CIL International Conference
High Seas Governance: Gaps & Challenges
Orchard Parade Hotel, 24-25 April 2017

Panel 2.
IMO Instruments to Identify and Protect Sensitive Marine Areas against Adverse Impacts from Shipping

Comments by Robert Beckman
Relevance of UNCLOS

1. UNCLOS is a “Constitution” for the Oceans

2. UNCLOS sets out the extent of prescriptive and enforcement jurisdiction of flag States, port States and coastal States with respect to ship-source pollution

3. IMO Conventions and Resolutions establish rules and standards, but UNCLOS imposes limits on how those rules and standards can be enforced by States
Jurisdiction of Flag States

1. **Flag States** have primary responsibility to ensure that ships flying their flag comply with IMO rules and standards, and the power to impose sanctions on ships flying their flag.

2. Flag States have an obligation of “**due diligence**” to ensure that ships flying their flag comply with IMO rules and standards.

3. “**Due diligence**” includes obligation to take measures to ensure compliance, including the imposition of sanctions.

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Jurisdiction of Port States

1. When a ship voluntarily enters a foreign port it is subject to the jurisdiction of the **port State** to ensure compliance with IMO regulations.

2. Port States may exercise jurisdiction to **correct deficiencies** in implementation of IMO rules and standards.

3. However, the power of port States to **impose sanctions** against foreign ships is limited by the provisions in Part XII of UNCLOS.
Jurisdiction of Coastal States

1. The nature and extent of the jurisdiction of coastal States over foreign ships is governed by UNCLOS, not by IMO Conventions.

2. The jurisdiction of coastal States over foreign ships is limited by the rights of foreign ships in each maritime zone:
   - Innocent Passage in territorial sea
   - Transit Passage in Straits
   - Archipelagic Sea Lanes Passage
   - Freedom of Navigation in EEZ & on HS

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Jurisdiction of Coastal States

1. It is often stated that the enforcement of routeing measures adopted by the IMO relies primarily on the exercise of coastal State jurisdiction.

2. However, if a foreign ship exercising passage rights fails to comply with a routeing measure, the remedy available to the coastal State is to report the violation to the flag State.

3. Coastal State has greater powers if the offending vessel voluntarily enters its port.
Jurisdiction in EEZ

1. Seaward of the outer limit the 12 nm territorial sea, foreign ships have freedom of navigation.

2. The general rule is that a coastal State may only regulate foreign ships in its EEZ by “giving effect to” the IMO regulations.

3. Exception in Art 211(6) of UNCLOS.

4. The right of a coastal State to intercept and board a foreign ship in its EEZ is extremely limited.
Jurisdiction on High Seas

1. The general principle governing ships on the high seas is that they are subject to the exclusive jurisdiction of the flag State

2. IMO has the power to adopt rules & standards governing ships on the high seas, including rules permitted by the IMO on routeing measures, MARPOL special areas and PSSAs

3. However, compliance and enforcement is almost exclusively under the jurisdiction of the flag State
High Seas MPAs - Creation

1. In my opinion it is possible to create PSSAs, Special Areas or Routeing Measures on the High Seas

2. If adopted by the IMO, the shipping community will be notified by IMO Circulars and the restrictions on shipping will be noted on Navigational Charts

3. Almost all ships will comply with them simply because they are obliged to comply with international rules and standards adopted by the IMO

Beckman, Comments in Panel 2 – Slide 9
High Seas MPAs - Compliance

1. As Prof Chircop has stated, it should be possible to create PSSAs, Special Areas or Routeing Measures on the High Seas

2. If adopted by the IMO, they will be designated in IMO Circulars and indicated on Navigational Charts

3. Therefore, most ships will comply with them simply because they are obliged to comply with international rules and standards adopted by the IMO
High Seas MPAs - Enforcement

1. Enforcement of compliance with MPAs on the high seas is the responsibility of **flag States**

2. Trend is to impose greater pressure on so-called “flags of convenience” to ensure that they exercise **due diligence** to ensure that vessels flying their flag comply with IMO Rules

3. The IMO’s new **Mandatory Audit Scheme** will assist in ensuring that flag States comply with the obligations set out in Part XII and in Article 94 of UNCLOS
High Seas MPAs - Enforcement

1. May be possible in some cases to use the Dispute Settlement Regime in UNCLOS against flag States who fail to fulfill their due diligence obligations

2. Reasoning in ITLOS Advisory Opinion on Deep Seabed on “duty to ensure” and “due diligence” is applicable

3. State Parties who suffers damage as a result of ship’s failure to comply may be able to institute proceedings under Part XV of UNCLOS

Beckman, Comments in Panel 2 – Slide 12
Conclusions

1. It possible under IMO guidelines and UNCLOS to establish MPAs and MARPOL Special Areas on the high seas

2. Can be proposed by a group of like-minded States

3. There is likely to be resistance at the IMO the first time PSSAs are proposed on the High Seas because there is no precedent

4. The fact that enforcement is almost exclusively the responsibility of flag States is in my view not a major problem

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THANK YOU

Robert Beckman