FRATERNIZING THE ASPECTS OF ENVIRONMENT AND LAW OF SEA- AN INTERNATIONAL REGIME

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Abstract

A customary standard is a pre-requisite in any field of international law similarly the law of sea has also been established by consonant, continuous and recurrent practice by the comity of nations. Under the auspices of UNCLOS III, 1982 which resolved the seabed mining issue, the situation of technological advancement, exploration and exploitation and other developmental regimes were gradually growing. The International Sea-Bed Authority was established to govern the Area which was beyond the national jurisdiction keeping in mind that the resources are common heritage of mankind. Several treaties on different topics contribute to the development of an integrated legal regime, such is the regime of seas under the Constitution of the Oceans. Ocean fertilization to combat climate change, ocean governance, exploration in order to find new pharmaceutical products and mining are few areas which challenges the regime of UNCLOS III. Environment remains to be vulnerable, instances of rise in sea-level, melting of polar ice-caps causing open water across Arctic, re-distribution of the sea stocks due to habitat change, coastal erosion, ocean acidification, changes in sea-surface temperatures are major challenges which the world community has to face in the contemporary times. Marine environment has been a concern since1994 Agreement which provides for procedures and mechanism to ensure the protection of marine environment along with assessment of the probable environmental impacts from the exploration and exploitation activities. The evolutionary and dynamic nature of the activities in sea-bed area have high impact of creating disturbances in the marine life-cycle. The principle of conservation within the international legal framework that governs the domains of exploration and exploitation in the continental shelves is also creating an increasing insufficient twin goal of environment protection and sustainability and its ultimate focus on conservation in conjunction with economic trends on the metal-oriented economy, the concepts of 'development' and 'sustainable human development are arching issues.

Keywords: International soft law, UNCLOS, norms, marine pollution, biodiversity

Introduction

Historically, the seas were just a way for merchant and transit routes, with the gradual development and industrialization, the oceans became subject of national jurisdictions. The law of sea regime dwells in various aspects governing the subject in creating different zones, territorial waters, contiguous zones, exclusive economic zones and High seas. High seas are those areas which are beyond national jurisdictions and in this regard the Area is a common heritage of mankind. New technological advancements paved a corporate way of extracting resources from the bottom of the sea which is abundant in natural resources. The sedimentary rocks contain minerals which are main attractions for metal-oriented activities. UNCLOS III,1982 is considered as a the constitution of the oceans but this constitution also has some gaps, these gaps are complimented by various other international instruments and Treaties in order to reflect on the principles which are of priority in understanding the law of sea regime as a whole. UNCLOS III led to the establishment of International Sea-bed Authority, Commission on the Limits of the Continental Shelf and the International Tribunal for the Law of Sea. Numerous roles were conferred on the existing institutions for instance International Maritime Organization, Food and Agriculture Organization; new obligations and dynamic parameters were undertaken. International law and environment law are constantly emerging with various new challenges with the change in times and conditions, moreover such challenges are towards traditional attitudes in terms of substantive legal obligations and the methods of law-making which have been characterized and settled as per international norms. Likewise the concept of Sustainable development which was proposed in the Brundtland Report of 1987 is of importance when it comes to law of sea in regards with exploitation and regulation of resources ,the laws regulating the environment and sea merge again since they integrate to obtain economic developments. Modalities for implementing this concept has developed legal significance in their own right, such as the use of the precautionary principle, or approach, the ecosystem approach and inter-generational equity[1].

The current state of law is cumulatively looking forward for managing environmental impact, oceans occupy unprecedented spaces and the regulation is dynamic in conjecture with multiple perspectives in order to come to an understanding. Uncalled and unanticipated political circumstances are also massive hurdles in reaching to effective as

[1] E G D Freestone and E Hey, The Precautionary Principle and International Law: *The Challenges of Implementation,*Kluwer Law International,The Hague (1996).

well as affective conclusions. Law of the sea has to be dynamic and calculative in order to responsive to such new challenges so that it remains relevant and flexible while managing the ocean spaces.

International law is of an evolutionary nature; consequently, the treaties and principles upon which it is based are based on interpretation techniques; these techniques are of utmost importance when dealing with conflicting situations; and when it comes to settled norms, conflicts between states are avoided to the greatest extent possible so that they do not lapse due to premature obsolescence or additional amendments and modifications. Article 31(3)c of the Vienna Convention on the Law of Treaties provides for "any relevant standards of international law applicable to the relations between the parties," which is also a general legal principle, as evidenced by Golder v. United Kingdom, 1975. The International Court of Justice in the case of Namibia Advisory Opinion based its approach on the fact that the terminology and concepts in dispute "were by definition evolving," and not on a larger conception applicable to all treaties. In the Aegean Sea Continental Shelf Case, the World Court reaffirmed that treaties must be "interpreted and used within the framework of the complete legal system in effect at the time of interpretation" (1978). The Shrimp Turtle decision of the WTO Appellate Body referred to the Rio Declaration on Environment and Development,1992, the Convention on Conservation of Migratory Species,1979, the CITES Convention of 1973, the Law of the Sea Convention,1982, and the Convention on Biological Diversity,1992, all of which created the current definition of "exhaustible natural resources."

In the recent times, international law is more about accommodating and avoiding conflicts between existing regimes so that they yield amicable and harmonious results. New Agreements, such as the 1993 FAO Compliance Agreement, the 1994 Agreement to Implement Part XI of the law of the sea Convention and the 1995 United Nations Fish Stocks Agreement reflect the changing priorities of the States in the wake of the seminal 1992 UN Conference on Environment and Development in Rio De Janerio. They have a major impact on the LOSC regime[2].

UNCLOS as soft law

[2] Richard Barnes, David Freestone and David M Ong, The Law of The Sea: Progress and Prospects, 3 Oxford University Press.

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Conventionally the UNCLOS was a soft law based on unilateral declarations, bilateral agreements and state practices but overtime, it has become a part of hard law, in terms of practices and its establishment of various institutions that co-ordinate and cooperate in ocean related activities.

- Agenda 21 of 1992 with specific emphasis on chapter 17 is towards the protection of the waters of the oceans.
- FAO Code of Conduct for Responsible Fisheries,1995
- FAO International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing, 2001.
- IMO Code of Conduct Concerning the repression of Piracy and Armed Robbery against Ships in western Indian Ocean and the Gulf of Aden, 2009.

Soft law attracts because of its capacity that determines on consequentially quicker basis without the rigid formalities that are associated with treaty negotiations and formal procedures, soft law has a distinct approach towards facing the challenges of contemporary issues that require rapid actions and consideration. Resolutions of the United Nations General Assembly are manifestly evident on the same inferences, for instance that if 1969[3] and 1970[4]. The influence of UNGA Resolution of 1991[5] on Drift-Net Fishing was assumed as non-binding but it is the same base on which the foundation was formulated upon a moratorium on such practices.

The International Seabed Authority (ISA) under (UNCLOS), ISA is tasked with organising, regulating, and controlling all mineral-related operations in "the Area" for the benefit of humanity as a whole. It is obligated to ensure the proper preservation of the maritime environment from negative impacts that may result from activities involving the deep seabed. ISA is also solely responsible for promoting and encouraging maritime scientific research in the Area and coordinating the dissemination of its findings. Typically, parties to a convention or accord agree on a certain interpretation method or technique; similarly, parties to the Law of the Sea Convention practise and agree on consensus. LOSC is not an exception to the pattern of soft law conventions promoting the implementation of treaties; this is also true of LOSC. The FAO Code of Conduct on Responsible Fishing, 1995, and the FAO Plan of Action on Illegal, Unreported, and Unregulated Fishing, 2001,

[3] UNGA Resolution 2574 D (XXIV), *Basic Documents* No 16.
[4] UNGA Resolution 2749 (XXV), *Basic Documents* No 17.
[5] UNGA Resolution 46/215 (1991), *Basic Documents* No 47.

are famous examples of this pattern being implemented inside the realms of productive regimes operating in parallel with LOSC. Even the International Court of Justice has voluntarily considered sustainable development as a "interstitial norm" drawn from the Rio Declaration. It is reasonable to establish that the general rules of soft law governing the interpretation and application of treaties are manifest and effective.

Soft law general principles while interpreting the LOSC are highly demonstrated and adopted by consensus in 1992 Rio Declaration under Principle 15 which is infamously known as the precautionary principles. In the Southern Blue-fin Tuna case, the fisheries conservations under LOSC had a modified approach as per the precautionary principle. Similarly Article 1 which defines Pollution, the obligation to carry an environment impact assessment under the provision of Article 206, there is a general obligation as per which the measures are to be taken in order to reduce, prevent and control the pollution under Article 194. The States are under an obligation to protect and preserve the marine environment under Article 235, these mentioned Article undertake a more liberal approach to proof of environment risk as is envisaged under the auspices of precautionary principles. In the case of 1995 Fish Stock Agreement, under Article 6, it clearly suggests that if State Parties intend to prefer an inclined LOSC emphasized approach regarding the precautionary principle; or perhaps in regards with the conservation and preservation of the biological diversity, the parties may do so. In such a scenario the interpretation is agreed by consensus. The Report of the ILC(2000) concluded that precautionary principle is already incorporated in the provisions of prevention and prior authorization including environment impact assessment, and that 'it could not be divorced'[6]. It has been observed 'The point which stands out is that some applications of the principle, which is based on the concept of foreseeable risk to other States, are encompassed within existing concepts of State Responsibility'[7].

With the technological advancement and growth of economies on the lines of development, serious concerns are associated towards sustainable development, biological diversity, international watercourses, natural heritage, cultural property in the depths of the oceans and environment damages. The examples above mentioned are to reflect in the dimension that soft law need not be imbedded in the treaties and conventions and converted into 'rule'

[6] Rao, Report of the ILC(2000) GAOR A/55/10, para 716.
[7] 5th Edn., BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 285-286 (Oxford University Press, Oxford 1998).

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of international law, therefore interpreting the soft laws is a better alternative in effecting the changes rather than procedurally bringing an amendment or additional modification in already established and settled regimes, specifically; the Constitution of the Oceans.

Jurisprudence in regional and global agreements in implementing LOSC

The International Law Commission undertook codification during 1950s and LOSC offered a substantial approach towards a comprehensive and uniform global order, in doing so sustained an articulate regime. Regional cooperation in the LOSC is provided for enclosed and semi-enclosed seas under Article 122 and Article 123.The provisions of 1982 LOSC and 1995 UNFSA were pondered and implemented accordingly in the fisheries management case. Article 237 entails preservation related obligations which are already under existing agreements specifically on marine environment and simultaneously it needs them to be 'carried out in a manner which is consistent with the general principles and objectives of Law of Sea Conventions.

Regionalism might lead to fragmentation of a regime which is frequently associated with the immanent risk in any established institution by law which is based on consensus amongst States parties but interestingly dealing with the case of LOSC, it carries a significant source for further development in its universal medium with a parallel risk all together.

Even before coming into force, the general principles derived from constant State practices in form of regional agreement is evident on how Part XII rapidly assumed its structure as a part of codification process within the auspices of customary law on protection of marine environment[8]. LOSC has been implemented via various other agreements like UNEP regional sea agreement and FAO regional fisheries agreements.

Observing from the Rio Agenda 21 and the integrated ecosystem management along with Johannesburg Declaration, also to mention, the Plan of Implementation, it can be the ambition for adoption of new treaties under the regional sea programs of the North East Atlantic, Baltic, Mediterranean, and Caribbean. The significant agreements in this regard are-

- OSPAR Agreement,1992

[8] P W BIRNIE and A BOYLE, INTERNATIONAL LAW AND ENVIRONMENT 349 (Oxford University Press, Oxford 2002).

- The Helsinki Agreement,1992
- Barcelona Convention (1996 Protocol)
- The Kingston Protocol of 1999

From pollution prevention, the paradigm has shifted to a sophisticated protection of the marine biodiversity resources and life. Judge Yankov remarked 'It is hard to conceive of the development of the modern law of the sea and the emerging international law of the environment in ocean-related matters outside the close association and interplay between UNCLOS and Agenda 21'[9] . Several new instances have been entailed under Agenda 21 which are not found in the LOSC but they modernize the current practice and implementation mechanism-

-It is apparent that an integrated precautionary approach should be taken for protecting the marine and coastal environment. The State Parties must engage themselves while initiating account of scientific uncertainty while regulating and administering the risks on environment.

- Concentrating over marine degradation and taking measures for marine ecosystem must not be limited within just controlling the source of pollution.

-Protecting the Exclusive Economic Zones is coupled with sustainable development of coastal regions and the sustainable utilization of marine living resources.

Regional agreements have a limitation which is imposed by Article 237. With respect to regional, national or international for other kinds of agreements, the constraints are quite extensive as is mentioned under Article 311(3). Article 311(3) is structured over Article 41 and 58 of the 1969 Vienna Convention on the Law of treaties[10]. It especially focuses on 'basic principles'. The framers of the LOSC kept the integrity of an interdependent treaty regime which is reflective of a general treaty law ; of the Convention in mind, the residual rules of priority are found in Article30(4) of the VCLT, same is displaced in favor of Article 41 which stands for lex posteriori rule .

[9] Alexander Yankov, *The law of the sea convention and Agenda 21: Marine Environment Implications* in BOYLE and FREESTONE, INTERNATIONAL LAW AND SUSTAINABLE DEVELOPMENT: PAST ACHIEVEMENTS AND FUTURE CHALLENGES 270-295 (Oxford University Press, Oxford 1999).
[10] 5, M NORDQUIST and SATYA N NANDAN, UNCLOS 1982: A COMMENTARY 238-240 (Nijhoff, The Hague 1995).

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The presumption is, in a situation of conflict envisaged under Article 311; LOSC will prevail over a later treaty dealing with the same matter, notwithstanding the lex posteriori rule. The commentary of ILC observed that 'the primary legal significance of a clause asserting the priority of a treaty over subsequent treaties in conflict with it appears to be in making explicit the intention of the parties to create a single 'integral' or 'independent' treaty regime that is not subject to contracting out; in other words, by expressly prohibiting contracting out, the clause predicates in unambiguous terms the incompatibility with the treaty of any subsequent agreement concluded by a party which derogate from the treaty'[11].

LOSC and the Convention on Biological Diversity

The evolution of a comprehensive legal regime may be attributable to consecutive treaties on distinct subjects. Law of Sea Convention makes no reference towards biological diversity and perhaps, after almost a decade, in the year 1992 during the Rio Conference, the Convention on Biological Diversity was adopted and its provisions are applicable on terrestrial as well as marine biodiversity. In these circumstances, the interpretation techniques are of utmost importance. Fishing activities directly affect the marine biological diversity which equally affects the regimes under Law of Sea Convention. In regards with the marine environmental matters Article 22 has a pre-requisite where parties are specifically required to implement the CBD 'consistently with the rights and obligations of the State party under LOSC'. This is crystal clear that they cannot neglect the rights of ship from their navigational freedom under Exclusive Economic Zone and the High Seas neither within the LOSC regime or already established customary law, in this context Article 22 of the CBD fortifies the terms which are prescribed under Article 311(3) of the LOSC. Parties to the CBD have wider freedom to deviate from Part XII than from other sections of the Convention because, as a *lex specialis*, Article 237 transcends Article 311[12].

In general understanding the effect of Article 22 of the CBD corroborate that the LOSC should triumphs, State parties to CBD cannot anticipate on the LOSC for justification or in order to tolerate fishing activities and fishing related practices that causes or threatens to cause harm to the biological diversity. Keeping in mind such a scenario, the CBD has

[11] ILC, 'Law of Treaties', Commentary to Draft Article 26, in 2 A D Watts (ed),The international law commission 1949-1998, 678 (Oxford University Press, Oxford 1999).
[12] 4, M NORDQUIST and SATYA N NANDAN, UNCLOS 1982: A COMMENTARY 423-426 (Nijhoff, The Hague 1995).

modified Part V and Part VII of the LOSC, now whether this is permissible within the scope of Article 311(3) is a question to ponder upon.

LOSC has been affecting on the institutional levels which is visible in the contemporary issues like the protection of cultural heritage, the ongoing impact on the major-law0making treaty is thought-provoking.

There is no provision governing the interface between the WTO Agreement and the General Agreement on Tariffs and Trade and other existing treaties in the WTO Agreement and the General Agreement on Tariffs and Trade. Article 3(2) of the WTO agreement on the Standards and Procedures Governing the Settlement of Disputes contains provisions with "covered agreements" that really should be interpreted in accordance with the customary rules of public international law. This also hints that while interpreting the WTO Agreements the Article 31 and Article33 of the VCLT shall be taken into account, and not specifically in accordance with the GATT principles of interpretation[13].

At the time of its conclusion, the 1982 LOSC was recognized as making a significant contribution to the protection and preservation of the marine environment[14].

(I) Certain Article are devoted to the protection of the marine environment have paved the way for jurisprudential studies in the field. Four features are notable to mention-

(II) The introduction for the first time in a treaty instrument of the general obligation to protect and preserve the marine environment[15]

(III) The elaboration, or incorporation by reference, of international minimum standards for the prevention, reduction and control of pollution of the marine environment from all the sources[16]

(IV) The inclusion of enforcement provision with respect to marine pollution in particular, with the innovation of Port State enforcement[17]

[13] WTO Appellate Body, Import Prohibition of Certain Shrimp and Shrimp Products (1998) WT/DS58/AB/R.
[14] 2 Eds., R R CHURCHILL and A V LOWE, THE LAW OF THE SEA, Chapter 15 (Manchester University Press, Manchester 1999).
[15] Article 192 of UNCLOS 1982.
[16] Article 194 of UNCLOS 1982.
[17] Article 218 of UNCLOS 1982.

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The application of the dispute settlement provisions of Part XV to the Convention of specified international rules and standards for the protection and preservation of the marine environment established by the LOSC[18].

CITES and LOSC

The wild fauna and flora is aimed to be protected under the international trade by the regulation of the CITES. The import, export and re-export of the live or dead animals is regulated under the auspices of CITES. Some species are threatened and some are not, there is a differentiation which is made between three categories: those species which are threatened with extinction, the trade must be strictly regulated, which means that trade shall be authorized in only exceptional circumstances. The ones that are not necessarily threatened at the moment with extinction and thirdly, the ones that are, in the eye of the State which has the jurisdiction over their exploitation. The approach of CITES in controlling the import and export was not new during 1973 but the fact that the mentioned Convention applied it on a global scale was innovatory[19]. The conflict easily evident in a number of global and regional fisheries management organizations can be resolved with proper cooperation, a fine example is the establishment of the International Whaling Commission.

The surplus jurisprudence flowing from World Court in consideration with the law of sea issues has been complimented by the work and progress of other international courts and tribunals, sustainable development of the oceans has been a major part that culminates environment with law of sea regime. The Court has contributed in parallel and complementary developments of International-Environmental law, linking the LOSC regime to the concept of sustainable development articulated in the instruments which emanated from the 1992 United Nations Conference on Environment and Development in Rio[20]. The 1997 Gabcikovo-Nagymaros Project judgment and the Codification and progressive development of the Sic utere tuo ut alienum non laedas, precautionary action and other fundamental principles of modern environment law were elucidated in this

[18] Article 297(1)(c) of UNCLOS 1982 and special arbitration under Annex VIII.
[19] 2nd Edn., P W BIRNIE and A E BOYLE, INTERNATIONAL LAW AND ENVIRONMENT, 626 (Oxford University Press, Oxford 2002).
[20] UNGA Res 55/2, Millennium Declaration, 8 September 2000.

judicial pronouncement and still, continue in the facilitate in the application of the 1982 LOSC within the framework of the UN Charter in the post-Rio/Johannesburg era[21].

Conclusion

Further evolution of the LOSC is possible and this has been taking place since decades via a wide variety of mechanism, including legally binding agreements and non-binding principles which are closely inter-linked as soft law principles. The corpus of the LOSC law is itself an example that the Convention will not wither away with time, chances of it being obsolete are rare since various other treaties and international instruments compliment the provisions of the regime giving it a catalytic effect. Since 1982, the development has taken place and is increasing in its momentum, marine biodiversity, cultural heritage, sea-bed exploitation are certain arenas which the Convention is facing challenges with, but as clear as a crystal, the LOSC still prevails and dominates the regulations in consideration with ocean related activities, be it fishing, international trade or navigation. It is an affirmative outlook that the Parties to the convention will continue to promote necessary developments within the framework of the Convention. LOSC allows for the international organizations to develop the Convention on basis of generally accepted principles and norms of the international law. Marine based initiatives such as the establishment and development of large marine ecosystem projects, meeting up with the international environmental treaties such as the Climate Change and the Biological Diversity Convention, the World Bank has also adopted for sustainable development agenda. Broader institutional and substantive developments by progressive methods and techniques of interpretation are employed to have a harmonious construction.

The development of law of the sea has become a question of governance of larger substantive rights and obligations. As De La Fayette notes, 'the subject of the ocean governance is extremely broad, potentially involving an analysis of the interaction among a large number of legal and policy instruments, as well as global and regional organizations and other bodies', the complexity of oceans and its governance is inevitable but by the collective conscience of the State Parties, it can be achieved. The regime is to be looked from an optimistic lens.

[21] B Kwiatkowska, *The contribution of the ICJ to the development of law of sea and the environmental law,* 8 Review of European Community and International Environmental Law 10-15 (1999).

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