Session 4: Transboundary Pollution of the Marine Environment

STATE RESPONSIBILITY AND TRANSBOUNDARY MARINE POLLUTION

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I. INTRODUCTION

Pollution of the marine environment is caused by human activities conducted in and on the oceans. This paper examines the responsibilities owed by States to ensure that damage to the marine environment caused by such activities is prevented, reduced and controlled. It examines potential remedies available to States that have been affected by transboundary marine pollution, and the ways in which liability for damage can be attributed to States who fail to give effect to their duties and obligations to protect and preserve the marine environment from activities conducted under their jurisdiction and control.

The primary source of international law that governs the oceans is the 1982 United Nations Convention on the Law of the Sea (UNCLOS)\(^1\). UNCLOS is a framework agreement setting out the rights and obligations of States with respect to all uses of the oceans. It is now almost universally accepted and many of its provisions, including those on protection and preservation of the marine environment, are generally regarded as binding on all States under customary international law.\(^2\)

UNCLOS is important to marine pollution because Part XII on protection and preservation of the marine environment is an integral part of the Convention. Since no “reservations” to UNCLOS are permissible\(^3\), States cannot become parties to UNCLOS without accepting its detailed provisions on the prevention, reduction and control of marine pollution.

UNCLOS is not a stand-alone convention, but a framework convention. UNCLOS recognizes the competence of specialized international organizations to proscribe rules to protect the marine environment. Many of the provisions of UNCLOS refer to laws, regulations, rules, standards and recommended practices of the “competent international organization”.\(^4\) The International Maritime Organization (IMO) is recognized as the competent international organization with respect to the safety of maritime navigation and

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\(^3\) UNCLOS, Article 309.

\(^4\) UNCLOS, Articles 22(3)(a), 41(4), 60(3), 197, 201, 204(1), 207(4), 208(5), 210(4), 211-214, 216-218, 222, 251, 262, 271, and 297(1)(c).
the protection of the marine environment from ship-source pollution.\(^5\) Many of the provisions of UNCLOS incorporate by reference the conventions and codes of the IMO on the protection and preservation of the marine environment. Because the general provisions in UNCLOS automatically incorporate the rules, standards, procedures and practices set out in IMO instruments that are being constantly updated by the IMO, the provisions in UNCLOS on prevention, reduction and control of pollution from ships remain current and relevant.

Although UNCLOS is the primary source of law that governs all uses of the oceans, its provisions on responsibility and liability for pollution of the marine environment must be read together with the International Law Commission’s 2001 *Articles on Responsibility of States for Internationally Wrongful Acts*\(^6\) (2001 ILC Articles). Several of the provisions in the 2001 ILC Articles have been cited by international courts and arbitral tribunals as evidence of general international law, and they have therefore become the starting point for analyzing the general international law on the responsibility of States.\(^7\)

Like the provisions of the 1969 *Vienna Convention on the Law of Treaties*, the 2001 ILC Articles are ‘secondary rules’. The ILC Articles set out the general conditions under international law for a State to be considered responsible for wrongful actions or omissions in breach of its primary obligations, and the legal consequences which flow therefrom. The ‘primary rules’ of international law are the obligations imposed on States in treaties and in rules of customary international law governing particular areas of law.\(^1\) For example, the primary rules governing the law of the sea are set out in UNCLOS. Secondary rules in the 1969 Vienna Convention and in the 2001 ILC Articles set out general rules on matters such as the legal consequences which result if a State party breaches the primary rules set out in UNCLOS.

Article 235 of UNCLOS sets out the general principles concerning responsibility and liability with respect to protection and preservation of the marine environment. Article 235(1) provides that States are *responsible* for the fulfilment of their international obligations concerning the protection and preservation of the marine environment, and that they shall be *liable* in accordance with international law. These provisions should be read in light of the 2001 ILC Articles and the decisions of international courts and tribunals.

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A State is “responsible” under international law if it fails to fulfill its international obligations to prevent, reduce and control pollution of the marine environment. If the responsibility of a State is engaged, it is under an obligation to cease continuing an act that is contrary to its obligations, and to offer appropriate assurances and guarantees of non-repetition, if circumstances so require. The responsible State is also under an obligation to make full “reparation” for the injury caused by the internationally wrongful act. In other words, a State is liable for damage resulting from pollution of the marine environment by ships or persons subject to its jurisdiction and control only if a causal link is established between the failure of the State to fulfil its obligations and the damage to the marine environment. The existence of a causal link between the State’s failure and the damage is a necessary element in establishing liability and cannot be presumed.

The rules on responsibility and liability have been clarified by the 2011 advisory opinion of the Seabed Disputes Chamber of the International Tribunal for the Law of the Sea (ITLOS) concerning Responsibilities and Obligations of States Sponsoring Persons and Entities with respect to Activities in the Area (Advisory Opinion on Responsibility of Sponsoring States). Although the advisory opinion was on specific questions relating to the responsibilities and obligations of States sponsoring entities to conduct exploration and exploitation activities of the deep seabed beyond areas of national jurisdiction, much of the Chamber’s discussion and analysis is relevant to other activities conducted by persons under the jurisdiction and control of a State that may cause pollution of the marine environment.

II. GENERAL OBLIGATIONS CONCERNING POLLUTION OF THE MARINE ENVIRONMENT

Due diligence obligations under Article 194 of 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. Thus, the obligation to take measures is qualified by language concerning common but differentiated responsibilities as set out in Principle 7 of the 1992 Rio Declaration on the Environment and Development (Rio Declaration).

8 2001 ILC Articles, Article 30.
9 2001 ILC Articles, Article 31(1).
Article 194(2) imposes an obligation on States regarding transboundary pollution from activities under their jurisdiction and control, that is, activities by ships flying their flag, by entities engaged in seabed activities subject to their jurisdiction, etc. It provides that:

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(3) provides that the measures in Part XII of UNCLOS on protection and preservation of the marine environment shall deal with all sources of pollution of the marine environment, including pollution from hazardous and noxious substances, pollution from vessels, and pollution from installations and devices used in exploration or exploitation of the natural resources of the seabed and subsoil.

Article 194(5) provides that the measures taken in accordance with Part XII 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. In other words, it requires States to take measures not only to prevent pollution, but to protect and preserve marine biological diversity.

These provisions in UNCLOS establishing a “responsibility to ensure” must be read in light of the reasoning in the Advisory Opinion on Responsibility of Sponsoring States. The advisory opinion of the Seabed Disputes Chamber defines the “responsibility to ensure” as one of “due diligence”. The 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. Such “due diligence” obligations may be characterized as obligations “of conduct” and not “of result”.

These due diligence obligations require a State to take measures within its legal system, including the adoption of laws and regulations as well as administrative measures to ensure that such laws and regulations are enforced. In paragraph 197 of its judgment in the Pulp Mills on the River Uruguay case, the International Court of Justice (ICJ) described such due diligence obligations in a treaty as follows:

13 UNCLOS, Articles 194(2), 210(3), 217(1)(2) and 235(2).
14 2011 Advisory Opinion on Responsibility of Sponsoring States, para 110.
It is an obligation which entails not only the adoption of appropriate rules and measures, but also a certain level of vigilance in their enforcement and the exercise of administrative control applicable to public and private operators, such as the monitoring of activities undertaken by such operators...

Environmental Impact Assessment

Articles 204 to 206 of UNCLOS impose general obligations on States to monitor the risks or effects of pollution of the marine environment. Article 204 provides that States should keep under surveillance the effects of activities which they engage in or permit. 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.

The rather vague language of Article 206 has been clarified (and developed) by both the ICJ and ITLOS. In paragraph 204 of its judgment of 20 April 2010 in the case concerning *Pulp Mills on the River Uruguay* (Argentina v. Uruguay), the Court stated:

> It may now be considered a requirement under general international law to undertake an environmental impact assessment where there is a risk that the proposed industrial activity may have a significant adverse impact in a transboundary context, in particular, on a shared resource. Moreover, due diligence, and the duty of vigilance and prevention that it implies, would not be considered to have been exercised, if a party planning works liable to affect the regime of the river or quality of its waters did not undertake an environmental impact assessment on the potential effects of such works.

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 UNCLOS and customary international law. In paragraph 146 it implied that that the obligation to conduct an EIA is required under Article 206 of UNCLOS:

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16 2011 Advisory Opinion on Responsibility of Sponsoring States, para 145.
146. As regards the Convention, article 206 states the following:

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 and shall communicate reports of the results of such assessments in the manner provided in article 205. [Article 205 refers to an obligation to publish reports.]

**Duty to cooperate on activities that may cause transboundary pollution**

The decisions of ITLOS have clarified the principles of general international law that apply to planned activities that may cause transboundary marine pollution of the marine environment. ITLOS addressed this issue in the course of its decisions in two cases on provisional measures. In the *MOX Plant Case (Ireland v. United Kingdom), Provisional Measures* the Tribunal stated in paragraph 82 of its Order for Provisional Measures 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.\(^\text{17}\) And the Tribunal stated in paragraph 89 that:

Ireland and the United Kingdom shall cooperate and shall, for this purpose, enter into consultations forthwith in order to:

(a) exchange further information with regard to possible consequences for the Irish Sea arising out of the commissioning of the MOX plant;

(b) monitor risks or the effects of the operation of the MOX plant for the Irish Sea;

(c) devise, as appropriate, measures to prevent pollution of the marine environment which might result from the operation of the MOX plant.

In the *Case concerning Land Reclamation by Singapore in and around the Straits of Johor (Malaysia v. Singapore), Provisional Measures* the Tribunal repeated its statement 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 (para 92). It further stated that the record of this case shows that there was insufficient cooperation between the parties up to the submission of the Statement of Claim on 4 July 2003 (para 97). The Tribunal then stated that “given the possible implications of land reclamation on the marine environment, prudence and caution require that Malaysia and Singapore establish mechanisms for exchanging information and assessing the risks or effects of land reclamation works and devising ways to deal with them in the areas concerned”.  

The duty to cooperate was also stressed in the Joint Declaration of Judges Ad Hoc Hossain and Oxman, but they framed the “fundamental principle” as a “due regard obligation” rather than a duty to cooperate. They stated that:

> Our decisions to join in supporting the unanimous Order of the Tribunal are informed by a fundamental principle on which the Convention is built. The right of a State to use marine areas and natural resources subject to its sovereignty or jurisdiction is broad but not unlimited. It is qualified by the *duty to have due regard* to the rights of other States and to the protection and preservation of the marine environment. (emphasis added)

Although there is no express language in UNCLOS providing for a duty to cooperate or a due regard obligation concerning planned activities under the jurisdiction and control of one State that may pollute the marine environment of another State, the ITLOS has in effect read this fundamental principle into Part XII of UNCLOS. The duty to cooperate set out in these cases seems to include a duty to give timely notice to the potentially affected State of the planned activities, to provide it with relevant information about the planned activities and to consult with it in good faith. It also implies an obligation to exchange information and

19 *Land Reclamation Case*, para. 97.  
20 *Land Reclamation Case*, para. 99.  

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to negotiate in good faith in order to balance the competing interests of the two States. Thus, it can be argued that ITLOS has interpreted the provisions in UNCLOS in light of principles of international environmental law that developed subsequent to UNCLOS by reading Principle 19 of the 1992 Rio Declaration into Part XII of UNCLOS. Principle 19 reads as follows:

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 / precautionary principle**

The precautionary approach is set out in Principle 15 of the 1992 Rio Declaration as follows:

In order to protect the environment, the precautionary approach shall be widely applied by States according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation.

ITLOS was asked to consider the legal status of the precautionary approach in both the MOX Plant and Land Reclamation cases. It did not expressly mention the precautionary approach in either case. Rather, the Tribunal stated that “prudence and caution” required the two States to take cooperative measures in order to fulfill their “duty to cooperate”, which the Tribunal stated was a fundamental principle of general international law. In the MOX Plant case the Tribunal stated that “prudence and caution require that Ireland and the United Kingdom cooperate in exchanging information concerning risks or effects of the operation of the MOX plant and in devising ways to deal with them, as appropriate”. In the Land Reclamation case the Tribunal stated that “given the possible implications of land reclamation on the marine environment, prudence and caution require that Malaysia and Singapore establish mechanisms for exchanging information and assessing the risks or effects of land reclamation works and devising ways to deal with them in the areas concerned”.

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22 The MOX Plant Case, para. 82. Land Reclamation Case, para. 92.
23 The MOX Plant Case, para. 84.
24 Land Reclamation Case, para. 99.
It is sometimes asserted that the precautionary approach has become a principle of general international law, and that the effect of the principle is to reverse the burden of proof concerning the possible impact of a given activity. However, the wording of Principle 15 does not seem to support the position that a State intending to undertake a given activity has the burden of proving that the activity will not harm the environment. The comment of the ICJ in the Pulp Mills case seems to support this conclusion, as it stated in paragraph 164 that:

Regarding the arguments put forward by Argentina on the reversal of the burden of proof and on the existence, vis-à-vis each Party, of an equal onus to prove under the 1975 Statute, 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. This trend is clearly reinforced by the inclusion of the precautionary approach in the Regulations and in the “standard clause” contained in Annex 4, section 5.1, of the Sulphides Regulations. So does the following statement in paragraph 164 of the ICJ Judgment in Pulp Mills on the River Uruguay that “a precautionary approach may be relevant in the interpretation and application of the provisions of the Statute” (i.e., the environmental bilateral treaty whose interpretation was the main bone of contention between the parties). This statement may be read in light of article 31, paragraph 3(c), of the Vienna

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28 *Pulp Mills Case*, para. 164.
Convention, according to which the interpretation of a treaty should take into account not only the context but “any relevant rules of international law applicable in the relations between the parties”.  

**Notification in case of emergencies**

Article 198 of UNCLOS provides that when a State becomes aware of cases in which the marine environment is in imminent danger of being damaged or has been damaged by pollution, it shall immediately notify other States it deems likely to be affected by such damage. This article is very similar to Principle 18 of the Rio Declaration, which provides that “States shall immediately notify other States of any natural disasters or other emergencies that are likely to produce sudden harmful effects on the environment of those States”.

**Recourse for compensation under national legal systems**

Article 235(2) recognizes that individuals or companies may be liable for damage caused by pollution of the marine environment. It imposes an obligation on States Parties to ensure that prompt and adequate compensation or other relief is available under their national legal system for damage caused by individuals or companies who are subject to their jurisdiction.

**III. SPECIFIC OBLIGATIONS CONCERNING POLLUTION OF THE MARINE ENVIRONMENT**

According to the reasoning of ITLOS in its *2011 Advisory Opinion on Responsibility of Sponsoring States*, the obligations of States are not limited to the due diligence obligation and other general obligations. Under UNCLOS and related instruments, States Parties also have obligations with which they have to comply independently of their obligation to ensure that activities under their jurisdiction and control are so conducted as not to cause damage by pollution to other States and their environment. These obligations may be characterized as “direct obligations”.

The obligations on States Parties to adopt laws and regulations and take other measures to prevent, reduce and control pollution of the marine environment from specific activities under their jurisdiction and control is very specific and detailed in many cases. This is because many of the obligations in UNCLOS incorporate by reference the detailed

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30 2011 Advisory Opinion on Responsibility of Sponsoring States, para 121.
provisions in the conventions and codes adopted by the International Maritime Organization (IMO) or other “competent international organizations”.  

**Obligations of flag States to prevent pollution from vessels**

The most detailed provisions in UNCLOS regarding pollution of the marine environment are those governing ship-source pollution. The UNCLOS provisions strike a balance between the right of all States to have ships flying their flag exercise the right of navigation on the seas, and the interests of coastal States and the international community as a whole in preventing, reducing and controlling pollution of the marine environment by vessels. Whilst freedoms of the seas are enjoyed by States under UNCLOS, States may authorize companies and individuals to exercise these freedoms by registering their vessels with the State and flying its flag. These vessels remain under the jurisdiction and control of the flag State.

Article 94 imposes an obligation on States to take such measures for ships flying their flag as are necessary to ensure safety at sea, and such measures shall include those necessary to ensure that the master, officers and, to the extent appropriate, the crew are fully conversant with and required to observe the applicable international regulations concerning the safety of life at sea, the prevention of collisions, and the prevention, reduction and control of marine pollution. In addition, Article 211(2) provides that States have an obligation to adopt laws and regulations governing pollution from ships flying their flag that “at least have the same effect” as the *generally accepted international rules and standards* adopted by the IMO. These provisions in effect mean that flag States must take steps to ensure that ships flying their flag comply with the very detailed rules and standards in the *International Convention for the Prevention of Pollution of the Sea*, known as MARPOL 73/78, as amended, as well as the IMO codes concerning the carriage of dangerous goods.  

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31 UNCLOS, Articles 197, 201, 207(4), 208(5), 210(4), 211(1)-(2) and (5)-(6), 212(3), 213-214, 216(1), 217(1) and (4), 218(1), 220(7), and 222.


33 It is not entirely clear which of the annexes to MARPOL would be included as “generally accepted international rules and standards”. Parties to MARPOL are automatically bound by Annexes I and II, but the other four annexes must be ratified separately. As at 9 January 2013, there were 152 parties to MARPOL 73/78 and Annexes I & II on oil pollution, 138 parties to Annex III on harmful substances in packaged form, 131 parties to Annex IV on sewage, 144 parties to Annex V on garbage and 75 parties to Annex VI on air pollution. Since only about half of the parties to MARPOL are parties to the Annex VI, the argument can be made that it does not fall within the phrase “generally accepted international rules and standards”. To complicate matters further, some of the IMO codes and guidelines that were initially adopted in non-binding
Therefore, even if a flag State is not a party to MARPOL 73/78, it must take measures to ensure that its ships observe MARPOL 73/78 (as amended) and it must adopt laws and regulations on the prevention of pollution from ships that are “at least as effective” as those in MARPOL 73/78 and the IMO codes on the carriage of dangerous goods.\(^\text{34}\) Furthermore, Article 217(1) imposes specific obligations on flag States with respect to enforcement, including the following:

States shall ensure compliance by vessels flying their flag or of their registry with applicable international rules and standards, established through the competent international organization or general diplomatic conference, and with their laws and regulations adopted in accordance with this Convention for the prevention, reduction and control of pollution of the marine environment from vessels and shall accordingly adopt laws and regulations and take other measures necessary for their implementation. Flag States shall provide for the effective enforcement of such rules, standards, laws and regulations, irrespective of where a violation occurs.

**Obligation on flag States to prevent pollution from dumping**

Dumping is defined in Article 1 of UNCLOS as “any deliberate disposal of wastes or other matter from vessels, aircraft, platforms or other man-made structures at sea”.\(^\text{35}\) Dumping does not include the placement of matter on the seabed for a purpose other than dumping, nor does it include the disposal of wastes governed from ships or platforms that is regulated by the provisions in MARPOL 73/78.\(^\text{36}\)

Article 210 provides that States shall adopt laws and regulations and adopt other measures to prevent, reduce and control pollution of the marine environment by dumping. It also provides that national laws, regulations and measures shall be “no less effective” in preventing, reducing and controlling such pollution than the “global rules and standards”.\(^\text{37}\) The “global rules and standards” are those set out in the 1972 *Convention on the Prevention

\(\text{resolutions have been subsequently incorporated into IMO conventions and made legally binding. For example, the International Code for the Construction and Equipment of Ships Carrying Dangerous Chemicals in Bulk (IBC Code) has been incorporated into MARPOL. On this very complicated issue, see Study by the Secretariat of the IMO, IMO Document No. LEG/MISC.7, 19 January 2012.}\)

\(^{34}\) UNCLOS, Article 211(2).

\(^{35}\) UNCLOS, Article 1(5)(a).

\(^{36}\) UNCLOS, Article 1(5)(b).

\(^{37}\) UNCLOS, Article 210(6).
of Marine Pollution by Dumping of Wastes and Other Matter. It is not clear, however, whether the global rules and standards also include the 1996 Protocol to the 1972 Convention. The reason for this doubt is that 87 States are parties to the 1972 Convention, but only 44 of the 170 members of the IMO are parties to the 1996 Protocol. On the other hand, the reference in this article is to “global rules and standards”, not to “generally accepted international rules and standards”. The study of the IMO Secretariat on relationship between UNCLOS and the IMO Conventions does not take a clear position on this issue but it does point out that there are no fundamental inconsistencies between UNCLOS and the 1972 Convention.

The enforcement of laws on dumping is the responsibility of coastal States and flag States. Article 216 provides that the laws and regulations adopted in accordance with the Convention and applicable rules and standards shall be enforced by the flag State with respect to vessels flying its flag. In effect this means that a State Party to UNCLOS must adopt and enforce laws and regulations on dumping that are “no less effective” than those in the 1972 Convention even if it is not a party to the 1972 Convention.

Pollution from seabed activities subject to national jurisdiction

Seabed activities subject to national jurisdiction are activities on the seabed and ocean floor in the EEZ or on the continental shelf, including construction and use of artificial islands, installations and structures, the exploration and exploitation of oil and gas resources, dredging and mining.

Article 208 of UNCLOS provides that coastal States shall adopt laws and regulations and take other measures to prevent, reduce and control pollution of the marine environment from such activities. It also provides that such laws, regulations and measures “shall be no less effective than international rules, standards and recommended practices and procedures.” Article 208 also provides that States shall establish global and regional rules,

39 IMO, Status of Multilateral Conventions and Instruments in Respect of which the International Maritime Organization or Its Secretary-General Performs Depositary or Other Functions, as at 9 January 2014, 511 and 525, <http://www.imo.org/About/Conventions/StatusOfConventions/Documents/Status%20-%202014%20New%20Version.pdf>.
40 UNCLOS, Article 210(4).
42 UNCLOS, Article 208(3).
standards and recommended practices and procedures to prevent, reduce and control pollution of the marine environment from such activities. 43 However, no such global rules, standards and recommended practices and procedures have been established. 44 Therefore, there are no international norms by which one can judge the national laws and regulations. The Montara Incident 45 in the Timor Sea and the Deep Water Horizon Incident 46 in the Gulf of Mexico have triggered calls in some quarters for the international community to take steps to establish international rules, standards and recommended practices and procedures for deep water drilling. In addition, the fact that some Pacific island States are beginning to licence companies to engage in mining activities on their continental shelf has raised the issue of whether the international community should also establish international rules, standards and recommended practices and procedures to govern mining activities within national jurisdiction, especially if such activities might pose a risk to the marine environment in maritime zones of other States or the marine environment of the high seas. 47

Pollution from or through the Atmosphere

Article 212 provides that States shall adopt laws and regulations to prevent reduce and pollution of the marine environment from or through the atmosphere. There are three categories of pollution of the marine environment from or through the atmosphere.

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43 UNCLOS, Article 208(5).
44 However, some IMO conventions establish rules and standards for certain matters relating to seabed activities. For example, the 1990 International Convention on Oil Pollution Preparedness, Response and Cooperation (OPRC) applies to oil pollution from offshore installations, and the 1972 London Convention applies to the disposal of platforms on the seabed.
45 Montara Oil Spill: ‘On 21 August 2009 the Montara wellhead platform drill rig owned by PTTEP Australasia suffered a well head accident, resulting in the uncontrolled discharge of oil and gas. The discharge of oil and gas was stopped on 3 November 2009.’ <http://www.environment.gov.au/topics/marine/marine-pollution/montara-oil-spill>.
46 Deepwater Horizon Accident and Response: ‘On the evening of 20 April 2010, a gas release and subsequent explosion occurred on the Deepwater Horizon oil rig working on the Macondo exploration well for BP in the Gulf of Mexico. ... Eleven people died as a result of the accident and others were injured. ... The fire burned for 36 hours before the rig sank, and hydrocarbons leaked into the Gulf of Mexico before the well was closed and sealed.’ <http://www.bp.com/en/global/corporate/gulf-of-mexico-restoration/deepwater-horizon-accident-and-response.html>.
The first category concerns pollution of the marine environment from or through the atmosphere from ships exercising their right to navigate on the oceans. Flag States have the responsibility to regulate this and to follow the rules, standards and recommended practices and procedures on air pollution from ships that are established by the IMO under Annex VI of MARPOL. This issue is also being discussed at the IMO in the context of the negotiations on climate change.

The second category concerns pollution of the marine environment from or through the atmosphere from aircraft exercising the right to fly over the oceans. The State of registry of the aircraft has the responsibility to regulate this, and to comply with the rules, standards and recommended practices and procedures adopted by the International Civil Aviation Organization (ICAO).

The third category concerns pollution of the marine environment from or through the atmosphere from activities inside the territory of a State. This type of pollution is in effect a form of land-based pollution, or pollution of the marine environment from land-based activities. Since the land-based activities that are the source of the pollution take place within the territory of a State, they are arguably better dealt with through other conventions rather than through a convention which governs ocean activities.

However, the general principles governing transboundary pollution would apply to pollution from or through the atmosphere from land-based activities in another State. Every State has an obligation to ensure that activities under its jurisdiction and control do not pollute the marine environment of another State or the marine environment of the high seas. As the definition in Article 1 of UNCLOS provides, there is pollution of the marine environment if there are deleterious effects such 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.

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48 UNCLOS, Article 217(1).
52 UNCLOS, Article 194(2).
Pollution from land-based sources

Article 207 provides that 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.\(^{53}\)

Article 207 also provides that States, acting especially through competent international organizations or diplomatic conference, shall endeavour to establish global and regional rules, standards and recommended practices and procedures to prevent, reduce and control pollution of the marine environment from land-based sources, taking into account characteristic regional features, the economic capacity of developing States and their need for economic development.\(^{54}\)

The international community has been unable to establish global and regional rules, standards and recommended practices and procedures as called for in Article 207.\(^{55}\) One of the major reasons for this is that most of the land-based sources of marine pollution are from activities which have historically been matters essentially within the domestic jurisdiction of States. They include the construction of sewer systems, the regulation of hazardous wastes in industry, the use of fertilizers and pesticides, etc. Many States, especially developing countries, are reluctant to agree to any legally binding instruments which limit their development policies within their territory.

Nevertheless, the general principles on transboundary pollution would apply to pollution of the marine environment from land-based sources. Every State has an obligation to ensure that activities under its jurisdiction and control do not pollute the marine environment of another State or the marine environment of the high seas.\(^{56}\) Therefore, if it can be established that activities within the territory of a State are causing pollution of the marine environment, that State would in principle be under an obligation of due diligence to take steps to prevent, reduce and control the pollution caused by the activity.

\(^{53}\) UNCLOS, Article 207(1).
\(^{54}\) UNCLOS, Article 207(4).
\(^{56}\) UNCLOS, Article 194(2).
IV. RESPONSIBILITY OF STATES FOR POLLUTION OF THE MARINE ENVIRONMENT

Invocation of the responsibility of a State

An important contribution of the 2001 ILC Articles is that they set out when a State can invoke the responsibility of another State for breaches of its obligations under international law. These provisions are especially important when considering the obligations undertaken by States when they become parties to an international treaty that contain provisions obligating States to take measures to protect the marine environment.

The general principle that an “injured State” can invoke the responsibility of another State is set out in Article 42 of the 2001 ILC Articles, which reads as follows:

A State is entitled as an injured State to invoke the responsibility of another State if the obligation breached is owed to:

a) that State individually; or

b) a group of States including that State, or the international community as a whole, and the breach of the obligation:

i) specially affects that State; or

ii) is of such a character as radically to change the position of all the other States to which the obligation is owed with respect to the further performance of the obligation.

The obligations of a State under UNCLOS to adopt and effectively enforce laws and regulations to prevent, reduce and control pollution of the marine environment are obligations owed to a group of States, that is, to all States parties to the Convention. If a breach of those obligations threatens to cause significant pollution of the marine environment in a maritime zone subject to the jurisdiction of a coastal State, that coastal State would be specially affected (pursuant to Article 42(b)(i)). Therefore, it would have the status of an injured State under Article 42 of the ILC Articles. The requirement is that a State is an injured State only if it is “specially affected”, that is, it must be affected by the breach in a way which distinguishes it from the generality of other States to which the obligation is owed.57

Article 48 of the 2001 ILC Articles sets out the circumstances under which a State other than an injured State can invoke the responsibility of a State. The relevant language reads as follows:

1. Any State other than an injured State is entitled to invoke the responsibility of another State in accordance with paragraph 2 if:
   a. The obligation breached is owed to a group of States including that State, and is established for the protection of a collective interest of the group.

The official commentary to Article 48 states that obligations coming within the scope of this Article must be “collective obligations”, that is, they must apply between a group of States and they must have been established in some collective interest, such as protection and preservation of the environment.\(^{58}\) A State entitled to invoke responsibility under Article 48(1) is “acting not in its individual capacity by reason of having suffered injury, but in its capacity as a member of the group of States to which the obligation is owed”.\(^{59}\)

Article 48 would enable any State party to UNCLOS to invoke the responsibility of a State if it breaches its obligations to adopt and effectively enforce laws and regulations to protect the marine environment, as these obligations are established for the collective interest of all States parties. The State invoking the responsibility of the flag State would be acting in its capacity as a member of the group of States to which the obligation is owed, that is, as one of the States parties to UNCLOS.

The invocation of the responsibility of a State is understood to require the taking of measures of a relatively formal character. It is not sufficient to criticize a State for breaching its international obligations, to call on a State to observe its international obligations, or to make a formal protest. To invoke the responsibility of another State, a State must raise or present a claim against the State or commence of proceedings against the State before an international court or tribunal.\(^{60}\) Article 43 of the 2001 ILC Articles set out the procedure for notice of a claim by an injured State which invokes the responsibility of another State. It must give notice of its claim to that State and specify: (a) the conduct that the responsible

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\(^{58}\) 2001 ILC Articles with Commentaries, Commentary to Article 48, para (6), 126.

\(^{59}\) 2001 ILC Articles with Commentaries, Commentary to Article 48, para (1), 126.

\(^{60}\) 2001 ILC Articles with Commentaries, Commentary to Article 42, para (2), 116.
State should take in order to cease the wrongful act, if it is continuing; and (b) what form reparation should take.61

Consequences of an internationally wrongful act

If there is an internationally wrongful act, the 2001 ILC Articles establish that two consequences follow for the responsible State. First, it must cease the unlawful conduct, and offer assurances and guarantees of non-repetition; second, it is under an obligation to make full “reparation” for the injury caused by the internationally wrongful act.62

If an injured State has the right to invoke the responsibility of another State, it can seek remedies such as assurances and guarantees of non-repetition or an order that the conduct of the State is a breach of its international obligations without having to prove that the internationally wrongful act caused injury to it. However, if an injured State is seeking reparation for injury or damage caused to it, it must show that the injury was caused by the internationally wrongful act.63

Importance of the dispute settlement regime in Part XV of UNCLOS

In most cases of environmental harm it is not possible to invoke the responsibility of another State by the commencement of proceedings against the State before an international court or tribunal. This is because the jurisdiction of international courts and tribunals is based on the principle of consent. No international court or arbitral tribunal has jurisdiction to hear the dispute unless both States consent.

UNCLOS is in many respects an exception to this rule because the general principle in Part XV on the Settlement of Disputes is that disputes concerning the interpretation or application of any provision in UNCLOS are subject to the system of compulsory procedures entailing binding decisions.64 When States become parties to UNCLOS, they consent in advance to the system of compulsory binding dispute settlement in Part XV of the Convention.

61 2001 ILC Articles, Article 43(2).
62 2001 ILC Articles, Articles 30 and 31.
63 2001 ILC Articles with Commentaries, Commentary to Article 31, para (9), 92.
The “default” rule in UNCLOS is that if there is a dispute between two States concerning the interpretation or application of any provision in the Convention, it is subject to the system of compulsory procedures entailing binding decisions in Section 2 of Part XV. States are obligated to first exchange views to try to resolve the dispute by following the procedures set out in Section 1 of Part XV. However, where no settlement has been reached by recourse to Section 1, the dispute may be unilaterally submitted at the request of any party to the dispute to the court or tribunal having jurisdiction under Section 2.

Which court or tribunal has jurisdiction to hear a dispute depends on whether the parties to the dispute have exercised their right to select a procedure for resolving disputes to which they are parties. Under Article 287, a State is free to choose, by means of a written declaration, one or more of four procedures for the settlement of disputes concerning the interpretation or application of the Convention: (1) adjudication before the ICJ; (2) adjudication before ITLOS; (3) arbitration under Annex VII of UNCLOS; or (4) special arbitration under Annex VIII of UNCLOS. A State may indicate its choice of procedure when signing, ratifying or acceding to UNCLOS, or at any time thereafter. If two States parties to a dispute have elected the same procedure, the dispute may only be referred to that procedure, unless the parties otherwise agree. If the States parties to the dispute have not elected the same procedure, or if one of them has not made a choice of procedure, the dispute may be submitted only to arbitration under Annex VII, unless the parties otherwise agree.

Another very important feature of UNCLOS with respect to disputes concerning the pollution of the marine environment is that a State party to a dispute which is referred to dispute settlement under Section 2 of Part XV may also request provisional measures to prevent serious harm to the marine environment. The only prerequisite is that the court or tribunal to which the dispute has been duly submitted must first determine that prima facie it has jurisdiction under Part XV or Part XI. Such provisional measures are legally binding. Even if a dispute is being referred to an arbitral tribunal, a State party may request

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65 UNCLOS, Article 283.
66 UNCLOS, Article 286.
67 UNCLOS, Article 288(1).
68 UNCLOS, Article 287(1).
69 UNCLOS, Article 287(1).
70 UNCLOS, Article 287(4).
71 UNCLOS, Article 287(5).
72 UNCLOS, Article 290(1).
73 UNCLOS, Article 290(1).
74 UNCLOS, Article 290(6).
provisional measures from ITLOS pending the establishment of the arbitral tribunal if ITLOS “considers that prima facie the tribunal which is to be constituted would have jurisdiction and that the urgency of the situation so requires”.75

Potential cases on the responsibility of States for pollution of the marine environment

Following from the above analysis, there are several types of disputes concerning the interpretation and application of the provisions on the protection of the marine environment in UNCLOS that are subject to the dispute settlement procedures in UNCLOS. They would include the following:

1. A dispute on whether a flag State is in breach of its obligations under Articles 94, 194, 211 and 217 to prevent, reduce and control pollution of the marine environment by ships flying its flag when such breaches cause or threaten serious pollution of the marine environment of the State instituting proceedings.

2. A dispute on whether a coastal State is in breach of its obligations under Articles 194, 208, 214, 235, 60 and 80 to prevent, reduce and control pollution from the marine environment from seabed activities under its jurisdiction when such breaches cause or threaten serious pollution of the marine environment of the State instituting proceedings.

3. A dispute on whether a flag State or a coastal State is in breach of its obligations under Articles 194, 206, 210 and 216 to prevent, reduce and control pollution of the marine environment by dumping when such breaches cause or threaten serious pollution of the marine environment of the State instituting proceedings.

4. A dispute on whether a coastal State is in breach of its obligations under Articles 194, 204, 206, 207 and 213 to prevent pollution of the marine environment from land-based activities under its jurisdiction and control, as well as its duty to cooperate and its obligation to conduct an environmental impact assessment, when activities cause or threaten serious pollution of the marine environment of the State instituting proceedings.

The relief sought in a case would depend upon the particular facts, but it could include a request for an order to cease the activities, an assurance of cessation of the activities and guarantees of non-repetition, and an order that the conduct of the State is a breach of its

75 UNCLOS, Article 290(5).
international obligations. If the State in breach of its obligations has failed to adopt laws and regulations as required in UNCLOS or has failed to take administrative measures to ensure effective compliance with such laws and regulations, the remedy sought might be an order for the State concerned to take such measures by a particular date. If the case involves a failure by a State to fulfil its “duty to cooperate” and its obligation to conduct an EIA, the State instituting proceedings could seek an order requiring the offending State to cooperate with it by sharing information on the activities it intends to carry out, by entering into consultations with it on how to conduct the EIA and how to minimize the potential impact of the activities on the marine environment of the affected State. Finally, if the State instituting proceedings can prove that the breaches have caused damage to the marine environment in its maritime zones, it could also seek an order for the payment reparations, including compensation for clean-up and restoration.

If the threat to its marine environment is serious and imminent, the State instituting procedures could also request an order for provisional measures under Article 290 to prevent serious harm to the environment. As explained earlier, even if the dispute would go to an arbitral tribunal under Annex VII, provisional measures can be sought from ITLOS pending the constitution of the Annex VII arbitral tribunal.

V. CONCLUSIONS

The general principles governing transboundary pollution of the marine environment are set out in UNCLOS and in the principles of general international law. The provisions in UNCLOS are being interpreted and applied by international courts and arbitral tribunals in light of evolving principles of international environmental law. This is a very positive development as it will ensure that UNCLOS remains a living document that can be adapted to meet the increased concerns about the fate of the oceans.

The general principles governing transboundary pollution of the marine environment are the same as those governing transboundary air pollution, transboundary pollution of shared fresh water resources and other forms transboundary pollution. However, the fact that UNCLOS is a universally accepted global convention governing the oceans makes transboundary marine pollution different in three important respects.

First, the principles and rules governing States are more clear and certain because they are set out in UNCLOS. States have a general due diligence obligation under Article 194 of UNCLOS to ensure that activities under their jurisdiction and control are so conducted as to not cause damage by pollution to other States and their environment. In addition, UNCLOS contains provisions establishing direct obligations on States to prevent, reduce and
control pollution of the marine environment from specific activities subject to their jurisdiction and control. This is especially so with respect to ship-source pollution because the provisions in UNCLOS incorporate by reference the detailed provisions contained in other conventions and instruments.

Second, the dispute settlement regime in Part XV of UNCLOS gives injured States the right to institute proceedings against other States parties who have breached their obligations under UNCLOS to prevent, reduce and control pollution of the marine environment. When they become parties to UNCLOS, States give their consent in advance to the procedures in section 2 of Part XV. As a result, if a dispute arises concerning the interpretation or application of any provision in the Convention, and it cannot be resolved by negotiation and consultation between the parties, either party to the dispute may unilaterally institute proceedings against the other State.

Third, the rules on the responsibility of States for internationally wrongful acts and the dispute settlement mechanisms in UNCLOS give injured States the right to seek remedies to prevent transboundary pollution of the marine environment. Such remedies may include a request for a State to conduct an EIA or to fulfill its duty to cooperate when it plans to engage in activities within its jurisdiction and control which may cause significant pollution of the marine environment of another State. This process is aided by the fact that the dispute settlement procedures in UNCLOS expressly provide that the State which commences proceedings has the right to request provisional measures to prevent serious harm to the marine environment.

Although UNCLOS provides States with a mechanism to hold States responsible if they fail to fulfill their obligations to prevent, reduce and control pollution of the marine environment, and to seek remedies to prevent and reduce such pollution, it does not provide an easy mechanism for holding States liable for damage caused to the marine environment. States are entitled to reparations from another State for damage to their marine environment only if the internationally wrongful act caused pollution of the marine environment. In other words, a State can be responsible for breaching its international obligations, but it may not be liable to pay reparations for damages unless it can be established that there is a causal link between the breach of the international obligation and the damage to the marine environment. However, this is not as serious a defect as it might appear. This is because remedies that force States to comply with their obligations to prevent, reduce and control pollution are far more important than remedies that require States to pay compensation after pollution has occurred.
In conclusion, the compulsory procedures entailing binding decisions in Part XV of UNCLOS provide scope for ensuring universal adherence to the provisions in UNCLOS concerning the prevention, reduction and control of pollution of the marine environment. However, the existence of remedies is not sufficient. What is needed is a group of environmentally conscious States who are willing to pay the financial and diplomatic costs involved in bringing proceedings against States that fail to fulfill their international obligations under UNCLOS to protect and preserve the marine environment.