



CIL Conference 2017

Gaps in High Seas Governance

High seas installations for the large-scale removal of plastic debris on the high seas
– a practical application of the current high seas regime

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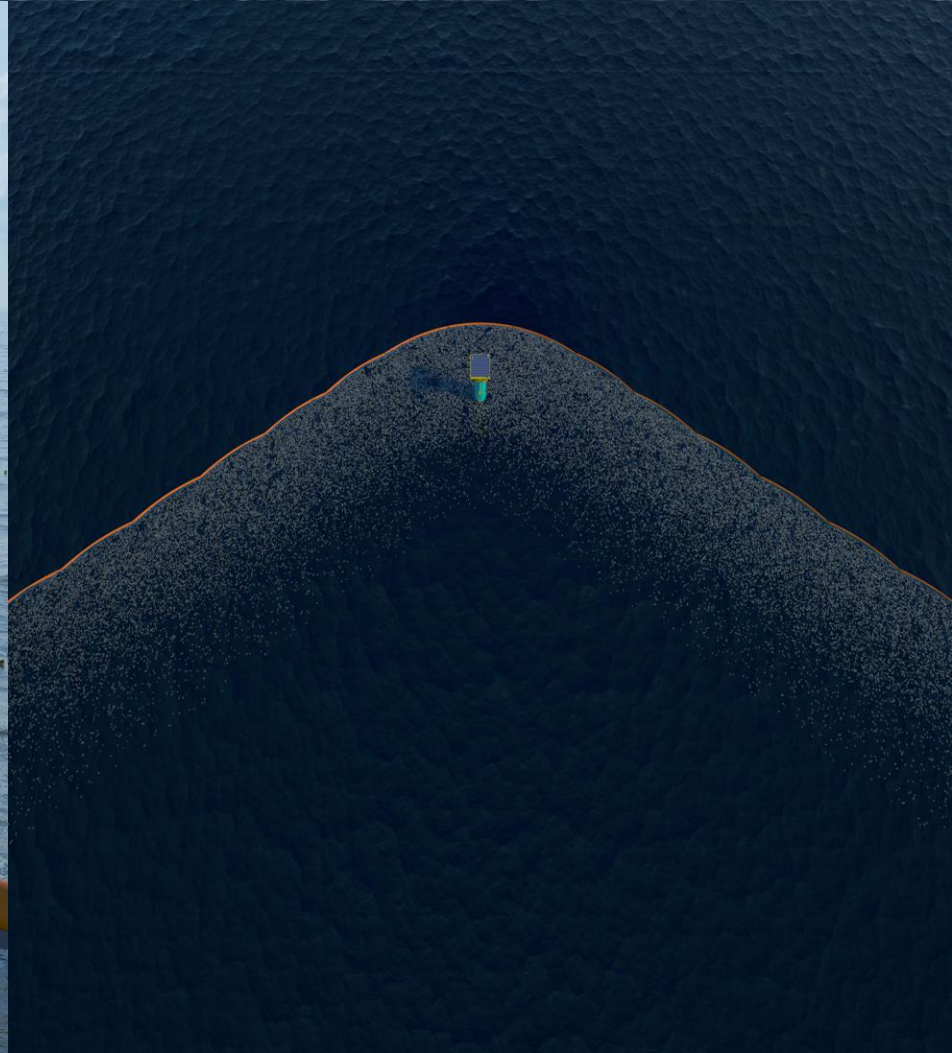
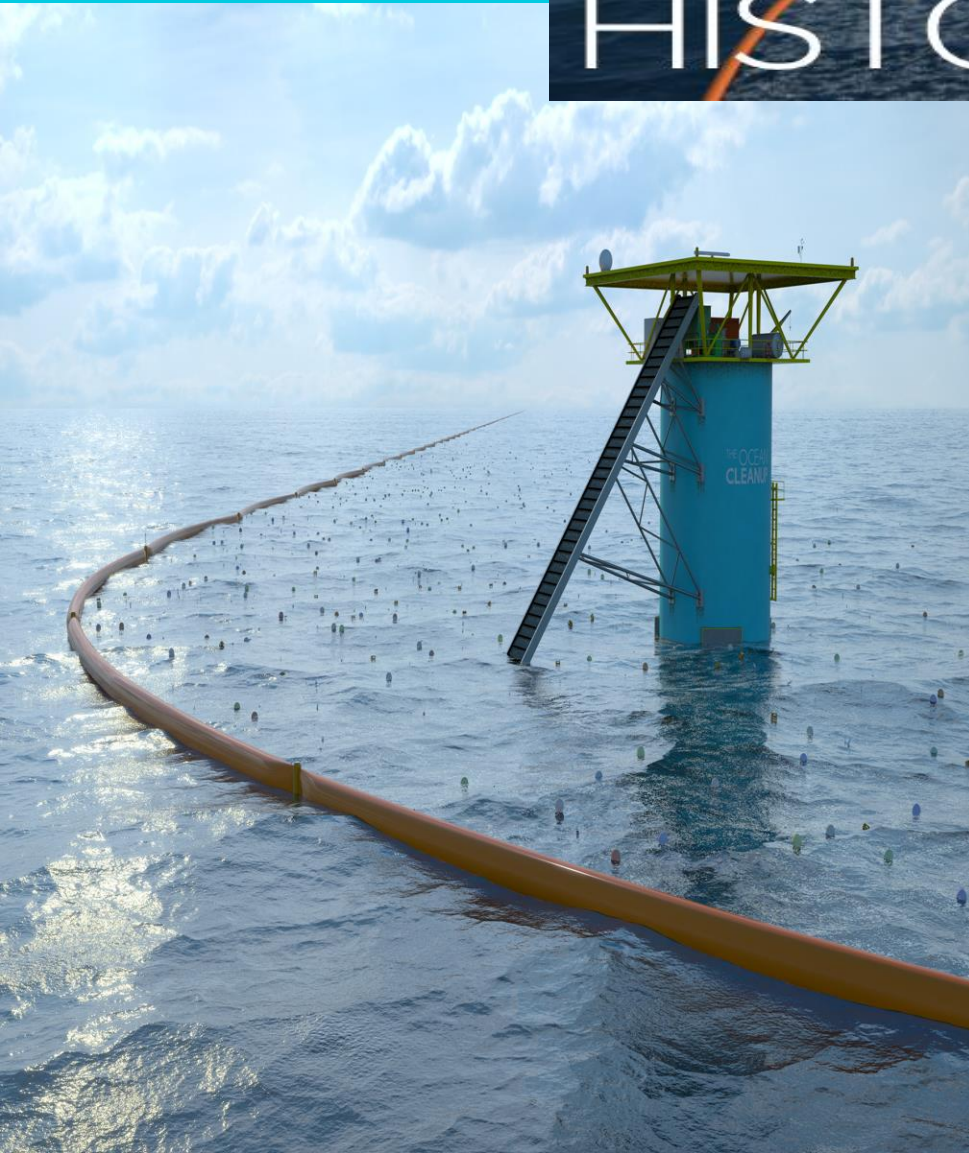
Overview

- I. The Ocean Cleanup proposal
- II. The legal regime governing the Array
 - A. Legal status
 - B. Unregulated High Seas Freedoms
 - C. UNCLOS substantive provisions
- III. Jurisdiction and control over the Array



THE OCEAN[®]
CLEANUP

THE LARGEST CLEANUP IN HISTORY



ROAD TO EXECUTION

By systematically eliminating technical risks through rapid iterations, we aim to start installation of the first full-scale array in the Great Pacific Garbage Patch by 2020.

THE FUTURE

- 2020
START PACIFIC CLEANUP
- 2017
DEPLOY THE PILOT

THE PRESENT

- 2016
AERIAL EXPEDITION
- 2016
NORTH SEA PROTOTYPE

THE PAST

- 2015
SCALE MODEL TESTING
- 2015
MEGA EXPEDITION
- 2015
VERTICAL DISTRIBUTION RESEARCH
- 2014
CROWD FUNDING CAMPAIGN
- 2014
FEASIBILITY STUDY
- 2013
THE OCEAN CLEANUP FOUNDED



MILESTONE / 2016
NORTH SEA PROTOTYPE

What is it?

- Definition of the Array as an installation
 - Not a naturally formed island
 - Not a vessel engaged in navigation
 - Not a means of transportation (unmanned)
- Look to specific instrument to assess whether Array falls within scope of application
 - UNCLOS
 - COLREGS, MARPOL, Intervention Convention, etc.



Unregulated High Seas Activity

UNCLOS Art. 87

High Seas are open to all States ... Freedom of the high seas is exercised under the **conditions** laid down by this Convention and by other rules of international law.

It comprises *inter alia*, ... (d) **freedom to construct** artificial islands and other **installations** permitted under international law.

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.



UNCLOS substantive provisions

- Generally applicable norms for activities in ABNJ
 - E.g peaceful purposes (art.88,147(2)(d), exercise effective jurisdiction and control (art.94), due regard for other legitimate ocean uses in ABNJ (art.87), take measures necessary to [protect and preserve the environment] (art.192, 194, 206)
- More specific provisions that are not directly applicable but instructive of generally applicable rule
 - E.g. Provisions on installations in the context of EEZ/CS (art. 60/80), Pollution, Deep Seabed Mining, Marine Scientific Research
- Main issue areas for TOC proposal set out by UNCLOS:
 - Accommodation with other ocean uses
 - Maritime Safety
 - Environmental Protection



Interference / Due regard / General Application

Accommodation of the Array with other high seas freedoms

Due regard:

- 1) cognizance of the interests of other states in their rights to exercise high seas freedoms.
 - Information gathering on existing fishing activities, cables, shipping lanes etc.
 - Providing information on the placement of the array.
- 2) Balance potentially conflicting rights (activities) with each other.
 - What is the nature of the rights/activities?
 - What is the extent of the interference?
 - What alternative approaches are there so that both activities can still take place?

Chagos Marine Protected Area Arbitration § 519



Interference / Due regard / Specific Provisions

- *Due Notice* (art.60(3), art.147(2)(c))

of the construction of an installation to be issued by coastal state / in accordance with ISA regulations → notice to mariners regarding dangers to navigation and such information affecting nautical charts, sailing directions and other nautical publications. **SAFETY**

- *Interference with recognized sea-lanes* (art.60(7), art.147(2)(b), art. 260)

Installations and their safety zones may not interfere with recognized sea-lanes essential to navigation (no obstruction where routing measures) / essential to international navigation or intense fishing activity.

- *Respect for the installation and safety zones* (art.60(6), art.260)

Vessels are to respect installations and their safety zones.

- *Protection of submarine cable* (art.112-115), 1888 Convention

Highly protected, imperative to prevent breaking or injuring cables, 1 nm distance to be kept to allow cable ships to maintain and repair cables.





Maritime Safety

Safety of the Array

- IMO standards developed in accordance with LOSC Art. 94(3-4) concerning the construction, equipment and seaworthiness, as well as the use of signals, the maintenance of communications and the prevention of collisions – Recommendation to apply to installations as to ships. **IMO Guidance Document MEPC.2/Circ.9 (FPSOs) 2010.**

Safety Zones

(art.60(4)-(6), art.147(2)(c), art.260, 1989 IMO Resolutions A.671(16),A.672(16), IMO Guideline of 2010 (FPSOs), ISA regs to be developed)

- Generally accepted standard: max. 500 meters measured from each point/side of the installation.
- Swing of movement may be factored in if necessary.

Signals and Maritime Safety Information

(art.60(3),art.147(2)(a),art.260)

- 'Due Notice' of construction or emplacement of installation
- Permanent means of warning of installation presence: physical signals, notices issued by national maritime administrations.
- Notice to Mariners via US Coastguard (responsible for sector XII)

Environmental Protection

UNCLOS

- broad obligations of general nature (art.194, art.145)

Prevent, **control, reduce pollution**

- EIA (art.206)

procedural tool enabling prevention, low threshold

Development environmental obligations (CBD, customary IL, specific instruments, etc.)

EIA in ABNJ (Pulp Mills and ITLOS Seabed Chamber AO 2011)

- in absence of international regulation specifying the content and scope of the EIA **it is for the state to determine** this taking into account the nature and magnitude of the proposed activity, likely adverse impact on the environment and need to exercise due diligence in conducting EIA.

1999 IAIA best practice operating principles and procedures

2012 CBD annotated Guidelines – “most useful for EIA of activities that are currently unregulated, with no procedure for assessing impacts”.



Calculability of Environmental Risk

Precautionary Principle in ABNJ

- more far-reaching protective environmental principle, requiring states to take preventive action at earlier stage – not just where ‘foreseeable risk of significant harm’ but preventive action even where scientific uncertainty as to environmental impact.
 - general application of such a principle to unregulated activities in ABNJ uncertain BUT:
 - UNGA Ban large-scale drift-net fishing 1989
 - Ban on large-scale ocean fertilization experiments culminating in 2013 adoption of amendment to LC/LP
- up to states to decide how to apply a precautionary approach, either increased care and diligence where scientific uncertainty or regulation/prohibition until scientific evidence available.



Jurisdiction and Control

- A state of registry?
 - UNCLOS art.109(3)(b), art.209(2), art.262
- Jurisdiction on High Sea on basis of nationality
 - UNCLOS ship nationality (art.91) and corresponding exclusive flag state jurisdiction (art.92) and duties of the flag state (art.94)
 - Applicability to objects other than vessels?
- National legislation
 - Up to states to decide on legislation concerning vessel registration, definition 'vessel' in national legislation may be broad enough to cover objects other than ships.



Additional Issues

- Liability for damage caused to / by the Array
- Importing the recovered plastic material

Thank you!

