Protection of Community Interests in International Law: The Case of the Law of the Sea

*Yoshifumi Tanaka**

A. von Bogdandy and R. Wolfrum, (eds.),
Max Planck Yearbook of United Nations Law, Volume 15, 2011, p. 329-375.

I. Introduction

1. The Emergence of Community Interests in International Law

It is argued that growing awareness of common interests of the international community leads to the structural change of international law. For instance, in 1994, Judge *Simma* stated that "[A] rising awareness of the common interests of the international community, a community that comprises not only states, but in the last instance all human beings, has begun to change the nature of international law profoundly."[1] More recently, the learned Judge highlighted that,

> "Indeed, international law has undoubtedly entered a stage at which it does not exhaust itself in correlative rights and obligations running between states, but also incorporates common interests of the international community as a whole, including not only states but all human beings."[2]

Likewise, Judge *Cançado Trindade* expressed the view that, "The growing consciousness of the need to bear in mind common values in pursuance of common interests has brought about a fundamental change in the outlook of International Law in the last decade."[3]

The "common interest of the international community as a whole" or "community interests" are an elusive concept and it is difficult to *a*

---

* The author would like to dedicate this article to Professor Lucius Caflisch for his seventy-fifth anniversary.

1 B. Simma, "From Bilateralism to Community Interest in International Law", *RdC* 250 (1994), 217 et seq. (234).

2 Id., "Universality of International Law from the Perspective of a Practitioner", *EJIL* 20 (2009), 265 et seq. (268). Furthermore, in the Festschrift in his honour, many writers addressed community interests in international law. See U. Fastenrath/ R. Geiger/ D.E. Khan/ A. Paulus/ S. von Schorlemer/ C. Vedder (eds), *From Bilateralism to Community Interest: Essays in Honour of Judge Bruno Simma*, 2011.

3 A.A. Cançando Trindade, "International Law for Humankind: Towards a New *Jus Gentium*", *RdC* 316 (2005), 9 et seq. (35). See also V. Gowlland-Debbas, "Judicial Insights into Fundamental Values and Interests of the International Community", in: A.S. Muller et al. (eds), *The International Court of Justice: Its Future Role after Fifty Years*, 1997, 327 et seq.; id., "An Emerging International Public Policy?", in: Fastenrath et al., see note 2, 241 et seq.

priori define it in the abstract.[4] As *Simma* himself pointedly observed, the existence of common interests does not derive from scientific abstraction but rather flows from the recognition of concrete problems.[5] Despite its elusive nature, it appears that currently no one can deny the increasing importance of the protection of community interests which transcend interests of each state and involve the vital needs for the survival of mankind.

In fact, at the normative level, the community interests seem to be reflected in legal concepts, such as *jus cogens*,[6] obligations *erga omnes*,[7] invocation of responsibility by a state other than an injured state,[8] individual criminal responsibility,[9] etc. While no detailed examination of

---

4 In this contribution, the term "common interests of the international community" and "community interests" will be used interchangeably.

5 Simma tentatively defines "community interests" as "a consensus according to which respect for certain fundamental values is not to be left to the free disposition of states individually or *inter se* but is recognized and sanctioned by international law as a matter of concern to all states." Simma, see note 1, 233. According to Simma, examples of common interests include: international peace and security, solidarity between developed and developing countries, protection of the environment, the common heritage of mankind, and the protection of human rights, ibid., 235 et seq. For an analysis of the concept of community interests, see I. Feichtner, "Community Interest", in: R. Wolfrum (ed.), *Max Planck Encyclopedia of Public International Law*, 2011.

6 Article 53 of the Vienna Convention on the Law of Treaties.

7 The *Barcelona Traction*, ICJ Reports 1970, 3 et seq. (32, paras 33-34). The Institut de Droit International defines an obligation *erga omnes* as "an obligation under general international law that a state owes in any given case to the international community, in view of its common values and its concern for compliance, so that a breach of that obligation enables all states to take action." Resolution of the Krakow Session, Obligations *Erga Omnes* in International Law, 2005, article 1 (a), available at <http://www.idi-iil.org>.

8 Cf. arts 40, 41 and 48 of the ILC's Draft Articles on Responsibility of States for Internationally Wrongful Acts. For an analysis in some detail of the concept of the "injured state", see in particular, K. Kawasaki, "The 'Injured State' in the International Law of State Responsibility", *Hitotsubashi Journal of Law and Politics* 28 (2000), 17 et seq. See also, by the same writer, "Draft Articles on State Responsibility Adopted by the International Law Commission in 2001: A Brief Overview", *Hitotsubashi Journal of Law and Politics* 30 (2002), 35 et seq.

9 Cf. preamble, para. 4, Rome Statute of the International Criminal Court.

these concepts can be made here, it can be observed that to a certain extent, they are enshrined in positive international law.[10] In this sense, it may be said that the protection of community interests is gradually being effected in positive international law.

On the other hand, an issue that needs further consideration is whether and to what extent effective mechanisms for the protection of community interests exist in contemporary international law. In this regard, *Villalpando* pointedly observed that, "International law, in other words, has been very conservative of its traditional institutions, which have not been challenged by the new developments towards the protection of community interests …"[11]

In his view, "the objective of achieving the common good has been pursued through legal tools that were not, at their origins, elaborated for that purpose and are better suited to the protection of individual interests."[12]

Likewise, *Sato* pointed to "a problem or dilemma inherent in the international society, where there is no alternative but to act by means of treaties which can, based on the principle of contract, bind only consenting states in order even to realize the public interest and organization despite the fact that the public interest of the whole of international society has become apparent."[13]

In response to this dilemma, it becomes necessary to explore possibilities of effective mechanisms for the protection of community interests in international law.

2. Limits of the Principle of Reciprocity

In this regard, particular attention must be devoted to the limits of the principle of reciprocity as a mechanism for ensuring compliance with

---

10 In his recent article, Villalpando has persuasively demonstrated the emergence of community interests in positive international law by examining those concepts. S. Villalpando, "The Legal Dimension of the International Community: How Community Interests are Protected in International Law", *EJIL* 21 (2010), 387 et seq.

11 Ibid., 410.

12 Ibid.

13 T. Sato, "Legitimacy of International Organizations and Their Decisions: Challenges that International Organizations Face in the 21st Century", *Hitotsubashi Journal of Law and Politics* 37 (2009), 11 et seq. (15).

rules of international law. While this principle has more than one meaning, it may be defined as "the relationship between two or more states according each other identical or equivalent treatment."[14] According to this principle, compliance with rules of law results from the interest a state perceives in the reciprocal action of another state or states. In other words, the principle of reciprocity seeks to secure the national interest of each state on the basis of the symmetry of rights and obligations.[15] Where a state breached an obligation, in response, an injured state may take countermeasures against the responsible state, or terminate or suspend treaty relations in accordance with article 60 of the Vienna Convention on the Law of Treaties.

Traditionally reciprocity has been a principal *leitmotiv* for compliance with rules of international law. In particular, the principle of reciprocity plays an important role in respect of the law of treaties, the law of armed conflict, rules on the treatment of aliens, the law of diplomatic privileges and immunities and the law of international economic relations, etc.[16] Considering that reciprocity rests on a decentralised nature of the international legal system, which is an essential character of international law, this principle will not lose its importance.

In certain fields of international law, however, the principle of reciprocity is seen as not being effective in securing compliance with relevant rules, the case in point being treaties concerning the protection of human rights. Those treaties seek to protect the dignity of the individual human being in general, detached from the individual interests of states. In this respect, the Inter-American Court of Human Rights held that "modern human rights treaties in general, and the American Convention in particular, are not multilateral treaties of the traditional type concluded to accomplish the reciprocal exchange of rights for the mu-

---

14 B. Simma, "Reciprocity", in: R. Bernhardt (ed.), *Encyclopedia of Public International Law*, Vol. IV, 2000, 29 et seq. (29).

15 H. Bull, *The Anarchical Society: A Study of Order in World Politics*, 3rd edition, 2002, 134; M. Virally, "Le principe de réciprocité dans le droit international contemporain", *RdC* 122 (1967), 1 et seq. (19).

16 Simma, see note 14, 30-31; Virally, see note 15, 22. It must be noted that the applicability of international humanitarian law does not rest only on reciprocal obligation. For instance, common article 3 of the Geneva Conventions and article 75 of Additional Protocol I are applicable regardless of reciprocity; A. Paulus, "Reciprocity Revisited", in: Fastenrath et al., see note 2, 113 et seq. (135).

tual benefit of the contracting states."[17] It may be said that the human rights treaties create objective obligations to protect community interests. Hence it is arguable that the principle of reciprocity ensuring reciprocal engagements cannot provide an adequate incentive for some states to comply with the human rights treaties.[18] In relation with this, it must be remembered that countermeasures shall not affect obligations for the protection of fundamental human rights.[19] Furthermore, article 60 para. 5 of the Vienna Convention on the Law of Treaties makes clear that termination or suspension of the operation of a treaty as a consequence of its breach does not "apply to provisions relating to the protection of the human person contained in treaties of humanitarian character, in particular, to provisions prohibiting any form of reprisals against persons protected by such treaties." Human rights law has already gained centre stage in international law and one can detect the increasing interactions between human rights law and other branches of international law, such as international human rights law and UN law. Furthermore, the ICJ, upheld the complementarity of human rights law and humanitarian law.[20] This situation might create a challenge with regard to the traditional mechanism of international law on the basis of the principle of reciprocity.

Similarly, the protection of the global environment seems to be considered as a community interest because ultimately environmental protection involves the protection of the life of all human beings in the

---

17 Advisory Opinion No. OC-2/82 of 24 September 1982, *The Effect of Reservations on the Entry into Force of the American Convention (Arts 74 and 75)*, reprinted in *ILM* 22 (1983), 37 et seq. (47, para. 29).

18 L. Henkin, *International Law: Politics and Value*, 1995, 206. Virally has argued that there is an antinomy between the principle of reciprocity and the protection of human rights. See Virally, see note 15, 20. See also Simma, see note 1, 242-243.

19 Article 50 (1) (b) of the ILC's Draft Articles on Responsibility of States for Internationally Wrongful Acts.

20 *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, ICJ Reports 2004, 136 et seq. (178, para. 106). See also Gowland-Debbas, see note 3, 247-255; J.A. Pastor Ridruejo, "Droit international des droits de l'homme et droit international humanitaire: leurs rapports à la lumière de la jurisprudence de la Court internationale de justice", in: M.G. Kohen (ed.), *Promoting Justice, Human Rights and Conflict Resolution through International Law. Liber Amicorum Lucius Caflisch*, 2007, 399-407.

world.[21] Like human rights treaties, treaties involving global environmental protection do not provide reciprocal obligations on the basis of mutual advantages because no single state is responsible and the interests of all states are at issue.[22] Furthermore, it must be noted that non-compliance by developing states with obligations concerning environmental protection may result from inadequate financial, technological and human resources. In some cases, it may be difficult for developing states to implement the same symmetrical obligations as developed states on this matter. Hence the effectiveness of global environmental protection cannot be supported relying exclusively on the principle of reciprocity which presupposes the formal equality of states.

The protection of community interests needs collective action because such interests involve vital needs for the survival of mankind as a whole. However, the principle of reciprocity essentially governs bilateral and contractual relations between atomistic states.[23] Accordingly, it may be argued that the traditional compliance mechanism on the basis of the principle of reciprocity contains an inherent limit in the protection of community interests.[24]

Actually the protection of community interests is increasingly important in the law of the sea,[25] and the effectiveness of the principle of reciprocity seems to be in need of reconsideration. A classical example involves the suppression of piracy.[26] Pirates have been considered as a *hostes humani generic* or "enemies of all mankind" and, consequently, on the high seas, or in any other place outside the jurisdiction of any state, "every state may seize a pirate ship or aircraft, or a ship or aircraft

---

21 Simma, see note 1, 238-240. For an analysis in some detail of community interests in the environmental protection, see J. Brunnée, "'Common Interest' – Echoes from an Empty Shell? Some Thoughts on Common Interest and International Environmental Law", *ZaöRV/ HJIL* 49 (1989), 791 et seq.; U. Beyerlin, "State Community Interests and Institution-Building in International Environmental Law", *ZaöRV/ HJIL* 56 (1996), 602 et seq.

22 A.E. Boyle, "Saving the World? Implementation and Enforcement of International Environmental Law Through International Institutions", *Journal of Environmental Law* 3 (1991), 229 et seq. (230).

23 Simma, see note 1, 232-233.

24 Paulus, see note 16, 123.

25 Cf. J.A. Pastor Ridruejo, "Le droit international à la veille du vingt et unième siècle: normes, faits et valeurs, Cours général de droit international public", *RdC* 274 (1998), 9 et seq. (254).

26 In this respect see the article by A.S. Kolb/ T.R. Salomon/ J. Udich in this Volume, 105 et seq.

taken by piracy and under the control of pirates, and arrest the persons and seize the property on board."[27] The courts of the state which carried out the seizure may decide upon the penalties to be imposed, and may also determine the action to be taken with regard to the ship, aircraft or property, subject to the rights of third parties acting in good faith. The seizure of piracy is the oldest and the most well attested example of universal jurisdiction.[28] Considering that piracy is a source of serious threat to sea communication and human life, the suppression of piracy can be regarded as a community interest. Since rules governing piracy do not rest on bilateral and contractual legal relations, it seems clear that the suppression of piracy cannot be effectively secured by the decentralised mechanisms on the basis of the principle of reciprocity. In fact, institutionalised counter-piracy operations through various organs, such as IMO, NATO, the European Union and the United Nations, are increasingly important.

A further illustrative example may be the legal regime governing the activities in the Area, namely, "the sea-bed and ocean floor and subsoil thereof, beyond the limits of national jurisdiction."[29] As will be seen, the Area and its resources are the common heritage of mankind, and its legal regime seeks to promote the benefit of mankind as a whole. It seems arguable that rules governing the Area are not based on mutual advantages between states, and, consequently, the effectiveness of these rules cannot be supported by the principle of reciprocity.

Furthermore, presently the protection of the marine environment is a matter of serious concern for the international community. Marine pollution severely damages the marine environment and ecosystems, and, in some cases, the environmental damage may be irreversible. Given that a healthy marine environment provides the foundation for all life, there appears to be a general sense that the protection of the marine environment is considered as a common interest of the international community as a whole. Substantive rules regulating marine pollu-

---

27 Article 105 of the 1982 United Nations Convention on the Law of the Sea (hereafter the UNCLOS). For the text of the Convention, UNTS Vol. 1833 No. I-31363.

28 M.D. Evans, "The Law of the Sea", in: M.D. Evans (ed.), *International Law*, 2nd edition, 2006, 623 et seq. (637); M. Shaw, *International Law*, 6th edition, 2008, 397. The UN Security Council, in S/RES/1976 (2011) of 11 April 2011, explicitly recognised that "piracy is a crime subject to universal jurisdiction", op. para. 14.

29 Article 1 (1) of the UNCLOS.

tion do not purport to provide reciprocal rights and obligations on the basis of mutual advantages. Hence the principle of reciprocity seems to be inadequate with a view to securing compliance with the rules on this subject.

Likewise the conservation of marine living resources is crucial because these resources are an important source of protein in a situation of food shortage at the global level. Yet the depletion of marine living resources is becoming a matter of more pressing concern.[30] State practice demonstrates that compliance with rules concerning the conservation of these resources cannot be effectively ensured by self-regulation on the basis of the principle of reciprocity.

Overall it is becoming apparent that the effectiveness of rules of the law of the sea cannot be supported only by the principle of reciprocity. A question thus arises how it is possible to protect community interests in law, without relying on the principle of reciprocity. With this question as a backdrop, this article will seek to address possible mechanisms for the protection of community interests in the specific context of the international law of the sea. In so doing, it will purport to identify basic models for the protection of community interests in international law. To this end, it will focus particularly on three issues.[31] After the introduction in Part I., Part II. will discuss the protection of community interests in the Area with particular reference to the jurisdiction of the International Seabed Authority (hereafter ISA). Part III. will address the protection of community interests in marine environmental protection. *Scelle's* theory of the law of dédoublement fonctionnel will provide an important insight into this consideration. Part IV. will examine the protection of community interests in conservation of marine living resources. On the basis of this consideration, models of the protection of community interests in international law will be discussed in Part IV.

---

30 For a recent study on conservation of marine living resources, see Y. Tanaka, "The Changing Approaches to Conservation of Marine Living Resources in International Law", *ZaöRV/ HJIL* 71 (2011), 291 et seq.

31 Thus this study will not seek to examine each and every issue which may involve community interests in the law of the sea. The role of international courts and tribunals in the protection of community interests is beyond the scope of this contribution because this is a distinct subject involving international dispute settlement. On this issue, see R. Wolfrum, "Enforcing Community Interests Through International Dispute Settlement: Reality or Utopia?", in: Fastenrath et al., see note 2, 1132 et seq.

II. Protection of Community Interests in the Area

1. Principle of the Common Heritage of Mankind

a. Community Interests in the Area

While the principle of the common heritage of mankind and related concepts can be seen in various branches of international law,[32] the most advanced regime on the basis of this principle can be found in the deep seabed regime governing the Area. Article 136 of the UNCLOS states "The Area and its resources are the common heritage of mankind." Thus all rights in the resources of the Area are vested in mankind as a whole, on whose behalf the ISA shall act by virtue of article 137 para. 2.[33] Article 140 para. 1 further 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 and of peoples who have not attained full independence or other self-governing status recognized by the United Nations in accordance with General Assembly resolution 1514 (XV) and other relevant General Assembly resolutions."

Article 140 para. 2 calls for the equitable sharing of financial and other economic benefits derived from activities in the Area through any appropriate mechanism, on a non-discriminatory basis, in accordance with article 160 para. 2 (f)(i). Moreover, article 141 provides that the Area shall be open to use exclusively for peaceful purposes by all states.

The cumulative effect of these provisions seems to suggest that the principle of the common heritage of mankind seeks to promote the common interest of mankind as a whole.[34] The term "mankind" is a trans-spatial and trans-temporal concept. It is trans-spatial because "mankind" includes all people on the planet. It is trans-temporal be-

---

32 See for instance article 11 of the 1979 Agreement Governing the Activities of States on the Moon and Other Celestial Bodies.

33 Under article 133 (a) of the UNCLOS, "resources" means "all solid, liquid or gaseous mineral resources *in situ* in the Area at or beneath the sea-bed, including polymetallic nodules."

34 Kiss considered that the common interest of mankind was the foundation of the common heritage of mankind. A.C. Kiss, "La notion de patrimoine commun de l'humanité", *RdC* 175 (1982), 99 et seq. (229 and 231).

cause "mankind" includes both present and future generations.[35] It would seem to follow that the common interest of mankind means the interest of all people of present and future generations. Considering that today the scope of the international community is well beyond the community of states,[36] it may be reasonable to argue that the concept of the common interest of mankind as a whole is equivalent to that of the community interest.

b. Raison d'être of the Principle of the Common Heritage of Mankind

In this regard, it is important to note that the principle of the common heritage of mankind emerged as an antithesis of the traditional principles governing the law. Traditionally the law of the sea was dominated by the principle of freedom and the principle of sovereignty.[37] The principle of freedom purports to ensure non-appropriation of the oceans and the freedom of various uses of the oceans, such as navigation, over flight, laying submarine cables and pipelines, construction of artificial islands, fishing and marine scientific research.[38] By contrast, the principle of sovereignty seeks to safeguard the interest of coastal states. This principle essentially promotes the extension of national jurisdiction into offshore spaces and supports the territorialisation of the oceans. In broad, the reconciliation of the principle of freedom and the principle of sovereignty has until recently been a central issue in the international law of the sea. It could well be said that the principal focus

---

35 R.J. Dupuy, "La notion de patrimoine commun de l'humanité appliquée aux fonds marins", in: R.J. Dupuy, *Dialectiques du droit international: souveraineté des Etats, communauté internationale et droits de l'humanité*, 1999, 189 et seq.; Kiss, see note 34, 240.

36 Article 53 of the Vienna Convention on the Law of Treaties limits the scope of the international community to the community of states. Considering that the state is not the only subject of international law, however, there appears to be no *a priori* reason that the international community should be limited to the community of states. In this respect, Judge Cançado Trindade argues that "the conception of international community encompasses today all subjects of international law – states, international organizations, individuals, and humankind", see note 3, 219. See also P.M. Dupuy, "L'unité de l'ordre juridique international: Cours général de droit international public (2000)", *RdC* 297 (2002), 9 et seq. (255).

37 D.P. O'Connell/ I.A. Shearer, *The International Law of the Sea*, Vol. I, 1982, 1.

38 Article 87 (1) of the UNCLOS.

of many of the traditional rules of the law has been on the safeguard of mutual interests between states on the basis of the two principles. Nonetheless, it was debatable whether the traditional principles could provide an equitable framework governing the activities in the deep seabed beyond the limits of national jurisdiction.

With regard to the legal status of natural resources in the deep seabed beyond the limits of national jurisdiction, three different views existed.[39] According to a first view, the seaward limit of coastal states' continental shelves moved into deeper waters under the "exploitability" criterion enshrined in article 1 of the 1958 Geneva Convention on the Continental Shelf. According to this view, ultimately the whole ocean floor would be divided among coastal states.[40] It would seem to follow that natural resources in the deep seabed would be subject to the sovereign rights of coastal states. According to a second view, the deep seabed is *res communis*, and, thus, the ocean beds as well as natural resources there would be subject to the freedom of the high seas. Consequently, whereas no state can appropriate the ocean floor, the Area and its resources could be used by any state. On the other hand, according to a third view, the deep seabed as well as its natural resources should be treated as *res nullius.* In this view, mining states would be able to appropriate the ocean floor as well as its natural resources through occupation.

In spite of differences in opinion, arguably the practical result of those interpretations would be almost the same: only technologically developed states could be best placed to explore and exploit natural resources in the deep ocean floor.[41] Furthermore, unrestricted seabed mining may entail the risk of having negative impacts upon land-based exporters of the minerals in question, in particular those which are developing states. Nonetheless, such a situation would worsen uneven development between developed and developing countries; and the consequence would be hardly acceptable for the developing states, which have called for the establishment of a New International Economic Order (NIEO).[42] Hence it became apparent that neither the principle of

---

39 R.R. Churchill/ A.V. Lowe, *Law of the Sea*, 3rd edition, 1999, 224-225.

40 This view was typically expressed by Oda; S. Oda, *International Control of Sea Resources*, 1989, 167.

41 Churchill/ Lowe, see note 39, 225.

42 With respect to the relationship between the NIEO and the common heritage of mankind, see for instance, E. Mann Borgese, "The New International Economic Order and the Law of the Sea", *San Diego L. Rev.* 14

sovereignty nor the principle of freedom could provide a legal framework ensuring the fair and equitable sharing of natural resources of the Area.

Against that background, in 1967, Maltese Ambassador *Pardo* made a historic proposal that the seabed and its natural resources beyond the limits of national jurisdiction should be the common heritage of mankind. In response, the Declaration of Principles Governing the Sea-Bed and the Ocean Floor, and the Subsoil Thereof, Beyond the Limits of National Jurisdiction was adopted by the General Assembly in 1970 (hereafter the 1970 Declaration).[43] This Declaration declared,

> "The sea bed and ocean floor, and the subsoil thereof, beyond the limits of national jurisdiction (hereafter referred to as the area), as well as the resources of the area, are the common heritage of mankind."

It further pronounced that,

> "The area shall not be subject to appropriation by any means by States or persons, natural or juridical, and no state shall claim or exercise sovereignty or sovereign rights over any part thereof."

Moreover, the 1970 Declaration made clear that,

> "All activities regarding the exploration and exploitation of the resources of the area and other related activities shall be governed by the international régime to be established ... "

Overall the 1970 Declaration did seem to suggest that neither the principle of sovereignty nor the freedom of the seas applies to the seabed activities in the Area.

Later, the essential elements set out in the 1970 Declaration were enshrined in the UNCLOS. Article 137 para. 1 explicitly prohibits the appropriation of the Area and its resources on the basis of the principle of sovereignty, by providing that,

> "No State shall claim or exercise sovereignty or sovereign rights over any part of the Area or its resources, nor shall any state or natural or juridical person appropriate any part thereof. No such

---

(1976-1977), 584 et seq.; L. Juda, "UNCLOS III and the New International Economic Order", *Ocean Dev. Int. Law* 7 (1979), 221 et seq.; K. Baslar, *The Concept of the Common Heritage of Mankind in International Law*, 1998, 210-216.

43 A/RES/2749 (XXV) of 17 December 1970. This resolution was adopted with 108 in favour, none against, and 14 abstentions.

claim or exercise of sovereignty or sovereign rights nor such appropriation shall be recognised."

Thus there is no scope to apply the traditional principle of sovereignty to the Area and its resources. At the same time, there is no freedom to explore and exploit natural resources in the Area because, as will be seen below, all seabed activities there are under the control of the ISA. In this regard, the common heritage of mankind in the Area must be distinguished from *res communis*. As a consequence, the two traditional principles in the law of the sea are clearly excluded in the legal framework governing the Area. It has to be stressed that the principle of the common heritage of mankind came into existence in the situation where neither the principle of sovereignty nor that of freedom could provide for a legal framework for ensuring the common interest of mankind as a whole.

2. Protection of Community Interests through the International Seabed Authority

a. Original Regime under the UNCLOS

The next issue involves a specific mechanism for ensuring the common interest of mankind as a whole. Under article 137 para. 2 of the UNCLOS, all rights in the resources of the Area are vested in mankind as a whole, on whose behalf the ISA shall act. Accordingly, activities in the Area shall be organized, carried out and controlled by the ISA on behalf of mankind as a whole in accordance with article 153 para. 1.[44] As a consequence, common interests of mankind arising from seabed activities in the Area are to be promoted through the ISA in a centralised manner. To this end, the ISA exercises prescriptive and enforcement jurisdiction regulating a wide range of issues concerning the Area. The

---

44 "Activities in the Area" means all activities of exploration for, and exploitation of, the resources of the Area (article 1 (3) of the UNCLOS). The Seabed Disputes Chamber of the International Tribunal for the Law of the Sea specified that "activities in the Area" include: drilling, dredging, coring, and excavation; disposal, dumping and discharge into the marine environment of sediment, wastes or other effluents; and construction and operation or maintenance of installations, pipelines and other devices related to such activities, *Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area*, Case No. 17, 1 February 2011, 28, para. 87. The text is available at <http://www.itlos.org>.

principal features of the ISA's jurisdiction can be summarised as follows.

The powers and functions of the ISA are limited to matters provided by the UNCLOS (limitation *rational materiae*).[45] Concerning those matters, however, the ISA has legislative and enforcement jurisdiction over activities in the Area. Article 17 para. 1 of Annex III provides that,

> "The Authority shall adopt and uniformly apply rules, regulations and procedures in accordance with article 160, paragraph 2(f)(ii), and article 162, paragraph 2 (o)(ii), for the exercise of its functions as set forth in Part XI on, *inter alia*, the following matters: ... "

Such matters include: (a) administrative procedures relating to prospecting, exploration and exploitation in the Area; (b) operations; (c) financial matters; (d) implementation of decisions taken pursuant to article 151 para. 10 and article 164 para. 2 (d). The ISA is also empowered to adopt appropriate rules concerning the protection of human life (article 146), protection of the marine environment (article 145), installations used for carrying out activities in the Area (article 147 para. 2 (a)), the equitable sharing of financial and other economic benefits derived from activities in the Area and the payments and contributions made pursuant to article 82 (article 160 para. 2 (f)-(i)). Furthermore, the ISA has the power to consider and approve the rules, regulations and procedures of the Authority. These rules, regulations and procedures shall relate to prospecting, exploration and exploitation in the Area (articles 160 para. 2 (f)-(ii) and 162 para. 2 (o)-(ii)).

Concerning the enforcement jurisdiction, article 153 para. 5 confers on the ISA the right to take at any time any measures provided for under Part XI with a view to ensure compliance with its provisions and the exercise of the functions of control and regulation assigned to it hereunder or under any contract. Specifically, the ISA possesses the right to inspect all installations in the Area used in connection with activities in the Area. The Council of the ISA is empowered to supervise and co-ordinate the implementation of the provisions of Part XI on all questions and matters within the competence of the ISA and invite the attention of the Assembly to cases of noncompliance under article 162 para. 2 (a). Notably, the ISA has also the power to sanction noncompliance. In this regard, article 18 para. 1 (a) of Annex III provides that a contractor's rights under the contract may be suspended or terminated in cases where the contractor has conducted his activities in

---

45 Article 157 (2) of the UNCLOS.

such a way as to result in serious, persistent and wilful violations of the fundamental terms of the contract, Part XI and the rules and regulation of the ISA; or where the contractor has failed to comply with a final binding decision of a dispute settlement body applicable to him.

The ISA may also impose upon the contractor monetary penalties proportionate to the seriousness of the violation in conformity with article 18 para. 2 of Annex III. A State Party which has grossly and persistently violated the provisions of this Part may be suspended from the exercise of the rights and privileges of membership by the Assembly upon the recommendation of the Council pursuant to article 185. In addition to this, the Council may issue emergency orders, which may include orders for the suspension or adjustment of operations, to prevent serious harm to the marine environment arising out of activities in the Area under article 162 para. 2 (w).

The jurisdiction of the ISA is exercised over all natural and legal persons engaging in activities in the Area, regardless of their nationalities. In this sense, the ISA's jurisdiction is of a general nature. Activities in the Area are to be carried out by the Enterprise, an operational organ of the ISA, and in association with the ISA by other commercial entities in accordance with article 153 para. 2. In this regard, article 4 para. 6 of Annex III requires that every entity other than the Enterprise must undertake,

> "(a) to accept as enforceable and comply with the applicable obligations created by the provisions of Part XI, the rules, regulations and procedures of the Authority, the decisions of the organs of the Authority and terms of his contracts with the Authority;
>
> (b) to accept control by the Authority of activities in the Area, as authorized by this Convention;
>
> (c) to provide the Authority with a written assurance that his obligations under the contract will be fulfilled in good faith;
>
> (d) to comply with the provision on the transfer of technology set forth in article 5 of this Annex."[46]

It is of particular interest to note that the jurisdiction of the ISA is directly exercisable over natural persons. In this sense, it may be said that the ISA has a supranational jurisdiction.[47]

---

[46] The obligation concerning the transfer of technology was deleted by the 1994 Implementation Agreement.

[47] J. Combacau, *Le droit international de la mer, Que sais-je?*, 1985, 91. See also R.J. Dupuy, *Le droit international, Que sais-je?* , 2001, 30.

Finally, the jurisdiction of the ISA is exclusive in the sense that no state, enterprise or natural and juridical person can be engaged in activities in the Area without approval of the ISA.[48] As resources in the Area are to be exploited for the benefit of mankind as a whole, it seems logical that the ISA representing mankind has the exclusive jurisdiction to organise activities in the Area.

In summary, the jurisdiction of the ISA is limited to matters provided by the UNCLOS. Concerning those matters, however, the ISA exercises both legislative and enforcement jurisdiction over all people and objects in the Area in an exclusive manner. It may be concluded that the ISA has the primary responsibility to safeguard the benefit of mankind as a whole in the Area. The legal regime governing the Area seems to provide an interesting example of a mechanism for the protection of community interests through an international organisation.

b. New Regime under the 1994 Implementation Agreement

On the other hand, some industrialised states strongly objected to the regime governing the Area. It is common knowledge that the United States voted against the UNCLOS and did not sign it. Many other industrialised states abstained and did not ratify the Convention. As a consequence, it became apparent that apart from Iceland, all State Parties to the Convention were developing states. Further to this, states such as the United States (1980), the United Kingdom (1981), Germany (1980, amended 1982), France (1981), Japan (1982), the former USSR (1982) and Italy (1985), enacted unilateral domestic legislation concerning deep seabed mining.[49] In 1984, eight states (the United States, the United Kingdom, Belgium, France, Germany, Italy, Japan, and the Netherlands) concluded the Provisional Understanding Regarding Deep Seabed Matters in order to avoid overlapping in deep seabed operations.[50] This situation severely damaged the unity and universality of the deep seabed regime established in Part XI and the UNCLOS as a whole.

---

48 F.H. Paolillo, "Institutional Arrangements", in: R.J. Dupuy/ D. Vignes, *A Handbook on the New Law of the Sea,* Vol. 1, 1991, 689 et seq. (706).

49 E.D. Brown, "Neither Necessary nor Prudent at this Stage: The Regime of Seabed Mining and Its Impact on the Universality of the UN Convention on the Law of the Sea", *Marine Policy* 17 (1993), 81 et seq. (93).

50 For the text, see *ILM* 23 (1984), 1354 et seq.

In response, in July 1990, the UN Secretary-General initiated informal consultations in order to meet the specific objections of the developed states.[51] These consultations resulted in the adoption of the Implementation Agreement on 28 July 1994.[52] According to article 2 para. 1 the provisions of the Implementation Agreement and Part XI of the UNCLOS are to be interpreted and applied together as a single instrument and in the event of any inconsistency between the Agreement and Part XI, the provisions of the Agreement shall prevail.

Despite its title, the Agreement seeks to modify the original regime of Part XI of the UNCLOS. By adopting the market-oriented and evolutionary approaches, the Implementation Agreement "modified" the original regime of Part XI of the UNCLOS with regard to, *inter alia*, the following matters: (i) Costs to States Parties and Institutional Arrangements; (ii) Approval procedure for an explanation plan; (iii) the Enterprise; (iv) Decision-making; (v) Review Conference; (vi) Transfer of Technology; (vii) Production Policy; (viii) Financial Terms of Contracts; (ix) the Establishment of the Finance Committee; and (x) Economic Assistance. The detailed examination of each and every change of the deep seabed regime is beyond the scope of this contribution.[53] Instead, a question to be examined is whether or not the essence of the principle of the common heritage of mankind was lost due to the 1994 Implementation Agreement.

---

51 The process of the consultations was succinctly summarised in the following document. UN General Assembly, *Consultations of the Secretary-General on Outstanding Issues Relating to the Deep Seabed Mining Provisions of the United Nations Convention on the Law of the Sea, Report of the Secretary-General*, Doc. A/48/950, 9 June 1994.

52 Agreement Relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982, entered into force on 28 July 1996. For the text of the Agreement, see UNTS Vol. 1836 No. I-31364; ILM 33 (1994), 1309 et seq. As at 21 July 2011, 141 states have ratified the Agreement.

53 There are many studies concerning the 1994 Implementation Agreement, including, E.D. Brown, "The 1994 Agreement on the Implementation of Part XI of the UN Convention on the Law of the Sea: Breakthrough to Universality?", *Marine Policy* 19 (1995), 5 et seq.; L.D.M. Nelson, "The New Deep Sea-Bed Mining Regime", *International Journal of Marine & Coastal Law* 10 (1995), 189 et seq.; B.H. Oxman, "The 1994 Agreement and the Convention", *AJIL* 88 (1994), 687 et seq.; L.B. Sohn, "International Law Implications of the 1994 Agreement", *AJIL* 88 (1994), 696 et seq.

The answer would be no for the following reasons. First, it must be highlighted that the essential elements governing the Area, namely, the principle of the common heritage of mankind, the non-appropriation of the Area and its natural resources, the use exclusively for peaceful purposes, and the benefit of mankind as a whole, remain the same.[54] In this regard, article 311 para. 6 of the UNCLOS makes clear that,

> "States Parties agree that there shall be no amendments to the basic principle relating to the common heritage of mankind set forth in article 136 and that they shall not be party to any agreement in derogation thereof."

The Preamble of the Implementation Agreement also reaffirmed that "the seabed and ocean floor and subsoil thereof, beyond the limits of national jurisdiction […], as well as the resources of the Area, are the common heritage of mankind." Moreover, Section 4 of the Agreement affirms that the principles, regime and other terms referred to in article 155 para. 2 of the UNCLOS shall be maintained. This provision confirms the basic elements of the principle of the common heritage of mankind.

Second, the exploration and exploitation activities in the Area are to be carried out by the Enterprise, and, in association with the ISA, by States Parties or state enterprises or natural or juridical persons which possess the nationality of States Parties or are effectively controlled by them or their nationals.[55] It is true that the establishment of the Enterprise was postponed and financial obligations of State Parties were not applied by the Implementation Agreement.[56] Even so, the mechanism for the direct exploration and exploitation of natural resources in the Area through the Enterprise is maintained because this is at the heart of the deep seabed regime. Thus it could well be said that the "parallel system" remains unchanged.

Furthermore, in its first Advisory Opinion of 1 February 2011, the Seabed Disputes Chamber of the International Tribunal for the Law of the Sea (ITLOS) pronounced that the role of the sponsoring state is to realise the common interest of all states in the proper implementation of the principle of the common heritage of mankind by assisting the ISA and by acting on its own with a view to ensuring that entities under its

---

54 Nelson, see note 53, 203.

55 Article 153 (2) of the UNCLOS.

56 Section 2.

jurisdiction conform to the rules on deep seabed mining.[57] Thus it may be concluded that the essential elements of the mechanism for the protection of community interests in the Area remain intact.

3. Conclusions

The results of the above considerations can be summarised in three points:

(i) The legal regime governing the Area relies on the principle of the common heritage of mankind. While traditional principles of the law of the sea, namely, the principle of sovereignty and that of freedom aim to safeguard the interests of individual states, the principle of common heritage of mankind seeks to safeguard the common interest of mankind as a whole. It is noteworthy that the principle of the common heritage of mankind came into existence in a situation where the traditional principles could not provide for an equitable framework for ensuring the common interest of mankind in the Area.

(ii) The ISA, acting on behalf of mankind as a whole, has the responsibility to protect the common interest in the Area. So far as matters provided by the UNCLOS are concerned, the ISA exercises both legislative and enforcement jurisdiction over all people and objects in the Area in an exclusive manner. Thus the common interest of mankind in the Area is to be protected by the ISA in a centralised manner.

(iii) The original regime established in the UNCLOS was significantly modified by the 1994 Implementation Agreement. Nonetheless, it must be stressed that the principal elements of the common heritage of mankind principle remain intact. Hence it is arguable that the common heritage of mankind continues to be the cardinal principle governing the activities in the Area.[58]

---

57 See note 44, 65, para. 226; 25, para. 76. While the Seabed Disputes Chamber of the ITLOS refers to "common interest of all States", it will be preferable to use the term "the common interest of mankind as a whole."

58 Simma, see note 1, 241.

III. Protection of Community Interests in Marine Environmental Protection

1. Port State Jurisdiction: An Individual Application of the Law of Dédoublement Fonctionnel

a. Port State Jurisdiction and *Scelle's* Theory of the Law of Dédoublement Fonctionnel

Another model of the protection of community interest can be seen in the context of marine environmental protection. It is beyond serious argument that the flag state has the primary responsibility with regard to the regulation of vessel-source marine pollution. Nonetheless, experience demonstrates that flag state responsibility alone is inadequate to ensure compliance with rules on this subject partly because of flags of convenience. With a view to complementing the flag state's responsibility, the UNCLOS introduced a new mechanism of port state jurisdiction under article 218.[59] Article 218 para. 1 stipulates that,

> "When a vessel is voluntarily within a port or at an off-shore terminal of a State, that State *may* undertake investigations and, where the evidence so warrants, institute proceedings in respect of any discharge from that vessel *outside* the internal waters, territorial sea or exclusive economic zone of that State in violation of applicable international rules and standards established through the competent international organization or general diplomatic conference."[60]

It is of particular interest to note that article 218 para. 1 is designed to allow a port state to exercise enforcement jurisdiction against foreign

---

59 For an analysis in some detail of port state jurisdiction, see in particular, T. Keselj, "Port State Jurisdiction in Respect of Pollution from Ships: The 1982 United Nations Convention on the Law of the Sea and the Memoranda of Understanding", *Ocean Dev. Int. Law* 30 (1999), 127 et seq.; T.L. McDorman, "Port State Enforcement: A Comment on Article 218 of the 1982 Law of the Sea Convention", *Journal of Maritime Law and Commerce* 28 (1997), 305 et seq.; E.J. Molenaar, "Port State Jurisdiction", in: Wolfrum, see note 5; id., "Port State Jurisdiction: Toward Comprehensive, Mandatory and Global Coverage", *Ocean Dev. Int. Law* 38 (2007), 225 et seq.; H.S. Bang, "Port State Jurisdiction and Article 218 of the UN Convention on the Law of the Sea", *Journal of Maritime Law and Commerce* 40 (2009), 291 et seq.

60 Emphasis added.

ships for vessel-source pollution that took place *outside* marine spaces under national jurisdiction of that state. As a consequence, the port state is entitled to take enforcement action against the vessel even where a violation was committed on the high seas or marine spaces under other states' jurisdiction, regardless of direct damage to the port state. This is an innovation because a port state has no jurisdiction over activities of a foreign vessel on the high seas under customary law. The legal ground for port state jurisdiction rests on the specific treaty provision, namely, article 218.[61]

It is conceivable that "applicable international rules and standards" referred to in this provision are considered to be established by MARPOL 73/78.[62] In relation to this, some argue that to the extent to which these rules are "applicable" or "generally accepted," the power to invoke rules and standards does not depend upon whether the flag state of that particular ship is a party to the relevant conventions due to their widespread adoption.[63] The existence of "applicable international rules and standards" is an essential element with a view to ensuring legitimacy of port state jurisdiction.

It may be said that under article 218, the port state would assume the role of an organ of the international community in marine environmental protection.[64] In this sense, the port state jurisdiction seems to

---

61 McDorman, see note 59, 318.

62 Ibid., 316; International Maritime Organization, Circular letter No. 2456, *Implication of UNCLOS for the Organisation*, 17 February 2003, Annex II, 17. MARPOL 73/78 means International Convention for the Prevention of Pollution from Ships, modified by the 1978 Protocol. For the text of the Convention see, IMO, *MARPOL 73/78: Consolidated Edition 2006* (2011 edition is forthcoming).

63 R. Wolfrum, "IMO Interface with the Law of the Sea Convention", in: M.H. Nordquist/ J.N. Moore, *Current Maritime Issues and the International Maritime Organisation*, 1999, 231; D. Rothwell/ T. Stephens, *The International Law of the Sea*, 2010, 344; P. Birnie/ A. Boyle/ C. Redgwell, *International Law and the Environment*, 3rd edition, 2008, 389. In fact, as at 31 May 2011, 150 states representing 99.14 per cent of the world's shipping tonnage were parties to Annexes I and II of MARPOL 73/78. IMO, *Status of Multilateral Conventions and Instruments in Respect of Which the International Maritime Organization or Its Secretary-General Performs Depositary or Other Functions*, 101.

64 Keselj, see note 59, 136; C.J. Tams, "Individual States as Guardians of Community Interests", in: Fastenrath et al., see note 2, 379 et seq. (397).

provide an interesting example of *Scelle's* theory of "la loi du dédoublement fonctionnel."[65]

In order to explore this point, some mention should be made of this unique theory.[66] According to *Scelle*, realisation of law in every society must rest on three functions, namely, legislative, judicial and enforcement functions.[67] However, the mode to perform these functions and its efficacy vary according to societies.[68] There is no centralised organ to perform the three social functions in the international society. Thus, in the inter-state order (l'ordre interétatique),[69] these functions are to be performed by state organs, namely, les agents et gouvernants étatiques. In the view of *Scelle*, the organs perform a dual role. Where state organs

---

65 D. Vignes, "Le navire et les utilisations pacifiques de la mer: La juridictions de l'Etat du port et le navire en droit international", in: Société française pour le droit international, *Colloque de Toulon: Le Navire en Droit International*, 1992, 127 et seq. (150); C. Mizukami, *Law of the Sea,* (in Japanese), 2005, 252. In this study, the term "the law of *dédoublement fonctionnel*" will be used.

66 Concerning the theory of the law of dédoublement fonctionnel, see G. Scelle, "Le phénomène juridique du dédoublement fonctionnel", in: W. Schätzel (ed.), *Rechtsfragen der internationalen Organisation, Festschrift für Hans Wehberg zu seinem Geburtstag*, 1956, 324 et seq.; A. Cassese, "Remarks on Scelle's Theory of 'Role Splitting' (*dédoublement fonctionnel)* in International Law", *EJIL* 1 (1990), 210 et seq.; M. Nishiumi, "Dédoublement fonctionnel de l'Etat et droit international contemporain: d'après la pensée de Georges Scelle" (in Japanese), *Yearbook of World Law* 20 (2001), 77 et seq.

67 G. Scelle, *Manuel de droit international public*, 1948 (hereafter *Manuel*), 15; See also G. Scelle, *Précis de droit des gens: principes et systématique, Première Partie*, 1932 (hereafter *Précis*), 18.

68 Ibid., 20.

69 According to *Scelle*, the international society can be divided into two categories, namely, inter-state society (*société interétatique*) and the supra-state society (*société super étatique*). In the supra-state society, one can detect social organs proper to the society, which distinct from national organs. In other words, social functions in the supra-state society are performed by supra-state organs (*les agents et gouvernants super étatiques*). The supra-state society is characterised by hierarchy. Thus, in this type of society, one can find federalism in a broad sense. On the other hand, social functions of the inter-state society are performed by the existing state organs (*les agents et gouvernants étatiques*). Here the law of *dédoublement fonctionnel* comes into play. G. Scelle, "Règles générales du droit de la paix", *RdC* 46 (1933), 327 et seq. (356).

perform their functions in the municipal legal order, they are considered as national organs. Where state organs perform their functions in the international legal order, they are regarded as international organs. More specifically when the head of state or other legislators of a state are involved with the formation of a law-making treaty in a conference, they may be considered as acting as international legislators (législateurs internationaux). Likewise, where a domestic court deals with a litigation concerning private international law, it acts as an international judicial body. Where one or more governments are involved with an enforcement action, they act as international enforcement agencies (agents exécutifs internationaux).[70] The dual role is called the law of dédoublement fonctionnel.[71] In essence, the law of dédoublement fonctionnel relates to the hierarchy of the legal order. While the phenomenon of dédoublement fonctionnel can be seen in municipal law,[72] its role is particularly important in international law.

It appears that the law of dédoublement fonctionnel has a valuable role in the law of the sea because there is no centralised organ to perform legislative, executive and judicial functions regulating human activities in the oceans. As said above, where the head or other legislators of a state participate in a conference to formulate "international rules, standards and recommended practices and procedures",[73] for instance, it is arguable that they perform legislative functions as international law-making bodies. As another example, the coastal state is compelled to give appropriate publicity to any danger to navigation, of which it has knowledge, within its territorial sea pursuant to article 24 para. 2 of

---

70 Ibid., 358-359.

71 In his article published in 1956, *Scelle* defines the law of dédoublement fonctionnel as: "les agents dotés d'une compétence institutionnelle ou investis par un ordre juridique utilisent leur capacité 'fonctionnelle' telle qu'elle est organisée dans l'ordre juridique qui les a institués, mais pour assurer l'efficacité des normes d'un autre ordre juridique privé des organes nécessaires à cette réalisation, ou n'en possédent [sic] que d'insuffisants." Scelle, see note 66, 331.

72 Ibid., 331-332.

73 "International rules, standards and recommended practices and procedures" contribute to enhance uniformity of national and international regulations with regard to the marine environmental protection. In fact, such rules and standards are often referred to in the UNCLOS. See for instance arts 208 (3), 210 (6), and 211 (2).

the UNCLOS.[74] This provision seems to indicate that the coastal state would assume the role of an advocate of the international community in the protection of safety of navigation through its territorial sea by announcing any risks.

On the other hand, it must be stressed that *Scelle* did not regard the law of dédoublement fonctionnel as an ideal means to perform essential functions of law. In fact, *Scelle* recognised that the law of dédoublement fonctionnel is a dangerous substitute for the institutional organisation which is absent in the international legal order. He thus argued that the traditional technique must be progressively replaced by a hierarchy of the institutions corresponding to the law of hierarchy of legal orders, namely, federalism.[75] In reality, the law of dédoublement fonctionnel seems to encounter considerable difficulties as to its practical implementation.

Three obstacles must be highlighted in particular. First the lack of incentive of states. The behaviour of states according to the law of dédoublement fonctionnel relies essentially on their goodwill. Yet it appears questionable whether states always have an adequate incentive to conduct themselves as an organ of the international community to protect community interests. Second the lack of co-ordination. It is debatable whether the fulfilment of an executive function by individual states may be less effective due to anarchical application of relevant rules of international law. Third, in some cases, the concept of community interests may be used as an ideology to justify a policy of a particular state. Thus there is a concern that the law of dédoublement fonctionnel may be abused in order to promote particular interests of a state or states in the pretext of the protection of community interests. As will be seen, these difficulties arise in the specific context of the law of the sea.

b. Limits of Port State Jurisdiction

Despite its innovative nature, port state jurisdiction is subject to some limitations. In particular, four limitations must be highlighted.

First, article 218 para. 1 holds that the power to exercise port state jurisdiction is permissive, not an obligation. In reality, it appears questionable whether or not the port state has good incentives to exercise its

---

74 This obligation seems to follow from the *dictum* of the *Corfu Channel* judgment, ICJ Reports 1949, 4 et seq. (22 et seq.).

75 Scelle, *Manuel*, see note 67, 22.

jurisdiction effectively.[76] The optional nature of port state jurisdiction may entail the risk of creating so-called "ports of convenience."[77] Considering that the ship owner is entitled to compensation by virtue of article 232 for losses suffered as a result of excessive port state action,[78] the port state may be cautious about exercising its jurisdiction. Second, port state jurisdiction encounters considerable difficulties with respect to its practical implementation. It would be highly difficult if not impossible to detect evidence of a specific discharge violation in a particular sea area.[79] There may also be logistical problems for ports which receive many ship visits annually.[80] Third, under the UNCLOS, there is no mechanism to co-ordinate common standards and procedures in the implementation of port state jurisdiction. As a consequence, there is a concern that foreign vessels may be subject to different legal procedures in different ports. This fact may impair the efficacy of the port state jurisdiction as well as the free and unimpeded sea communication. Fourth, it must be noted that under the UNCLOS, port state enforcement is subject to substantive and procedural restrictions. Concerning substantive restrictions, port state jurisdiction deals only with the violation of international rules with regard to vessel-source pollution. Thus, the breach of international rules relating to construction, design, equipment, crewing and other vessel standards falls outside the scope of article 218.[81] Further to this, the port state can enforce only "international

---

76 In fact, in the legislative process of port state jurisdiction, Japan expressed the view that "there was no great incentive for port states to initiate proceedings with regard to pollution violations which took place far from their own territories." A/CONF.62/C.3/SR.10, *Official Records of the Third United Nations Conference on the Law of the Sea,* Vol. II, 357, para. 44 (Mr. Oda). See also T.L. McDorman, "Regional Port State Control Agreements: Some Issues of International Law", *Ocean & Coastal L. J.* 5 (2000) 207 et seq. (217); A.K.J. Tan, *Vessel-Source Marine Pollution*, 2006, 220. According to Ho-Sam Bang, there have been no court cases where port states have prosecuted foreign vessels for unlawful discharges in accordance with article 218 of the UNCLOS. Bang, see note 59, 312.

77 Molenaar, see note 59 (2011), 1.

78 Tan, see note 76, 220.

79 While an eyewitness may be the only form of evidence to prove the existence of a discharge violation, it is difficult to find the eyewitness. Keselj, see note 59, 138.

80 Tan, see note 76, 220.

81 McDorman, see note 59, 315. However, it is arguable that article 219 of the UNCLOS may expand the scope of the port state jurisdiction. Kesel, see note 59, 138-139.

rules and standards established through the competent international organization or general diplomatic conference." Accordingly, it is arguable that the port state is not free to create and enforce its own discharge rules and standards.

With regard to procedural restrictions, article 218 para. 2 prohibits the port state to institute proceedings where a discharge violation occurred in the internal waters, territorial sea or EEZ of another state unless that state, flag state or a state damaged or threatened by the discharge violation so requests, or where the violation has caused or is likely to cause pollution in the internal waters, territorial sea or EEZ of the port state. Port state jurisdiction is further qualified by article 226. Article 226 para. 1 (a) imposes upon states, including the port state, an obligation not to delay a foreign vessel longer than is essential for purposes of the investigations. Under the same provision, any physical inspection of a foreign vessel shall be limited to documentary examination. Further physical inspection of the vessel may be undertaken only when there are clear grounds for believing that the condition of the vessel or its equipment does not correspondent with the documents; the documents are insufficient to confirm or verify a suspected violation; or the vessel is not carrying valid certificates and records.

If the investigation indicates a violation of applicable laws or international rules and standards for the protection of the marine environment, release is to be made promptly subject to reasonable procedures such as bonding or other appropriate financial security pursuant to article 226 para. 1 (b). Under article 218 para. 4, the records of the investigation carried out by a port state are to be transmitted upon request to the flag state or to the coastal state. Any proceedings instituted by the port state on the basis of such an investigation may, subject to Section 7, be suspended at the request of the coastal state when the violation has occurred within its internal waters, territorial sea or EEZ. Further to this, the flag state may force a suspension of the proceedings being undertaken by the port state for an alleged discharge violation where the flag state takes proceedings to impose penalties in respect of corresponding charges within six months pursuant to article 228 para. 1.

2. Port State Control: An Institutional Application of the Law of Dédoublement Fonctionnel

a. The Memoranda of Understanding on Port State Control

As noted, one of the essential limitations of the individual application of the law of dédoublement fonctionnel involves the lack of co-ordination. The sporadic application of the law will seriously impair the efficacy of the protection of community interests. In response, there will be a need to institutionalise the application of the law. In this regard, port state control seems to provide an interesting model.[82]

Port state control is a mechanism for verifying whether a foreign vessel's documentation and the vessel itself comply with international rules and standards with regard to the safety of ships, living and working conditions on board ships and protection of the marine environment set out by relevant treaties. Port state control seeks to enhance safety at sea and regulate vessel-source pollution by applying the same standards in a similar manner to visiting vessels in ports.[83] In so doing, it purports to ensure effective compliance with relevant treaties.

Unlike port state jurisdiction, port state control does not prosecute the vessel for an alleged breach of relevant international rules and standards. Port state control is limited to taking an administrative measure of verification, including the detention of a vessel. In this respect, port state control must be distinct from port state jurisdiction.[84] On the other hand, like port state jurisdiction, port state control purports to carry out the inspections of foreign vessels, regardless of direct damage. Thus port state control may also be considered as a mechanism for protecting community interests relating to the marine environmental protection.

Actually many global treaties concerning pollution regulation and marine safety provide port state control. Examples include: the 1974 International Convention for the Safety of Life at Sea (SOLAS),[85] MAR-

---

82 Generally on this issue, see in particular, H.S. Bang, "Is Port State Control an Effective Means to Combat Vessel-Source Pollution? An Empirical Survey of the Practical Exercise by Port States of Their Powers of Control", *International Journal of Maritime & Coastal Law* 23 (2008), 715 et seq.

83 McDorman, see note 76, 209.

84 McDorman, see note 59, 320; Bang, see note 82, 717.

85 Annex Chapter 1, Regulation 19. Entered into force on 25 May 1980. For the text of the Convention, UNTS Vol. 1184 No. I-18961.

POL,[86] the 1976 ILO Convention No. 147 concerning Minimum Standards in Merchant Ships,[87] the 1966 International Convention on Load Lines,[88] the 1978 International Convention on Standards of Training, Certification and Watchkeeping for Seafarers,[89] and the 2006 Maritime Labour Convention.[90]

In order to enhance the efficiency of port state control set out by these treaties, it is necessary to co-ordinate actions between port states. Indeed, concerted action is useful to eliminate so-called "port shopping" and to reduce the burden of repetitive inspections of foreign ships.[91] Thus port states formulated regional institutions effectuating port state control through Memoranda of Understanding. To date, nine Memoranda have been established: 1982 Paris Memorandum of Understanding on Port State Control (hereafter the Paris MOU);[92] 1992 Viña del Mar (or Latin-American Agreement); 1993 Tokyo MOU on Port State Control (the Asia-Pacific region); 1996 Caribbean MOU; 1997 Mediterranean MOU; 1998 Indian Ocean MOU; 1999 Abuja (the West and Central African Region) MOU; 2000 Black Sea MOU; and 2004 Riyadh (the Arab States of the Gulf) MOU.[93] In addition, EC Council Directive 95/21/EC on Port State Control was adopted on 19 June 1995.[94]

---

86 Regulation 11 of Annex I, Regulation 16 (9) of Annex II, Regulation 8 of Annex III, Regulation 8 of Annex V, and Regulation 10 of Annex VI.

87 Article 4. Entered into force on 28 November 1981. The text of the Convention is available at <http://www.ilo.org>.

88 Article 21. Entered into force on 21 July 1968. For the text of the Convention see UNTS Vol. 640 No. I-9156.

89 Article X and Regulation I/4. Entered into force on 28 April 1984. For the text of the Convention, see UNTS Vol. 1361 No. I-23001.

90 Regulation 5.2. Not entered into force. The text of the Convention is available at <http://www.ilo.org>.

91 Bang, see note 82, 726.

92 The Paris Memorandum of Understanding includes 27 states. The text as well as relevant information are available at <http://parismou.org>.

93 Bang, see note 82, 718.

94 Council Directive 95/21/EC of 19 June 1995 concerning the Enforcement, in respect of Shipping Using Community Ports and Sailing in the Waters under the Jurisdiction of the Member States, of International Standards for Ship Safety, Pollution Prevention and Shipboard Living and Working Conditions (Port State Control). For an analysis of this directive, along with the text, see E.J. Molenaar, "The EC Directive on Port State Control in Context: the European Union", *International Journal of Maritime & Coastal*

One might take the Paris Memorandum of Understanding as an example because this is the first regional arrangement for port state control and was followed by other regional arrangements in this field.[95] The origin of the Paris Memorandum of Understanding traced back to the Hague Memorandum which was adopted between members of maritime authorities in Western Europe in March 1978. After the *Amoco Cadiz* incident, in January 1982, a new Memorandum of Understanding on Port State Control was adopted in Paris in January 1982 and entered into force on 1 July 1982. This instrument has been amended several times in order to meet new safety and marine environment requirements. On 1 January 2011, the New Inspection Regime replaced the existing Port State Control regime.[96]

In its Preamble, the Paris Memorandum of Understanding recognised that effective action by port states is required to prevent the operation of substandard ships, while the flag state has the principal responsibility for the effective application of standards laid down in international instruments. The Preamble also highlighted the need to increase maritime safety, the protection of the marine environment and the importance of improving living and working conditions on board of ships.

Under Section 1.2, the Maritime Authorities of the Member States, referred to as "the Authorities," will maintain an effective system of port state control with a view to ensuring that foreign merchant ships calling at a port of its state, or anchored off such a port, comply with the standards laid down in the relevant instruments as defined in Section 2.[97] Each Authority will apply those relevant instruments which

---

Law 11 (1996), 241 et seq. This Directive was amended by Directive 2001/106/EC of 19 December 2001.

95 Whatever the need for caution, normally a Memorandum of Understanding is considered as an instrument which is not legally binding. A. Aust, *Modern Treaty Law and Practice*, 2007, 32. The Paris Memorandum of Understanding is considered as a non-binding instrument. It used a less mandatory term, namely, "will". Molenaar, see note 94, 256.

96 Paris Memorandum of Understanding, The New Inspection Regime (NIR) of the Paris Memorandum of Understanding, available at <http://parismou.org>.

97 For the purpose of the Paris Memorandum, relevant instruments are the following: the International Convention on Load Lines, 1966 (LOAD LINES 66); the Protocol of 1988 relating to the International Convention on Load Lines, 1966 (LL PROT 88); the International Convention for the Safety of Life at Sea, 1974 (SOLAS); the Protocol of 1978 relating to the In-

are in force and to which its state is a party.[98] Hence States Parties to the Paris Memorandum of Understanding commit themselves to effectuate the conventions which are legally binding for them.[99] Sufficient inspections are a key component of port state control.[100] Thus each Authority will carry out an inspection on every foreign merchant ship of Priority I calling at one of its ports or anchorages, subject to the flexibility and regional commitment as described in Annex 11.[101] In 2009, a total number of 24,186 inspections were performed, and the overall inspection effort, which is the ratio of the number of inspections to the number of individual ship calls in members' ports, was 29.93 per cent. Thus, apart from Finland, all Member States reached the target of the 25 per cent inspection effort commitment of the Memorandum.[102]

The Authorities will, upon the request of another Authority, endeavour to secure evidence relating to suspected violations of the re-

---

ternational Convention for the Safety of Life at Sea, 1974 (SOLAS PROT 78); the Protocol of 1988 relating to the International Convention for the Safety of Life at Sea, 1974 (SOLAS PROT 88); the International Convention for the Prevention of Pollution from Ships, 1973, as modified by the Protocol of 1978 relating thereto, and as further amended by the Protocol of 1997 (MARPOL); the International Convention on Standards of Training, Certification and Watchkeeping for Seafarers, 1978 (STCW 78); the Convention on the International Regulations for Preventing Collisions at Sea, 1972 (COLREG 72); the International Convention on Tonnage Measurement of Ships, 1969 (TONNAGE 69); the Merchant Shipping (Minimum Standards) Convention, 1976 (ILO Convention No. 147) (ILO 147); the Protocol of 1996 to the Merchant Shipping (Minimum Standards) Convention, 1976 (ILO Convention No. 147) (ILO P147); the International Convention on Civil Liability for Oil Pollution Damage, 1969 (CLC 1969); Protocol of 1992 to amend the International Convention on Civil Liability for Oil Pollution Damage, 1969 (CLC PROT 1992); the International Convention on the Control of Harmful Anti-Fouling Systems on Ships, 2001 (AFS 2001); the International Convention on Civil Liability for Bunker Oil Pollution Damage, 2001.

98 Section 2.3.

99 Keselj, see note 59, 142.

100 McDorman, see note 76, 215.

101 Section 1.3. The Inspection and Selection Scheme is divided into two priorities, namely Priority I and Priority II. Ships under Priority I must be inspected because either the time window has closed or there is an overriding fact. See Annex 8 to the Paris Memorandum of Understanding, Inspection and Selection Scheme.

102 Paris Memorandum of Understanding, *Annual Report 2009*, 18.

quirements on operational matters of Rule 10 of the 1972 Convention on the International Regulations for Preventing Collisions at Sea (COLREG 72) and MARPOL. In the case of suspected violations involving the discharge of harmful substances, an Authority will, upon the request of another Authority, visit in the port the ship suspected of such a violation in order to obtain information and where appropriate to take a sample of any alleged pollutant.[103] Furthermore, it will endeavour to secure the rectification of all deficiencies detected. For this purpose, appropriate action will be taken, which may include detention or a formal prohibition of a ship to continue an operation due to established deficiencies which would render the continued operation hazardous.[104] In the case of a detention, the Authority concerned will immediately notify the flag Administration in writing and include the report of inspection.[105] At the same time, the Authorities will make all possible efforts to avoid unduly detaining or delaying a ship.[106] In addition, each Authority will report on its inspections under the Memorandum and on its results in accordance with Annex 3.[107] Moreover, following detentions, each Authority may refuse access of a foreign merchant ship to its ports and anchorages according to Section 4.

As noted, the harmonisation of procedures between Member States is one of the key elements of port state control. Thus a Committee, which is composed of a representative of each of the Authorities and of the Commission of the European Communities, is to promote the harmonisation of procedures and practices relating to the inspection, rectification, detention, banning and the application of Section 2.4.[108]

b. Commentary

Port state control is a means to effectuate treaties concerning safety at sea and the regulation of vessel-source pollution which are legally bind-

---

103 Section 6.

104 Section 3.4.

105 Section 3.7. The number of detentions in 2008 and 2009 was 1,220 and 1,059, respectively. The average detention rate in 2009 was 4.38 per cent and was lower than the historically low figure of 2005, which was 4.67 per cent. There has been a trend of decrease of the number of detentions in the last decade. Paris Memorandum of Understanding, *Annual Report 2009*, 18.

106 Section 3.13.

107 Section 5.3.

108 Section 7.3.2.

ing for port states. By applying a uniform set of standards and procedures, port state control enables Member States to the Memoranda of Understanding to set in motion concerted inspections to verify compliance with relevant treaties on these subjects. In so doing, port state control would assume the role of an organ of the international community to protect community interests in marine environmental protection and safety at sea.[109] In this sense, port state control can be regarded as an institutional application of the law of dédoublement fonctionnel.

On the other hand, it must be noted that considerable differences in practice exist between States Parties to the Memoranda of Understanding. Take the Indian Ocean Memorandum as an example. In 2010, Mauritius carried out only 4 inspections, whilst Australia carried out 3127 inspections.[110] In the case of the Abuja Memorandum, South Africa carried out 622 inspections and Congo carried out 378 inspections in 2008. On the other hand, in the same year, no inspection was carried out by Angola, Benin, Cameroon, Cape Verde, Côte d'Ivoire, Equatorial Guinea, Gabon, Guinea, Liberia, Mauritania, Namibia, Sierra Leone and Gambia.[111] It seemed unclear whether the limited number of inspections was due to the inefficiency of port authorities or because the number of visiting vessels was very limited. However, one may suspect that the former reason is more realistic. Such a difference in practice will create a port of convenience.[112] There are also differences in the inspection rate between the Memoranda of Understanding. In 2009, the inspection rate under the Tokyo Memorandum was approximately 61 per cent[113] and that under the Black Sea Memorandum was 58.6 per cent.[114] In the same year, as noted, the inspection rate under the Paris Memorandum was 29.93 per cent.

In addition, there are differences in the status of ratifications of the relevant instruments between Member States of the Memoranda of Understanding. One might take the status of MARPOL as an example.[115]

---

109 Cf. Molenaar, see note 59 (2011), 1.

110 Indian Ocean Memorandum of Understanding on Port State Control, *Annual Report 2010*, 10.

111 Abuja Memorandum of Understanding, *Annual Report 2008*, 16.

112 Keselj also expressed the same concern. Keselj, see note 59, 148.

113 *Annual Report on Port State Control in the Asia-Pacific Region* 2009, 11.

114 *Port State Control in the Black Sea Region, Annual Report 2009*, 5.

115 As of 31 May 2011, 18 Authorities adhere to the Tokyo Memorandum of Understanding. Relevant information is available at <http://www.tokyo-mou.org>. Section 2.4 of the Memorandum of Understanding states that

The Convention is a key instrument regulating vessel-source marine pollution. As of 31 March 2011, many of the Member States to the Tokyo Memorandum became a party to MARPOL, including all Annexes. Nonetheless, Fiji did not ratify the Convention. Indonesia, Thailand and Viet Nam accepted only the obligatory Annexes I and II. Consequently, the optional Annexes, namely, Annexes III, IV, V and VI are not applied by these states. New Zealand did not accept Annexes IV and VI. The Philippines, Papua New Guinea, and the Russian Federation did not accept Annex VI. The differences in the ratifications of relevant instruments will impair the uniform application of relevant rules within ports under the Memoranda. Likewise, relevant instruments applied by port state Authorities vary. In this regard, there will be a need to enhance coordination between Memoranda of Understanding.

3. Conclusions

The above made considerations lead to the following conclusions:

(i) Under article 218 of the UNCLOS, the port state may enforce applicable international rules and standards against foreign vessels for vessel-source pollution that took place *outside* marine spaces under national jurisdiction, regardless of direct damage. In this case, the port state would assume the role of an organ of the international community in order to protect community interests in the field of marine environmental protection. In this sense, the port state jurisdiction can be considered as the individual application of the law of dédoublement fonctionnel.

(ii) On the other hand, it appears questionable whether the port state has a good incentive to exercise its jurisdiction to investigate marine pollution which has caused no direct damage. The lack of coordination is another obstacle of port state jurisdiction.

(iii) Port state control purports to harmonise procedures to carry out inspections to verify compliance with relevant treaties with regard to the regulation of vessel-source marine pollution and safety at sea. By applying common standards to visiting vessels in ports, port state control enables Member States to the Memoranda of Understanding to carry out the inspections in a uniform manner. Port state control seems

---

"Each Authority will apply those relevant instruments which are in force and *binding upon it.*" (emphasis added).

to provide an example of the institutional application of the law of dédoublement fonctionnel.

IV. Protection of Community Interests in the Conservation of Marine Living Resources

1. The Unilateral Approach and Its Limits

a. General Considerations

Marine living resources are of vital importance for mankind because these resources constitute an important source of protein in a situation of an explosion of the global population.[116] As marine living resources are renewable, it is important to pursue proper conservation policies in order to prevent the exhaustion of those resources. Thus there appears to be a general sense that conservation of marine living resources involves a common interest of the international community.[117] At the same time, marine living resources are important for trade and industry of many states.[118] Accordingly, conservation policy of these resources directly affects the economic development of states. In short, conservation of marine living resources deeply involves not only community interests but also national interests at the same time. Hence caution may be needed to prevent the pursuit of special interests of a state or a group of states under the guise of action in the protection of community interests.

In general, two approaches to the conservation of marine living resources may be identified.[119] The first is the individual approach taken by the coastal state. The individual approach applies to conservation of living resources in marine spaces under national jurisdiction. Consider-

---

116 According to FAO, in 2007, fish accounted for 15.7 per cent of the global population's intake of animal protein and 9.1 per cent of all protein consumed. FAO, *The Status of World Fisheries and Aquaculture*, 2010, 3.

117 C. Kojima, "Implementing Community Interests in the Law of the Sea: the Conservation and Management of Marine Living Resources", *The Chuo Law Review* 116 (2009), 1 et seq.

118 In 2008, trade in fish and fishery products represented a share of about 10 per cent of the total agricultural exports and 1 per cent of world merchandise trade in value terms. FAO, see note 116, 9.

119 Cf. Kojima, see note 117, 12.

ing that approximately 90 per cent of all commercially exploitable fish stocks are caught within 200 miles of the coast, conservation of living resources in the EEZ is particularly important.[120] The second is the institutional approach which is applied through international institutions, in particular, regional fisheries organs. This approach may be relevant particularly to conservation of living resources on the high seas. A question to be examined in this part is whether or not these two approaches can be seen as a legitimate and effective means to protect community interests in conservation of marine species.

b. Conservation of Living Resources in the EEZ

The coastal state has sovereign rights for the purpose of exploring, exploiting and conserving the natural resources in the EEZ.[121] The coastal state exercises both legislative and enforcement jurisdiction on this matter. In this respect, article 73 para. 1 UNCLOS stipulates that,

> "The coastal State may, in the exercise of its sovereign rights to explore, exploit, conserve and manage the living resources in the exclusive economic zone, take such measures, including boarding, inspection, arrest and judicial proceedings, as may be necessary to ensure compliance with the laws and regulations adopted by it in conformity with this Convention."

While this provision provides enforcement jurisdiction of the coastal state, the reference to "the laws and regulations adopted by it" suggests that that state also has legislative jurisdiction.

At the same time, article 61 para. 2 of the UNCLOS obliges the coastal state to ensure through proper conservation and management measures that the maintenance of the living resources in the EEZ is not endangered by overexploitation, taking into account the best scientific evidence available. Accordingly, the coastal state has the primary responsibility to take proper conservation measures in its EEZ. These measures of the coastal state, if they are effectively implemented, will contribute to protect the community interests in the conservation of marine living resources. Nonetheless, it seems naïve to consider that the coastal state would assume the role of an advocate of the international

---

120 P. Malanczuk, *Akehurst's Modern Introduction to International Law*, 7th revised edition, 1997, 183; P.G.G. Davies/ C. Redgwell, "The International Legal Regulation of Straddling Fish Stocks", *BYIL* 67 (1996), 200; Churchill/ Lowe, see note 39, 162.

121 Article 56 (1) (a).

community in the conservation of living resources in the EEZ according to the law of dédoublement fonctionnel.

In this regard, it must be pointed out that "conservation" is not a purely scientific or biological concept, but is qualified by economic, political and social elements. In fact, article 2 of the 1958 Geneva Convention on Fishing and Conservation of the Living Resources of the High Seas defines conservation as "the aggregate of the measures rendering possible the optimum sustainable yield from those resources so as to secure a maximum supply of food and other marine products." Article 2 further provides that "Conservation programmes should be formulated with a view to securing in the first place a supply of food for human consumption." It is conceivable that the "supply of food for human consumption" will be determined on the basis of economic and social needs.[122] While the above provision relates to conservation of living resources on the high seas, the same will apply to conservation of these resources in the EEZ. It may be argued that conservation measures are essentially a matter of national policy of the coastal state.

Specifically, as explained elsewhere,[123] the conservation of marine living resources in the EEZ relies on the key elements, namely, the concept of allowable catch and that of maximum sustainable yield. Concerning the concept of allowable catch, article 61 para. 1 provides that "The coastal state shall determine the allowable catch of the living resources in its exclusive economic zone." Article 62 para. 2 imposes on the coastal state to determine its capacity to harvest the living resources of the EEZ; where the coastal state does not have the capacity to harvest the entire allowable catch, it shall give other states access to the surplus of the allowable catch.

Apart from the single qualification not to endanger living resources by overexploitation, however, the coastal state has a broad discretion in setting the allowable catch.[124] Thus there is a risk that the coastal state emerges with a zero surplus and thereby evades its duty to allocate surpluses in its EEZ by manipulating the allowable catch.[125] Likewise, a

---

122 Concerning the concept of conservation, see Y. Tanaka, *A Dual Approach to Ocean Governance: the Cases of the Zonal and Integrated Management in International Law of the Sea*, 2008, 32-35.

123 Ibid., 52.

124 W.T. Burke, *The New International Law of Fisheries: UNCLOS 1982 and Beyond*, 1994, 47-48.

125 Yet such manipulations would be contrary to the obligation of optimum utilisation as well as the obligation not to abuse rights by virtue of article

concern is also voiced that the determination of maximum sustainable yield is rarely, if ever, correct and the administrative measures taken with a view to its adoption have been and generally still are inadequate and inappropriate.[126] It must also be remembered that under article 297 para. 3 (a), any disputes relating to a state's sovereign rights with respect to the living resources in the EEZ or their exercise are exempted from the compulsory settlement procedure embodied in Part XV of the UNCLOS. This means that there is no review process by a third party capable of examining the validity of the conservation measures of the coastal state in its EEZ.[127] Overall it seems evident that the conservation measures of the coastal state are essentially characterised by its own economic and social interests in the EEZ.

2. The Institutional Approach and Its Limits

a. At-Sea Inspection of Non-Contracting Party Vessels on the High Seas

The high seas are open to all states, whether coastal or land-locked.[128] Thus no coastal state can unilaterally extend its jurisdiction with regard to the conservation of living resources on the high seas. As the high seas are governed by the principle of freedom, all states enjoy the freedom of fishing. It is beyond serious argument that the flag state has the primary responsibility to ensure compliance with rules relating to the conservation of marine species on the high seas by vessels flying its flag.[129] However, there are growing concerns that the effective implementation of the flag state's jurisdiction over fishing vessels is seriously under-

---

300 of the UNCLOS. L. Caflisch, "Fisheries in the Exclusive Economic Zone: An Overview", in: U. Leanza (ed.), *The International Legal Regime of the Mediterranean Sea,* 1987, 149 et seq. (161).

126 G.L. Kesteven, "MSY Revisited: A Realistic Approach to Fisheries Management and Administration", *Marine Policy* 21 (1997), 73 et seq.

127 R. Barnes, "The Convention on the Law of the Sea: An Effective Framework for Domestic Fisheries Conservation?", in: D. Freestone/ R. Barnes/ D. Ong (eds), *The Law of the Sea: Progress and Prospects,* 2006, 233 et seq. (246).

128 Article 87 (1) of the UNCLOS.

129 While the definition of the concept of compliance in international law varies amongst writers, compliance may be defined broadly as the behaviour of a state which conforms to its international obligations.

mined by the practice of flags of convenience, re-flagging and illegal, unreported and unregulated fishing (IUU fishing).[130] It is becoming apparent that self-regulation on the basis of flag state jurisdiction alone is seen as not being adequate in the conservation of marine living resources. Thus growing attention is devoted to non-flag state measures through regional fisheries bodies.

As explained elsewhere,[131] these measures may be divided into two categories: inspection at sea and inspection in port. Each category is further divided into two sub-categories: inspection of Contracting Party vessels and inspection of non-Contracting Party vessels.[132] No serious question will arise with regard to at-sea or port inspections of Contracting Party vessels since the legitimacy of such inspections rely on the consent of the Contracting Party. On the other hand, the legitimacy of at-sea and port inspections of non-Contracting Party vessels needs careful consideration.

At-sea inspection of vessels of non-Contracting Parties is carried out by some regional fisheries organs. Take the Northeast Atlantic Fisheries Commission (NEAFC) as an example. Under article 37 para. 1 of the 2010 NEAFC Scheme of Control and Enforcement (hereafter the 2010 NEAFC Scheme),[133] Contracting Parties to NEAFC are obliged to transmit to the Secretary without delay any information regarding non-Contracting Party vessels sighted or by other means identified as engaging in fishing activities in the convention area. The Secretary is to transmit this information to all Contracting Parties within one business day. NEAFC inspectors are required to request permission to board and inspect non-Contracting Party vessels in accordance with article 38. If the master of the vessel consents to be boarded, the inspection shall be documented by completing an inspection report as set out

---

130 A definition of IUU fishing is provided in Section 3 of FAO, International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing, 2001.

131 Tanaka, see note 122, 106. For a recent analysis in some detail of non-flag state measures, see Tanaka, see note 30.

132 For an analysis of non-flag state measures in the context of conservation of living resources on the high seas, see R.G. Rayfuse, *Non-Flag State Enforcement in High Seas Fisheries*, 2004; Tanaka, see note 122, 106-118. For a more recent analysis of these measures, see Tanaka, see note 30.

133 NEAFC, Scheme of Control and Enforcement, February 2010. Generally on NEAFC, see T. Bjørndal, "Overview, Roles and Performance of the North East Atlantic Fisheries Commission (NEAFC)," *Marine Policy* 33 (2009), 685 et seq.

in Annex XIII. If the master does not consent for his vessel to be boarded and inspected or does not fulfil any of the obligations laid down in article 19 (a) to (e) of the 2010 NEAFC Scheme, the vessel shall be presumed to have engaged in IUU activities in accordance with article 38 para. 3. Similar procedures for inspecting non-Contracting Party vessels can be seen in the 2010 Northwest Atlantic Fisheries Organization (NAFO) Conservation and Enforcement Measures (hereafter the 2010 NAFO Scheme).[134]

At first sight, at-sea inspection of non-Contracting Party vessels may seem to be an institutional application of the law of dédoublement fonctionnel because a regional fisheries organ polices fishing activities of vessels on the high seas, even if the flag state of a fishing vessel is not a party to the organ. However, at-sea inspection of non-Contracting Party vessels seems to leave some room for discussion with regard to its legitimacy. The most debatable issue may be the presumption by regional fisheries organs of undermining conservation and enforcement measures. In this regard, article 37 para. 2 of the 2010 NEAFC Scheme stipulates that the non-Contracting Party vessel that has been sighted or by other means identified as engaging in fishing activities in the convention area is presumed to be undermining the Recommendations established under the Convention.[135] Article 37 para. 3 of the NEAFC Scheme further provides that,

> "In the case of a non-Contracting Party vessel sighted or by other means identified as engaging in transhipment activities, the presumption of undermining conservation and enforcement measures applies to any other non-Contracting Party vessel that has been identified as having engaged in such activities with that vessel."

The presumption of undermining conservation and enforcement measures is provided in regulatory measures of other fisheries organs,[136] such as the NAFO,[137] the Indian Ocean Tuna Commission (IOTC),[138]

---

134 The Northwest Atlantic Fisheries Organization, Conservation and Enforcement Measures, NAFO/FC Doc. 11/1 available at <http://www.nafo.int/fisheries/CEM/CEM.pdf>.

135 However, vessels of the co-operating non-Contracting Parties under article 34 are exempted from the presumption.

136 R. Rayfuse, "Regulation and Enforcement in the Law of the Sea: Emerging Assertions of a Right to Non-Flag State Enforcement in the High Seas Fisheries and Disarmament Contexts", *Austr. Yb. Int'l L.* 24 (2005), 181 et seq. (188).

137 Article 52 of the 2010 NAFO Scheme.

the International Commission for the Conservation of Atlantic Tunas (ICCAT),[139] and Commission for the Conservation of Antarctic Marine Living Resources (CCAMLR).[140] Nonetheless, the presumption of undermining the measures in the regulatory areas raises at least two issues that need further consideration.

A first issue concerns the legitimacy of conservation measures of regional fisheries organs. Unlike port state jurisdiction, fisheries organs do not apply "applicable international rules and standards established through the competent international organization or general diplomatic conference." The legitimacy of regulatory measures adopted by regional fisheries organs is not generally accepted at the global level. In fact, these measures are qualified by the economic, political and social needs of the Member States to such fisheries organs. Accordingly, in some cases, opinions of the Member States may be divided with respect to the validity of regulatory measures. Some fisheries organisations thus affirm that a State Party which is opposed to a regulatory measure adopted by a fisheries organ is exempted from the application of the measure.[141] It appears unreasonable to argue that vessels of third states are automatically bound by the regulatory measures of the regional fisheries organisations, while Member States may be released from such regulations by opposition. It must also be remembered that in accordance with the principle *pacta tertiis nec nocent nec prosunt*, the regional treaty is not binding upon non-Contracting Parties unless rules of the treaty become part of customary law.

A second issue relates to the consistency with the principle of freedom of the high seas. With some exceptions, such as high seas fishing

---

138 Para. 2 of Resolution 01/03 Establishing a Scheme to Promote Compliance by Non-Contracting Party Vessels with Resolutions Established by IOTC, 2001.

139 Para. 1 of the Recommendation by ICCAT Concerning the Ban on Landings and Transhipments of Vessels from Non-Contracting Parties Identified as Having Committed a Serious Infringement, entered into force 21 June 1999.

140 Para. 4 of Conservation Measure 10-07 (2009): Scheme to Promote Compliance by Non-Contracting Party Vessels with CCAMLR Conservation Measures.

141 For instance, article 12 (2) (b)(c) of the NEAFC Convention; article XII (1) and (3) of the 1978 Convention on Future Multilateral Cooperation in the Northwest Atlantic Fisheries; article VIII (3) (c) and (e) of the 1966 International Convention for the Conservation of Atlantic Tunas.

for anadromous and catadromous species,[142] fishing on the high seas is, *prima facie*, lawful in international law. While the presumption concerned shifts the burden of proving innocence to vessels of non-Contracting Parties, there is scope to consider the question whether the reversal of the burden of proof is not contrary to the principle of freedom of fishing. It is true that all states are under a duty to co-operate with other states in taking the conservation measures concerning the living resources of the high seas in accordance with arts 117 and 118 of the UNCLOS. However, it is questionable whether the duty to co-operate will automatically lead to the reversal of the burden of proof.[143] Overall the legitimacy of at-sea inspection of non-Contracting party vessels on the high seas seems to remain a matter for discussion.

b. Port Inspection of Non-Contracting Party Vessels

Some regional fisheries organisations apply port inspection of non-Contracting Party vessels. Take the 2010 NEAFC Scheme as an example again. Article 40 of the Scheme provides as follows,

> "When a non-Contracting Party vessel enters a port of any Contracting Party, it shall be inspected by authorized Contracting Party officials knowledgeable of Recommendations established under the Convention and shall not be allowed to land or tranship any fish until this inspection has taken place."

Article 41 further provides that landings and transhipments of all fish from a non-Contracting Party vessel which has been inspected in port "shall be prohibited in the ports and waters of all Contracting Parties if such an inspection reveals that the vessel has species onboard which are subject to Recommendations established under the Convention unless the master of the vessel provides satisfactory evidence to the competent authorities proving that the fish were caught outside the Regulatory Area or in compliance with all relevant Recommendations established under the Convention." Inspections of non-Contracting

---

142 Fishing of anadromous and catadromous species beyond the 200-nautical mile limit is in principle forbidden by arts 66 (3) and 67 (2) of the UNCLOS, respectively.

143 M. Hayashi, "New Developments in International Fisheries Law and the Freedom of High Seas Fishing" (in Japanese), *The Journal of International Law and Diplomacy* 102 (2003), 156 et seq. (172).

Party vessels in port are also provided in the IOTC,[144] ICCAT,[145] CCAMLR[146] and NAFO.[147]

As the port is part of internal waters which are under the territorial sovereignty of the coastal state, that state is entitled to regulate access to its ports and landings and transhipments there. There appears to be scope to argue that to some extent, port inspection can contribute to protect community interests with regard to the conservation of living resources on the high seas. On the other hand, a question may arise whether port state inspection of non-Contracting Party vessels is equivalent to *de facto* extension of regulatory measures of a specific fisheries organ toward the high seas. In this regard, care should be taken that the legitimacy of conservation measures adopted by regional fisheries organs or coastal states is not *a priori* established in relation to third states. Furthermore, as demonstrated by the *EU-Chile Swordfish* dispute,[148] the unilateral prohibition of access, landing and transhipments in the port may entail the risk of creating an international dispute between the port state and the fishing state. The consistency between such unilateral measures and the WTO law, in particular, Article XX of the 1994 General Agreement on Tariffs and Trade, may also be at issue.[149] Thus the port state should be cautious about unilaterally applying the conservation measures to vessels of third states fishing on the high seas.[150] In addition, it is submitted that the current system of port

---

144 Paras 4 and 5 of IOTC Resolution 05/03 Relating to the Establishment of an IOTC Programme of Inspection in Port.

145 Para. 2 of the Recommendation by ICCAT Concerning the Ban on Landings and Transhipments.

146 Para. 5 of the CCAMLR Conservation Measure 10-07 (2009).

147 Article 54 of the 2010 NAFO Scheme.

148 WTO, Chile – Measures Affecting the Transit and Importation of Swordfish, Request for the Establishment of a Panel by the European Communities, WT/DS193/2, 7 November 2000; International Tribunal for the Law of the Sea, *Case Concerning the Conservation and Sustainable Exploitation of Swordfish Stocks in the South-Eastern Pacific Ocean*, 20 December 2000. However, both cases were suspended in March 2001. The dispute was eventually settled by negotiation between the parties. With respect to the EU-Chile Swordfish Dispute, see M.A. Orellana, "The Swordfish Dispute between the EU and Chile at the ITLOS and the WTO", *Nord. J. Int'l L.* 71 (2002), 55 et seq.

149 Cf. D. König, "The Enforcement of the International Law of the Sea by Coastal and Port States", *ZaöRV/ HJIL* 62 (2002), 1 et seq. (10).

150 Hayashi, see note 143, 172-173.

inspections is not very effective largely due to insufficient vessel information and lack of compliance among port states. Inconsistency of port state inspections may create a problem associated with ports of convenience.[151]

3. Conclusions

The above considerations yield the following conclusions.

(i) Concerning conservation of living resources in the EEZ, the coastal state has a broad discretion in determining the total allowable catch as well as the maximum sustainable yield (MSY). There is no review process by a third body on this matter. It is argued that the conservation of living resources in the EEZ is essentially characterised by the promotion of the economic and social interests of the coastal state.

(ii) On the high seas, the flag state has the responsibility to implement relevant treaties concerning conservation of marine living resources. Nonetheless, it became apparent that the flag state responsibility is inadequate to ensure effective compliance with these treaties due to the practice of flags of convenience and IUU fisheries.

(iii) In response, regional fisheries organs increasingly adopt non-flag state measures. On the one hand, it appears that to a certain extent, at-sea and port state inspections of Contracting Party vessels can contribute to enhance effectiveness of regulatory measures with regard to conservation of living resources on the high seas. On the other hand, legitimacy of at-sea inspections of non-Contracting Party vessels is not free from controversy because conservation measures adopted by regional fisheries organs cannot be considered as *a priori* legitimate to vessels of non-Contacting Parties.

(iv) In order that regional fisheries organs and their Member States could assume the role of an organ of the international community in conservation of living resources on the high seas, there will be a need to enhance the legitimacy of conservation measures. In this regard, a possible solution may be that regional fisheries organs invite all non-Contracting Parties which have fisheries interests in the regulatory ar-

---

151 S. Flothmann/ K. von Kistowski/ E. Dolan/ E. Lee/ F. Meere/ G. Album, "Closing Loopholes: Getting Illegal Fishing Under Control", *Science* 328 (2010), 1235 et seq.

eas to participate at meetings to formulate conservation measures as a co-operating party.[152]

V. General Conclusions

On the basis of the above considerations, three possible models may be identified with regard to the protection of community interests in international law.

The first model involves the protection of community interests through an international organisation. This is the most institutionalised model. An illustrative example is provided by the ISA governing the activities in the Area. As discussed earlier, activities in the Area are controlled by an international organisation, i.e., the ISA for the benefit of mankind as a whole. It may be said that presently the international community or mankind has an operational organ to promote community interests in the Area.[153] This is an important innovation in the sense that it introduces the concept of "mankind" as an emerging actor in international law.

The second model concerns the protection of community interests by an individual application of the law of dédoublement fonctionnel. According to this model, community interests are to be protected by each state which would assume the role of an advocate of the international community. This is essentially a decentralised model. The case in point in the law of the sea may be the port state jurisdiction with regard to the regulation of vessel-source marine pollution.

The third model pertains to the protection of community interests through an institutional application of the law of dédoublement fonctionnel. An example may be provided by the port state control embodied in various regional Memoranda of Understanding. According to this model, action of relevant states is more institutionalised. It may be said that this mode is in the middle between the first and second models.

The first model remains exceptional in international law, and it appears difficult to expect that a similar organisation like the ISA will develop in other branches of the law in the near future. A dilemma thus

---

152 For instance, such a mechanism is adopted by the 2010 NEAFC Scheme (article 34 (2)).

153 In this sense, it may be said that this mode is akin to the supra-state society (société super étatique).

arises as to how it is possible to protect community interests, which essentially require collective action, in the decentralised legal system. In response, at the present stage, the second and third models on the basis of the law of dédoublement fonctionnel seem to furnish realistic mechanisms for the protection of community interests in international law.

On the other hand, as noted, the lack of adequate incentive may be a major obstacle to the individual application of the law of dédoublement fonctionnel. Moreover, the lack of co-ordination may create another obstacle, undermining the efficacy of the protection of community interests. Hence there will be a need to further institutionalise the application of the law of dédoublement fonctionnel. Furthermore, it must be remembered that, as shown in the conservation of marine living resources, community interests and national interests may be mixed. As a consequence, in some cases, the application of the law of dédoublement fonctionnel may entail the risk of pursuing interests of a particular state or a group of states under the guise of action in the protection of community interests. Considering that the concept of community interests may be used as an ideology to justify a policy of a state or a particular group of states, to ensure the legitimacy of rules and standards is of central importance in the application of the law of dédoublement fonctionnel.

At present one can no longer deny that the survival of mankind as a whole may be difficult without the protection of community interests. It is argued that such interests cannot be effectively protected by the legal system relying exclusively on the principle of reciprocity. Thus the quest for effective mechanisms for the protection of community interests will continue to be an issue of considerable importance in international law.