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The Marine Environment, Marine Living Resources and Marine Biodiversity

International Environmental Law

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Regulating the marine environment

What are the **key challenges** facing the Marine Environment?

- Unsustainable fishing
- Pollution
- Habitat destruction
- Climate Change
- Invasive species

The marine environment puzzle - Bugge.
Threats to the marine environment – climate change

• Threats to the marine environment come from different sources:
  – Ships and the fishing industry
  – Land based pollution sources
  – Warming climate and ocean acidification
Regulation of the marine environment

• QUESTION: How do we regulate the use of resources and the protection of the environment on the high seas outside of the jurisdiction of states?
  – Extended jurisdiction of states?
  – Greater liability for flag states?
  – Extensive international regulation of common resources?
A brief history

- 1893 - Pacific Fur Seal Arbitration - dispute between the UK and the US as to the circumstances in which a coastal State could interfere with British fishing activities on the high seas.
- 1926 – Preliminary Conference on Oil Pollution of Navigable Waters
- 1954 – Oil Pollution Convention
- 1958 - International Maritime Organisation (IMO) came into existence
A brief history continued

• 1969 – Intervention Convention
• 1971 – Oil Pollution Fund Convention
• 1972 – Stockholm Convention - marked the beginning of a distinctive area of international law – international environmental law – and raised concerns about the marine environment.
• 1973 – International Convention for the Prevention of Pollution from Ships (MARPOL)
• 1982 – UNCLOS (entered into force 1994) – oceans are the common heritage of mankind.
Evolution of marine environment regulation

- Need for law to respond to the decline in fish stocks
- Law on pollution has largely developed in response to accidents

Eg. Torrey Canyon incident in 1968 (oil spill off UK), the Amoco Cadiz incident in 1978 (oil tanker ran aground off the coast of France) and Exxon Valdez in 1989 (oil tanker spill off the coast of Alaska). (But … BP)

The primary instrument governing the Marine Environment in IEL
- Completed in 1982
- Widely supported
- Main objective - establishment of a legal order for the seas and oceans of the world, to facilitate international communication and promote peaceful uses of the seas and oceans, the equitable and efficient utilization of their resources, the conservation of their living resources, and the study, protection and preservation of the marine environment.
- Provides a framework – both spatial and functional
  - Stipulates the nature of different kinds of sovereign rights
  - Fundamental principles of ocean conservation
- Creates a framework for issues of jurisdiction, fisheries and exploitation of resources. Does it create a framework for marine protection? Marine protected areas? Incorporation of environmental principles?
- Created the International Tribunal for the Law of the Sea with jurisdiction over any dispute on UNCLOS. It has heard just 24 cases since 1996.
- Criticised for its fragmented approach and failure to protect resources outside of national jurisdiction
UNCLOS creates different kinds of obligations in these different zones: In territorial and archipelagic waters coastal states exercise exclusive sovereignty. In the EEZ coastal states have sovereign rights to explore and exploit but this is limited by obligations in migratory and straddling stocks, and by conservation obligations (states must establish a management regime).
Part XII UNCLOS: Protection and preservation of marine environment

- **Article 192** General obligation – States have the obligation to protect and preserve the marine environment.

- **Article 193** - Sovereign right of States to exploit their natural resources

  “States have the sovereign right to exploit their natural resources pursuant to their environmental policies and in accordance with their duty to protect and preserve the marine environment.”

- **Article 194** - Measures to prevent, reduce and control pollution of the marine environment

  States shall take, individually or jointly as appropriate, all measures consistent with this Convention that are necessary to prevent, reduce and control 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, and they shall endeavour to harmonize their policies in this connection.
**Environmental provisions of UNCLOS**

- Definition of pollution in Art 1 - "pollution of the marine environment" means the introduction by man, directly or indirectly, of substances or energy into the marine environment, including estuaries, which results or is likely to result in such deleterious effects as harm to living resources and marine life, hazards to human health, hindrance to marine activities, including fishing and other legitimate uses of the sea, impairment of quality for use of sea water and reduction of amenities.

- Article 207 UNCLOS – states must “prevent, reduce and control pollution of the marine environment from land based sources…”
Environmental provisions in UNCLOS

• Part II – Sovereignty of a coastal state extents to territorial sea – 12 nautical miles from the low water line.
  – Art 21 – state can adopt laws relating to innocent passage on marine protection, management of pollution, scientific research

• Art 61 and 62 – coastal states must implement management and conservation policies for the EEZ – includes reference to an ecosystem approach (in very limited terms – only ref to associated and dependant species)
**UNCLOS**

Living organisms on the deep sea bed

Biotech/genetic resource governance

No principles (esp sustainability and precaution)

Conservation within territorial seas

**What’s missing?**

Migratory species

Ecosystem approach

*Does the CBD address any of these gaps?*
Filling the gaps left by UNCLOS:

• Implementing agreements under UNCLOS:
  – 1995 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 (Fish Stocks Agreement) – again some indication of an ecosystem approach – states must take into account the ‘biological unity’ of the stocks - also incorporates precautionary principle and sustainability
Filling the gaps: regional agreements

- In the works – current gap in regard to biological resources and marine genetic research on the life of the ocean floor: [Development of an international legally binding instrument under the United Nations Convention on the Law of the Sea on the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction](#)

- [UNEP Regional Seas Programme](#) 1974 – “engaging neighbouring countries in comprehensive and specific actions to protect their shared marine environment.”
Filling in the gaps

OSPAR Convention for the Protection of the Marine Environment of the North-East Atlantic
- Takes stronger measures than those envisioned by UNCLOS – such as the prohibition on dumping at sea
  - New approach - Treats:
    - pollution from land-based sources
    - pollution for off-shore installations
    - pollution by dumping and incineration at sea
  - An annex and detailed rules for each of these.
OSPAR continued

Plays a major role in reducing marine pollution by hazardous substances.
- General obligation: States “shall … take all possible steps to prevent and eliminate pollution”
- Principles: the precautionary principle, the polluter pays principle, “sustainable management”, “latest technological developments and practices”
- Minimum regulation: States can take stricter measures than agreed pursuant to the convention.
- Creation of the OSPAR Commission – powers to take legally binding decisions, assess compliance
Marine living resources
Marine Living Resources

• Challenges of marine living resources management:
  – Migratory stocks
  – Freedom of the High seas
  – Lack of incentive to limit fishing
  – Problem of communication between science and policy
  – New discoveries in regard to ocean floor genetic resources

https://vimeo.com/42619545
Marine Living Resources regulation

• 1958 Convention on the Territorial Sea and the Contiguous Zone and Convention on the Continental Shelf – sovereignty of the coastal state over rights to living resources in the territorial sea and continental shelf

• 1958 Convention of the High Seas – Freedom of the high seas including freedom of fishing “to be exercised with reasonable regard to the interests of other states”

• 1958 High Seas Fishing and Conservation Convention – requires states to adopt measures for the conservation of marine resources
Marine Living Resources Regulation

1982 UNCLOS

• Maritime zones governing marine living resources in and beyond national jurisdiction.

• Extended rights of coastal states by formalising legal status of the EEZ (Art 56).

• TAC must not result in endangerment of living resources “taking into account best scientific evidence available.” (Art 61)

• Provisions on management of fisheries broadly reflect customary international law.

• Some protection for migratory species and marine mammals, specifically through requirements of co-operation.

• High seas – maintains freedom of all states to fish (Art 87) limited by treaty obligations, rights of coastal states must be respected, provisions concerning conservation must be respected (Art 116).
Marine Living Resources Regulation

- **1993 Compliance Agreement**
  - Seeks to address the problem of “flags of convenience”
  - Details the obligations of flag states including not undermining conservation measures
  - Excludes vessels less than 24 metres
  - Has only received limited support

- **1995 Fish Stock Agreement**
  - Applies to straddling fish stocks and highly migratory fish beyond areas of national jurisdiction (with limited provision to conservation within areas of national jurisdiction)
  - Primary responsibility still falls on the flag state
  - Increased international conservation obligations including:
    - Obligations to adopt measures to ensure long term sustainability and promote optimum utilization
    - Use of best scientific evidence to maintain maximum sustainable yield
    - Applies precautionary approach
    - Assess impacts of fishing and other human activities and environmental factor
    - Protect biodiversity
    - Monitoring and surveillance
    - Emphasis on regional and sub-regional arrangements – limiting the right to fish in some instances by requiring participation in regional organisations.

- **Johannesburg Plan of Implementation 2002** – restore stock levels by 2015

Important role of the FAO and the Committee of Fisheries

Regional Instruments
Marine living resources case law

- **Pacific Fur Seal Arbitration 1893** – limits of jurisdiction to protect marine animals and the absolute freedom to fish. Limitations of the ‘flag state’ approach.

- **1972 Fisheries Jurisdiction case (ICJ)** – Iceland decided to extend its exclusive fishing zone to 50 nautical miles. Court denied Iceland’s right to do so but said that Iceland had preferential fishing rights. ICJ found the states must have respect the other’s rights and needs and must have due regard for conservation needs.

- The WTO Appellate Body’s decision in the **Shrimp Turtle case 1998**, concerning the circumstances in which the United States was able to impose conservation measures under its laws on shrimping activities taking place in four Asian countries.
International Tribunal for the Law of the Sea’s provisional measures order in the Southern Blue-Fin Tuna case brought by Australia and New Zealand against Japan, addressing Japan’s unilateral scientific experimental fishing (August 1999).

- ITLOS prescribed provisional measures pending the decision of an arbitral tribunal setting the annual allocation at the level last agreed and stopping experimental fishing, applying a precautionary approach.
- The arbitral tribunal decided that it did not have jurisdiction to hear the claim. One of the advantages of UNCLOS is the compulsory jurisdiction provision. This provision was seen to be undermined by the decision in the Southern Blue Fin Tuna Case.
Marine biodiversity
Marine biodiversity

• **UNCLOS** – Part XII
• **Convention on Biological Diversity** (CBD)
  – relationship between the CBD and UNCLOS?
  – Responsibility on states to ensure activities within their jurisdiction do not cause damage to other states or areas beyond their jurisdiction (Art 3)
  – Jakarta Mandate on Marine and Coastal Biological Diversity 1995 – area management, protected areas etc
• Regional measures and some species specific interventions

= A piecemeal approach to marine biodiversity
Marine biodiversity

• A new International Agreement on Marine Biodiversity?

• Outcome of the Ad Hoc Open-ended Informal Working Group:

  “Decide that negotiations shall address the topics identified in the package agreed in 2011, namely the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction, in particular, together and as a whole, marine genetic resources, including questions on the sharing of benefits, measures such as area-based management tools, including marine protected areas, environmental impact assessments and capacity-building and the transfer of marine technology”
Marine Protected Areas in the High Seas

- UNCLOS – no legal impediment to establishing MPAs in the high seas given the freedoms of the high seas.
- Some pioneering work to establish MPAs under the OSPAR Convention – identified 8 potential MPA sites – various barriers to this process.
- IWC Whale sanctuary and other examples of limited MPAs’
- Less than 1 percent of the oceans are protected by MPAs
- No single definition of MPA (although see the CBD) and little international regulation
- Johannesburg Plan of Implementation – set goals for 2012
MPAs continued

Case of Chagos Archipelago - On 18 March 2015, the Permanent Court of Arbitration unanimously held that the MPA which the UK declared around the Chagos Archipelago in 2010 was created in violation of international law.

“Not only did the United Kingdom proceed on the flawed basis that Mauritius had no fishing rights in the territorial sea of the Chagos archipelago, it presumed to conclude – without ever confirming with Mauritius – that the MPA was in Mauritius’ interest.”
Summing up: Key questions

• How are we regulating the marine environment in the high seas? Is this regulation adequate? How could it be regulated better?

• How are we enforcing state obligations in the high seas? Are courts effective? Do we need more and better enforcement mechanisms?

• Are states co-operating in the management of marine resources and in the preservation of the marine environment? Are the co-operative mechanisms effective?
Resources

- [http://www.jus.uio.no/english/services/library/treaties/06/6-05/](http://www.jus.uio.no/english/services/library/treaties/06/6-05/)
- IMO - [http://www.imo.org/Pages/home.aspx](http://www.imo.org/Pages/home.aspx)
- JCLOS blog - [https://site.uit.no/jclos/](https://site.uit.no/jclos/)