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Expert Commentary

Is the International Seabed Regime of the LOSC 1982 an Objective Regime Valid

Erga Omnes?

*(Reviewing the Legal Status of Seabed from the
Perspective of the Law of Treaties)*

Damos Dumoli Agusman*

Keberadaan the Area sebagai tempat yang memiliki potensi sumber daya alam yang besar, telah menjadi sumber konflik khususnya mengenai hak eksplorasi di tempat tersebut. Untuk itu, UNCLOS III telah memberikan solusi penetapan status the Area sebagai Common Heritage of All Mankind yang diatur dalam rezim hukum khusus. Lahirnya rezim ini mendapat tentangan dari Amerika Serikat dan beberapa negara industri lainnya yang menginginkan agar wilayah the Area diberlakukan "first come first serve regime" atau freedom of high seas. Permasalahan berikutnya adalah apakah rezim khusus ini dapat berlaku juga bagi Negara yang bukan merupakan pihak dari UNCLOS III seperti Amerika Serikat?

The Seabed regime (the Area) is a newly emerging regime adopted within the LOSC 1982. The regime is intended to translate the concept of common heritage of mankind (CHM) into institutional reality, by establishing International Seabed Authority,

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whose functions are to organize and control activities in the area, particularly with a view to administering the resources of the area (Art. 157). It is very unique since the authority will be a first international organization which will have its own resources, and will have jurisdiction over vast areas of the globe.

The CHM principle itself has been universally accepted by the adoption of UNGA Resolution 2749, 1970 (on Declaration of Principles Governing the Seabed and the Ocean Floor, and the Subsoil Thereof, beyond the limits of National Jurisdiction), but how to interpret the principle was a very controversial issue which divided states into two groups. There were two fundamentally different interpretations of the CHM principle. The technologically-advanced states contend that the CHM principle does not preclude the freedom to unilaterally explore and exploit the resources of the Sea Bed. On the other hand, the developing nations adhere to the contention that the principle is a general rule of international law prohibits unilateral mining. The latter attempts to develop the CHM principle in pursuance to the notion of so-called establishing an *international economic order*. They do not only contend that the seabed can not be subject to appropriation but also claim that all countries must share in the management of the region and then further, there must be an active sharing of the benefits reaped from the exploitation of the Area's resources. This progressive principle is eventually reflected in the LOSC 1982, and of course, this allegedly excessive demand could not meet the former's interest.

The law-making nature of the LOSC 1982, particularly when it creates a regime for a common space property of the Area, inevitably requires as a prerequisite a universal acceptance of the Convention. The regime it creates will not work without universal participation of all states. It had been assumed before that all states would be parties to the Convention since the negotiation approach was based on consensual and package deal nature, but unpredictably, at the nearly-conclusion session, Reagan Administration through its shift foreign policy so-called

"negotiation from strength",¹ could not accept the far-reaching consensus on controversial issue of seabed regime and brought about non-universally acceptance of the Convention.

The present non-universal situation, which was obviously unthinkable and unpredictable during the negotiation, raised a big question about the legal status of the seabed regime. The paramount aim of a desirable seabed regime for resource exploration and exploitation can not be achieved if there are third states outside the LOSC 1982 who ignore the regime by claiming an open right to use the seabed resources and authorize their nationals and vessels to mine there. In pursuing this problem most authors emphasize on ineffectiveness of the seabed regime rather than its legality. It is beyond doubt that the existence of multi regimes would not only affect the effectiveness of the regime but, which is most important, create a conflict of a legal norm where the practical and legal nature of the regime would most likely be far more uncertain.²

The essential feature of seabed regime is that it is creating an international regime upon the Area, by converting from the high seas regime into seabed/CHM regime. The regime is intended to embrace "all states". Accordingly, it is suggested to be seen not as a contracts having effect for state parties but an instruments intending to establish general rules applied for all states. The wording of the seabed regime clearly indicates this feature. The LOSC 1982, particularly the regime provisions, uses various terms of subjects such as "coastal states", "developing states", "all states", "every state", and "no state" in every different context. This kind of wording should be presumed as refer to states generally regardless parties or not to the Convention. A definition has been given by the LOSC 1982, but it is only to the term "state parties" ("State parties"

¹ "Negotiation from strength" is a well-known phrase describes the character of Reagan Administration's foreign policy. This hard line policy was particularly directed to the Soviet Union, then penetrated to other strategy-concerned areas such as UNCLOS III.

² Grolin, Jesper, *The Future of the Law of the Sea*, ODIL, 1984, p. 20.

mean states which have consented to be bound by this Convention and for which this Convention is in force (Art. 1.1.2(1) the LOSC 1982). Therefore, the regime, as might be said of the whole Convention, declares certain rights and imposes obligations on all states.

Consequently, another problem emerges, if there are some states stay outside the LOSC 1982, it might lead to a strong argument that such regime is in breach of the principle of *pacta tertiis nec nocent nec prosunt*, that a treaty does not create either obligations or rights for a third State without its consent.

The Vienna Convention on the Law of Treaties 1969, Art. 36, rules out the possibility to accord rights to all states if the state parties intend to do so. The wording such as "all states" of the LOSC 1982 indicates such an intention. But, interestingly, the regime also imposes obligations which, according to Art. 35 of The Vienna Convention, requires not only such intention but also expressly and written acceptance of the non-party to such obligations.

There is a strict view that the LOSC 1982 has a contractual nature which binding only state parties, based on ancient maxim of *pacta tertiis nec nocent nec prosunt*, and might affect third parties by virtue of customs as ruled out by Art. 38 Vienna Convention.³ Most writers then take the view that the some rules of LOSC 1982 declares customary rules, some other have passed into, and the rest is going to pass into customary rules. It can be said of Part XI (Area), in spite of the absence of state practices (there no yet exists established practices of states in exploration and exploitation over the seabed area), and the rule could instantly pass into customary law.⁴ This traditional argument seems resolve the problem. By

³ Lee, Luke T, the Law of the Sea Convention and Third States, *AJIL*, 1983, Vol. 77, p. 565.

⁴ It is in the line of Bin Cheng argument about instant customary law, see Bin Cheng, United Nations Resolutions on Outer Space: "Instant" International Customary Law", *Indian Journal of International Law*, 1965.

claiming that the LOSC 1982 will fully pass into customary rules, they contend that the seabed regime will be valid to all states. But, the legal constraint is still unavoidable, since the existence of persistent objector rules may prevent non-party states to be bound by the Convention. United States is in the good position to invoke this rule because from the beginning (i.e. voted against the UNGA *Moratorium Resolution 2574*, 1969) it has persistently objected that the CHM principle include the prohibition of unilateral mining in the Seabed area.

One might argue that the persistent objector rule is only temporary or strategic value in the evolution of rules of international law. For instances, US, UK, and Japan objections to expanded coastal state jurisdiction were ultimately to no avail, and they have been forced to accede to 12-mile territorial sea and 200-mile EEZ,⁵ on the way around, Norway persistently objection with regard to normal baseline, lasted by the adoption of straight baselines principle in Geneva Convention 1958, and Germany objection to equidistance principle, eventually accepted by LOSC 1982. It is clear then, that the existence of persistent objector rule eventually will be resolved or determined by the *market forces* of international community.

However, despite the fact that the seabed regime might eventually pass into customary rules and be valid to all states, it is still debatable whether it is appropriate to deal with the legal force of the regime by the strict view of the principle of *pacta tertiis nec nocent nec prosunt* or alternatively by virtue of customs. The very entirely nature or the undivided character of the regime which necessitate universally acceptance by all states, leads to the strong suggestion that it should be approached under particular concept of international law beyond such traditional methods. Accordingly, it is worth reexamining the legal nature of the seabed regime and particularly its legal effects to third parties in a more appropriate manner.

⁵ Charney, Jonathan I, the Persistent Objector Rule and the Development of Customary International Law, *BYIL*, 1985, p.21-22.

It is a general principle that a treaty does not create either obligations or rights for a third State without its consent. But Waldock, a special Rapporteur to the ILC drafting the Vienna Convention recommended that provisions be included to recognize that, in two instances, a treaty can create rights and duties for third states. The first occurs where a treaty establishes an **objective regime**, creating rights and obligations *erga omnes*. The second arises where a treaty becomes binding upon a third State because it actually declares a rule of customary international law. Sometime a treaty may lead to the general acceptance of a norm of customary law which accordingly will bind non-parties.⁶

Brierly also indicated that international law has begun to recognize that some treaties have an objective, legislative character, for example where they create international situations or entities binding upon all states, whether contracting parties or not. Such as the Aaland Island Convention of 1856, this neutralized those islands in the Baltic and which was held by a commission of jurists established by the League Council to be objectively valid *erga omnes*. The Suez Canal Convention of 1908 and the clauses of the Versailles Treaty concerning the Kiel Canal, both of which converted the Canals into international waterways. Then the UN Charter.⁷

McNair pointed out the existence of a kind of constitutive or semi-legislative treaties or treaties of a public law character which frequently embody the decision of a powerful group of states, acting or assuming to act in the public interest. Likewise, *The Reparation for Injuries Case* 1949, noted the existence of international organizations of states which possess international personality for the purpose of a claim that exercisable against all states whether member or non-member.⁸

⁶ Triggs, Gillian, *International Law and Australian Sovereignty in Antarctica*, Sydney, 1986, p. 140-144.

⁷ Triggs, *Ibid*, p. 144.

⁸ Sinclair, I, *Vienna Convention on the Law of Treaties*, 1984, p. 104-105.

Starke also recognize that certain multilateral Convention which are intended to have universal operation, may provide in terms for their application to non-parties. Such as Single Convention on Narcotic Drugs concluded at New York 1961, enabled an international organ finally to determine the estimates for legitimate narcotic drug requirements of States, not parties to the Convention.⁹

Legal writings thus supports the notion that treaties establishing objective regime may have effects *erga omnes*. Interestingly, Waldock concluded his work for the ILC with the recommendation that a treaty establishes an objective regime when it appears from its terms and to create in the general interest general obligations and rights relating to particular region, State, territory, locality, river, waterways, or to a particular area of sea, sea-bed, or air space....¹⁰

International Law Commission in drafting Vienna Convention particularly in dealing with the matter of "treaties and third states" tried to cover the objective regime. Some members expressed the view that the concept of treaties creating objective regimes existed in international law and merited special treatment in the draft articles. In their view, treaties which fall within this concept are treaties for the neutralization or demilitarization of particular territories or areas, and treaties providing for freedom of navigation in international rivers or maritime waterways; and they cited the Antarctic Treaty as a recent example of such a treaty. Other members, however, while recognizing that in certain cases treaty rights and obligations may come to be valid *erga omnes* considered that these cases resulted from the grafting of an international custom upon a treaty. Since there was no agreement with regard to the source of such effect, the Commission decided to leave this question aside in drafting articles. It must not therefore be assumed that the deliberate decision of the ILC not to make special

⁹ Starke, G, *An Introduction to International Law*, 1977, p. 466.

¹⁰ Triggs, *Op. Cit*, p. 144.

provision for objective regimes constitutes a denial of the existence of this category of treaties. It constitutes at most a denial of the need for a special rule to explain the relationship between treaties creating objective regimes and third states.¹¹ It can be seen then from the Vienna Convention on Succession of States in respect of Treaties, which acknowledges the objective regime valid *erga omnes*¹². In its commentary to this Convention, the ILC reaffirmed that the Vienna Convention on the Law of Treaties 1969, does not except treaties intended to create objective regimes from the general rules which it lays down concerning the effects of treaties upon third states. Unfortunately, since then, the trend indicates that the concept of objective regime valid *erga omnes* has more likely been seen in the light of Article 38 Vienna Convention than in such a category that not yet covered by the Convention.

The division of opinion in the ILC on the question of objective regime may reflect the general position of the Socialist States at that time upon the rule that obligations can not be imposed on third States in the absence of their clear consent. Curiously, this position seems to be decline, since in dealing with The LOSC 1982, the Soviet authors supports the idea that the Convention would be law for all states—even those that are outside its framework.¹³

It is also interesting to note the case of *International Status of South West Africa* which stated:

From time to time it happens that a group of great Powers, or a large number of States both great and small, assumes a power to create by a multipartite treaty some new international regime or status, which soon extends beyond the limit of actual contracting parties, and giving it an

¹¹ Sinclair, *Op. Cit.*, p. 105.

¹² Art. 12 of the Vienna Convention on the Succession of States in respect of Treaties, 1975.

¹³ Danilenko, Gennady M, *International Law Making, Perestroika and International Law* Editor: Anthony Caraty and Gennady M Danilenko, Eidenburgh, 1990, p. 19.

objective existence. This power is used where some public interest is involved.

The next question then is what the legal basis for the *erga omnes* effect is. It can not be denied that the source of *erga omnes* effect of objective regime is a controversial issue. The traditional approach contends that the source remains custom. It might be argued, if such effect remains custom, can it be said that the Antarctic Treaty, which is always being cited as a recent example of creating an objective regime, imposes obligations *erga omnes* by virtue of custom when a small number of states have become parties to the treaty? McNair argues that the effect of certain kinds of treaties *erga omnes* is to be attributed to some inherent and distinctive juridical element in that treaty.

Further, Reuter stated that when consents or institution flow from a sufficiently representative group of States directly (principally) interested in a question, these consents or institutions can sometime produce effects in regard of third states. So the legal basis of the objective effects of this category of treaties is to be found not in the intention of the parties but in the consent of a sufficiently representative group of States. It is very important with regard to the multilateral treaties which establish an international regime intended to produce objective legal effects.¹⁴

There is also an interesting argument saying that particular areas belong to no state such as high seas, seabed, and outer space, are under occupation of international community i.e. the United Nations. On the basis of the rules of international law relating to occupation of territory, in dealing with such areas, the United Nations could enact, by a qualified majority, rules binding all states.¹⁵

¹⁴ Halloway, Kaye, *Modern Trends in Treaty Law*, London, 1967, p. 583.

¹⁵ See Finn Seyerstedt's comments on Realistic Approach to international Law, in *The Spirit of Uppsala*, New York, 1984, edited by Atle Grahl-Madsen and Jiri Toman, p. 267.

There are four elements of the seabed regime which closely related to this objective regime. Firstly, there is a legal change of regime, from the high seas regime to a newly emerging regime, from *res communis* concept to CHM. The two are fundamentally different. *Res communis* regime implies free for all, and allow all states to use the area or even to abuse it more or less it wishes, including the appropriation of natural resources. Meanwhile, under CHM principle that the management, exploitation and distribution of the natural resources of the Area in question are matters to be decided by international community and are not to be left to the initiative and discretion of individual states or their nationals. This changing signifies that the new regime possesses universal or *erga omnes* legal effect. Accordingly, no state can possibly claim that it is still bound by high sea regime meanwhile other states are bound by the new CHM regime.

Secondly, the regime is intended to have permanent and general effect on a common area, a particular area which belongs to all mankind. The regime governs the Area exclusively, Art. 153 (1) declares that All activities in the Area are to be organized, carried out and controlled by the authority on behalf of mankind as a whole. So it is to serve the general interest of all states or possesses public character. It is in the interest of all mankind that the seabed area shall continue forever to be used exclusively for peaceful purposes and shall be carried out for the benefit and interest of all mankind.

Third, the regime establishes an international organization (authority) possesses objective international personality, which is valid *erga omnes* against all states. *The Reparation for Injuries Case* 1949, noted the existence of international organizations of states which possess international personality for the purpose of a claim that exercisable against all states whether member or non-member. The Court based its opinion on the number of participants of the Organization and the aim to be pursued, thus recognized that a certain legislative power could be possessed by a large group of

states even though this did not comprise all States.¹⁶ It can be argued then that the objective personality of International Seabed Authority which will have its own resources and jurisdiction over the Area and the right to control over activities in the Area should be applicable to all states regardless parties or not to the LOSC 1982.

Fourth, the regime is created by common consent of a sufficiently representative group of states. It is always being cited that the negotiation process in the UNCLOS III reflected a trend what so-called democratization of international relations. The basis of decision making for the general interest in international community has fundamentally shifted from power politics to democracy.

These elements significantly lead to the conclusion that the seabed regime is an objective regime and therefore is valid *erga omnes*.

This paper is not intended to consider whether the nature of objective regime might also be invoked for the whole part of the LOSC 1982, because such topic needs special consideration and research. The seabed area (Part XI) has such a distinct nature that more likely to consider in the context of objective regime. It is one of international spaces (outer space and Antarctic, are among others) which has allegedly been claimed as common heritage of mankind. But the objective regime might be the legal answer to the idea of many states and jurists to regard the LOSC 1982 as falling into a special category with the reasons: the very scope of the Convention suggest codification and progressive development on a scale analogous to code making in municipal legal system, a near exhaustive statement and formulation of the rules for a discrete branch of law. During the debate on the Convention, a number of states have expressed the opinion that the Convention created the only valid law for the ocean space binding all states irrespective of their participation. Many developing states claimed, in particular,

¹⁶ Hermann Mosler, *The International Society as a Legal Community*, in *Recueil des Cours*, 1974, p. 235.

that the Convention would be law for all states—even those that are outside its framework. Furthermore, Group of 77 assert that Part XI is binding upon all states because it stems from the consensus declaration of the UNGA and the crystallization of the concept and has therefore become a peremptory norm of international law. The view of which can not sufficiently be approached merely by the traditional source of international law under the rubric of *the inter-relations of treaty and customs*.

In fact, some rules provided within Part XI seem incompatible with the nature of objective regime. The seabed regime does not enforce *erga omnes* principle thoroughly. Instead, it also makes a legal distinction between state parties and non-state parties in carrying out certain rights and obligations arise from the regime. The discriminated application in one hand and *erga omnes* application on the other hand in dealing with an area of common heritage of mankind clearly incompatible with the nature of an objective regime.

The provisions stipulate *erga omnes* principle are such as, Art. 137 which says:

- (1) *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 judicial person appropriate any part thereof. No such claim or exercise of sovereignty or sovereign rights nor such appropriation shall be recognized.*
- (3) *No State or natural or judicial person shall claim, acquire or exercise rights with respect to the minerals recovered from the Area except in accordance with this part. Otherwise, no such claim, acquisition or exercise of such rights shall be recognized.*

These paragraphs which are reflecting the agreed principle of CHM impose obligations to all states without any discrimination whether parties or not. This construction is consistent to *erga omnes* nature. To do otherwise the paragraph undoubtedly becomes meaningless. Art. 153:1 is also correct in stating that the Authority shall organize and control activities in the Area. In carrying such rights the Authority performs *on behalf of mankind* not of state

parties. Unfortunately, when the principle further implemented into institutional level or exploitation system, the rights do not confer on all states. Art 157 states that only state parties through the authority organize and control activities in the area. Undoubtedly, this rule is inconsistent to objective regime because it ignores other states as commoners.

It might be said that the objective regime was created in the wrong arrangement, or, it may also right to state that the objective regime is confronted by the existing traditional principle of international law, which based on state sovereignty, so the consequence is that the distinction of state parties and non-state parties as reflecting the sacred element of state's sovereignty (*consent of states* to the Convention) is definitely required. From this point of view, it can be best concluded that a common area or a common resources such as seabed (Area) should not be dealt with based on legal distinction of state parties and non-state parties, but should be based on *erga omnes* principle, under which all states should be treated without any legal discrimination.

Bibliography

- Brewer, William, C, *Deep Seabed Mining: Can an Acceptable Regime ever found*, ODIL, 1982, vol 11.
- Caminos, Hugo, and Michael R. Molitor, *Progressive Development of International Law and The Package Deal*, AJIL, 1985, vol. 79.
- Charney, Jonathan I, *The Persistent Objector Rule and The Development of Customary International Law*, BYIL, 1985.
- Danilenko, Gennady M, *International Law Making, Perestroika and International Law* Editor:Anthony Caraty and Gennady M Danilenko, Eidenburgh, 1990.
- Grahl-Madsen, Atle, and Jiri Toman, (ed.) *The Spirit of Uppsala*, New York, 1984.

- Goedhuis, *Some Recent Trends in the Interpretation and the Implementation of the Rules of International Space Law*, Columbia Journal of Transnational Law, 1981.
- Grolin, Jesper, *The Future of the Law of the Sea*, ODIL, 1984.
- Halloway, Kaye, *Modern Trends in Treaty Law*, London, 1967.
- Hermann, Mosler, *International Society as a Legal Community*, Recueil Des Cours, 1974.
- Larschan, Bradley, and Bonnie C. Brennan, *The Common Heritage of Mankind Principle in International Law*, Columbia Journal of Transnational Law, 1983, Vol. 21.
- Lee, Luke T, *The Law of the Sea Convention and Third States*, AJIL, 1983, Vol. 77.
- McNair, Arnold, D, *The Law of Treaties*, Oxford, 1961
- Reuter, Paul, *Introduction to the Law of Treaties*, London, 1989.
- Schmidt, Markus G, *Common Heritage of Mankind or Common Burden?*, Oxford, 1989.
- Shingleton, Brad, *UNCLOS III and the Struggle of Seabed Mining*, ODIL 1984, Vol13.
- Sinclair, I, *Vienna Convention on the Law of Treaties*, 1984.
- Starke, G, *An Introduction to International Law*, 1977.
- Starke, G, *Treaties as a Source of International Law*, BYIL, 1946.
- Treves, Tullio, *The Adoption of The Law of the Sea Convention: Prospect for Seabed Mining Marine Policy*, 1983, vol. 7.
- Triggs, Gillian, *International Law and Australian Sovereignty in Antarctica*, Sydney, 1986.