article 21, on the exercise of the right of innocent passage, allows the coastal state to adopt laws and regulations on the conservation of the living resources of the sea, the prevention of infringement of the fisheries laws and regulations of the coastal state and the prevention, reduction and control of pollution thereof. In article 56, coastal states were given SOVEREIGN rights over the living resources of the EEZ, part of these sovereign rights include conserving and managing the living or non-living natural resources of the water column, and the sea-bed and its subsoil (which are to be

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exercised in accordance with the provisions of part VI: the Continental Shelf). Articles 61 and 62 outline the legal regime for the conservation and utilization of the living resources in the EEZ, employing techniques such as, (with respect to the Coastal State): 1) determining the allowable catch per stock, 2) maintaining species populations at levels that can produce the maximum sustainable yield, 3) regularly exchanging available scientific information with competent international organizations and with all concerned States (which may also include non-coastal states allowed to fish in the EEZ), 4) promoting optimum utilization of the living resources, (except for cetaceans-whales, dolphins and porpoises, the exploitation of such can be prohibited, limited or regulated more strictly than what is provided in part V-article 65, and there are conventions prohibiting the capture and sale of such) and 5) giving access to 3rd parties to the surplus of the allowable catch. Third parties fishing in the EEZ are mandated to comply with the regulations established by the Coastal State. There are specific provisions on the harvesting of anadromous stocks and catadromous species in the EEZ, with the associated responsibility for their conservation and management (articles 66 and 67). And on its Continental shelf, the coastal state can take reasonable measures to prevent, reduce and control pollution from pipelines (article 79).

In the exercise of its sovereign rights for the conservation and management of the living and non-living resources in the EEZ, under article 73, the coastal State may take such measures such as boarding, inspection, arrest and judicial proceedings as may be necessary to ensure compliance with the laws and regulations adopted by it in conformity with the UNCLOS.

Article 123 provides a guide for Coastal states bordering enclosed or semi-enclosed seas and international organizations for transboundary arrangements for the management and conservation of the marine environment and the resources in such seas.

In the Area, the Authority is mandated to adopt appropriate rules, regulations and procedures for preventing, reducing and controlling pollution and other hazards to the marine environment and for protecting and conserving the natural resources of the Area and the prevention of damage to the environment's flora and fauna.

And for the area beyond the EEZ, articles 117 to 119 states that all States have the duty to take such measures, with respect to their nationals, as may be necessary for the conservation of the living resources in the high seas. Among these measures include the establishment of RFMOs and employing the precautionary and the ecosystem approaches in determining allowable catch and in establishing other conservation measures.

The functional legal regime that applies to the protection of marine biodiversity, Part XII (Protection and Preservation of the Marine Environment), obliges all states to take measures to protect the marine environment and to prevent, reduce and control pollution of the oceans. In fulfilling these obligations, states (and competent international organizations) are to cooperate (globally and regionally) in formulating and elaborating international rules, standards and recommended practices and procedures that are consistent with UNCLOS.

The 1982 UN Convention on the Law of the Sea is a framework convention for the use, management and governance of the oceans, the sea floor and their resources. A big part of the legal regimes set forth in the UNCLOS is a reflection of customary international law, as evidenced by the practice of states and decisions by the ICJ, in the delineation of sovereignty

and jurisdiction over maritime zones and their resources, and in states' associated responsibilities of protecting and preserving the marine environment. The terms "marine biodiversity" (let alone biodiversity) and "marine genetic resources" are not specifically referred to in the UNCLOS, though the marine environment in general and, in particular, the vulnerable marine ecosystems, several species of fish, huge, well-loved marine mammals, and reefs (as base points, and only when they are drying or fringing) have received forms of protection under the UNCLOS.

It was not until the Convention on Biological Diversity (CBD) did marine biodiversity obtain specific treatment for its conservation and sustainable use, and the fair and equitable sharing of benefits emanating from genetic resources. However, the application of the CBD is limited to resources in areas within national jurisdiction, and only to processes that affect marine biodiversity in areas beyond national jurisdiction. But, as stated in article 22 of the CBD, the implementation of the provisions of the CBD on the marine environment should be consistent with the rights and obligations of States under the UNCLOS, and UNCLOS has a spatial and legal regime to govern marine environment protection in the high seas and the Area, albeit in a very general manner, and focusing primarily on pollution prevention and fisheries/stock conservation.

The UNCLOS does not have specific provisions that protects and conserves all components of marine biodiversity, including marine genetic resources. But in their wisdom, the framers of the UNCLOS were well aware that "the problems of ocean space are closely interrelated and need to be considered as a whole"<sup>3</sup>, and in the interest of adopting a constitution of the oceans, crafted a holistic document that has enabled all states to exercise

their sovereign rights and freedoms over the marine environment, consistent with international law, and their corresponding obligations to protect and preserve the marine environment.

Has it been effective in conserving marine biodiversity and marine genetic resources? Not quite, or a better answer would be, not yet. As a framework convention, UNCLOS has given rise to a number of global and regional initiatives, undertaken by states parties, non-states parties, coastal, land-locked and archipelagic states, and a host of international governmental and non-governmental organizations, that has focused not so much on what they can get from the oceans, but what they can do to ensure the sustainability of this resource. The UN General Assembly has begun the process of studying the issue through the Ad Hoc Open-ended Informal Working Group to study issues relating to the conservation and sustainable use of marine biodiversity beyond areas of national jurisdiction and has included in its deliberations, the issue of marine genetic resources. It is thus only a matter of time.

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<sup>1</sup> Biological diversity is defined in the CBD as: the variability among living organisms from all sources including, inter alia, terrestrial, marine and other aquatic ecosystems and the ecological complexes of which they are part; this includes diversity within species, between species and of ecosystems.

<sup>2</sup> 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.

<sup>3</sup> 3rd preambular paragraph of the 1982 UNCLOS.