JURISDICTION AND CONTROL OVER ACTIVITIES BY NON-STATE ENTITIES ON THE HIGH SEAS AND PROTECTION OF THE MARINE ENVIRONMENT

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Exercise of effective jurisdiction and control over non-state entities in the high seas

1. UNCLOS regime
2. International cases
3. Application to specific activities in the high seas (marine scientific research, submarine cables and pipelines, survey vessels and construct artificial islands and other installations)
Exercise of effective jurisdiction and control over non-state entities in the high seas

• High Seas

• Article 94 UNCLOS

• Every State shall effectively exercise its jurisdiction and control in administrative, technical and social matters over ships flying its flag.

• In particular every State shall:
  - maintain a register of ships...; and
  - assume jurisdiction under its internal law over each ship flying its flag and its master, officers and crew in respect of administrative, technical and social matters concerning the ship...
Exercise of effective jurisdiction and control over non-state entities in the high seas

• Article 194 (2) UNCLOS

• States shall take all measures necessary to ensure that activities under their jurisdiction or control are so conducted as not to cause damage by pollution to other States and their environment, and that pollution arising from incidents or activities under their jurisdiction or control does not spread beyond the areas where they exercise sovereign rights in accordance with this Convention.
International cases on Article 94 and Flag State due diligence concerning protection of marine environment

• *Responsibilities and obligations of states with respect to activities in the area* (Advisory opinion) (2011)


• *South China Sea Arbitral Award (Philippines v China)* (2016)
ITLOS Advisory Opinion on Responsibilities and obligations of states with respect to activities in the area

Question on the responsibilities of States sponsoring non-state entity activities in the Area

- Treaty law binding upon States and become effective upon sponsored contractors through domestic law

- “The connection between States Parties and domestic law entities required by the Convention is twofold, namely, that of nationality and that of effective control.”
ITLOS Advisory Opinion on Responsibilities and obligations of states with respect to activities in the area

- Key issue was the meaning of “the responsibility to ensure” compliance with the provisions of Part XI by States over activities in the Area, carried out by States Parties, or state enterprises or natural or juridical persons which possess the nationality of States Parties or are effectively controlled by them or their nationals.
ITLOS Advisory Opinion on Responsibilities and obligations of states with respect to activities in the Area

- Tribunal concluded that the “responsibility to ensure” was an obligation of conduct and not to achieve a result
- Obligation of “due diligence”
ITLOS Advisory Opinion on Responsibilities and obligations of states with respect to activities in the Area

• Due diligence

1. Adoption of appropriate rules and measures

2. Active enforcement

3. Exercise of administrative control applicable to public and private operators (such as the monitoring of activities of operators)
Request for an Advisory Opinion submitted by the Sub-regional Fisheries Commission (SRFC) (Advisory Opinion)

• 4 questions presented by the SRFC to ITLOS
• Question 1: Flag State obligation for vessels flying its flag engaged in IUU fishing in the EEZ of another State
  • Article 94 makes no mention of fishing activities or conservation of marine living resources
Request for an Advisory Opinion submitted by the Sub-regional Fisheries Commission (SRFC) (Advisory Opinion)

- **ITLOS interpretation of Article 94:**
  - “the flag State, in fulfilment of its responsibility to exercise **effective jurisdiction and control in administrative matters**, must adopt the necessary administrative measures **to ensure** that fishing vessels flying its flag are not involved in activities which will undermine the flag State’s responsibilities under the Convention in respect of the **conservation and management of marine living resources.** (para. 119)
  - The Tribunal interpreted the predicate words of article 94(2)- “[i]n particular”- to be **indicative** and not exhaustive.
Request for an Advisory Opinion submitted by the Sub-regional Fisheries Commission (SRFC) (Advisory Opinion)

- ITLOS interpretation of Article 94:
- Tribunal incorporated:
- Articles 192
- 58(3)
- 62(4) requiring nationals of States to comply with the conservation measures of another State
South China Sea Arbitral Award (Philippines v China) (2016)

• The Tribunal applied due diligence obligation “to take those measures necessary to protect and preserve rare or fragile ecosystems as well as the habitat of depleted, threatened or endangered species and other forms of marine life.”

• Failure of China to take measures to prevent the harvesting of endangered species by fishermen was a breach of Article 192 and 194(5).

• According to the Tribunal the due diligence obligation is triggered when a State is “aware that vessels flying its flag are engaged in the harvest of species internationally as being threatened with extinction or are inflicting significant damage on rare or fragile ecosystems or the habitat of depleted, threatened or endangered species”.

• The State must adopt rules and measures to prevent such acts and maintain a level of vigilance in enforcing them.
Exercise of effective jurisdiction and control over non-state entities in the high seas

• Does article 94 apply to the flag State obligation to protect and preserve the marine environment under Part XII engaged in other activities on the high seas?
  • MSR
  • Submarine cables and pipelines
  • Survey vessels
  • Offshore installations
Marine scientific research, submarine cables and pipelines, and construction of installations in the high seas

• Article 87

• ...Freedom of the high seas is exercised under the conditions laid down by this Convention and by other rules of international law

• (c) freedom to lay submarine cables and pipelines, subject to Part VI;

• (d) freedom to construct artificial islands and other installations permitted under international law, subject to Part VI;

• (f) freedom of scientific research, subject to Parts VI and XIII.

• These freedoms shall be exercised by all States with due regard for the interests of other States in their exercise of the freedom of the high seas, and also with due regard for the rights under this Convention with respect to activities in the Area.
Marine scientific research, submarine cables and pipelines, and construction of installations in the high seas

• Article 87

• Conditions laid down by this Convention and by other rules of international law:
  • Part XII of UNCLOS
  • Other applicable instruments and decisions (MEAs, IMO, FAOs...)
  • Case law
Marine Scientific Research on the high seas by non-state entities

- No definition of MSR under UNCLOS
- Article 87 - Freedom to conduct MSR on the high seas Article 87 under the conditions laid down by this Convention and by other rules of international law
- Article 112: Right applies to bed of the high seas beyond the CS
- Article 238 - Right of all States to conduct MSR subject to the rights and duties of other States
- Article 257 - Right of all States to conduct MSR in the water column in conformity with the Convention
Article 240 General principles for MSR inter alia

• (b) marine scientific research shall be conducted with appropriate scientific methods and means compatible with this Convention;

• (c) marine scientific research shall not unjustifiably interfere with other legitimate uses of the sea compatible with this Convention and shall be duly respected in the course of such uses;

• (d) marine scientific research shall be conducted in compliance with all relevant regulations adopted in conformity with this Convention including those for the protection and preservation of the marine environment.
Marine Scientific Research on the high seas by non-state entities

Application of article 94 to non-state ships for MSR and “due diligence” to MRS activities in the high seas

1. What are the ‘appropriate scientific methods and means’?
   • International standards for high seas?
   • Do they include article 206 impact assessments?
   • Sample methodology? Large scale?
   • Example of ocean-iron fertilization
   • Protection of vulnerable or fragile ecosystems.. (Article 194(5)

2. Which regulations adopted in conformity with UNCLOS?
   • IMO shipping regulations and standards for safety of navigation and environmental protection
   • Article 206 (EIA) + 205 (reporting)
Submarine cables and pipelines

• Article 87 - Freedom to lay submarine cables and pipelines to be exercised according to the conditions laid down by this Convention and by other rules of international law

• Article 112 - Right of all States to lay submarine cables and pipelines on the bed of the high seas beyond the continental shelf.

• Article 58(1) - Right to maintain and repair such cables
Submarine cables and pipelines

Two parts:

1. Surveying activities for routeing of submarine cables or pipelines
2. Laying of the submarine cables or pipelines on the seabed with purpose built ships
Submarine cables and pipelines

• Different risks associated with submarine cables and pipelines

• Article 79 UNCLOS:
  • Coastal State can take reasonable measures to prevent and protect against pollution from pipelines but no mention of submarine cables (79.2)
  • Coastal State has right to consent to delineation of laying of pipelines on its continental shelf but no mention of submarine cables.

• What are the environmental risks from the laying of underwater cables in the high sea?
Submarine cables and pipelines

• Different risks associated with submarine cables and pipelines

• What are the environmental risks from the laying of underwater cables in the high sea? During laying of the cables/pipelines and after?
  • Disturbance of habitats and benthic communities
  • Sedimentation? (plowing and burial)
  • Potential entanglement issues with fishing gear and marine mammals
  • Discharge of chemicals and other pollutants
  • Cumulative impacts?
The **International Cable Protection Committee** position in the BBNJ negotiations:

- Submarine cables should be exempt from any additional environmental impact assessment other than that provided under article 206 of UNCLOS and not included in any BBNJ marine spatial planning.
Survey vessels

• No specific provisions in UNCLOS covering *survey vessels* in the high seas (and EEZ)
• Article 87 freedom of navigation regime in the high seas
Survey vessels

- **Environmental impacts:**
  - IMO instruments for shipping apply (eg. Dumping)
  - Other non-vessel sources of environmental impacts:
    - Use of sonar and acoustic sounding methods
    - Underwater noise (= pollution under UNCLOS?)
  - Other impacts on the marine environment?
  - EIA? (UNCLOS 206 but what standards?)
  - Protection of the marine environment? (Part XII)
    - Conservation of marine mammals and fish stocks
Offshore Installations

• No definition? Floating units? Fixed units?

• Article 194 (1) requires States (not only flag States) to individually or jointly take all measures to prevent, reduce and control pollution of the marine environment.

• 194 (2) States shall take all measures necessary to ensure that activities under their jurisdiction or control are so conducted as not to cause damage by pollution to other States and their environment, and that pollution arising from incidents or activities under their jurisdiction or control does not spread beyond the areas where they exercise sovereign rights in accordance with this Convention.
Offshore Installations

• 194 (3) Measures taken by States are to minimize to the maximum extent possible:
  • Pollution from Installations used for exploration and exploitation of natural resources of the sea-bed and subsoil (national jurisdiction) (194 3..c)
  • Pollution from other installations operating in the marine environment, in particular to prevent accidents, deal with emergencies and ensure safety of operations at sea (high seas?) (194.3.d)
Are Due Diligence Requirements Being Met?

1. **Adoption of appropriate rules and measures nationally for application in the HS**
   - Article 192
   - Article 194 (Pollution prevention)
   - Protection of rare or fragile ecosystems, habitats or endangered species (194.5)
   - 204 (monitoring)
   - 206 (EIA)

2. **Active enforcement by the State**

3. **Exercise of administrative control applicable to public and private operators** (such as the monitoring of activities of operators)