



# Book - Unit 2 - The Law of the Sea

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Course: Introductory Course to the International Legal Framework on Marine Pollution

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# 1. The Law of the Sea Process

In the mid-twentieth century, international competition over rights to harvest fisheries in outside of territorial waters led to disputes between states. Extraction of hydrocarbons and minerals from the continental shelf and deep sea bed, respectively, also led to disputes among states. Increasing populations and technological advancements created impetus for states to assert claims of national jurisdiction further from the coast, setting them on collision courses.

The United Nations took up the issues and, in an effort to find lasting solutions to the problems, tasked its International Law Commission to codify principles customarily applied by states to their uses of the sea. The work of the Commission led to the gradual development of a number of conventions that addressed, inter alia, marine pollution issues.

## United Nations Conferences on the Law of the Sea

The first United Nations Conference on the Law of the Sea, held in 1958, adopted four separate Conventions on laws of the sea. Respectively, they dealt with the high seas, the territorial sea and the contiguous zone, the continental shelf, and fishing and conservation of the living resources of the high seas. A voluntary protocol was also adopted requiring the compulsory settlement of disputes that might arise between parties as a result of interpretation or implementation of the conventions. However, the four Conventions did not address the problem of marine pollution in any detail and were overtaken by subsequent international agreements.

A second conference on the Law of the Sea in 1960 was unproductive but a third was a major success in producing agreement. It was convened in 1973 and met twice a year until 10 December 1982, when the omnibus United Nations Convention on the Law of the Sea (“UNCLOS”) was adopted.

## United Nations Convention on the Law of the Sea

UNCLOS entered into force on 16 November 1994 and has 167 parties (March 2015). In the twelve -year period prior to its entry into force, some of the provisions of UNCLOS had matured into customary international law and became binding on all states.

UNCLOS establishes the international legal order of the oceans. The variety of subjects dealt with is covered in a total of 320 articles, divided into seventeen parts, each part dealing with a broad subject concerning the sea. In addition, UNCLOS has nineteen Annexes, each dealing with a specific marine issue. The subject of prevention of marine pollution is covered mainly under part XII of UNCLOS. Some relevant rules are located in other parts, especially part II, concerning the territorial sea, and part XI, concerning the deep sea bed.

## 2. The Law of the Sea and Marine Pollution

Part XII of UNCLOS is a ground-breaking achievement, entirely dedicated to protection of the marine environment. The 45 articles apply to seas and oceans forming the territories of parties, and their exclusive economic zones including the sea bed and to the high seas, ocean floor and ice-covered areas.

It is set out in sections that concern general provisions, global and regional cooperation, technical assistance, monitoring and environmental assessment, international rule formation, enforcement, safeguards against inept enforcement, ice-covered areas, responsibility and liability for pollution damage and sovereign immunity.

## Definition of marine pollution

The definition of marine pollution in UNCLOS (article 1(4)) is: *“...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 hazard 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.”*

*This definition raises the problem of identifying thresholds for the various threats described in it. Implicit in that problem is identifying what the assimilative capacity of the marine environment is since the scientific understanding of the ocean's assimilative capacity is not well advanced.*

## Key provisions

The key provisions of Part XII of UNCLOS include:

- Article 192 which states the obligation to protect and preserve the marine environment;
- Article 193 which preserves the sovereign rights of states to exploit their own natural resources reflecting the concern of many countries, particularly developing countries, to ensure that they are not obstructed from following the quickest possible path to industrial development;
- Article 194 which provides that states are to take all measures necessary to prevent, reduce and control pollution of the marine environment using the best practicable means at their disposal and in accordance with their capabilities. The environment protection obligations are heavily qualified by reference to the limits of state capabilities and, later, by reference to their sovereign right to exploit their natural resources. Article 194 also sets out the obligations for states not to cause damage by pollution to other states and their environment or areas beyond those where states exercise sovereign rights, that is, the high seas. Article 194 is based upon obligations in customary international law, as articulated in the Trail Smelter and Corfu Channel cases, and Principle 21 of the Stockholm Declaration; and
- Article 195 which imposes a duty not to transfer pollution from one type to another, or from one area to another. For example, sewage can be a land-based source when discharged from an ocean outfall, but may be transformed into a dumped source if it is partially treated and the sludge is then dumped at sea by a barge.

## Principles of International Environmental Law

It has been almost three decades since these general principles were formulated and other, newer principles have since caught the imagination of the international environmental community.

In addition to the notion of sustainable development, there are the precautionary principle, integrated ecosystem management, biodiversity conservation, use of best available technologies or environmental practices, and the eclipse of the notion of the right to maximize use of the oceans assimilative capacity.

In relation to these newer concepts, UNCLOS is largely silent, but provides a vehicle for separate new legal initiatives. For example, article 194(3)(a) requires the parties to minimise release of toxic substances to reduce the potential of their reaching the marine environment. This provision has relevance to the implementation of the Stockholm Convention on Persistent Organic Pollutants of 2001.

## States obligations

Other important aspects of Part XII of UNCLOS include:

- Article 198 requiring states to immediately notify others deemed likely to be affected by any form of threatening pollution, whether it emanates from activities or areas under the jurisdiction of the notifying state or not;
- Article 202 requiring states to cooperate in scientific research and information exchange, and to jointly conduct the research necessary to establish appropriate scientific criteria for the formulation of rules to protect the environment;
- Article 203 obligating states to provide scientific and technical assistance to developing states to enhance their capacity to protect the marine environment, specifically including the preparation of environmental assessments and assistance in minimizing the effects of major pollution incidents;
- Article 204 mandating that states keep under particular surveillance the effects of any activities that they engage in directly or permit in order to determine whether those activities are likely to pollute the marine environment. This is a relatively low threshold for the requirement to identify activities that are to be kept under surveillance;
- Article 205 providing that states must publish reports of the results obtained by their monitoring activities;
- Article 206 requiring states to assess the potential effects of activities which they have reasonable grounds to believe may cause substantial pollution or significant harmful changes to the marine environment and to communicate such reports to the competent international organizations. The latter assessment is also, in effect, an obligation to conduct Environmental Impact Assessments (“EIA”);
- Article 213-233 providing for enforcement through investigation of violations, criminal proceedings against offenders, imposition of monetary penalties against offenders and several other sanctions and remedies, as well as limitations on enforcement;
- Article 235 providing that parties shall be responsible and liable for pollution damage under international law should they fail to carry out their duties and responsibilities; and
- Article 237 providing that UNCLOS should be implemented without prejudice to the environmental obligations imposed under other treaties relating to the marine environment.

## Chapter XII and other treaties

Chapter XII of UNCLOS sets out a broad framework for comprehensive measures to control marine pollution. Although drafted a quarter century ago and prior to the development of the sustainable development paradigm, its provisions still provide a solid basis for the prescription of standards and for their enforcement regimes. The provisions are supplemented by a range of treaty laws that prescribe standards in much greater detail for more narrowly defined sources of pollution or for particular regions.

### 3. Dispute settlement

In case any disputes arise as a result of the interpretation or implementation of the provisions of the Convention, they are to be resolved in the manner provided for by the Convention.

Parties have an obligation under part XV to settle all their disputes by peaceful means. Part XV sets out a compulsory procedure for binding dispute resolution that is unique among environment protection treaties. First, parties are obliged to conciliate. If conciliation fails, they must resolve the dispute by means of a binding decision handed down by their choice of either the International Tribunal for the Law of the Sea (“ITLOS”), the International Court of Justice (“ICJ”) or by an arbitral panel. Either a general panel (Annex VII) or a specialist environmental panel (Annex VIII) can arbitrate the dispute.