

PURPOSE OVER CATEGORY

CO₂ Transport & the Purposive Reconstruction of the Law of the Sea

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One molecule. Eight legal identities.

- 1 **EMISSION**
UNFCCC / EU ETS
- 2 **CAPTURED CO₂**
CCS Directive
- 3 **CARGO**
IGC Code / SOLAS
- 4 **NOXIOUS SUBSTANCE**
HNS Convention
- 5 **WASTE**
London Protocol
- 6 **DUMPING**
London Protocol Art. 1(4)
- 7 **COMMODITY**
Storage certificates
- 8 **AVOIDED POLLUTION**
ITLOS AO 2024

*The hair-splitting
machine is running
at full capacity.*

Jhering, 1884

RUDOLF VON JHERING

1818-1892

1872

Der Kampf um's Recht

The Struggle for Law

1877

Der Zweck im Recht

Law as a Means to an End

1884

Scherz und Ernst

Jest and Earnest in Jurisprudence

Two methods of legal reasoning



Begriffsjurisprudenz

Conceptual Jurisprudence

Category → Purpose

Starts with the legal concept.

Forces new phenomena into
existing categories.

Purpose is irrelevant.



Zweckjurisprudenz

Purposive Jurisprudence

Purpose → Category

Starts with the social purpose.

Designs legal categories
to serve that purpose.

When purpose changes, law follows.

The Heaven of Juristic Concepts

Scherz und Ernst in der Jurisprudenz, 1884



I

The Interpretation Press

Squeezes an indefinite number of meanings out of any statute.



II

The Fiction Apparatus

Constructs legal fictions on demand.



III

The Hair-Splitting Machine

Divides a single hair into 999,999 equal parts. Then splits each part again.

Admission requires a draught inducing total forgetfulness of human affairs. For the most accomplished jurists, it was entirely superfluous. They had nothing to forget.

“

*The purpose is the creator
of the entire law.*

Der Zweck ist der Schöpfer des ganzen Rechts.

Der Zweck im Recht, vol. I, 1877

The law of the sea: three organizing purposes

UNCLOS, 1982



Navigation

Freedom of the seas.
Flag state jurisdiction.
The ocean as highway.



Resources

Continental shelf. EEZ.
Sovereign rights over
living and non-living.



Environment

Part XII UNCLOS.
London Protocol. MARPOL.
Prevent, reduce, control.

IV

Climate Mitigation

A purpose the law of the sea
was never built to serve.

After the ITLOS Advisory Opinion
(21 May 2024), it is a purpose the
law of the sea is now required
to serve.

GHG emissions = marine pollution

Under UNCLOS Art. 1(1)(4)

States must take all necessary measures

CO₂ defies every inherited category



It uses ships

but it is not trade.



It involves the seabed

but it is not extraction.



It poses environmental risk

but its purpose is environmental protection.

London Protocol: patching categories



16 years since adoption. Still not in force. The purpose is straining against the category.

New layers. Same architecture.



BBNJ Agreement

June 2023

Purpose: biodiversity.

EIA required for activities with "more than a minor or transitory effect" in areas beyond national jurisdiction.

CCS transport and storage both plausibly meet this threshold. But the criteria were designed for biodiversity, not climate.



ITLOS Advisory Opinion

21 May 2024

GHGs = marine pollution.

Unanimous. 153 pages. CO₂ is a "substance." Heat is "energy." Both introduced into the marine environment. Deleterious effects documented by IPCC.

"Stringent" due diligence required. Paris Agreement does not exhaust UNCLOS Part XII obligations.

**We are reasoning
from categories.**

Not from purposes.

Regulators ask: what category does CO₂ fit?

Jhering would say: wrong question.

The right question: what purpose does CO₂ transport serve?



What is CO₂?

A question about concepts.



X

What is CO₂ for?

A question about purpose.



✓

1. Resolves the Art. 1(1)(4) paradox
2. Rationalizes LP.3(4) workaround
3. Directs BBNJ EIA to right counterfactual

*Der Zweck ist der Schöpfer
des ganzen Rechts.*

The purpose has changed.

The law of the sea has not yet caught up.

"The life of the law is a struggle."

References

Jhering, *Der Zweck im Recht*, vol. I (Leipzig 1877); trans. Husik (Boston 1913)

Jhering, *Der Kampf um's Recht* (Wien 1872); trans. Lalor (Chicago 1915)

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Hart, 'Jhering's Heaven of Concepts' in *Essays in Jurisprudence and Philosophy* (Oxford 1983) 265

ITLOS, *Advisory Opinion on Climate Change and International Law* (21 May 2024)

BBNJ Agreement (19 June 2023)

London Protocol (1996); Res. LP.1(1) (2006); LP.3(4) (2009); LP.5(14) (2019)

Argüello & Bokareva, 'Transboundary transportation of CO₂ streams' *Frontiers in Marine Science* (2024)