

International Environmental Law Course

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UN Law of the Sea Convention: Main concepts and principles of environmental protection and enforcement.

1. Introduction - background

Historically the sea was mostly an “open access resource”, a “common”; only narrow territorial waters under state jurisdiction.

“Freedom” of the sea - for shipping (Hugo Grotius’ “Mare liberum”).

Regulation and control mainly left to the “flag state”.
(In practice virtually no regulation and control.)

The sea and its resources were seen as “unlimited”.

The risk of over-exploitation (a “tragedy of the commons”)

- pollution from ships and dumping
- fishing, whaling
- off-shore petroleum activity (on the “continental shelf”)

The need for international rules to regulate the use of the sea as a common.

The first UN Law of the Sea Conference 1958 resulted in 4 conventions but they left many open questions and insufficient solutions.

1982 UNCLOS was adopted.

Law of the Sea is today a major (and complex) issue in both general public international law and international environmental law.

The two main issues in an environmental perspective:

- management of “the marine living resources” in the sea: mainly fish stocks and whales,
- control of pollution.

2. Basic issues, developments and concepts

The question: How to regulate, control and enforce activities outside territorial waters, on the “high seas”? Possible solutions:

- a comprehensive international regime and organization? (“Common heritage of the mankind”?)
- extended coastal and port state jurisdiction, and coastal state obligations?
- strict obligations for flag states to regulate and enforce?

The different interests involved: “flag” versus “coast” (?) But most coastal states are also flag states! Norway as a case. A question of their primary interest.

The UN Convention on the Law of the Sea has elements of all alternatives, but the main result is *extended coastal state jurisdiction*:

- Extension of the territorial sea to max. 12 nautical miles (1 nautical mile = 1852 m.) from “baseline” (internal waters)
- Extension of “contiguous zone” (for enforcement) to 24 nautical miles
- Exclusive Economic Zone (max. 200 nautical miles)
- Continental Shelf of the coastal state (defined earlier)
- And also:
- Clearer rights for *port states*.
- Stricter obligations for *flag states*.

International Seabed Authority to regulate exploitation of seabed minerals in international waters (“The area”, UNCLOS Part XI.) Art. 136: “The Area and its resources are the common heritage of mankind”.

The key legal issues are the respective rights and obligations as regards marine living resources and pollution of flag states, port states and coastal states, in internal waters, the territorial sea, and the EEZ, on the continental shelf, and on the high seas outside national jurisdiction.

3. UNCLOS – some general points

UNCLOS – ratified by 157 states (but not USA).

Much of UNCLOS is regarded as *customary international law* and thus binding also for states that have not ratified it.

UNCLOS is partly an “*umbrella convention*” and a “*framework convention*”, laying down principles of jurisdiction and exploitation of resources, but also very detailed on some issues.

More details in other conventions, both global and regional.

Many of the *principles of international environmental law* have been developed and recognized since 1982 and must influence and supplement the interpretation of UNCLOS today (sustainable development, precautionary principle).

Newer treaties are also important sources for the law of the sea, such as Fish stock agreements, CBD, numerous pollution control conventions..

4. The main elements re. marine living resources and the protection of the marine environment:

Part V Exclusive economic zone: General obligation to protect marine living resources from over-exploitation (see arts. 61-67)

Part VII High Seas (section 2): general obligation to “conserve” living resources (see arts. 116-120).

Part XII Protection and preservation of the marine environment:

- General obligation to protect the marine environment (art. 192).
- Sovereign right for states to exploit their natural (marine) resources “in accordance with their duty to protect and preserve the marine environment” (art. 193).

- Part XII deals mainly with marine pollution, from land-based sources including dumping, vessels, and off shore petroleum activity.
- Part XII Section 6 regulates the enforcement measures to be taken by flag states, port states and coastal states to control pollution from ships.

Part XV Settlement of disputes: Tribunal for the Law of the Sea (art. 287).

5. Marine living resources: Rights and obligations of coastal states, and on the high seas - main lines in UNCLOS.

1. Introduction: the problem, and the main line in UNCLOS: extended coastal state right and responsibility.

(But not an “ecosystem approach”)

2. The general management principle of “conservation of the living resources”.

3. *Territorial sea.*

Full sovereignty - jurisdiction to establish and enforce rules on fishing etc.

4. *Exclusive Economic Zone.*

The coastal state has full sovereign rights as regards the management of living and non living resources (art. 56, 1 a)).

Exceptions: navigation, pipelines, etc. (art. 58 – with reference to the High seas rules arts. 87-115)).

The coastal state has a “duty of conservation” and avoid over-exploitation (art. 61), by establishing Total allowable catch - TAC (art. 61 (1)) with the aim of achieving Maximum sustainable yield – MSY (art. 61 (3)), but this is rather vague as it allows to take into account various factors, also economic.

The coastal state has a duty to give other states “access to the surplus” if it does not take the whole of TAC itself (art. 62 (2)), within “conservation” limits.

See art. 63 for stocks occurring within the EEZ of several states. Here agreements on quotas etc. are required.

Hopefully, coastal state management in the EEZ is better than international rules for the high seas, but no guarantee.

5. High seas.

In principle: freedom and flag state jurisdiction (arts. 87 (1) e) and 92 (1).

But note the general obligations/principles: Part VII section 2 (arts. 116-120).

Since these are too vague, the 1995 UN Convention relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks was negotiated, with

- important principles of conservation in arts. 5-7, including the application of the precautionary approach (art. 6),
- institutions and very detailed rules on the
 - duties of the flag state (art. 18)
 - compliance and enforcement, including international cooperation (arts. 19-23).

6. Jurisdiction over pollution from ships – main lines in UNCLOS

6.1. Introduction: The general obligation to prevent marine pollution from all sources (Part XII, section 5 arts. 207-212).

6.2. General obligation to establish international rules to prevent and reduce pollution from ships (art. 211 (1)).

6.3. “Generally accepted rules and standards”. The International Maritime organization (IMO) as the “standard-setting body”.

6.4. Flag state:

Starting point: “Ships shall sail under the flag of one state only... and are subject to its exclusive jurisdiction” except according to other special rules (art. 92)

Important *obligations*, such as

- *Shall* adopt laws to prevent pollution that “at least have the same effect as that of generally accepted rules and standards” (art. 211 (2)).
- *Shall* enforce general rules of administrative, technical and social matters applicable to their ships (art. 94).
- *Obligation to enforce* (“shall ensure compliance”) international rules and standards in the field of pollution applicable to their ships (art. 217).

6.5. Port state/coastal state

Port state is always coastal state and vice versa. But some distinctions as regards the rights over foreign vessels.

6.5.1. Internal waters and in ports:

Full jurisdiction as on land territory. May issue such national rules as seen necessary to protect the marine environment.

Port state has *the right* to (“may”) undertake investigations, institute proceedings for “violation of applicable international rules and standards”, also outside internal waters, *even on the high seas* (art. 218 (1)) - “when a vessel is voluntarily within a port”.

Nuances and details in art. 218 (2-4).

6.5.2 Territorial sea.

Starting point: UNCLOS art 2: The coastal state has full sovereignty in the territorial sea: lawmaking, control and enforcement.

But an important exception: *ships' right to "innocent passage"* in the territorial sea (arts. 17-32). Innocent passage: passage "not prejudicial to the peace, good order or security of the coastal state" (art. 19).

"Any act of willful and serious pollution" is not innocent (art. 19, 2 (h)).

Coastal state may issue regulations, including for environmental purposes (art. 21 (1)), - but not rules concerning "design, construction, manning and equipment" unless in accordance with generally accepted international rules and standards.

Detailed enforcement rules (arts. 218-220).

For example: right to inspection of a foreign ship if "clear grounds" to believe that it has violated rules applicable in the territorial waters.

6.5.3 *Exclusive Economic Zone (EEZ)*.

Coastal state jurisdiction on issues for the "protection and preservation of the marine environment" (art. 56, 1 b (iii)).

Coastal state may issue pollution rules in accordance with "generally accepted international rules and standards".

However: generally speaking little restrictions on the "freedom of the seas" for shipping, as far as enforcement is concerned (see art. 220, in particular 220 (3) and (5)).

6.5.4 *The High Seas*.

Flag state control (arts. 94, 211(2) and 217).

Otherwise "freedom of the seas" for navigation etc.

But port state/coastal state may take action when a ship is "voluntarily within a port" (Art. 218) against violations of applicable international rules and standards".

In case of an accident: the International Convention Relating to Intervention on the High Seas in Cases of Oil Pollution Casualties (extended to other forms of pollution):

Coastal states may take “such measures on the high seas as may be necessary to prevent, mitigate or eliminate grave and imminent danger to their coastline or related interests from pollution....” (art. 1).

6. Summing up

UNCLOS is fundamental, but far from the whole picture of protection of the marine environment.

It is supplemented by *inter alia* global conventions on pollution from ships and dumping, CBD, and straddling stocks, and regional conventions on pollution from other sources, “regional seas conventions”, and on fisheries.

A fragmented, partly overlapping and complex system.