Law of the Sea Perspectives on Climate Change

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Abstract
The Law of the Sea Convention was negotiated at a time when climate change was not yet part of the international environmental agenda. Nevertheless, it is not a static or immutable legal regime and it is not difficult to apply Part XII to greenhouse gas (GHG) emissions and climate change insofar as they affect the marine environment. However, it is doubtful whether viewing climate change from the perspective of the law of the marine environment greatly alters the overall picture. At best it provides a vehicle for compulsory dispute settlement notably lacking in the UN Framework Convention on Climate Change (UNFCCC) regime. Realistically, while the 1982 Convention may import any newly agreed standards for the control of GHGs, it is not a substitute for further agreement within the UNFCCC framework.

Keywords
Law of the Sea; climate change; marine environment; marine pollution; dispute settlement

Climate Change and the Law of the Sea Convention

The Law of the Sea Convention (LOS Convention or 1982 Convention; 1833 UNTS 396), whose 30th anniversary this journal is rightly celebrating, was negotiated at a time when climate change was not yet part of the international environmental agenda. Not surprisingly the focus of Part XII is on concerns that were prominent in the 1970s, including marine pollution from ships and dumping, and the protection of fragile ecosystems and endangered species. Nevertheless, the 1982 Convention must be “interpreted and applied within the framework of the entire legal system prevailing at the time of the interpretation.” Integration within that larger system, not fragmentation from it, must necessarily be the starting point when considering the further evolution of the law of the sea.

Although the 1982 Convention says nothing explicit about climate change or greenhouse gas (GHG) emissions, the provisions of Part XII are increasingly

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relevant to climate change insofar as GHG emissions cause marine pollution and harm the marine environment. In particular, Article 192 provides that “States have the obligation to protect and preserve the marine environment.” The ‘marine environment’ for this purpose includes “rare and fragile ecosystems as well as the habitat of depleted, threatened or endangered species and other forms of marine life.” In addition, States parties also have an obligation under Article 117 to conserve “the living resources of the high seas”. The latter phrase certainly covers fish and marine mammals. Later treaties, such as the 1992 Convention on Biological Diversity (CBD; 31 ILM 818 (1992)), suggest that Part XII can readily be interpreted to cover protection of marine biodiversity in general, and conservation of coral reefs in particular. The obligation of States is thus not confined to the protection of economic interests, private property or the human use of the sea implied in the Convention’s definition of ‘pollution’.

For low-lying States and small islands, sea-level rise and changes in the marine ecosystem are the most immediate threats posed by climate change. As we have seen, atmospheric deposition of CO$_2$ into the marine environment arguably falls within the terms of Article 192 and the subsequent provisions of Part XII. It may be that other GHGs are also relevant, but CO$_2$ appears to be the most important and to have the greatest impact on the health of the oceans. Article 194 requires States to take measures necessary to prevent marine pollution “from any source”. There is an indicative list of sources in Article 194(3) which covers, inter alia, “the release of toxic, harmful or noxious substances, especially those which are persistent, from land-based sources, from or through the atmosphere or by dumping.” While anthropogenic GHGs are not specifically listed here, it is entirely plausible to read Article 194(3) as covering atmospheric depositions of CO$_2$ resulting in marine pollution. A significant proportion of marine pollution already comes from airborne depositions, and it has never been suggested that this is excluded from the LOSC. If there were any doubt about this, reference could also be made to Article 207 on land-based sources of marine pollution. Article 212 would cover CO$_2$ emissions from ships or aircraft, although it might be argued that it goes no further than that. Taken together, Articles 194, 207 and 212 appear to cover all airborne sources of marine pollution comprehensively, including GHGs.

These CO$_2$ emissions have caused marine pollution. Article 1(1)(4) of the LOSC defines ‘pollution of the marine environment’ to include the

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2 Article 194(5).
3 See Articles 118–120.