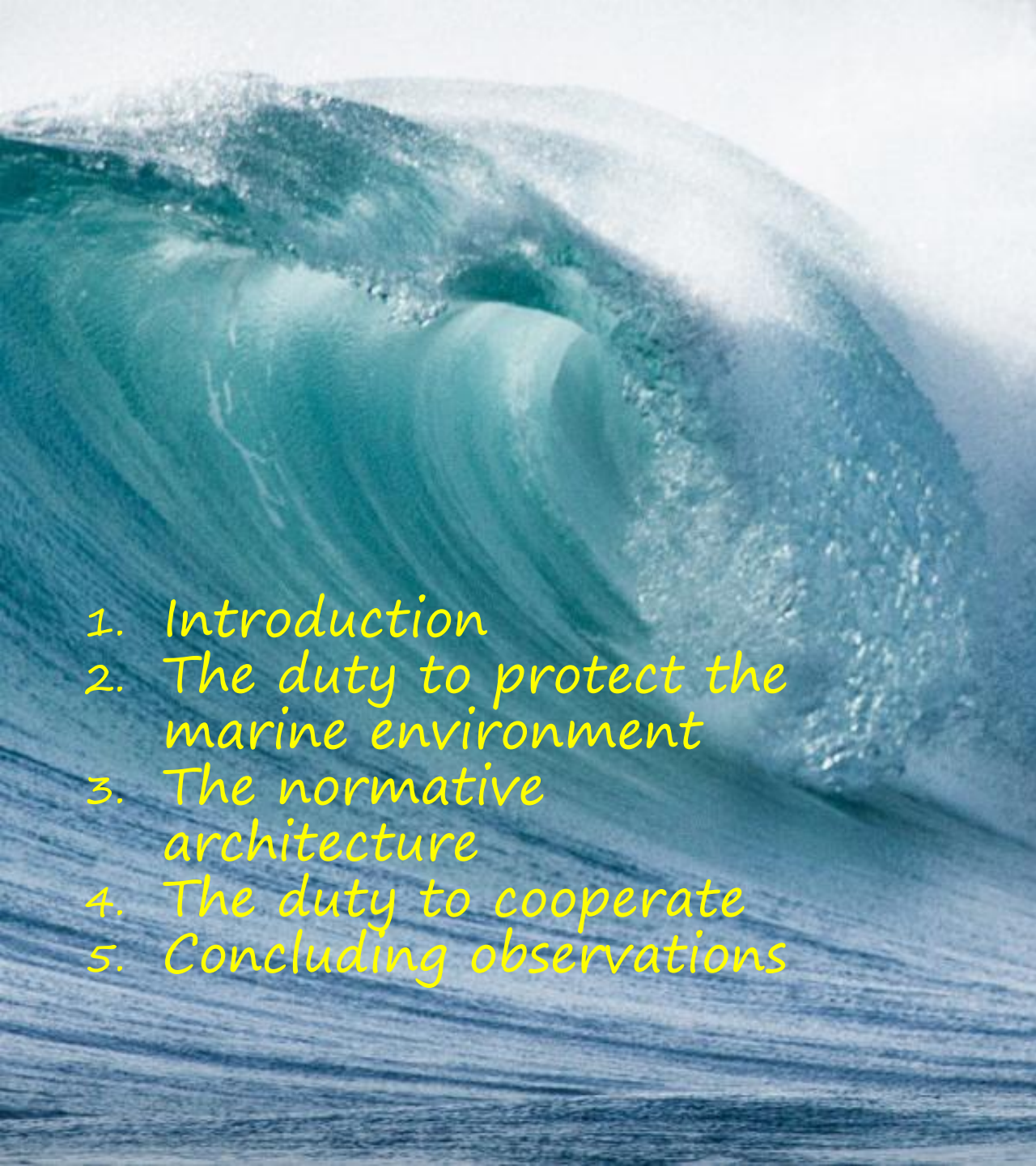


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 2. The duty to protect the marine environment
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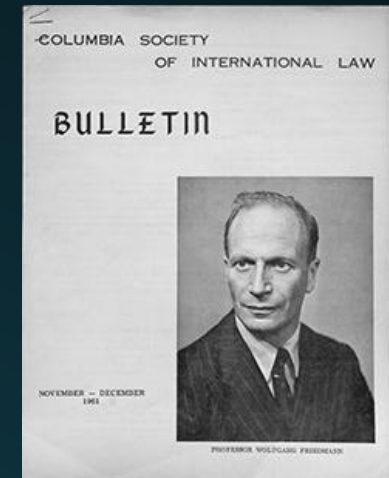
The Legal Framework for the Protection and Preservation of the Marine Environment

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1. Introduction

- Wolfgang Friedmann (1964):
 - The development of international law following WWII:
 - Classic international law of co-existence (territoriality)
 - Emerging law of international cooperation facilitated by global and regional organizations
- UN Stockholm Conference on the Human Environment, 1972
 - New organizations (UN Environment & Regional Seas Programme)
 - Change in mandates of existing organizations (e.g., FAO, IMO)
- UNCLOS III, 1973-82: 'competent international organizations' assigned roles as instruments of international cooperation

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2. The duty to protect the marine environment

- “States have the obligation to protect and preserve the marine environment” (UNCLOS art 192)
- Part XII is “not limited to measures aimed strictly at controlling marine pollution”; “certainly an important aspect of environmental protection ... [BUT] is by no means the only one.” (Chagos, 2015)
- “... the conservation of the living resources of the sea is an element in the protection and preservation of the marine environment” (Southern Bluefin Tuna, 1999)
- Article 192 is a duty to act “... informed by the other provisions of Part XII and other applicable rules of international law” (SCS, 2016)

Key principles & duties

To prevent, reduce and control pollution (e.g., UNCLOS, Part XII)

To conserve (e.g., UNCLOS, art 62; CBD; IWC; FAO instruments; SRFC Adv Op, 2015)

No harm, *sic utere tuo* (good neighbourliness)(e.g., UNCLOS art 196; Trail Smelter, 1938/41; Malaysia/Singapore, 2003; Pulp Mills, 2010; Seabed Adv Op, 2011)

Ecosystem-based approach (e.g., CBD; FAO Code of Conduct for Responsible Fishing)

Best environmental practices, environmental assessment (e.g., Seabed Adv Op, 2011)

Precautionary approach (e.g., Rio Declaration P15; London Convention; Seabed Adv Op, 2011)

Duty to notify, inform & responsibility to monitor (e.g., UNCLOS, art 198; Pulp Mills, 2010)

Polluter pays/liability for environmental harm (e.g., civil liability conventions; Seabed Adv Op, 2011)

Duty to adopt & enforce laws/regulations (e.g., UNCLOS)

Duty to cooperate (e.g., UNCLOS, arts 61, 62, 197; SRFC Adv Op, 2015)

Common but differentiated responsibilities (e.g., CBD; Paris Agreement)

Good faith and abuse of rights (e.g., UNCLOS art 300)

3. The normative architecture

- “The content of the general obligation in Article 192 [UNCLOS] is further detailed in the subsequent provisions of Part XII, including Article 194, as well as by reference to specific obligations set out in other international agreements, as envisaged in Article 237 of the Convention.” (SCS, 2016)
 - Art 237:
 - 1. The provisions of this Part are without prejudice to the specific obligations assumed by States under special **conventions and agreements** concluded previously which relate to the protection and preservation of the marine environment and to agreements which may be concluded in furtherance of the general principles set forth in this Convention.
 - 2. Specific obligations assumed by States under special conventions, with respect to the protection and preservation of the marine environment, **should be carried out in a manner consistent with the general principles and objectives of this Convention.**

Parts II-VI

- Regulation of IP, TP, AWP
- EEZ environmental jurisdiction
- Conservation & utilization of living resources
- Straddling stocks, HMS, mammals, anadromous, catadromous species

Part VII

- Conservation & management of high seas living resources
- UNFA

Part IX

- Cooperation in semi-enclosed seas

Part XI

- Protection of the environment of the Area from mining activities
- Environmental regulatory competence of ISA

Part XIII

- MSR environment protection considerations

Part XII

- General obligation to protect
- Measures to prevent, reduce and control pollution
- Duty not to transfer damage
- Introduction of alien species
- Global & regional cooperation
- Notification of imminent or actual damage
- Contingency plans against pollution
- Scientific and technical assistance
- Environmental assessment & monitoring
- LBS, seabed, Area activities, dumping & vessel pollution
- Enforcement by coastal, flag port states
- Principle of self-protection
- Enforcement procedures
- Ice-covered areas
- Responsibility & liability

- **Framework agreements**
 - UNCLOS
 - UNFCCC
- **General int law**
 - ILC Articles
- **Soft law**
 - Agenda 21
 - Stockholm, Rio (1&2), Joburg Declarations
 - Etc.
- **Shipping**
 - MARPOL
 - Ballast waters
 - Anti-Fouling
 - Ship recycling
 - Wreck removal
 - Intervention
 - Salvage
 - Civil liability instruments
- **Dumping/waste /CCS/geo-eng**
 - London Conv
 - Basel Con
- **LBS**
 - Montreal Guidelines
 - Washington Decl & GPA
 - Stockholm (POPs)
 - Minamata
- **Conservation**
 - CBD
 - Ramsar
 - CITES
 - WHC
 - IWC
 - Unesco Conv
 - Etc.
- **Fishing**
 - UNFA
 - Compliance Agreement
 - Port measures
 - FAO instruments
- **Climate law?**
 - Vienna
 - Montreal Prot
 - Kyoto
 - Paris
- **Human rights?**
 - Human rights law
 - UNDRIP

Relationship between UNCLOS and other conventions (global & regional)

- **Art 197**
 - Cooperation in formulation of global & regional rules, accounting for characteristic regional features
- **Arts 207-212**
 - Referential incorporation of internationally agreed rules, standards, recommended practices & procedures adopted through competent international organizations
- **Art 237**
 - Without prejudice to prior & subsequent agreements; consistency with UNCLOS
- **Art 311**
 - compatibility; modification/suspension by groups of states (subject to conditions)
- Operationalization of global duties at the regional/subregional levels:
 - Global convention sets general rules for regions
 - Global convention makes express provision for particular regions (e.g., MARPOL re marine regions as special areas/ECAs)
 - Global conventions spin off mirror agreements at the regional level (e.g., OPRC Convention re Mediterranean, Arctic)

4. The duty to cooperate

- “States shall cooperate on a global basis and, as appropriate, on a regional basis, directly or through competent international organizations, in formulating and elaborating international rules, standards and recommended practices and procedures consistent with this Convention, for the protection and preservation of the marine environment, taking into account characteristic regional features.” (UNCLOS art 197)
- “... the duty to cooperate is a fundamental principle in the prevention of pollution of the marine environment under Part XII of the Convention and general international law ...” (MOX Plant, 2001)(aff’d in Malaysia/Singapore, 2003)

Standard of the duty

- Duty to cooperate = a due diligence procedural obligation:
 - “...the obligation to ‘seek to agree ...’ [63(1) and the obligation to cooperate [64(1)] ... are ‘**due diligence**’ obligations which require the States concerned to consult with one another in good faith, pursuant to article 300 of the Convention. The consultations should be meaningful in the sense that substantial effort should be made by all States concerned, with a view to adopting effective measures necessary to coordinate and ensure the conservation and development of shared stocks.” (SRFC Adv Op, 2015).

Content of the duty to cooperate

- Contextual, direct or through international organizations
- Focus on common concern (bilateral, sub-regional, regional, global)
- Actions:
 - **Collaboration/acting jointly**, in accordance with their capabilities (UNCLOS art 191(1))
 - **Coordination** (UNCLOS arts 63(1), 123, 272, 276)
 - **Consultation** (UNLCLOS arts 66(2/3), 142, 169(1), 211(6); *SRFC Adv Op*, 2015; *Malaysia/Singapore*, 2003)
 - **Exchange** (UNCLOS arts 61(5), 119(2), 200; *Malaysia/Singapore*, 2003)
 - **Notify/inform** (UNCLOS arts 73, 142(2), 194, 198, 211(6/7), 226(1), 231)
 - **Report/communication of reports** (UNCLOS arts 94(6), 205, 206; *SRFC Adv Op*, 2015, re flag state to complaining state; WOA regular process since 2002)
 - **Technical assistance** (UNCLOS, art 202)
 - **Membership in international organizations**, as appropriate (implied in UNCLOS arts 197; UNFA)

Competent organizations (marine environment)

• Environment (general):

- UN Environment
- IAEA;
- IHO
- IMO
- IOC
- FAO
- ISBA
- UNIDO
- IHO
- UNESCO
- WMO
- World Bank (203)
- IUCN?
- IPCC?

• Navigation & shipping:

- IMO
- IHO
- IAEA

• Marine mammals:

- IWC
- FAO
- UNEP
- IMO?

• Seabed Mining:

- ISA
- IMO?

• Fisheries:

- FAO
- IOC

• MSR:

- IOC
- WMO
- FAO
- IAEA
- FAO
- IHO
- ISBA
- UNESCO
- UN Environment
- WHO
- UNDP
- World Bank

• LBS:

- UN Environment
- IMO
- IAEA
- UNIDO

• Dumping:

- IMO
- UN Environment
- IAEA
- WHO
- IOC

5. Concluding observations

- The duty to cooperate in marine environment protection and preservation/conservation is well-established.
- Regime participation issues – lack of universality, uniformity
- Normative framework:
 - Largely issue-based, sectoral, silos?
 - Gaps? LBS? Acidification? Plastics? Noise? Grey water? Physical systems (e.g., ice, ocean carbon sinks, currents, etc.)?
- Intergovernmental institutional framework:
 - Fragmented? Insufficiently transparent?
 - Danger of regulatory capture by interest groups/states?
- Clarificatory role of international courts/tribunals
- From an international law of co-existence to an international law of cooperation to an international law of common concern for the environment: what next?
 - Greater accountability and transparency?

Thank you

Questions & comments?

Regimes for co-existence and cooperation

