International Environmental Law Principles and Policy and its effects on Navigational Regimes under the law of the sea

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Introduction

The sea needs to be protected from pollution, extensive use and resource degradation. In this context, international environmental laws are meant to manage natural resources and environmental quality. "The Stockholm Declaration", "The Rio Declaration" and many various charters with conventions have been introduced and enunciated including important environment law principles[1]. Moreover, the article 192 of Part XII of the Law of the Sea Convention (LOSC) emphasizes that it is obligatory that all states must "protect and preserve the marine environment[2]" and establishes the foundation for continuing the progress of protecting this as a customary obligation of all maritime zones both within and beyond national jurisdiction.

This essay briefly reviews the essential elements of the United Nations Convention on the Law of the Seas (UNCLOS) Navigational regime with international Environment Law Principles, having China and the United States as key topical examples in their involvement and influence in the Asia-Pacific region. Further, a circumstantial explanation on complementary behaviour of both these bodies of Law and Policy has also been included in the essay for the purpose of elaborating the argument.

International Environment Law Principles and Navigational Regimes

[1] Lal Kurukulasuriya and Nicholas A. Robinson, Training manual on international environmental law (UNEP Publication, 2006) 23.
[2] United Nations Convention on the Law of the Sea (UNCLOS), opened for signature 9 Dec 1982, 31UNTS 1261, (entered into force 16 Nov 1994).

Environment Law has evolved through the development of international environmental law principles and policies which are incorporated into various international agreements and non-binding documents. The following Environment Principles[3] introduced by Sands (1995) which interact with Navigational Regimes under the Law of the Sea are discussed in order to elaborate on the general discussion.

a. The obligation reflected in Principle 21 of the Stockholm Declaration and Principle 2 of the Rio Declaration indicate that states have the sovereignty over their natural resources and the responsibility not to cause environmental damage.

b. The principle of preventive action

c. The principle of good neighbourliness and International co-operation

d. Principle of Sustainable Development

e. The Precautionary Principle

f. The polluter Pays Principle

g. The principle of common but differentiated responsibility"

According to the 1982 UNCLOS, which is considered as "the constitution of the ocean", the maritime environment is divided into "maritime zones" alongside national jurisdiction, namely "the territorial sea", "exclusive economic zone" and "continental shelves", as well as the areas beyond national jurisdiction such as the high seas. Navigational administrations outlined by UNCLOS are vital when deliberating on Principles of Environment Law. According to Article 192 of UNCLOS, marine conservation is the responsibility of the coastal state[4]. Pragmatically, the coastal states are in the ideal situation to apply and enforce those laws. Part XII of UNCLOS emphasizes the requirements that the states have to enforce marine conservation laws unique to them. However, as the exercising authority of the coastal state terminates at the high seas, the convention sets forth the responsibility to all states to protect the environment and reduce pollution beyond that point. As per UNCLOS, there are four

[3] Phillippe Sands, *Principles of International Environment Law- Volume 1* (Manchester University Press,1995) 183.
[4] *UNCLOS* art 192.

distinct Navigational regimes and customary international law[5]. Accordingly, the following Navigational regimes have the influence and interaction of Environment law principles when deriving the posture of the regimes on the marine environment in which they exist.

a. Innocent passage applying to the territorial sea and archipelagic waters;

b. Transit passage through straits used for international navigation;

c. Archipelagic sea lanes (ASL) passage through archipelagic waters.

d. High seas and its Navigation

These regimes in UNCLOS and said environment principles have paved the way to concentrate the conservation of the marine environment and the protection of marine wildlife. Part XII of UNCLOS is on the "Protection and Preservation of the Marine Environment" which includes both the general and specific obligations of state parties to avert, decrease, and contain pollution.[6] The Navigational regimes are particular innovations of UNCLOS and are especially important to marine conservation. As per the Article 56, the coastal state has the supreme rights to explore, exploit and conserve and manage natural resources.[7] According to "the Conservation of Living Resources", especially by Article 61, a coastal state has the right to determine the permissible catch of the living resources in its areas of jurisdiction. However, the same Article directs the coastal state "taking into account the best scientific evidence available," to ensure, through proper conservation and management measures, that the living resources are not endangered by over-exploitation.

[5] Sam Bateman, 'UNCLOS and its Limitations as the Foundation for a Regional Maritime Security Regime'(IDSS working paper)10 http://www.rsis.edu.sg/publications/WorkingPapers/WP111.pdf.
[6] Ralph J. Gillis, *Navigational Servitudes* (Martinus Nijhoff,2006) 166,69.

[7] *UNCLOS* article 56.

Article 61 further indicates that conservation measures applicable for environment, which is the sustainable development Principle, direct states to maintain or restore populations of harvested species at levels which can produce the maximum sustainable yield.[8] This action in turn helps the state to strengthen their marine conservation efforts and permits coastal states to apply their own laws to preserve the Navigational regimes that are under their jurisdiction and state sovereignty to prevent unregulated fishing through legislation. This has circumvented the UNCLOS applicability with principle 21/principle 2 and its second element, which asserts it is the responsibility for not causing environment damage.

The environment factor and UNCLOS navigational regimes have the right approach over the Environment Law principle, more prominently on "Principle 21 of the Stockholm Declaration.[9]" This ascertains the sovereign right of States to take advantage of natural resources and their interdependent responsibility to guarantee that the activities within their jurisdiction or control do not cause damage to the environment of other States or of areas. The power of coastal nations enforce various anti-pollution measures operates differently on the basis of the location and the territorial sea.[10] Article 211(4) of UNCLOS has incorporated principles of environment law and it allows coastal States to adopt laws and regulation for the deterrence, reduction and control of marine pollution from foreign vessels, including vessels exercising the "right of innocent passage.[11]"

UNCLOS direct offenders are dealt only with monetary penalties for the violation that occur within the territorial sea. They are the only type of penalties imposed unless the vessel has committed an act intentionally causing serious pollution.[12] This has a direct bearing on the Polluter pays principle[13], under which the party responsible for pollution or degradation of natural resources is obliged to pay for restoration, clean up, economic losses, and damages to the health.

[8] Patricia W. Birnie, *Legal Measures for the Conservation of Marine Mammals* (International Union for conservation of nature and Natural resources, and the centre for environment education, Inc . 1982) 6.
[9] Kurukulasurya, above n 1, 27.

[10] Malgosia Fitzmaurice, David M. Ong and Panos Merkouri (eds), *Research Handbook on International Environmental Law* (Edward edgar Publishers, 2010) 571.
[11] Ibid.
[12] *UNCLOS* art. 220(1).
[13] Sands, above n 3.

The application of UNCLOS Article 43, the "burden sharing" article that provides for cooperation between user States and States bordering a strait on the provision of navigational and safety aids and the prevention of marine pollution, creates an issue because many user States have been reluctant to contribute to the costs[14]. However, both Article 43 and good neighbourliness principle[15] with burden sharing concept has derived an avenue for user States to involve in the management of the straits which is necessary for navigational safety[16]. Like good neighbourliness, from the Rio Declaration of 1992 has evolved another important principle for developing countries, which is the principle of common but differentiated responsibilities. This means that all countries have equal responsibility for the protection of the global environment; however, the richer countries have a particular responsibility to undertake and pay for remedial action, as maintenance of straits, and ASLPs are eligible to be supported. In this context, a good example was evident through Cooperative Mechanism for the Malacca[17] that has agreed upon a joint project to improve navigational safety by removing of wrecks, replacing aids to navigation in Sumatra destroyed by the tsunami, capacity building for response to accidents involving hazardous and noxious substances and most importantly the financial contributions to the Aids to Navigation Fund.

Principle of preventive action is also an obligation under the International Environment Law[18] that regulates and prevents damages to the environment. Designation of Archipelagic Sea lanes isolating delicate marine environment, declaring restricted zones through domestic legislations are some of the counter measures that could apply to prevent, reduce or limit marine environment degradation. Philippines which comprise of span of atolls very rich in marine bio diversity has not designated the ASLP in their archipelago has environment reasons to justify their course of action under this preventive action[19].

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[14] Bing-bing Jia, *The Regime of Straits in International Law* (Oxford University Press, 1998) 60.
[15] Sands, above n 3, 192.
[16] Edgar Gold, ' Transit Services in International Straits: Towards Shared Responsibilities' (1995*) Malaysian Institute of Maritime Affairs Paper*, 221.

[17] Robert B. Cribb, Michčle Ford, *Indonesia beyond the water's edge: managing an archipelagic state* (Institute of South east Asian Studies-2001) 118.
[18] Sands, above n 3,194
[19] Jay L. Batongbacal, 'Barely Skimming the Surface : Archipelagic Sea Lanes Navigation and the IMO' in Alex G. Oude Elferink (ed), *Oceans Management In The 21st Century: Institutional Framework & Responses* (Martinus Nijhoff Publishers, 2004) 66.

The principle of sustainable development in International Environment Law[20] has a futuristic approach on the UNCLOS regimes. In spite of the freedoms of high seas, the freedom of fishing and freedom of scientific research has much relevance with the environment conservation issues, but UNCLOS directs such freedom to be exercised under the due regard concept. As explained, the freedom of fishing is more applicable to marine conservation under principles of sustainable development.[21] In this regard, states do not have the jurisdiction to pass laws concerning sustainable yield and use their jurisdiction in its optimum level in the high seas. However, UNCLOS gives some guidance on how to determine the catch limits through Article 116. These principles of environment law which are equivalent to Article 118 of UNCLOS declares that states are bound for the duty to cooperate in the conservation and management of resources in the high seas.

High Seas, Straits and Flag States

The high seas are commonly shared by all. Due to its commonality, its conservation has become a matter of priority to states. It also provides the authorities to punish environmentally irresponsible conduct on the high seas via the flag-state of the offender. Flags of convenience, or vessels registered with states which do not prescribe or enforce rigorous fishing practices, sanitation, and pollution control standards are a weakness of the high seas regime.[22]

Straits that play a key role in Navigation and also are liable for pollution could create situations in which the interest of the Flag state and coastal state collide. Unimpeded navigation through these important straits are a concern to flag states, because of the great economic and strategic significance. Further, coastal states are confronted with a range of risks brought about by heavy traffic and marine environment concern. Accidents are more likely to happen in straits than in open seas and harmful substances will usually have relatively grave effect due again to the proximity of the coastal line and the frequently shallow waters.[23] Flag states' expectation and interest within archipelagic waters would be the same as in straits used for international navigation. More or less, the same applies to coastal states due to the often enclosed character of archipelagic waters.[24] Article 37 and 38 of LOSC introduced the concept of the right of

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[20] Ibid,198.
[21] Sands, above n 3,201.
[22] Kurukulasuriya, above n1, 163
[23] Erik Jaap Molenaar, *Coastal State Jurisdiction over Vessel-Source Pollution* (Kluwer Law International,1998)283.
[24] Ibid.

transit passage that applies on the straits used for Navigation. But to control and regulate such straits from vessel source pollution, a legal provision is modelled with restrictive wording under Article 42(1) of UNCLOS Part III. However, there are is no particularly relevant provisions for coastal states enforcing jurisdiction over ships carrying hazardous cargo and their possible pollution.

Vessel Source Pollution due to Different State Practices

UNCLOS defines the EEZ as "an area beyond and adjacent to the territorial sea" in which "the rights and jurisdiction" of the coastal state and "the rights and freedoms" of other states interrelate.[25] However, the United States being a maritime power has a different opinion about Article 56 and Article 58. They assert, freedom of navigation in the high seas, should be available to military vessels and aircraft with rights to conduct military operations, exercises and activities to be enjoyed by all states in the Exclusive Economic Zone (EEZ). Obviously, the military operations have environment implications like Sonar operations which is a key environmental challenge faced by Navies. In addition, the United States has not recognized innocent passage through archipelagic waters which once manoeuvred US Carl Vinson and operated Air Crafts in the Indonesian archipelagic waters, claiming freedom of Seas. This, therefore, challenged domestic legislations that negatively effects on the precautionary laws imposed on environment.[26]

After ratifying UNCLOS, China, as the rising power of Asia, has a different stance on the same issue and asserts that prior permission is required when another country decides to use her EEZ for a military purpose or even otherwise. China considers war ships or similar vessels entering Chinese EEZs without China's permission as a violation of relevant International Law as well as Chinese laws and regulations. The aggressive Chinese action to use force at sea towards the US was an incident of bravado, which confirms the Chinese stance against any state which takes military acts in their exclusive economic zone without their prior permission.[27] These different state practices bring various interpretations to navigational regimes and its environmental laws to prevent vessel source pollution. However, Article 220

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[25] *UNCLOS* Art.56 and 58

[26] John F. Murphy, *The United States and the Rule of Law in International Affairs* (Cambridge University Press, 2004) 229

[27] Jing Geng, ' The Legality of Foreign Military Activities in the Exclusive Economic Zone under UNCLOS' (2012)
28(74) *Merkourios journal* 22-30

paragraph (3), (5) and (6) of UNCLOS are concerned with coastal State enforcing jurisdiction over Vessel-Source pollution within the EEZ. This reflects an exercise of enforcement which depends on the seriousness of the damage.[28]

Essay Question

Answering the essay question, “Can the two bodies of law and policy operate in a complementary way?", it has been found a positive outline where International Maritime Law and International Environment Law supports each other. The literature survey of this essay has confirmed that principles with International Environment Law can be considered as basic elements of a framework statute which can be used as a base or general guide for purposes of introducing laws on marine environment. The legal status of international environmental law principles and concepts is varied and some are already constituted into laws; others are evolving and in the process of gaining acceptance.

The following discussion brings evidence to confirm the representation from environment law principle on the legal treaties and maritime laws. Mostly their legal status would be to perform a role by filling the legal gaps on the particular law related to the environment thus providing guidance on law enforcement.[29]

UNCLOS’ navigational regimes for the regulation of vessel source pollution builds mainly on rules originating from the international environment law principles as explained and the rules of environment law derived through the concepts which explains that any state has the fullest rights over its natural resources, and its duty is not cause any damage to its environment. These obligations are reflected in “Principle 21 of the Stockholm Declaration and Principle 2 of Rio Declaration.[30]” These principles support the sovereignty rights of the resources of the State, whilst providing a legal basis for bringing claims under customary law asserting liability for environment damage. However, the increasing number of substandard ships and pollutants entering into navigational regimes has become a common tragedy where exclusive flag state jurisdiction loses its responsibility.[31]

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[28] *LOSC* art. 220.
[29] Sands, above n 3,183.
[30] Ibid 186.
[31] Molennar above n 22,88

The other environment law principle applicable especially on navigational regimes under state jurisdiction and state sovereignty derived in UNCLOS is the Principle of Preventive Action which minimizes environment damage as an objective.[32] According to this preventive principle, any state is under an obligation to prevent damage to the environment within its own jurisdiction, including the obligation to take appropriate regulatory and administrative measures."

The principle of good neighbourliness derived in Article 74 of the UN Charter directs states to practice good neighbourliness and international cooperation. This principle is subject to many treaties and other international acts and is further supported by state practice. "Principle 24 of the Stockholm Declaration" has declared general political commitment to international cooperation in matters concerning the protection of the environment. Further, "Principle 27 of the Rio Declaration" directs states and people to cooperate in good faith with the inner spirit of partnership whilst fulfilling the declaration obligations.[33] The other general principle is Sustainable development adopting the sustainable approach, and it is to focus on the adoption of standards for specific natural resources and marine living resources. This concept has considered the conservation needs of present and future generations whilst placing limits upon the exploitation of natural resources with the role of equitable use of natural resources principle that derives the required rights and obligation. Many treaties have evolved from these concepts, which have been identified as the base for laws that govern not only the environment but also the sustainability of resources as well. UNCLOS 1992, EEA agreement, the 1989 Lome Convention and 1987 "Bruntland report" have effectively incorporated and used the principle of sustainable development.[34]

"Rules of liability and compensation for damage" resulting to the marine environment establishes an incentive to prevent harm and also may require restoration. Several principle treaties have been adopted to establish rules of liability in relation to pollution or damage to the environment. There are evidences to suggest that conventions such as MARPOL 73/78, the Oil Pollution Liability Convention and the dumping conventions have contributed positively to the protection of the marine environment.[35] This particular law has the essence of polluter pay principles where the cost of environment resurrection has to be borne by the polluter.

[32] Ibid 194.
[33] Kurukulasuriya, above n 1,23.
[34] Sands, above n 3, 199.
[35] Ibid 161-2

Australia which is reliant on the shipping industry has recognized the environmental and economic impacts of a marine pest introduction via ships' ballast water as a threat to its marine environment. In this context, Australia has introduced mandatory ballast water management requirements with a view to reducing the risk of introducing harmful aquatic organisms into Australia's marine environment. Further, all internationally plying vessels intending to discharge ballast water anywhere inside the Australian territorial sea are required to manage their ballast water in accordance with Australia's mandatory ballast water management requirements.[36]

The approaches enshrined within the United Nations Convention on the Law of the Sea on marine environment protection do not have much to do with the pollution from land based and other sources. However, the environment principle developed in Agenda 21 on improving coastal zone management and regulatory human habitats recognize that the protection of the ocean and seas from land based pollution[37] will ultimately be achieved only by integrating considerations derived in International Environment Law, such as the precautionary principle.

One of the main reasons for the pollution from vessels is by operational discharges from ships, such as the cleaning of tanks, deballasting or from discharges following accidents.[38] The prevention of such pollution from vessels is an objective addressed mainly by UNCLOS and MARPOL 73/78. Article 208 of UNCLOS directs protection of sea bed environment within the national jurisdiction of a state should prevent pollution through legislated laws but should not be diluted to be less effective than international rules, principles and recommended practices.[39] This precautionary action is also subjected to the precautionary principle that has the wide spread support by the international community on the protection of marine environment. As an Asia-Pacific regional country, China has a different approach on the precautionary principle. The Chinese development strategy has more uncertainties, risks and problems about public health and environment means. This faces more risks and burden, therefore, the precautionary principle has more constrains, but on the other hand China needs the precautionary principle to solve these troubles and thereby the risk assessment and risk

[36] Robin Warner, 'Law of the Sea- Navigational Regimes under the LOSC and Protection of the Marine Environment and Law of the Sea' (Presentations done for Maritime Policy Post Graduates at Australian National Centre for Ocean Resources and Security, 02 April 2013).
[37] Sands, aboven 3,160.
[38] Warner above n 36.
[39] *UNCLOS* art.208

management are needed.[40] Hence, China's sustainable development strategy clearly indicates that their environment policy only balances the environment vis-a-vis development.

Principle 7 of the Rio Declaration[41] directs "states to cooperate in a spirit of global partnership to conserve, protect and restore the health and integrity of the earth echo system" and this encompasses the principle of common but differentiated responsibility. The special needs of developing countries, their capacities, and the principles of common but differentiated responsibilities have also resulted in the establishment of an institutional mechanism to provide financial, technological and other technical assistance to developing countries by helping them to implement the obligation of particular treaties.

In contrast to the environment principle, the treaties and conventions have derived rules in a practical and binding manner. It is evident that the environment principles have guided the treaties, laws and conventions discussed above and served as a theoretical basis on various issues. This means Environment Principles and Rules points to particular decision on legal obligation in special circumstances, but they differ in character to the direction they give. This concludes that environment principles embody legal standards but the standards they contain are more general than commitment and do not specify particular action unlike rules as discussed above.

Conclusion

The analysis in the discussion reflects the extremely complex nature of the passage regime laid down in UNCLOS. Environment Principles have also been incorporated into many environment laws, treaties and conventions and their application has an ambiguity on navigational regimes that have complications in the identification of which geographical factor has what passage regime whether in the EEZ or elsewhere. The application of environmental factor derived in UNCLOS and other environment regulatory bodies have unresolved questions and are not commensurate with the high seas passage right innocent passage, transit passage or non-suspend able innocent passage etc. Certain articles in law bodies governing environmental law including in UNCLOS have an ambiguous language with undefined key words which could lead to vague interpretations. Such ambiguity is also a reason for countries in the Asia-Pacific

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[40] James E. Hickey and Vern R. Walker. Refining the precautionary principle in the international environmental law. 1995(14) *Virginia Environmental Law Journal*: 423-453.
[41] Molenaar, above n 22, 55

to affirm opposing views on the application of UNCLOS and its environment obligations into different navigational regimes.

Certain states have introduced subsequent domestic/international legislation to overcome the implementation issues of particular articles of the LOSC, that are contrary to their maritime interest, and they have also confused the validation of LOSC in navigational regimes. It is a duty of all states to have a greater clarity and understanding of the Law of the Sea, particularly with regard to navigational regimes and its environment protection when using the Sea. UNCLOS is without qualification, the single most important and far-reaching legal instrument to address issues of marine conservation. The comprehensive nature of UNCLOS provides a framework to address future issues in the law of the sea, and its provisions can foster additional progress in environment conservation. However, the future of marine conservation depends upon the ability and willingness of states to comprehensively interact with these common objectives and the capacity of individual states to prescribe and enforce their own marine conservation laws according to the Environment Law Principles.

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