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Article abstract

This article examines the obligation of States to cooperate under the *United Nations Convention on the Law of the Sea* (*UNCLOS*). The authors analyse all the relevant provisions of the Convention in order to determine the nature and scope of such an obligation. The obligation to cooperate thus enshrined is intricate in nature insofar as it has several facets. This intricacy is reflected in a range of duties to cooperate expressed in a variety of phrases. The latter are sometimes mandatory, sometimes hortatory. In some cases, cooperation is even optional for States Parties. Therefore, the article adopts an extensive approach to the obligation to cooperate. The latter includes the obligation to exchange information and the obligation to negotiate or consult. In this respect, the obligation to cooperate is tricky in nature. On the one hand, the obligation to exchange information is complex because it includes two mandatory sub-obligations: the obligation of publicity and the obligation to notify. On the other hand, there is an ambivalent obligation to negotiate or consult. The article further examines the semantic diversity of relevant *UNCLOS* provisions, the pursuit of special States' interests and the paucity of coercive measures against States as potential hindrances to the performance of the obligation to cooperate. The authors recommend solutions to overcome such hindrances. Good faith execution, the reconciliation of State interests with community interests, and the use of countermeasures to induce compliance are respective solutions to these limitations.

THE OBLIGATIONS OF STATES TO COOPERATE UNDER THE *UNITED NATIONS CONVENTION ON THE LAW OF THE SEA*

Etienne Kentsa & Arnold Moyo Dongue[*]

This article examines the obligation of States to cooperate under the *United Nations Convention on the Law of the Sea* (*UNCLOS*). The authors analyse all the relevant provisions of the Convention in order to determine the nature and scope of such an obligation. The obligation to cooperate thus enshrined is intricate in nature insofar as it has several facets. This intricacy is reflected in a range of duties to cooperate expressed in a variety of phrases. The latter are sometimes mandatory, sometimes hortatory. In some cases, cooperation is even optional for States Parties. Therefore, the article adopts an extensive approach to the obligation to cooperate. The latter includes the obligation to exchange information and the obligation to negotiate or consult. In this respect, the obligation to cooperate is tricky in nature. On the one hand, the obligation to exchange information is complex because it includes two mandatory sub-obligations: the obligation of publicity and the obligation to notify. On the other hand, there is an ambivalent obligation to negotiate or consult. The article further examines the semantic diversity of relevant *UNCLOS* provisions, the pursuit of special States' interests and the paucity of coercive measures against States as potential hindrances to the performance of the obligation to cooperate. The authors recommend solutions to overcome such hindrances. Good faith execution, the reconciliation of State interests with community interests, and the use of countermeasures to induce compliance are respective solutions to these limitations.

Cet article examine l'obligation de coopération des États en vertu de la *Convention des Nations Unies sur le droit de la mer* (*CNUDM*). Les auteurs analysent toutes les dispositions pertinentes de la Convention afin de déterminer la nature et la portée d'une telle obligation. L'obligation de coopérer ainsi consacrée est de nature complexe dans la mesure où elle comporte plusieurs facettes. Cette complexité se traduit par une série d'obligations de coopérer exprimées par des expressions variées. Ces dernières sont tantôt impératives, tantôt incitatives. Dans certains cas, la coopération est même facultative pour les États parties. Dès lors, l'article adopte une approche extensive de l'obligation de coopérer. Cette dernière comprend l'obligation d'échanger les informations et l'obligation de négocier ou de consulter. À cet égard, l'obligation de coopérer est de nature complexe. D'une part, l'obligation d'échanger les informations est complexe car elle comprend deux sous-obligations impératives : l'obligation de publicité et l'obligation de notification. D'autre part, il existe une obligation ambivalente de négocier ou de consulter. L'article examine en outre la diversité sémantique des énonciations pertinentes de la *CNUDM*, la poursuite des intérêts particuliers des États et la rareté des mesures coercitives à l'encontre des États comme autant d'obstacles potentiels à l'exécution de l'obligation de coopérer. Les auteurs recommandent des solutions pour surmonter ces obstacles. L'exécution de bonne foi, la conciliation des intérêts des États avec ceux de la Communauté et l'utilisation de contre-mesures pour inciter à la conformité sont des solutions respectives à ces limitations.

Este artículo examina la obligación de los Estados de cooperar en virtud de la *Convención de las Naciones Unidas sobre el Derecho del Mar* (*CNUDM*). Los autores analizan todas las disposiciones pertinentes de la Convención para determinar la naturaleza y el alcance de dicha obligación. La obligación de cooperar así consagrada es de naturaleza intrincada en la medida en que presenta varias facetas. Esta complejidad se refleja en una serie de obligaciones de cooperar expresadas en diversas expresiones. Estos últimos son a veces obligatorios, a veces exhortativos. En algunos casos, la cooperación es incluso facultativa para los Estados Parte. Por lo tanto, el artículo adopta un enfoque amplio de la obligación de cooperar. Esta última incluye la obligación de intercambiar información y la obligación de negociar o consultar. En este sentido,

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la obligación de cooperar es de naturaleza delicada. Por un lado, la obligación de intercambiar información es compleja porque incluye dos subobligaciones obligatorias: la obligación de publicidad y la obligación de notificar. Por otro lado, existe una obligación ambivalente de negociar o consultar. El artículo examina además la diversidad semántica de las disposiciones pertinentes de la CNUDM, la búsqueda de intereses particulares de los Estados y la escasez de medidas coercitivas contra los Estados como posibles obstáculos al cumplimiento de la obligación de cooperar. Los autores recomiendan soluciones para superar estos obstáculos. Así, la ejecución de buena fe, la conciliación de los intereses estatales con los comunitarios y el uso de contramedidas para inducir al cumplimiento se consideran soluciones respectivas a estas limitaciones.

The codification operation that led to the adoption of the United Nations Convention on the Law of the Sea[1] (hereafter "*UNCLOS*") in 1982 contributed to the structure of international relations in the use of the seas and oceans. Considered for a long time as "a body of customary international law",[2] the rules governing the seas were becoming obsolete with time and "the need for adaptability"[3] became the most important concern of the international community. Therefore, there was a significant change in the rules governing the use of the sea[4], especially concerning the duty of States to cooperate. The reading of the *UNCLOS* preamble suggests cooperation is at the heart of sea use. In fact, states wanted to settle, in the spirit of mutual understanding and cooperation, all issues relating to the law of the sea. The same observation goes for international rules relating to treaties, notably the 1969 Vienna Convention on the Law of Treaties.[5] In its preamble, treaties constitute a means of developing peaceful cooperation among the Nations. It is worth noting that one of the purposes of the United Nations is to achieve international cooperation, in solving international problems.[6] International cooperation is the "guiding principle of the United Nations."[7] In addition, the Charter of Economic Rights and Duties of States[8] imposes cooperation as the main mechanism for resolving States' economic and social problems; and encourages cooperation, based on mutual advantage and equitable benefits for all peace-loving States.[9] From the combined reading of these international instruments, cooperation is the most important means of international relations. International cooperation *sensu largo* is

> Cooperation that two or more States may grant each other by agreement or on a case-by-case basis, [in various] matters, for the transmission, reciprocal recognition and/or enforcement of foreign legal acts and judgements, for the transmission of information, for the transfer of arrested persons (extradition, mutual assistance in criminal matters, transfer of detainees), for the performance of investigations, letters rogatory and searches for missing persons.[10]

The school of liberal institutionalism reminds us that there is a time when cooperation can be advantageous for States.[11] Since all States have interests in the seas,

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1 *United Nations Convention on the Law of the Sea*, 10 December 1982, 1833 UNTS 397, 21 ILM 1261 [*UNCLOS*].

2 Yoshifumi Tanaka, *The International Law of the Sea*, 3rd ed (Cambridge: Cambridge University Press, 2019) at 26.

3 *Ibid*.

4 The three conferences for the codification of the law of the sea [*UNCLOS* I (1958), *UNCLOS* II (1960), and *UNCLOS* III (1973-1982)] focused on the issues of the delimitation of the sea and the determination of the jurisdiction of costal States over the parts of the sea placed under their jurisdiction.

5 *Vienna Convention on the Law of Treaties*, 23 May 1969, 1155 UNTS 331 [*VCLT*].

6 *UN Charter*, 26 June 1945, UNTS No 1 Chapter XVI, art 1(3).

7 Anne Peters, "International Dispute Resolution: A Network of Cooperational Duties" (2003) 14:1 EJIL 1 at 2. See *UN Charter*, arts 1(3); 11; 13; Chapter IX.

8 *Charter of Economic Rights and Duties of States*, UNGA, 29th Sess, UN Doc A/9631 (1974) GA Res 3281 (XXIX).

9 *Ibid*, Preamble.

10 See Jean Salmon, *Dictionnaire de droit international public* (Bruxelles: Bruylant/AUF, 2001) at 432.

11 See Bertrand Badie, "Les Nations Unies face au conservatisme des grandes puissances", *Le Monde diplomatique* (June 2015) at 9.

cooperation is the main vehicle for such interests protection. The *UNCLOS* aimed the realization of a just and equitable international economic order taking account of interests and needs of mankind as a whole and, in particular, the special interests and needs of developing coastal or land-locked countries.[12] While the principal role of the law of the sea is the reconciliation of States' interests, "the protection of community interests appears at present to be increasingly important in th[is] law."[13] Even though positive international law remains to some extent the law of States, these States not only have individual interests, but also – and increasingly – share interests that are common to all States, as well as to their (trans)national communities.[14] Such a development is acknowledged by the "widely referenced move away from an international 'law of coexistence' towards a 'law of cooperation'."[15] In effect, the obligation of States to cooperate is not merely the concern of law of the sea, but also other areas of international law like international criminal law,[16] international environmental law,[17] etc. By making cooperation an obligation of States in their relations, international law imposes on them peaceful participation in international development. In this respect, there is a promotion of pacific settlement of disputes[18] amongst States as the primary mechanism imposed on them under international law whatever their matter. The origin of duty to cooperate under *UNCLOS* can be found in Principle 7 of the *Rio Declaration on Environment and Development*, which states: "States shall co-operate in a spirit of global partnership to conserve, protect and restore the health and integrity of the Earth's ecosystem."[19] The duty to cooperate is a legal requirement imposed on *UNCLOS* Parties to proactively work together in a coordinated manner as far as the law of the sea is concerned, taking into account both the individual State and community interests. This obligation includes:

> an obligation to notify affected States of actual or imminent danger to the marine environment, to make contingency plans for dealing with such dangers, to research, to study and to exchange information and data in order to provide scientific criteria for the development of rules, standards, procedures and practices to reduce, prevent or control pollution.[20]

The obligation to cooperate is a corollary of the principle of performance in good faith of States' treaty obligations. The principle of good faith is a source of the

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12 *UNCLOS*, *supra* note 1, Preamble.

13 See Tanaka, *International Law of the Sea*, *supra* note 2, at 538.

14 See Rozemarijn J Roland Holst, *Change in the Law of the Sea: Context, Mechanisms and Practice* (Leiden/Boston: Brill Nijhoff, 2022), at 59.

15 *Ibid.*

16 See generally Valerie Oosterveld, Mike Perry & John McManus, "The cooperation of States with the International Criminal Court" (2001) 25:3 Fordham Intl L J 767.

17 See generally Alastair Neil Clark, "The Duty to Cooperate in International Environmental Law: Constraining State Discretion through Due Respect" (May 2020), online: <https://academic.oup.com/yielaw/article/30/1/22/6054286>.

18 See *UN Charter*, Chapter VI.

19 *Rio Declaration on Environment and Development*, Annex I of the *Report of the United Nations Conference on Environment and Development*, UNGA, 1992, UN Doc A/CONF.151/26 (Vol 1), Principle 7.

20 See Moira L McConnell & Edgar Gold, "The Modem Law of the Sea: Framework for the Protection and Preservation of the Marine Environment? (1991) 23:1 Case Western Reserve J of Intl L 83 at 91.

duty to cooperate in general international law.[21] Article 300 of *UNCLOS* requires States Parties to fulfil in good faith the obligations assumed under the Convention. The International Court of Justice (ICJ) in the North Sea Continental Shelf Cases specified the content of the international obligation to cooperate in a spirit of good faith:

> The parties are under an obligation to enter into negotiations with a view to arriving at an agreement, and not merely to go through a formal process of negotiation […]; they are under an obligation so to conduct themselves that the negotiations are meaningful, which will not be the case when either of them insists upon its own position without contemplating any modification of it.[22]

As noted by Rogoff, "[t]he international negotiation process, viewed as a whole, is the principal vehicle for cooperation between states."[23] Like a contract, *UNCLOS* is an instrument of cooperation in the maritime field.[24] Therefore, the parties shall come together to fulfil their obligations following the decision they have made, taking into account the interests of each of them. In that regard, all States concerned negotiate piecemeal and approve all relevant decisions unanimously, whether separately or within a collegiate body. Institutionalized cooperation is more successful in preparing the necessary data for decision-makers.[25] Here, the principle of reciprocity[26] plays an important role since States ensure themselves that their relations are moving smoothly in keeping with the principle of good faith. As the main actors to whom the duty to cooperate applies, States must respect all the rules of international law in the conduct of their sea-related relations. The performance of the duty to cooperate implies the application of the principle of limited sovereignty. The concept of sovereignty in international law is a crucial element for identifying the State endowed with the ability to enter treaties.[27] Despite the complexity of the concept, De Malberg considered that a State is sovereign when it is free from any subordination to a foreign power from an international perspective.[28] Combacau considers sovereignty as the freedom of the State to do everything in its power.[29] Nonetheless, when the State becomes a party to a treaty, it decides to abandon part of its sovereignty to give

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21 See Peters, "International Dispute Resolution", *supra* note 7 at 15-16.

22 *North Sea Continental Shelf (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands)*, Judgment of 20 February 1969, [1969] ICJ Rep 3, para 85.

23 Martin A Rogoff, "The Obligation to Negotiate in International Law: Rules and Realities" (1994) 16:1 Mich J of Intl L 141 at 182.

24 René Demogue, Georges Ripert and Jean Carbonnier have defended the idea that the contract is fundamentally an act of cooperation. On this subject, read François Diesse, "Le devoir de coopération comme principe directeur du contrat" (1999) 43 Arch Phil D 259.

25 Dante A Caponera, "Patterns of Cooperation in International Water Law: Principles and Institutions" (1985) 25:3 Nat Resources J 563 at 570.

26 Read Francisco Paris & Nita Ghei, "The Role of Reciprocity in International Law" (2003) 36:1 Cornell Intl L J 93.

27 The Permanent International Court of Justice (PCIJ) stated, "the right of entering into international engagements is an attribute of State sovereignty." See *SS Wimbledon* case, PCIJ, Series A, No 1, Judgment 17 August 1923, at 25.

28 Raymond Carré de Malberg, *Contribution à la théorie générale de l'État: spécialement d'après les données fournies par le droit constitutionnel français,* vol 1 (Paris: Recueil Sirey, 1920) at 75.

29 Jean Combacau, "Pas une puissance, une liberté : la souveraineté internationale des États" (1993) 67 Pouvoirs at 51.

legitimacy to the instrument. In effect, the States Parties in application of the principle *pacta sunt servanda*[30] must perform the duty of cooperation imposed by *UNCLOS*.

Cooperation is evoked almost in two-thirds[31] of the *UNCLOS*, either as general cooperation or the duty to cooperate. Direct obligations are imposed on States, which concern all parts of the sea.[32] This paper assesses the nature and scope of the obligation of States to cooperate under *UNCLOS*. The authors undertake to analyse in a detailed manner the relevant *UNCLOS* provisions to determine the nature of the obligation incumbent on States Parties concerning cooperation. On the other hand, they dwell on the uncertainty surrounding the performance of this obligation to study its hindrances.

I. The Intricate Nature of the Obligation to Cooperate

The *UNCLOS* contains a myriad of words to express the States' obligation to cooperate; thereby making the *Convention* "a prime example of obligations run amok."[33] Such words include "shall cooperate,"[34] "should cooperate,"[35] "may cooperate,"[36] "shall publish,"[37] "shall notify,"[38] "shall communicate,"[39] "shall enter into negotiation,"[40] "shall seek to agree upon,"[41] "shall promote international cooperation,"[42] etc. This semantic diversity, coupled sometimes with the use of hortatory phrases such as "should", "seek to" and "make every effort to", makes the obligation to cooperate intricate. A careful reading of the relevant Convention provisions helps identify a series of cooperation obligations. In effect, depending on the areas of cooperation, States Parties have at the same time a mandatory, an exhortatory and a tricky obligation to cooperate.

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30 See *VCLT*, art 26.

31 Christophe Nouzha notes that cooperation underpins all the rules of law enshrined in the *UNCLOS*. See Christophe Nouzha, "Le rôle du Tribunal international du droit de la mer dans la protection du milieu marin" (2005) 8:2 RQDI 65 at 81.

32 Read United Nations, Division for Ocean Affairs and the Law of the Sea (Office of Legal Affairs), *The Obligations of States Parties under the United Nations Convention on the Law of the Sea and Complementary Instrument,* New York, 2004.

33 Seokwoo Lee, "*UNCLOS* and the Obligation to Cooperate", in Clive Schofield, ed, *Maritime Energy Resources in Asia: Legal Regimes and Cooperation* (February 2012) Special Report No 37 at 25.

34 See *UNCLOS*, *supra* note 1, art 41(5); art 61(2); art 64(1); art 65; art 66(3); art 66(4); art 69(3); art 70(4); art 94(7); art 98(2); art 100; art 108(1); art 117; art 118; art 130(2); art 197; art 199; art 200; art 201; art 226(2); and art 235(3).

35 *Ibid* art 43; and art 123.

36 *Ibid* art 129.

37 *Ibid* art 211 (6).

38 *Ibid* art 73(4); art 198; art 211(6); art 217(7); art 231; and art 254(1).

39 *Ibid* art 206; art 211(3); and art 250.

40 *Ibid* art 118; and art 130(2).

41 *Ibid* art 63(1 and 2).

42 *Ibid* art 143.

A. The Mandatory Obligation to Cooperate

Under *UNCLOS*, the phrase "shall cooperate" generally expresses the mandatory nature of the fundamental obligation to cooperate. Several articles of the *Convention* contain such a phrase.

First, concerning sea-lanes and traffic separation schemes (TSS), Article 41(5) provides that, regarding a strait where such schemes through the waters of two or more States bordering the strait are being proposed, the States concerned shall cooperate in formulating proposals in consultation with the International Maritime Organization (IMO). This provision creates a mandatory obligation of cooperation for States. In addition, such States shall formulate the proposals in consultation with the IMO even though the role of the latter "is largely recommendatory in relation to its member States".[43] It is noteworthy that IMO recommendations, while not legally binding, are "widely accepted and implemented".[44]

Secondly, for the conservation and management of the living resources in exclusive economic zones (EEZs) and high seas, six articles of the *Convention* provide for the obligation of States to cooperate. Article 61(2) imposes an obligation on the coastal State to cooperate with competent international organizations (IOs) whether sub regional, regional or global in the adoption of proper conservation and management measures to avoid overexploitation. The most notable global organization is the Food and Agriculture Organization (FAO), which performs both normative and technical activities in support of member countries in the conservation of living resources, and provides statistical and other data on fish stocks and fishing efforts.[45] Under Article 64(1), the coastal State and other States whose nationals fish in the region for the highly migratory species shall cooperate directly or through appropriate IOs to ensure the conservation and promote the objective of optimum utilization of such species throughout the region, both within and beyond the EEZ. Where no appropriate IO exists, the coastal State and other States whose nationals harvest these species in the region shall cooperate to establish such an organization and participate in its work. The reference to the dual goal of ensuring conservation and promoting optimum utilization reflects Articles 61(2) and 62(1) in framing the management of highly migratory species as an economic resource.[46] However, Article 64 is criticized for the fact that it does not go far enough in promoting the goals of the *Convention* and is ultimately seen as treating highly migratory species no differently from others subject to Part V of the *Convention*.[47] Article 65 creates a mandatory obligation for States to cooperate for the conservation of marine mammals in the EEZs. However, it does not clearly establish

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43 Bing Bing Jia, "Article 41", in Alexander Proelss, ed, *United Nations Convention on the Law of the Sea: A Commentary* (Munich: Beck/Hart/Nomos, 2017) 307 at 312.

44 See Nihan Ünlü, *The Legal Regime of the Turkish Straits* (The Hague/London/New York: Martinus Nijhoff Publishers, 2002) at 64.

45 See James Harrison & Elisa Morgera, "Article 61", in Proelss, *supra* note 4353, 480 at 491.

46 Myron H Nordquist, Satya N Nandan & Shabtai Rosenne, eds, *United Nations Convention on the Law of the Sea 1982: A Commentary*, vol II (1993) at 657, cited in James Harrison & Elisa Morgera, "Article 64", in Proelss, *supra* note 43, 513 at 516.

47 John W Kindt, "The Law of the Sea: Anadromous and Catadromous Fish Stocks, Sedentary Species, and The Highly Migratory Species" (1984) 11:1 Syracuse J of Intl L and Commerce 9 at 21.

when an IO would be "appropriate" for the establishment of a distinct regime for marine mammals.[48] Therefore, it is only where the coastal State opts to delegate such jurisdiction to an IO, that the organization becomes appropriate in the sense of the first sentence of article 65.[49]

Concerning anadromous stocks, Article 66(3)(b) imposes on the State of origin a mandatory obligation to cooperate in minimizing economic dislocation in other States fishing them, taking into account the normal catch and the mode of operations of such States, and all the areas in which such fishing has occurred. It is inferred that the State of origin cannot arbitrarily prevent the fishing of anadromous stocks by other States on the high seas where it is clear that a ban might lead to economic dislocation.[50] Besides, Article 66(4) states that in cases where anadromous stocks migrate into or through the waters landward of the outer limits of the EEZ of a State other than the State of origin, such State shall cooperate with the State of origin in conserving and managing such stocks. As per Article 117, all States have the duty take or to cooperate in taking necessary measures for their respective nationals for the conservation of the living resources of the high seas. Even though the phrase "shall cooperate", nothing suggests the exhortatory nature of the duty to cooperate so proclaimed. In effect, the ICJ recognized the obligation in 1974 in Fisheries Jurisdiction Case. The Court asserted that "the former laissez-faire treatment of the living resources […] in the high seas has been replaced by a recognition of a duty to have due regard to the rights of other States and the needs of conservation for the benefit of all."[51] Article 118 reiterates the duty of cooperation embodied in Article 117 in more mandatory terms. Article 118 must be read in conjunction with Articles 63 to 65, which similarly establish cooperative obligations in respect of transboundary, shared, straddling, highly migratory stocks and associated and dependent species as well as marine mammals.[52] The customary status of the general duty to cooperate of the first clause of Article 118 has been accepted in State practice and the decisions and awards of international courts and tribunals including the ICJ[53] and the International Tribunal for the Law of the Sea (ITLOS)[54]. Therefore, such an obligation is binding on all States.[55] In addition, Article 118 specifies that States shall appropriately cooperate to establish sub regional or regional fisheries organizations for the conservation and management of living resources in the high seas. The criterion of "appropriateness" will be determined by the nature and identity of the species, stocks and States concerned.[56]

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48 James Harrison & Elisa Morgera, "Article 65", in Proelss, *supra* note 43, 519 at 523.

49 See Ted L McDorman, "Canada and Whaling: An Analysis of Article 65 of the Law of the Sea Convention" (1998) 29:2 Ocean Development & Intl L 179 at 182, cited in Harrison & Morgera, *ibid*.

50 See James Harrison, "Article 66", in Proelss, *supra* note 43, 527 at 531.

51 *Fisheries Jurisdiction Case (United Kingdom of Great Britain and Ireland v Iceland)*, Merits, Judgment of 25 July 1974, [1974] ICJ Rep 3, para 72.

52 See Rosemary Rayfuse, "Article 118", in Proelss, *supra* note 43, 817 at 819.

53 *Gabčíkovo-Nagymaros Project (Hungary v Slovakia)*, Judgment of 25 September 1997, [1997] ICJ Rep 7, para 141.

54 ITLOS, *MOX Plant Case (Ireland v United Kingdom)*, Provisional Measures, Order of 3 December 2001, ITLOS Reports (2001), at 95, para 83.

55 See Rayfuse, "Article 118", in Proelss, *supra* note 43, 817 at 824.

56 *Ibid* at 827.

Thirdly, regarding the fishing rights, Article 69(3) provides that, when the harvesting capacity of a coastal State approaches a point which would enable it to harvest the entire allowable catch of the living resources in its EEZ, the coastal State and other States concerned shall cooperate in the establishment of equitable arrangements. The coastal State and other States, namely land-locked States (LLS), are under a mandatory duty of cooperation in the establishment of equitable arrangements to protect the rights of participation of developing LLS. Here, such rights matter even if there is no surplus of allowable catch. However, it seems the establishment of equitable arrangements would appear to require the consent of the coastal State.[57] In effect, the apparent restriction in reality gives an increased control to the coastal State through the negotiation of terms and conditions applicable to access.[58] In addition, Article 71 provides for an exception, which excludes completely the application of Article 69[59] where a coastal State's economy is overwhelmingly dependent on the exploitation of the living resources of the EEZ. Article 70(4) phrasing is similar to that of Article 69(3), the only difference being that the former contemplates the obligation to cooperate in the establishment of equitable arrangements to allow the participation of developing geographically disadvantaged States in the exploitation of the living resources of the EEZs of coastal States of the sub region or region. The establishment of such arrangements would also appear to require the coastal State's consent, and the provision therefore fails to create any absolute rights for geographically disadvantaged States.[60]

Fourthly, concerning the duty of the flag State relating to the inquiry into marine casualty or incidents of navigation, Article 94(7) states that the flag State and the other State "shall cooperate" in the conduct of any inquiry held by that other State into any such marine casualty or incident of navigation. This suggests that in case of "marine casualty", that is, vessels collision, stranding or other incident of navigation, or other occurrence on board a vessel or external to it resulting in material damage or imminent threat of material damage to a vessel or cargo,[61] the flag State and the other State have a mandatory duty to cooperate to establish the relevant facts. Moreover, States are subject to a mandatory duty to cooperate the "fullest possible extent" in the repression of piracy under Article 100. Piracy was the first crime recognized as a crime against international law and subject to universal jurisdiction.[62] This may be the rationale behind the use of the "strongest wording"[63] "fullest possible extent". The duty to cooperate does not expressly require that States have an adequate domestic criminal

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57 See James Harrison, "Article 69", in Proelss, *supra* note 43, 543 at 547.

58 Francisco O Vicuña, *The Exclusive Economic Zone: Regime and Legal Nature under International Law* (Cambridge: Cambridge University Press, 1989) at 56, cited in Harrison, *ibid.*

59 Harrison, *ibid*.

60 James Harrison, "Article 70", in Proelss, *supra* note 43, 548 at 551.

61 See *UNCLOS*, *supra* note 1, art 221

62 See Ivan Shearer, "Piracy", in Anne Peters, ed, *Max Planck Encyclopaedia of Public International Law* (Oxford: Oxford University Press, 2024) para 1, online (pdf): <https://cil.nus.edu.sg/wp-content/uploads/2017/11/Ivan-Shearer-Piracy-EPIL.pdf>.

63 See Yaron Gottlieb, "Combating Maritime Piracy: Inter-Disciplinary Cooperation and Information Sharing" (2013) 46:1 Case Western J of Intl L 303 at 311.

legislation addressing piracy nor does it require the prosecution of suspect pirates.[64] Similarly, Article 108(1) requires all States to cooperate in the suppression of illicit traffic in narcotic drugs and psychotropic substances engaged in by ships on the high seas contrary to international conventions. The duty laid down in this provision "is not limited to taking action regarding a State's own flag vessels, but this does not imply any enforcement powers against foreign vessels."[65]

Furthermore, concerning Marine Scientific Research (MSR), Article 200 states, States shall cooperate, directly or through competent IOs, in promoting studies, undertaking programs of scientific research and encouraging the exchange of information and data acquired about pollution of the marine environment. This provision imposes an obligation upon States to cooperate in gathering information on the causes and effects of pollution, in recognition of the fact that the nature of the marine environment means that pollution may have widespread impacts and affect a number of States.[66] In the light of the information and data acquired pursuant to Article 200, States shall cooperate similarly in establishing appropriate scientific criteria for the formulation and elaboration of rules, standards and recommended practices and procedures for the prevention, reduction and control of pollution of the marine environment.[67] According to Stephens, the above provision recognises that there is much more likely to be agreement on rules for the protection of the marine environment when these rules are based upon widely accepted scientific criteria.[68] In addition, Article 243 provides for two separate obligations of cooperation pending on States and IOs.[69] The first obligation consists of the creation of favourable conditions for the conduct of MSR at sea while the second requires States and IOs to cooperate in order to ensure that scientists hold dialogue and interact among themselves.[70]

When it comes to delays or technical difficulties in traffic in transit, Article 130(2) places an obligation of cooperation on the competent authorities of the transit States and LLS concerned, in case such delays or difficulties occur for their expeditious elimination. Lastly, with respect to the protection and preservation of the marine environment, Article 197 provides for the fundamental duty of States to cooperate on a global and regional basis. The inclusion of the terms "on a global basis" and "on a regional basis" indicate that the duty to cooperate applies to all marine spaces whether within or beyond national jurisdiction.[71] Article 197 is considered as "encompass[ing] cooperation of both a procedural (e. g. sharing information) and substantive (e. g. cooperation in defining rules for environmental protection) character."[72] Such duty of cooperation has been recognised as forming part of customary international law and is

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64 See Douglas Guilfoyle, "Article 100", in Proelss, *supra* note 43, 733 at 737.

65 Douglas Guilfoyle, "Article 108", in Proelss, *ibid*, 759 at 762.

66 See Myron H Nordquist, Shabtai Rosenne & Alexander Yankov, eds, *United Nations Convention on the Law of the Sea 1982: A Commentary*, vol IV (1991) at 91, cited in Tim Stephens, "Article 200", in Proelss, *ibid*, 1341 at 1342.

67 See *UNCLOS*, *supra* note 1, art 201.

68 See Tim Stephens, "Article 201", in Proelss, *supra* note 43, 1344 at 1344.

69 See Nordquist, Rosenne & Yankov, *supra* note 66 at 477.

70 Irini Papanicolopulu, "Article 243", in Proelss, *supra* note 43, 1636 at 1637.

71 Tim Stepens, "Article 197", in Proelss, *supra* note 43, 1328 at 1329.

72 *Ibid* at 1330.

an expression of the general duty of States to cooperate to conserve, protect and restore the health and integrity of ecosystems.[73] In the MOX Plant Case before the Permanent Court of Arbitration (PCA), both parties (Ireland and the United Kingdom) "took the textual approach but reached different conclusions on the interpretation of Article 197."[74] The United Kingdom argued, Article 197 requires States Parties to cooperate in formulating and elaborating international rules, standards and recommended practices and procedures, and cooperation on the management of sources of transboundary risk is not involved.[75] Ireland criticized this view in its reply.[76] Previously, the ITLOS in the same case stated, "the duty to cooperate is a fundamental principle in the prevention of pollution of the marine environment under Part XII of the Convention and general international law."[77]

Article 235(3), on the other hand, requires States to cooperate in the implementation of existing international law on liability and in the further development of international law relating to responsibility and liability for damage to the marine environment. This provision operates alongside Article 304, which provides that *UNCLOS* provisions relating to responsibility and liability for damage are without prejudice to the application of existing rules and the development of further rules regarding responsibility and liability under international law.[78] By making specific reference to the establishment of compulsory insurance or compensation funds, Article 235(3) offers the possibility for the creation of a trust fund to compensate for damage to the marine environment caused by activities in the Area where a contractor does not meet its liability in full while the sponsoring State is not liable under article 139(2).[79]

The provisions examined above, although imposing a mandatory obligation on States Parties, nevertheless leave them some room for maneuver as to how to implement such an obligation. This latitude seems even greater in the case of the exhortatory obligation to cooperate.

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73 See *Rio Declaration on the Environment and Development*, UN Doc A/CONF.151/5/REV.1 (1992), ILM 31, 874, Principle 7 [*Rio Declaration*]; UNCED, Report of the United Nations Conference on the Environment and Development, UN Doc A.CONF/151/26/REV.1 (Vol. I) (1992), 9 (Agenda 21), Ch 17.

74 See Lee, *supra* note 33 at 27. See also Seokwoo Lee & Jeong Woo Kim, "*UNCLOS* and the Obligation to Cooperate: International Legal Framework for Semi-Enclosed Seas Cooperation", in Keyuan Zou, ed, *Maritime Cooperation in Semi-Enclosed Seas: Asian and European Experiences* (Leiden/Boston: Brill/Nijhoff, 2019) 11 at 17.

75 *MOX Plant Case (Ireland v United Kingdom)*, "Counter-Memorial of the United Kingdom" (9 January 2003) Permanent Court of Arbitration (PCA), at 147, para 6.36, online: <https://pcacases.com/web/sendAttach/854>.

76 *MOX Plant Case (Ireland v United Kingdom)*, "Reply of Ireland", 7 March 2003, (PCA), at 85, para 7.38, online: <https://pcacases.com/web/sendAttach/853>.

77 *MOX Plant Case (Ireland v United Kingdom)*, Provisional Measures, Order of 3 December 2001, ITLOS Reports 2001, at 95, para 82.

78 Tim Stephens, "Article 235", in Proelss, *supra* note 43, 1585 at 1590.

79 ITLOS Seabed Disputes Chamber, *Responsibilities and Obligation of States Sponsoring Persons and Entities with Respect to Activities in the Area*, Advisory Opinion of 1 February 2011, ITLOS Reports (2011), at 10, para 205.

B. The Exhortatory Obligation to Cooperate

In the *UNCLOS*, the expression "should cooperate" articulates the exhortatory nature of the duty to cooperate. Articles 43 and 123 are phrased with the exhortatory "should." First, concerning straits used for international navigation, Article 43 encourages user States and States bordering a strait to cooperate by agreement (a) "in the establishment and maintenance in a strait of necessary navigational and safety aids or other improvements in aid of international navigation; and (b) for the prevention, reduction and control of pollution from ships." Even though there is no doubt that Article 43 is "hortatory in wording",[80] it should be noted "an agreement alone does not discharge the states from the duty to cooperate" since "the duty is one of a continuing nature."[81] Article 123 being the only article that expressly deals with the rights and duties of States bordering enclosed or semi-enclosed seas,[82] encourages such States to cooperate with each other in the exercise of these rights and in the performance of these duties. As noted by Hua Zhang, due to the hortatory language of Article 123, both academics and practitioners hold different interpretations with regard to its legal nature.[83] Based on the negotiating history of Article 123, many authors regard it as "a declaratory provision", or "a mere recommendation", [84] while some other commentators still assert the legal value of Article 123.[85] While some authors believe that Article 123 is a legal obligation to cooperate,[86] others consider it as containing "directives générales, invitations adressées aux États riverains", or as "an instrument to legitimize proposals for cooperation."[87] In the *MOX Plant Arbitration Case*, the first case that has so far dealt with Article 123, the Ireland and UK, though having different understandings of the material scope of their obligation to cooperate, agreed that Article 123 is "hortatory, rather than mandatory."[88] The State practice usually reflects the negotiating history. In effect, since Articles 122 and 123 are non-obligatory, they are rarely invoked in practice. In some instances, States even decline to use them as a legal basis for exercising jurisdiction, possibly out of fear as to possible restrictions of the exercise of State sovereignty.[89] As far as the duty to render assistance is concerned, Article 98(2) requires coastal States to "promote" the establishment, operation and

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80 See Bing Bing Jia, "Article 43", in Proelss, *supra* note 43, 320 at 321.

81 Lee, *supra* note 33 at 28.

82 Budislav Vukas, "Enclosed and Semi-Enclosed Seas", Max Planck Encyclopaedia of Public International Law, para 15, cited in Ingo Winkelmann, "Article 123", in Proelss, *supra* note 43, 886 at 887.

83 Hua Zhang, "The Duty of Cooperation in Semi-Enclosed Seas: Exploring the Way Forward for the South China Sea", in Keyuan Zou, *supra* note 74, 31 at 31.

84 As Winkelmann noted, "[t]he genesis of Art 123 indicates that the provision was not intended to create a clear-cut legal obligation of regional cooperation." See Winkelmann, *supra* note 82 at 887.

85 See Mitja Grbec, *Extension of Coastal State Jurisdiction in Enclosed and Semi-Enclosed Seas: A Mediterranean and Adriatic Perspective* (Routledge, 2014) at 36–46, cited in Zhang, *supra* note 83 at 32.

86 Carl A Fleischer, "Fisheries and Biological Resources", in René-Jean Dupuy & Daniel Vignes, eds, *A Handbook on the New Law of the Sea*, vol 2 (Dordrecht: Martinus Nijhoff, 1991) 989 at 1045. See Winkelmann, *supra* note 84 at 887.

87 Laurent Lucchini & Michel Voelckel, *Droit de la mer*, vol 1 (Paris: Pedone, 1990); Tullio Treves, "Rapport Général" (1995) 3 Revue de l'INDREMER at 71 and 86, cited in Winkelmann, *ibid*.

88 Reply of Ireland, *supra* note 76, para 7.17. See Lee & Kim, *supra* note 74 at 19.

89 See Winkelmann, *supra* note 84 at 888.

maintenance of an adequate and effective search and rescue service regarding safety on and over the sea and, where circumstances so require, by entering regional arrangements with neighbouring States. The duty of cooperation "is clearly hortatory […] and likely reflects treaty law developments in relation to search and rescue arrangements that were already underway at the time."[90]

Moreover, there is an optional duty to cooperate expressed by the phrase "may cooperate". Article 129 provides for such option. In fact, where there are no means of transport in transit States to give effect to the freedom of transit or where the existing means, including the port installations and equipment, are inadequate in any respect, the transit States and land-locked States concerned "may cooperate" in constructing or improving them. According to Lee and Kim, "[t]he rationale behind this wording was to give due regard for the sovereignty of all states when establishing a new legal order for the seas and oceans."[91] However, the real reason of such voluntary wording is the fact that "many transit States that lack the appropriate means of transport or other facilities to allow LLS to realise their right of free access to and from the sea are themselves developing countries."[92] Therefore, Article 129 serves to illustrate that cooperation between LLS and transit States may be a practical solution to such problems.[93]

The wording of provisions discussed above expresses the hortatory nature of the obligation to cooperate unlike the obligation to negotiate or consult examined below.

C. The Tricky Obligation to Cooperate

The obligation to cooperate is tricky since it comprises the obligations to exchange information and to negotiate or consult which seem complex and ambivalent respectively.

1. The Complex Obligation to Exchange Information

The duty to exchange information "can be identified as a particular obligation within the general duty to cooperate."[94] Exchanges of information are classified into "publicity, notification, and other exchanges of information",[95] making this an obligation of complex nature.

a) The Mandatory Obligation of Publicity

The *UNCLOS* provides for the publicity of information or reports as a duty through different expressions: those concerned with restrictions versus those concerned

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90 See Douglas Guilfoyle, "Article 98", in Proelss, *supra* note 43, 725 at 726.
91 Lee & Kim, *supra* note 74 at 22.
92 Kishor Uprety & Amber Rose Maggio, "Article 129", in Proelss, *supra* note 43, 924 at 926.
93 *Ibid*.
94 See Gottlieb, *supra* note 63 at 317.
95 Lee & Kim, *supra* note 74 at 22.

with dangers.[96] Concerning restrictive practices, States have the duty to give "due" publicity to relevant laws and regulations.[97] States are also required to give "due" publicity to charts and lists of geographical coordinates under Article 16.

Then again, States shall give "appropriate" publicity to: (i) danger to navigation within the territorial sea,[98] (ii) danger to navigation or overflight within or over the straits,[99] and danger to navigation or overflight within or over archipelagic sea-lanes,[100] and the depth, position, and dimensions of any installations or structures are not entirely removed in EEZs.[101] Albania as the coastal State was under the obligation to warn shipping in general of the existence of a minefield in the Corfu Channel as stated by the ICJ.[102] As indicated by Lee and Kim, while it is not entirely clear how "appropriate publicity" differs from "due publicity", considering that dangers demand a more immediate response than mere restrictions, one may reasonably assume that the term "appropriate" implies a stricter level of publicity than the term "due".[103]

Moreover, the *UNCLOS* implicitly provides for the obligation to give simple publicity. In effect, the latter does not specify how publicity should be given regarding the publication of reports on the monitoring of risks or effects of pollution. In this respect, Article 205 simply requires that States shall publish reports of the results obtained or provide such reports. The same observation goes for publicity of the limits of any such particular, clearly defined area under Article 211(6). Although this publicity is considered simple, the use of the phrase "shall publish", instead of "due" or "appropriate" publicity, actually indicates the mandatory nature of the duty pending on the States concerned, even though the phrases "due" and "appropriate" publicity can be considered as expressing stricter duties.

Furthermore, States and competent IOs shall make available by publication and dissemination through appropriate channels information on proposed major programs and their objectives as well as knowledge resulting from MSR.[104] This is another instance of "simple" publicity since "the information obtained from [MSR] is not seen as infringing upon the interests of other States or posing any danger to navigation or overflight."[105]

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96 *Ibid* at 23.

97 For matters concerned, see *UNCLOS*, art 21(3), art 22(4), art 41(2) and (6), art 54, art 25(3), art 42(3), art 47, art 53(7) and (10), art 75(2), art 211(3).

98 *Ibid* art 24(2). It is based on the *Corfu Channel Case* that the obligation to warn was introduced into Article 24(2). See ILC, *Report of the International Law Commission: Commentaries to the Articles Concerning the Law of the Sea*, UN Doc A/3159 (1956), GAOR 11th Sess. Suppl. 9, 12, 19 (Art 16). See Tanaka, *International Law of the Sea*, *supra* note 2 at 116; Richard A Barnes, "Article 24", in Proelss, *supra* note 43, 217 at 218.

99 *UNCLOS*, *supra* note 1, art 44.

100 *Ibid* art 54.

101 *Ibid* art 60(3).

102 *Corfu Channel Case (United Kingdom of Great Britain and Northern Ireland v Albania)*, Merits, Judgment of 9 April 1949, [1949] ICJ Rep 22.

103 Lee & Kim, *supra* note 74 at 23.

104 *UNCLOS*, *supra* note 1, art 244(1).

105 Lee & Kim, *supra* note 74 at 24.

The only exception to the disclosure of the information is contained in Article 302 of *UNCLOS*, that is, the situation where the disclosure of information is contrary to the essential interests of State's security. States could therefore deny the exchange of information based on this provision. However, "if, as a matter of policy, a State refrains from sharing information related [for instance] to the prevention and suppression of maritime piracy, it can hardly be argued that it fulfils its obligation to cooperate in good faith."[106]

b) The Mandatory Obligation of Notification

The main difference between notifications and publicity is that the latter must indicate the particular States to which information is given because "it is a unilateral process, unless otherwise provided."[107] The wording of the notification requirements under *UNCLOS* indicates the mandatory nature of the obligation to notify.

First, in case of the exercise of its criminal jurisdiction on foreign ship passing through its territorial sea after leaving internal waters, the coastal State shall, on the master's request, notify a diplomatic agent or consular officer of the flag State before taking any steps[108] authorized by its laws. With respect to the EEZ, in cases of arrest or detention of foreign vessels the coastal State "shall promptly notify" the flag State, through appropriate channels, of the action taken and of any penalties subsequently imposed.[109] States "shall promptly notify" the flag State and any other State concerned of any measures taken pursuant to Section 6 Part XII against foreign vessels, and shall submit to the flag State all official reports concerning such measures.[110] Notification here helps both flag and coastal States to ensure their respective interests are protected.[111]

Secondly, when a State is aware of imminent danger of damage or actual damage of the marine environment by pollution, it "shall immediately notify" other States it deems likely to be affected by such damage, as well as the competent IOs.[112] Such duty to notify other States of risks of significant harm is grounded in "elementary considerations of humanity" according to the ICJ.[113] It noted that Article 198 revolves around the theme of otherness, or even altruism,[114] except that for some authors, perhaps more pragmatic than others, international cooperation to deal with marine pollution is primarily a matter of "prudent self-interest."[115] In any case, Article 198

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106 Gottlieb, *supra* note 63 at 322.
107 Lee & Kim, *supra* note 74 at 24.
108 *UNCLOS*, *supra* note 1, art 27(3).
109 *Ibid* art 73(4).
110 *Ibid*, art 231.
111 See Richard A Barnes, "Article 27", in Proelss, *supra* note 43, 229 at 236.
112 *UNCLOS*, art 198.
113 *Corfu Channel Case*, *supra* note 102 at 22.
114 Syméon Karagiannis, "L'obligation de notifier les (risques de) dommages environnementaux selon la Convention des Nations Unies sur le droit de la mer" (2016) 49:1 RBDI 138 at 142.
115 Patricia W Birnie, Alan Boyle & Catherine Redgwell, *International Law and the Environment*, 3rd ed (Oxford: Oxford University Press, 2009) at 423.

contains "one of the minimal requirements of cooperation in a transboundary context,"[116] even if this cooperation is on purely individual bases.[117]

Thirdly, States and competent IOs which have submitted to a coastal State a project to undertake MSR in its EEZ and continental shelf pursuant to Article 246(3), "shall give notice" to the neighbouring land-locked and geographically disadvantaged States of the proposed research project and "shall notify" the coastal State thereof,[118] since the consent of the latter is required in accordance with Article 246(2). Obviously, the obligation to notify does not apply to MSR projects conducted by the coastal State in its EEZ or on its continental shelf.[119]

2. The Ambivalent Obligation to Negotiate or Consult

Under *UNCLOS*, the obligation to negotiate or consult constitutes another aspect of the obligation to cooperate. With respect to the obligation to negotiate, Article 118 imposes a mandatory obligation on States whose nationals exploit identical or different living resources in the high seas, to enter into negotiations. In this context, one particular element of the general obligation to cooperate is the obligation to negotiate with a view to taking the measures necessary for the conservation of the living resources concerned.[120] The requirement to enter into negotiations is "a practical method of performing the prescribed duty to cooperate."[121] The duty to negotiate arises from the fundamental obligation on States embodied in Article 33 of the UN Charter to settle their disputes by peaceful means.[122] Despite the mandatory wording of Article 118, "the obligation to negotiate is an obligation of conduct not result; a mere pactum in negotiando."[123]

On the other hand, Article 142(2) requires consultations, including a system of prior notification, to be maintained with the coastal State, with a view to avoiding infringement of the rights and legitimate interests due to activities in the Area. If the intent of the drafters with regards to the obligation to consult may seem unclear, it is obvious that the expression "consultations [and] prior notification shall be maintained" indicates that any entity carrying activities in the Area shall first of all notify the coastal State, then enter into and maintain consultations with latter. This is also a "practical method" of cooperation since "potential conflicts are prevented by consultations and prior notification of the coastal State" under Article 142(2).[124]

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116 Pierre-Marie Dupuy & Jorge E Viñuales, *International Environmental Law*, 1st ed (Cambridge: Cambridge University Press, 2015) at 65.
117 Karagiannis, *supra* note 114 at 142.
118 *UNCLOS*, *supra* note 1, art 254(1).
119 Sookyeon Huh & Kentaro Nishimoto, "Article 254", in Proelss, *supra* note 43, 1707 at 1712.
120 See Rayfuse, "Article 118", in Proelss, *supra* note 43, 817 at 825.
121 Lee & Kim, *supra* note 74 at 26.
122 See Rayfuse, "Article 118", in Proelss, *supra* note 43, 817 at 825.
123 *Ibid* at 826.
124 Silja Vöneky & Anja Höfelmeier, "Article 142", in Proelss, *supra* note 43, 986 at 987.

The complex array of provisions relating to the obligation to cooperate makes it a multifaceted obligation, which makes its performance uncertain or difficult due to hindrances discussed in the following paragraphs.

II. The Hindrances to the Performance of the Obligation to Cooperate

The possible hindrances to the performance of the obligation to cooperate include the semantic diversity of *UNCLOS* provisions relating to this obligation, the pursuit of a special States interests and the paucity of coercive measures against States.

A. The Semantic Diversity of Relevant *UNCLOS* Provisions

By the semantic diversity, we refer to the various phrases used in the *UNCLOS* to state the States' obligation to cooperate. Because of this diversity of expressions, some scholars talk about "obligations of cooperation."[125] This semantic diversity makes the interpretation of the corresponding duties tricky. Therefore, such semantic diversity constitutes a limitation to the implementation of the obligation to cooperate. In effect, this obligation can only be effectively performed when States Parties adopt the same interpretation of relevant *UNCLOS* provisions. Cooperation implies a complementary action, a joint or symbiotic action by two or more States Parties, which is only possible where the actors have the same or at least a similar understanding of the nature of their common duty. This underlines the principal challenge regarding the duty to cooperate, a two-way duty, which is more difficult to perform since a State cannot cooperate alone. The latter can just lead up the cooperation and expects the other State(s) to respond favourably in accordance with the corresponding *UNCLOS* provisions.

Consequently, the risk attached to the semantic diversity with respect to the obligation to cooperate is the selective implementation of the numerous provisions relating thereto. Cooperation will be effectively carried out in the implementation of provisions of which States concerned have concurring interpretations. Yet, since the obligation to cooperate is intricate as it takes many forms, the immediate consequence is that it may lead to variable interpretations by the States Parties. For instance, in the relationship between State A and State B, the former may consider the phrases "shall cooperate" and "should cooperate" as both indicating a mandatory obligation to cooperate while the latter argues that the first and the second phrases are mandatory

[125] See for example, N Okuwaki. "The Cooperation Obligations under the *UNCLOS*", in Shunji Yanai & Shinya Murase, eds, *The Practice of International Law: In memory of Ambassador Ichirō Komatsu* (Shinzansha, 2015) at 409–454 (in Japanese), cited in Yongming Jin, "The United Nations Convention on the Law of the Sea and China's Practice", in Dai Tamada & Keyuan Zou, eds, *Implementation of the United Nations Convention on the Law of the Sea: State Practice of China and Japan* (Springer, 2021) 41 at 61 and 63.

and hortatory respectively. Such contradictory interpretations would obviously lead to a dispute that the States Parties shall settle by peaceful means in accordance with Article 2 (3) of the UN Charter.[126]

The above example is an illustration of the difficulties that may arise from the semantic diversity of relevant *UNCLOS* provisions. If it is generally admitted in the practice of Anglo-Saxon States that the use of the auxiliary verbs "shall" and "must" indicates a legal obligation of result while that of "should" expresses a legal obligation of conduct, States Parties to a given treaty may still have different interpretations. It is worthy of note to recall what happened in Paris during COP21. In fact, Laurent Fabius, former French Minister of Foreign Affairs, explains how a typing error in the English version of the Paris Agreement changed a "should" into a "shall" and had to be corrected at the last minute to avoid a rejection by the US delegation, and hence the failure of the agreement.[127] The author explains that John Kerry, then Secretary of State and head of the US delegation, told him by telephone,

> I cannot accept this wording [...] because in one passage of the text the word shall is used where in previous versions the word should was. In one case, it is - as jurists say - an obligation of means, in the other the United States would have to commit itself to a result. This would require the express approval of the US Senate. […] if we have to refer the matter to the Senate, which is overwhelmingly hostile to action against global warming, there will be no Paris Agreement.[128]

This example shows how important the wording of treaty obligations can be for States Parties. The State practice is usually the reflection of such wording. A treaty like *UNCLOS* that contains a myriad of phrases for the same obligation needs an authoritative judicial interpretation from the relevant bodies in charge of dispute settlement, that is, the ITLOS, the ICJ, the arbitral tribunal constituted in accordance with Annex VII and the special arbitral tribunal constituted in accordance with Annex VIII.[129] In fact, only these judicial or arbitral bodies could reconcile the predictably varying States' interpretations of cooperation duties under *UNCLOS*.

In all cases, States Parties to *UNCLOS* "shall fulfil in good faith" their cooperation obligations in accordance with Article 300. In fact, any interpretation of these obligations, which is not made in a spirit of good faith, cannot be said to conform to the requirement to fulfil the obligations in accordance with this principle.[130] The ICJ observed,

> the principle of good faith is a well-established principle of international law. It is set forth in Article 2, paragraph 2, of the Charter of the United Nations; it is also embodied in Article 26 of the Vienna Convention on the Law of Treaties of 23 May 1969. It was mentioned as early as the beginning of this

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126 *UNCLOS*, *supra* note 1, art 279.

127 Laurent Fabius, *37 Quai d'Orsay. Diplomatie française 2012-2016* (Paris: Plon, 2016) at Chapter one (eBook).

128 *Ibid* [translated by the authors].

129 *UNCLOS*, *supra* note 1, art 287.

130 See Killian O'Brien, "Article 300", in Proelss, *supra* note 43, 1937 at 1940.

> century in the Arbitral Award of 7 September 1910 in the North Atlantic Fisheries case (United Nations, Reports of International Arbitral Awards, vol XI, p. 188).[131]

As demonstrated above, the *UNCLOS* semantic diversity is an obstacle to the implementation of States' obligation to cooperate. However, the principle of good faith constitutes a solution to this limitation insofar as States cannot validly justify their refusal or failure to cooperate by the fact that the relevant provisions are scattered or complex. The principle of good faith requires them to mutualise their efforts or actions for the proper conduct of maritime activities, the conservation and management of marine resources, and the protection and preservation of the marine environment.

B. The Pursuit of Special States' Interests

Nowadays, it is undeniable "international law increasingly reflects the interests of 'humanity' more widely: conceptualising states as 'protectors' of these interests by focusing on their 'functional role'."[132] Today, international law of the sea seems to reflect the "inflection point" sometimes defined as "Kant's Copernican revolution, which may be simply presented as a transition of [public international law] from state law to the law of states and nations […] in which international law also becomes an instrument of protection of the common goods of the entire international community."[133] Nonetheless, contrary to the spirit of international law of the sea which has as special purpose the "protection of community interests [of States],"[134] the latter may often pursue their individual interests. Indeed, one may be tempted to follow the skeptical view that among States there is no friendship but interests. In any case, States engage in international commitments primarily to foster their individual economic or political interests. For instance, the conservation of marine living resources deeply involves both community interests and national interests. Therefore, "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."[135] From the State perspective, the ratification of or adhesion to *UNCLOS* is first driven by self-interest. It is through the aggregation and protection of special or individual interests of States that the protection of community interests can easily be achieved. The international society and its law have preserved the sovereign equality of States and "have solved the paradox of enshrining the protection of public goods among equal members by

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131 *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v Nigeria; Equatorial Guinea intervening)*, Preliminary Objections, Judgment of 11 June 1998, [1998] ICJ Rep 275, para 38.

132 Holst, *supra* note 14 at 64.

133 Jerzy Menkes & Anna Kociołek-Pęksa, "Heterogeneity, Compliance and Enforcement of Public International Law, Remarks on Sanctions and countermeasures: Legal Theory and the Sociology of Law Approach" (2019) 63:6 Politeja, Europe of Fatherlands? 7 at 9. [emphasis in original].

134 Yoshifumi Tanaka, "Protection of Community Interests in International Law: The Case of the Law of the Sea" (2011) 15 Max Planck Yearbook of United Nations Law 329. [Tanaka, "Protection of Community Interests].

135 *Ibid* at 364.

recognizing that all have an individual interest in that regard."[136] Therefore, "internationally there is not one collective interest, but many (as many as there are states) identical interests having a collective content."[137]

No matter such a "collective content", for many reasons, States may prefer "to frame their individual interests as common interest, and even when giving effect to what could objectively be recognised as a 'common interest', the underlying reasons are difficult to discern and not necessarily altruistic in nature."[138] In effect, Wolfrum asks himself whether a single state or limited number of states could declare that, for instance, "a certain resource or area needs to be preserved in the common interest of biodiversity preservation, despite express objection thereto by other states."[139] This situation arose in the Chagos arbitration, where the United Kingdom argued that it was acting in the common interest of ecosystem protection by the establishment of a "no-take marine protected area" (MPA) around the Chagos archipelago, despite objection thereto by Mauritius. Mauritius also claimed sovereignty over the archipelago, but had not been consulted by UK in the MPA designation process.[140] The PCA concluded that the UK failed to consult with Mauritius in the declaration of the MPA in accordance with the provisions of the *Convention*.[141] The Tribunal added that it was from that moment "open to the parties to enter into the negotiations that the Tribunal would have expected prior to the proclamation of the MPA, [in order] to achiev[e] a mutually satisfactory arrangement for protecting the marine environment, to the extent necessary under a 'sovereignty umbrella'."[142]

Therefore, it would be naïve to think that States cooperate essentially because relevant *UNCLOS* provisions bind them. In fact, States cooperate not only out of obligation, but also out of self-interest.[143] Given that the main aim of foreign legal policies is to determine the conduct of States according to their own national interests, as perceived by the latter,[144] a State Party's penchant to cooperate under *UNCLOS* may thus depend on its national interests. Therefore, States would easily cooperate in instances where their individual interests converge with community interests. For example, with respect to the conservation of fish in high seas, States have both a particular and a general interest. First, they have "a particular interest in anadromous, catadromous, or highly migratory fish stocks which spend part of their lifecycle in that state's domestic waters or EEZ (or stocks which straddle that state's EEZ and the

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136 Santiago Villalpando, "The Legal Dimension of the International Community: How Community Interests are Protected in International Law" (2010) 21:2 EJIL 387 at 394.

137 *Ibid*.

138 See Holst, *supra* note 14 at 61.

139 See Rüdiger Wolfrum, "Identifying Community Interests in International Law: Common Spaces and Beyond", in Eyal Benvenisti & Georg Nolte, eds, *Community Interests Across International Law* (Oxford University Press, 2018) at 20, cited in Holst, *ibid.*

140 Holst, *ibid.*

141 *Chagos Marine Protected Area Arbitration (Mauritius v United Kingdom)*, PCA case no 2011-03, Award of 18 March 2015, para 544.

142 *Ibid*.

143 See Etienne Kentsa, *Les législations des États africains en matière de coopération avec la Cour pénale internationale*, PhD Thesis, University of Douala, 2020 [unpublished] at 15.

144 See Robert Kolb, *Réflexions sur les politiques juridiques extérieures* (Paris: Pedone, 2015) at 15.

adjacent area of high seas)."[145] Second, they have "a general interest in the taking of any high seas fish as part of that state's 'freedom of fishing' on the high seas."[146] Obviously, there is no conflict between the above special and general interests; the States concerned would therefore instantly cooperate.

In line with Article 61(2) *UNCLOS*, the primary responsibility to take appropriate conservation measures to protect marine living resources in its EEZ is that of the coastal State. If such measures are effectively implemented, they will contribute to protect the community interests in the conservation of marine living resources. Nevertheless, "it seems naïve to consider that the coastal state would assume the role of an advocate of the international community in the conservation of living resources in the EEZ according to the law of dédoublement fonctionnel."[147]

It is true that "a degree of uncertainty about how certain interests, rights and obligations interact under particular circumstances is inherent in any legal system."[148] In a situation where the special interest of a State varies with a general interest, the latter would be tempted to opt for the first. In fact, "tensions between sovereign interests and [community] interests […] continue to emerge" and "are not only visible on the broader level in the need for enhanced cooperation and an integrated (as opposed to zonal) governance approach to tackle global challenges like climate change or ocean acidification effectively, they are also visible on the individual state level."[149] In such a situation, "neither the impacts of climate change nor the costs and benefits of mitigation are equally shared among cooperating states. As a result, their individual short-term interests and priorities inevitably diverge."[150]

Moreover, to enjoy the marine resources beyond the national jurisdiction of the coastal State, some developed States especially those having advanced technologies ensure they are up to date for the exploration and exploitation of the high seas and the Area resources. Obviously, there exists an inequality between those States and the developing ones. Therefore, there may be a deficient cooperative relationship due to the growing technological and technical imbalance between the States. Article 142(2) requires consultations, including a system of prior notification, to be maintained with the coastal State, with a view to avoiding infringement of the rights and legitimate interests due to activities in the Area. The obligations to consult and notify deriving from this provision may be difficult to perform in practice. For instance, if a developed State wants to carry out activities in the Area and the coastal States concerned are developing States two situations may arise. First, the developed State may be tempted to proceed without consulting with and notifying them because in its view, they do not have any technology at their disposal allowing them to claim rights and legitimate interests beyond their national jurisdiction. Second, the developing coastal States, if

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145 Rogoff, *supra* note 23 at 177-78.
146 *Ibid.*
147 Tanaka, "Protection of Community Interests", *supra* note 156 at 365-66 [emphasis added].
148 Holst, *supra* note 14 at 15.
149 *Ibid* at 62.
150 *Ibid*, note 58.

consulted and notified, may oppose the performance of those activities since they have no interest therein.

The above scenarios of conflict of interests leading to non-cooperation may only be averted if all the States understand that the protection of community interests preserves their individual interests.[151] In effect, States should adopt a "functional perception of sovereignty" which "in principle allows it to be aligned with the protection of common interests, as is visible in the various conceptions of 'commonality' already present in *UNCLOS* and in positive international law more generally."[152]

C. The Paucity of Coercive Measures against States

The term "paucity" is preferred to that of "absence" here because even though sometimes little noticed, cases of reprisals "happen hundreds of times a day in countries through-out the world."[153] Without questioning the coerciveness of international law[154] as a whole, international law of the sea in general and *UNCLOS* in particular seem to be free of coercion as far as States are concerned. The *UNCLOS* does not actually contemplate the possibility of enforcement measures against States.[155] Specifically with respect to the performance of the obligation to cooperate imposed on States Parties, no matter the mandatory language the *Convention* uses in that regard, one may wonder what could be the legal consequence of a State Party's refusal or failure to cooperate under *UNCLOS*. In line with international law of cooperation, the effectiveness of *UNCLOS* cooperation regime largely depends on the willingness of States Parties. Therefore, in the case where such States fail to cooperate, the *UNCLOS* regime would seem defenseless. In effect, the cooperation at stake here is an interstate cooperation, which is horizontal in nature. The principles of sovereignty and equality of States are such as to make the obligation of cooperation between the States Parties to *UNCLOS* less strict.

Case law on the issue of States cooperation under *UNCLOS* corroborates the above analysis. In fact, the ITLOS and the PCA have had opportunities to rule on the matter of cooperation under *UNCLOS*. However, after establishing the refusal or failure of States Parties to cooperate or consult, judges and arbiters refrained from ordering strong enforcement measures to the wrongdoers; seemingly, because the negotiators of the *Convention* never had the intent to give such power to international judges and arbitrators. In fact, in the following cases, claimants did not request such enforcement measures from the ITLOS and the PCA. They instead requested them either to make

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151 See Villalpando, *supra* note 136 at 411-14.

152 Holst, *supra* note 14 at 63.

153 See Anthony D'Amato, "The Coerciveness of International Law" (2009) 52 German Yearbook of Intl L 437 at 456.

154 *Ibid* at 437-60.

155 The *UNCLOS* provides for enforcement measures with respect to foreign and flag State vessels and their personnel. See generally, art 73, art 217, art 220, art 224 and art 233.

findings on the failure to cooperate or consult or to order provisional measures relating to cooperation and consultation.

In the MOX Plant Case, the ITLOS stated, "prudence and caution require[d] that Ireland and the United Kingdom cooperate in exchanging information concerning risks or effects of the operation of the MOX plant and in devising ways to deal with them, as appropriate."[156] Finally, the Tribunal prescribed as a provisional measure: "[parties] shall cooperate and shall, for this purpose, enter into consultations".[157]

In the Land Reclamation Case, the ITLOS declared, "there was insufficient cooperation between the parties up to the submission of the Statement of Claim on 4 July 2003."[158] As a provisional measure, the Tribunal prescribed that "Malaysia and Singapore shall cooperate and shall, for this purpose, enter into consultations forthwith in order to: […] exchange, on a regular basis, information on, and assess risks or effects of, Singapore's land reclamation works."[159] In both above cases, the failure to cooperate had no legal consequence.

However, the reading of the PCA's Order of 24 June 2003 in the MOX Plant Case[160] helps notice that the ITLOS' Order of 2001 was efficient to some extent. In effect, the PCA was satisfied that since December 2001, there had been an increased measure of cooperation and consultation, as required by the ITLOS Order. On the other hand, the Tribunal was concerned that such cooperation and consultation "may not always have been as timely or effective as it could have been."[161] In particular, as noted by the Tribunal, "problems have sometimes arisen, both before and since the ITLOS Order, from the absence of secure arrangements, at a suitable inter-governmental level, for coordination of all of the various agencies and bodies involved."[162] In this respect, the Tribunal also recalled the United Kingdom's offer, referred to in paragraph 48 of its Order, to review with Ireland the whole system of intergovernmental notification and cooperation.[163] Consequently, the Tribunal simply recommended, "the parties should seek to establish [such] arrangements […] and to undertake the review of the intergovernmental system referred to in that paragraph".[164]

A recommendation instead of an order was justified by the fact that the PCA considered that the question of cooperation between Ireland and United Kingdom regarding the preservation of the marine environment of the Irish Sea was dealt with, to some extent at least, in the ITLOS Order. It further noted that both parties accepted that Order as remaining in force and binding upon them. In addition, the Tribunal

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156 *MOX Plant Case, supra* note 77 para 84.
157 *Ibid* at para 89.
158 *Land Reclamation in and around the Straits of Johor (Malaysia v Singapore)*, Provisional Measures, Order of 8 October 2003, [2003] ITLOS Rep at 10, para 97.
159 *Ibid* at para 106.
160 *The MOX Plant Case (Ireland v United Kingdom)*, Order No 3 of 24 June 2003, Suspension of Proceedings on Jurisdiction and Merits, and Request for further Provisional Measures.
161 *Ibid* at para 66.
162 *Ibid.*
163 *Ibid.*
164 *Ibid* at para 67.

observed that Ireland did not seek any modification of the ITLOS Order as such, as distinct from an order requiring further measures of cooperation and exchange of information.[165] For all these reasons, the Tribunal affirmed the provisional measure prescribed by ITLOS in its Order of 3 December 2001.

In the Chagos arbitration, the PCA, after concluding that UK breached its obligation under *UNCLOS* for failing to consult with Mauritius in the proclamation of a no-take MPA, simply stated that it was open to the parties to enter into the negotiations that the Tribunal would have expected prior to such proclamation.[166]

In the South China Sea Arbitration, the PCA noted that there was "no convincing evidence of China attempting to cooperate or coordinate with the other States bordering the South China Sea."[167] With respect to the protection and preservation of the marine environment in the South China Sea, the Tribunal found that "China has not cooperated or coordinated with the other States bordering the South China Sea concerning the protection and preservation of the marine environment concerning such activities."[168] It further considered that "China has failed to communicate an assessment of the potential effects of such activities on the marine environment, within the meaning of Article 206 of the *Convention*;" and declared "China has breached its obligations under Articles 123, 192, 194(1), 194(5), 197, and 206 of the *Convention*."[169]

The above cases show that, with respect to cooperation under *UNCLOS*, States Parties consider relevant international judicial and arbitral bodies as competent to adjudicate disputes relating to the application and interpretation of relevant *UNCLOS* provisions. However, they reserve to themselves the power of sanction of non-compliance with or breach of such provisions. In fact, even though *UNCLOS* does not offer the possibility of enforcement measures against States, in case of the breach of the obligation to cooperate, the latter may still resort to coercive measures whether individually or collectively. As recalled by D'Amato, "[a] State's reaction to a delict (illegal act) has variously been called a retaliation, a reciprocal violation, a countermeasure, and a reprisal."[170] A reprisal originally was a mechanism "whereby an otherwise unlawful act is rendered legitimate by the prior application of unlawful force."[171] International law "extends a legal privilege to states to use coercion against any state that has selfishly attempted to transgress its international obligations. International law thus protects itself through the opportunistic deployment of its own rules."[172]

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165 *Ibid* at para 64.
166 *Chagos Marine Protected Area Arbitration*, *supra* note 161 at para 544.
167 *South China Sea Arbitration (Republic of the Philippines v People's Republic of China)*, PCA Case No 2013–19, Award of 12 July 2016, para 986.
168 *Ibid* at para 1203 B (13)(b).
169 *Ibid* at para 1203 B (13)(c).
170 D'Amato, *supra* note 153 at 450.
171 Malcolm N Shaw, *International Law*, 9th ed. (Cambridge: Cambridge University Press, 2021) at 691.
172 D'Amato, *supra* note 153 at 460.

The use of such coercion is done by imposing sanctions on the wrongdoer. In public international law,

> a sanction [refers to] a wide range of reactions of the subjects of the international legal order, incited by an infringement of any norm deriving from that order, aimed less at penalization of the wrongful subject, but mostly at re-establishment of the observance of the disrupted law and at ensuring the effectiveness of international commitments. […] in specific cases a sanction may endeavor to incite the wrongdoer to perform a previously breached obligation (facere) or to restrain from breaching an obligation (non facere).[173]

Here, the concept of "countermeasures" has been preferred to that of "sanction". Nonetheless, "countermeasures are not always differentiated from 'sanctions' (or institutionalized coercive measures), and from unilateral measures to enforce 'sanctions'."[174] The ICJ has established the conditions for the legality of countermeasures in its judgment in the Gabčíkovo-Nagymaros Project Case as follows:

> In order to be justifiable, a countermeasure must meet certain conditions […] [First,] it must be taken in response to a previous international wrongful act of another State and must be directed against that State. […] Secondly, the injured State must have called upon the State committing the wrongful act to discontinue its wrongful conduct or to make reparation for it. […] In the view of the Court, an important consideration is that the effects of a countermeasure must be commensurate with the injury suffered, taking account of the rights in question. […] its purpose must be to induce the wrongdoing State to comply with its obligations under international law, and […] the measure must therefore be reversible.[175]

It flows from this that a lawful countermeasure shall be taken in response to a prior internationally wrongful act of another State and because of the failure to remedy it, directed against the latter. It shall also be proportionate, and its purpose must be the compliance of the Wrongdoing State with its international obligations. Therefore, in the event of an injury suffered by a State Party to *UNCLOS* because of the breach of the obligation to cooperate by another Party, the former can take countermeasures in order to prompt the latter to fulfil its obligation. However, such coercive measures are not a punishment since their purpose must be to induce compliance of the Wrongdoing State.

In the contemporary international legal order, international sanctions are the only legally incontestable form of pressure on a particular subject (state or IO) and they aim at enforcing compliance with the established international norms.[176] This was the function assigned, for example, to the sanctions on Russia in 2014 in reaction to "the violation of rules and norms of international law through its military aggression against

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[173] Menkes & Kociołek-Pęksa, *supra* note 133 at 12.

[174] See Joaquín Alcaide Fernández, "Countermeasures", online: <oxfordbibliographies.com/view/document/obo-9780199796953/obo-9780199796953-0072.xml>.

[175] *Gabčíkovo-Nagymaros Project, supra* note 53 at 55-57, paras 83-87.

[176] Menkes & Kociołek-Pęksa, *supra* note 154 at 13.

Ukraine."[177] This example shows that there exists the possibility of using individual or even collective countermeasures against a State Party to *UNCLOS* that does not want to cooperate. Nonetheless, the weakness of this solution is that the Wrongdoing State in return may resort to counter-coercive measures, as it was the case of the Russian Federation. In fact, "the sanctions encountered a response from the [latter] in the form of retorsion - countersanctions."[178]

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The foregoing assessment of the nature and scope of the States obligation to cooperate under *UNCLOS* leads to the following inferences. The multiplicity of relevant provisions in this instrument and the diversity of semantics used give rise to a complex set of duties. This paper found that the obligation of States to cooperate is intricate. Sometimes the *Convention* prescribes a mandatory obligation to cooperate; sometimes it simply urges States to cooperate. It even provides for cases where cooperation is simply optional for States. Adopting a broad conception of the obligation to cooperate, this paper included the obligation to exchange information and the obligation to negotiate or consult. In this respect, the obligation to cooperate has a tricky nature. Then again, the obligation to exchange information is complex because it includes two binding sub-obligations: the obligation of publicity and the obligation to notify. On the other hand, there is an ambivalent obligation to negotiate or consult.

The semantic diversity of *UNCLOS* with regard to the States' obligation to cooperate constitutes a hindrance to the performance of this obligation, as this paper demonstrated. The proposed solution to this limitation is the performance in good faith. Another hindrance is the pursuit of special States' interests. To overcome this limitation, States need awareness on the fact that the protection of community interests can help preserve their individual interests. The final limitation is the paucity of coercive measures against States. In this respect, though *UNCLOS* does not contemplates such measures against States, the latter may resort to countermeasures to induce compliance with the *Convention*. As D'Amato notes, "the nations of the world are in legal equilibrium" in such a way that "an encroachment by any State upon the rights of another State or States should immediately trigger their threat or use of reprisals."[179] Therefore, despite the apparent flexibility of its cooperation regime, States, as masters of international normativity, have the power to turn *UNCLOS* into a coercive order.

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177 *Ibid.*
178 *Ibid.*
179 D'Amato, *supra* note 153 at 460.