

The governance models for oceans and the United Nations Convention on the Law of the Sea

*Fernando Loureiro Bastos**

1 Introduction

The preamble to the United Nations Convention on the Law of the Sea (the Convention), signed 10 December 1982, aims at the creation of a 'legal order for the seas and oceans which will facilitate international communication, and will promote the peaceful uses of the seas and oceans, the equitable and efficient utilizations of their resources, the conservation of their resources, and the study, protection and preservation of the marine environment'.

The legal order designed to regulate the use of the oceans is founded on the basic assumption that activities in the oceans do not require the appropriation of maritime areas by states, in particular, by coastal states. Accordingly, with the exception of internal waters, the recognition of 'sovereignty', 'sovereignty rights', and 'jurisdiction' over maritime spaces of coastal states does not imply the granting of exclusive powers over those spaces. Indeed, as opposed to an idea of exclusivity over a territory, the exercise of power by the coastal states over maritime spaces should take account of the uses of the oceans that are recognised simultaneously for all other states.

The simplest and most comprehensible example of the simultaneity of the uses of the oceans, is the freedom of navigation for ships belonging to third states through the maritime areas of coastal states. Accordingly, regarding the territorial sea, it is stated that 'ships of all States, whether coastal or landlocked, enjoy the right of innocent passage through the territorial sea'.¹ Likewise, paragraph 1 of article 58 provides, in relation to the exclusive economic

*Fellow, Institute for International and Comparative Law in Africa, Faculty of Law, University of Pretoria; Professor, Faculty of Law, University of Lisbon.

¹Article 17 (Right of innocent passage). Articles cited without any other reference belong to the Convention.

zone, that ‘all States, whether coastal or land-locked, enjoy, subject to the relevant provisions of this Convention, the freedoms (...) of navigation’.

Over the centuries, and in accordance with the principle of the equality of states, the activities of states in the ocean space have been organised on the basis of state sovereignty. In these terms, as evidenced by the exclusive powers of the flag state over ships using its flag, the actions of each state in the oceans were free and subject to no external control. This way of regulating the behaviour of states was compatible with the immensity of the oceans and the idea that marine resources, in particular living resources, were inexhaustible and did not require global management.²

In more recent decades, the daily use of sea routes by tens of thousands of vessels of all types, the uncontrolled overfishing of biological resources, and the ongoing threat hanging over the global space of ecological disasters caused by marine pollution, have resulted in the necessity to rethink the model of uses of the oceans based exclusively on the parallel and uncoordinated pursuit of the individual interests of sovereign states.

In the seventeenth century, the quarrel between the partisans of *mare liberum* and *mare clausum*, which included participation by the Portuguese Frei Serafim de Freitas, was the expression of a model of ocean management. On one hand, Hugo Grotius advocated freedom of action in the oceans and that they were not available for appropriation. On the other hand, Selden defended the idea that the oceans could be subject to the individual sovereignty of states. Albeit with radically different consequences, each of these positions was based on the power of each individual state, whether the flag state or the coastal state.

Over exploitation of living resources, coupled with ecological disasters during the last decades, gave rise to the questioning of an ocean governance model based solely on the pursuit of the interests of individual states. The alternatives to this model of governance can be summarised in at least six different options.

- (1) The first would be the creation of a community management of ocean spaces and its uses through an international entity, distinct and

²For further developments, see Bastos *The internationalization of marine natural resources. Contribution to an understanding the international legal framework governing the joint development of common offshore oil and natural gas deposits on continental platforms, potential exploitation of mineral resources in the Area, fishing on the high seas, and the effects of the respective conventional regulations towards to third party State* (in Portuguese) PhD thesis University of Lisbon (2005) at 597- 608.

independent from the states, with supranational powers and appropriate mechanisms to punish the behaviour of offenders without the intervention of individual states.

- (2) A second option would be the creation of community management of the ocean spaces and its uses, through an international entity independent of the states, but dependent on the capacity of the individual states to act.
- (3) A third option would be a collective management of ocean spaces and its uses by all states coordinated as the 'international community' but dependent on the intervention of individual states to act.
- (4) A fourth option would be the governance of ocean space and its uses conducted by international intergovernmental organisations with the mandatory participation of states, as an expression of their collective interests.
- (5) A fifth option would be the governance of ocean space and its uses conducted by intergovernmental organisations with the voluntary participation of the states concerned, as an expression of a reconciliation between the individual interests and collective interests of the states.
- (6) A sixth, and final, option would be cooperation amongst the states concerned, including through international intergovernmental organisations, as an expression of a reconciliation between the individual interests and the collective interests of the states.

The various models of ocean governance presented here differ in the nature and intensity of the cooperation amongst states, and the necessity of creating an international entity with powers independent of the intervention of individual states. The first model assumes that the pursuit of community interests involves the creation of an autonomous entity, separate from the individual states. Conversely, and at the opposite pole, the sixth model, organises cooperation between the states through voluntary participation in international intergovernmental organisations.

On the occasion of the celebration of thirty years of the completion of the drafting of the Convention, it is interesting to examine the choices that were made as regards the international commitment to the management of ocean space and its uses. I shall start by assessing the peculiarities involved in the drafting process of the so-called 'Constitution of the Oceans'.

2 **The peculiarities in the process of elaboration of the United Nations Convention on the Law of the Sea**

The Convention is the result of an original negotiation process³ during which an attempt was made to harmonise a wide range of subjects and bring together very diverse interests.⁴ At the outset, there was no draft prepared by the International Law Commission, unlike what happened at the First United Nations Conference on the Law of the Sea⁵ which formed the basis for the four 1958 Geneva Conventions on the Law of the Sea. It should be borne in mind that the composition of the international community changed substantially as a result of decolonisation from 1955 onward. The newly independent states sought to safeguard the greatest possible freedom of decision in their choices with regard to the creation of international law.

The Convention has its origin in two very ambitious targets. On the one hand, to achieve a binding international treaty despite an extraordinarily broad agenda, which included virtually all matters relating to oceans in peacetime. And, on the other hand, to do so on the basis of consensus so as to create a legal regime that would benefit from universal participation and implementation. The intention of creating a legal regime that was as comprehensive as possible, led to the inclusion, in the same process, of matters relating to areas within and beyond national jurisdiction, and the activities that could be pursued in these spaces.

In the case of the sea-bed beyond national jurisdiction, the novelty was the basic idea pursued from the beginning of the negotiations, namely, to achieve the internationalisation of the sea-bed space beyond the limits of national jurisdiction. The objective was to create a completely new legal regime, the opposite of the freedom of the seas. This related to the matter of ownership, in that ownership by states would not be possible, and the space would belong to an entity that was independent of both individuals and states. In terms of the exploitation of mineral resources, the basic intention was to create an

³*Id* at 194-204.

⁴In critical terms, Johnston 'UNCLOS III and UNCED: A collision of mind-sets?' in Kriwoken, Haward, Vanderzwaag and Bruce (eds) *Oceans law and policy in the post-UNCED era: Australian and Canadian perspectives* (1996) at 13, argues that '[d]espite its important experiments with consensus techniques, UNCLOS III was essentially a neo-classical exercise in treaty making, conceivably the last of this traditional consensual kind devoted comprehensively to a globally significant subject of political (world community) development'.

⁵According to Miles *Global ocean politics. The decision process at the Third United Nations Conference on the Law of the Sea 1973-1982* (1998) at 16, this option is justified in view of the fact that the discussion was not confined to strictly legal matters, and the states wished to have their representatives making decisions that had a direct bearing on vital national interests. In similar vein see Koh and Jayakumar 'The negotiating process of the Third United Nations Conference on the Law of the Sea' in Nordquist (ed) *United Nations Convention on the Law of the Sea 1982. A commentary* vol I (1985) at 46-50.

international entity for this purpose, and to assign a residual role to states on the matter.

The drafting of a single international instrument was intended so that states would not be able to choose only the advantageous aspects of the legal regime to be created. The idea was to find a balance that would satisfy the interests of all participants, summed up in the idea of a *package deal*. The *package deal* aimed at creating a framework for the conduct of states in maritime space that would reflect a balance between the various parts of the legal regime as regards rights and duties, and also in relation to how the various interests involved were reconciled.⁶

Meetings of the Third United Nations Conference on the Law of the Sea were convened for 32 months spanning almost ten years, between 1973 and 1982.⁷ The meetings took place in a universal and highly politicised forum. This was the result, first of all, of the composition of the delegations of the countries represented. While developed countries sent experts in the various field of the sea, developing states used personnel with generic knowledge, which crisscrossed the various subjects in the logic of the struggle between North and South and its adaptation to a structural change based on the principles of the New International Economic Order.

It should be noted that the final outcome of the negotiations was decisively influenced by the activities of a diverse set of interest groups,⁸ in particular interest groups that emerged during the negotiations from, and overlapped the traditional regional groups based on which the conference had been planned, and by which seats on the various committees had been distributed.⁹ These

⁶For the various interpretations of the content of the 'package deal' see Joyner and Martell 'Looking back to see ahead: UNCLOS III and lessons for global commons law' (1996) 27 *Ocean Development and International Law* at 77, draw attention to the fact the matters subject to possible transaction were not identical for all players; and Allott 'Power sharing in the law of the sea' (1983) 77/1 *AJIL* at 12 and 13. This question is analysed by Miles n 5 above at 8-12, based on the division of the Convention into two parts: the first including parts II, III, IV, V, VI, XII, XIII e XV; and the second part XI, Annex III and Resolution II of the Annex I of the Final Act.

⁷For criticism see Ogley 'Between the devil and the law of the sea. The generation of global environmental norms' in Vogler and Imber (eds) *The environment and international relations*, (1996) at 155-70, who typifies at 157 the Third UN Conference on the Law of the Sea as 'a diplomatic horror story'.

⁸A summary of the various groups can be found in Evensen 'Working methods and procedures in the Third United Nations Conference on the Law of the Sea' (1986) IV/199 *Recueil des Cours* at 487-495; Koh and Jayakumar n 5 above at 71-86 and 105-112; and Miles n 5 above at 22-33.

⁹In this sense, Dupuy *L'Océan Partagé. Analyse d'une négociation (Troisième Conférence des Nations Unies sur le Droit de la mer)* (1979) at 34; and Miles n 5 above at 98. A regional distribution of seats is the justification for the Third United Nations Conference on the Law of the Sea to be organised based on three commissions when there were basically two sets of issues

interest groups represented, in some cases, the special position of states relative to the marine space, particularly in geographical terms, as happened with archipelagic states, with states with a continental margin exceeding 200 nautical miles, or the landlocked or geographically disadvantaged states. In other cases, the diversity corresponded to aggregations of an ideological nature, as happened with the Group of 77,¹⁰ or of the states aligned with the Union of Soviet Socialist Republics.

The particularities of the negotiations of the Convention had an unintended and initially unexpected result, namely the emergence of two versions of the same legally binding commitment. On the one hand, the Convention signed on 10 December 1982 in Montego Bay, and, on the other hand, the Convention that entered into force on 16 November 1994 as a result of the combination of the original text with the Agreement relating to the Implementation of the Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982 (1994 Agreement).¹¹

The 1994 Agreement is one of the best examples of the pragmatism of the international system. In theoretical terms, it is a complex legal document, very difficult to characterise. In practice, states found an effective solution to the problems of entry into force and production of universal effects of the Convention,¹² given that the problems that blocked its entry into force were confined to Part XI on the Area and related annexes and resolutions.¹³

In the late eighties of the previous century, the international community was faced with two alternatives: either it maintained the text of the Convention as it had been signed on 10 December 1982, and accepted that the developed states would not participate because of the opposition to the regime for the exploration

to be discussed.

¹⁰The so-called Group of 77 had a potential participation of 118 states, coming from the African, Arab, and Latin American regional groups. Its size resulted, however, in a double-edged sword. On the one hand, the Group of 77 had the ability to determine the contents of any matter about which it had assumed a position. But, on the other hand, owing to the diversity of subjects which was included, it could maintain unity only as a result of rigid agreements on general principles, which made it very inflexible in terms of concrete discussions.

¹¹For further detail see Bastos n 2 above at 225-241.

¹²Tuerk 'The idea of the common heritage of mankind' in Martínez Gutiérrez (ed) *Serving the rule of international maritime law. Essays in honour of Professor David Joseph Attard* (2010) at 167, describes it as 'highly innovative'.

¹³Annex III 'Basic conditions of prospecting, exploration and exploitation'; Annex IV 'Statute of the Enterprise'; Resolution I of Annex I of the Final Act of the Third United Nations Conference on the Law of the Sea concerning the 'Establishment of the Preparatory Commission for the International Sea-Bed Authority and for the International Tribunal for the Law of the Sea'; and Resolution II of Annex I of the Final Act 'Governing preparatory investment in pioneer activities relating to polymetallic nodules'.

and exploitation of the mineral resources of the Area; or it could find a way to achieve the universality of participation in order to safeguard the existence of a global legal regime applicable to the oceans, and so avoid dual regulation for the common use of the sea-bed space beyond national jurisdiction.

Initially it seemed that the problem could be resolved by choosing between two classic solutions, namely, by taking the subject matter of part XI out of the Convention or altering it in a precise and detailed manner. At the end of the informal consultations, the solution arrived at is unrelated to these initial alternatives.¹⁴ Neither was part XI of the Convention withdrawn from the treaty, nor was there any modification. The 1994 Agreement merely created conditions for the implementation of part XI. In practice, however, it changed the originally envisaged rules substantially. The hope to create a binding international treaty that would not have allowed for reservations or exceptions, was abandoned.¹⁵ Nevertheless, modifications were limited to those permitted by the fundamental principles of part XI.¹⁶

Consequently, although in strictly formal terms it is possible to devise two parallel and separate texts for the Convention, the number of states ratifying the 1994 Agreement excluded the possibility of the initial version of part XI of the Convention becoming a reality.

The new regime, provided for in the 1994 Agreement, ultimately results in the exploitation of marine mineral resources in the sea-bed beyond national

¹⁴On the question see Vignes 'La fin du schisme des fonds marins. A propos de la réunion de l'Assemblée générale des Nations Unies en session extraordinaire des 27, 28 et 29 juillet 1994 relative à la Convention sur le Droit de la Mer' (1995) XXVII/1 *Revue Belge de Droit International* at 154 and 155, which stresses the critical importance of the simultaneous entry into force of the solution chosen; Anderson 'The mechanisms for adjusting part XI and their relation to the implementation agreement' in Nordquist and Moore (eds) *Entry into force of the Law of the Sea Convention* (1995) at 89-94; and Treves 'The agreement completing the UN Law of the Sea Convention: Formal and procedural aspects' in Nordquist and Moore (eds) *id* 99-104, which underlines the fact that the substance may have preceded the choice of the type of act and how that was of decisive importance.

¹⁵Under art 309, which was based, in the opinion of Wolfrum 'The legal order for the seas and oceans', in Nordquist and Moore n 14 above at 165, in the reciprocal nature of rights and duties under the Convention and some of which pursue the interests of the international community. Moreover, as the same author states at 166, the intention of art 309 not allowing reservations or exceptions unless expressly permitted, should not be jeopardised by an inadequate interpretation of art 310 concerning the declarations and statements. On this question see Nelson 'Declarations, statements and "disguised reservations" with respect to the Convention on the Law of the Sea' (2001) 50 *ICLQ* at 778 calls attention to the fact that 'there is little doubt that several declarations made ostensibly under article 310 do not conform to the rules contained in the Convention'.

¹⁶Article 155. The initial legal regime failed in a number of respects as shown by Iguchi 'Perspectives on proposed revisions in Part XI' in Nordquist and Moore n 14 above at 136-138.

jurisdiction not being conducted under a model of community management, despite the creation of an international intergovernmental organisation in the form of the International Seabed Authority.¹⁷

Against this background, it is now possible to move on to an analysis of ocean governance models, first with a note on the importance of the Convention for International Law for the International Community.

3 The importance of the United Nations Convention for the Law of the Sea for international law and the international community

The importance of the Convention for both international law and the international community can be summarised in five points,¹⁸ the relevance of which has been confirmed by thirty years of operation of the Convention.

First, the Convention is one of the rare examples of treaties of universal application. The application of the Convention can be seen at two different levels: spatial and subjective. The spatial application level affirms that it is potentially applicable to any marine space, whether or not within the jurisdiction of states. On the personal or subjective application level, the Convention allows for the participation of all existing states, whether coastal or landlocked, as well as the international organisations to whom its member states have transferred competency over matters governed by the Convention.¹⁹⁻²⁰

Secondly, the Convention is an international instrument that aims to regulate the allocation of marine space comprehensively. On the one hand, it governs the allocation of space from a horizontal perspective. It seeks to establish precise, generally applicable limits in respect of maritime zones belonging to states, or zones that can be claimed by them, and it makes rules for the

¹⁷In this sense, note the Advisory Opinion of the Seabed Disputes Chamber of the International Tribunal for the Law of the Sea of 1 February 2011, which states expressly that ‘the Authority is the international organization established by the Convention’ (§ 26).

¹⁸As to the importance of the Convention, see the analysis by Oxman ‘The rule of law and the United Nations Convention on the Law of the Sea’ (1996) 7 *European JIL* 353.

¹⁹In September 2013, the Convention had 166 parties: 163 states and the European Union (whose ratification had taken place on 1 April 1998) (http://www.un.org/Depts/los/reference_files/chronological_lists_of_ratifications.htm).

²⁰Annex IX, in particular art 1. On the issue, Simmonds ‘The community’s participation in the UN Law of the Sea Convention’ in O’Keeffe and Schermers *Essays in European law and integration* (1982) at 179-185, and ‘The UN Convention on the Law of the Sea 1982 and the community’s mixed agreements practice’ in O’Keeffe and Schermers (eds) *Mixed agreements* (1983) at 199-206; and, in general, Bastos *Mixed agreements in European community law. Contribution to the understanding of their legal basis* (1997) (in Portuguese) with reference at 219-222 to the division of powers under annex IX of the Convention.

determination of common spaces and internationalised spaces. On the other hand, it regulates the allocation of marine space in a vertical perspective as it is designed to regulate the water column and its surface, but also the sea-bed and the subsoil of the sea. In some situations, the Convention confers all the powers on the same international subject, while, in other situations, it distributes these amongst various international subjects.

Thirdly, the Convention is a binding commitment on the law of the sea that transcends the scope of any agreement before it.²¹ From one perspective, the Convention seeks to regulate activities that can be developed in the marine space in peacetime. Accordingly, it provides rules that allow states to pursue a number of activities, both in spaces that are within the sovereign jurisdiction of the state, as well as in common spaces or internationalised spaces. On the other hand, the Convention establishes rules for the protection and preservation of the marine environment.²²

Fourthly, the importance of the Convention results from its having assumed a position of supremacy over other treaties applicable to the international maritime space. Its authority is confirmed in relation to prior commitments in as much as they are expressly or implicitly permitted or safeguarded in its articles. The Convention also serves as a framework for international agreements that aim to implement its objectives, as is the case of the 1994 Agreement relating to part XI, and the Agreement of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and

²¹On this question see, in broad terms and taking into consideration all matters that have been subject to international regulation since the 1958 Geneva Conventions on the Law of the Sea, Joyner 'The international ocean regime at the new millennium: a survey of the contemporary legal order' (2000) 43 *Ocean and Coastal Management* which states at 200 that 'at the end of the 20th century, the 1982 LOS Convention serves as the hub of the contemporary law of the sea regime, around which, a corpus of international law for protecting and managing the world's oceans has evolved in broad scope and is firmly in place'.

²²In this sense, Oxman n 18 above at 355, which qualifies the Convention in relation to the protection of the global environment as the 'most comprehensive and far-reaching treaty ... yet achieved'; and Borgese *The oceanic circle: Governing the seas as a global resource* (1998) at 113, and *Ocean governance and the United Nations* (1995) at 23 and 24. The Convention establishes rules relating to the protection of the interests of coastal states and global interests, but some authors, such as Payoyo *Ocean governance and the United Nations* (1995) at 338; and Wolfrum 'The protection of the marine environment after the Rio Conference: Progress or stalemate?' in Beyerlin, Bothe, Hofmann and Petersmann *Recht zwischen Umbruch und Bewahrung. Völkerrecht – Europarecht – Staatsrecht. Festschrift für Rudolf Bernhardt* (1995) at 1009-1016, understood that the legal regime of the Convention is insufficient in this respect since it is limited to identifying sources of marine pollution. An overview of environmental regulations by the Convention can be found in Yturriaga 'Protection of the marine environment against pollution' (1986) 54/55/56, (1984) 85/86 *Annuaire de l'AAA / Yearbook de l'AAA – Ressources Naturelles en Droit International / Natural Resources in International Law* at 8-45.

Highly Migratory Fish Stocks (1995 Agreement), governing the management of the capture of certain species of fish in the high seas.

Finally, the Convention created the conditions for a transition from unilateralism to multilateralism with regard to the Law of the Sea. There are a considerable number of provisions which are based on cooperation amongst states as such, or under the auspices of universal, regional or sub-regional international organisations.

The relevance of the Convention can be highlighted on two other levels. On the one hand, the matters it covers have been studied and discussed, taking into account the contributions from very different perspectives, both in legal terms and those of the natural sciences (such as biology and geology). On the other hand, the Convention is a summary of the discussions on the Law of the Sea that took place throughout the twentieth century, originating from three different sources. First, there were the discussions in international conferences on the Law of the Sea, particularly the Hague Conference in 1930 under the League of Nations, and the Geneva Conferences in 1958 and in 1960.²³ Secondly, there were debates in a number of entities within the United Nations family, such as the International Law Commission, the United Nations Food and Agriculture Organisation, the Intergovernmental Oceanographic Commission of UNESCO, the International Maritime Organisation, the United Nations Environment Program, and the World Meteorological Organisation. Thirdly, there was the theoretical framework provided by the *Institut de Droit International* and the International Law Association.

Accordingly, the conclusion of the Convention on 10 December 1982, and its subsequent entry into force on 16 November 1994, was extremely positive for all states. It allowed for the creation of a legal regime applicable to the ocean space and to the uses of the oceans, endowed members of the International Community who wished to pursue activities in the sea²⁴ with norms and institutions potentially common to all states.

²³In this regard see Miles n 5 above at 18 and 19. It should also be noted that the Convention incorporated commitments assumed during the work of the *Ad Hoc* Committee of the Seabed and the Seabed Committee, between 1968 and 1973. The use of commitments achieved previously became possible because the amount of material to discuss at the Third United Nations Conference on the Law of the Sea did not allow for their being fully discussed during the negotiation process. This means that, although the Convention would only come into force in 1994, some points of the text have a vision of reality situated in time, particularly from the standpoint of science and technology.

²⁴Accordingly, Burke 'State practice, new ocean uses, and ocean governance under UNCLOS' in Mensah (ed) *Ocean governance: Strategies and approaches for the 21st century* (1996) at 219-225. For criticism, see. Friedheim 'Ocean governance at the millennium: Where we have been – where we should go' (1999) 42 *Ocean and Coastal Management* at 754-762.

I shall now return to the evaluation of the regulation and management of ocean space and the uses of the oceans, provided by the Convention.

4 Management of the ocean space and the uses of the oceans in the United Nations Convention on the Law of the Sea

Given the historical circumstances, the composition of the international community, and the characteristics of contemporary international law, the result achieved during the long negotiation process of the Convention was intended to strike a balance between national interests and collective interests in the management of ocean space and the use of the oceans.

Examples of relevant legal regimes seeking a balance between the interests of individual states and the interests of the community of states are:

- (i) The legal regime of straits used for international navigation (part III of the Convention).
- (ii) The provision of sea lanes in archipelagic waters to be set by archipelagic states, under article 53.
- (iii) The legal regime of the exclusive economic zone, taking into account paragraph 2 of article 56, articles 58 and 59,²⁵ and articles 69 and 70.²⁶
- (iv) The provision for payments and contributions in kind in respect of the exploitation of non-living resources of the continental shelf beyond 200 nautical miles (art 82).²⁷
- (v) The imposition of flag state duties regarding the conservation and management of the living resources of the high seas (articles 116 to 120).²⁸
- (vi) The promotion of cooperation amongst states bordering enclosed or semi-enclosed seas (art 123).

²⁵Article 59 (Basis for the resolution of conflicts regarding the attribution of rights and jurisdiction in the exclusive economic) is particularly significant when it expressly provides that 'the conflict should be resolved on the basis of equity and in the light of all the relevant circumstances, taking into account the respective importance of the interests involved to the parties as well as to the international community as a whole'.

²⁶With the provision of access of landlocked states (art 69) and geographically disadvantaged states (art 70) to the 'exploitation of an appropriate part of the surplus of the living resources of the same sub-region or region'.

²⁷On this point see n 12 above at 162-164.

²⁸On the cooperation amongst states on the high seas with respect to fishing, see Bastos n 2 above at 658-684 and 695-705.

- (vii) The legal regime of internationalisation of the Area in part XI of the Convention, as amended by the 1994 Agreement.²⁹
- (viii) The imposition on states of a general obligation to protect and preserve the marine environment (art 192).
- (ix) The promotion of international cooperation in marine scientific research for peaceful purposes (arts 242 to 244).
- (x) The promotion of international cooperation for the development and transfer of marine technology (Part XIV of the Convention).

Reconciling the interests of individual states and their collective interests led to the formulation of a number of provisions where the coordination of actions amongst states should preferably be carried out through international inter-governmental organisations:

- (i) In developing proper conservation and management measures of the living resources in the exclusive economic zones (par 2 of art 61).
- (ii) In preparing measures ensuring conservation and promoting the objective of the optimum utilisation of highly migratory species (par 2 of art 64, supplemented later by the Agreement of 1995³⁰).
- (iii) In preparing measures to prohibit, limit, or regulate the exploitation of marine mammals (art 65).
- (iv) In contributing and exchanging scientific information, catch and fishing effort statistics, and other data relevant to determining the allowable catch and establishing other conservation and management measures of the living resources of the high seas (par 2 of art 119).
- (v) In cooperation programmes amongst states bordering on enclosed or semi-enclosed seas (art 123).
- (vi) Within international programmes of marine scientific research in the Area (subparagraph (b) of par 3 of art 143).
- (vii) In formulating and elaborating international rules, standards, and recommended practices and procedures for the preservation of the marine environment (art 197).

²⁹Paragraph 1 of art 140 (Benefit of mankind) is particularly significant in this context when it provides that 'activities in the Area shall, as specifically provided for in this part, be carried out for the benefit of mankind as a whole, irrespective of the geographical location of States, whether coastal or land-locked, and taking into particular consideration the interests and needs of developing States ...'. The Advisory Opinion of the Seabed Disputes Chamber of 1 February 2011 imposes concrete behaviour in relation to it on states sponsoring entities carrying out exploitation of mineral resources in the Area when it states that '[t]he role of the sponsoring State, as set out in the Convention, contributes to realization of the common interest of all States in the proper application of the principle of the common heritage of mankind which requires faithful compliance with the obligations set out in Part XI' (§ 76).

³⁰On the 1995 Agreement see Bastos n 2 above at 685-694.

- (viii) In developing and promoting contingency plans for responding to pollution incidents in the marine environment (art 199).
- (ix) In promoting studies, undertaking programmes of scientific research, and encouraging the exchange of information and data acquired about pollution of the marine environment, as well as in establishing appropriate scientific criteria for the formulation and elaboration of rules, standards, and recommended practices and procedures for the prevention, reduction, and control of pollution of the marine environment (arts 200 and 201).
- (x) In the control of the risks of pollution and the effects of pollution of the marine environment (art 204).
- (xi) In the formulation and elaboration of global and regional rules and standards, as well as recommended practices and procedures for the protection, reduction, and control of pollution of the marine environment from activities relating to the seabed under national jurisdiction (par 5 of art 208).
- (xii) In the formulation and elaboration of global and regional rules, standards, and recommended practices and procedures for the prevention, reduction, and control of marine pollution by dumping (par 4 of art 210).
- (xiii) In establishing rules and norms of an international character for the prevention, reduction, and control of marine pollution from vessels, and promoting the adoption of fastening systems of traffic to minimise the risk of accidents which might cause pollution to the marine environment (par 1 of art 211).
- (xiv) In establishing rules and standards, as well as recommended practices and procedures, for the prevention, reduction, and control of pollution of the marine environment from or through the atmosphere (par 3 of art 212).
- (xv) In the creation of conditions conducive to the realisation of marine scientific research in the marine environment and to integrate the efforts of scientists studying the nature and interrelationships of phenomena and processes occurring in the marine environment (art 243).
- (xvi) In promoting the dissemination of data and scientific information, transference of knowledge resulting from marine scientific research, and the development of training programmes and training of technical and scientific personnel of developing states in order to strengthen their autonomous scientific capacity (par 2 of art 244).
- (xvii) In promoting the establishment of general criteria and guidelines that help states to determine the nature and implications of marine scientific research (art 251).

- (xviii) In promoting the development and transfer of marine science and technology according to fair and reasonable conditions (par 1 of art 266 and art 270).
- (xix) In promoting the training and education of nationals of developing states on marine technology (subparagraph (d) of art 268 and art 269).
- (xx) In the promotion and establishment of guidelines, criteria, and standards for the transfer of marine technology (art 271).
- (xxi) In the establishment of national centres of scientific and technological marine research and the strengthening of existing national centres (art 275).

The pursuit of strictly individual interests by states through ocean management and the uses of the oceans continued, however, to have an importance in the Convention that cannot be ignored, and this becomes obvious in the following instances.

- (i) In the acceptance of the discretion with which the coastal state may draw straight baselines for fixing its internal waters (art 7).³¹
- (ii) In the assigning to coastal states of virtually all living, catchable, natural resources, to the extent that about 90% of species of economic interest are within the exclusive economic zones of states.³²
- (iii) In providing ‘sovereign rights’ to the exploration and exploitation of natural resources of the continental shelf up to 200 nautical miles (art 77).³³⁻³⁴

³¹For further developments see Bastos n 2 above at 270-280.

³²In terms of subparagraph (a) of par 1 of art 56 (Rights, jurisdiction and duties of the coastal state in the exclusive economic zone), the coastal state has ‘[s]overeign rights for the purpose of exploring and exploiting, conserving and managing the natural resources, whether living or non-living, of the waters superjacent to the sea-bed ...’.

³³In accordance with par 4 of art 77 (Rights of the coastal State over the continental shelf) should be understood as natural resources ‘mineral and other non-living resources of the sea-bed and other non-living of the sea-bed and subsoil resources of the sea-bed and other non-living of the sea-bed and subsoil together with living together with living organisms belonging to sedentary species ...’.

³⁴The synthesis by Tuerk n 12 above at 161 and 162, gives a clear idea of the consequences of the ownership of non-living marine resources undertaken by coastal states, when he states that ‘[t]he EEZ probably represents the largest transfer of resources to national jurisdiction in history as these zones cover about 8 per cent of the surface of the earth, 36 per cent of the surface of the seas and contain an estimated 87 per cent of the offshore hydrocarbon resources. If one adds to the area of EEZs the area of the continental shelf where it extends beyond 200 nm – up to 350 nm from the baselines or up to 100 nm from the 2,500 metre isobaths – an estimated 97 per cent of the offshore hydrocarbon resources fall under national jurisdiction.’

- (iv) In the discretion and, in certain situations, the arbitrariness, with which the state, whether coastal or landlocked, can attribute its nationality to ships (art 91), and how the exclusive jurisdiction of the flag state in controlling the activity of ships which have their nationality, may subvert or even reduce to actual irrelevance the duties that are imposed on these states over the various maritime spaces (arts 92 and 94).³⁵
- (v) By not creating any relevant regulation on the legal regime of warships and government ships operated for non-commercial purposes (arts 32, 95, 96 and 236).³⁶
- (vi) In the very broad freedom of choice of means of dispute settlement under Part XV of the Convention.³⁷⁻³⁸

The enumeration reveals that the governance of ocean spaces, and its uses adopted in the Convention, is fundamentally based on reconciling individual and collective interests. No mechanisms appropriate to furthering interests designed as community interests, were created. It is possible to conclude that the articles of the Convention organised ocean management in accordance with the fifth and sixth models initially provided. This is in view of activities pursued individually by states, by the cooperation amongst states through voluntary participation in intergovernmental international organisations, and, in certain matters, the allocation to certain international intergovernmental organisations of the regulatory function as to how certain activities should be conducted.³⁹

A few references to the issue of the protection of community interests (or the interests ‘of the international community’) conclude this study.

³⁵For further developments see Bastos n 2 above at 609-615.

³⁶In accordance with art 32 (Immunities of warships and other government ships operated for non-commercial purposes) ‘with such exceptions as are contained in subsection A and in articles 30 and 31, nothing in this Convention affects the immunities of warships and other government ships operated for non-commercial purposes’.

³⁷For further developments see Bastos n 2 above at 209-225.

³⁸In this matter the limits set out in art 297 (Limitations on applicability of section 2) are particularly significant, highlighting subparagraph (a) of par 3, which provides that ‘the coastal State shall not be obliged to accept the submission to such settlement of any dispute relating to its sovereign rights with respect to the living resources in the exclusive economic zone or their exercise, including its discretionary powers for determining the allowable catch, its harvesting capacity, the allocation of surpluses to other States and the terms and conditions established in its conservation and management laws and regulations’.

³⁹The best example in this regard is how a mandate to regulate shipping activities was gradually assigned to the International Maritime Organisation (IMO).

5 The United Nations Convention on the Law of the Sea as a manifestation of the interests of the international community and of humanity

The International Community represents an ideal of planetary organisation of the entire human race. It starts with the unit and the finiteness of the earth and the essential identity of the people who inhabit it. It aims to provide appropriate mechanisms for the peaceful coexistence of present generations, and guarantees for the existence of conditions of life and reproduction necessary to the emergence of future generations.

Contemporaneously, the virtues of the idea of an international community are mostly associated with a need for the creation of an authority that can supercede the power of individual states. The aim is to create an entity that can act in the interests of the community, reducing to proper proportions the individual interests of each of the subjects of international law and the entities that comprise such a community. It is with this awareness that criticisms commonly directed at the actions of the United Nations and the inadequacy of its powers, notably as a result of the dominance of some states in the Security Council, should be noted.

There are, however, substantial differences between pursuing a set of parallel individual interests – even if they are classified as collective interests – and acting in accordance with the dictates of community interests of the international community or of humanity.⁴⁰ In the first case, the collaboration between states is always the result of a balancing of the individual interest of each of the participating states. In this case, each state has the ability, identically legitimate and sanctioned by international law, to collaborate or not to collaborate with other states.⁴¹ In the second case, however, the combined action of states as a consequence of the presence of community interests, will be the result of compliance of each of the states with interests that transcend their individual interests, regardless of the advantages that can be gained from such compliance. Accordingly, the issue of individual choice is relegated to being a secondary consideration because of the benefits that might result for all the subjects from a proper attention to the community interests involved.

⁴⁰ On this issue, based on Scelle's idea of *dédoublement fonctionnel*, see Ribeiro 'The protection of marine biodiversity: Importance of state power in pursuit the "general interest"' in Urbina and Iglesias Ponte (eds) *Protección of interests en el derecho collective del mar y cooperación internacional* (2012) 40-44.

⁴¹ A recent example is the opposition by Iceland to the creation of a Marine Protected Area in the seabed and subsoil of the northern part of the Charlie-Gibbs Fracture Zone, partially located in an area that corresponds to the Icelandic continental shelf beyond 200 nautical miles. On this issue, and the creation of Marine Protected Areas in general, see Ribeiro n 40 above at 45-52.

Accordingly, the existence of the international community (or ‘humanity’) with an autonomous nature, necessarily implies that its action is legitimised in accordance with community interests, notwithstanding the process that has been chosen to select or reveal them. The present international community dominated by states,⁴² is not incompatible with the existence of community interests parallel or superior to, the individual interest of each of the existing states, but the articles of the Convention offer no really tangible option in that direction. The Convention simply defines community interests as interests that should be pursued collectively by states, even when they are qualified as the interests ‘of the international community’.

It is possible to find some provisions with directives for action in accordance with the interests of the international community and humanity in the Convention. In this context, the following articles can be mentioned: article 59, with the provision that conflicts regarding the attribution of rights and jurisdiction in the exclusive economic zone should be solved ‘taking into account the respective importance of the interests involved to the parties and to the whole international community’; article 137, where it is established that the ‘rights over the resources of the Area belong to humanity in general’; article 140, which is devoted to activities in the Area that shall be carried out to ‘the benefit of mankind in general’; and paragraph 3 of article 246, where it is established that scientific research in the exclusive economic zone and the continental shelf should be pursued in order to ‘increase scientific knowledge of the marine environment for the benefit of all mankind’.

The provisions mentioned above imply that there are two different situations when it comes to the pursuit of community interests. One situation is the creation of an entity distinct from states, with its own, specific mechanisms to act, in accordance with the first model of governance of the ocean space, and its uses initially referred to. Another situation, that is completely different, is the attribution of the power to act on behalf of the international community and humanity, as a means of legitimising the actions of states,⁴³ regardless of

⁴²For further developments see Bastos n 2 above at 727-736.

⁴³In this sense, the position taken by the Seabed Disputes Chamber of the International Tribunal for the Law of the Sea on the Advisory Opinion of 1 February, 2011, is illuminating. It stated at § 230, that ‘in the sphere of the obligation to assist the Authority acting on behalf of mankind as a whole, while deciding what measures are reasonably appropriate, the sponsoring State must take into account, objectively, the relevant options in a manner that is reasonable, relevant and conducive to the benefit of mankind as a whole. It must act in good faith, especially when its action is likely to affect prejudicially the interests of mankind as a whole.’ Accordingly, in the conclusions of the Advisory Opinion (§ 242, p. 75), the Seabed Disputes Chamber states that ‘[t]he sponsoring State does not have absolute discretion with respect to the adoption of laws and regulations and taking of administrative measures. It must act in good faith, taking the various options into account in a manner that is reasonable, relevant and conducive to the benefit

the existence of the international community and humanity as autonomous legal entities,⁴⁴ because participation in the framework of the Convention is not mandatory.

The Convention has not resulted in any radical change in this area, notwithstanding the objectives that were articulated during its negotiation. Indeed, regardless of the need for a radically different and the fairest future organisational model, changing the present model of international organisation requires a set of modifications that would radically alter the fundamental structural features of the international legal system in force, in particular at the level of the subjects, the production of law, and conflict resolution. None of this took place as a result of the conclusion and entry into force of the Convention.

As for the subjects, the international legal system continues to be based on states. States continue to monopolise the representation of diverse interests – internal or international – or, from another perspective, individual interests of states, collective interests, or so-called ‘community interests’. This means in practice, as evidenced by the actions of the Security Council of the United Nations, that there is no representation of a community interest distinct from the interests of states in their entirety or, what is even more reductive, from the interests of certain groups of states. The changes introduced by the Convention have not yet reached a level where an autonomous expression of the diverse interests, whether sectorial, through the aggregation of individuals in non-governmental organisations or transnational corporations, or, on a global basis, by the recognition of the international community or humanity as international legal subject distinct from states, can be said to exist.

Regarding the making of law, the main and most relevant sources of international law – custom and treaties – continue to reflect the will of states. In the absence of any entities placed in a position of independence and superiority in relation to states, there is still no possibility of an expression of community interests, which is a key determinant for the existence of a legislative power equivalent to that which is characteristic of the rule of law. Participation in the formulation of the rules of international law is generally limited to states which have a relevant interest in the emergence of the

of mankind as a whole.’

⁴⁴On this issue, from the perspective of enforcement of international responsibility, see Vaurs-Chaumette ‘The international community as a whole’ in Crawford, Pellet and Olleson (eds) *The law of international responsibility* (2010) at 1023-1028, who conclude at 1027 that ‘the concept of international community today does not refer to a juridical person, which does not yet exist, but rather to an international public order which is not disaggregated even its though its manifestations may be’.

international rules under consideration. This means that, in practice, the creation of international law remains the exclusive domain of actions of individual states, either through their direct activities, or as moderated through international organisations.

As for the resolution of conflicts, states still prefer to resolve their disputes through negotiation, without the intervention of third parties, in order to secure the essential features of the solution that will be adopted. Situations where states generally accept the jurisdiction of international courts, continue to be exceptional. Similar to this are the specific cases where states involved in a dispute resort to an international tribunal or court,⁴⁵ or accept the intervention of a court of arbitration. Only after taking into consideration this cautious way of acting, is it possible to understand the extreme caution with which Part XV of the Convention was planned, regardless of whether it is genuinely innovative from an international law perspective.

6 Conclusions

The oceanic governance envisaged in the Convention has, as a basic assumption, advanced the idea that the use of the oceans does not imply ownership of the maritime spaces by states – in particular by coastal states – and that the use of the oceans pursued by several states in parallel can, and should, be reconciled and harmonised.

The alternatives to a governance model based solely on the pursuit of individual interests of states, is characterised by the following six distinct options:

- (i) firstly, by creating a community management of ocean space and its uses through an international entity distinct and independent from states, with supranational powers and appropriate mechanisms to punish the behaviour of offenders without the intermediation of states;
- (ii) secondly, by creating a community management of ocean space and its uses through an international entity distinct and independent from states, with a capacity to act in dependence on the collective intervention of states;

⁴⁵An indication of the reluctance of states to resolve their disputes through the intervention of a third party, is the number of cases submitted to the International Tribunal for the Law of the Sea since it start work in 1996. The most recent case, from October of this year, is only the 22th case since the beginning of its activities. It is a request for provisional measures, proposed by the Netherlands against the Russian Federation in a dispute concerning the arrest and detention of the vessel Arctic Sunrise and its crew by the authorities of the Russian Federation.

- (iii) thirdly, through the collective management of ocean space and its use by all states, while acting in a coordinated way as the International Community and with a capacity to act in dependence on the intervention of states;
- (iv) fourthly, through a governance of ocean space and its uses conducted by international intergovernmental organisations with the mandatory participation of states, as an expression of collective interests;
- (v) fifthly, through a governance of ocean space and its uses conducted by international intergovernmental organisations with voluntary participation of the states concerned, as an expression of a conciliation between individual interests and the collective interests of states; and, finally,
- (vi) by the cooperation between the states concerned, including through international intergovernmental organisations, as an expression of the conciliation between individual interests and collective interests of states.

The above models of ocean space governance are different in nature, and vary according to the degree of cooperation amongst states and the possibility of the creation of an international entity with powers of action not dependent on the intervention of states.

The governance of ocean space and its uses adopted in the Convention is fundamentally based on reconciling the individual interests of states and collective interests, and no appropriate mechanisms have been established in furtherance of so-called community interests. Activities in the ocean space are mainly organised according to the fifth and sixth models. That is, through activities pursued individually by states, with cooperation amongst states through voluntary participation in intergovernmental international organisations, notwithstanding the allocation of a regulatory function to certain international intergovernmental organisations on specific maritime matters.

The existence of the international community (or 'humanity') with an autonomous nature, necessarily implies that its action is legitimised in accordance with community interests, notwithstanding the process that has been chosen to select or reveal them. The present International Community dominated by the states is not incompatible with the existence of community interests parallel or superior to, the individual interest of each of the states, but the articles of the Convention are inconclusive in this regard. The Convention simply organises community interests as interests that should be pursued collectively by state members of the Convention, without making their participation mandatory.