

Advisory Committee on Protection of the Sea (ACOPS) – Written evidence (UNC0017)

THE LAW OF THE SEA CONVENTION IS FIT FOR PURPOSE!!!

PREFACE

1. ACOPS is surprised and dismayed at the question itself, the manner in which it is framed, and the impetus for this consultation. The question challenges the rule of law and the international legal order. The United Kingdom has always staunchly supported these fundamental principles that are essential to the peaceful coexistence of nations. As a co-founder of the United Nations Charter and a member of the United Nations Security Council, the United Kingdom bears a particular responsibility to “establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained”.¹
2. The framing of the question is also troubling: it could be characterized as “leading”, in that it suggests the desired answer. In the present case the desired answer appears to be negative.
3. The impetus for the consultation raises another concern: is the United Kingdom considering withdrawing from the Law of the Sea Convention, which establishes “a legal order for the seas and oceans”?²
4. It is under these disquieting circumstances that ACOPS provides reasons for its **positive** answer to the question posed in the consultation: **the Law of the Sea Convention is indeed fit for purpose.**

IMPLEMENTATION IS THE PROBLEM

5. We illustrate this statement primarily with a selection from the extensive and detailed provisions of Part XII of the Law of the Sea Convention (hereinafter, LOSC), which is specifically dedicated to the protection and preservation of the marine environment, although marine environmental protection provisions are found throughout the LOSC. We apply these provisions to the climate change issue currently threatening the health and wellbeing of our planet.

¹Preamble, United Nations Charter (adopted 26 June 1945, San Francisco, in force 20 October 1945), available at: <https://www.un.org/en/about-us/un-charter/full-text>. The Law of the Sea Convention (LOSC) invokes the UN Charter in its Preamble (penultimate chapeau): “the codification and progressive development of the law of the sea achieved in this Convention will contribute to the strengthening of peace, security, cooperation and friendly relations among all nations in conformity with the principles of justice and equal rights ... in accordance with the Purposes and Principles of the United Nations as set forth in the Charter,” ...

²LOSC Preamble, fourth chapeau. Note that LOSC Article 317(3) limits the freedom of action of States subsequent to their withdrawal from/denunciation of the LOSC.

6. Article 192 of the LOSC states the legal requirement: "States have the obligation to protect and preserve the marine environment."

7. Note the mandatory language "have the obligation" and the absence of any exceptions and qualifications that would weaken, negate or otherwise render this obligation unenforceable *de jure* and *de facto*.³ This obligation applies throughout the entire marine environment, regardless of its jurisdictional status, hence in all the maritime zones as defined by the LOSC.

8. Part XII sets out in some detail the means by which States must⁴ implement and enforce their obligation to protect and preserve the marine environment, including the requirement that: "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*"⁵ (Emphasis supplied.) Note the comprehensive scope of "from any source." This includes "all"⁶ marine-based sources of pollution of the marine environment.⁷ However – and most importantly in light of the climate change discussion to follow – it also includes all sources from the land⁸ and from or through the atmosphere.⁹

9. Note the required priority order (prevent, reduce and control) of the measures to be taken, and the absence of the word "or." Note also that the measures must "include those necessary to protect and preserve rare or fragile ecosystems as well as the habitat of depleted, threatened or endangered species and other forms of marine life."¹⁰ Furthermore, the marine environmental protection measures taken by States are not permitted "to transfer, directly or indirectly, damage or hazards from one area to another or transform one type of pollution into another."¹¹ Finally, LOSC Article 235 sets out State responsibility, liability, recourse and compensation requirements to further underpin its marine

³For an example of such weakening language, see the 1992 Convention on Biological Diversity, where nearly every "shall" is followed by the qualification "as far as possible and as appropriate." See A. Boyle and C. Redgwell, *Birnie, Boyle, and Redgwell's International Law and the Environment*: 4th Revised edition, Oxford University Press, 2021; P. Verlaan, 'The Interface of Science and Law: A Challenge to the Privileging of "Marine Biodiversity" over "Marine Environment",' in R.A. Barnes and R. Long (eds), *Frontiers in International Environmental Law: Oceans and Climate Challenges: Essays in Honour of David Freestone*, Brill, Leiden, 2021, pp. 409-429 (<https://brill.com/view/title/38675?language=en>) [open access].

⁴The operative term in international law for a mandatory action, as also used in the LOSC, is 'shall.' 'Must' is used in this submission to avoid confusion or misunderstanding as to the mandatory nature of the word 'shall.'

⁵LOSC Article 194(1).

⁶"[a]ny source" is further reinforced by the use of the word "all" in Art. 194(3): "The measures taken pursuant to this Part shall deal with all sources of pollution of the marine environment."

⁷Examples of such different sources include: dumping (e.g., Arts. 194(3)(a), 210, 216); vessels (e.g., Arts. 194(3)(b), 211); use of technologies, various types of installations and devices (e.g., Arts. 194(3)(c) and (d)); seabed activities subject to national jurisdiction (e.g., Arts. 208, 214); activities in the Area (e.g., Arts. 209, 215 and relevant Articles from Part XI, especially Art. 145).

⁸ LOSC Arts. 194(3)(a), 207, 213.

⁹LOSC Arts. 194(3)(a), 212.

¹⁰LOSC Article 194(5). This Article protects marine biodiversity, and much else besides, without qualifications or exceptions. See Verlaan, *op. cit. supra*, note 3.

¹¹LOSC Article 195.

environmental protection regime. ACOPS draws particular attention to the directly applicable requirements for State action at an internal, national level.¹²

10. “Pollution of the marine environment” is defined in LOSC Article 1(1)(4).¹³ Note the comprehensive scope (“substances or energy”) and methods (“directly or indirectly”), the precautionary language (“results or is likely to result”), and the extensive, varied and non-exclusive list of effects-based criteria to which this Article applies. For example, there is no doubt that the increase in greenhouse gas (GHG) emissions that result in, e.g., ocean warming and acidification, among other deleterious effects, falls within the definition of pollution under this Article.

11. The specific inclusion of the land and the atmosphere in the sources of pollution of the marine environment governed by the LOSC is reinforced by requiring States “to take all measures necessary to ensure that *activities under their jurisdiction or control* are so conducted as not to cause damage by pollution to other States and their environment, and that *pollution arising from incidents or activities under their jurisdiction or control does not spread beyond the areas where they exercise sovereign rights* in accordance with this Convention.”¹⁴ (Emphasis supplied).

12. The LOSC specifically conditions and limits the “sovereign right of States to exploit their natural resources:” This exploitation must be conducted “in accordance with their duty to protect and preserve the marine environment.”¹⁵ Note that these environmental obligations are considered as reflecting or as having acquired the status of customary international law:¹⁶ they therefore also apply to all States, including those that are not Parties to the LOSC.

13. Consider the legal implications under international law of “*from any source*” and “*activities under their jurisdiction or control*” together with the specific inclusion of land-based and atmospheric sources of pollution of the marine environment with regard to the mandatory State responsibility for protection and preservation of the marine environment. All activities and sources of pollution from anywhere in the world that result in or are likely to result in the occurrence of one or more of the circumstances on the (non-exclusive) list of “deleterious effects” in Article 1(1)(4) are brought within the jurisdiction of the LOSC, and must be prevented, reduced and controlled.

¹²LOSC Article 235(2): “States shall ensure that recourse is available in accordance with their legal systems for prompt and adequate compensation or other relief in respect of damage caused by pollution of the marine environment by natural or juridical persons under their jurisdiction.”

¹³LOSC Article 1(1)(4): ““pollution of the marine environment” means the 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, 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;” ... Note that these deleterious effects are not restricted to the marine environment alone, as attested by, e.g., the examples of human health, living resources (and not just marine resources) and amenities.

¹⁴LOSC Art. 194(2).

¹⁵LOSC Art. 193.

¹⁶R.R. Churchill and A.V. Lowe, *The Law of the Sea*, 3rd edition, Juris Publishing, Manchester University Press, 1999; Boyle and Redgwell, *op. cit. supra*, note 3.

14. The LOSC is uniquely powerful, environmentally speaking. In this respect no other international treaty imposes clear, specific, unqualified, and enforceable environmental protection requirements with regard to the effects of human actions from land, air and sea on the marine environment. Yet the global community of nations continues to act as if protecting the marine environment, let alone the global environment, is legally optional. It is not. This erroneous assumption is exemplified in the approach they have taken since the adoption of the 1992 United Nations Framework Convention on Climate Change (FCCC) and its subsequent protocols to the issue of excessive anthropogenic GHG emissions, as described below.

THE CLIMATE CHANGE CRISIS REQUIRES BOTH THE LOSC AND THE FCCC

15. The many adverse environmental effects of unchecked and mounting anthropogenic GHG emissions have long been known. They are increasingly observed worldwide. Labelling this issue as 'climate change' is confusing to the public and is not conducive to finding useful responses. With regard to the adverse effects of GHG emissions on the marine environment, to use the term 'climate change' is inadequate, if not largely inaccurate. For example, these adverse effects include ocean acidification, deoxygenation, and intensification of noise pollution, none of which are directly addressed by the global climate treaty regime. However, these processes "result or are like to result in ... harm to living resources and marine life," among other "deleterious effects" defined as "pollution of the marine environment" by the LOSC.

16. Unlike the FCCC, the LOSC does require the necessary actions to prevent, reduce and control this pollution with enforceable language and its legal mandate is binding and legally enforceable on all States. Because GHG emissions fall squarely within the LOSC's definition of pollution of the marine environment,¹⁷ States must act in accordance with the LOSC's legally enforceable requirements to prevent, reduce and control them.¹⁸ That the FCCC does not require these actions does not render inapplicable the LOSC's obligations on the FCCC parties.¹⁹

17. The FCCC and its protocols further reinforce the requirement of the LOSC that States must act on GHG emissions, and provide useful additional specificity to the requirements of the LOSC by setting out various approaches for doing so. But crucially, it is the LOSC that provides the legal "teeth" lacking in the FCCC system. The LOSC also provides the legal mechanisms to apply other relevant treaties and instruments on the protection of the marine environment to devise measures that can support the implementation of both the FCCC and the LOSC. This includes

¹⁷*Ibid.*

¹⁸P. Verlaan, 'Geo-engineering, the Law of the Sea, and Climate Change,' *Carbon and Climate Law Review* 2009 (4):446-458 (2009); A. Boyle, 'Law of the Sea Perspectives on Climate Change,' 27(4) *International Journal of Marine and Coastal Law* 831-838 (2012); Verlaan, *op. cit. supra*, note 3, especially note 7.

¹⁹LOSC Art. 311(2): "This Convention shall not alter the rights and obligations of States Parties which arise from other agreements compatible with this Convention and which do not affect the enjoyment by other States Parties of their rights or the performance of their obligations under this Convention."

ensuring that new measures designed to prevent, reduce and control GHG emissions do not, e.g., transform one type of pollution into another. Examples include measures on the sub-seabed sequestration of carbon dioxide under the London Convention and its Protocol, and on technology for decreasing emissions from shipping that may further increase underwater water noise pollution.

18. The two treaties bind the same community of States, with the LOSC providing the enforceable legal basis and legal recourse mechanisms for the critically necessary immediate action on GHG emissions that has, so far, eluded the FCCC and its protocols. Had the LOSC and the FCCC been interpreted and implemented together with regard to preventing, reducing and controlling GHG emissions in 1994, when they both entered into force, the environmental crisis the world is now facing – with no effective and timely remedies apparently in sight, even as the FCCC COP 26 is convened in Glasgow – might have been less acute. This positive result could have been achieved under the LOSC, had the States Parties to the LOSC (SPLOS) chosen to implement their responsibilities thereunder.²⁰ Joint implementation of the two treaties is indispensable.

19. The GHG emissions issue is but one example of this baffling refusal by the global community of nations, in particular the SPLOS, to use the LOSC to achieve its purposes as set out in its Preamble, of which we highlight the third *chapeau*: “*Conscious* that the problems of ocean space are closely interrelated and need to be considered as a whole,” ...

20. ACOPS considers that the LOSC is not only “fit for purpose”, but essential, both legally and scientifically, to address the causes of climate change effectively, as well as all other degradations of the marine environment caused or worsened by human activities.

THE LOSC IS THE KEYSTONE TREATY

21. The problem is not with the LOSC. The problem is with its States Parties, who seem disinclined to implement it adequately, if at all. The subsidiary questions raised in the present consultation are principally implementation issues. These subsidiary questions must be addressed under the LOSC as the keystone treaty and through the lens of the relevant sectoral and topical global treaties and instruments, including the FCCC, which provide additional detail conducive to achieving effective implementation of their objectives. In the implementation at the national/domestic level it must be ensured that the necessary measures are developed and adopted consistently with this overarching international legal order and its substantive provisions. Investments in the development of technological and

²⁰Why has the SPLOS, composed of the 168 – as of 31 October 2021 – Parties (167 States and the European Union) who meet annually at the United Nations (UN) in New York under the auspices of the UN Department of Ocean Affairs and Law of the Sea (DOALOS) [http://www.un.org/depts/los/meeting_states_parties/SPLOS_documents.htm], never embarked on implementing the [environmental] requirements of the LOSC to which they are all legally bound?

scientific measures to deal with climate change must comply with the legal context and be framed accordingly from their inception.

22. The aspects of those subsidiary questions, such as those asked in this consultation, that raise interpretation issues must be addressed as provided under international law. The rules governing treaty interpretation are undeniably complex. The LOSC is part of an intricately woven legal fabric of diverse rules and principles of international law, judicial and arbitral interpretations, institutional mechanisms, and other applicable treaties. The LOSC cannot be interpreted accurately without at least a minimum understanding of this fabric.²¹ Other treaties and instruments of this legal fabric contribute further context and specificity to the interpretation of the LOSC.

23. As could be inferred from our reflections on the role (or rather the overall lack thereof) of the SPLOS in implementing the LOSC's marine environmental protection requirements, problems in the *functioning* of a particular treaty are usually not solved by setting up a different treaty, let alone by attempts to discredit the first treaty. Instead, the problems more likely risk being exacerbated, particularly if the first treaty remains in force and operational, as is the case with the LOSC.

24. ACOPS suggests that the United Kingdom could take the lead for the SPLOS to examine the reasons why this keystone treaty is not being adequately implemented, both in its own right and in the context of the implementation of the sectoral and topical treaties referred to above, for which the LOSC serves as the overall integrating instrument by incorporating them by reference. Once the reasons have been determined, the SPLOS would be in a position to take the appropriate steps accordingly. This approach would be fully consistent with the rule of law and support the international legal order.

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Received 11 November 2021

²¹See the Vienna Convention on the Law of Treaties (VCLT) (8 ILM 1969; Vienna, 23 May 1969; in force 17 January 1980). It is the primary source for mechanisms governing treaty interpretation. See also: C. McLachlan, 'The principle of systemic integration and Article 31(3)(c) of the Vienna Convention,' 54 *International and Comparative Law Quarterly* 279-320 (2005); A. Aust, *Modern Treaty Law and Practice*, 3rd ed., Cambridge University Press, Cambridge, 2013. See also for a further illustration of the broader legal complexities within which all work with legally binding international instruments is situated and which must be observed: J. Crawford, *Brownlie's Principles of Public International Law*, 9th ed., Oxford University Press, Oxford, 2019; <https://10.1093/he/9780198737445.001.0001>. The LOSC invokes these complexities in, e.g., Arts. 237 and 311; see also A. Boyle, 'Further development of the Law of the Sea Convention: Mechanisms for change,' 54 *International and Comparative Law Quarterly* 563-84 (2005); doi:/0.1093/iclq/lei017.