

Chapter 5

Global Solidarity, Differentiated Responsibilities and the Law of the Sea

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Abstract

The United Nations Convention on the Law of the Sea 1982 appears to be strongly concerned with common interests and goals; the Convention could be characterised as enshrining the idea of global solidarity. Global solidarity is concerned with cooperation between States to address issues of collective concern in a way that recognises differences in individual States' needs and capacities. There has been a rise in interest in global solidarity in some areas of international law, such as human rights, environment, health, and climate, but the potential to global solidarity to frame our thinking about the law of the sea has not yet been explored. As well as a gap in the law of the sea literature on global solidarity, there remain wider questions about how global solidarity should be framed as a legal concept. This chapter begins to address this gap on solidarity in the law of the sea literature, as well as contribute to wider discussions about the role and function of global solidarity. I present an analytical framework for global solidarity that captures six dimensions of solidarity thinking (participation, common goals, normative priorities, differential commitments, delivery mechanisms, and accountability). Particular attention is given to the core idea of differential commitments. This framework is then applied to two aspects of the 1982 Convention: marine environmental protection and fisheries. I show that although the inclusion of differential commitments in the law of the sea appears to support solidarity goals, the way that such commitments are structured serves to inhibit our ability to pursue global solidarity. Other fundamental concerns, such the emphasis on uniform standards in shipping, or the priority afforded to exclusive fishing by coastal States, run counter to solidarity and differential commitments. In some instances, this serves to increase the dependence of some states on others rather than empower them. If we are to advance global solidarity then there is much work to do to demonstrate the benefits of solidarity, as well as work through how solidarity might play out against other fundamental interests that are not so necessarily aligned with solidarity goals.

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5.1 Introduction

Global solidarity is an approach to law, policy and social organisation that recognises different needs, capacities and rights in the pursuit common interests and goals. The United Nations Convention on the Law of the Sea 1982 (LOSC)¹ is seemingly an agreement strongly concerned with common interests and goals. Throughout the LOSC, States assume rights to harvest resources or to make exclusive use of some ocean spaces, but these are qualified by community-type obligations towards the environment and to account for the interests of other States. Indeed, the LOSC's preamble speaks to 'the realization of a just and equitable international economic order which takes into account the interests and needs of mankind as a whole and, in particular, the special interests and needs of developing countries, whether coastal or land-locked'. Its text is replete with provisions that differentiate between the obligations and entitlements of developed and developing States in respect of access to and use of marine resources and spaces. Each year the Reports of the Secretary General on Oceans and Law of the Sea reiterates the vulnerability of developing states to changes in our oceans, especially from sea level rise and depleted resources. The Reports also emphasises the importance of the oceans to their economic and social development vulnerable States.² The LOSC designates the deep seabed as the common heritage of mankind (CHM). In many respects, the Convention seems to enshrine solidarity.

And yet, the extent to which the Convention truly aligns with or influences conduct in a way that reflects global solidarity can and should be questioned. For example, the distribution of marine resources to coastal States under the Convention remains framed largely in terms of

¹ United Nations Convention on the Law of the Sea 1982, 1833 UNTS 3. Hereafter: LOSC.

² See https://www.un.org/Depts/los/general_assembly/general_assembly_reports.htm. See also the annual General Assembly resolutions on oceans and law of the sea, and the resolutions on sustainable fisheries. https://www.un.org/depts/los/general_assembly/general_assembly_resolutions.htm

‘objective’ geographic criteria rather than equitable criteria.³ This means that the distribution of resources is either the random consequence of geography or it is shaped by particular legal and social constructions of geographic fact, such as the importance of space to a particular community.⁴ The CHM regime for the deep seabed has not yet come into full operation and it is currently under significant strain as to how it might apply to marine genetic resources in areas beyond national jurisdiction.⁵ Here there is a profound debate about the choice of governing principles (freedom of the seas or common heritage) and it is clear that individual interests are pitted strongly against collective interests. So, there is evidence that solidarity does not permeate nor shape every aspect of the LOSC. This begs the question how exactly does the LOSC advance global solidarity? Given that the oceans are a common space and an important site of interstate transactions, the law of the sea is an important theatre in which the concept of solidarity will play out.

Beyond the law of the sea, the idea of global solidarity is gaining traction in both academic literature and policy fora. It is embraced by some commentators in the fields of human rights,⁶ refugee protection,⁷ the right to health,⁸ labour rights,⁹ and international institutional law.¹⁰ Solidarity has also come to the fore as a guiding principle for response to the Covid pandemic.¹¹ More generally, the realization of international solidarity is being advanced through the work of a United Nation’s appointed Independent Expert.¹² Global solidarity appears to be on the rise. This makes it all the more important to understand how it will play out in other areas of international law.

Broadly speaking international solidarity is concerned with cooperation between States to address issues of collective concern in a way that recognises differences in individual States’ needs and capacities. More specifically, it is cooperation towards peaceful co-existence, with a view to: ‘equal partnerships and the equitable sharing of benefits and burdens, refraining from

³ Ibid., Arts 55 and 76 on the definition of the EEZ and continental shelf. More generally maritime zones are determined by coastal geography. See Rosenne 1996, 319-334; Purcell 2019.

⁴ Purcell 2019, 26-27.

⁵ De Santo et al 2020.

⁶ See e.g. Alston 1982, 307-322; Wellman 1981, 639.

⁷ Mitsilegas 2017, 721-739.

⁸ Catalan 2021.

⁹ Smith 2006, 873; Van Boven 2011, 137-147.

¹⁰ Freestone 2007, 1077-1107.

¹¹ See Libal and Kashwan 2020, 537-546; Askary and Fallah 2020, 193-203.

¹² Office for the High Commissioner for Human Rights, Human Rights and international solidarity, Human Rights Resolution 2005/55, 20 April 2005, UN Doc. E/CN.4/RES/2005/55.

doing harm or posing obstacles to the greater well-being of others, including in the international economic system and to our common ecological habitat'.¹³ Initiatives to pursue global solidarity are developed principally in areas of international environmental law and, more specifically, the regime for climate change. Here, solidarity is often manifest in terms of common but differentiated responsibility (CBDR), a topic upon which much has been written.¹⁴

Despite the rise of solidarity and interest in the wider literature on international law aspects of global solidarity,¹⁵ there is little that specifically addresses this in the context of the law of the sea.¹⁶ This is remarkable given that the ocean is such a significant common space. Some attention is given over to CBDR in law of the sea scholarship, but this is largely limited to analysis of pollution control, and more specifically, emissions of greenhouse gases by ships.¹⁷ The literature does not consider the wider aspects of solidarity and the implications for how this perspective could shape the law of the sea more generally. This chapter seeks to address this gap in the literature by exploring the role that global solidarity plays in the law of the sea. I show that solidarity concepts, including differential treatment of States, exists to varying degrees in different areas of the law of the sea. However, although the inclusion of differential commitments in the law of the sea appears to support solidarity goals, the way that such commitments are framed is shown to inhibit our ability to achieve global solidarity. Understanding these limits is critical to us being able to better understand and frame future action designed to enhance global solidarity.

In the next section of the chapter (Section 5.2), the concept of global solidarity is mapped out, before explaining how it is reflected in rules that focus on differential treatment of States. Drawing upon both literature and legal/policy instruments, a conceptual structure for global solidarity is proposed. In Section 5.3, the link between CBDR and global solidarity is unpacked. This reveals the importance of formally differentiated commitment to global solidarity. It also shows how differential treatment is the product of highly contextualised law-making. This provides a basis for examining how solidarity and differential treatment operate

¹³ Report of the independent expert on human rights and international solidarity (A/HRC/15/32 and Corr.1), para. 58

¹⁴ Stone 2004, 276; Rajamani 2002, 120-131; Honkonen 2009; Brunnée and Streck 2013, 589-607; Rajamani 2018, chap VI.22.

¹⁵ MacDonald 1996, 259-302; Wellens 2005, 775 ff; Wolfrum 2009, 8-20; Koroma 2012, 103-129; Carozza and Crema 2014.

¹⁶ See Ball 1982, 461. There is passing mention of solidarity by Feichtner 2019, 601-633. Cullet uses the common heritage provisions of UNCLOS for a brief illustration of differential treatment. Cullet 2016, 305-328.

¹⁷ Kopela 2013, 70-101; Kopela 2020, 134; Shi and Gullett 2018, 134-156; Chen 2021.

in the law of the sea. In Section 5.4, I identify specific examples of solidarity norms in the law of the sea, tracing these from the LOSC into a range of global instruments that implement or develop the LOSC's general provisions. I focus on norms in two categories: those concerned with environmental protection and those concerned with the distribution of natural resources. Whereas the former type of norm appears to have consolidated in light of the increasing recognition of differential treatment within wider international environmental law, which has influenced the law of the sea, solidarity norms that advance more equitable sharing of natural resources have struggled to develop.

5.2 Reflections on Global Solidarity

Solidarity is infrequently defined or used in international legal instruments. When it is mentioned, it tends to be in the form of resolutions or other soft law instruments. Thus, the General Assembly Resolution on the promotion of a democratic and equitable international order defines solidarity as:

‘a fundamental value, by virtue of which global challenges must be managed in a way that distributes costs and burdens fairly in accordance with basic principles of equity and social justice and ensures that those who suffer or who benefit the least receive help from those who benefit the most.’¹⁸

Despite infrequent reference to a specific rule or principle of ‘solidarity’ in legal instruments, some writers have been quite firm in their advocacy of the concept.¹⁹ Much of this literature involves joining the dots between disparate rules and principles of international law that embody shared goals and drawing this together within a wider moral standard that demands the more equitable treatment of members of international society. The prevailing view of solidarity, as reflected in the work of MacDonald, seeks to treat solidarity as a structural principle – something that is essential to the functioning of international law.²⁰ However, imprecision in the use of the concept makes it difficult to pin down the precise parameters of solidarity. This is critical when it is used as a legal construct. For example, a working paper commissioned by the Sub-Commission on the Promotion and Protection of Human Rights

¹⁸ Resolution 56/151. UN Doc A/Res/56/151, 8 February 2002.

¹⁹ See generally authors cited at fn 15. For more sceptical views, see Dann 2010, 55.

²⁰ MacDonald 1996, 262.

shows solidarity to be capable of being framed in terms of a value, a concept, a principle, right or duty.²¹ It is also framed differently as either ‘solidarity’ or ‘international solidarity’.²² This looseness in its use undermines its currency as a norm or even concept. Solidarity is frequently observed in acts of cooperation or the pursuit of common interests. It is sometimes framed as a precondition for the functioning of international law.²³ Indeed, taken in its loosest sense, solidarity might be little more than a synonym for cooperation. Yet it can be distinguished from mere cooperation because solidarity is also characterised by the goal of achieving an (re)distribution of benefits or burdens so as to address prior inequalities.²⁴ If we are to use solidarity as a meaningful analytical concept, then we need to provide a clearer account of the concept.

To this end, we can begin with the work of Wolfrum, a leading advocate of solidarity as a principle.²⁵ He ascribes to solidarity three functions: ‘the achievement of common objectives through common action of states, the achievement of common action through differentiated obligations of states and actions to the benefit of particular states’.²⁶ In essence this means States taking account not merely their own interests, but the interests of other States and the international community when acting. In this sense it forms part of a wider intellectual tradition that advances community interests over the mere coordination of bilateral interests.²⁷ For others, it rests in a view of international law rooted in human rights rather than sovereignty of States.²⁸ Evidence for the ‘principle of solidarity’ is drawn from diffuse rules of international law, such as Article 55 of the United Nations Charter²⁹ or Principle 7 of the Rio Declaration.³⁰ Some associate it with a category of obligations *erga omnes*.³¹ However, whilst there is intuitive appeal in the use of solidarity as a new concept distinct from other related notions, it tends to collapse back into established legal concepts, such as cooperation.³²

²¹ RB Dos Santos Alves, ‘Human Rights and international solidarity’, 15 June 2004, E/CN.4/Sub.2/2004/43

²² *Ibid.*

²³ ‘The notion of solidarity - both of interdependence, from which social laws and obligations can emerge, and of communities working towards a common goal or in the common interest - has long been central to international law.’ Koroma 2012, 103.

²⁴ See Boisson de Chazournes 2010, 93, 95-96.

²⁵ Wolfrum 2009.

²⁶ *Ibid.*, 1087.

²⁷ See e.g. Simma 1994, 217; Bedjaoui 1991, 14.

²⁸ Mann 2016, 211-215.

²⁹ E.g. Boisson de Chazournes 2010, 95.

³⁰ E.g. Shelton 2010, 145.

³¹ MacDonald 1996, 263.

³² Boisson de Chazournes 2010, 97.

Returning to Wolfrum, his reasoning in support of solidarity tends to be a priori, with some passing effort to adduce evidence in support of it from cognate legal rules or principles.³³ Undoubtedly, it is possible to draw upon specific legal rules to illustrate the idea but, critically, there is infrequent, explicit reference to the concept of solidarity in legal texts.³⁴ At best solidarity provides an explanatory framework, akin to sustainable development, rather than a specific right with defined normative content. Hestermeyer is right to conclude that the concept falls short of a formal principle of international law.³⁵ His survey of the literature indicates a lack of agreement on the exact nature of solidarity, and this uncertainty means it cannot function as a legal norm – at present. Similarly, as Rudall notes, there is yet no general obligation to assist peoples in other countries.³⁶ This is not to suggest that solidarity may not emerge as a general principle of law, or to suggest that solidarity has no analytical purchase. At the very least, solidarity is a useful methodological device to help frame questions about the purpose and function of international law. By drawing together diffuse but related concepts and practices it may tell us something about the direction international is taking – or should take. In this vein, the UN mandated Independent Expert for solidarity has been charged with promoting international solidarity and ascertaining its conceptual and normative elements.³⁷ This initiative provides a focus for understanding the development of a legal concept of solidarity.

The Independent Expert for solidarity was first appointed in 2005, with their mandate being extended periodically – most recently in 2020.³⁸ Building upon earlier phases of work, which were exploratory in nature, much of the Independent Expert’s current mandate is focused on moving from a principle of solidarity to a right of international solidarity. In 2017, the then Independent Expert, Virginia Dandan, submitted a draft resolution on the right to international solidarity to the Human Rights Council, which defined the right and its objectives, as well as the modes for securing the achievement of the right.³⁹ Whilst the draft resolution has not been formally adopted by the UN, it provides a useful starting point for developing a more meaningful concept of solidarity, as well as providing insights into how the concept might

³³ See, for example, Koroma 2012, 103.

³⁴ See e.g. Art 3 of the United Nations Convention to Combat Desertification 1994, (1994) 32 ILM 1332; or Art 2(2)(a) of the Charter of the Organization of African Unity 1963, 479 UNTS 49.

³⁵ Hestermeyer 2012, 45, 48. Also Delbrück 2012, 15–16.

³⁶ Rudall 2021, 12.

³⁷ Above (fn 12).

³⁸ Human Rights Council, Resolution 44/11 Mandate of the Independent Expert on human rights and international solidarity, 23 July 2020, UN Doc. A/HRC/RES/44/11.

³⁹ Draft declaration on the right to international solidarity, Annex to UN Doc A/HRC/35/35.

develop into a legal interest. There are precedents for this because the work of the UN's Independent Experts plays an important role in shaping emergent areas of policy and law.⁴⁰ This is illustrated by the recent decision of the Human Rights Council to adopt a resolution recognising for first time that having a clean, healthy and sustainable environment is a human right.⁴¹ It should be noted that solidarity here is firmly rooted in human rights concepts and fits very much within the discourse on third generation rights.⁴² This does not necessarily limit solidarity to the field of human rights. Analysis and application of the concept already extends to areas of international environmental law, trade law and humanitarian law. However, this does mean we need to be sensitive to solidarity's developing normative heritage and, in particular, the resistance of developed States to strong positive obligations to assist other States.⁴³ This resistance is reflected more generally in the resistance to differential obligations in climate regimes.⁴⁴

International solidarity is defined as 'the expression of a spirit of unity among individuals, peoples, States and international organizations, encompassing the union of interests, purposes and actions and the recognition of different needs and rights to achieve common goals.'⁴⁵ This definition contains several key elements: the existence of common goals, common action(s) and differential needs. These features give solidarity its distinctive character, setting it apart from first- and second-generation rights (when considered as part of the human rights discourse). Although framed as an 'expression of unity', solidarity is described as a foundational principle underpinning international society, based on and in accordance with 'Justice, equity, peace, non-interference, self-determination, mutual respect and accountability in international relations',⁴⁶ the permanent sovereignty over natural resources,⁴⁷ 'Equitable, just and fair partnerships of States as the basis of international cooperation',⁴⁸ respect for human rights,⁴⁹ and the accountability of State for the implementation of foreign policy and

⁴⁰ Piccone 2011.

⁴¹ HRC, The human right to a safe, clean, healthy and sustainable environment, Resolution 48/12, 5 October 2021. UN Doc A/HRC/48/L.23/Rev.1.

⁴² See Vasak 1984, 837; Wellman 1981.

⁴³ Voting on resolutions of the HRC on solidarity issues tends to be split between developing and developed States, and as yet no formal resolutions have fully endorsed a solidarity right. See e.g. Resolution 38/2 on Human rights and international solidarity, 5 July 2018, A/HRC/RES/38/2.

⁴⁴ Bodansky 1993, 501-502.

⁴⁵ Above (fn 39). *Ibid*, Art 1(1).

⁴⁶ *Ibid*, Art 1(3)(a).

⁴⁷ *Ibid*, Art 1(3)(b).

⁴⁸ *Ibid*, Art 1(3)(c).

⁴⁹ *Ibid*, Art 1(3)(d).

international commitments.⁵⁰ Recognition of differential needs is reinforced by a general objective to create an environment for ‘Preventing and removing the causes of asymmetries and inequities between and within States, and the structural obstacles and factors that generate and perpetuate poverty and inequality worldwide’.⁵¹ Together these elements establish not merely negative duties, but positive obligations towards the realisation of solidarity rights.⁵²

Drawing on the draft resolution, as well as academic commentaries on international solidarity, the following common elements can be synthesized. First, there must be some form of community.⁵³ This might seem axiomatic, but there remain powerful debates about whether there is an international society or community, what it looks like and who comprises it: is it merely States, or does it also include international organisations, individuals, and other private legal persons?⁵⁴ Is ‘community’ a unitary actor or merely a loose description for coordinated, but disaggregate actions? The point here is not to engage in a debate about the precise make-up of an international community, but to draw attention to the fact that this is not a fixed or certain matter. Communities are dynamic systems involving some degree of continuity and a structured relationship based upon shared values and reciprocity.⁵⁵ At one end of the spectrum exist strong communities with well-defined and established structures for developing and advancing community goals, such as the EU. At the other are looser collections of actors, perhaps defined more by self-interested patterns of interaction than by coordinated action.⁵⁶ The membership of the international community of States has steadily grown and changed over time. Accordingly, the way in which this community developed influenced and will continue to influence both the form and operation of any community interests and the content of the law.⁵⁷ Arguably, since the strength of solidarity correlates to the degree of cohesion in a community, then solidarity is more strongly advanced in communities where effective structures or process exist that enable community interest to emerge. This suggests that an inclusive approach to community is important. Notably, the Draft Declaration takes an inclusive approach, referring not only to ‘all members of the international community’, but

⁵⁰ Ibid, Art 1(3)(e).

⁵¹ Ibid, Art 3(a).

⁵² Koroma 2012, at 110.

⁵³ Draft Declaration (fn 39), preambular, para 12 and Art 2(b); MacDonald 1996, 260; Wolfrum 2009, 1088.

⁵⁴ For views in support of a community, see Möslér 1980; Franck 1995. Cf, de Visscher 1968, 94; Toope 2000, 103. For a survey of the challenges inherent in constructing the idea of an international community, see Kritsiotis 2002, 961 or McCorquodale 2006, 241.

⁵⁵ Franck 1995, *ibid*, 12.

⁵⁶ See Simma 1994, 245.

⁵⁷ See Higgins 1999, 78-95.

also individuals, peoples, States and international organisations.⁵⁸ It refers repeatedly to partnership, and participation in social and international order.⁵⁹ To the extent that we can speak of global solidarity or solidarity in respect of global issues, then the community should be inclusive in its membership. This then entails mechanisms, both within and between States, to ensure the voice of those with a stake in an issue, whether it be the sustainable use of marine resources or the distribution of vital medicines, can be heard.

Second, solidarity is in essence an expression of common interests. Accordingly, there must exist some common interests or goals.⁶⁰ This is closely related to the idea of a community – since communities are largely defined by their shared values or interests.⁶¹ Solidarity goals typically align with established interests/principles of the international community as manifest in key legal instruments such as the United Nations Charter, including peaceful co-existence, reduction of social, economic and political asymmetries and inequities.⁶² They are also associated with shared environmental interests, such as sustainable use of resources or the prevention of harm, although the link between environmental rights and solidarity is less frequently made.⁶³ Whilst there is general recognition that common interests exist, their precise nature, and the process for identifying them remain underassessed.⁶⁴ It is reasonable to observe that the content of a category of common interests may vary over time and according to the composition of the international community.

Although the existence of common interests is essential to the concept of solidarity, common interests cannot simply be posited. They must be derived from some general (i.e. moral) theory of law or be empirically ascertainable as a result of the deliberative actions of a community. The former approach to determining common interests can be observed in accounts of common interests, such as that by Simma.⁶⁵ Or it can be seen in the idea of shared understandings as, for example, advanced by Brunnée and Toope.⁶⁶ The latter approach to determining common interests can be based on legal concepts such as *jus cogens* or obligations *erga omnes*.

⁵⁸ Draft Declaration (fn 39), preambular, para 12 and Art 1(1).

⁵⁹ Ibid, Arts 4(1), 7(4). And 9(1)(b).

⁶⁰ Ibid, preambular, para 12 and Art 2(b); MacDonald 1996, 290; Wolfrum 2009, 1087; Hestermeyer 2012, 51; Koroma 2012, 103; Villalpando 2010, 391-392.

⁶¹ Bull 1995, 51.

⁶² Draft Declaration (fn39), Art 1; United Nations Charter, Art 1.

⁶³ Draft Declaration, Arts 1(b) and 9(b); See also Alfredsson and Ovsioyk 1991, 19; Shelton 2010, 149.

⁶⁴ Besson 2018, 36-49.

⁶⁵ Simma 1994.

⁶⁶ Brunnée and Toope 2010.

The way common interests are determined can have consequences for the way in which legal issues are addressed. As Koroma argues, certain common interests entail joint obligations, not merely several obligations, since collective goals cannot be achieved by individual acts alone.⁶⁷ ‘Commonality’ denotes certain issues that affect or are affected by all States and so the issues demand collective action. Seizing on this aspect of commonality, some commentators associate global public goods with solidarity.⁶⁸ Global public goods include matters such as a healthy climate, the ozone layer, peace and security, and public health. Use or production of such goods affect all States. However, there is no rationale economic incentive to supply public goods because everyone benefits from such goods and cannot be excluded from them. This tends to drive cooperative practices because individual means of creating and protecting such goods are simply inadequate. Strictly speaking global public goods are non-rivalrous and non-excludable – like lighthouse services. However, as Bodansky points out, few if any goods meet this description.⁶⁹ Thus clean air is rendered rivalrous by air pollution. A second category of common interests relate to common pool resources. These are resources for which it is costly (although not impossible) to exclude access to, and for which the benefits consumed by one person subtract from the benefits available to others. This includes the oceans and some of its resources – e.g. high seas fisheries. This reinforces the importance of exploring how solidarity is used to frame cooperation in respect of such resources. Whereas cooperation may be required to generate public goods, cooperation is required to ensure good management of common pool resources. In both cases, this points towards having structured mechanisms in place to enable cooperation.

Third, for common interests to be meaningful they should be afforded some degree of normative priority over individual interests.⁷⁰ A relevant example of such prioritisation is found in Article 103 of the UN Charter, which sets the common interests enshrined in the Charter above other obligations that States might enter into in their treaty relations. However, this provision aside, as Besson notes in her pithy discussion of community interests, normative priority cannot be simply assumed, it needs to be justified in each case.⁷¹

⁶⁷ Ibid, 109.

⁶⁸ Villalpando 2010; Morgera 2012.

⁶⁹ Bodansky 2012, 651.

⁷⁰ See further my discussion of normative public interests in Barnes 2009, 68-117, where I develop a threefold account of interests based on basic interests, structural interests and particular interests.

⁷¹ Besson 2018, 37.

Sometimes, a priority for community interests might result from the inherent logic of the interest and so be product of common interest and cooperative action. If cooperation generates benefits for both parties at no additional cost (i.e. it results in a Pareto improving outcome), then cooperation ought to be the preferred course of action for both parties and so it ought to prevail over countervailing individual interests. For example, if two States can benefit from cooperation in fisheries management to increase the size of a stock, then both parties ought to cooperate to secure this gain, rather than risk degrading the stock through unilateral exploitation.⁷² Of course, such cooperation does not always occur in practice because of conflicting national interests, a lack of information or free riding. However, this lack of cooperation usually leads to an overall loss. Sometimes, the priority of the interest may be a product of widely accepted moral priorities; here, we can allude back to categories of norms that are non-derogable.⁷³ Of course, not all community interests are fundamental or peremptory norms. In such cases, Wellens argues that the specific relationship between the community interests and other interests will need to be articulated.⁷⁴ Even if one disagrees that common interests should have some normative priority as a general proposition, the fact that some community interests do have priority indicates that in practice the strength of solidarity is shaped by the normative weight attached to the common interest. The weighting of interests will develop over time as the relationships between different interests is work out in practice.⁷⁵

Fourth, there should be an adjustment of opportunities and commitments for different members of the international community according to differential needs and capacities to meet common goals. This may include different obligations for different States, or variations in the form or extent of an obligation, including the availability of exceptions or qualifications as regards its implementation. This most clearly associates with the concept of common but differentiated responsibility, which is considered in more detail in Section 5.3 below.

Fifth, and related to the last point, differential commitments are strongest when they are delivered through collective processes. This is important for both the legitimacy of the commitment and to avoid criticisms of ‘patronage’ or philanthropy whereby wealthy donor

⁷² Lodge et al 2007, 10-11.

⁷³ See Wellens 2010, 3 and 41-42.

⁷⁴ Ibid, 43-4.

⁷⁵ See Barnes 2009.

States contribute to the ongoing dependency of poorer States. When differential commitments are merely projected onto States, then differential treatment does not arise from a relationship of equality and as a result it lacks legitimacy.

Shared understandings alone are insufficient to ground norms – they must also be formed through shared practices.⁷⁶ Since the strength of a solidarity commitment will be influenced by both the terms used to frame the commitment and the means through which it is to be implemented, it is crucial to consider whether the setting and delivery of the commitment occurs unilaterally or through collective processes. At one end of the spectrum, some legal provisions are framed to allow States to vary delivery of their legal commitment according to their capacity or needs.⁷⁷ Examples of this include variable commitments to use of science or technology in response to environmental issues.⁷⁸ At the other end of the spectrum are commitments that require coordinated efforts or action to deliver an outcome. This could include institutional delivery of capacity building measures or the division of shared targets into individual actions through collective decision-making – e.g. fishing entitlement shared out by a regional fisheries management organisation (RFMO). Whilst solidarity practices may occur through individual acts by States, I would argue that norms gain greater authority through shared practices, and that this is best enabled where there are collective delivery mechanisms. The lack of collective mechanisms may weaken the quality of a commitment or render it susceptible to countervailing self-interested concerns of States. As an example of this, Leclerc argues that the principle of differentiated responsibilities in climate law is rendered meaningless by reducing it to individually determined contributions.⁷⁹

Finally, there should be some form of accountability mechanism. This echoes the preceding point, but focuses on enhancing compliance with differential commitments, rather than the formulation and prescription of commitments. In the first instance, there should be oversight of State commitments. As with the prescription of interests, this may happen individually or collectively, but it tends to be most effective when done collectively, through for example

⁷⁶ Brunnée and Toope 2010, 353. An excellent example of how the lack of practice undermines the shared norm is given by Kirk and Besco 2021.

⁷⁷ Voight and Ferreira treat such commitments as differential, although one may simply categorise them as flexible rules. Voigt and Ferreira 2016, 301.

⁷⁸ Such commitments might be viewed as ‘contextual commitments’. See for example, LOSC Art 61(2), which requires best use of science and cooperation in fisheries management. Recourse is had by some States to the International Council for the Exploration of the Sea to generate scientific data and advice. Also, LOSC Arts 202-203 on the provision of technical assistance to developing States.

⁷⁹ Leclerc 2021, 76-85. Cf Sharapova 2021, 63-75.

compliance committees or oversight bodies. In both cases, there also needs to be account take for differential capacities in how such oversight is exercised. For example, the Paris Climate Agreement 2015 provides that the compliance and implementation committee ‘shall pay particular attention to the respective national capabilities and circumstances of Parties’.⁸⁰ Yet, the nature of interests at play mean that we cannot always expect States to be motivated to prioritise interests of others or the international community as a whole over their immediate self-interests. Ideally the individual and common interests should be aligned, but there will be instances where they come into conflict, and where individual States fail to meet their commitments to act towards the collective good. Accordingly, strong compliance mechanisms are needed to hold States to account.

Taking these six elements together, we can view solidarity as a framework concept. As a framework concept, solidarity does not have exact dimensions. Solidarity also exists in multiple dimensions and in varying degrees according to the weight of interests and the context within which legal commitments operate. We should also note a difference between positive and negative solidarity. Positive solidarity requires States to act towards some commonly defined goals, whereas negative solidarity requires States to refrain from acting against common goals. Solidarity may be manifest unilaterally or collectively.⁸¹ In the former, individual States act unilaterally towards common goals, whereas in collective solidarity, action is coordinated through individual process that mediate individual interests. Given the variable and contextual nature of solidarity, one can posit an account of solidarity with strong and weak versions (and indeed intermediate variations). This is summarised in Table 5.1. This is a useful way to view solidarity since it allows solidarity to be evaluated in a calibrated and contextual way. Accordingly, the existence of each of the various elements and the degrees to which they exist influences the strength of solidarity on a particular issue. This approach is applied in Section 5.3, where specific provisions of the law of the sea are analysed in terms of global solidarity. However, before we explore the application of solidarity, the central idea of differential commitments is unpacked. This is important, because it is this element of solidarity that distinguishes solidarity from more general forms of cooperation

⁸⁰ Art 15(2) of the Paris Agreement 2015, (2016) 55 ILM 743.

⁸¹ This is distinct from Hestermeyer’s notions of self-centred and altruistic solidarity. In the former, individual interests are aligned with collective interests, whereas in the latter there is no immediate individual interest and action is purely for the benefit of others. See Hestermeyer 2012, 49-50.

Table 5.1: Spectrum of the Elements of Solidarity

	Strong Solidarity	Weak Solidarity
1	Inclusive and participatory community	Weakly defined community, exclusive of participation
2	Clearly defined, specific common goals	General, or poorly defined objectives
3	Normative priority for common goals	Priority for individual interests
4	Clearly calibrated differential commitments	Ambiguous/discretionary adjustments to legal commitments
5	Collective delivery mechanisms	Individual State delivery mechanism
6	Strong accountability mechanisms	No accountability mechanisms

5.3 Global Solidarity and Common but Differentiated Responsibilities

Solidarity and differential treatment constitute responses to historic, social, economic and structural inequality within the international legal system. They seek to place greater burdens upon developed States that have generated more pollution and so bear a greater responsibility for a degraded environment. Or they may alleviate burdens on poorer States. Solidarity and differential responsibility may be used to rectify historic injustices through colonial wrongs. They can also respond to the different levels of economic development between States. Recognition of these asymmetries requires a more fundamental restructuring of rights and obligations because it challenges the idea that states are formally speaking sovereign equals. For the time being, international law remains based on the formal equality of States, despite the actual inequality of States. So, unless formal equality is qualified by some mechanism for formal differentiation, then informal inequality will be perpetuated. Differentiation of commitments is a practical means by which the notion of solidarity can be achieved.⁸²

Central to the idea of solidarity is the recognition that there must be a formal differentiation of States commitments and opportunities. This is not merely recognition that there are differences in how such commitments affect each State, it is about formally responding to and addressing such difference. It is easy to recognise the differences between States but it is far more challenging to do something practical that remedies such disadvantages, especially in a system

⁸² Cullet 1999.

that favours formal equality.⁸³ Nor is it merely about flexible implementation, although this may help enable States achieve some solidarity goals. For example, a duty to prevent harm may be framed in terms of ‘best’ or ‘appropriate’ endeavours, permitting scope for varied steps to be used to implement the basic obligation.⁸⁴ It may also be framed in terms of due diligence, again allowing for implementation to be calibrated according to circumstance. However, this flexibility is to the benefit of States in general, rather than being a deliberate allowance for individual disadvantaged States. If solidarity is to mean anything, then differential treatment must recognise and respond to specific forms and levels of disadvantage, as well as the structural conditions that perpetuate disadvantage.

This need to formally respond to difference and disadvantage is recognised by Stone who observes that differential treatment occurs ‘agreements that are non-uniform in how undertakings are formally verbalized, not in how they affect each party’.⁸⁵ A more calibrated approach to the categorisation of norms is provided by Magraw,⁸⁶ who distinguishes between absolute norms (i.e. those that apply identically to all States), contextual norms (i.e. those which appear on the face of it identical, but which allow variations in application),⁸⁷ and differential norms (i.e. those which explicitly distinguish how an obligation applies to specific States).⁸⁸ This approach is useful in that it helps further calibrate the forms of differential treatment. As an additional observation with regard to contextual norms, it is possible to make a further distinction between explicit contextual norms and implicit contextual norms. The former refers to a provision that expressly lists any variables that should be accounted for in the implementation of the commitment. An example is Article 266 of the LOSC, which requires States to promote marine scientific research with specific regard to the needs of developing States, and with a view to accelerating their economic development. The latter includes open ended treaty provisions that simply allow for States to vary their commitments according to circumstance, and so can be used to leverage solidarity goals, or indeed any other policy goal.⁸⁹

⁸³ Shelton 2010, 151-152.

⁸⁴ See for example, Art 3 of the ILC Draft articles on Prevention of Transboundary Harm from Hazardous Activities, with commentaries, which provides that ‘The State of origin shall take all appropriate measures to prevent significant transboundary harm or at any event to minimize the risk thereof’. Reproduced in Yearbook of the International Law Commission, 2001, vol. II, part two.

⁸⁵ Stone 2004, 277.

⁸⁶ Magraw 1990, 69.

⁸⁷ E.g. Art 4 of the Convention Concerning the Protection of the World Cultural and Natural Heritage 1972, 1037 UNTS 152.

⁸⁸ E.g. Arts 5 and 10 of the Montreal Protocol, which sets different time scales for states to implement their commitments. Protocol on Substances that Deplete the Ozone Layer 1985, 1522 UNTS 3.

⁸⁹ For example, a duty to adopt ‘reasonable’ rules to promote marine scientific research under Art 255.

Whilst such distinctions may not matter a great deal in how they shape the outcome of individual commitments, the way the commitment is framed is important because it may facilitate agreement. For example, it may be easier for States to negotiate implicit contextual norms because they benefit all States and not just a subset of States. The distinction may also say something about the true levels of agreement underlying the differential measures. Thus, the more explicit the text on differential treatment, the greater the degree to which consensus may be presumed to exist as to the solidarity goal. In contrast the use of open textured norms may mask fundamental disagreements about the attribution of responsibility for the circumstances justifying differential treatment (e.g. historic pollution) or the degree to which some States should benefit from differential treatment.⁹⁰

Unlike the broader notion of solidarity, forms of differential treatment appear more commonly in legal texts, such as the Article 19(3) of the Constitution of the International Labour Organization,⁹¹ Article XVIII of the General Agreement on Tariffs and Trade,⁹² Principle 12 of the Stockholm Declaration,⁹³ Principles 6 and 7 of the Rio Declaration,⁹⁴ Article 5 of the Montreal Convention, Article 3 of the United Nations Framework Convention on Climate Change (UNFCCC),⁹⁵ Article 3 of the Kyoto Protocol,⁹⁶ Articles 20(4) and 21 of the Convention on Biological Diversity,⁹⁷ and Article 4A of the of the Basel Convention.⁹⁸ Such provisions recognise that States' substantive obligations should differ according to a range of status related factors, such as economic development or climatic conditions. Differential treatment may be advanced also through procedural rules, whereby States are given different formal representation in international institutions.⁹⁹ Examples include Article 10 of the International Tropical Timber Agreement on the distribution of voting rights and Article 161 of the LOSC on the composition of the Council of the International Seabed Authority. Of course, it may be observed that differential treatment is not always about correcting power

⁹⁰ French makes a similar observation in French 2000, 35.

⁹¹ Constitution of the International Labour Organization 1919, 15 UNTS 40.

⁹² General Agreement on Tariffs and Trade 1947, 55 UNTS 187.

⁹³ Report of the United Nations Conference on the Human Environment 1972, UN Doc. A/Conf.48/14/Rev.1.

⁹⁴ Report of the United Nations Conference on Environment and Development, Annex I: Rio Declaration on Environment and Development, A/Conf.151.26 (Vol. I), 12 August 1992.

⁹⁵ United Nations Framework Convention on Climate Change 1992, 1771 UNTS 107.

⁹⁶ Kyoto Protocol to the United Nations Framework Convention on Climate Change 1997, 2303 UNTS 148.

⁹⁷ Convention on Biological Diversity 1992, 1760 UNTS 79.

⁹⁸ Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal 1989, 1673 UNTS 126.

⁹⁹ See Rajamani 2006, 38-46.

asymmetries, hence the privileged position of the permanent five members of the Security Council. Accordingly, one cannot assume that differential treatment is always corrective.

Another way in which differential commitments can be manifest is through the operation of due diligence commitments. The literature on the relationship between the two concepts is rather under-developed, focusing mainly on climate law, but it is worth exploring.¹⁰⁰ Due diligence obligations are variable and contextual obligations of conduct.¹⁰¹ Diligence focuses on the control of non-state actors in situations when their conduct will impact upon the legal commitments of States. Due diligence entails a duty to ensure, through reasonably appropriate levels of vigilance and control, that activities authorised by a States are conducted in accordance with the State's international commitments.¹⁰² In other words, a duty to use best possible efforts to secure compliance with international standards. However, the nature of such duties varies according to each States circumstance. Since the economic, technical, and institutional capacities for control vary between States, due diligence does not require each and every State to act in the same way. However, although due diligence allows for differential levels of conduct, there is no determinate level of differentiation established under international law. The exercise of due diligence may be subject to some degree of international oversight (e.g. through claims of State responsibility), but its application is mostly left to individual States and so it is very much dependent upon how each State assess its capacity to act. This enhances the autonomy of States and avoids the problem of 'patronage', but it does atomise the pursuit of solidarity goals by marginalising opportunities for collective decision-making on matters of common concern.

Specific treaty provisions including detailed differential commitments tend to be exceptional. Most treaties favour uniform obligations, albeit with scope for exceptions or variations in application due to the use of general or ambiguous language. Stone suggests that there are a number of reasons for the exceptional nature of differential commitments.¹⁰³ Some norms are so morally unambiguous so as to not permit exceptions (e.g. torture), some States may decline to seek differential treatment for altruistic reasons, whereas other States will act for altruistic reasons without a legal duty to do so. Sometimes side payments are used to secure participation

¹⁰⁰ See, for example, Voigt and Ferreira 2016, 296-297 and 30; Rajamani 2020, 163.

¹⁰¹ *Responsibilities and Obligations of States Sponsoring Persons and Entities with respect to Activities in the Area* (2011) paras 117. Also *Pulp Mills on the River Uruguay case* (2010) ICJ Report 14, paras 197, 204.

¹⁰² See Koivurova 2010.

¹⁰³ Stone 2004, 282-283.

without ‘diluting a norm’. Thus, more burdensome differential treatment or structural change can often be avoided by States. There are indications of increased use of due diligence obligations in fields like environmental law, and this may point to a desire by States for flexibility in the implementation of commitments. However, by way of caution, it should be noted that there are limits to this flexibility. Thus, the extension of preferential treatment in respect of liabilities caused by seabed activities based on due diligence was rejected by ITLOS in the *Area Advisory Opinion*. Here the Tribunal ruled out differential treatment in the absence of rules specifically allowing for this.¹⁰⁴ This suggests that we must be careful about expecting too much of due diligence as a vehicle for differential treatment.

The above examples show differential treatment to be highly contextual and the product of specific treaty negotiations. Differential commitments operate in discrete regimes and do not amount to a general obligation to use CBDR as a means of governing common interest issues.¹⁰⁵ Indeed, it seems doubtful that differential treatment could become a customary obligation. First, differentiation operates variously according to context, so it would be difficult to identify the consistency of practice required to constitute a customary rule. This variation is simply a product of how different interests play out in different contexts.¹⁰⁶ Take for example climate change: low-lying islands States are concerned with loss of territory, but other States may benefit from longer growing seasons for crops. Such differences in interests are not specific to categories of developed or developing States. This means that it becomes difficult to generalise about the nature of interests and so pin down general standards for conduct. This means that the inherent variety of interests render differential treatment unsusceptible to customary international law. Second, differential treatment appears to have a norm qualifying function. Of itself, it is not fundamentally norm creating in nature. Difference is only meaningful if difference is related to the object or form of conduct set out in a discrete norm creating rule. Differential treatment may also take the form of a process to better enable certain disadvantaged interests to be heard.¹⁰⁷ As such, it can only operate within a specific institutional context. In the absence of a general requirement to act with solidarity or to differentiate in the treatment of States, then we must look to how solidarity and differential

¹⁰⁴ *Responsibilities and Obligations of States Sponsoring Persons and Entities with respect to Activities in the Area* (2011) paras 157-158.

¹⁰⁵ Rajamani 2006; 158; Stone 2004.

¹⁰⁶ Shelton 2010, 153.

¹⁰⁷ See text at n 99.

obligations operate within specific legal regimes, although we may draw lessons from other areas.

5.4 Solidarity and Common but Differentiated Responsibilities in the Law of the Sea

The LOSC contains numerous provisions that differentiate between the position and commitments of States according to their needs or capacity. Its text is replete with references to developing States, landlocked States or geographically disadvantaged States.¹⁰⁸ For example, the provisions on the conservation and management of living resources require coastal States to account for the needs of developing States when setting catch levels and determining access to stocks,¹⁰⁹ whilst allowance is made for landlocked and geographically disadvantaged States to participate in surplus stocks. Exemptions are made for developing States that are net importers of mineral to make payments and contributions in respect of non-living resources harvested on the extended continental shelf,¹¹⁰ with developing State status being a factor to be considered in the distribution of revenues generated from mineral exploitation of the extended continental shelf.¹¹¹ Several provisions on the Area reflect the needs of developing States.¹¹² Part XII on the Protection and Preservation of the Marine Environment provides for scientific and technical assistance to developing States.¹¹³ When developing pollution measures in respect of land-based sources, account shall be taken of the position and needs of developing States.¹¹⁴ Developing States are specifically flagged for the active transfer of scientific data and knowledge derived from marine scientific research¹¹⁵ and the promotion of marine technological assistance.¹¹⁶

Within this chapter, it is not possible to explain each and every differential commitment within the LOSC. The present analysis focuses on two sets of provisions that may entail solidarity or differential commitments: those related to environmental protection and those related to fisheries. These are core areas of the law of the sea and so they provide a litmus test of the

¹⁰⁸ See for example, LOSC Arts 69, 70, 148, 152, 160(2)(k), 161(1)(d), 244, 254, 266, 268, 269, 272, 274, and Annex VI, preambular, para 2.

¹⁰⁹ LOSC Arts 61 and 62. See also Art 119 in respect of fishing on the high seas.

¹¹⁰ LOSC Art 82(3).

¹¹¹ LOSC Art 82(4).

¹¹² LOSC Art 140, 143-4, 148, 150, 151, 152, and 155.

¹¹³ LOSC Art 202 and 203.

¹¹⁴ LOSC Art 207.

¹¹⁵ LOSC Art 244(2).

¹¹⁶ LOSC Art 266. See also Arts 268(d), 269(a) 271-6.

extent and depth of differential commitments.¹¹⁷ Also, as framework provisions, the influence of these general provisions can be traced through subsequent instruments to assess how differential treatment evolves in practice. Before examining these two areas, it is worth noting an interesting example of differentiation that has emerged recently within the framework of the LOSC, despite the absence of any formal textual provisions on this matter. This relates to the determination of baselines when affected by sea level rise. This indicates that differential treatment is not something confined purely to the text of an agreement, but an approach that may emerge as part of the dynamic evolution of the law of the sea – reflecting the idea of the LOSC as a living instrument.¹¹⁸

The issue of baselines is critical to the basis of maritime authority since baselines determine the boundary between land/internal waters as well as mark the point from which other maritime zones are measured and so may have significant impacts for the exercise of jurisdiction over wider sea areas. States are normally required to measure their baselines from the low-water mark, but there is no express provision dealing with changes in the position of the low-water mark.¹¹⁹ It is now clear that climate change induced sea level rise may result in the landward retreat of the low-water mark in many States, resulting in the loss of features that can be used to generate basepoints and, more drastically, the loss of territory *per se*.¹²⁰ The traditional approach has been to treat baselines as ambulatory and to expect them to be redrawn according to changes in coastal geography. However, some vulnerable States are resorting to the use of fixed geographical coordinates for the setting their baselines to protect against the loss of maritime entitlements.¹²¹ This includes Declaration on Preserving Maritime Zones in the Face of Climate Change-related Sea-Level Rise 2021 issued by the Pacific Islands Forum.¹²² In effect, individual States and groups of States are self-differentiating their baseline method to offset the variable impacts of climate change. This suggests that solidarity need not always be

¹¹⁷ The provisions relating to the Area and the Common Heritage of Mankind are most frequently examined as solidarity provisions. These are further considered by Davenport in this volume, see Chap. 6.

¹¹⁸ See Barrett and Barnes 2016.

¹¹⁹ LOSC, Art 5.

¹²⁰ This matter is under consideration by the International Law Association. See Vidas et al 2015, 397-408; Report of the International Law Association Committee on International Law and Sea Level Rise, 2018, at <https://www.ila-hq.org/index.php/committees>. And more recently has been placed on the agenda of the International Law Commission. See UN Doc. A/CN.4/740 Sea-level rise in relation to international law. First issues paper by Bogdan Aurescu and Nilüfer Oral, Co-Chairs of the Study Group on sea-level rise in relation to international law. International Law Commission Seventy-second session Geneva, 27 April–5 June and 6 July–7 August 2020.

¹²¹ Freestone and Schofield 2016.

¹²² Adopted on 6 August 2021. Available at <https://www.forumsec.org/2021/08/11/declaration-on-preserving-maritime-zones-in-the-face-of-climate-change-related-sea-level-rise/>

pursued by formal means within treaty regimes. Self-help can empower individual States and avoids the trap of structural inequality that flows from patronage or charitable type commitments. What may be more challenging is assessing whether such self-help is permissible and legitimate. It is suggested that the framework for solidarity set out in Section 2 will be useful in this respect.

5.4.1 Solidarity and Differential Commitments in the Protection of the Marine Environment

The marine environment is not exclusive to individual States, so it is incumbent upon us to consider at least some aspects of marine environmental protection at the international level. Part XII of the LOSC establishes a framework of general commitments to prevent, reduce and control pollution of the marine environment from land, vessel, atmospheric and seabed activities. Reflecting the common interest in a healthy marine environment, such standards should be harmonised and, through cooperative arrangements leading to common standards.¹²³ However, there is recognition that measures should not be absolutely uniform, but that they should consider regional and local differences, as well as differences in the capacity of States to adopt and enforce pollution control measures. Accordingly, several provisions of the Convention provide for either the contextual application of rules or explicit forms of differential treatment. For example, difference is implicit in the reference to sovereign rights to exploit resources pursuant to national environmental policies in Article 193. Furthermore, most obligations are highly contextual, with frequent reference to ‘adopting measures ‘as appropriate’¹²⁴ or ‘as necessary’¹²⁵ or ‘taking account of characteristic regional features’.¹²⁶ Such provisions may allow for some flexibility in how pollution responsibilities are undertaken although, in some of these provisions, there is no explicit reference to differences between States according to development status or needs. Such obligations are typically due diligence obligations and so reflect a weak form of solidarity.

Article 194(1) provides that ‘States shall take, individually or jointly as appropriate, all measures consistent with this Convention that are necessary to prevent, reduce and control

¹²³ LOSC, Arts 194(1) and 197.

¹²⁴ Ibid, Arts 194(1), 207(3), 208(4), 217(2), 220(7) 233, 235, 236.

¹²⁵ Ibid, Arts 194(1), 194(2), 194(5), 196, 207(2), 208(2), 210(2), 212(2), 213, 214, 217, and 222.

¹²⁶ Ibid, Art 197.

pollution of the marine environment from any source, using for this purpose the best practicable means at their disposal and *in accordance with their capabilities.*' (Emphasis added). This provision is a general framing obligation, which is developed in other provisions of the Convention, and is further specified through subsequent practice or agreements. The allowance for capability to be taken into account responds to concerns by developing States that a duty to use the best practical measures would over-burden them.¹²⁷ The caveat on capability does not remove the need to take measures, rather it adjusts the nature or form of measures to be taken. Harrison suggests that this may result, in some circumstances, in developing States bearing a lower burden of responsibility. However, in practice this will depend upon a range of factors such as access to technical and financial assistance.¹²⁸ Given the very open nature of the text, which is suggestive of a contextual obligation rather than a differential commitment, it is necessary to consider other provisions to understand the extent of any differential treatment for developing States.

Section 3 of Part XII deals with technical assistance. It is patently concerned with addressing the capacity gap developing States face in addressing address marine pollution. This section of the LOSC is important since effective pollution control measures depend upon scientific and technical expertise, as well as an institutional capacity to deliver pollution control measures. The part of the LOSC can be traced to Principle 12 of the Stockholm Declaration, which urged support for the provision of resources to help States meet their environmental commitments.¹²⁹ As Harrison observes, the requirements for assistance set out in Section 3 reflect a more widely acknowledged view that the principle of common but differentiated responsibility requires developed States to help developing States meet their commitments without compromising the protection of the environment.¹³⁰

More specifically, Article 202 establishes three broadly differential commitments. The first commitment is for States to promote the provision of 'scientific, educational, technical and other assistance to developing States.'¹³¹ As a general commitment directed to 'all States', it includes both 'north-south' and 'south-south' assistance, so it is not, strictly speaking, a typical differential commitment. Also, although the provision is framed in mandatory terms (i.e.

¹²⁷ See Czybulka 2017, 1304.

¹²⁸ Harrison 2017, 1348.

¹²⁹ Above (fn 93). See Nordquist et al 1990, 100.

¹³⁰ Harrison 2017, 1347.

¹³¹ LOSC, Art 202(a).

‘States shall’), the duty is only to *promote* assistance, so it does not compel States to deliver specific forms of support to developing States.¹³² This may reflect a wider reluctance on the part of developed States to accept onerous commitments to provide technical assistance.¹³³ At best, it leaves the extent and form of assistance to be determined by the donor States. This reinforces the idea that the LOSC favours forms of development patronage. Indeed, it is impossible to read any of Section 3 as establishing a right to claim any specific form of assistance or support. Second, there is a duty on all States to provide appropriate assistance, especially to developing States, to minimise the effect of major incidents that threaten serious pollution to the marine environment.¹³⁴ This duty concerns assistance with clean-up operations following maritime pollution incidents, so operates in limited circumstances. The use of the term ‘appropriate’ gives donor States some leeway to determine how assistance is to be provided. This duty has largely been subsumed by commitments under the International Convention on Oil Pollution Preparedness, Response and Cooperation 1990, which allocates the IMO a lead role in coordinating such support responses, including support for developing countries.¹³⁵ In principle, this has enabled a degree of collective governance of differential treatment, and so might militate against development patronage or politicisation of the delivery of development support. Third, Article 202 establishes a duty for all States to provide appropriate assistance, especially to developing States, to prepare environmental assessments. Again, considerable latitude is afforded to donor States in how they provide technical assistance.

Article 203 of the Convention explicitly grants developing States preferential treatment in the provision of support to address marine pollution: ‘Developing States shall, for the purposes of prevention, reduction and control of pollution of the marine environment or minimization of its effects, be *granted preference by international organizations* in: (a) the allocation of appropriate funds and technical assistance; and (b) the utilization of their specialized services.’ As with Article 202, the IMO has rightly taken a lead in coordinating such support, which one hopes can result in more effective targeting of support to developing States. However, given the nature of technical assistance, which is not channelled through single institutional processes

¹³² Nordquist et al 1990, 103.

¹³³ Matsui 2002.

¹³⁴ LOSC, Art 202(b).

¹³⁵ See Arts 9-12. Art. 12(2) requires particular attention to be given to the needs of developing countries. International Convention on Oil Pollution Preparedness, Response and Cooperation 1990, 1891 UNTS 77 (OPRC Convention).

by States, and is delivered in quite varied ways, it is difficult to assess the effect of Article 203 commitments.¹³⁶ Unfortunately, other than Harrison's review of the Article 203, there is little analysis in the literature of how assistance is provided by States and international organisations.¹³⁷ As such it is impossible to say how effective these provisions are in building capacity within developing States. If we consider this in purely legal terms, the commitment is mandatory, and it is not qualified by phases such as appropriate or necessary. It simply asserts a priority call on assistance for developing States. The precise means of delivering assistance are not set out in Article 203, although Harrison notes that it is common in the practice of the IMO to calibrate the provision of assistance, with least developed States receiving most preferential treatment.¹³⁸

Article 207(4) provides that 'States, acting especially through competent international organizations or diplomatic conference, shall endeavour to establish global and regional rules, standards and recommended practices and procedures to prevent, reduce and control pollution of the marine environment from land-based sources, *taking into account characteristic regional features, the economic capacity of developing States and their need for economic development*' (emphasis added). It appears to be a clear form of differential treatment. Yet it is notable that the same qualification is not replicated for other forms of pollution, such as ship source pollution. As Boyle observes: 'Quite simply, in regard to this form of pollution, States did not wish to commit themselves to the same level of strong international control imposed on pollution from ships. The social and economic costs of such measures were seen as unacceptably high. The preferred solution was thus a weaker level of regulation, a resort to regional rather than global cooperation, and a greater leeway for giving preference to other priorities.'¹³⁹ This may appear to be a significant enabler of differential commitments in that it could allow less developed States to adopt less costly or sophisticated pollution control measures than developed States. However, read as a whole, the provision is focused less on differential standards and more on simply allowing less robust standards to be adopted – allowing for what Hassan calls 'a licence of reluctance'.¹⁴⁰

¹³⁶ Some data is provided by the IMO through its annual reports on technical cooperation. Available at <https://www.imo.org/en/OurWork/TechnicalCooperation/Pages/Default.aspx>

¹³⁷ Harrison 2017, 1354.

¹³⁸ Ibid.

¹³⁹ Boyle 1992, 26.

¹⁴⁰ Hassan 2006, 86.

Although marine pollution is a common concern to all States, individual States differ in their degree of interest in the problem, and, more importantly, in their capacity to respond to the problem. It is generally recognised that international support needs to be provided to developing States to enable the implementation of international pollution control measures. Despite this recognition, the specific provisions of Part XII remain quite general in how individual State's obligations are differentiated. Most obligations are simply drafted as contextual norms, allowing for a degree of latitude to be adopted by each State. The strongest differential provisions relate to the preferential treatment of developing States in the provision of technical assistance, the nature of such commitments remains quite general, and difficult to assess. Here the coordination role assumed by the IMO as the 'competent international organisation' has meant that a range of practical delivery mechanisms and more effective coordination of efforts are in place. The regular reporting of the IMO, as well as the integration of information from a range of cross cutting initiatives, such as the IMO Member State Audit scheme, offer possibilities for the more effective monitoring and delivery of differential commitments in respect of marine pollution control. However, further analysis of the effectiveness of this is required.

Within the framework of the LOSC, one might expect to see differential treatment of States developed through global and regional agreements. However, regional seas environmental agreements do not generally include differential commitments because the constituent members tend to comprise States at similar levels of economic development. Some IMO Conventions do contain provisions that account for the differential needs of developing States, but this is uncommon.¹⁴¹ Shipping standards and marine pollution regulations are mainly directed at creating a level-playing field through harmonised standards.¹⁴² Thus, the IMO operates on the basis of the principles of non-discrimination and no more favourable treatment (NMFT) meaning that the same global standards that apply equally to all States.¹⁴³ This prevents ship owners and operators from compromising global safety standards by flagging out

¹⁴¹ See for example, the OPRC Convention (fn 135), and Regulation D5 of the International Convention for the Control and Management of Ships' Ballast Water and Sediments, 2004, providing for period review of standards, and including assessment of the developmental needs of developing countries. Available at <https://treaties.un.org/doc/Publication/UNTS/No%20Volume/55544/Part/I-55544-080000028053b465.pdf>

¹⁴² IMO Strategic Plan 2018-2023, A/30/Res. 1110, 8 Dec 2017, Annex, paras 3, 14, and 33.

¹⁴³ This is embedded in Art 5(4) of the International Convention for the prevention of Pollution from Ships, 1973 (MARPOL), 1340 UNTS 184. See also, Resolution MEPC.229(65) Promotion of Technical Co-Operation and Transfer of Technology relating to the Improvement of Energy Efficiency of Ships, International Maritime Organization (IMO), London, 2013; IMO Policy Brief to Preparatory Committee (2016). Available at https://www.un.org/depts/los/biodiversity/prepcom_files/IMO_Policy_Brief_BBNJ_PrepCom_1.pdf

to States with lower regulatory standards. It may also permit States parties to IMO agreements to take steps to ensure that the vessels of non-parties are treated according to the same standards as ships flying the flag of States parties. At best, contextually defined obligations in IMO agreements may allow States to vary how measures are implemented.¹⁴⁴

This uniform policy approach has recently come under pressure due to the influence of climate law, especially as regards the interface with rules on ship emissions under MARPOL.¹⁴⁵ The Kyoto Protocol entrusted the reduction of greenhouse gas (GHG) emissions from marine bunker fuels to the IMO but it has taken a long time for the IMO to begin to mobilise change. IMO measures on the reductions of GHG can be traced to 2003 and the IMO Resolution on policies and practices related to the reduction of greenhouse gas emissions from ships.¹⁴⁶ In 2011, the IMO added a new chapter on ‘Regulations on energy efficiency for ships’ to the Annex VI of MARPOL.¹⁴⁷ This introduced mandatory technical measures in the form of the Energy Efficiency Design Index (EEDI) for new ships and for a Ship Energy Efficiency Management Plan (SEEMP) applicable to all ships. Despite some States seeking to accommodate stronger differential commitments in the new chapter of MARPOL, a weaker compromise was eventually adopted after some difficult debates focusing on the core IMO policy of NMFT.¹⁴⁸ Some recognition was given to the needs of developing States in Regulation 23 of Annex VI, which places an obligation upon States, in cooperation with the IMO and other international bodies, to ‘promote and provide, as appropriate, support directly or through the organization to States, especially developing States, that request technical assistance.’ Significantly, the Resolution adopted to implement this recognised the relevance of the principles ‘enshrined in the UNFCCC and its Kyoto Protocol including the principle of common but differentiated responsibilities and respective capabilities’.¹⁴⁹ Although the Resolution continued to reiterate support for the principle of non-discrimination and no more

¹⁴⁴ See for example Regs 1, 3, and 18 of Ch III of SOLAS; Reg V of Ch IV of SOLAS and Reg 15 of Ch V of SOLAS; Art 3 of MARPOL.

¹⁴⁵ Protocol of 1978 relating to the International Convention for the Prevention of Pollution from Ships, 1973 (with annexes), 1340 UNTS 62.

¹⁴⁶ Resolution A.963(23) IMO Policies and Practices related to the Reduction of Greenhouse Gas Emissions from Ships.

¹⁴⁷ Resolution MEPC.203(62), Amendments to the Annex of the Protocol of 1997 to amend the International Convention for the Prevention of Pollution from Ships, 1973, as Modified by the Protocol of 1978 relating thereto (Inclusion of Regulations on Energy Efficiency for Ships in MARPOL Annex VI).

¹⁴⁸ Kopela 2020, 137.

¹⁴⁹ See MEPC 65/22, Report of the MEPC on its 65th Session (24 May 2013) para 4.10 and Annex 4 containing Resolution MEPC.229(65) on the Promotion of Technical Co-operation and Transfer of Technology Relating to the Improvement of Energy Efficiency of Ships.

favourable treatment, this reference to differentiated responsibilities represents a softening of the IMO's robust approach to uniform standards. The IMO constituent agreement requires the IMO to promote shipping services 'without discrimination'. This was intended to ensure measures that are adopted do not distort trade or the provision of shipping services.¹⁵⁰ The IMO mandate was set before stronger solidarity concerns became part of legal discourse and this may have given rise to an unreflective, acritical practice of pursuing regulatory uniformity. Arguably, as long as differential measures for States do not threaten global safety or pollution standards, or open the door to discriminatory practices, then they would be consistent with the IMO's mandate.

Following the Paris Agreement, the MEPC approved a 'Roadmap for developing a comprehensive IMO strategy on the reduction of GHG emissions from ships' in 2016.¹⁵¹ This led to the adoption of an Initial IMO Strategy on Reduction of GHG Emissions from Ships, which outlines the IMO's vision and guiding principles for emissions, as well as a range of candidate measures for the reduction of GHG from ships and supporting measures to facilitate their implementation.¹⁵² This is the first IMO measure to formally recognise the principle of CBDR, alongside the principles of non-discrimination and NMFT.¹⁵³ Although the Initial Strategy is non-binding, it sets out ambitions for emissions reductions, as well as a timeframe and list of candidate measures.¹⁵⁴ The Initial Strategy frames the IMO's work on the reduction of ship emissions and will influence the form and content of subsequent regulatory measures. The challenge for the IMO is how to reconcile the application of the two sets of principles, since they pull in different directions – uniformity versus differentiation. Kopela notes that different proposals have been advanced here such as phased implementation schemes, adjustments for geographically disadvantaged States, and compensation schemes enabled via market-based measures (e.g. marine emissions trading scheme).¹⁵⁵ The latter might include combining emissions credits with a system of rebates for developing countries or using the purchase of emission credits to create a development fund. Chen suggests that the IMO can draw upon the

¹⁵⁰ Article 1(b) of the Convention on the International Maritime Organization 1948, as amended (entered into force 17 March 1958), 289 UNTS 3.

¹⁵¹ Doc MEPC 70/18/Add.1, Annex 11, Roadmap for developing a comprehensive IMO Strategy on GHG emissions from ships (2016).

¹⁵² IMO, Resolution MEPC 304(72) Initial IMO Strategy on Reduction of GHG emissions from Ships (adopted on 13 April 2018), Annex 11, MEPC 72/17/ADD.1.

¹⁵³ *Ibid.*, para 3.2.

¹⁵⁴ *Ibid.*, paras 3.1 and 4.

¹⁵⁵ Kopela 2020, 146. Also, Shi and Gullett 2018, 125-127.

differentiation mechanisms set out in the Paris Agreement.¹⁵⁶ However, there remains significant resistance to the adoption of formally differential measures and the use of compensatory measures using market instruments.¹⁵⁷ The issue of GHG reductions from shipping remains on the IMO's Marine Environment Protection Committee's (MPEC) agenda. Ultimately, since the work of the IMO depends upon the policy positions adopted by its members States, much will depend upon how States respond to pressures to accommodate differential treatment. This may be more likely in the future if States take seriously their commitments under the Paris Agreement.

To summarise, there are clearly drawn community interests in the protection of the marine environment and there is some recognition of the differential needs of developing States in the legal regimes for the protection of the marine environment. However, if we consider the elements of solidarity summarised in Figure 1, it is clear that the LOSC advances these rather weakly. First, other than a community interest in protecting the marine environment, solidarity interests are poorly articulated in Part XII and linked merely to some form of economic disadvantage faced by developing States. Other than a general contextual requirement to take account of such needs, there is no specific differentiation of legal commitments in the LOSC or in multilateral agreements on marine environmental protection. There may be contextual commitments that enable more flexible implementation by individual States. At best, there are mechanisms that require or call for the provision of technical assistance or capacity building measures. However, these measures take the form of vertical solidarity.¹⁵⁸ The support that they provide appears motivated more by a sense of charity or patronage; it is not done due to some relationship of equality where resources are shared as of right following from a true recognition of equal status. Whilst vertical solidarity may help remove ad hoc inequalities, it does nothing to alter the structural inequality that exists between the donor and beneficiary.

The limited provision of technical assistance in Part XII should not be wholly discounted as a hollow gesture to solidarity. Part XII could begin to make inroads into inequality by providing developing States with some of the tools and skills to enhance their autonomous capacity to enhance pollution controls. However, the absence of specific standards or commitments to render assistance and the absence of a right demand assistance weakens the effectiveness of

¹⁵⁶ Chen 2021.

¹⁵⁷ MPEC suspended discussions of market-based measures in MEPC 65/22 (fn 149) para 5.1.

¹⁵⁸ Dann 2010, 57.

development support. It is difficult to imagine how general obligations to provide technical assistance and capacity building measures could be enforced by beneficiary States against donor States because the actual beneficiaries are not specifically identified. Although the IMO is the competent international organisation responsible for the development of generally accepted rules and standards, its practices reveal that collective mechanisms are no guarantee that solidarity rights can be secured. Within the IMO, the dominant regulatory culture favours uniform legal commitments to ensure the effectiveness of shipping regulation. This suggests that other measures of the common good (i.e. clear, uniform and effective standards) may outweigh considerations of individual justice inherent in solidarity based approaches (i.e. each according to their needs or capacity).

5.4.2 Solidarity and Differential Commitments in Fisheries Conservation and Management

Coastal States enjoy exclusive rights to exploit the living marine resources of their exclusive economic zone (EEZ).¹⁵⁹ However, such rights are balanced with a number of conservation and management responsibilities.¹⁶⁰ The enjoyment of rights and the burdens of responsibility is a fundamental aspect of the *sui generis* nature of the EEZ.¹⁶¹ This arrangement came to be because of the interplay of a number of different interests and claims, including a general interest in the effective management of valuable resources and a need to limit access to resources to stop overfishing, as well as a wide range of historical claims, general recognition of coastal State dependency on local fish stocks and, in principle, the greater degree of practical control that coastal States could practically exercise over such resources.¹⁶² Some States advanced claims to an exclusive fisheries zone based on a ‘theory of compensation’, which sought to justify exclusive fisheries on the basis that a lack of a meaningful physical continental shelf should be compensated for by the grant of exclusive control over coastal fisheries.¹⁶³ This latter claim is perhaps closest to the idea of differential treatment, but it was not a generally recognised basis for claims to an EEZ. Indeed, disaggregating the specific weight and influence of any of these interests on the final text of the LOSC is next to impossible. This

¹⁵⁹ LOSC, Art 56(1).

¹⁶⁰ LOSC, Art 58(2).

¹⁶¹ Nordquist et al 1993, 525.

¹⁶² See Barnes 2009, 202-215.

¹⁶³ See Ulloa Y Sotomayor 1957, 47, cited in Attard 1987, 7.

means that it may be difficult to identify with precision a clear set of agreed common interests or values that underpin the fisheries provisions of the LOSC – other than what may be inferred from its text. Whilst general objectives to realise just and equitable international economic order, and to account for the special interests and needs of developing States is noted in the preamble to the LOSC, this relates to the Convention as whole, and not the specific framing of its provisions on fisheries. More specific to fisheries is the reference in the Preamble to the ‘equitable and efficient utilization of [ocean] resources and the conservation of living resources’. Although these are indicative of common goals for fisheries, they are evidently quite general in nature and need to be teased out through and analysis of specific substantive provisions.

If any common objective exists for fisheries, then the strongest candidate for this would appear to be an overarching duty to ensure proper conservation of fishery resources. This is reflected in the decisions of several international tribunals, including the *North Atlantic Coast Fisheries* case¹⁶⁴ and the *Fisheries Jurisdiction* case.¹⁶⁵ In the latter case, Judge Singh clearly stated that ‘The law pertaining to fisheries must accept the primacy for the need of conservation based on scientific data. This aspect has been properly emphasised to the extent needed to establish that the exercise of preferential rights of the coastal State, as well as the historic rights of other States dependent on the same fishing grounds, have all to be subject to the over-riding consideration of proper conservation of the fishery resources for the benefit of all.’¹⁶⁶ It should be noted here that such a common interest says nothing about the specific distribution or use of resources other than that they should be sustainable. Thus, there is little to infer about the equitable use of resources from calls for conservation per se.

There are four provisions of the LOSC that suggest some form of differential treatment. First, Article 61(3) provides that when coastal States establish the total allowable catch, ‘Such measures shall also be designed to maintain or restore populations of harvested species at levels which can produce the maximum sustainable yield, as qualified by relevant environmental and economic factors, including the economic needs of coastal fishing communities and the *special requirements of developing States* (...)’ (emphasis added). Second, Article 62(3) is a

¹⁶⁴ *North Atlantic Coast Fisheries* case (Great Britain v United States of America) Award of 7 September 1910, reproduced in RIAA, vol XI, 167.

¹⁶⁵ *Fisheries Jurisdiction case* (United Kingdom of Great Britain and Northern Ireland v Iceland), Merits, Judgment of 25 July 1974, (1974) ICJ Reports 3.

¹⁶⁶ Declaration by Nagendra Singh, *ibid*, at 40.

corresponding provision that deals with access to surplus fish stocks. It provides that ‘In giving access to other States to its exclusive economic zone under this article, the coastal State shall take into account all relevant factors, including, inter alia, the significance of the living resources of the area to the economy of the coastal State concerned and its other national interests, the provisions of articles 69 and 70, the *‘requirements of developing States in the subregion or region in harvesting part of the surplus and the need to minimize economic dislocation in States whose nationals have habitually fished in the zone or which have made substantial efforts in research and identification of stocks.’* (Emphasis added). In short, coastal States should factor the needs of developing States into catch limits and the allocation of fishing opportunities. Clearly, these are discretionary factors, and no specific weight is attached to any of the factors to be considered by the coastal State. These provisions fall short of establishing any specific entitlement or right for developing States

Two further provisions make allowance for two groups of disadvantaged States. Article 69 specifically addresses the special position of land-locked States. It provides that ‘the coastal State and other States concerned shall cooperate in the establishment of equitable arrangements [...] to allow for participation of developing land-locked States of the same subregion or region in the exploitation of the living resources of the exclusive economic zones of coastal States of the subregion or region, as may be appropriate in the circumstances and on terms satisfactory to all parties. Article 69 continues to provide that ‘[d]eveloped land-locked States shall [...] be entitled to participate in the exploitation of living resources only in the exclusive economic zones of developed coastal States of the same subregion or region having regard to the extent to which the coastal State, in giving access to other States to the living resources of its exclusive economic zone, has taken into account the need to minimize detrimental effects on fishing communities and economic dislocation in States whose nationals have habitually fished in the zone.’ The second such differential provision is Article 70(5), which provides an identical allowance for geographically disadvantaged States, i.e. States whose coastal geographic makes them dependent upon the living resources of other States. These provisions appear to establish a right for disadvantaged States to fish in other states coastal waters. However, when these provisions are read alongside Article 61 and 62, these Articles 69 and 70 to contain relatively weak differential provisions.¹⁶⁷

¹⁶⁷ For a review of the structural weaknesses of Part V, see further Barnes 2006, 233-260.

These inequities in the distribution of resources are exaggerated by the weakness of any meaningful redistributive commitments in the allocation of living resources. First, any entitlement depends upon the existence of surplus stocks, and this is unlikely to exist in practice because most States domestic fleets can harvest fully their TACs. This is particularly true in developed States where most fleets have excess fishing capacity. In contrast, in some developing States, foreign access to stocks is made available at the expense of domestic industries.¹⁶⁸ In some cases this may be done to help generate revenue that could be reinvested in building up domestic capacity. Such an approach is pursued through the EU external fishing policy, but this is not always conducted in line with the development needs of host fishing countries.¹⁶⁹ Second, concern for disadvantaged States is only one set of factors to be considered in the distribution of any surplus fishing entitlements, and so may be overridden by other factors, such as detriment to local fishing communities, historic fishing, and risk of overburdening of some States to meet development needs of other States.¹⁷⁰ Third, any distribution of fishing entitlements to disadvantaged States depends upon the political disposition of the coastal State and its willingness to cooperate to share a surplus. Fourth, there is no collective process to determine such entitlements. Although access to surplus stocks may be given effect to through cooperative means – ultimately it is the coastal State’s prerogative to dictate the terms and conditions for any access – including the imposition of fees. Finally, there is no mechanism for holding the coastal State to account if it fails to take account of such factors because the exercise of sovereign rights falls out with the scope of the Convention’s compulsory dispute settlement mechanism.¹⁷¹

In contrast to the LOSC, the Fish Stocks Agreement establishes additional and potentially stronger differential commitments for developing States.¹⁷² One of the key issues in developing the Agreement was how to resolve the tension between coastal developing States seeking to enhance their exploitation of shared stocks in areas under their jurisdiction and distant water fishing states interests in maintaining access to such stocks. To this end, the Agreement establishes a range of measures that enhance the capacities of developing States to engage in fisheries governance. Thus Article 3 requires States to give due consideration to the respective

¹⁶⁸ See, for example, Atta-Mills et al 2004, 12-21; Jönsson 2019, 213-230.

¹⁶⁹ See, for example, Johnson et al 2021, 532-545; Okafor-Yarwood and Belhabib 2020.

¹⁷⁰ See the factors listed in Article 69(2) and 70(2).

¹⁷¹ See LOSC, Art 297(3).

¹⁷² Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks 1995, 2167 UNTS 3. (Hereafter: UNFSA or Agreement).

capacities of developing States in the application of general principles of fisheries management in Article 5, as well as the application of the precautionary principle and adoption of compatibility of measures for high seas and coastal fisheries management. Whilst this falls short of establishing differential catch entitlements, it does position differential treatment as one of the overarching objectives that should shape conservation and management measures. This is an important difference from the LOSC, since it establishes a general requirement to treat developing States differentially in respect of shared fisheries. More specifically, the Agreement provides that in determining participatory rights in regional fisheries arrangements, States should consider the interests of developing States in the region.¹⁷³ Although this does not establish a right to participate, it provides a dedicated and additional reason why developing States should be admitted to regional arrangements. Furthermore, Article 1 of Annex 1 requires support, including training and financial and technical assistance, to be provided to developing States to help build their capacity to manage straddling and migratory fish stocks through research programmes.

The most important differential provisions of the UNFSA are found in Part VII (Articles 24, 25 and 26). In general terms, these provisions recognise the special requirements of developing States and set out objectives for enhancing cooperation and identifying ways in which support to developing States can best be provided. Although one might question whether these articles constitute differential provisions per se because they do not differentiate between the same kinds of commitments for States, rather they tend to constitute additional commitments imposed upon developed States to cooperate with and support developing States to better enable developing States to meet their obligations to manage fisheries. In this sense they are designed to prevent or close gaps between States in respect of their capacity to enjoy access to fishery resources.¹⁷⁴ They are also designed to ensure that a disproportionate burden of conservation action is not shifted onto developing States.

In contrast to the LOSC, the specific needs of developing States are more clearly identified in the UNFSA to include: vulnerability (i.e. economic dependence on fisheries as well fisheries as a source of nutritional needs); impacts upon subsistence, small-scale and artisanal fisheries, women fishers and indigenous people; and disproportionate conservation burdens.¹⁷⁵ Strictly

¹⁷³ UNFSA, Art 11(f).

¹⁷⁴ UNFSA, Art 25(1).

¹⁷⁵ UNFSA, Art 24(2)(c).

speaking the requirements of the UNFSA are framed in terms of enabling measures, rather than clearly defined differential obligations. Thus, account of States different capacities should be considered when cooperating to manage shared stocks. Such support is not directed towards a redistribution of entitlements to catch fish, rather it is directed at improving developing States' capacity to conserve and manage stocks over which they already enjoy access.¹⁷⁶ Since the adoption of management measures (including any differential measures) will often be taken cooperatively through regional arrangements and by reference to the compatibility principle, then there is potentially scope for greater collective decision-making to shape the application of differential commitments to the benefit of developing State needs. However, this should not mask the reality that the decision-making processes of most regional fisheries arrangements is constrained by local membership conditions and the self-interests of members.

This is illustrated by a brief survey of the practice of RFMOs. For example, no developing State fishing activity takes place in the areas managed by the Northwest Atlantic Fisheries Organization (NAFO) and the Northeast Atlantic Fisheries Commission (NEAFC). Since all members of these two RFMOs are developed States, there is little consideration of developing State needs in their respective management measures.¹⁷⁷ More generally, beyond some training or moderate financial support offered to disadvantaged States, no regional agreement formally differentiates its decision-making process to accommodate the different needs of developing States.¹⁷⁸ That said, the decision of the Commission for the Conservation of Southern Bluefin Tuna to create a formal status for non-cooperating member States was motivated in large part by a recognition that full membership of the arrangement was financially difficult for developing States.¹⁷⁹ Also, the Western and Central Pacific Fisheries Commission (WCPFC) is exceptional in that its constituent treaty makes specific reference to the needs of small island

¹⁷⁶ UNFSA, Art 25(3).

¹⁷⁷ NAFO Performance Review Panel Report 2018 notes that the requirements of Part VII of the UNFSA have not been taken into account and suggests NAFO follow the example of NEAFC (at p 46), which has engaged in some capacity building initiatives. (Available at <https://www.nafo.int/Portals/0/PDFs/Performance/NAFOPerformanceReviewPanelRpt2018.pdf>). In NEAFC, no management measures have addressed developing State needs and the expectation is that any such States would have to meet the same standards as other States. See NEAFC Performance review 2014 at 119-20. (Available at <https://www.neafc.org/system/files/Final%20Report%202014%20NEAFC%20Review.pdf>)

¹⁷⁸ FAO, *Performance reviews by Regional Fishery Bodies: Introduction, Summaries, Synthesis and best Practices Vol 1: CCAMLR, CCSBT, ICCAT, IOTC, NAFO, NASCO, NEAFC* (FAO Fisheries and Aquaculture Circular No. 1072, 2012) pp 15 (CCAMLR), 26 (ICCAT) and 30-1 (IOTC). More generally, the review called for capacity support for developing States to be enhanced. *Ibid*, p 56.

¹⁷⁹ FAO, *Ibid*, 80.

developing States when deciding allocations of fishing entitlements.¹⁸⁰ This perhaps reflects the fact that membership of the WCPFC includes a large number of developing States.¹⁸¹

Despite the development of capacity-building and procedural measures in the UNFSA, one expert study found that there is little evidence of increases in developing States access to high seas fish stocks.¹⁸² The fundamental obstacle to increased access is that with a finite pool of resources, changes to fishing entitlements to benefit developing States will require concessions by other States. At present the distribution of catch entitlements is a zero-sum game and States are unlikely to sacrifice domestic fishing concerns for those of foreign fishing interests. Whilst more effective conservation measures could increase the size of the resource base and thereby enable future gains to be distributed to disadvantaged States, this seems to be a thin basis for reimagining the more equitable redistribution of fisheries resources to disadvantaged States. Most RFMOs remain wedded to allocations based on historic catch level and this seems unlikely to change – so future accrued gains from improved conservation are most likely to go to those State that already access the stocks. Although some RFMOs have developed allocation criteria that include equitable principles or environmental considerations these have yet to be put effectively into practice.¹⁸³

The UNFSA was adopted in 1995 after the Rio Summit, and so developed the Rio Declarations recognition of differential needs in Articles 5-7. It is likely that this influenced the inclusion of provisions that establish stronger differential commitments on fisheries than the LOSC. Another, practical reason for this increased focus on addressing differential needs is that the Agreement concerns shared stocks that are located, in part, on the high seas. As such, the common nature of such resources, as well as the fact that effective management depends upon cooperation may have generated greater focus on collective goals. Whilst the Agreement is mainly focused on conservation and management, it also focuses on equitable considerations. Its preamble refers to the ‘need for specific assistance, including financial, scientific and technological assistance, in order that developing States can participate effectively in the conservation, management and sustainable use of straddling fish stocks and highly migratory fish stocks’. As discussed above, this goal is reflected in the Agreement’s substantive

¹⁸⁰ See also, ICCAT Criteria for the Allocation of Fishing Possibilities 2001, ICCAT Ref 01-25.

¹⁸¹ However, the same membership balance is true of other RFMOs, especially tuna RFMOs without developing state needs being a factor in allocation decisions.

¹⁸² See Lodge et al 2007, 95.

¹⁸³ Seto et al 2021, 242–259.

provisions. However, although there are more explicit provisions containing differential commitments, these remain quite general, perhaps with the obligation to provide financial and capacity building support to developing States. Such provisions do not directly shape decisions on the allocation of fisheries resources in a way that benefits developing States. Neither is there any priority afforded to such interests. They are either framed as general factors to be taken into account (i.e. contextual norms) or they amount to forms of side payments (e.g. financial and development support) to encourage developing States to participate in the UNFSA. There remains an absence of more fundamental rights of preferential access to fishery resources. Although the mechanisms for delivering on these commitments will in part be delivered collectively through RFMOs, there is evidence that entrenched interests take priority in questions of resource distribution. The focus on maintaining the status quo has impeded calls to make allocations more equitable. Overall, the differential treatment provisions of the UNFSA remain relatively weak.

Exhortations to consider the differential capacities and needs of developing States run through the non-binding FAO Code of Conduct for Responsible Fisheries.¹⁸⁴ Apart from where the Code might influence regional fisheries management arrangements, the Code mainly depends upon individual States to give effect to its provisions. As such, it operates within the existing structure of rights and duties established by the LOSC and other fisheries agreements. Article 5 of the Code deals directly with special requirements of developing countries. It begins with a general exhortation to take the capacity of developing States into account in implementation of the recommendations of the Code. This is framed as a general proposition but read in conjunction with Article 5.2, it requires States and international organisations to take into account certain factors when managing fisheries. Such factors extend to the ‘special circumstances and requirements of developing countries, including in particular the least-developed among them, and small island developing countries’.¹⁸⁵ This should lead to the ‘adoption of measures to address the needs of developing countries, especially in the areas of financial and technical assistance, technology transfer, training and scientific cooperation and in enhancing their ability to develop their own fisheries as well as to participate in high seas fisheries, including access to such fisheries’.¹⁸⁶ These general commitments are echoed in other

¹⁸⁴ Code of Conduct for Responsible Fisheries, Report of the Conference of FAO, 28th Sess., Rome 20–31 Oct. 1995, Doc. C 95/REP, Annex I. (Hereafter Code).

¹⁸⁵ *Ibid.*, Art 5.2.

¹⁸⁶ *Ibid.*

provisions, such as to factor the special requirements of developing countries into the setting of catch levels (e.g. MSY).¹⁸⁷ In the context of post-harvest trade measures, States should cooperate to facilitate the production of value added products by developing States.¹⁸⁸ If States change trading measures, then due consideration should be given to requests from developing countries for temporary derogation from such obligations. In the context of fisheries research, States should ensure the availability of training and facilities, considering the special needs of developing countries,¹⁸⁹ as well as promoting research capacities of developing countries and financial support to this end.¹⁹⁰ As a non-binding instrument, the Code does not formally affect the respective rights and duties of States. It is intended to influence State conduct by guiding practice and influencing policy. Compared to the LOSC and UNFSA, the Code is more inclusive of community interests in one key respect: it reaches beyond States to address and intergovernmental organisations, and more generally persons engaged in fisheries management. As such it may influence and engage a wider range of persons in how fisheries are regulated and operated.

The analysis of differential treatment in international fisheries law reveals some key limitations on the idea that solidarity goals influence fisheries conservation and management commitments and practices. Returning to the elements of solidarity summarised in Figure 1, many of these can be seen to be lacking or weakly advanced in the fisheries provisions of the LOSC and related instruments. First, the principal goal of fisheries regulation is sustainable use, and this is focused on the protection and use of the resource base. Use is not immediately concerned with the equitable distribution of resources between States, and although sustainable use is a common interest, it does not necessarily entail some form distributional benefit for disadvantaged States. This shows that some common interests are not necessarily aligned with solidarity goals. Second, the resource provisions of the LOSC operate so as to protect certain types of entitlement, and at root entitlement is based on geography (e.g. an extension of exclusive authority on the basis of coastal configurations) or historic interests; it is not based upon equality or equity of access to resources. Although there are some equitable adjustments to the distribution of authority over living resources, these are framed weakly, and they do not necessarily lead to more equitable outcomes in the sense of redistributing resources to those

¹⁸⁷ Ibid, Art 7.2.1.

¹⁸⁸ Ibid, Art 10.1.10.

¹⁸⁹ Ibid, Art 12.1.

¹⁹⁰ Ibid, Art 12.18 and 12.20.

most in need from those that benefit most from initial allocation of resources. Third, although there are some duties to share resources, or to cooperate in their management, there are no corresponding rights on the part of developing States to claim entitlements or have a say in how resources are used. There is merely some general prioritising of need in the process for deciding how surplus might be distributed. Coastal States enjoy wide discretion over the distribution of resources, and there are no effective mechanisms for challenging this or holding coastal States to account for a failure to distribute access in accordance with the equitable provisions of the Part V of LOSC. Finally, the form of solidarity that exists in international fisheries law serves to deepen structural inequality. As in the case of environmental protection, solidarity in exists as vertical relationship whereby a privileged donor gives something to a disadvantaged party in need, but merely as an act of philanthropy; it is not the result of a horizontal relationship of equality where goods are shared as of a right flowing from a true recognition of equal status. Crucially, since international fisheries law does nothing to alter the basis of entitlement, or even work as a means to this end, it does nothing to alter the structural inequality that exists between the donor and beneficiary.

5.5 Reflections on Solidarity in the Law of the Sea

This chapter set out to address a gap in the literature in respect of how the law of the sea responds to ideas of global solidarity. This endeavour requires careful attention, largely because much of the law of the sea developed before the idea of global solidarity emerged and so there is a risk of revisionism. However, the analysis reveals that there are elements of solidarity thinking embedded in the LOSC and later instruments. Although international law carved up the oceans into national zones and is largely concerned with the distribution of rights over maritime activities to States, the fact remains that the proper governance of the oceans is a common concern to all States. And the law of the sea has always recognised some common interest in the oceans, whether this is through the designation of the high seas as a non-exclusive space, or through the various measures adopted to restrain harmful activities. Of course, the extent and form of its response to common interests has varied over time, just as such common interests have evolved. So, what is needed is an approach to both solidarity and the law of the sea that is sensitive to their conceptual limits and contextual operation.

Global solidarity is rooted in ideals of global cooperation. It has been more strongly advanced in the field of international human rights, where the moral authority of human rights claims lends solidarity greater weight. However, this may render solidarity less useful in other contexts. Also, much of the discourse around global solidarity frames it in terms of existing interests, such as equity or self-determination, and this makes it difficult to understand the value that solidarity adds to existing legal analysis. For these reasons, an account of solidarity was offered up that enabled a more detached way of analysing the influence of solidarity thinking on international law, including the law of the sea. This frames solidarity as a framework concept that is both scalable and contextual, ranging from weak to strong solidarity. It is defined by six elements: the degree to which inclusive and participatory communities exist; the degree to which common interests are defined within a community; the degree to which such common interests take normative priority over self or individual interests; the degree to which differential commitments (towards common goals) are framed in law, the extent to which collective responsibility is used to frame and hold States to account for the pursuit of common interests. Of these criteria, differential commitments are argued to be the most meaningful means of pursuing solidarity goals since they are more readily identifiable and measurable than notions of community or common interest.

When looking at differential commitments, the foregoing analysis has revealed some of the hidden structural limitations that impede solidarity goals. Differential commitments tend to be the exception rather than the rule and they are highly contextual and norm qualifying in character. Differential commitments include a range of legal measures that treat States differently according to need or status, or which allow States to vary the application of their commitments according to circumstance. In the case of the former, there is a risk that differential treatment is either tokenistic or framed as a limited form of compensation or side payment to disadvantaged States. This does little to challenge structural inequality. In the case of the latter, contextual flexibility is a benefit provided to all States and so potentially of most value to states that can exploit flexibility. These are real risk in the absence of strong forms of collective accountability for the delivery of differential norms. These findings tend to be born out when we look at the law of the sea.

In the shipping sphere of the law of the sea, it seems that a balance has been reached whereby uniform standards remain the norm, but they are offset by loosely framed compensatory measures for disadvantaged States. It is not clear that this balance results from antipathy

towards solidarity per se. Rather it results from a preference for uniform standard setting in shipping. My point here is not to claim that one approach or the other is better in tackling global pollution, but rather to reveal States' a preference for global standards and a more limited concern for a the equitable distribution of responsibilities to protect the environment. In practice, the absence of differentiation of substantive commitments is partially alleviated through side-payments because this serves to protect the integrity of shipping standards. The bottom line is that some common interest goals are simply not obviously aligned with solidarity goals. The fact that most other marine environmental obligations are framed in general terms or as due diligence obligations means that all States enjoy a degree of flexibility in their implementation. However, this serves to conceal a deeper level of antipathy for differential treatment in the law of the sea. Arguably, it reflects the idiom that all are equal, but some are more equal than others. The traditional balance is only recently being challenged in the area of ship emissions under the influence of climate law, where differential obligations are more fundamentally rooted in the conceptual structure of the basic agreements. However, the difficulty of accommodating stronger differential commitments reveals that the regulatory culture in the law of the sea has been less sympathetic to solidarity goals that would appear on the surface.

The same picture of antipathy to strong differential commitments and solidarity is revealed in the field of fisheries law. The dominant paradigm is sustainability rather than equitable use. Moreover, the distribution resource access is driven largely by the exigencies of geography or history. The law of the sea tends to protect such entitlements. Although there are some token efforts to account for the needs of disadvantaged states in the law of the sea, these have not resulted in any meaningful redistribution of wealth or opportunity. At best, the solidarity or differential commitments take forms that leave disadvantaged States dependent upon the good will of well-resourced donor States. Indeed, most developed States maximise the exploitation of coastal fisheries, and in some cases have exported their excess fleet capacity into the waters of developing States or high seas fisheries. Whilst the UNFSA offers stronger differential commitments, there remains a lack of clear rights that establish meaningful entitlements to access fisheries on the part of disadvantaged States.

For advocates of global solidarity, the current picture of solidarity in the law of the sea is perhaps somewhat disappointing. There are few clear differential commitments that meaningfully give effect to more a equitable spread of rights and responsibilities. Whilst rules

on the protection of the marine environment are coming under pressure to generate clear differential commitments in response to climate change, there is less evidence of differential commitments finding their way into fisheries law. This reflects the perhaps obvious fact that whilst all States more readily share a common concern in the prevention of harm to a shared environment, the common interest in the greater distribution of fishing opportunities to disadvantaged States or persons is less clear. Furthermore, in both cases, there is a clear pull exerted by other common interests, such as the international uniform standards of pollution control or the sustainable use of resources. Such interests appear to have greater traction with States and so may work against solidarity interests. This suggests that advocates of solidarity have more work to do to demonstrate the benefits of solidarity, as well as rethinking how solidarity can relate to other fundamental interests that are not directly aligned with solidarity goals.

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