MITIGATING THE PRINCIPLE OF SOVEREIGNTY OVER BIOLOGICAL RESOURCES?

Liziane Paixão Silva Oliveira[·]
Ana Flávia Barros[·]
Jorge Gomes do Cravo Barros[·]

Abstract

With time, States' sovereign rights were limited by international law and the western liberal order under the UN auspices. Concerning environmental issues, the Convention on Biological Diversity (CBD) stressed this trend within national jurisdiction. However, concerning resources beyond national jurisdiction, legal doctrine and international relations theories offered a heated debate on the validity of the principle of sovereignty over biological resources. It is the case for the Antarctic Treaty System and the biodiversity beyond national jurisdiction regime (BBNJ). Therefore, there is a clear and partial fragmentation of the international environmental legal system, due to the limited circulation of principles. For some authors, the common concern of mankind represents a threat to this principle, while for others sovereignty is still totally assured by legal commitments. After an analysis of the UN resolutions, we discuss sovereign rights and the CBD, and then we look at the common concern of mankind. From a legal and political standpoint, the results are that the principle of sovereignty had a double-fold evolution: it is limited by the concept of common interest of mankind and the international obligations more than ever, but it is not challenged by them.

Keywords

Sovereignty; Antarctica, BBNJ; biodiversity; United Nations Convention on Biological Diversity.

· Doutorado na Universidade Aix-Marseille III, na França (2012), Mestrado em Direito pela Universidade de Brasília (2006), Pós-graduação em Direito Ambiental pelo UniCEUB (2004). Professora do Programa de Mestrado e Doutorado em Direito do UniCEUB. Professora da Universidade Tiradentes. Professora da Universidade de Vila Velha. Bolsista de pós-graduação pela CAPES-FAPITEC (2017-2018). Pesquisadora do Instituto de Tecnologia e Pesquisa (ITP).

· Pós-doutorado no CERIC (Centre d'Etudes et de Recherches Internationales et Communautaires) da Universidade Aix Marseille (França) no âmbito do Edital Mar II da CAPES, Projeto "A estratégia brasileira para a gestão sustentável dos recursos vivos e não vivos marinhos", com bolsa da CAPES (Programas Estratégicos - DRI). orcid.org/0000-0002-8804-0378 Doutora em Relações internacionais/Direito internacional - Université de Paris I (Panthéon-Sorbonne), 2000. Professora da Universidade de Brasília no Instituto de Relações Internacionais. Coordenadora da Pós-graduação desde 2016. Foi Chefe da Assessoria de Assuntos Internacionais da UnB de 2008 a 2014. Áreas de atuação: governança global dos oceanos, Antártica, BRICS, Agenda 2030 e política externa brasileira . Outros projetos internacionais: Projeto CAPES COFECUB sobre recursos marinhos minerais.

· Doutor em Ciências em Geologia pela Universidade Federal do Rio de Janeiro (1976) e Pós- Doutor em Geologia pela University of St. Andrews- Escócia (1985). Geólogo, graduado pela Universidade Federal de Pernambuco (1964), Diplôme d' Études Supérieures pela Université de Strasbourg - França (1968). Tem experiência acadêmica e profissional em Geociências, com ênfase em Hidrogeologia e Geologia Ambiental. Atualmente, é professor aposentado da Universidade de Brasília (UnB).

MITIGAÇÃO DO PRINCÍPIO DA SOBERANIA SOBRE OS RECURSOS BIOLÓGICOS?

Resumo

Este artigo se dedica a esboçar os limites adquiridos pelo poder soberano do Estado na Convenção sobre Diversidade Biológica (CDB). No que concerne aos recursos sob jurisdição nacional, o princípio da soberania está posto. No que concerne aos recursos além da jurisdição nacional, ou casos controversos, como o alto mar (regime de biodiversidade além da jurisdição nacional, BBNJ) ou no sistema do Tratado da Antártica (ATS), o debate está em curso. Observa-se uma fragmentação parcial do direito internacional ambiental, em função de uma limitada circulação de princípios. Na doutrina e na teoria das relações internacionais há um debate acalorado acerca da validade do princípio da soberania dos Estados nacionais sobre os seus recursos biológicos. Para alguns autores, o poder soberano sofre ameaça do instituto de "preocupação da humanidade", mas para outros ele continua preservado justamente por ser o pilar do direito internacional público. Neste contexto, os resultados demonstram uma dupla evolução: o princípio da soberania tornou-se mais limitado pelo interesse geral da humanidade e por obrigações internacionais sem precedentes. Entretanto, o princípio não está ameaçado pelos recentes desenvolvimentos do direito internacional ambiental.

Palavras-chave

Soberania; Antarctica; BBNJ; Biodiversidade; Convenção sobre Diversidade Biológica

1. INTRODUCTION

In international tort law, mitigating means that the party that suffered loss or damage is expected to act in order to minimize the damage. In this article, it means that mankind is at the same time the actor and the victim of biological losses (BIERMANN, 2014; STEFFEN *ET AL.* 2015, IUCN[1]). As a consequence, the principle of sovereignty over biological resources is challenged by different regimes related to the Antarctic Treaty System (ATS) and the biodiversity beyond national jurisdiction (BBNJ), to mention two cases of ongoing multilateral negotiations. Although private stakeholders have undoubted growing importance in this debate[2], we will focus on States' sovereignty, mostly from a legal point of view. In that sense, to what extent is it possible to reconcile States' sovereign rights and the common interest of mankind in what concerns biodiversity in spaces beyond national jurisdiction?

International law and the western liberal order have evolved significantly (PRANTL, 2014) after 1972 UN Conference on Human Environment (BOULET et al, 2016) in the sense of promoting compliance with international environmental obligations and building up diplomatic solutions for the sustainable use of common living resources. Considering the structural concept of "common heritage of mankind" replaced by the "common concern of mankind" (LOUKA, 2006), this article looks at the circulation of environmental principles and concepts in the biodiversity regime in order to assess whether the principle of sovereignty was reinforced or not since 1972.

The departing point is that general principles and customary norms proceed from the same progressive sedimentation of general statements, together with more

[1] http://www.iucnredlist.org/.

[2] See for instance Thomson Reuters' Report "Redefining Business Success in the 21st Century – An Executive Perspective for Energy Corporate Leaders". It states that the 250 biggest companies in the world are responsible for one third of the global CO_2emissions.<https://www.thomsonreuters.com/en/products-services/energy/redefining-energy-business-success.html> 31 October 2017.

or less coherent State practice and sometimes assisted by judicial consolidation (DUPUY, 2007). As a result, there is a circulation of consensus and principles in international public law. This idea of circulation was developed by Sandrine Maljean-Dubois (2016), among others, to state that although the environmental regimes show significant fragmentation (KOTZE, 2008), there are factors to be explored since they assure significant cohesion in some cases. One of them is the circulation process, in which individuals and ideas pass from one legal text or multilateral negotiation arena to another. Therefore, international regimes are at the same time fragmented but also connected.

Fragmentation is actually inevitable if one considers all the complexity of a diplomatic process from a political and legal viewpoint.[3] One current case is the CORSIA system, created in the ICAO regime for climate mitigation, in which the CBDR principle was not accepted as it is in the CDB regime[4].

From a technical point, the same may be argued, since different issues inside the same regime are usually dealt with separately. The biodiversity regime is a key example of fragmentation since it has several dimensions (environmental, social, economic to highlight only the main ones from the concept of sustainable development). As a consequence, different negotiating agendas were created in the multilateral law-making process, being the CBD an umbrella convention to be the basis of further States' commitments, expressed in the Cartagena and Nagoya Protocols. Financing and burden-sharing are other factors that deepen fragmentation. Taking only living resources into account, the biodiversity regime is composed of several issues, such as forests, marine life, wildlife, water, living modified organisms, climate, and so on. In addition to that, sectorial approaches were usually chosen both in domestic and international law-making after 1972. For the oceans, fishing, navigation, piracy and trafficking, pollution, mineral exploration and biodiversity beyond the limits of national jurisdiction (BBNJ) are the central issues. In a nutshell, fragmentation is ineluctable and rather easy to accept as a necessary step to a better approach to specific issues. In other words, it would be impossible to negotiate the sustainable use of biological resources in a holistic manner, although they are all interconnected. Useless to mention that there is no biodiversity protocol so far, since it would be too complex to negotiate in the short term with around 200 sovereign States.

The 1992 United Nations Convention on Biological Diversity (CBD) was the keystone of the biodiversity regime, imposing a more integrated approach, usually named as "the Rio spirit" and taking the 1972 legacy as the basis for the necessary improvement related to reducing fragmentation. Also, the Rio 2012 Declaration "The Future We Want" followed the same pattern. However, the concrete outcomes of this initiative are rather poor. Over the past decade, multilateral and regional efforts to improve the integration and the "ecosystemic approach" proliferated (TARLOCK, 2007). But taking fragmentation as a challenge, it may be reduced if negotiators re-

[3] MOGHERINI, F. **Global Strategy to steer EU external action in an increasingly connected, contested and complex world**. Available at: <http://www.eeas.europa.eu/top_stories/2015/150627_eu_global_strategy_en.htm>. Retrieved on: 15 apr. 2016.

[4] KORBER, V.; ANSELMI, M. **Climate Governance and International Civil Aviation: Negotiations at ICAO and the Role of Brazil**. International Studies Association, San Francisco, 7 April 2018. Available at: https://www.isanet.org/Conferences/San-Francisco-2018/Program/Browse.

spect more attentively the pillars of international law. The law-making process has to be more adapted to our changing Planet and scientific reports, but they need not be also more incoherent. So, the emerging "ecosystemic approach" may be useful for the circulation of individuals and ideas in the same framework and improve their orchestration (ABBOTT et al, 2016).

The concept of regime is understood as "[…] sets of implicit or explicit principles, norms, rules, and decision-making procedures around which actor expectations converge […]"(KRASNER, 1982). But we also believe that with time regimes shall be less "control-oriented" to be more "insurance regimes" as Keohane predicted in the 1980's (KEOHANE, 1982). Indeed, he considered the decline of industrial countries to discuss the limits of command and control mechanisms and suggested that international regimes should be developed for the sake of all States. These two authors' ideas correspond well to the evolution of the biodiversity regime.

To give some reflections on the question raised in the title, this article will first of all discuss the principle of sovereignty over natural resources and its circulation in selected UN General Assembly (UNGA) resolutions, the 1972, 1992 and 2012 Declarations and in the UN 1992 Convention (CBD). Thus, it will show how the circulation of the sovereignty principle was directly influenced by the North-South divide and the diplomatic efforts of the G77/China, the biggest negotiating group ever, to reaffirm the principle of sovereignty over living resources within national jurisdiction. Then, it will bring the structuring concepts of "common heritage of mankind" and "common concern of mankind" to assess the validity and the scope of the sovereignty principle over biological resources nowadays. Finally, it will show that the CDB is not likely to be applied to the BBNJ and ATS negotiations because the Convention is limited to spaces under national sovereignty.

"Sovereignty" is a hard concept to define, and it lends itself to different interpretations over time (EGEDE, 2011). It has been defined as that state in which "[…] a group of people within a defined territory are molded into an orderly cohesion by the establishment of a governing authority which is able to exercise absolute political power within that community […]"(HART, 1997). Implicit in the idea of a sovereign is its absolute monopoly over the internal affairs of its territory. Nevertheless, there seems to be a clear evolution from the idea of an "absolute" sovereignty to a more responsible form of entitlement to rights. In other words, if sovereignty is well embedded in international law treaties, it is also limited by the obligations related to sustainable development, precautionary and ecosystemic approaches.[5] It would be interesting to discuss how powerful States like the US, China and Russia may be exceptions to the "responsible sovereignty paradigm", but this is out of the scope of this text.

The current sovereignty principle was due to the efforts of individual developing states and the G77/China Group against the interests of developed countries and the threats of appropriation they posed (KISS, 2004).The latter were more favorable to a free access regime to biological resources, as it was shown at the creation of the FAO (Food and Agriculture Organization). Some even proposed that biodiversity should

[5] These two latter were consolidated after 1992 and are discussed in different regimes, such as fisheries and biodiversity in areas beyond national jurisdiction (the high seas).

be considered "common heritage of mankind", but they were unsuccessful, as we will discuss later on.

As a result of this North/South divide, the preamble of the CDB states that biological diversity is a "concern", not a heritage so that there is no possession assured by the text. In a conciliatory effort, biodiversity is taken as essential to human survival, the states have their rights over biological resources guaranteed and the international community is encouraged to adopt international instruments for their conservation, but not on a planetary scale, since the ATS and BBNJ are *de facto* excluded. Both the preamble and Article 3 reaffirm sovereign rights of States. Article 15.1 brings the third direct reference to sovereign as it regulates the access to genetic resources.

Although private stakeholders like advocacy networks and the public opinion have growing importance in this debate, we will focus on States' sovereignty, mostly from a legal point of view. In that sense, to what extent is it possible to reconcile States' sovereign rights and the common interest of mankind in what concerns biodiversity? Will the principle of sovereignty survive to this structural concept of common interest of mankind?

2. SOVEREIGNTY OVER NATURAL RESOURCES: AN ANALYSIS OF THE UN RESOLUTIONS

The 1950's and 1960's witnessed the decolonization process in Africa and Asia, continents rich in natural resources but deprived of the best available technologies to exploit them.The same may be stated for Latin America in general. This explains, to a large extent, their insistence on the sovereignty principle as the right to use freely their own natural resources (SILVA, 2002).

However, there were companies exploiting oil, wood, silver, gold and other natural resources in the colonies. So the main question was whether independent States had the legal obligation to respect the contracts signed when they were colonies. In accordance to customary law and treaties, the state has independent and autonomous rights on its territory. Is that enough to affirm that states have property rights over natural resources?

Experts such as Sepúlveda (1980), stressed the need to encourage developing countries to explore their resources aiming at economic development. Castañeda (1976)stated that the least developed countries consider that unrestricted control over their natural resources is essential for their national growth. Thus, sovereignty was not a requisite to development, but its basis, since development also requires a territory, the valorization/pricing of resources, and population engagement, in order to promote political, social, cultural and economic cohesion.

In this context of decolonization and bipolar world order, the UN General Assembly voted Resolution 626 (VII) in 1952 (KELLOG, 1955).Put bluntly, it established the right of the peoples to dispose and explore freely their wealth and natural resources according to the UN Charter. Likewise, the UNGA resolution 1803 (XVII) on permanent sovereignty over natural resources brought more details to this principle. In fact, it was the result of a difficult negotiation process, and it recognized the rights

of peoples and nations to permanent sovereignty over their wealth and natural resources in accordance to their national development interests and well-being. Abi-Saab (1991) stated that "permanent" indicates the rule and the eventual limitations of international law are the exceptions. Indeed, the term "permanent" reinforces the principle of sovereignty. Verduzco (1980) agreed that "permanent" is linked to the property rights of the State, since the process of extraction, production, transformation and commercialization are carried out or authorized by the State. Furthermore, other UNGA resolutions used the term "inalienable" to confirm this trend of sovereignty corroboration.

Negotiations related to the 1962Resolution 1803 (XVII) were marked by conflicting positions concerning the nationalization of natural resources. Chile claimed for a compensation corresponding to nationalization, expropriation or requisition for the exploration of its natural resources. On the contrary, the United States insisted that compensation should be appropriate, sufficient and effective. The Soviet Union defended that asking poor States for any compensation would violate their sovereign right over their natural resources because those countries could not afford to pay to have their rights recognized (MONREAL, 1974). It even created a commission as follows: "Bearing in mind its resolution 1314 (XIII) of 12 December 1958, by which it established the Commission on Permanent Sovereignty over Natural Resources and instructed it to conduct a full survey of the status of permanent sovereignty over natural wealth and resources as a basic constituent of the right to self-determination, with recommendations, where necessary, for its strengthening, and decided further that, in the conduct of the full survey of the status of the permanent sovereignty of peoples and nations over their natural wealth and resources, due regard should be paid to the rights and duties of States under international law and to the importance of encouraging international co-operation in the economic development of developing countries [...]".

At the end, article 4 of the resolution established that the nationalization, expropriation or requisitioning should be based on public utility, security or national grounds or reasons. They were recognized as overriding the private or particular interest, being national or foreign. In these cases, the owner would receive the corresponding compensation, according to the norms of the state adopting these measures, to its sovereign rights and to international law. In case of controversy, the jurisdiction of the owner state prevails and should be exhausted.

Furthermore, the 1974 Resolution 3281 (XXIX) also assured States rights over natural resources, compensation in the case of nationalization, expropriation or requisitioning and it determined that foreign investments should comply with the laws of the host State, aiming at its national development (STERN, 2003).

In the same vein, in 1966 the UNGA adopted the International Convenant on Economic, Social and Cultural Rights,[6] whose first article states that:

> 1. All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

[6] Brazil only ratified it in 1992.

> 2. All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence.

Afterwards, international environmental law largely recognized the principle of state sovereignty over natural resources, both biological and mineral, as shown below with the comparison of the 1972 and 1992 Conventions. This contributed to limit the debate about ecological intervention and to reinforce the principle of equality among sovereign states.

3. SOVEREIGN RIGHTS, THE UN CONVENTIONS AND DECLARATIONS ON ENVIRONMENT

The 1972 Stockholm Declaration reinforced the sovereign right of states over natural resources on their territory. Principle 21 proclaims:

> States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction.

In the 1970's Schanchter wrote that the first part of the principle above assures the permanent States sovereignty:

> In recent years no normative principle has been more vigorously asserted by the less-developed countries than that of 'permanent sovereignty over natural resources', a concept generally defined by its proponents as the 'inalienable right of each state to the full exercise of authority over its natural wealth and the correlative right to dispose of its resources fully and freely'. For many developing countries this right is regarded as an essential condition of their national independence and of their ability to decide on basic political and economic arrangements. (LYNCH, 1998)

Sands estimated that the Rio Declaration was the result of concessions to developing and developed countries, and also a balance between environmental protection obligations and economic development goals (SANDS, 1995).The 1992 Principle 2 reaffirms the sovereign rights of States over natural resources, but it does notreproduce the Stockholm Declaration Principle 21. The insertion of the terms "development" and "responsibility" in Principle 2 led to a new interpretation, since sovereignty was simultaneously reinforced with the right to development principle and then limited with the concept of responsibility.

Pallemaerts stated that the introduction of both terms was not naive since it altered the delicate balance between States' rights and duties related to natural resources established back in 1972. Although the Rio Declaration may seem to strengthen environmental protection, it actually hides a regressin environmental regimes in his analysis (PALLEMAERTS, 1994).

While the Stockholm Declaration limitedStates' sovereignty by the use of their respective natural resources with protective policies and the duty not to cause damage to other states' territory, the Rio Declaration limited the rights of States by environmental and development policies, widening the exploration spectrum with development needs. As Pallemaerts (1994) puts it:

> In the Stockholm Declaration, the sovereign right of States to exploit their natural resources was affirmed in the context of their national environmental policies, giving 'a more ecological colour to the principle of sovereignty over natural resources (which was originally established in a primarily economic context). This environmental colour is now neutralized by the parallel stress on national development policies. After Rio, a State's responsibility in the exercise of its sovereign right to exploit its natural resources will no longer be measured first and foremost in terms of its environmental policy obligations, which are now explicitly subordinated to the dictates of its economic development policy.

In fact, mainstream western scholars argued that the Rio Declaration was less protective than the Stockholm one because instead of redefining the relationship between development and environment, it only led to the understanding that the first prevailed over the latter. However, from a Southern point of view, development must prevail over environmental protection because it is a *sine qua non* condition for environmental law effectiveness. In other terms, fighting starvation and poverty is the best pathway for sustainable development. Since 1972, Brazil, China, India and the African Group defend firmly that development is the priority of the global agenda and international law, and that explains why the 2002 Conference in South Africa was entitled Sustainable Development Summit (or Rio+10).

The 2002 Johannesburg Declaration on Sustainable Development does not mention explicitly the sovereignty principle, but it was written in accordance with the Rio one. States agreed on the responsibility to strengthen the interdependent and mutually supported pillars of sustainable development in the local, national, regional and global levels. In addition, they committed themselves to cooperation to promote socio-economic development and environmental protection.Furthermore, the Rio 2012 Declaration "The Future We Want" (A/CONF.216/L.1) reinforced this Southern view, along with the 2015 UN Global Goals, that development is the priority on the global agenda, not only for the environmental challenges, but also for a sustainable world peace and inclusive security. Article 58 refers to green economy and sovereignty, so does article 121 concerning water and 227 on mining rights.

In short, the three declarations legally shield states' sovereignty, but it is no longer unlimited. In each declaration States accepted new obligations and started reducing their own *marge de manoeuvre* in relation to the sustainable use of biological resources, notably in the European Union. Some telling and older examples are the CITES, RAMSAR Conventions and also UNCLOS.

3 THE SOVEREIGN RIGHT OF STATES TO EXPLORE ITS BIOLOGICAL RESOURCES: THE CBD UNDER ANALYSIS

The 1992Convention builds on the former multilateral declarations and corroborates the principle of sovereignty, since it is a hard law treaty. As aforementioned, there are three direct references to the sovereign rights of States over biological and genetic resources in the Convention on Biological Diversity. In fact, during the preparatory negotiations for the 1992 Conference, the sovereignty principle was only evoked in the preamble, but it ended up also in Article 3 of the CBD (GLOWKA *et al*, 1996).This was the first time that a principle was included in a binding environmental law treaty (IUCN, 2012).

Article 3:

> States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction.

The interpretation of this article leads to the conclusion of a general obligation of environmental protection as a limiting factor of sovereignty, as Alexandre Kiss (2004)promoted and Buck agreed in relation to transboundary pollution challenges (BUCK, 1998).From a totally different perspective, Henry Kissinger mentions that issues now have a global basis, and therefore States have to solve their collective action problems, or put differently, they have to cooperate in their own interest (KISSINGER, 2015).

Furthermore, the obligation of avoiding damages beyond the limits of national jurisdiction also means that principles of prevention and precaution must be employed. Even if a state adopts environmentally sound politics, if damages are caused, it should have to repair them, and even compensate for the damage caused, under the condition that the causal link is established. Nevertheless, the 2011 Fukushima Daiichi nuclear disaster is an interesting case because although the link was not established and Japan was not legally liable, China argued that the South China Sea was contaminated and asked for quick solutions (ALFAIA, 2014).

Another limit is the future generations' rights to sustainable development models and policies. Aiming at the global quality of well-being, it may restrict the free and unsustainable use of natural resources beyond the limits of national jurisdictions (IUCN, 2012).Alexandre Kiss (2000) also affirmed that the common interest of humanity should be considered as a limit to sovereignty rights.

In short, environmental issues are interdependent and they demand collective action for sustainable solutions. As Boutros-Ghali reaffirmed:

> The foundation-stone of this work is and must remain the State. Respect for its fundamental sovereignty and integrity are crucial to any common international progress. The time of absolute and exclusive sovereignty, however, has passed; its theory was never matched by reality. It is the task of leaders of States today to understand this and to find a balance between the needs

> of good internal governance and the requirements of an ever more interdependent world. Commerce, communications and environmental matters transcend administrative borders; but inside those borders is where individuals carry out the first order of their economic, political and social lives. The United Nations has not closed its door. Yet if every ethnic, religious or linguistic group claimed statehood, there would be no limit to fragmentation, and peace, security and economic well-being for all would become ever more difficult to achieve. (GHALI, 2012).

So far we have concluded that the sovereignty principle circulated from the 1972 to the 1992 and the 2012 Declarations. Its interpretation changed in the sense of two seemingly contradictory directions, that is, the right to development and the limits to sovereign rights under the sustainable development paradigm. Then we explain that a Southern interpretation does not accept this contradiction theory. In fact, development rights are essential for the sustainable development goals as the UN puts it after the Millenium and Sustainable Development Goals (MDGs and SDGs) and also for the respect of the sovereignty principle. This last part will tackle the biodiversity issue from this conclusion above, since biodiversity is not a natural resource, it cannot be appropriated. In fact, it was not even well estimated yet in most countries, as it is in Antarctica and the high seas.

4 BIOLOGICAL DIVERSITY AS A COMMON CONCERN OF MANKIND

The Stockholm Declaration implicitly considers the environment as a common heritage of mankind. And the 1974 Charter of Economic Rights and Duties of States (A/RES/29/3281), establishes in Article 29 that seabed, ocean floor and subsoil as well as the resources of the Area are a common heritage of mankind, based on the principles of the UNGA Resolution 2749 (XXV) of 1970. As a consequence, appropriation or unilateral claims and military use of resources beyond the limits of national jurisdiction are excluded. Also, States should share benefits derived thereof on a equitable basis. This notion implies the recognition of interests that are common and superior to the interests of states (ALTEMIR, 1992).

The common heritage of mankind (CHM) was established in the 1970's after Ambassador Pardo's proposition. Southern countries were profoundly worried that developed countries would take possession of all common resources, *res nullius* and *res communis*, and not share the benefits from their appropriation. It was then included in article 136 of the 1982UN Convention on the Law of the Sea (UNCLOS), for example, as it states that marine seabedis CHM under the auspices of the International Authority created by the same treaty. The CHM regime also includes the Antarctic, the high seas, celestial bodies, international airspace, and international waters.

The concept of CHM is totally different from *res communis* because it creates legal obligations to assure the common interest of mankind. It establishes a form of *trust* with three main aims: the pacific use of resources, scientific research and conservation, as well as sharing benefits from their exploitation. In fact, it was a structural concept for international environmental law, and not a principle. Developed and developing countries had a lot to disagree on during the 1992 negotiations.The first

group, also called "the North", promoted that biological diversity should be considered a common heritage of mankind and refrained from the idea of common concern in order to avoid new financial obligations (BURHENNE-GUILMIN; CASEY-LEFKOWITZ, 1992).The other group, "the South" usually biodiversity rich countries, preferred the term "concern" to reduce chances of interference in the exploration of biological and genetic resources. In fact, the North-South divide was once again clear in this specific agenda related to both concepts.

Brazil, India and China led the G-77/China to the consensus that biological resources belonged to the State where they occur naturally, so they are not the heritage of mankind because they are not *res nullius* nor *res communis*. In the same vein, forests, biodiversity (VARELLA, 2004) and genetic resources are only a common concern of mankind, and never will be a common heritage. So the access to genetic resources must be regulated by the owner countries. The United States, among other technologically advanced countries, disagreed firmly, proposing there should be contracts to regulate access to these resources (DUTFIELD, 2004; LOUKA, 2006).

It is interesting enough to notice that in 1992 the South was against the inclusion of new items in the list of CHM and the North, on the contrary, tried to impose it to assure free access to genetic resources. So it was a complete different use of this structural concept. The reason the South changed radically its position was that it firmly recognizes the sovereign principle over the use of natural resources, while the North had no interest to do so. During the negotiating process, a new concept of common concern of mankind was coined (UNEP, 2003).The Southern view prevailed and the CBD only mentions in its preamble that biodiversity is a common concern of mankind, with no clear definition or legal force. Hence, states have the obligation to cooperate and to offer funding to the sustainable use of biodiversity (BURHENNE-GUILMI; CASEY-LEFKOWITZ, 1992).

The deepest difference between heritage and concern is that only the first one prohibits appropriation (SALOM, 1997). So if biodiversity is a common concern of mankind, states are entitled to a share of benefits from the use of genetic resources, since the CBD guarantees the states' rights over natural resources e recognizes its right to regulate access to resources in its territory.

Finally, the Common Concern of Mankind in the CBD refers to the conservation and sustainable use of biological resources, not to aspects related to public or private property, free or controlled access, although the results of this concept are the right over natural resources and the regulated access by the state where the resources are. In this sense, the international community as a whole has the obligation to care for these living resources. In sum, it can be argued that Southern states managed to reaffirm the sovereignty principle in environmental legal texts bringing the common concern of mankind as a new structural concept.

5 CONCLUSIONS

This article assessed legal instruments related to biological resources and some IR concepts to answer whether the principle of sovereignty was reinforced or not

since 1972. It focused on the UN Summits, Declarations, Conventions and UNGA Resolutions and concluded that the principle evolved in two ways.

First of all, the sovereignty principle circulated considerably, maybe more than other principles in international environmental law. It was limited by international obligations determined more recently than the states' rights, such as preventing causing damages beyond the limits of national jurisdiction, the responsibility to repair damages and even compensate the victims if necessary. Public opinion and advocacy networks are also important factors of limitation of sovereignty rights over time. Other more theoretical limits are the sustainable development paradigm, the duties to cooperate and to use the resources in the interest of present and future generations. The concept of common heritage of mankind was also promoted by developing countries and circulated in different legal debates to prevent developed countries from claiming sovereignty over international waters and surface, airspace, celestial bodies and the Antarctic. Curiously, it was then promoted, in 1992, by developed countries to prevent developing States from reaffirming their sovereign rights over the exploration of biological resources, notably in relation to forests and genetic resources. As a consequence, they had to agree on the structural concept of common concern of mankind instead, which has no clear legal status since it is only a political arrangement between Northern, Southern and emerging states. So the CBD established that the biological diversity is a common concern of mankind. As a consequence, it does not threat the principle of sovereignty over biological resources, but it allows states to refuse the planetary scope of the CDB in relation to the ATS and BBNJ regimes under negotiation.

Secondly, since 1972 the sovereignty principle was reinforced in legal and political interpretation simultaneously with the principles of the right to development and common but differentiated responsibilities. Thus, global issues and collective action challenges are not a threat to sovereignty either since they do not impose delegation mechanisms nor precise obligations yet.

In sum, the sovereignty principle will survive to the common concern of mankind concept and also to the creation of new duties to states in relation to environmental global challenges in the ATS and BBNJ. But it is no longer the "absolute" sovereignty discussed two centuries ago.

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