

# **The legal framework for ocean fertilisation experiments**

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# Introduction 1/2

Abbreviations used in this presentation:

**OF** = ocean fertilisation

**MSR** = marine scientific research

**EEZ** = exclusive economic zone

**LOSC** = 1982 UN Convention on the Law of the Sea

**LC** = 1972 London Dumping Convention

**LP** = 1996 Protocol to LC

**CBD** = 1992 Convention on Biological Diversity

**COP** = Conference of the Parties

# Introduction 2/2

Scope for **confusion** within MSR community:

- several relevant treaties
- Resolution LC-LP.1 (Oct 2008)
- CBD COP Decision IX/16 (May 2008)
- possible changes to existing legal framework

# Maritime zones

Zones discussed in this presentation:

- marine internal waters
- territorial sea
- EEZ
- high seas

# Legal framework 1/2

- customary international law
- LOSC (in particular Parts XII and XIII)
- LC and LP
- CBD
- 1991 Espoo Convention
- regional seas treaties

# Legal framework 2/2

*Not covered in this presentation, but relevant:*

- 1992 UN Framework Convention on Climate Change
- European Community law, e.g. Marine Strategy Directive
- national laws

# Preliminary question no.1: is OF 'pollution'? 1/2

- Why is this relevant?
- Because LOSC and LC/LP contain general duties regarding 'pollution'
- LOSC: see Arts. 194-7 and 206, amongst others
- Art. 194 (1) LOSC: 'States shall take, individually or jointly as appropriate, all measures consistent with this Convention that are necessary to prevent, reduce and control pollution of the marine environment **from any source ...**'

# Preliminary question no.1: is OF 'pollution'? 2/2

LOSC: Art. 1 (1)(4) – 'pollution of the marine environment'

'the introduction by man, **directly or indirectly**, of **substances** or energy into the marine environment ... which **results or is likely to result in** such **deleterious effects** as **harm to living resources and marine life**, hazards 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;'

# Preliminary question no.2: is OF 'dumping'? 1/4

- Why is this relevant?
- Because LC/LP (and LOSC) contain specific duties regarding 'dumping'
- **Art. 4 (1)(1) LP:** 'Contracting Parties shall prohibit the dumping of any wastes or other matter with the exception of those listed in Annex 1.'
- **Art. 4 (1)(2) LP:** 'The dumping of wastes or other matter listed in Annex 1 shall require a permit. ...'

# Preliminary question no.2: is OF 'dumping'? 2/4

- No time in this presentation to go into this in detail
- There is a definition of 'dumping' in LC/LP (and in LOSC)
- See now **Resolution LC-LP.1 (2008) on the regulation of ocean fertilization**
  - adopted on 31 October 2008
  - non-binding on LC/LP parties

# **Preliminary question no.2: is OF ‘dumping’? 3/4**

## **Resolution LC-LP.1 (2008):**

- OF = ‘any activity undertaken by humans with the principle [sic] intention of stimulating primary productivity in the oceans’
- LC/LP scope ‘includes ocean fertilization activities’
- ‘legitimate scientific research’ should be regarded as ‘placement of matter for a purpose other than the mere disposal thereof’ under Art III (1)(b)(ii) LC and Art. 1 (4)(2)(2) LP
- other OF activities ‘should not be allowed’, currently

# **Preliminary question no.2: is OF ‘dumping’? 4/4**

## **Resolution LC-LP.1 (2008):**

- assess scientific research proposals on case-by-case basis, using to-be-developed assessment framework
- assessment framework to include tools for determining whether proposed activity is ‘contrary to the aims’ of LC/LP [cf. Art III (1)(b)(ii) LC / Art. 1 (4)(2)(2) LP]
- if assessed and found acceptable under assessment framework, proposal = ‘legitimate scientific research’
- ‘until specific guidance is available’, LC/LP parties urged to use ‘utmost caution and best available guidance’ to evaluate scientific research proposals

# View of CBP COP (COP 9, May 2008, Dec. IX/16) 1/2

CBP COP: ‘... *requests* Parties and *urges* other Governments, in accordance with the precautionary approach, to ensure that ocean fertilization activities **do not take place until** there is an adequate scientific basis on which to justify such activities, ... and a global ... control and regulatory mechanism is in place for these activities; **with the exception of small scale scientific research studies within coastal waters....**

# View of CBP COP (COP 9, May 2008, Dec. IX/16) 2/2

... Such studies should only be authorized if **justified by the need to gather specific scientific data**, and should also be subject to a **thorough prior assessment** of the potential impacts of the research studies on the marine environment, and be **strictly controlled**, and **not be used for** generating and selling carbon offsets or any other **commercial purposes;**'

# Interim summary 1/2

- LOSC and LC/LP general provisions on pollution, if applicable
- **Resolution LC-LP.1 (October 2008):**  
‘legitimate scientific research’ is acceptable;  
but no finalised assessment framework yet
- **CBD COP Decision (May 2008):**  
‘scientific research studies’ are acceptable if  
‘small scale’ and ‘within coastal waters’ (plus other conditions)

# Interim summary 2/2

- **CBD Dec. IX/16** provision starts with '*Bearing in mind* the ongoing scientific and legal analysis occurring under the auspices of the [LC] and the [LP] ...' and refers to (awaited) 'global ... control and regulatory mechanism'
- What is the status of **CBD Dec. IX/16** in the light of (non-binding) Resolution LC-LP.1 (2008), bearing in mind Art. 22 CBD?

# **LOSC regime for MSR 1/3**

## **Part XIII - general provisions**

**Art. 239:** duty to 'promote and facilitate' MSR

**Art. 240** (general principles):

- peaceful purposes
- appropriate methods and means
- no unjustifiable interference with other legitimate uses of the sea; but duly respected by such uses
- in compliance with valid relevant regulations, including those on protection and preservation of the marine environment

# LOSC regime for MSR 2/3

## Part XIII - EEZ provisions

### Art. 246 et seq.:

- consent in 'normal circumstances' etc.
- may **withhold consent** if MSR, *inter alia*, 'is of direct significance for the exploration and exploitation of natural resources ...' or 'involves ... the introduction of harmful substances into the marine environment'
- various rights and duties for research State and coastal State

# LOSC regime for MSR 3/3

## high seas

- One specific provision in Part XIII
- General provisions of Part XIII apply
- **Art. 87:** freedom of scientific research, subject to Parts VI and XIII

# Next steps 1/2

- Further developments within LC/LP
- Response of CBD COP at COP 10 ?
- Intergovernmental Oceanographic Commission
- Developments within regional seas organisations ?

# Next steps 2/2

- What will be response of those wishing to conduct OF research ?
- What will be their reaction to LC/LP assessment framework ?
- Will some OF research take place involving States not bound by any LC/LP rules and standards that may be adopted in due course ? (Bear in mind Art. 210 (6) LOSC)

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