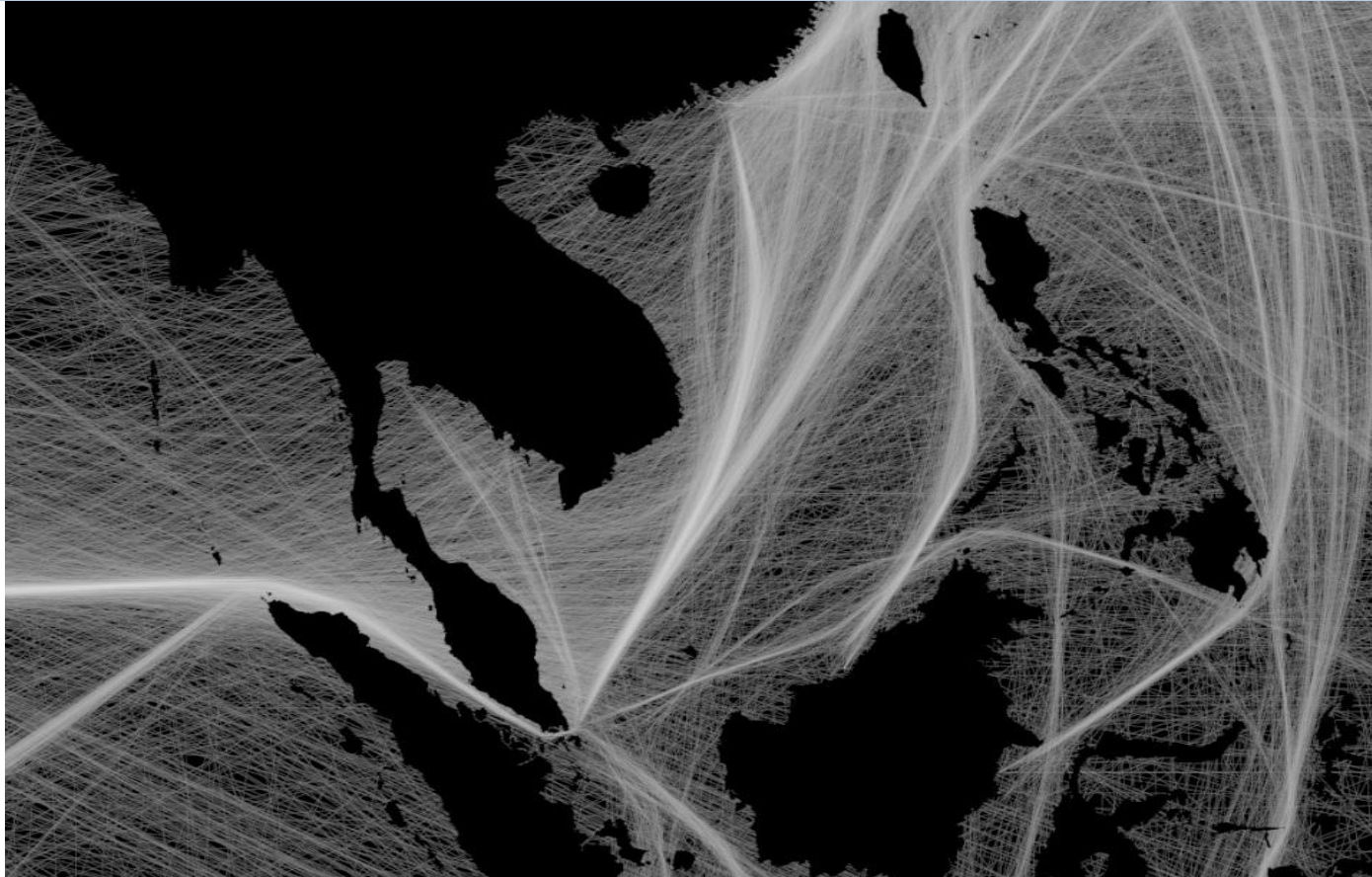


Ballast Water Management Convention:

D1&2 Regs and related compliance issues



Pre-conference policy discussions

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CIL

Centre for International Law



NUS

National University
of Singapore

Outline

- 1. Status: Geographical scope and regional application**
- 2. Convention structure**
- 3. Requirement of sampling: when? Indicative vs. Detailed?**
- 4. D-2 implementation and new PSC Guidelines**
- 5. Sanctions in case of non compliance**
- 6. Some questions and ideas**

Consequence of Entry into force

- enters into force **12 months** after ratification by at least **30 States** representing **35%** of the world merchant shipping gross tonnage
- becomes applicable to
 - vessels flying the flag of a State that has become a party and to
 - vessels flying the flag of a non-party State if they come to the port or within the jurisdiction of a party State .

Consequence of Entry into force – Getting a global picture

- 43 States which have ratified the Convention to date represent 32.54%
- Out of the 43 States that have become a party to the Convention, 13 are among the largest 35 flag States; i.e. 22 of the main flag States have not yet become parties.
- Out of the top 5 largest flag States, Liberia and Marshall Islands have become a party (not Panama, HK, Singapore), nor Bahamas, Greece, etc.

Consequence of Entry into force

- **Re. Port States: Many European States are parties; not the United States yet, few African countries, not HK, China, Southeast Asia (except Malaysia)**
- **When does it become a global standard?**

UNCLOS art. 211(2): States shall adopt laws and regulations for the prevention, reduction and control of pollution of the marine environment from vessels flying their flag or their registry. Such laws and regulations shall at least have the same effect as that of generally accepted international rules and standards [established through the IMO].

Consequence of Entry into force

- **Regional traffic:**
 - from Party State to non Party State = no issue of non-compliance under the Convention
 - from non-party State to Party State = exemption needed under A-4 and G7 if parties want to avoid applying the Convention discharge and treatment rules

Structure of Ballast Water regs:

Convention Body and Annexes

- 22 articles in the main text of the Convention
- New measures are in Annexes which are deemed to form integral part of the Convention (Regulations A to E)
- They are mandatory and must be implemented by Parties
- Amendment to Convention text and Annexes (art.19) requires acceptance by a minimum of 2/3 of the Parties
- tacit acceptance mechanism can be used unless 1/3 of the Parties object within 1 year of adoption (or other agreed period)

Structure of Ballast Water regs:

Guidelines

- 14 Guidelines are prepared and amended by the MEPC
- They are designed to assist State in implementation
- Not mandatory *per se*, but can become so by virtue of the Convention language (e.g. art.9 (1)(c)) though Guidelines' language is generally drafted so as to not be imperative
- It is also in the interest of flag States to respect them closely for smooth PSC
- They can be amended by resolution of the MEPC (majority vote), same as for initial adoption [no formal adoption by the IMO Council]

Obligations under the BWMC & UNCLOS

- Prevent, minimize and ultimately eliminate the transfer of Harmful Aquatic Organisms and Pathogens : no discharge in port closer than 200nm from coast and 200m depth [unless treated water or specific circumstances/exclusions]
- BWM practices must not cause greater harm than they prevent to their environment, human health, property or resources, or those of other States
- In taking measures to prevent, reduce or control pollution of the marine environment, States shall act so as not transfer, directly or indirectly, damage or hazards from one area to another or transform one type of pollution into another. (UNCLOS, art.195)

Obligations under the BWMC & UNCLOS

Ballast Water Management Performance Standards (D-2)

- **Discharge** less than 10 viable organisms per $\text{cm}^3 \geq 50\mu\text{m}$, and less than 10 viable organisms per ml $\leq 50\mu\text{m}$ and $\geq 10\mu\text{m}$

less than indicator microbes
- **How can this be controlled** → Criticism of this legal obligation based on issues of representativity of sampling methods
- **However, this Standard is used:**
 - to test Water Treatment efficiency (G8 under comprehensive review)
 - to test compliance through sampling

Flag States

- **Flag States are expected to ensure compliance of vessels flying their flag**
- **Ballast Water and Sediments Management Plan must be approved by the Flag State**
- **Approval of treatment systems:**
 - **Physical: flag State, taking into account IMO (MEPC) Guidelines**
 - **Active substances: IMO, following expert group (GESAMP) recommendations, and flag State administration**
- **Ballast Water Record Book on board available for inspection**
- **Ballast Water Management Certificate for Vessels > 400 GT often delegated by flag State to class societies collaborating with IMO**

Port States rights & obligations- Inspection and sampling

Is there an obligation or a right of sampling by the Port State and when?

- **Art. 9 on Inspection of Ships: “a ship to which this Convention applies [...] may be subject to inspection [...] for the purpose of determining whether the ship is in compliance with this Convention”**
- **Note Also Art.3(2)(3): no more favourable treatment to vessels of non Party States**
- **Art 9: If there is a valid Certificate on board, inspection is limited to:**
 - **Inspection of the Ballast Water Record Book, and/or**
 - **Sampling of the ship’s Ballast Water (according to G8) without unduly delaying operations**

Port States rights & obligations- Inspection and sampling

- If there is no valid Certificate on board or there are clear grounds for believing that
 - (a) the condition of the ship or its equipment does not correspond substantially with the particulars of the Certificate; or
 - (b) The master or the crew are not familiar with essential shipboard procedures relating to Ballast Water Management, or have not implemented such procedures;a detailed inspection may be carried out.

Port States rights & obligations- Inspection and sampling

Guidelines on Port State Control Under the 2004 BWM Convention

- Adopted at MEPC 67 albeit still under review
- The Ballast Water Review Group created to look at PSC inspection and measures to facilitate the entry into force of the Convention and implementation of the Ballast Water Performance Standard in D-2
- Note that Indonesia, Philippines, Vietnam and Thailand were not present
- Note also that these Guidelines are not specifically referred to in the text of the Convention
- They also specify that they are not intended to limit the rights the port State has in verifying compliance with the BWM Convention

Port States rights & obligations- Inspection and sampling

Guidelines on Port State Control Under the 2004 BWM Convention

- Study of threshold for moving from
 - indicative analysis, which is expected to be essentially document based, to
 - detailed analysis, which is expected to take the form of a detailed inspection
- Distinguishes 4 inspection levels:
 - (1) initial inspection; (2) more detailed inspection; (3) sampling; and (4) detailed analysis to verify compliance

Port States rights & obligations- Inspection and sampling

Guidelines on Port State Control Under the 2004 BWM Convention

- Initial inspection:
 - Minimum expected (Valid Certificate, Management plan on Board and approved, Record Book complete and up-to date and respecting required format and procedure)
 - Visual check of overall ship condition
 - Officer in charge of Management Plan and trained
 - Sampling possible, [but understanding that indicative sampling would not be used for compliance purposes]

What is the purpose of indicative sampling if no confidence in the reliability of the analysis?

Port States rights & obligations- Inspection and sampling

Guidelines on Port State Control Under the 2004 BWM Convention

- Stages 2, 3 and 4 are all part of the ‘more detailed inspection’ triggered by the clear grounds justifying it [see art. 2.2.4 of the PSC Guidelines]

Sanctions by Port/Coastal State

- In case of a violation of the requirements of the Convention/non-compliance within the jurisdiction of any Party, sanction can be imposed under the laws of that Party
- Should positive *indicative sampling* lead to severe sanction? Interpretation in implementation?
- Convention is silent. But PSC Guidelines bring some proposed clarification for circumstances where the Port State is legitimate in “warning, detaining or excluding” [see art. 2.5.2 of PSC Guidelines]
- Criminal sanction possible? No provision to the contrary but controversial

Some Questions and Ideas

- Value of *indicative sampling/analysis*?
- Interpretation of *indicative sampling/analysis*?
- Not much place for ecological risk-based approach (port of origin and next port of call) except through the exemption mechanism.
- Could *indicative sampling* be triggered by a risk-based analysis?
- Dangers of prescriptive regulations in technical areas (example of the offshore industry which is moving towards adaptive mechanism)