

MARINE PLASTIC DEBRIS AND TRANSBOUNDARY POLLUTION : A LEGAL PERSPECTIVE

Robert Beckman

Head, Oceans Law and Policy Programme, CIL

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THESIS

- Marine marine plastic debris in SE Asia causes **transboundary pollution** of the marine environment because it is is carried by rivers and ocean currents from one State to another
- Consequently, ASEAN States have a **legal obligation** under the 1982 UN Convention on the Law of the Sea to take measures to prevent, reduce and control the pollution by marine plastic debris

OUTLINE OF PRESENTATION

1. Principles of International Law Governing Transboundary Pollution
2. Relevance of 1982 UNCLOS
3. Prospects for Regional Cooperation on Plastic Marine Debris

PART 1

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PRINCIPLES OF INTERNATIONAL LAW GOVERNING TRANSBOUNDARY POLLUTION

International Law and Environmental Pollution

- International Law does little to govern how States can pollute the environment within their own territory
- States can allow companies within their territory to fill their lakes with garbage and poison their rivers, air and soil
- International law applies only when activities under their jurisdiction and control cause pollution to the environment outside their territory

1972 Stockholm Declaration

Principle 21

*States have, in accordance with the Charter of the United Nations and the principles of international law, the **sovereign right** to exploit their own resources pursuant to their own **environmental policies**, and the **responsibility** to ensure that activities within their jurisdiction or control do not cause damage **to the environment of other States or of areas beyond the limits of national jurisdiction.***

1992 Rio Declaration

Principle 2

*States have, in accordance with the Charter of the United Nations and the principles of international law, the **sovereign right** to exploit their own resources pursuant to their own **environmental and developmental policies**, and the **responsibility to ensure** that activities within their jurisdiction or control do not cause damage to the **environment of other States or of areas beyond the limits of national jurisdiction***

State Responsibility for Transboundary Pollution

- Under international law a State is not directly responsible or liable for the acts of pollution by companies or citizens within its territory that cause transboundary pollution
- However, a State can be responsible if it has knowledge that persons under its jurisdiction and control are causing transboundary pollution, and it fails to take measures to prevent, reduce and control such pollution

Sources of Marine Debris

- Approximately 80% of marine pollution comes from land
 - Of which 90-95% is plastic
- Approximately 20% of marine pollution comes from ships
 - Plastics from fishing gear
 - Plastics from illegal dumping

Plastic Marine Debris as Transboundary Pollution

- Most marine debris comes from river systems, sewer systems and shore-based activities
- Coastal States are the source of most plastic marine debris, but other States bordering international rivers can also be sources
- Because most plastic marine debris floats, it is carried by ocean currents to the maritime zones of other States and to the high seas
- It is **transboundary pollution**

PART 2

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RELEVANCE OF 1982 UNCLOS

Importance of 1982 UNCLOS

- Universally Accepted – 168 Parties as of 17 Nov 2017
- All States in ASEAN are parties except Cambodia
- States Parties have obligations to protect and preserve the marine environment from all sources of pollution
- The provisions in UNCLOS on the marine environment are legally binding on all parties to UNCLOS
- Most of its provisions are also binding on States not parties under customary international law

UNCLOS: Dispute Settlement

- UNCLOS is one of the few international treaties which provides that all States parties are bound by its system of **compulsory binding dispute settlement**.
- The Dispute Settlement Regime in Part XV provides that if a dispute between two States Parties on the interpretation or application of the provisions of the Convention cannot be resolved by negotiation, either party to the dispute may invoke the **compulsory binding dispute settlement procedures** and institute proceedings before an international court or arbitral tribunal
- The decision of a court or tribunal is final and binding

UNCLOS: General Obligations

Article 192

States have the obligation to protect and preserve the marine environment.

Article 193

*States have the **sovereign right to exploit their natural resources** pursuant to their environmental policies and in accordance with their **duty to protect and preserve the marine environment.***

UNCLOS: General Obligations

Article 194 -

(1) Obligation to take all measures necessary to prevent, reduce and control pollution of the marine environment from any source

(2) Obligation to take all measures necessary to ensure that **activities under their jurisdiction or control** do not cause damage by pollution **to other States or their environment** and

that such pollution from activities under their jurisdiction and control does not spread beyond the areas where they exercise sovereign rights

UNCLOS & Ship-Source Pollution



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- The disposal of plastic by merchant ships is strictly regulated by the universally-accepted convention of the International Maritime Organization known as MARPOL 73/78
- UNCLOS provides that States Parties must have laws and regulations to prevent pollution from vessels that are at least as effective as the international regulations in MARPOL 73/78
- UNCLOS provides that flag States must also take steps to ensure that their regulations are enforced

UNCLOS Article 207. Pollution from Land-Based Sources

- Obligation to **adopt laws and regulations** to prevent, reduce and control pollution of the marine environment from land-based sources in their territory, *taking into account international rules and standards.*
- Obligation to **take other measures** as may be necessary to prevent, reduce and control land-source pollution
- Obligation to harmonize policies “**at the appropriate regional level**”
- Obligation to **endeavour to establish global and regional rules and standards** to prevent, reduce and control marine pollution from land-based sources

UNCLOS Article 213. Enforcement of Laws on Land-based Sources

- Obligation on States to enforce their laws and regulations – to ensure compliance by persons and companies in their territory
- Obligation on States to take other measures to implement applicable international rules and standards
- Failure to enforce laws and regulations may result in “State responsibility”

Effectiveness of UNCLOS on Land-Based Sources

- UNCLOS provisions on land-based sources are the weakest in 1982 UNCLOS
- Primary reason is that UNCLOS governs activities in ocean space, not activities on land territory
- Although the rules are less clear than in some other areas, there is a duty on all States Parties to adopt and enforce laws and regulations to prevent, reduce and control pollution of the marine environment from activities within their territory

PART 3

PROSPECTS FOR REGIONAL COOPERATION ON PLASTIC MARINE DEBRIS

UNCLOS: Duty to Cooperate to Adopt Rules and Standards

Article 197

States shall cooperate on a global basis and, as appropriate, on a regional basis, in formulating and elaborating international rules, standards and recommended practices and procedures for the protection and preservation of the marine environment, taking into account characteristic regional features

Note: Article 197 can be used as a basis for the adoption of rules and standards to address the issue of marine plastic debris in the region

UNCLOS: Cooperation in Semi-Enclosed Seas

Article 123

- States bordering an enclosed or semi-enclosed sea should cooperate with each other in the exercise and performance of rights and obligations under UNCLOS
- Shall endeavour to coordinate the implementation of rights and duties on protection and preservation of the marine environment

NOTE: this article could be used as basis for cooperation among states bordering the South China Sea and the Gulf of Thailand to address the issue of marine plastic debris

Prospects for Global and Regional Action

- Given other priorities such as BBNJ, it is unlikely that the international community will agree on global rules and standards to govern marine plastic debris
- It may be more fruitful to address the issue at the regional level
- Which body should take the lead ?
 - The membership in COBSEA, PEMSEA and ASEAN all differ
 - Cooperation under UNEP regional seas programmes in Asia has been less than in some other regions

Article 123 and the COC as basis for cooperation

- One possibility is to call on China and ASEAN to include cooperation to reduce marine debris in the South China Sea under the Code of Conduct (COC) currently under negotiation
- Cooperation could include China and the ASEAN states bordering the South China Sea
- It should also include the States bordering the Gulf of Thailand, as well as Laos a Mekong River State
- Such cooperation would not be politically sensitive because it would not include areas of overlapping sovereignty claims or maritime claims

Map from South China Sea Case





Failure to Cooperate could provoke a legal case

- If any State party to UNCLOS fails to exercise “due diligence” to take measures to prevent, reduce and control pollution of the marine environment by plastic debris, a State whose waters are polluted from such debris could institute proceedings under the dispute settlement regime in Part XV of UNCLOS
- Such action could be encouraged by States cooperating to address the problem

Conclusions

- Reasons why ASEAN States and China should cooperate to address the issue of plastic marine debris in the South China Sea & Gulf of Thailand
 1. They have an legal obligation to do so under 1982 UNCLOS
 2. Failure to cooperate could result in State Responsibility and a legal case
 - 3. It is the right thing to do**

THANKS FOR YOUR ATTENTION

Robert Beckman

Head, Ocean Law & Policy Programme

Centre for International Law

National University of Singapore

Email: cilbeckman@nus.edu.sg