CSCAP Workshop
UNCLOS & Maritime Security
Manila, Philippines, 27 May 2014

PROTECTION AND PRESERVATION OF THE MARINE ENVIRONMENT

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PART 1

General Obligations Concerning Protection and Preservation of the Marine Environment
Importance of UNCLOS


• Universally accepted

• Parties must accept Provisions on Environment in Part XII and on Settlement of Disputes in Part XV

• Provisions of UNCLOS being interpreted in light of developing principles of international environmental law

• Principles and rules governing States are more clear and certain because they are set out in UNCLOS
• Article 194(1) imposes a general obligation on States to take all measures consistent with UNCLOS that are necessary to prevent, reduce and control pollution of the marine environment from any source, using for this purpose the best practicable means at their disposal and in accordance with their capabilities.

• “Pollution of the marine environment” is defined in Article 1.
States shall 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.
Article 194(5) - Ecosystems & Species

• The measures taken in accordance with this Part shall 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.
Obligations “to ensure”

• Provisions in UNCLOS establishing a responsibility to ensure set out obligations that States Parties must fulfil by exercising their power over entities under their jurisdiction and control, such as ships flying their flag or companies subject to their national jurisdiction.

• Must be read in light of the reasoning in the 2011 Advisory Opinion on Responsibility of Sponsoring States.

• The Advisory Opinion defines the “responsibility to ensure” as one of “due diligence”.

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Article 206 provides that when States have reasonable grounds for believing that planned activities under their jurisdiction or control may cause substantial pollution of or significant and harmful changes to the marine environment, they shall, as far as practicable, assess the potential effects of such activities on the marine environment.

In paragraph 145 of its 2011 Advisory Opinion on Responsibility of Sponsoring States, the ITLOS Seabed Disputes Chamber affirmed that the obligation to conduct an environmental impact assessment (EIA) is a general obligation under both Article 206 of UNCLOS and customary international law.
Duty to Cooperate

• In the *MOX Plant Case (Ireland v. United Kingdom)*, and the *Land Reclamation Case (Malaysia v. Singapore)*, ITLOS stated that the “duty to cooperate” is a fundamental principle in the prevention of pollution of the marine environment under Part XII of the Convention and general international law.

• Duty to Cooperate is similar to Article 19 of 1992 Rio Principles:
  – States shall provide prior and timely notification and relevant information to potentially affected States on activities that may have a significant adverse transboundary environmental effect and shall consult with those States at an early stage and in good faith.
Precautionary Approach

- In its 2010 decision in the *Pulp Mills Case*, the ICJ stated in paragraph 164 that:
  - ... the Court considers that while a precautionary approach may be relevant to the interpretation and application of the provisions of the Statute, it does not follow that it operates as a reversal of the burden of proof.

- In its 2011 *Advisory Opinion on Responsibility of Sponsoring States*, ITLOS suggests that it agrees with the ICJ on the precautionary approach and hints that it may be willing to read it into UNCLOS:
  - 135. The Chamber observes that the precautionary approach has been incorporated into a growing number of international treaties and other instruments, many of which reflect the formulation of Principle 15 of the Rio Declaration. In the view of the Chamber, this has initiated a trend towards making this approach part of customary international law.
PART 2

Specific Obligations to take Measures to Prevent, Reduce and Control Pollution of the Marine Environment and to Enforce such Measures
Specific Obligations

• Pollution from Vessels – Articles 211, 217-220
• Pollution from Dumping – Articles 210 & 216
• Pollution from Seabed Activities Subject to National Jurisdiction – Articles 208 & 214
• Pollution from Land-Based Sources – Articles 207 & 213
• Pollution from or through the Atmosphere – Articles 212 & 222
UNCLOS provisions on Pollution from Vessels require **flag States** to adopt laws and regulations that *have at least the same effect* as that of *generally accepted international rules and standards* established by the International Maritime Organization (IMO).

- **MARPOL 73/78: International Convention on the Prevention of Pollution from Ships**
UNCLOS provisions on Pollution by Dumping require States to adopt laws and regulations and take other measures that are no less effective than the global rules and standards.

- 1972 Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter
• Article 208 provides that States shall adopt laws and regulations and take other measures that are *no less effective than* the international rules, standards, and recommended practices and procedures.

• However, the international community has not established the global rules and standards called for in Article 208.

• **THIS IS A SERIOUS GAP:** There are no international rules and standards governing pollution from offshore oil platforms within national jurisdiction.
Pollution from Land-Based Activities

- **Article 207 - Pollution from Land-Based Sources**

- 1. States shall adopt laws and regulations to prevent, reduce and control pollution of the marine environment from land-based sources, including rivers, estuaries, pipelines and outfall structures, taking into account internationally agreed rules, standards and recommended practices and procedures.

- ANOTHER GAP: There are few internationally agreed rules and standards – only for specific chemicals or pollutants.
PART 3

IMO Conventions on Pollution of the Marine Environment by Oil and HNS
IMO Conventions to Prevent Ship-Source Pollution

- Conventions regulating the design, construction and equipment on ships in order to minimise the threat of pollution –
  - MARPOL 73/78
  - 2004 International Convention for the Control and Management of Ships' Ballast Water and Sediments (not yet in force)
MARPOL 73/78 Annexes

- Annex I (Oil), EIF 2 Oct 1983, 152 parties
- Annex II (Noxious Liquid Substances), EIF 2 Oct 1983, 152 Parties
- Annex III (Harmful Substances in Packaged Form), EIF 1 July 92, 138 Parties
- Annex IV (Sewage), EIF 27 Sep 2003, 131 Parties
- Annex V (Garbage), EIF 31 Dec 1988, 144 Parties
- Annex VI (Air), EIF 19 May 2005, 72 Parties
1990 Convention on Oil Pollution Preparedness, Response and Co-operation (OPRC 1990)

EIF 13 May 1995, 105 Parties

The OPRC 1990 aims to provide a global framework for international co-operation in combating major incidents of marine pollution.

Parties are required to establish measures for dealing with pollution incidents, both nationally and in co-operation with other countries.
IMO Conventions on Preparedness and Response (OPRC-HNS Protocol 2000)

- This Convention extends the OPRC regulatory framework to address pollution incidents involving hazardous and noxious substances, i.e., chemicals.
1969 International Convention on Civil Liability for Oil Pollution Damage (CLC 69) was adopted in 1969 to ensure that adequate compensation is available to persons who suffer oil pollution damage resulting from maritime casualties involving oil-carrying ships.

CLC 92, entered into force on 30 May 1996, amending CLC 69 and substantially increasing the amount of liability of the shipowner.

CLC places the liability for such damage on the owner of the ship from which the polluting oil escaped or was discharged.

Subject to a number of specific exceptions, the owner’s liability is strict; it is the duty of the owner to prove in each case that any of the exceptions should in fact operate.

The CLC requires ships covered by it to maintain insurance or other financial security in sums equivalent to the owner’s total liability for one incident.
IMO Conventions on Liability and Compensation – CLC 69 & CLC 92

- The CLC applies to all seagoing vessels actually carrying oil in bulk as cargo, i.e., generally laden tankers.
- Bunker spills from ships other than tankers are not covered.
- The CLC covers pollution damage resulting from spills of persistent oils suffered in the territory (including the territorial sea) of a State Party to the Convention.
- Compensation is paid by the insurance company of the shipowner to persons who suffered pollution damage.
- The shipowner cannot limit liability if the incident occurred as a result of the owner's personal fault.
IMO Conventions on Liability and Compensation – CLC 92

- CLC 92 substantially increases the amount of liability of the shipowner.
- CLC 92 allows for a States Party to it to issue certificates to ships registered in States which are not Party to it, so that a shipowner can obtain certificates to both CLC 69 and CLC 92, even when the ship is registered in a country which has not yet ratified CLC 92.
- This is important because a ship which has only a CLC 69 certificate may find it difficult to trade to a country which has ratified CLC 92, since it establishes higher limits of liability.
IMO Conventions on Liability and Compensation – Fund 71 & FUND 92

• The 1971 Fund Convention established a second layer of compensation for oil pollution damage from tankers that exceeds the amount of liability of the shipowner under CLC 69.

• The International Oil Pollution Compensation (IOPC) established by Fund 71 is managed in London by a Secretariat.

• Contributions to the Fund are made by companies in States Parties who receive oil by sea from tankers (usually oil companies).

• The Fund is available only for oil pollution damage in the territory States Parties to the Fund.

• Fund 92 increased compensation amounts & extended the scope of coverage in line with increased liability of shipowners under CLC 92.
IMO Conventions on Liability and Compensation – 2001 Bunker

- It entered into force on 21 Nov 2008 and has 70 parties.
- The Bunkers Convention was adopted to ensure that adequate, prompt, and effective compensation is available to persons who suffer damage caused by spills of oil, when carried as fuel in ships' bunkers.
- The Bunkers Convention applies to damage caused on the territory, including the territorial sea, and in exclusive economic zones of States Parties.
- The Bunkers Convention provides a free-standing instrument covering pollution damage only.
IMO Conventions on Liability and Compensation – 2001 Bunker

- The convention is modelled on the 1969 CLC.
- As with the CLC, a key requirement in the Bunkers Convention is the need for the registered owner of a vessel to maintain compulsory insurance cover.
- Another key provision is the requirement for direct action - this would allow a claim for compensation for pollution damage to be brought directly against an insurer.
- It requires ships over 1,000 gross tonnage to maintain insurance or other financial security.
- In all cases, the limit of liability cannot exceed an amount calculated in accordance with the Convention on Limitation of Liability for Maritime Claims, 1976, as amended.
The International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea (HNS) was adopted in 1996.

It was modeled on the FUND convention and introduced strict liability for the shipowner and a system of compulsory insurance and insurance certificates.

Practical problems in implementation prevented States from ratifying it, so it was replaced by a 2010 Protocol.

The 2010 HNS Protocol is not yet in force.
PART 4

MARPOL Special Areas and PSSAs
Marine Protected Areas
Special Areas and PSSAs

- IMO conventions give Coastal States an opportunity to establish special rules in certain vulnerable coastal areas to reduce the threat of oil pollution from ships.
- There are two types of areas that can be established where special rules will apply to ships.
- Both types are established by the IMO after the submission of scientific and technical evidence by the Coastal State.
The first is “Special Areas” under MARPOL 73/78, which is defined as follows:

a sea area where, for recognized technical reasons in relation to its oceanographic and ecological condition and to the particular character of its traffic, the adoption of special mandatory methods for the prevention of sea pollution by oil, noxious liquid substances, or garbage, as applicable, is required.
Special Areas under MARPOL

- Special Areas are provided with a higher level of protection from “operational discharges” from ships than other areas of the sea.
- Special Areas can be established by the IMO if it can be shown by scientific and technical evidence that the areas are vulnerable to pollution by discharges from ships and that special mandatory measures of protection are required.
Marpol 73/78 Annex V - Special Areas

The North Sea  The Baltic Sea  Black Sea

Wider Caribbean region
incl. the Gulf of Mexico and the Caribbean Sea

Mediterranean Sea  Red Sea  “Gulfs area”

Antarctic area (south of latitude 60 degrees south)
The second area where special IMO rules can apply to ships are “Particularly Sensitive Sea Areas”, or PSSAs. A PSSA is defined as follows:

an area that needs special protection through the IMO because of its significance for recognized ecological or socio-economic or scientific reasons and which may be vulnerable to damage by international maritime activities.
PSSAs

- If an area is designated as a PSSA, the IMO may order "associated protective measures" (APMs).
- APMs are international rules and standards within the purview of the IMO which regulate international maritime activities for the protection of the area at risk.
- Examples of APMs are discharge restrictions, routing measures, operational criteria and prohibited activities.
Special Areas and PSSAs

- Special Areas and PSSAs are important tools for Marine Protected Areas that are located beyond 12 nautical miles from the coast, in the Exclusive Economic Zone of a Coastal State.

- Unless a Marine Protected Area is designated as a Special Area or PSSA, ships need only comply with the “generally accepted international rules and standards” of the IMO rules on the prevention of pollution from ships and the safety of navigation of ships (e.g., MARPOL 73/78 and SOLAS).
UNCLOS provides a framework for protecting the marine environment from all sources of marine pollution.

IMO conventions supplement UNCLOS and are incorporated into its provisions.

ARF members should undertake a review to determine:

1. If they have implemented their obligations under UNCLOS
2. Whether they are parties to the IMO conventions and have implemented them into their domestic law
3. Whether they should establish Special Areas or PSSAs
Thanks for your attention

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