

# Addressing Climate Change Impacts through UNCLOS Part XV Dispute Settlement Mechanisms

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# 1. The Value of Litigation

- Strengthens the hand of weak states
- Could turn Paris commitments into UNCLOS Part XII obligations
- Puts pressure on UNCLOS parties to deliver
- Might enable a tribunal to order further measures

But.....

- Politically difficult for small island states
- May hinder negotiations
- Procedurally complex if multiple parties
- Expensive to use arbitration
- Could lose! What then?

## 2. Possible cases

- 1. Non compliance with UNCLOS pollution control obligations
- 2. Non-cooperation as required by UNCLOS
- 3. Damage to coastal state caused by a future violation of UNCLOS obligations
- NOT going to discuss
- Claims for historic damage caused by climate change
- Claims for damage prior to negotiation of Paris Agreement caused by climate change





### 3. Is there Marine Pollution as defined in UNCLOS?

Art. 1 (1) (4) - “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”.



## 4. The Scientific Evidence

### Global average temperature

Very likely to exceed 2° C if atmospheric CO<sub>2</sub> concentrations continue to rise (UK Met Office)

### Ocean Warming

“Warming of the climate system is unequivocal, as is now evident from observations of increases in global average air and ocean temperatures, widespread melting of snow and ice and rising global average sea level.” (IPCC, AR4)

“Human-induced warming of the atmosphere and oceans is unequivocal.” (UN *Oceans & LOS 2017*)



## 5. More Scientific Evidence

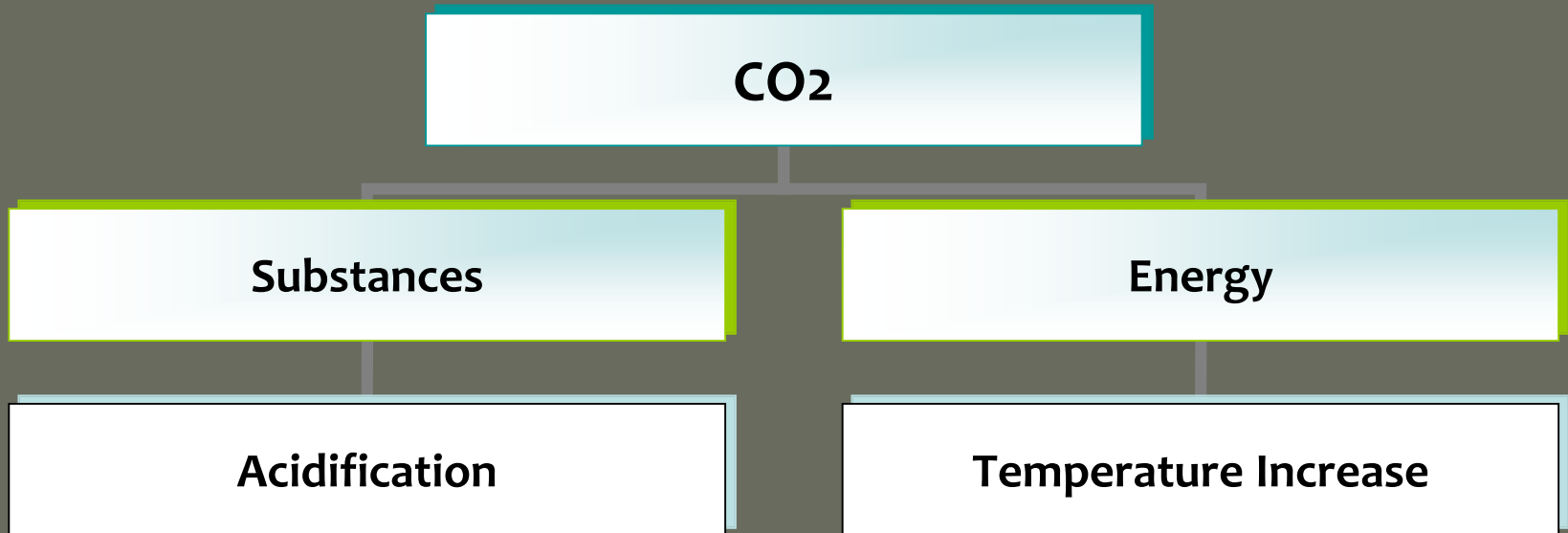
### CO<sub>2</sub> Uptake and Acidification

The surface ocean absorbs  $\approx 1/4$  of the emitted carbon dioxide to the atmosphere. “As more ... anthropogenic CO<sub>2</sub> has been emitted into the atmosphere, the ocean has absorbed greater amounts at increasingly rapid rates.” (CBD)

“Ocean uptake of CO<sub>2</sub> ... from increasing atmospheric CO<sub>2</sub> concentrations, reduces surface ocean pH and carbonate ion concentrations ...” as a result, “... the oceans are becoming increasingly acidic, jeopardizing marine biodiversity and even entire ecosystems (e.g. coral reefs).” (IOC/UNESCO)



## 6. Greenhouse gases as marine pollutants



CO<sub>2</sub> deposition and introduction of energy to the oceans are potentially pollutants

Do they cause harm to the marine environment and low-lying coastal states?



## 7. Are there “deleterious effects”?

- **UN 2017 *Oceans and the law of the sea***
- Sea-level rise and flooding in low-lying states
- Displacement of coastal communities – impact on private life, health, food and water supplies
- Coral bleaching and mortality
- Changes in distribution, abundance and productivity of marine species
- Intensification of extreme weather events
- **Conclusion: we can prove “deleterious effects” on coastal states and the marine environment**





## 8. UNCLOS Obligations

- **Art. 192** - Obligation to protect and preserve the marine environment.
- **Art. 194 (1)** – States shall take measures necessary to prevent, reduce and control “pollution of the marine environment from any source, using for this purpose the **best practicable means...**”
- **Art. 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...”



## 9. UNCLOS Obligations

- **Art. 207** – take account of generally accepted international rules, standards and recommended practices and procedures on land-based sources of marine pollution
- **Art. 212** – ditto on pollution from or through the atmosphere
- **Are there relevant generally accepted international rules & standards?**
- Yes

## 10. UNCLOS Applied

- Paris commitments = “all measures necessary” and “generally accepted international rules etc” under Arts 194, 207, 212
- **Paris Agreement** Art.2: Hold global temperature increases to ‘**well below**’ 2° C and if possible below 1.5°
- All parties to ‘maintain successive **nationally determined contributions**’ to reducing GHG emissions
- It’s the 2° objective that matters

# 11. UNCLOS Applied

- Conclusion:
- UNCLOS parties must comply with Paris targets?
- Ultimately a question of interpretation of UNCLOS, UNFCCC and Paris Agreement





## 12. Co-operation

- **Art 197:** Cooperate to formulate standards and practices for the protection and preservation of the marine environment.
- ***MOX Plant Case 2001*** and ***Land Reclamation Case 2003*** : “the duty to co-operate is a fundamental principle in the prevention of pollution of the marine environment”.
- ***SCS Case 2016***: “no convincing evidence of ... attempting to cooperate or coordinate with the other States”
- **Conclusion:** Parties must co-operate to implement Paris – does this strengthen the case? No



## 13. UNCLOS Part XV Jurisdiction

- Part XV Compulsory dispute settlement for disputes concerning marine environment – Articles 286, 288, 297(1), *Chagos and South China Sea*
- Would it cover climate change disputes based on UNCLOS?
- Yes: case based on Articles 192, 194, 207, 212
- There is an UNCLOS case
- There is also a UNFCCC case. Which prevails?
- Does UNFCCC Art 14 trump UNCLOS Part XV?





## 14. UNFCCC Art 14

- Negotiate and conciliate
- ICJ or arbitration only if parties agree
- If conciliation fails Article 281 UNCLOS applies – Part XV jurisdiction unless parties otherwise agree
- Only **express** agreement excludes UNCLOS Part XV: *South China Sea* overruling *Southern Bluefin Tuna*
- **There is jurisdiction over an UNCLOS case after UNFCCC procedures are exhausted – OR**
- **Proceed directly to Part XV!** See *South China Sea* (2015) on treaty parallelism: UNCLOS and UNFCCC cases are different.

## 15. Admissibility

- Two potential problems might arise
- Is there a dispute?
- Do we need to sue all the GHG emitting parties?
- Both issues in *Marshall Islands Case*





## 16. Part XV Forum

- UNCLOS Art 287: Choice of forum
- ICJ, ITLOS or special arbitration compulsory for parties that make Article 287 declaration – very few
- Art 282: ICJ compulsory jurisdiction for parties whose optional clause declarations do not exclude Part XV expressly – *Somalia/Kenya Case* – circa 30 states
- Annex VII arbitration default choice for everyone else or when parties have not made same choice
- **Most developing states have opted by default for Annex VII**

## 17. G8 States: Dispute Settlement Choice

States	UNCLOS	Dispute Settlement
Australia	Yes	ITLOS or ICJ
Canada	Yes	ITLOS or Annex VII Arbitration
France	Yes	Annex VII Arbitration*
Germany	Yes	1st choice - ITLOS
		2nd Choice - Annex VII Arbitration
		3rd Choice - ICJ
Italy	Yes	ITLOS or ICJ
Japan	Yes	Annex VII Arbitration*
UK	Yes	1st Choice - ICJ
		2nd Choice - ITLOS (case by case basis)
US	No	UNFSA only – Annex VIII Special Arbitration
EU	Yes	Annex VII Arbitration

\*Annex VII Arbitration by default, as no choice was made under Art. 287.

## 18. G20 States: Dispute Settlement Choice

States	UNCLOS	Dispute Settlement
Argentina	Yes	Annex VII Arbitration*
Brazil	Yes	Annex VII Arbitration*
China	Yes	Annex VII Arbitration*
India	Yes	Annex VII Arbitration*
Indonesia	Yes	Annex VII Arbitration*
South Korea	Yes	Annex VII Arbitration*
Mexico	Yes	ITLOS/ICJ/Annex VIII
Russia	Yes	Annex VII
		Annex VIII Marine environment
Saudi Arabia	Yes	Annex VII Arbitration*
South Africa	Yes	Annex VII Arbitration*
Turkey	No	n/a

\*Annex VII Arbitration by default, as no choice was made under Art. 287.



## 19. Annex VII Problems

- Most developing states have opted for arbitration.
- China, India, Brazil, SIDS can only sue/be sued under Annex VII
- The most **expensive** option by far
- Procedurally the most difficult
  - Multiple applicants
  - Multiple respondents
  - = Risk of multiple arbitrations? Or
  - = One case with multiple arbitrators? Art 3(g)





## 20. ICJ or ITLOS cases

- Better option for case involving multiple respondents
- Example of *Serbia v NATO* cases in ICJ
- Useful option only for suing Australia, Canada, UK, Germany, Italy, Mexico
- No use for suing EU, US, China, Russia, India, Brazil – Annex VII the only option
- Conclusion: Annex VII the only realistic option unless parties agree a transfer

## 21. Who can sue?

- Dispute concerning marine environment
- Part XII = Erga omnes partes obligations
- See *South China Sea Case*
- See also *Whaling Case*
- Enforcing compliance with treaties that create rights for all states
- **Any party can sue**



## 22. Remedies

- What remedies?
- Negotiate *Gabcikovo*
- Restitution *Trail Smelter*
  - = Do more – but what?
- Relationship with UNFCCC damage mechanism?





# CONCLUSIONS

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