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THE OBLIGATION OF STATES TO PROTECT AND PRESERVE THE MARINE ENVIRONMENT

Summary of the general report

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INTRODUCTION

In their declaration adopted on July 1, 2022 (Our Ocean, Our Future, Our Responsibility), participants at the Lisbon conference renewed their political commitment to take appropriate action to address the ocean crisis. They acknowledged a "collective failure » to achieve ocean-related goals and expressed "deep alarm at the global emergency facing the ocean". Paragraph 10 of the declaration recalls “the need to enhance the conservation and sustainable use of oceans and their resources by implementing international law as reflected in the United Nations Convention on the Law of the Sea, which provides the legal framework for the conservation and sustainable use of the oceans and their resources”.

The purpose of this convention is to establish a legal order for the seas and oceans, within which appears the regime for the international protection of the marine environment (Part XII). Among the general principles that form the central body of this international regime, the principle of international responsibility (article 235 of UNCLOS) emphasizes the general accountability of States, that is to say their general ability to account for their actions and inaction on the state of the oceans: States are legally responsible for the degradation of the oceans and seas, because they have solemnly committed themselves, with the full authority of international treaties, to effectively reduce threats to marine life and to restore the state of the oceans if it is affected by human activity.

While inspired by the principles of international environmental law, the international protection regime established by Part XII is specific to the marine environment and adapted to its natural and legal particularities. The drafters of the Convention on the Law of the Sea succeeded in designing this protection for the seas and oceans by inventing the legal concept of "marine environment", characterized by its uniqueness, its legal unity, and the interconnection of marine life. The establishment of this unique regime of the marine environment has made it possible to extend international legal protection to the high sea and the seabed, in the interest of mankind and in the common higher interest of States.

The General Report is intended as a practical guide to Part XII of the Law of the Sea Convention in view of the Monaco colloquium in May 2023.

1. DEFINITION OF THE MARINE ENVIRONMENT

What is the marine environment? Does any species that interacts with a marine area belong to the marine environment? Are all marine areas included? Where does the terrestrial environment begin?

« "Marine environment" includes the physical, chemical, geological and biological components, conditions and factors which interact and determine the productivity, state, condition and quality of the marine ecosystem, the waters of the seas and oceans and the airspace above those waters, as well as the seabed and ocean floor and subsoil thereof ».[1]

- It is apparent from the relevant definition for the interpretation of the Convention on the Law of the Sea that the marine environment refers to the field of interaction for marine life. In other words, the place where different elements, whatever their nature, interact with each other and give rise to marine life.
- The marine environment is therefore a space characterized by its uniqueness. This is made possible not only by the interconnection between the different ecosystems and life cycles that compose it, but also by the absence of material barriers which ensures continuity and fluidity of the environment.
- Finally, the marine environment is a single space. It encompasses all seas and oceans and all maritime areas (whether under national jurisdiction or beyond national jurisdiction).
- These different characteristics of the marine environment (interactivity, uniqueness and unity) raise the question of its extent. From the airspace to the seabed, from coastal areas and estuaries to the high sea, the marine environment is one and encompasses all areas that interfere in any way with marine life.

These different elements of definition highlight the concordance between the legal conception of the marine environment and its scientific reality. This coherence is important in that it allowed the drafters of UNCLOS to establish a single legal regime of international protection that applies to the entire marine environment, including the estuary and the coastline.

[1] Regulation 1- Use of terms and scope, para. 3(c), *Regulations on Prospecting and Exploration for Polymetallic Nodules in the Area*, ISA, Kingston, 22 July 2013, ISBA/19/C/17.

2. THE CONCEPTS OF "PROTECTION" AND "PRESERVATION" OF THE MARINE ENVIRONMENT.

The second part of this report focuses on the distinction between "protection" and "preservation" of the marine environment and the scope of the distinction.

The object of protection is to deal with a threat or a future event and therefore relates to the prevention of damage, even if it also includes measures aimed at reducing and controlling it. Prevention aims at the state, situation, condition, way of being of the sea currently and its maintenance or improvement.

- The distinction between the action of protecting and that of preserving operates on the criterion of temporality. The States have an obligation to act in order to protect the marine environment from any future harmful event and to preserve (or improve) its current state by protecting it from any disturbance of its ecological balance. The idea adopted here is that protection and preservation refer to two distinct types of obligations.

- Despite this, the complementarity of these two concepts (protection and preservation) is the key to ensuring the effectiveness of the legal regime established by Part XII. Damage to the marine environment that is not covered by the action to protect is covered by the action to preserve and vice versa).

- Finally, the protection and preservation of the marine environment also includes the conservation of biological resources. This integration permit to take into account the problems linked to the overexploitation of fishery resources and the disappearance of marine species.

3. THE OBLIGATION TO PROTECT AND PRESERVE THE MARINE ENVIRONMENT.

The third part of the report focuses on Article 192 of the Convention, which establishes a general obligation for States to protect and preserve the marine environment. · The content of Article 192 is analyzed strictly, but also in relation to the other provisions of the Convention and by taking into account international jurisprudenceThe content of Article 192 is analyzed strictly, but also in relation to the other provisions of the Convention and considering international jurisprudence.

The obligation to protect and preserve the marine environment is a general principle established by the Convention. This obligation has the broadest scope and its application cannot be restricted by any other provision of the Convention. This generality strongly influences the interpretation of the other provisions of Part XII.

- The obligation to protect and preserve the marine environment is a "general" or "generic" obligation. On one hand, this implies that it brings together a series of international obligations (obligation to protect, preserve, required, not to harm the marine environment, obligation of prudence and precaution, etc.) On the other hand, to be effective, this obligation does not allow any derogation, exception or restriction.
- Combined with the understanding of article 145 (Protection and preservation of the marine environment) (part XI), the general character of the obligation to protect and preserve the marine environment of article 192 (part XII) is clarified and reinforced. Indeed, article 145 specifies that the protection and preservation of the marine environment must be done effectively. All the risks that threaten the marine environment must be considered together with any disturbance of its ecological balance, but also the conservation of resources and damages to marine fauna and flora.
- Interpretation of Article 192 in conjunction with Article 193 reflects the need to reconcile the economic interests of States, linked to the exploitation of the natural resources present in the maritime areas under their jurisdiction, and the interests of the international community in protection and preservation of the marine environment. While the Convention takes full account of the sovereign rights associated with the exploitation of resources, it remains that these must be exercised in accordance with the provisions of the Convention, which include the obligation to protect and preserve the marine environment and all of the provisions of Part XII without exception.

4. PREVENT, REDUCE AND CONTROL MARINE POLLUTION AND OTHER RISKS, AS WELL AS ADDRESS THE DETERIORATION OF THE OVERALL STATE OF THE MARINE ENVIRONMENT.

The fourth part of the report focuses on the content of Article 194 which provides for the obligation of States to prevent, reduce and control marine pollution. Composed of 5 paragraphs, it covers different situations which are all part of the general obligation to protect and preserve the marine environment (Article 192).

Article 194 is drafted in terms whose generality excludes any restriction on the duty to prevent marine pollution. The due diligence obligation applies to all States; it includes all sources of pollution, requires taking all necessary measures and targets damage to the marine environment, a notion that includes all maritime areas, including littoral zones and the high seas.

- Article 194(1) refers to the obligation of all States to take the necessary measures to prevent, reduce and control pollution of the marine environment. The obligation to take "necessary", "appropriate" measures or "to ensure" is a so-called due diligence obligation. What does this mean? The duty of care is an obligation of "conduct" and not of result. It means that the State must use all necessary means and endeavour, as far as possible, to ensure that an activity carried out by the State, or by an entity under its jurisdiction (e.g. a company), does not cause serious harm to the marine environment. The responsibility of the State can therefore only be engaged if it is shown that it did not use all the means at its disposal to prevent the occurrence of the serious harm.

- Paragraph 1 of Article 194 may be invoked by a State which has suffered no damage to its marine environment. Unlike compensation for transboundary damage, the obligation referred to in paragraph 1 is an obligation *erga omnes partes*, i.e. an obligation of general interest.

- Paragraph 2 of Article 194 prescribes the obligation of States to take such measures as may be necessary to prevent damage to the environment of another State caused by an activity under its jurisdiction or control. This provision refers to the notion of transboundary damage that includes the protection of the sovereignty of the State and its environment. The occurrence of such damage causes environmental harm to an identified State which may then claim reparation as an injured State.

- The due diligence obligation is assessed on a case-by-case basis and may vary over time. Indeed, the degree of diligence required may change depending on the means available to the State taking the measures, the area concerned, the vulnerability of the

threatened ecosystem, the urgency of the situation, the nature of the risk, its seriousness or the probability of its occurrence.

- Paragraph 3 of Article 194 reinforces the general scope of the duty of care. Indeed, it specifies that the measures taken by States must cover all sources of pollution of the marine environment (land-based pollution, introduction of energy, radioactive substances, noise pollution, use of explosives, light pollution, global warming, etc.).

- Paragraph 5 of Article 194 also reinforces the generality of Article 194 by specifying that the due diligence obligation is aimed at the conservation of marine life. Indeed, paragraph 5 integrates, in the general obligation of article 192, the obligation to preserve rare or delicate ecosystems, as well as the habitat of species and other marine organisms. This provision is not restrictive.

5. THE OBLIGATION TO COOPERATE

The fifth part of the report is devoted to Section 2 of Part XII which deals with the duty of interstate cooperation. International cooperation is a tool or a means available to States to work collectively for the protection and preservation of the marine environment. It is necessary to analyze the content of this obligation and how it must be implemented, along with emphasizing the underlying obligations which it implies :

« States shall co-operate on a global basis and, as appropriate, on a regional basis, directly or through competent international organisations, 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 »[2].

- The duty to cooperate in the protection and preservation of the marine environment is a general principle widely affirmed by the Convention and by international jurisprudence.
- The role of international cooperation is twofold. On the one hand, cooperation is a means made available to States to implement their obligation to protect and preserve the marine environment. This is its instrumental function. On the other hand, cooperation is a tool for preventing maritime pollution. This second function of the duty to cooperate is made explicit in Article 194 of the Convention and reaffirmed by the case law of the International Tribunal for the Law of the Sea (Mox Factory (Ireland v. United Kingdom), Order, p. 110, para. 82).
- Cooperation in the protection and preservation of the marine environment can be global or regional. This alternative allows States to opt for the mode of cooperation that seems to them the most appropriate to a defined situation. Thus the case of pollution in enclosed and semi-enclosed seas (Article 123 of the Convention) requires cooperation adapted to the geographical reality.
- To effectively fulfill their duty to cooperate, States adopt a number of procedural measures to facilitate and develop inter-State cooperation in the protection and preservation of the marine environment. Such measures are evidence of cooperative behavior by the State. This is why the obligation to cooperate is considered as a procedural obligation.

[2] Article 197 UNCLOS.

6. THE PRECAUTIONARY APPROACH.

The sixth part of the report deals with the obligation of States to apply a precautionary approach when carrying out activities whose effects could have consequences for the marine environment.

When an activity under the authority or control of a State is carried out, the State shall adopt a precautionary approach to that activity, where there is a risk of serious or even irreversible harm to the marine environment. The State is expected to take precautionary measures in regard to this activity, even in the absence of scientific certainty about its actual impact. In the event of serious harm to the marine environment, the State would be liable if it were found not to have taken the necessary precautionary measures to prevent the risk from occurring.

- The precautionary approach to the protection and preservation of the marine environment is conventionally accepted by the Regulations on prospecting and exploration for polymetallic nodules and sulphides adopted by the ISA.
- A State must adopt a precautionary approach whenever (1) an activity under the jurisdiction or control of that State is conducted, (2) there are substantial grounds for believing that there is a risk of harm to the marine environment, and (3) the threshold of seriousness implies that the harm cannot be ignored.
- The distinctive feature of the precautionary approach is that a State must take precautionary measures even though there is scientific uncertainty that the activity in question will indeed have a serious or even irreversible impact on the marine environment.
- In order to fulfil its obligation to adopt a precautionary approach, every State must take all necessary measures to anticipate the risk of damage. The obligation of prudence and precaution formulated by the International Tribunal for the Law of the Sea specifies this behaviour expected from the State. It implies, for any State, to adopt a set of measures (safeguards measures, enforcement measures, cooperation measures, evaluation measures), defined and ordered.
- The precautionary approach is an integral part of the due diligence obligation set out in article 194 of the Convention. This implies that by failing to take a precautionary approach when carrying out an activity at sea, when it should have done so, the State is in breach of its duty of care and, more broadly, of its obligation to protect and preserve the marine environment.

7. THE CONVENTION IN THE INTERNATIONAL SYSTEM.

The United Nations Convention on the Law of the Sea does not hang in the air. Nevertheless, it occupies a special place among international treaties. Part XII on the marine environment illustrates the strong characteristics of the Convention. The first thing to note is the density of its requirements. This part brings together the general principles of international marine environmental law. It can only be understood as coherently obeying the rationality of the interpretation of international treaties (A). The Convention is intended to codify the customary international law of the sea and Part XII contributes to this objective. We can thus observe the transitivity of its provisions with the principles of international environmental law, in particular (B). The Convention also has a unifying objective, which is particularly asserted for Part XII and which is reinforced by international justice of the sea (C).

A. Read the Convention

- The interpretation of UNCLOS is guided by the principle of consistency that governs treaty law. It ensures that a text is interpreted in a uniform, and therefore predictable, manner by States. Thus, the obligation to protect and preserve the marine environment must be interpreted in the context of the Convention and in accordance with its object and purpose[3].

- UNCLOS is also governed by the principle of good faith in its application and interpretation. States must respect the Convention and fully comply with the obligations it contains. Furthermore, they must interpret its content in a way that ensures the internal and external coherence of the Convention. Thus, in order to understand the meaning of article 192, the interpreter may refer to elements internal to the Convention (other provisions, other official language versions) and external (international agreements and State practice).

- The duty to protect and preserve the marine environment is not absolute and must be reconciled with the pursuit of anthropogenic activities necessary for humanity. This

[3] Preamble, para. 4, UNCLOS : « Recognizing the **desirability of establishing** through this Convention, with due regard for the sovereignty of all States, **a legal order for the sea and oceans** which will facilitate international communication, and will promote the peaceful uses of the seas and oceans, the equitable and efficient utilization of their resources, the conservation of their living resources, and the study, **protection and preservation of the marine environment** ».

reconciliation approach is common in law (e.g., human rights) and involves balancing the legitimate interests involved.

- International obligations have a polarity: they can be positive (obligation to act, to take measures) and negative (obligation not to act). The same is true for the obligation to protect and preserve the marine environment which obliges States not only to take measures against pollution of the seas and oceans, but also to refrain from causing serious harm to the marine environment.

B. The Convention and the principles of international environmental law.

- UNCLOS brings together two categories of rules. On the one hand, the Convention brings together rules that only apply to relations between States that have signed and ratified this treaty. These provisions having an exclusively conventional character are indicated in the text by the use of the term “State party”. On the other hand, the Convention brings together rules which are intended to codify customary law and which would therefore be applicable to States not party to the Convention. The provisions of Part XII belong to this second category.
- The principles of international law are a subsidiary source of the law of the sea. If the Convention had not contained provisions relating to the protection and preservation of the marine environment, the international tribunals of the law of the sea (Part XV of the Convention) would therefore have had to apply the rules and principles of international environmental law. Part XII of UNCLOS is only an adaptation of international environmental law that takes into account the specificities of the sea, such as the existence of non-appropriated spaces and the interconnection of marine ecosystems. However, this specificity does not affect the legal continuity between the two laws, and the law of the sea inherits the obligation of cooperation, diligence and precaution from international environmental law.

C. The justiciability of the law of the sea.

- The Law of the Sea Convention guarantees access to international justice for States Parties through its own judicial body, the International Tribunal for the Law of the Sea, and its arbitral tribunals. This fundamental guarantee of justice is a major distinction from other instruments of international environmental law and from specific agreements, including regional agreements, relating to the protection of the marine environment.
- The Convention promotes the implementation of specific agreements relating to the protection and preservation of the marine environment on the basis of compatibility. International cooperation within the framework of competent international organizations or through other means is a preferred means for States to fulfill their obligations under the Convention. The Convention has a role in structuring the cooperative activity for the marine environment. The general principles of Part XII, the rules and standards of competent international organizations, the obligations established by specific or particular agreements and recommended practices constitute the international regime for the protection of the marine environment.
- The International Tribunal for the Law of the Sea has confirmed the possibility to extend the justiciability of the Convention to disputes arising out of the implementation of specific obligations which falls under the law of the sea. Hence the protection of the marine environment has its own "environmental justice", which is particularly easy to access, including through the advisory procedure.