

The E.U. and the Development of Measures against Ship-Source Pollution: The View from Outside

Dr. Alan Khee-Jin TAN

Associate Professor, Faculty of Law, National University of Singapore



Overriding Concern: The unilateral nature of E.U. measures, creating a precedent for coastal state erosion of navigational rights – note: criminalisation!

As political response to *Erika* and *Prestige* spills, European Commission drove moves at IMO to –

- Accelerate phasing-out of single-hulled vessels
- Prohibit passage of such vessels carrying heavy oils through E.U. waters
- Declare Particularly Sensitive Sea Area (PSSA) in Western European Waters

Ship-Source Pollution Directive

- **Criminal penalties for causing pollution from ships, even where non-intentional or accidental**
- **Outside Territorial Sea: departs from MARPOL 73/78 to create new class of liable actors – parties other than the master, owner, crew ...**
- **... on lower standard of liability – SERIOUS NEGLIGENCE (MARPOL: intent, recklessness with knowledge of probability of damage)**
- **Within Territorial Sea: all actors can be liable for SERIOUS NEGLIGENCE, even the master, owner, crew**

European Court of Justice

- MARPOL: Community not party; not bound
- UNCLOS: Community is party, but UNCLOS confers no rights on individuals to bring action against states
- “Serious negligence” susceptible to interpretation; not an uncertain concept
- Up to member states’ courts to define – uncertainty!
- Suggesting that challenge to Directive can only be brought by another state, in different forum? (or member state before the ECH again)

Substantive legal arguments side-stepped: Advocate-General Kokott's views?

- Outside Territorial Sea: “serious negligence” cannot go beyond MARPOL’s “recklessness with knowledge of probability of damage”
- Within Territorial Sea: “serious negligence” can carry own, stricter meaning
- Harmonious interpretation or legal gymnastics??

More on Advocate-General Kokott's views

Probably right about Territorial Sea

Outside Territorial Sea? Her position (assuming it is adopted by member states eventually) creates much uncertainty

Lest we get too legalistic, what is the balance to be sought here?

- UNCLOS's delicate compromise between coastal state rights and right of navigation – conditioned upon prescription and enforcement of international standards set by “competent international organization” (ie. IMO!)
- Evolution of environmental consciousness: duly reflected in contemporary IMO dynamics – no need to disturb UNCLOS compromise!

- Support principle of extending environmental liability to entire chain of actors
- But to be done multilaterally, not unilaterally
- Imposing CRIMINAL penalties, particularly on lowered threshold of culpability, requires no less than full debate at IMO
- Logical flaw: intent/recklessness for master, serious negligence for others further down the chain? Seek correction at IMO!



- Undesirable precedent for coastal state action
- Right of transit passage through straits used for international navigation – wholly different from Great Barrier Reef!
- No legal basis for compulsory pilotage in any IMO instruments
- No legal basis in UNCLOS for coastal state / port state unilateral action in straits used for international navigation
- MEPC Recommendation – flag states to inform ships that they *should* comply

- Marine Notices already issued in Australia – no immediate interception of infringers, but ...
- ... subject to arrest the next time ship enters Australian port
- Applies even to ships transiting en route to destination outside Australia
- Diplomatic protests from the United States and Singapore – understand that the scheme can only be recommendatory/voluntary

Again, what is the balance between environment and maritime shipping?

- In both cases, attempts to expand coastal state jurisdiction legally problematic
- Appeal to environmentalism very attractive and understandable, but again, there is no need to upset the UNCLOS compromise
- It is not as if recourse to IMO action is impossible
- Precedent value – Straits of Malacca and Indonesian archipelago?!

What is the value we place on stability of UNCLOS?

vs.

How do we ensure UNCLOS is adaptable to keep up with changing circumstances?

Thank You / Takk

