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Testing the boundaries between the Basel and MARPOL regimes: are they complementary or mutually exclusive?

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Abstract

Incidents relating to unsafe management of wastes generated due to blending operations on board vessels have ignited an ongoing discussion between two competing legal regimes: the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal (Basel Convention) and the International Convention for the Prevention of Pollution from Ships as modified by its 1978 Protocol (MARPOL). Despite that blending operations of bulk liquid cargoes during the sea voyage have been prohibited, unanswered questions remain regarding the potential applicability of the Basel Convention to ship-generated wastes while on board vessels and after their discharge at port reception facilities. This paper analyzes the relationship between the Basel Convention and MARPOL and the rationale for concluding that these regimes are indeed mutually exclusive.

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1. Introduction

Conflicting legal regimes are not an unusual occurrence in every field of law. International environmental law in particular has experienced a fast development, which has led to the adoption of a plethora of legal instruments. Environmental law regimes could deal with: 1) a particular portion of the environment, e.g., air, sea, and land, 2) a particular activity, e.g., transboundary movements of wastes or ship source pollution, or 3) a particular substance,

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e.g., persistent organic pollutants. In this scenario, regulatory overlaps could occur and sometimes a certain situation could be subject to different legal regimes with distinct and even conflicting obligations! How does international law cope with these issues? Generally, international treaties contain exclusion clauses to avoid conflicts of law. The Basel Convention contains such a clause, which excludes from its scope of application: “[w]astes which derive from the normal operations of a ship, the discharge of which is covered by another international instrument.” These wastes are regulated by MARPOL. As it will become apparent in this paper, despite the introduction of such exclusion clause, a conflict did emerge between the Basel Convention and MARPOL regarding the potential applicability of the obligations contained in the Basel Convention to ship-generated wastes, especially after their discharge at port reception facilities. Since the principles governing these treaties are incompatible, the author argues that the Basel Convention cannot be regarded as a complementary regime of MARPOL.

In the aftermath of the *Probo Koala*^a and *Probo Emu*^b incidents, uncertainties arose regarding the nature of wastes generated as a result of blending activities on board vessels, and the regime applicable to those substances blurred the boundaries between MARPOL and the Basel Convention. As a starting point, it is of fundamental importance to be aware that blending operations should be distinguished from industrial processes carried out on board vessels. The former consists of mixing two substances into one while the latter involves deliberate chemical reactions to create a new product with different properties than those of the substances originally processed. Blending operations of fuel at sea was a common practice and the demand for bio-fuel blends also increased for several reasons, explained by the IMO (2009) [1], such as: a) meeting the customers’ needs regarding the characteristic of a product and b) lowering of costs. So, the initial discussion centered on whether blending operations and the management of their residues fall within the exclusion contained in Article 1(4) of the Basel Convention.[2]

Despite that blending operations were not unusual, these activities were not regulated. In this scenario, one could think that regulating blending operations on board vessels at sea and in ports would close the “gap” between MARPOL and Basel and avoid further conflicts between these regimes. Indeed, the ninetieth session of the IMO Maritime Safety Committee held in May 2012 adopted the SOLAS regulation VI/5.2 to prohibit blending operations of bulk liquid cargoes during the sea voyage and production processes on board ships. However, this is just the tip of the iceberg since the real dilemma is how to deal with ship-generated waste^c in its sea-land interface. In this scenario, blending operations were just a catalyst triggering the following questions: What happens after ships discharge their wastes into reception facilities? Is the Basel Convention applicable *ipso facto* to ship-generated wastes once discharged from the vessel? Does MARPOL provide any environmentally sound management (ESM) of ship-generated waste at land? In which circumstances is the Basel Convention applicable to ship-generated wastes while on board? And in the midst of the controversy lies the exclusion contained in Article 1 (4) of the Basel Convention.

Against the above background, the following issues are discussed in the present paper: a) the events leading to the blurring of boundaries between the Basel Convention and MARPOL, b) the reach of the exclusion contained in Article 1 (4) of the Basel Convention, c) the meaning of “transboundary movements” and the associated obligations, d) whether MARPOL provides for an ESM of ship-generated waste at land, and e) whether the ESM obligation, under the Basel Convention, subsists regardless of the occurrence of a transboundary movement of wastes.

2. Blending operations on board ships: the loophole

Disasters have generally been the catalyst for the adoption of maritime safety and marine pollution regulations, and the attention paid to blending operations in the wake of the *Probo Koala* and *Probo Emu* is not an exception. In

^a A detailed account of this incident can be found at Verschuuren J, Kuchta S. Victims of environmental pollution in the slipstream of globalization. In van Dijk J, Letschert R, editors. *The new faces of victimhood: globalisation, transnational crimes, and victim rights*, The Netherlands: Springer; 2010, p. 127-156.

^b A detailed account of this incident can be found at Skjold, T., et al. Accident investigation following the vest tank explosion at Sløvåg: Revision 03 – English Version, Bergen: CMR Gexcon; 2008.

^c In this article, ship-generated wastes should be understood as including residues from both machinery and cargo. Although MARPOL refers to the discharge of harmful substances in general, at EU level, for instance, Directive 2000/59/EC on port reception facilities for ship-generated waste and cargo residues makes a distinction between these categories in its Article 2 (c) and (d).

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