

Oceans and the law of the sea

Report of the Secretary-General

Addendum

F. Legal issues

176. The present section is divided into two parts: the first part presents information on the jurisdictional framework and the general principles applicable to the conservation and sustainable use of marine biodiversity beyond areas of national jurisdiction and explains the legal framework provided by UNCLOS and other relevant instruments. The second part addresses legal issues relating to genetic resources.

1. Legal framework for the conservation and sustainable use of marine biodiversity beyond national jurisdiction

177. UNCLOS establishes the legal framework for all activities in the oceans. As stated in its preamble, UNCLOS sets out a legal order for the seas and oceans to facilitate international communication and promote peaceful uses of the seas and oceans, equitable and efficient utilization of their resources, conservation of their living resources and study, protection and preservation of the marine environment.

178. UNCLOS does not specifically address issues relating to biodiversity. However, as the Convention applies to all activities in the oceans, its jurisdictional framework and general principles also apply to the conservation and sustainable use of biodiversity, including in areas beyond national jurisdiction.

(a) Jurisdictional framework

179. In setting out a comprehensive set of rules governing ocean activities, UNCLOS divides marine space into a number of zones, divided both horizontally and vertically. Vertically, the sea is divided into the seabed or ocean floor and the superjacent water column. Horizontally, space is measured from baselines extending along the coast, in accordance with articles 5 and 7 of the Convention. In the sea area between the baseline and the coast, called “internal waters”, the coastal State enjoys absolute sovereignty. Extending seawards from the baselines for up to 12 nautical miles is the territorial sea, where the coastal State also enjoys sovereignty, with the exception of a right to innocent passage by foreign ships (article 8). In the exclusive economic zone, which may extend up to 200 miles from the coast, coastal States enjoy sovereign rights over natural resources, both living and non-living, as well as jurisdiction for the construction of artificial islands, the protection of the marine environment and over marine scientific research (article 56). Although in most cases the seabed beyond the territorial sea, termed “the continental shelf”, is subsumed within the regime of the exclusive economic zone, where the physical shelf extends beyond the 200-mile limit, the sovereign rights of the coastal State over the mineral resources of the shelf and the living “sedentary species” attached to it continue up to the limits set out in article 76 of the Convention.

180. The water column that is not included in the exclusive economic zone, the territorial sea or the internal waters of a State, or in the archipelagic waters of an archipelagic State, constitutes the “high seas” (article 86). Under part VII of the Convention, the high seas are open to all States, under the regime of the freedom of the high seas. The freedom of the high seas includes freedom of navigation; freedom of overflight; freedom to lay submarine cables and pipelines; freedom to construct artificial islands and other installations, subject to part VI; freedom of fishing and freedom of marine scientific research, subject to parts VI and XII. These freedoms must be exercised by all States with due regard for other States’ interests in their exercise of high-seas freedoms (article 87). High-seas freedoms must also be exercised under the conditions laid down by UNCLOS, including the provisions on

the conservation and management of living resources (part VII, section 2), the general obligations to protect and preserve the marine environment (part XII) and by other rules of international law.

181. Under UNCLOS, the seabed and ocean floor and subsoil thereof beyond the limits of national jurisdiction have been designated as “the Area” (article 1, para. 1 (1)). Part XI of UNCLOS and the 1994 Agreement relating to the Implementation of Part XI of UNCLOS (the Part XI Agreement) specifically define the legal regime for the Area. The Area and its resources are the common heritage of mankind (article 136). Resources are defined in article 133 to mean “all solid, liquid and gaseous mineral resources in situ in the Area at or beneath the seabed, including polymetallic nodules”. The International Seabed Authority is the organization through which States organize and control all activities of exploration for and exploitation of the resources of the Area (article 1, para. 1 (3)), particularly with a view to administering mining activities in the Area (article 157). Activities must be carried out for the benefit of mankind as a whole and the Authority must provide for the equitable sharing of financial and other economic benefits derived from activities in the Area (article 140).

182. The continental shelf shall not extend beyond the limits defined in article 76 of UNCLOS and the coastal State is required to delineate the outer limit of its continental shelf in accordance with the provisions of that article.

183. As provided in article 77, coastal States exercise sovereign rights for the purpose of exploring the continental shelf and exploiting its natural resources. The natural resources consist of the mineral and other non-living resources of the seabed and subsoil, together with living organisms belonging to sedentary species, defined as organisms which, at the harvestable stage, are either immobile on or under the seabed or unable to move except in constant physical contact with the seabed or the subsoil. The extent to which the definition of sedentary species under article 77 covers the complex web of life of deep-sea ecosystems may need to be addressed in order to clarify whether such ecosystems and organisms belong to the regime of the continental shelf or of the water column above it. The issue is important since, beyond the 200 nautical mile limit, or within that limit in cases where an exclusive economic zone has not been declared, while the coastal State has sovereign rights over biological resources belonging to sedentary species on the continental shelf, other biological resources are subject to the regime of the high seas. In the context of conservation and sustainable use, the relationship between high-seas activities, in particular fishing, and a coastal State’s sovereign rights over the sedentary species of the continental shelf may therefore need to be clarified.

(b) Instruments relevant to the conservation and sustainable use of marine biodiversity beyond areas of national jurisdiction

184. UNCLOS establishes the legal framework for all activities in the oceans and contains the general principles applicable to the conservation and sustainable use of marine biodiversity in areas beyond the limits of national jurisdiction. It is supplemented by a number of specialized instruments, concluded either prior to or after its adoption or which may be concluded in order to implement its general principles. Articles 237 and 311 of UNCLOS define its relationship with these instruments. Below is a brief summary of the relevant instruments that directly or indirectly address issues relevant to the conservation and sustainable use of biodiversity in areas beyond national jurisdiction. Some of the instruments referred to aim at regulating specific activities, such as those discussed in chapter II.E above on environmental issues, others address the conservation and sustainable use of biodiversity itself.¹⁵⁷

Instruments addressing biodiversity

185. The Convention on Biological Diversity is complementary to UNCLOS in relation to its specific objectives.¹⁵⁸ Pursuant to its article 1, the three objectives of the Convention on Biological Diversity are the conservation of biological diversity,

the sustainable use of its components and the fair and equitable sharing of the benefits arising out of the utilization of genetic resources, including by appropriate access to genetic resources, by appropriate transfer of relevant technologies, taking into account all rights over those resources and to technologies, and by appropriate funding. While in areas within national jurisdiction the Convention on Biological Diversity applies both to components of biological diversity and to processes and activities carried out under the jurisdiction or control of States, in areas beyond national jurisdiction, that Convention applies only to processes and activities carried out under the authority of States (article 4). This means that the Convention on Biological Diversity does not apply to the components of marine biodiversity beyond national jurisdiction. Nevertheless, in accordance with article 5, States party to that Convention are required to cooperate directly, or through competent international organizations, for the conservation and sustainable use of biodiversity beyond national jurisdiction (see also A/59/62/Add.1, paras. 254-260). In carrying out activities beyond national jurisdiction that have, or are likely to have, a significant adverse impact on the conservation and sustainable use of biodiversity, States parties must take into account the provisions of the Convention (articles 6 to 14) and the policy decisions taken by its Conference of the Parties.

186. Other relevant instruments include the Convention on Migratory Species (including its regional agreements: the Agreement on the Conservation of Cetaceans of the Black Sea, Mediterranean Sea and Contiguous Atlantic Area, the Agreement on the Conservation of Small Cetaceans of the Baltic and North Seas and the Agreement on the Conservation of Albatrosses and Petrels, under which parties agree to take, individually or in cooperation, appropriate and necessary steps to conserve migratory species and their habitats; and the Convention on International Trade of Endangered Species, which provides measures to curtail global trade in threatened and endangered species. Among marine listings established under these instruments are many species of cetaceans, marine turtles and corals (see also A/59/62/Rev.1, paras. 261-264).

Living resources of the high seas

187. The conservation and management of the living resources of the high seas is addressed in articles 116 to 120 of UNCLOS. Fishing on the high seas must be exercised in conformity with the general provisions on conservation and management, as well as with a number of specific global and regional instruments that require high-seas fishing States to cooperate in the establishment of conservation and management measures in the high seas. At the global level, relevant instruments include the United Nations Agreement for the Implementation 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 Highly Migratory Fish Stocks and the 1993 FAO Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas (see also A/59/62/Add.1, paras. 301-305 and A/59/298, paras. 105-107). At the regional level, the duty of States to cooperate for the conservation and management of marine living resources is implemented through regional fisheries management conventions and arrangements. The regional organizations created under these instruments establish conservation and management measures for specific areas and species in accordance with their mandates. Not all areas beyond national jurisdiction are covered by regional fisheries management organizations and most of these organizations do not manage all fish species (see also A/59/298, paras. 131-149). In addition, the 1946 International Convention for the Regulation of Whaling regulates the conservation and utilization of whale resources.

188. Non-binding instruments relevant in this regard include the FAO Code of Conduct for Responsible Fisheries and four FAO international plans of action. The Reykjavik Declaration on Responsible Fisheries in the Marine Ecosystem and the second supplement to the FAO Technical Guidelines for Responsible Fisheries, on

the ecosystem approach to fisheries, provide voluntary guidelines on the implementation of the ecosystem approach (see also A/59/298, paras. 110-112).

Navigation

189. Navigation on the high seas is subject to the general provisions under UNCLOS on the prevention, reduction and control of pollution from vessels and the duty of the flag State (articles 194, 211 and 217-220), which are reinforced by a number of specific instruments adopted by IMO, including the International Convention for the Prevention of Pollution from Ships, 1973, as modified by the Protocol of 1978 relating thereto, the International Convention on the Control of Harmful Anti-fouling Systems on Ships and the International Convention for the Control and Management of Ships' Ballast Water and Sediments (see also A/59/62/Add.1, paras. 265-270).

Marine scientific research

190. Marine scientific research must be carried out in conformity with the provisions contained in part XIII of UNCLOS, including the general principles under article 240. These include the requirement that marine scientific research must be conducted in compliance with all relevant regulations adopted in conformity with UNCLOS, including those for the protection of the marine environment (see also paras. 203 to 205 below).

Cables, pipelines and artificial islands

191. The laying of submarine cables and pipelines is also subject to UNCLOS general provisions on the protection of the marine environment. The same applies to the construction of artificial islands and other installations, which are also regulated by the 1978 Protocol relating to the Convention for the Prevention of Pollution from Ships as regards discharges, while the 1972 London Convention covers their deliberate disposal at sea.

Protection and preservation of the marine environment

192. The protection and preservation of the marine environment is addressed in general by the comprehensive framework set out in part XII of UNCLOS. Article 192 establishes a general obligation for States to protect and preserve the marine environment. States are required to take all measures necessary to prevent, reduce and control pollution of the marine environment from any source, using "the best practicable means at their disposal and in accordance with their capabilities" (article 194, para. 1). In particular, States must "protect and preserve rare or fragile ecosystems as well as the habitat of depleted, threatened or endangered species and other forms of marine life" (article 194, para. 5). States are also required to avoid the use of technologies, or the intentional or accidental introduction of alien species to a particular part of the environment, which may cause harmful changes thereto (article 196). In addition, States are required to exercise their prescriptive and enforcement jurisdictions to prevent, reduce and control pollution from all sources (articles 194, para. 1, 207, para. 1, 208, para. 1, 209, para. 2, 210, para. 1, 211, paras. 2-4, 212, para. 1 and section 6 of part XII generally on enforcement). They are also to cooperate on a global and, as appropriate, on a regional basis, in the formulation of international rules, standards, recommended practices for the protection and preservation of the marine environment (articles 207, para. 4, 208, para. 5, 209, para. 1, 210, para. 4, 211, para. 1, 212, para. 3). They must monitor the risks or effects of pollution of any activities conducted under their control, as well as assess the potential effects of planned activities on the marine environment (articles 204-206). Moreover, States are required to provide scientific and technical assistance to developing States to enhance their capabilities to protect and preserve the marine environment (articles 202 and 203). Pursuant to article 235, States are responsible for the fulfilment of their international obligations concerning the protection and preservation of the marine environment and they are liable in accordance with international law. They are also responsible and liable for damage caused by pollution of the marine environment arising out of marine scientific research undertaken by them or on their behalf (article 263).

193. The obligations for States to protect and preserve the marine environment are complemented by a number of international instruments, including the IMO instruments mentioned in paragraph 189 above dealing with pollution from vessels, the 1972 London Convention and its 1996 Protocol and the non-binding Global Programme of Action. Other conventions whose implementation would enhance the conservation and sustainable use of biodiversity beyond national jurisdiction, even though they do not directly address the issue, include the United Nations Framework Convention on Climate Change, the Kyoto Protocol thereto and the Stockholm Convention on Persistent Organic Pollutants (see also A/59/62/Add.1, paras. 271-273 and 275).

194. As envisaged under article 197 of UNCLOS on regional cooperation, a number of regional seas conventions and action plans address the protection of the marine environment, including through measures specifically dealing with marine biodiversity, on a regional basis (see also A/59/62/Add.1, paras. 279-287).¹⁵⁹

195. The protection of the marine environment from harmful effects that may arise from activities in the Area, is provided for by article 145, under which the International Seabed Authority must adopt measures, including the protection and conservation of the natural resources of the Area and the prevention of damage to the flora and fauna of the marine environment of the Area. The Authority has adopted Regulations on Prospecting and Exploration for Polymetallic Nodules¹⁶⁰ and is currently considering draft regulations for prospecting and exploration of polymetallic sulphide and cobalt-rich crust deposits. These regulations have a strong environmental element aiming, inter alia, at the protection and conservation of the natural resources of the Area and the prevention of damage to marine biodiversity. The Authority also plays an important role in promoting marine scientific research in the Area (article 143; see also paras. 204 and 205 below and A/59/62/Add.1, paras. 252 and 253).

Protection of specific areas and species

196. Some of the legal instruments mentioned above provide for defined geographic areas, including beyond national jurisdiction, to be placed under a higher level of protection than the waters and/or seabed around them (for example, the 1978 Protocol relating to the Convention for the Prevention of Pollution from Ships; the IMO "Guidelines for the Identification and Designation of Particularly Sensitive Sea Areas, which provide for the designation of areas within and beyond the limits of the territorial sea; measures adopted under regional fisheries management conventions and arrangements; the Convention on Migratory Species; and the Regulations on Prospecting and Exploration for Polymetallic Nodules of the International Seabed Authority). At the regional level, some binding legal agreements provide for multiple-use marine protected areas beyond national jurisdiction, while ensuring that the regulation of particular activities is consistent with high-seas freedoms under UNCLOS (for example, the Convention for the Protection of the Marine Environment of the North East Atlantic and the 1995 Protocol Concerning Specially Protected Areas and Biological Diversity in the Mediterranean to the Convention for the Protection of the Marine Environment and the Coastal Region of the Mediterranean). High seas sanctuaries, where commercial whaling is prohibited, have been established under the International Convention for the Regulation of Whaling in the Southern Ocean and the Indian Ocean.¹⁶¹