



## **Legal issues relevant to deployment of CO<sub>2</sub> sequestration technologies**

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# Legal issues

- International law where transboundary effects (both in terms of climate change and deployment of CS)
- National law – regulation of deposit and injection of wastes, groundwater protection, law relating to sub-surface property rights
- Liability (national and international) – timescale and the duration of licence/permit and entity undertaking the injection, monitoring of effects, and the possibility of ultimate national State liability

# CS and international law

- Relevant multilateral environmental agreements (treaties) (MEAs) provide the basis for any assessment of the international legal position.
- International treaties as basis for global, political and jurisdictional issue.
- Recent activities incl. IEA and CSLF workshop and papers, IPCC Special Report (work in progress), OSPAR JL paper (agreed June 2004) and upcoming London Convention work on legal issues.

# Relevant MEAs

- UNFCCC (climate change)
- UNCLOS (law of the sea)
- London Convention and Protocol (dumping of wastes at sea)
- OSPAR Convention (NEAtlantic)
- Basel Convention (int movement of waste)
- Convention on Biological Diversity
- Antarctic Treaty and Madrid Protocol
- Espoo Convention and Kiev Protocol (int environmental assessment)

# Applying international law to the process of CS

- Interpreting the treaties (Vienna Convention on the Law of Treaties Article 31)
- Examining the provisions of the relevant MEAs (OSPAR and London processes)
- Negotiation, political agreement and treaty amendment

- Obligations fall only on the Parties to that treaty
- Treaty obligations inform policy decisions of States
- States individually or jointly (OSPAR, London) apply own interpretations to treaty provisions, but ultimate determination may lie with International Court of Justice or arbitral tribunal under treaty
- Concepts (sustainable development, precautionary approach) included in treaties
- Where obligations inconsistent, later treaties will supersede earlier ones, but also *lex specialis* where provisions on specific subject will supersede general ones (UNFCCC/Kyoto Protocol and marine treaties)
- Necessary amendment of treaties requires further negotiations, a minimum level of support for their adoption and subsequent entry into force, and will amend earlier treaties only for those Parties that have ratified the amendments.

# Key issues for CS - 1

- Whether storage constitutes “dumping” - is the placement of the matter “other than for the purposes of the mere disposal thereof” (UNCLOS, London, OSPAR) e.g. EOR, experiments and storage for the purposes of climate change mitigation
- Whether the CO<sub>2</sub> can benefit from treaty exemptions concerning wastes arising from the normal operations of offshore installations (London) or as discharges or emissions from them (OSPAR)
- Is storage in the seabed expressly covered in the treaties or is it limited to the water column (UNCLOS, London, OSPAR)?

# Key issues for CS - 2

- Is CO<sub>2</sub> or substance captured if containing impurities) an “industrial waste” (London), “hazardous waste” (Basel) or does the process of its storage constitute “pollution” (UNCLOS)?
- The method of the CO<sub>2</sub> reaching the disposal site as regards the application (or not) of treaties to pipelines, vessels, and offshore structures (London, OSPAR)
- The proposition that CO<sub>2</sub> may cause marine pollution through continued aerial emissions if storage is not chosen as a mitigation option (UNCLOS, OSPAR).
- Treaties not drafted with CS specifically in mind

# UNFCCC

- United Nations Framework Convention on Climate Change and its Kyoto Protocol both anticipate, and could be said to encourage, the practice of carbon sequestration.
- Parties to the Convention are obliged to promote sustainable management, and promote and cooperate in the conservation and enhancement, as appropriate, of sinks and reservoirs of all greenhouse gases...including...oceans, as well as other terrestrial, coastal and marine ecosystems (article 4.1(d)).

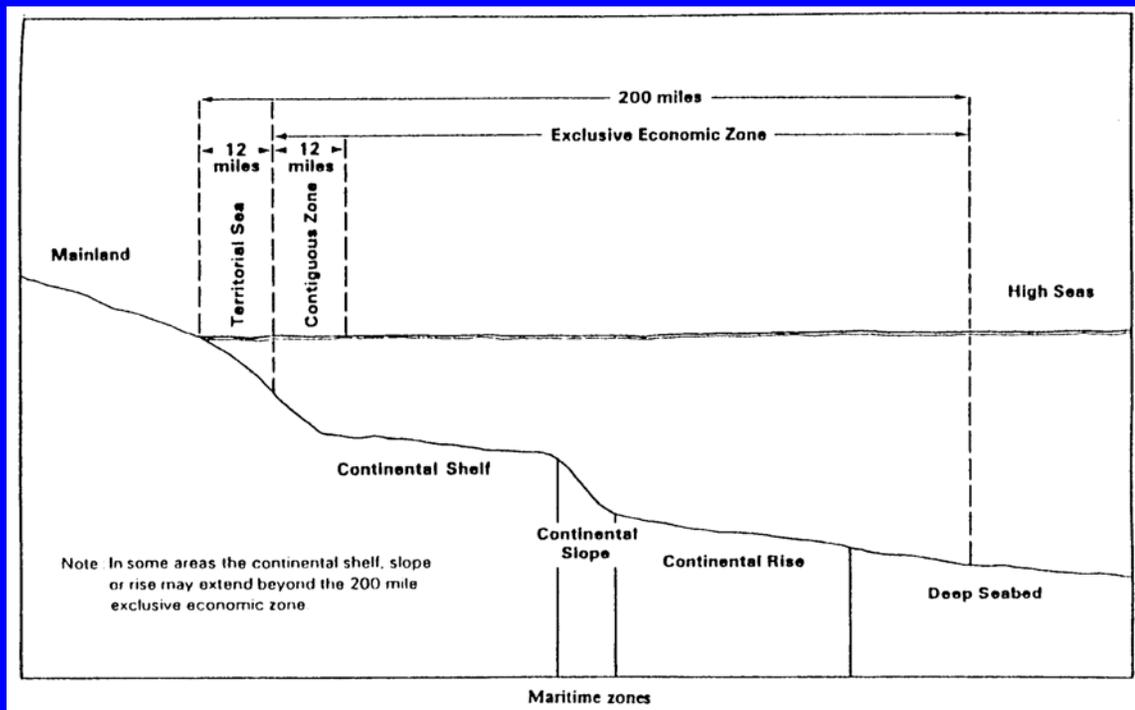
# Kyoto Protocol

- The Protocol requires its Parties to implement and/or further elaborate policies and measures such as research on, and promotion, development and increased use of, ...carbon dioxide sequestration technologies (article 2.1(a)(iv)).

# UNCLOS 1982

- UNCLOS is a global framework convention relying on other subject-specific or regional marine treaties agreed amongst its States Parties to provide more detailed regulation (Article 197 – cooperation globally or regionally on marine environment; Article 210 – pollution by dumping) and viewed in the light of those agreements.
- establishes areas of jurisdiction of a coastal State, namely its ***territorial sea*** (measured as 12 nautical miles out from baselines), ***exclusive economic zone*** (up to 200 miles out) and ***continental shelf***, where it may exercise rights subject to the limited rights of other States, as well as the establishment of the ***high seas*** beyond (open to all States).

# UNCLOS zones



# London Convention and Protocol

- Considered by Scientific Group in 1999 without agreement
- Process of legal analysis initiated at 26<sup>th</sup> consultative meeting in 2004
- Intersessional work now ongoing with legal questions submitted to Parties in March 2005
- Responses due end June 2005 with synthesis report of views being considered at LC27 in October 2005
- Parallel consideration of environmental impacts (London seminar 20 May)

# OSPAR

- Jurists linguists interpretation developed 2003/4 and endorsed by Parties June 2004
- Found that permissibility of CS dependent on method (use of pipelines from land, vessels and offshore installations) and purpose (scientific experiment, EOR, climate change mitigation i.e. disposal) of placement regardless of location of CS (ocean or geologic) or environmental effects
- Subsequent workshop on environmental effects – Norway October 2004

# Amendment of treaties

- As difficult as negotiating/activating original?
- Amendments may apply only as between those parties that have agreed to be bound by them
- Subsequent agreements – need not be formal amendments (Article 39 VCLT e.g. by a COP Decision, oral agreement or unilateral practice with tacit consent of all parties, but may be breach if *inter se*)
- Amendment before coming into force e.g. UNCLOS Part XI – possible for London Protocol?

# Elements in an amendment mechanism

- Number of parties to *sponsor* an amendment
- Majority needed to *adopt* an amendment
- Whether adopted amendment requires to be *ratified* or receive tacit consent
- Number of ratifications for its *coming into force*
- Whether amendment binds parties that have not accepted it

# [Specific amendment provisions]

## London Convention (Article XV) and Protocol (Article 21)

- Amendment adopted by 2/3 Parties present (and voting - LP) at consultative meeting
- Amendments to articles binding on those accepting it (not all) and comes into force 60 days after 2/3 Parties (at that time) have accepted it (positive procedure)
- Amendments to annexes have 100 day period for submission of declarations of objection (negative procedure)

## OSPAR (Article 15)

- Amendment adopted at OSPAR Commission by unanimous vote of the Contracting Parties
- Amendments binding on those accepting it (not all) and come into force 30 days after ratification by at least seven Contracting Parties
- Amendments to an annex –ditto except adopted by  $\frac{3}{4}$  of Contracting Parties bound by it

# Conclusions

- Complex position dependent on the actual mechanisms adopted for CS
- Arbitrary and patchy regulation
- Relevance of precautionary approach (article 3 LP, article 2 OSPAR)
- CS not anticipated at time of adoption of relevant agreements
- Need for resolution of the issue at a political level at relevant meetings of Parties, with subsequent treaty amendment