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Viewpoint

# Is climate change an unforeseen, irresistible and external factor – A *force majeure* in marine environmental law?

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ABSTRACT

Several environmental laws include provisions on natural causes or *force majeure*, which except States from their commitments if it can be proven that the failure to meet the commitment is due to factors outside their control. The European Union Marine Strategy Framework Directive (MSFD) has a pivotal role in managing EU marine waters. This paper analyses natural causes and *force majeure* provisions of the MFSD and other marine legislation, and addresses their interaction with climate change and its consequences, especially the effect on the obligation of ensuring seas are in Good Environmental Status. Climate change is an exogenic unmanaged pressure in that it emanates from outside the area being managed but in which the management authority has to respond to the consequences of climate change, such as sea level rise and temperature elevation, rather than its causes. It is suggested that a defence by a Member State of *force majeure* may be accepted if an event was proven to be due to an externality of control, irresistible and unforeseeable. The analysis contends that countering such a legal defence would centre on the fact that climate change is a well-accepted phenomenon, is foreseen with an accepted level of confidence and probability and is due to human actions. However, as yet, this has not been legally tested.



## 1. Introduction

Marine ecosystem management aims to maintain natural ecological structure and functioning while at the same time ensure the ecosystem services from which society gains benefits are maintained (Atkins et al., 2011; Elliott, 2011). There are many activities and pressures which require management (Borja et al., 2013) especially as these create hazards and risks to society (Elliott et al., 2014). Activities and pressures within an area are what may be termed endogenic managed pressures in which causes and consequences have to be addressed. Superimposed on these are those from outside the management area (exogenic unmanaged pressures) for which their causes are not addressed at a local level but their consequences require to be addressed (Elliott, 2011; Scharin et al., 2016).

Climate change can be regarded as an exogenic pressure on the biological, physical and chemical states of oceans and coastal zones (IPCC, 2014b; Elliott et al., 2015). The physical impacts include relative sea level rise leading to 'coastal squeeze', coastal adjustments and increases in the intertidal area and incursion into estuaries resulting in effects on ecosystem services such as fisheries (Elliott et al., 2015 and references therein). Chemical changes to the marine environment include decreased pH levels (i.e. acidification) and increased $CO_2$ leading to reduced growth of calcareous structures, macroalgae and macrofauna, changes to the water sediment and biogeochemistry impairing health of species and changes to overall ecosystem functioning. Biological changes emanate from physical and chemical changes reducing reproduction, community displacement and northward migration of species (Elliott et al., 2015).

Most of the plethora of marine environmental agreements and legislation aimed at controlling the adverse effects of human activities (Boyes and Elliott, 2014; Elliott, 2014) can be regarded as being sectoral in that it influences specific activities or geographical areas (catchments, estuaries, sea regions, etc.). Hence, while there is increasing knowledge of how climate change will affect the marine and coastal environment, less is known about how climate change will affect marine legislation, management, protection and conservation. Given that marine management now aims to be holistic by accounting for all pressures and activities that may have a detrimental impact (Barnes, 2012; Boyes and Elliott, 2014), it must include the effects of both exogenic managed and exogenic un-managed pressures such as climate change. We have suggested elsewhere (Elliott et al., 2015) that climate change confers risks that local management, and especially the implementation of European Directives, cannot easily accommodate: notably those that are unforeseeable, irresistible, external to the area being managed and can affect management. In particular, Elliott et al. (2015) indicate that European Member States at risk of not meeting the long-term goal, in the Marine Strategy Framework Directive (MSFD (European Commission,

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2008) (2008/56/EC)), of having their marine waters in Good Environmental Status (GEnS), must prove that this failure is outside their control or face potential infraction proceedings. The MSFD specifically accommodates such scenarios, providing in Article 14 for exceptions on the basis of factors inter alia beyond its control, i.e. natural causes and *force majeure* (Box 1). Although such events may be a significant barrier to GEnS, they are not defined in the MFSD. This paper aims to interrogate these concepts in marine environmental management although the lessons here are pertinent to other environments. In particular, we consider whether a Member State will, in coming decades, have a legal defence that climate change or its specific consequences, constitutes *force majeure*.

## 2. Force majeure as a legal principle

*Force majeure* is a principle common to most legal systems and while usually associated with the law of contract or obligations, Table 1 shows its inclusion in marine environmental laws. In domestic law, *force majeure* may operate as a defence to a claim of contractual liability on the grounds that the failure to perform an obligation was due to factors beyond the control of the contracting party. It is also recognised as a general principle of international law and EU law, where it operates as a potential defence to liability for failure to perform obligations. Before considering how the concept operates specifically in EU law, and as regards marine environment law, the origins and parameters of *force majeure* need to be outlined as a general legal concept. This provides both context and more general guidance on how the concept can be used, especially given the typically minimal accounts of *force majeure* in EU marine legislation.

Box 1

Article 14, (1) of the MSFD (2008) relating to exceptions
Marine Strategy Framework Directive, 2008

*Article 14*

**Exceptions**

1. A Member State may identify instances within its marine waters where, for any of the reasons listed under points (a) to (d), the environmental targets or good environmental status cannot be achieved in every aspect through measures taken by that Member State, or, for reasons referred to under point (e), they cannot be achieved within the time schedule concerned:

(a) action or inaction for which the Member State concerned is not responsible;
(b) natural causes;
(c) *force majeure*;
(d) modifications or alterations to the physical characteristics of marine waters brought about by actions taken for reasons of overriding public interest which outweigh the negative impact on the environment, including any transboundary impact;
(e) natural conditions which do not allow timely improvement in the status of the marine waters concerned.

The Member State concerned shall identify such instances clearly in its programme of measures and shall substantiate its view to the Commission. In identifying instances, a Member State shall consider the consequences for Member States in the marine region or subregion concerned.

However, the Member State concerned shall take appropriate ad-hoc measures aiming to continue pursuing the environmental targets, to prevent further deterioration in the status of the marine waters affected for reasons identified under points (b), (c) or (d) and to mitigate the adverse impact at the level of the marine region or subregion concerned or in the marine waters of other Member States.

Although the concept of *force majeure* originated in Roman law, the modern doctrine is founded in French law, as stated in Article 1148 of the Code Civil. This provides that no damages are due where the debtor has been prevented from conveying or doing that what he was obliged to as a result of *force majeure or cas fortuit* (a fortuitous event). This has similarities with the Roman law concepts of *custodia* (a form of custody/safekeeping that entails a high degree of responsibility) and *vis maior* ('superior force' or accident that cannot be foresee or averted thereby relieving the custodian of liability), which were revised under the Napoleonic Code (Nicholas, 1995). *Force majeure* was developed to encompass government decrees, both domestic and foreign, as well as acts of war, floods, droughts, rare freezes, epidemics, strikes and riots. This catalogue makes it challenging to formulate statements regarding the requisites preceding its application. Although alien to the common law, including *force majeure* clauses in contracts has generated some jurisprudence on the construction of the term, including concepts of frustration or impossibility of performance.

Under international commercial law, the non-performance of a party is excused if they can prove that this was due to forces beyond his control and that were not foreseen at the time of concluding the contract; they do not, however, restrict the right of the party whom has not received performance to terminate the contract (Bonell, 2006). When the impediment causing *force majeure* is only temporary, then the performing party will be given a reasonable period of extra time for performance, depending on the nature of the interruption and its effect on the progress of the contract. Article 7.1.7 of the UNIDROIT (2010) Principles of International Commercial Contracts, states that the parties may further refine their definition of *force majeure*, thereby limiting or expanding its scope. They must also give notice of a failure to perform and the reasons for this within a reasonable period of time, failing which the other party may be entitled to damages.

Care is required when drawing upon the concept of *force majeure* as applied in the context of contracts since this is concerned with obligations on private parties as opposed to States. Accordingly, the parties may be able to shape the way the *force majeure* event affects performance of the contract. For example, commercial contracts increasingly prefer the lower threshold test of *impracticability* of performance, rather than *impossibility* (Augenblick and Rousseau, 2012). Furthermore, any questions of knowledge, foreseeability, externality and control, which are typical elements of *force majeure* (see below), must be evaluated quite differently to how they operate for States.

International law requires States to protect and preserve the marine environment, and prevent or minimize marine pollution (Boyes and Elliott, 2014) and breach of such obligations may incur liability, although it is more likely that States will firstly suffer political or diplomatic rebukes. International law recognizes several circumstances that preclude the wrongfulness of States for failing to comply with their international obligations, including *force majeure* (International Law Commission, 2001). The International Law Commission (ILC) defines *force majeure* as '*the occurrence of an irresistible force or of an unforeseen event, beyond the control of the State, making it materially impossible in the circumstances to perform the obligation*'.

As an example, the Basel Convention Protocol on liability and compensation for damage includes a *force majeure* clause outlining when liability will not apply (Table 1). For example, if an exporter vessel loses polychlorinated biphenyls, listed within Annex I of the convention, due to storm damage, then the exporter would be liable for damage (Art. 4, para 1). However, if the exporter can prove that the event meets the criteria of paragraph 5, sub-section (b), he may not be liable. Due to climate change, storminess and storm surges are becoming more frequent and therefore may be considered to be foreseeable. If the event (the storm) was foreseeable, it could be avoided, for example, by the ship not sailing. In this case, the importance of weather forecasting together with ship logs indicating vessel sailing related to the storm forecast will define the case. If the storm surge was not forecast until the vessel had left port and

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