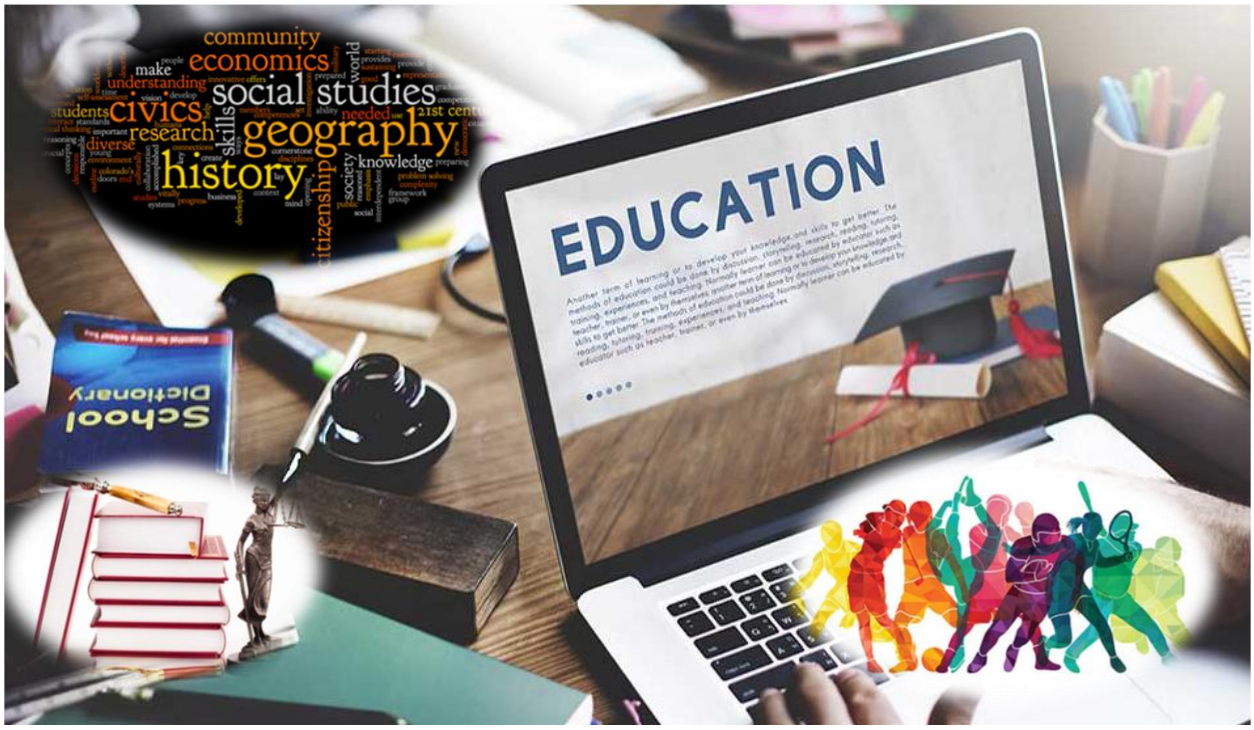

Email:editorijless@gmail.com Volume: 5, Issue2, 2018 (April-June)

INTERNATIONAL JOURNAL OF LAW, EDUCATION, SOCIAL AND SPORTS STUDIES (IJLESS)

http://www.ijless.kypublications.com/

ISSN:2455-0418 (Print), 2394-9724 (online)

www.kypublications.com

International Journal of Law, Education, Social and Sports Studies (IJLESS)
Volume: 5, Issue 2, 2018
ISSN: 2455-0418 (Print), 2394-9724 (online)
Research Article

An Overview on Historical Evolution of Legal Regime of Pollution of Marine Environment

Khaled.Abdalhadi.A Hamad[1], Y.P.Rama Subbaah[2]
[1]Research Scholar, [2]Professor
Acharya Nagarjuna University Agarjuna Nagar-522510,Guntur (A.P) India

ABSTRACT
One of the most remarkable developments in the international law in last century was the increasing solicitude for the situation of the marine environment. The ideas of "the oceans were somehow bottomless dumping grounds with limitless assimilative capacity and a ceaseless ability to surrender their resources" have been substitute with a fresh, and more scientifically oriented, consciousness of the oceans environmental and ecological health. The oceans are indeed focal points of this recent and growing environmental Consciousness and all of that is consider under the doctrine of "the freedom of-the-seas". The environmental degradation of the oceans is by definition a global problem. Overfishing, vessel and land-based pollution, unsustainable and environmentally unfriendly exploitation of mineral resources, as well as the destruction of marine biodiversity are the concerns of all humanity. Taking a historical review to all economic, social and political environments in a region as a essential relies to understanding the logic of The Evolution of Legal Regime of Pollution of Marine Environment.

Introduction

The oceans had long been subject to the freedom of-the-seas doctrine - a principle put forth in the seventeenth century essentially limiting national rights and jurisdiction over the oceans to a narrow belt of sea surrounding a nation's coastline. The remainder of the seas was proclaimed to be free to all and belonging to none.[1] While this situation prevailed into the twentieth century, by mid-century there was an impetus to extend national claims over offshore resources. There was growing concern over the toll taken on coastal fish stocks by long-distance fishing fleets and over the threat of pollution and wastes from transport ships and oil tankers carrying noxious cargoes that plied sea routes across the globe. The hazard of pollution was ever present, threatening coastal resorts and all forms of ocean life. The navies of the maritime powers were competing to maintain a presence across the globe on the surface waters and even under the sea.[2]

A tangle of claims, spreading pollution, competing demands for lucrative fish stocks in coastal waters and adjacent seas, growing tension between coastal nations' rights to these resources and those of distant-water fishermen, the prospects of a rich harvest of resources on the sea floor, the

[1]S. Kuwahara , The Legal Regime of Protection of the Mediterranean Against Pollution from Land-Based Sources, Dublin 1984

[2] Global Programme of Action for the Protection of the Marine Environment from Land-Based Activities, para. 2. The text is available at http://www.gpa.unep.org/bin/php/home/index.php

increased presence of maritime powers and the pressures of long-distance navigation and a seemingly outdated, if not inherently conflicting, freedom-of-the-seas doctrine - all these were threatening to transform the oceans into another arena for conflict and instability.[3]

In 1945, President Harry S Truman, responding in part to pressure from domestic oil interests, unilaterally extended United States jurisdiction over all natural resources on that nation's continental shelf - oil, gas, minerals, etc. This was the first major challenge to the freedom-of-the-seas doctrine. Other nations soon followed suit.[4]In October 1946, Argentina claimed its shelf and the epicontinental sea above it. Chile and Peru in 1947, and Ecuador in 1950, asserted sovereign rights over a 200-mile zone, hoping thereby to limit the access of distant-water fishing fleets and to control the depletion of fish stocks in their adjacent seas.Soon after the Second World War, Egypt, Ethiopia, Saudi Arabia, Libya, Venezuela and some Eastern European countries laid claim to a 12-mile territorial sea, thus clearly departing from the traditional three-mile limit.

Later, the archipelagic nation of Indonesia asserted the right to dominion over the water that separated its 13,000 islands. The Philippines did likewise. In 1970, Canada asserted the right to regulate navigation in an area extending for 100 miles from its shores in order to protect Arctic water against pollution.[5]From oil to tin, diamonds to gravel, metals to fish, the resources of the sea are enormous. The reality of their exploitation grows day by day as technology opens new ways to tap those resources.

In the late 1960s, oil exploration was moving further and further from land, deeper and deeper into the bedrock of continental margins. From a modest beginning in 1947 in the Gulf of Mexico, offshore oil production, still less than a million tons in 1954, had grown to close to 400 million tons. Oil drilling equipment was already going as far as 4,000 metres below the ocean surface.

The oceans were being exploited as never before. Activities unknown barely two decades earlier were in full swing around the world. Tin had been mined in the shallow waters off Thailand and Indonesia. South Africa was about to tap the Namibian coast for diamonds. Potato-shaped nodules, found almost a century earlier and lying on the seabed some five kilometres below, were attracting increased interest because of their metal content.

And then there was fishing. Large fishing vessels were roaming the oceans far from their native shores, capable of staying away from port for months at a time. Fish stocks began to show signs of depletion as fleet after fleet swept distant coastlines. Nations were flooding the richest fishing waters with their fishing fleets virtually unrestrained: coastal States setting limits and fishing States contesting them. The so-called "Cod War" between Iceland and the United Kingdom had brought about the spectacle of British Navy ships dispatched to rescue a fishing vessel seized by Iceland for violating its fishing rules.[6]

Offshore oil was the centre of attraction in the North Sea. Britain, Denmark and Germany were in conflict as to how to carve up the continental shelf, with its rich oil resources.

---

[3] The 1985 Montreal Guidelines for the Protection of the Marine Environment against Pollution from Land-Based Sources, 1 (b). Reproduced in: H. H o hma n n (ed.), Basic Documents of International Environmental Law, vol. I, London et al. 1992, 130-147

[4]Me n g Q.-N., Land-Based Marine Pollution: International Law Development, London et al., 1987, xi.

[5]L. J u d a , International Law and Ocean Use Management: The Evolution of Ocean Governance, London 1996, 103. Possibly the first international document which addressed the regulation of landbased

marine pollution was the 1972 Stockholm Action Plan. See Recommendations 86 (f) as well as 92 (b) of the Stockholm Action Plan. The Stockholm Action Plan was reproduced in: H o hma n n (note 4), 27-47.

[6]ICJ Reports (1949), 22.

It was late 1967 and the tranquillity of the sea was slowly being disrupted by technological breakthroughs, accelerating and multiplying uses, and a super-Power rivalry that stood poised to enter man's last preserve - the seabed.[7]It was a time that held both dangers and promises, risks and hopes. The dangers were numerous: nuclear submarines charting deep waters never before explored; designs for antiballistic missile systems to be placed on the seabed; supertankers ferrying oil from the Middle East to European and other ports, passing through congested straits and leaving behind a trail of oil spills; and rising tensions between nations over conflicting claims to ocean space and resources. The oceans were generating a multitude of claims, counterclaims and sovereignty disputes.[8]

The hope was for a more stable order, promoting greater use and better management of ocean resources and generating harmony and goodwill among States that would no longer have to eye each other suspiciously over conflicting claims.

Global Legal Framework for the Regulation of Land-Based Marine Pollution:

Customary International Law and General Principles of Law:

Regulation of marine pollution, in particular land-based marine pollution, is a novel phenomenon in the law of the sea. Owing to the paucity of State practice in this area, it is not surprising that customary law contains few rules relevant to the question of marine pollution.[9] Probably the most important customary rule on this issue would be that no State has the right to use or permit the use of its territory in such a manner as to cause injury in or to the territory of another State. The rule of *sic uteretuoutalienum non laedas* (use your own property so as not to injure that of another) was explicitly expressed in the Trail Smelter arbitration (1938-41).[10] Although the context is different, it may also be recalled that the ICJ, in the Corfu Channel case of 1949, has already referred to the "every State's obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States".[11]

Later on, this rule was further elaborated in Principle 21 of the Stockholm Declaration of 1972.[12]

> 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[13].

---

[7]Cf. R. Pisillo -Mazzeschi , The Due Diligence Rule and the Nature of the International Responsibility of States, 35 GYIL 38 (1992).

[8]M.A. Fitzmaurice ,International Protection of the Environment, 293 RCADI 288-289 (2001).

[9]L. Juda , International Law and Ocean Use Management: The Evolution of Ocean Governance, London 1996, 103. Possibly the first international document which addressed the regulation of landbased marine pollution was the 1972 Stockholm Action Plan. See Recommendations 86 (f) as well as 92 (b) of the Stockholm Action Plan. The Stockholm Action Plan was reproduced in: H o hma n n (note 4), 27-47.

[10] The *Trail Smelter* case, International Environmental Law Reports, vol. 1, Cambridge 1999, 310.

[11] ICJ Reports (1949), 22.

[12] Principle 21 stated that: "States have […] 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." The Stockholm Declaration was reproduced in: H o hma n n (note 4), 21-26.

[13] Principle 2 of the Rio Declaration. The text is available at http://sedac.ciesin.org/entri/texts/rio.declaration.1992.html

Furthermore, the similar rule is also incorporated in the Draft Articles on the Prevention of Transboundary harm from Hazardous Activities of 2001. Article 3 of the latterstipulates that: "The

At present, there is no doubt that the rule of sic *uteretuoutalienum non laedas* reflects customary international law. Indeed, the customary law character of this rule was clearly confirmed by the International Court of Justice (ICJ) in the Advisory Opinion concerning Legality of the Threat or Use of Nuclear Weapons,[14] as well as in the Gabcikovo-Nagymarous Project case of 1997.[15] Undoubtedly the rule of sic uteretuoutalienum non laedas is a basic principle in international environmental law. With respect to the scope and the function of this rule, however, the following limits must be noted.

The UN Convention on the Law of the Sea (1982)

At present, the 1982 LOSC is the only treaty which provides general obligations to prevent land-based pollution at the global level. In this respect, Article 194 (1) obliges States to take all measures consistent with this Convention that are necessary to prevent, reduce and control pollution of the marine environment from any source, using for this purpose the best practicable means at their disposal and in accordance with their capabilities.[16]It is apparent that land-based pollution is covered by this provision. Article 194 (2) further imposes a duty upon States to take all measures necessary to ensure that activities under their jurisdiction or control are so conducted as not to cause damage by pollution to other States and their environment; and that pollution arising from incidents or activities under their jurisdiction or control does not spread beyond the areas where they exercise sovereign rights in accordance with the 1982 LOSC. In addition, Article 194 (3) (a) stipulates that measures taken pursuant to Part XII shall include, inter alia, those designed to minimise to the fullest possible extent "the release of toxic, harmful or noxious substances, especially those which are persistent, from land-based sources, from or through the atmosphere or by dumping" (emphasis added). In so providing, it is argued that the 1982 LOSC marks an important advance over the earlier Geneva Conventions, which covered only limited sources of marine pollution.[17]

Development of Non-Binding Instruments:

In the response to these questions, attempts have been made to develop a global legal instrument relating to the land-based pollution particularly under the auspices of UNEP.42 An important outcome was the adoption of the 1985 Montreal

Guidelines for the Protection of the Marine Environment against Pollution from Land-Based Sources.43 While the Montreal Guidelines are of a voluntary nature,[18] it is noteworthy that they specify the measures to be taken in order to "prevent, reduce and control" pollution from land-based sources in detail.[19] In fact, the Montreal Guidelines enumerates various measures which should be taken by each State. Such measures contain: environmental impact assessment, monitoring, notification, information exchange and consultation, scientific and technical co-operation, assistance

---

State of origin shall take all appropriate measures to prevent significant transboundaryharm or at any event to minimize the risk thereof." The text is available at http://untreaty.un.org/ilc/texts/9_7.htm

[14] ICJ Reports (1996), 241-242, para. 29.

[15] ICJ Reports (1997), 41, para. 53

[16] Arguably, the term "the best practicable means at their disposal and in accordance with their capabilities" may introduce a double standard, since, in theory, developing States with limited capabilities may not be required to take as costly or sophisticated actions as developed States. Even so, it is not suggested that developing States may be free from the obligations to protect the marine environment. J.I. C h a r n e y , The Marine Environment and the 1982 United Nations Convention on the Law of the Sea, 28 The International Lawyer 886-887 (1994). Furthermore, the 1982 LOSC obliges States to provide appropriate assistance especially to developing States. See Articles 202, 203.

[17]Birnie / Boyle (note 18), 352. In the Geneva Conventions, land-based pollution as well as airborne pollution were free from regulation.

[18] Montreal Guidelines is reproduced in: H o hma n n (note 4), 130-147.

[19] With respect to the comprehensive analysis of this Guidelines, see in particular M e n g (note 7), 163-215.

to developing countries, development of control strategies etc. In this respect, it is interesting to note that the 1985 Montreal Guidelines stress the need for "a comprehensive environmental management approach".[20]

This approach is a new concept which needs some clarification. In this regard, it is notable that the 1985 Montreal Guidelines highlighted the inter-linkage between the protection of the marine environment and that of international watercourses. On this point, the Guidelines require that "if discharges from a watercourse which flows through the territories of two or more States or forms a boundary between them are likely to cause pollution of the marine environment, the States concerned should co-operate in taking necessary measures to prevent, reduce and control such pollution".[21] Considering that rivers are a major contributor to marine pollution, the co-ordination between a marine pollution regime and environmental regulation of international watercourses becomes particularly important with a view to preventing land-based marine pollution.[22]Furthermore, one may note with interest that the 1985 Montreal Guidelines introduced the concept of specially protected areas with a view to protecting fragile ecosystems from land based pollution.[23] In this respect, Annex I to the Guidelines states that the strategy on specially protected areas involves the identification of unique or pristine areas, rare or fragile ecosystems, critical habitats and the habitat of depleted, threatened or endangered species and other forms of marine life. Those areas to be protected or preserved from pollution, including that from land-based sources, are selected on the basis of a comprehensive evaluation of factors, including conservational, ecological, recreational, aesthetic and scientific values. To this end, States are required to notify an appropriate international organisation of the establishment of any modification to such areas, with a view to the inclusion of such information in an inventory of specially protected areas.[24] Considering that the conservation of the marine ecosystem is becoming an important issue in the international community, it is worth noting that the regulation of land-based pollution is linked to the conservation of the marine ecosystem in the Montreal Guidelines. Later on, a need for the prevention of degradation of the marine environment from land-based activities was stressed by Agenda 21 of 1992.[25]

Limitation on the Global Legal Framework:

The above analysis on the global legal framework governing the land-based marine pollution yields the following conclusions:

- The rule of sic uteretuoutalienum non laedas as well as the doctrine of abuse of rights may be relevant in the regulation of land-based marine pollution. In practice, however, the generality of those rules give rise to difficulties as to implementation in the regulation of land-based marine pollution.
- The 1982 LOSC explicitly obliges States to prevent marine pollution from land-based activities. Nevertheless, the relevant provisions in the LOSC are so general that States have a large discretion in this field.
- After the adoption of the 1982 LOSC, the need to regulate marine pollution from land-based activities is repeatedly highlighted in some global documents. It is of particular interest to

[20] Guideline 10.

[21] Guideline 5 (c).

[22] In reality, at the global level, the inter-linkage between law of the sea and law of international watercourses is reflected in the 1992 Convention on the Protection and use of Transboundary Watercourses
and International Lakes (Preamble and Article 2 (6)), the 1997 UN Convention on the Law of the Non-Navigational Uses of International Watercourses (Article 23).

[23] Paragraph 1.3.2.3 of Annex I. See also Guideline 7.

[24] Paragraph, 1.3.2.3 of Annex I.

[25] Paragraph 17.24 ff.

note that new elements – such as a comprehensive environment management approach as well as the precautionary approach – are being reflected in those documents.

- It must be admitted, however, that overall attempts to address land-based marine pollution at the global level have been made only in the form of less formal instruments. In this sense, it is inescapable to conclude that the regulation at the global level remains a weak one. A question arising here is why the regulation of the land-based marine pollution remains inadequate at the global level. Several reasons explain the weakness of the global legal framework in this field.

It must be noted that the activities which may cause land-based pollution are in essence within the territorial sovereignty of each State; and such activities are closely bound up with crucial national programmes for economic, industrial and social development of those countries. The economic costs of measures to regulate land-based pollution are seen as high, and inevitably affect economic development.[26] Hence, States are often reluctant to approve any attempts at restricting their economic developments by legally binding instruments. States will accept legal regulation only if a global legal instrument will adequately reflect their need for the development and if it will benefit their national interests. It would seem that at the global level, these conditions are not yet fulfilled with respect to the land-based marine pollution.[27]

Conclusion

It would seem that the normative level on this subject relies essentially on economic, social and political environment in a region. It would for example be safe to argue that the 1992 OSPAR Convention contains relatively advanced rules and mechanisms to this matter. An explanation may be that Parties to this convention are essentially developed States, sharing common political and economic systems. Furthermore, apart from Switzerland, those Parties are, at the same time, member States of the European Community. In this regard, it should be remembered that Article 2 of the Treaty Establishing the European Community enunciates that one of the tasks of the Community is to promote "a high level of protection and improvement of the quality of the environment".[28] Thus, the member States of the EC share the same goal concerning environmental protection. In addition, it should be remembered that there have been political commitments through the International North Sea Conference (INSC) to intensify the protection of the marine environment in all North Sea. It may be arguable that those political and economic commitments stimulate a relatively advanced legal framework for the protection of the marine environment and the regulation of the land-based pollution in the North-East Atlantic. At the present stage at least, however, it appears difficult to expect the same development in other regions.

[26]Boyle (note 27), 26; Williams / Davis (note 55), 210; N o l l kaemper (note 2), 154

[27] Me n s a h (note 42), 312-313; B i r n i e / B o y l e (note 18), 409-410. This is particularly true of developing States.

[28] Consolidated version established after the Treaty of Nice.