DISCUSSION SUMMARY
FORUM 1: PROTECTION OF THE MARINE ENVIRONMENT AND CLIMATE CHANGE

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1. INTRODUCTION

The forum on ‘Protection of the Marine Environment and Climate Change’ stressed the important role of the oceans in the global climate system, *inter alia* for the water and carbon cycle.

It also illustrated the manifold threats that are posed on the marine environment. The hazards firstly derive directly from the consequences of climate change and include rising water temperatures or ocean acidification. Secondly, they result from attempts to mitigate climate change, e.g. via carbon capture and storage (CCS). It was stressed that these perils add to the existing problems deriving from multiple uses such as shipping, fishing, resource extraction etc. and the implied effects on the marine environment like pollution, overexploitation and many more.

The resulting threats not only impair the ocean’s capacity to mitigate climate change e.g. by the oceans’ function as CO₂ sink, but also imperil marine biological diversity.

2. DISCUSSED TOPICS

There was a broad consensus among forum participants that in light of the identified hazards the regulation of marine environmental protection is highly unsatisfactory.

2.1. Hard or Soft Law Approach

The discussion centred on the way forward to improve regulation of the marine environment and specifically on the question of whether a hard or a soft law approach is preferable.

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Although subject to considerable debate among legal scholars, hard and soft law are generally distinguished by their binding or nonbinding character. Some scholars, however, conduct the characterisation along the three parameters precision of rules; obligation; and delegation to a third-party decision maker. Accordingly, ‘[t]he realm of “soft law” begins once legal arrangements are weakened along one or more of [these three] dimensions’.4

The discussion showed that the differentiation between soft and hard law in the sense of the first definition is not a clear-cut issue in many cases. Jochen Flasbarth reported about the experience from the Convention on Biological Diversity (CBD),5 where there are differing views within the different departments of the Federal Environment Agency (UBA) whether the decisions of the Conference of the Parties (COP) create legally binding obligations on the Member States.

Catherine Redgwell pointed out that the decisive quality of a legal instrument lies in its normative pull, which depends on a range of issues, e.g. its hortatory or mandatory wording, and not only on its binding or non-binding character.

2.2. Fragmentation

Another matter the discussion evolved around was the issue of fragmentation and the ensuing risk of conflicting obligations. Fragmentation of international law refers to the ‘emergence of specialized and (relatively) autonomous rules or rule-complexes’6 such as trade law, environmental law, law of the sea etc. The issue comes to the fore where parallel regulations applicable to the same matter trigger the question of which one should be applied to a given case.

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2 See e.g. Dinah Shelton (ed), Commitment and Compliance: The Role of Non-Binding Norms in the International Legal System (Oxford Univ. Press 2000).
4 Ibid., 422.