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Implementation of Marine Pollution Treaties as Municipal Law in East Asian Countries: The Need for Guidelines

By

Juita Ramli
Centre for Ocean Law and Policy
Maritime Institute of Malaysia (MIMA)
B-06-08 -B-06-11
6th. Floor, Megan Phileo Avenue
12, Jalan Yap Kwan Seng
Kuala Lumpur 50450
Tel: 603 261 2960
Fax: 603 261 7045
E-Mail: juita@mima.gov.my

ABSTRACT

Treaties often fail to define specific principles that may nevertheless be fundamental to the purpose of the treaty. This leaves such principles open to differing interpretation. Usually, countries interpret international treaties in a manner which accommodate their domestic needs, and such interpretations are reflected in municipal laws. In particular, marine environmental treaties - which provide the international basis to protect and preserve the marine environment and its resources - are often subject to differing interpretations by various State Parties. This is especially likely to be the case where political and cultural differences are acute.

Politically and culturally different countries bound the East Asian seas. Naturally, a tendency to define marine environmental treaties in a manner which is acceptable by the government of the day or other important actors, may be irresistible. This paper argues that there may be scope within a defined geographical region, for States to identify common ground for interpretation of vague treaty provisions and principles. Although universal acceptance of all aspects of every relevant treaty is unlikely, each term or principle which enjoys shared interpretation will serve to enhance the collective effectiveness of individual national effort.

As a first step, one proposal is to identify and clarify common State obligations and rights provided by the LOSC 1982 and Agenda 21, and secondly to identify issues, which have been widely accepted within this region.

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"International law, as reflected in the provisions of the *United Nations Convention on the Law of the Sea* …, sets forth rights and obligations of States and provides the international basis upon which to pursue the protection and sustainable development of the marine and coastal environment and its resources. This requires new approaches to marine and coastal area management and development, at the national, subregional, regional and global levels, approaches that are integrated in content and are precautionary and anticipatory in ambit…"

Chapter 17.1, Agenda 21

Introduction

Every treaty[1] establishes various rights, responsibilities, obligations, duties and, if any, liabilities to be borne by the country - the State Party. Some may mistakenly view treaties as instruments that primarily confer benefits, but treaties may be crafted in a manner that deprives States of certain rights that seem to be offered by participation in any particular treaty. The "devil is in the detail", and the details entails interpretation of vague principles.

When a country chooses to enter into a treaty, the country expresses its consent to be bound by the stipulated provisions of that particular treaty as espoused by the international law maxim *pacta sunt servanda*.[2] At the domestic level, the State Party would be required, most often than not, to implement the treaty according to its domestic procedures in order to execute rights and obligations provided by the treaty. Article 27 of the *Vienna Convention on the Law of Treaties* provides that: 'A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty'. Internal limitations are recognised as an encumbrance towards full implementation of a treaty but,

[1] Treaty means an international agreement concluded between States in written from and governed by international law, whether embodied in a single instrument or in two or more related instruments and includes bilateral and multilateral agreement, convention, or understanding that imposes obligation upon a State Party.

does not exempt the Party State from being bound by the requirements of the treaty. Such internal limitations would include lack of understanding and appreciation of treaty rights, obligations and responsibilities. The lack of understanding more often than not stems from failure to appreciate vital terminology or provisions enshrined in a particular treaty. Certainly when we begin to discuss marine or ocean related treaties or even matters concerning the management of the marine environment or resources, familiar buzzwords would not escape from the discussion. Today, it seems difficult for us to ignore vogue terminology which has been accepted as established principles in many maritime treaties[3] when discussing ocean management. The words 'sustainable development', 'integrated coastal management', 'precautionary principle', 'maritime sovereignty' and 'sustainable fisheries' are some of the phrases we are familiar with.

Such phrases do not enjoy universally consistent interpretation, and this is reflected in the differing manner in which they have been adopted by East Asian States. However, wide acceptance of these notions, particularly since late 1990s, suggests that they are influencing the marine policies of East Asian countries and are likely to continue to do so.

Before we proceed to identifying some suggested phrases or provisions which arguably have, or might, cause some confusion, allow me to quickly provide a short history of the development of marine pollution treaties since the advent of the United Nations Conference on the Human Environment in 1972 – which simultaneously coined certain phrases for environmental management of the oceans.

International treaties on the protection of the marine environment

Since the 1972 Stockholm Declaration more than 50 treaties for the protection of the marine environment have been developed. The first multilateral marine environment

[2] Which means every treaty in force is binding upon the parties to it and must be performed by them in good faith.

[3] Likewise if we read academic journals, government declarations, national legislation. See, Herriman, Max. 1997. Acceptance of Post-UNCED Environmental Management Concepts in East Asia, Ocean University of Qingdao, p.1, unpublished.

treaty was the London Convention[4], followed by MARPOL[5] in 1973. Both are IMO-generated treaties which govern vessel-source pollution.[6] Other marine pollution prevention treaties at both international and regional levels have since been established under the auspices of the United Nations particularly, UNEP[7].

In 1982, the *United Nations Convention on the Law of the Sea* (LOSC) was adopted and opened for signature providing a framework for the governance of the oceans. With the exception of Thailand and the DPR Korea, all other East Asian States are already parties to the LOSC. The LOSC has been widely embraced by other community States and has been largely accepted – as *the* international law – governing the relationships between a large majority of States regarding ocean use. Part XII of the LOSC provides a general regime for the protection of the marine environment.

Following the acceptance of the LOSC, the general Assembly at UNCED[8] ten years later, accepted a resolution for the "Protection of the oceans, all kinds of seas, including enclosed and semi-enclosed seas, and coastal areas and the protection, rational use and development of their living resources".[9]

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[4] See *Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter*, done at London, 29 December 1972, ILM 1294 (1973). Entered into force 30 August 1975.

[5] See *International Convention for the Prevention of Pollution from Ships*, done at London 2 November 1973, ILM 1319 (1973). Entered into force 2 October 1983; modified by the *Protocol of 1978 relating thereto* (MARPOL 73/78), done at London 17 February 1978, ILM 546 (1978).

[6] IMO also subsequently established specific instruments relating to emergency and safety situations, liability and compensation for oil pollution damage, and the establishment of an appropriate compensation fund. For further discussion see Adede, Andonico O. 1993. *International Environmental Law Digest: Instruments for International Responses to Problems of Environment and Development 1972 – 1992*, Elsevier Science Publishers B.V., Amsterdam, pp. 15-16.

[7] i.e.United Nations Environment Programme. The treaties *inter alia* are: the *Convention on the Prevention of Marine Pollution from Land-Based Sources, 1974* (for North Atlantic, Arctic oceans and the North Sea); *Convention for the Protection of the Natural Resources and Environment of the South Pacific region, 1986;* the *Basel Convention, 1989*; *Protocol to the Kuwait Convention concerning Marine Pollution resulting from Exploration and Exploitation of the Continental Shelf, 1989.* Most of the treaties were regional treaties designed to prevent, abate and combat marine pollution arising from specific activities occurring in particular regions.

[8] United Nations Conference on Environment and Development held in Rio de Janeiro in 1992 adopted a declaration and global agenda for management of the environment into the next century.

[9] See *Report of the United Nations Conference on Environment and Development*, UN doc. A/CONF.151/26/Rev.1 (Vol. I), Chapter 17 of Agenda 21.

Common State obligations and rights provided by LOSC and Agenda 21 and other marine environment protection treaties

Whilst Article 193 of the LOSC confers State Parties the sovereign right to exploit their natural resources, State Parties must do so "pursuant to their environmental policies and in accordance with their duty to protect and preserve the marine environment" as required under Article 192. States also have the obligation to ensure that activities under their jurisdiction shall not cause pollution damage to the marine environment of other States. The LOSC imposes on States the duty to take all measures necessary to prevent, reduce and control pollution of the marine environment from any source – using the best practicable means in accordance with their capabilities - and shall endeavour to harmonise their policies.[10] In similar breath, *Agenda 21* in confirming and recognising the rights and obligations of States set forth in the LOSC, recommends "new approaches to marine and coastal area management and development, at the national, subregional, regional and global levels…that are integrated in content and are precautionary and anticipatory in ambit."

In line with the LOSC and *Agenda 21*, other marine environmental treaties often require State Parties to "take implementation measures and to harmonise their policies towards the general goal of protecting the marine environment against pollution by specific substances".[11] Dr. Adede in his book on *International Environmental Law Digest* presents a checklist of 27 major clauses occurring in environmental treaties concluded since the 1972 Stockholm Conference which affirm State obligations in protecting the marine environment. There are at least six categories of provisions reflected in several treaties which are of immediate relevance to the protection of the marine environment, they include:

1) Provisions on the general obligation of States to protect and preserve the marine environment when exercising sovereign rights to exploit their natural resources

[10] See Article 194, LOSC. The LOSC also imposes on States the duty to take measures to prevent, reduce and control pollution resulting from the use of technologies and the introduction – intentional or accidental – into the marine environment of new or alien species that may cause significant and harmful changes to the a particular part of the marine environment, see article 196.

a) LOSC, Articles 192 – 194;

b) *Convention on Biological Diversity, 1992*, Article 3.

2) Provisions on the obligation to take measures to prevent, reduce and control pollution of the environment

a) LOSC, Article 194;

b) London Convention, 1972;

c) *Convention for the Prevention of Marine Pollution from Land-based Sources, 1974*, Article 4.

3) Provisions on the obligation not to transfer environmental harm from one State to another or not to substitute one form of environmental harm for another

a) LOSC, Article 195;

b) London Convention, 1972, Article IV.

4) Provisions on prompt notification of environmental emergencies

a) LOSC, Article 198;

b) IAEA *Convention on Early Notification of a Nuclear Accident, 1986*;

c) *Biological Diversity Convention*, Articles 14(1)(d) and (3);

d) *International Convention on Oil Preparedness, Response and Co-operation (OPRC), 1990*, Article 5(1)(c);

e) *Convention for the Protection of the Mediterranean Sea against Pollution, 1976*, Article 9.

5) Provisions on contingency plans and assistance in case of environmental emergency arising from accidents

a) LOSC, Article 199;

b) *Kuwait Protocol concerning Regional Co-operation in Combating Pollution by Oil and Other Harmful Substances in Case of Emergency, 1978*, Article 2(2);

c) OPRC 1990, Article 3;

d) *Agreement for Co-operation in dealing with Pollution of the North Sea by Oil, 1983*, Article 7.

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[11] Adede, 1993, *op. cit.*, p. 16, specifically referred this phrase to State obligations as required by the London Convention, 1972. However, it is submitted here that the requirement is applicable generally taking into account the general objectives of all marine environment protection treaties.

6) Provisions on specially protected areas
    a) LOSC, Article 234;
    b) *Convention for the Protection and Development of the Marine Environment of the Wider Caribbean Region, 1983*, Article 10;
    c) *Convention for the Protection, Management and Development of the Marine and Coastal Environment of the Eastern African Region, 1985*, Article 10;
    d) *ASEAN Agreement on the Conservation of Nature and Natural Resources, 1985*, Article 13.

In general, the following State obligations are addressed commonly in major environmental treaties:[12]

1) Recognition of sovereign rights of States to exploit their natural resources pursuant to their environmental polices and the corresponding duty to protect and preserve the environment;
2) The obligation of States to take measures to prevent, reduce and control pollution of the environment with the best practicable means at their disposal;
3) The obligation of States to ensure that, in taking such measures, they do not transfer directly or indirectly, damage or hazards from one area of the environment to another or transform one type of pollution into another, and
4) The obligation of each State to notify other States in case planned activities or events in its territory are likely to cause environmental damage to other States.

Common treaty provisions or principles including 'vogue' (or vague?) treaty provisions or principles

Whilst Treaty provisions might be seen as an attempt to clarify State obligations respecting marine environment protection, words or phrases like "dumping", and concepts such as "sustainable development" established in such provisions are often either left undefined, or ill-defined, allowing States to adopt freely their own interpretation suitable for domestic implementation. The risk this poses is that States may differ in their interpretation and this can hamper efforts to harmonise environment

[12] Adede, *op. cit.*, p.100.

policies as required by LOSC and *Agenda 21*. Such discordant interpretation may be crucially harmful where marine bio-region straddles political boundaries.

For example, Article 1 of the LOSC defines "pollution of the marine environment" as follows:

> "pollution of the marine environment" means the introduction by man, directly or indirectly, of substances or energy into the marine environment, including estuaries, which results or is likely to result in such deleterious effects as harm to living resources and marine life, hazards to human health, hindrance to marine activities, including fishing and other legitimate uses of the sea, impairment of quality for use of sea water and reduction of amenities.

The term "marine environment" however is undefined and left largely to interpretation by States. Chapter 17 of Agenda 21 interprets the marine environment as including 'the oceans and all seas and adjacent coastal areas' which together 'form an integrated whole that is an essential component of the global life-support system and a positive asset that presents opportunities for sustainable development'. Does the Agenda 21 definition help to clarify meaning for the purpose of law? And even if it does do so, to what extent does a soft law provision influence Treaty implementation? Are living creatures *in* the marine environment or do they form a component part of it? In answering this question, perhaps we can reflect on the status of organisms such as coral?

The phrase 'prevent, reduce and control pollution' which recurs in the LOSC has also been left open to interpretation. A suggestion put forward is that perhaps, the phrase is "intended to cover all possible measures to combat pollution, in whatever phase" [13].

To further illustrate this point, Chapter 17 of the *Agenda 21*, for example, declared three important principles underpinning ecologically sustainable development of ocean resources. In order to adopt the spirit of Agenda 21, State management for such development would necessarily implement the principles of 'integration', 'precautionary' and 'anticipatory'. But each of these terms in themselves gives rise to the possibility of

[13] Molenaar, Erik Jaap. 1998. *Coastal State Jurisdiction Over Vessel-Source Pollution*, PhD thesis presented to the University of Utrecht, Netherlands, p.2.

differing interpretation. For example, what degree of environmental damage warrants application of the 'precautionary principle': *any* damage, *severe* damage, *irreversible* damage, or perhaps even the mere threat of some temporary change? Indeed, what constitutes 'damage' in the context of an ever-changing marine environment?

Acceptance of marine environment treaties in the East Asian Seas Region

The East Asian Seas countries[14] are politically and culturally different. However, ocean affairs are an integral part of the countries in this region. All States share a common sea area. Brunei, Indonesia, the Philippines, Malaysia, Thailand, Cambodia, Vietnam and China bound the South China Sea; China, DPR Korea, R. Korea bound the Yellow Sea whereas Indonesia, Malaysia and Singapore are the littoral States of the Strait of Malacca. We have been constantly reminded that the current state of implementation of international conventions on marine environment protection in the East Asian countries is far from satisfactory. It is well and good to document a list of 'implementing national laws' but if enforcement of the laws is slack because we do not understand what needs to be done, where we can do it, how do we do it and who amongst us can do it – the objective of achieving a common goal: i.e. to protect and preserve the marine environment whilst simultaneously harmonising the policies therewith - would be futile. No doubt there are significant factors[15] which together impede the smooth implementation of treaties at the domestic level. However, understanding and appreciating the significance of established marine environment protection terms is a vital component to successful implementation of such treaties. We might do well to recognise that ratification or implementation of treaties nationally may be influenced by

[14] The East Asian States of Brunei, Cambodia, DPR Korea, Indonesia, Malaysia, China, Philippines, R. Korea, Singapore, Thailand, Vietnam are the 11 participating States in the EAS Regional Programme; Japan has an observer status; and Laos is the land-locked State who has the right to participate in discussions and negotiations concerning the protection and exercise of its rights as provided under Part X of the LOSC 1982. Source: *Regional Programme for the Prevention and Management of Marine Pollution in the East Asian Seas* brochure.

[15] The MPP-EAS Technical Report No. 20 published by the GEF/UNDP/IMO Regional Programme for the Prevention and Management of Marine Pollution in the East Asian Seas reported that lack of legal professionals in the region, inaccessibility of legal information and reference materials in the countries, differences in legal systems, languages, demographic and social characteristics and economic development among the countries were the factors identified as impediments to implementing international conventions component of the Regional Programme.

problems in assessing the implications of the instruments and in effecting implementation. Unclear terms and imprecise definition exacerbate such difficulties.

One other important observation is that many treaties have only come into force within the last ten years or so. Countries in this region which began to define their ocean policy have to grapple with many newly-emerging principles which might not be properly translated into their own language.

A study undertaken by the Maritime Institute of Malaysia (MIMA)[16] from 1996 – 1998 on the status of maritime laws and conventions in Malaysia revealed that although Malaysia is a party to or signatory to many international legal instruments, implementation at the domestic level is rather poor due to a number of factors. The lack or absence of municipal laws implementing particular treaties pointed to the common failure of implementing agencies to grasp fully the obligations, responsibilities or even rights created by the treaties.[17] The issue becomes more problematic when more than one implementing agency is responsible for the enforcement of a treaty. Often, implementing agencies and other significant actors interpret the laws to suit and meet their *raison d'être.* This can result in ineffective and inefficient implementation of the treaty. Thus, Malaysia has recognised that a common interpretation of terminology and general provisions of a treaty requires the collaboration of the different concerned actors.

Such a principle would seem also to hold the promise of benefit within defined geographical regions[18] – States could identify common ground for interpretation of vague treaty provisions and principles. Although universal acceptance of all aspects of relevant treaty is unlikely, shared interpretation of specific term or principle would serve to enhance the collective effectiveness of individual national effort. For States which border

[16] Ramli, Juita. 1998. *MIMA Report on the Status of Maritime-related National Laws and Maritime Conventions in Malaysia*, Maritime Institute of Malaysia (MIMA), Kuala Lumpur, p.1.
[17] Other factors include lack of scientific research; lack of dedicated personnel to attend to specific matters which often results in the poor coordination among agencies to resolve problems requiring immediate attention.
[18] See, Bridgewater, Peter, 1996. Managing and Conserving the Marine Environment in Tsamenyi and Herriman (eds), *Rights and Responsibilities in the Marine Environment: National and International*

enclosed or semi-enclosed seas such an effort would lend substance to their obligation to "co-operate" and "co-ordinate" as specified in Article 123 of LOSC.

Conclusion and Recommendations

Politically and culturally different countries bound the East Asian seas. Naturally, a tendency to define marine environmental treaties in a manner which is acceptable by the government of the day or other important actors, may be irresistible. Perhaps, as a region, there is a need to define what exactly are we attempting to achieve and question ourselves about how serious are we about establishing common goals and values.

The East Asia is the only region which has yet to develop a regional marine environment protection treaty.[19] This is a sad comparison against other regional sea areas[20] which have developed many specific regimes to prevent, abate and combat pollution in the marine environment. We can do better than this, and an essential first step is to ensure that we share common understanding. Clarification of certain terms and treaty provisions, as they are to apply to our unique region, is important if we are to harmonise our laws and policies for effective marine management. Unless we all play the same tune, we are just making noise.

Dilemmas, Wollongong, pp. 47 – 53. Bridgewater suggests the adoption of a bioregional approach where marine management and conservation would mean also managing marine biodiversity.

[19] Although, UNEP is understood to be coordinating a program to encourage East Asian States to come to an agreement in establishing, in the near future, a regional treaty concerning issues in the South China Sea.

[20] They include the Mediterranean Sea, West and Central African Region, South-East Pacific, Red Sea and Gulf of Aden, Wider Caribbean Region, Eastern African Region, South Pacific Region, Baltic Sea and Belts, North Sea, Antarctic and Arctic Regions and the Northeast Atlantic.

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