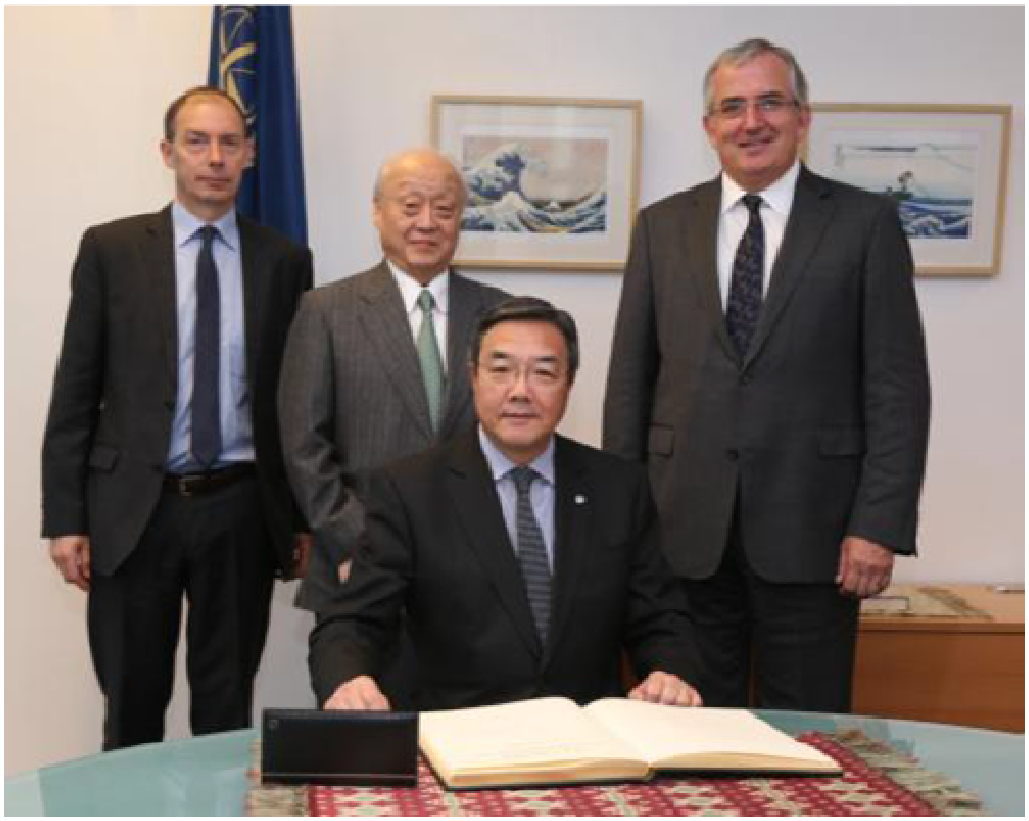
Circulated in more than 100 States to personalities in the legal and maritime professions

IMLI e-News

The IMO International Maritime Law Institute Official Electronic Newsletter (Vol. 11 , Issue No. 24) 21 March 2014

MR. KOJI SEKIMIZU (SECRETARY-GENERAL OF IMO) VISITS ITLOS

On Tuesday 18 March 2014, H.E. Mr. Koji Sekimizu (Secretary-General of IMO), at the invitation of H.E. Judge Shunji Yanai (President of the International Tribunal for the Law of the Sea), paid an official visit to the Tribunal. Mr. Sekimizu, who visited the Tribunal for the first time since his appointment as the Secretary-General of IMO, was initially welcomed in the President's Office by Judge Yanai, Judge Albert Hoffmann (Vice-President of the Tribunal), and Professor Philippe Gautier (Registrar of the Tribunal). Mr. Sekimizu subsequently met the other Members of the Tribunal.



H.E. Mr. Koji Sekimizu (Secretary-General of IMO) being photographed at the Office of the President of the Tribunal with (from left to right) Professor Philippe Gautier, H.E. Judge Shunji Yanai and H.E. Judge Albert Hoffmann

During his visit, Mr. Sekimizu delivered a lecture in the courtroom of the Tribunal entitled: *The United Nations Convention on the Law of the Sea and the International Maritime Organization.* The lecture was attended by the Members of the Tribunal, together with other representatives such as representatives of the Consular Corps, local shipping and insurance companies, law firms, and federal and local authorities. The lecture is recaptured below**:**

(As delivered)

The United Nations Convention on the Law of the Sea and the International Maritime Organization

Address by
Mr. Koji Sekimizu
Secretary-General of the
International Maritime Organization

Main courtroom of the International Tribunal for the Law of the Sea
Tuesday, 18 March 2014, 11 a.m.

President of the International Tribunal for the Law of the Sea, Members of the Tribunal, ladies and gentlemen,

First of all, I would like to express my appreciation to Judge Yanai for the kind invitation to visit this prestigious Organization. It is my great pleasure and honour to be the first Secretary-General to visit the premises of the Tribunal. As Judge Yanai said, Dr. Rosalie Balkin visited the Tribunal and joined a seminar upon his invitation last year. Judge Yanai has kindly attended a special session of the Legal Committee of IMO to commemorate and celebrate the 100th session of the Committee, upon my invitation. Now, upon his kind invitation, I am at the Tribunal's main court addressing Members of the Tribunal and distinguished representatives of the maritime community of Hamburg.

IMO has two educational institutions – the IMO International Maritime Law Institute (IMLI) in Malta and the World Maritime University (WMU) in Sweden. I have asked the Director of IMLI, Professor David Attard to join me today.

I am pleased to see that the relationship between the Tribunal and IMO has thus been enhanced in recent years and I am sure our excellent and close relations will be further strengthened in the future.

Under the United Nations Convention on the Law of the Sea, the International Maritime Organization – IMO has a mandate as a global legislative entity to further regulate maritime issues on the basis of many of its provisions. In my address, I will focus in detail on this unique relationship and also highlight recent developments at IMO.

The United Nations Convention on the Law of the Sea, also known as UNCLOS, is widely recognized as the general legal framework within which all activities in the oceans and seas must be carried out. Although IMO is explicitly mentioned in only one of the articles of UNCLOS (article 2 of Annex VIII), several provisions in the Convention refer to the "competent international organization" in connection with the adoption of international shipping rules and standards in matters concerning maritime safety, efficiency of navigation and the prevention and control of marine pollution from vessels and by dumping.

In such cases, the expression "competent international organization", when used in the singular in UNCLOS, applies exclusively to IMO, bearing in mind the global mandate of the Organization as a specialized agency within the United Nations system established by the Convention on the International Maritime Organization: the "IMO Convention".

***

Article 1 of the IMO Convention establishes the global scope of IMO safety and anti-pollution activities. It also refers to other tasks such as the promotion of efficiency of navigation and the availability of shipping services based upon the freedom of shipping of all flags to take part in international trade without discrimination.

The following facts indicate the wide acceptance and uncontested legitimacy of IMO's universal mandate in accordance with international law:

- 170 sovereign States representing all regions of the world are at present Parties to the IMO Convention and accordingly Members of IMO;
- all Members may participate in meetings of the IMO bodies responsible for drafting and adopting recommendations containing safety and anti-pollution rules and standards. These rules and standards are normally adopted by consensus;
- all States, whether or not they are Members of IMO or the United Nations, are invited to participate in the IMO conferences responsible for adopting new IMO conventions; and
- most IMO treaties are in force and very well ratified.

***

UNCLOS is acknowledged to be a "framework convention". Many of its provisions can be implemented only through specific operative regulations in other international agreements.

These provisions clearly establish an obligation on Parties to UNCLOS to apply IMO rules and standards. This assertion implies that IMO rules and standards are very precise technical provisions which cannot be considered as binding among States unless they are parties to the treaties where they are contained.

It should not be forgotten that an intense treaty making activity was in progress at IMO well before the Third United Nations Conference on the Law of the Sea (UNCLOS III) started its deliberations in 1973; by the end of these deliberations in 1982 when UNCLOS was adopted, most of the main IMO treaties (SOLAS, MARPOL, STCW) had been adopted and some of them were uncontestedly considered as "generally accepted".

Between 1973 and 1982, the Secretariat of IMO (formerly IMCO) actively contributed to the work of the Third United Nations Conference on the Law of the Sea in order to ensure that the elaboration of IMO instruments conformed with the basic principles guiding the elaboration of UNCLOS. This period was also the most prolific in the history of IMO.

Overlapping or potential conflict between the work of IMO and UNCLOS was avoided by the inclusion in several IMO conventions of provisions which state specifically that their text did not prejudice the codification and development of the law of the sea in UNCLOS or any present or future claims and legal views of any State concerning the law of the sea and the nature and extent of coastal and flag State jurisdiction.

When I refer to the period after IMO initiated its activities in 1959, I must mention the **Torrey Canyon** incident in 1967 as a result of which the International Convention on Civil Liability for Oil Pollution, 1969 (CLC) and the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, 1971 (Fund Convention) were adopted. In the context of the law of the sea, it is worth mentioning the importance of extending the mandate of a UN agency to regulate the liability of private persons in view of the diversity of interests affected by oil pollution damage.

The emergence of the concept of regulating damage to the marine environment and the establishment of compulsory insurance arrangements to cover for such damage is a milestone in the history of the evolution of international law relating to responsibility and liability for pollution damage progressively developed at IMO in the wake of the **Torrey Canyon** incident. This evolution is reflected now in article 235 of UNCLOS.

On that basis also the 1992 Protocols to the CLC and Fund Convention, the 1996 HNS Convention, the 2001 Bunkers Convention, the 2007 Nairobi Wreck Removal Convention and the 2010 HNS Protocol were established within the framework of IMO and under the provisions of article 235 of UNCLOS.

***

The degree of acceptability and worldwide implementation accorded to the rules and standards contained in IMO treaties is paramount in considering the extent to which Parties to UNCLOS

should apply IMO rules and standards. This means that the degree of international acceptance of these standards is decisive in establishing the extent to which Parties to UNCLOS are under an obligation to implement them. This factor will also be important in determining to what extent Parties to UNCLOS can enforce generally accepted safety and anti-pollution shipping standards developed at IMO, even if they are not Parties to the IMO treaties containing those rules and standards.

Since 1982, formal acceptance of the most relevant IMO treaty instruments has increased greatly. To date the three conventions that include the most comprehensive sets of rules and standards on safety, pollution prevention and training and certification of seafarers, namely, SOLAS, MARPOL and STCW, have been ratified by 162, 152 and 157 States, respectively (representing approximately 99% gross tonnage of the world's merchant fleet). The general degree of acceptance of these shipping conventions arises mainly from their implementation by flag States, which is strengthened by the fact that, under the principle of "no more favourable treatment", port States which are Parties to these conventions, respectively, are obliged to apply these rules and standards to vessels flying the flag of non-party States.

In this regard, States Parties to UNCLOS should ensure that ships flying their flag or foreign ships under their jurisdiction apply generally accepted IMO rules and standards regarding safety and prevention and control of pollution. Non-compliance with these IMO provisions would result in substandard ships and violate the basic obligations set forth in UNCLOS concerning safety of navigation and prevention of pollution from ships.

Paramount for the implementation of IMO regulations is the requirement contained in article 94 of UNCLOS that every State "shall effectively exercise its jurisdiction and control in administrative, technical and social matters over ships flying its flag" and the comprehensive set of references included in the same article to the duty of the flag State to implement regulations which are recognized without dissent as being IMO shipping rules and standards.

Enforcement of IMO regulations concerning construction, equipment, seaworthiness and manning of ships relies primarily on the exercise of flag State jurisdiction. Other areas such as signals, communications, prevention of collisions, ships' routeing, and ship reporting involve the effective exercise of both flag and coastal State jurisdiction.

Furthermore, several IMO instruments regulate the degree to which States may enforce corrective measures as port State control to ensure that foreign ships comply with international standards. However, such enforcement is limited to the conditions laid down in the main IMO conventions.

In the field of maritime awareness and information on navigation, Automatic Identification System (AIS) and Long-Range Identification and Tracking (LRIT) System have been established in IMO under SOLAS. They are new systems for collecting vital information on ships data and identity and their navigation regulated solely under the SOLAS Convention.

However, these new international regulations do not alter or affect the fundamental framework of UNCLOS over rights, jurisdiction, duties and obligations of Parties to UNCLOS. They are new

international regulations but being implemented within the framework of UNCLOS. The same applies to the mandatory IMO Member State Audit Scheme which will be established under SOLAS, MARPOL, Load Lines, TONNAGE, COLREG and STCW.

The application by States Parties to UNCLOS of IMO rules and standards should also be seen as an incentive for them to become Parties to the IMO treaties containing those rules and standards. As Parties to those treaties, they would receive specific entitlements in accordance with precise treaty law provisions in each case. Paramount among them would be the value accorded by States Parties to IMO treaties to the certificates issued pursuant to those instruments. Also important would be the right of States Parties to participate in any action taken to amend the treaties in question.

***

In principle, IMO treaties do not regulate the nature and extent of coastal State jurisdiction. In this regard, the degree to which coastal States may enforce IMO regulations in respect of foreign ships in innocent passage in their territorial sea or navigating the exclusive economic zone (EEZ) is provided by UNCLOS. The same principle applies to transit passage in straits used for international navigation or to archipelagic sea lane passage in archipelagic waters. The enforcement of routeing measures adopted at IMO also relies primarily on the exercise of coastal State jurisdiction.

Prior to UNCLOS, coastal State jurisdiction with regard to navigation was solely regulated in two specific IMO treaty instruments: the Convention Relating to Intervention on the High Seas in Cases of Oil Pollution Casualties, 1969 (the 'Intervention Convention'), and the Protocol Relating to Intervention on the High Seas in Cases of Pollution by Substances Other than Oil, 1973 (the 'Intervention Protocol'). These instruments specifically regulate the right of the coastal State to intervene on the high seas in the case of pollution casualties. The basic principles in these instruments are now codified in article 221(1) of UNCLOS.

Article 221(1) of UNCLOS recognizes the right of a coastal State to take and enforce measures beyond the territorial sea proportionate to the actual or threatened damage to protect their coastline or related interests from pollution or threat of pollution, following upon a maritime casualty or acts relating to such a casualty, which may reasonably be expected to result in "major harmful consequences".

However, the scope of the Intervention Convention of 1969, the Intervention Protocol of 1973, and article 221(1) of UNCLOS is restricted to casualties causing damage to coastal or related interests from pollution following upon a casualty likely to cause major harmful consequences. Moreover, the Intervention Convention and the Protocol require also the existence of grave and imminent danger to the coastline and related interests of a State. Accordingly, these treaties do not empower a coastal State either to intervene generally to remove wrecks in waters beyond the territorial sea in situations where safety of navigation rather than damage from pollution is an issue, or in cases of pollution that does not result in major harmful consequences.

On 18 May 2007, an IMO Conference convened at the United Nations Office in Nairobi (UNON) adopted the Nairobi International Convention on the Removal of Wrecks, 2007. The Nairobi Convention fills a gap in the existing international legal framework and provides the legal basis for States to remove from their exclusive economic zones, wrecks which pose a

hazard to the safety of navigation or to the marine and coastal environments, or both. It will make shipowners financially liable and requires them to take out insurance or provide other financial security to cover the costs of wreck removal. It will also provide States with a right of direct action against insurers, once this instrument enters into force.
Before the adoption of the Nairobi Convention, there were no explicit rules in international law that conferred clearly on coastal States the right to undertake a wreck removal in their EEZ for purposes of ensuring the safety of navigation only. However, since States have rights under international law to protect their security and vital interests, it was agreed in the IMO Legal Committee that there existed no bar to the conclusion of a convention on wreck removal in areas beyond the territorial sea.

While the role of regulating coastal State jurisdiction at a global level is part of UNCLOS, the so-called 'approval role', namely, the adoption of ships' routeing provisions at the request of coastal States along particular sea zones adjacent to their coast has been continuously expanded in IMO after receiving its initial legitimation in the Convention on the International Regulations for Preventing Collisions at Sea, 1972 (COLREG) in connection with the adoption of Traffic Separation Schemes - TSS.

This situation changed not only as a result of the progressive recognition of UNCLOS but also through debates within IMO related to the ever problematic issue of the approval role of the Organization, not only in connection with TSS but also with routeing measures in general. This was a subject which throughout the history of the Organization had been the source of discussions focusing on the extent and features of IMO's role in the adoption of routeing measures depending on the sea zone where these measures should apply. In addition, the adoption of ships' routeing measures became not only related to safety of navigation but also to environmental considerations, and this additional feature made necessary a closer analysis of IMO's environmental mandate in the light of Part XII of UNCLOS.
***
When UNCLOS moved from its customary law status to that of a treaty in force, it meant that IMO instruments, rather than simply taking into account UNCLOS, had to conform to its regulations. The question of compatibility between UNCLOS and IMO conventions is addressed by the IMO Secretariat in a very detailed study from which the first edition dates from 1987 and has thereafter been up-dated from time to time (latest version: IMO document LEG/MISC.8 dated 30 January 2014).

A rather striking example of how things had changed is shown by the introduction of explicit references to UNCLOS as source of obligations for States Party to SOLAS in connection with the adoption of ships' routeing and ship reporting systems. As a consequence of amendments to chapter V of this Convention, regulations V/10.9 and V/11.9 indicate respectively that all adopted ships' routeing systems and ship reporting systems "shall be consistent with international law, including the relevant provisions of the 1982 United Nations Convention on the Law of the Sea". These provisions have no parallel in any other IMO treaty instrument.
* * *
Part XII of UNCLOS addresses the protection and preservation of the marine environment. Article 192 of UNCLOS provides for the general obligation for States to protect and preserve the marine environment. This obligation applies everywhere in the oceans. Article 194 further

elaborates on the measures to be taken by States, individually or jointly as appropriate, consistent with UNCLOS, to prevent, reduce and control pollution of the marine environment from any source.

States are also required, pursuant to article 197, to cooperate on a global basis and, as appropriate, on a regional basis, directly or through competent international organizations, in formulating and elaborating international rules, standards and recommended practices and procedures consistent with UNCLOS, for the protection and preservation of the marine environment. IMO is the competent international organization to adopt rules and standards relating to pollution from vessels and pollution by dumping.
Many IMO instruments exclusively relate to the prevention of marine pollution, irrespective of whether the introduction of polluting substances into the sea is the result of an accident involving a ship or derives from ship-related operational discharges. Besides MARPOL 73/78 and MARPOL PROT 1997 in particular the following instruments are relevant: OPRC 1990 and OPRC-HNS 2000 Protocol; AFS 2001; BWM 2004 and the Hong Kong Ship Recycling Convention 2009.

Article 2, paragraph 2, of MARPOL 73/78 includes a definition of "harmful substance" which is compatible with the definition of "pollution of the marine environment" included in article 1, paragraph 4, of UNCLOS. Both definitions cover actual or potential harm to living resources and marine life, hazards to human health, hindrance to legitimate uses of the sea, and reduction of amenities. While the definition in UNCLOS applies to all sources of marine pollution, including the introduction of energy into the marine environment, MARPOL only addresses "discharges" from vessels, as defined in article 2(3) of MARPOL.
Likewise article 196 of UNCLOS refers to the introduction of alien or new species irrespective of their source, while the 2004 BWM Convention is applicable to the ballast water taken on board ships.
***
In accordance with article 211(6) of UNCLOS special mandatory requirements for certain areas regarding the prevention of operational discharges of harmful substances have been incorporated in Annexes I, II, IV and V of MARPOL 73/78.
A comparison of article 211(6) of UNCLOS with the provisions on special areas under MARPOL 73/78 indicates that, while the areas established pursuant to article 211(6) are restricted in jurisdictional scope to the EEZ, the MARPOL special area provisions cover enclosed or semi-enclosed areas which may include parts of the territorial sea, the EEZ and the high seas. Implementation of MARPOL special areas is, however, subject to the jurisdictional limits provided in UNCLOS.

To date, ten special areas have been designated under MARPOL Annex I, while the Antarctic area has been designated as a special area under Annex II and the Baltic Sea under Annex IV. Eight special areas have been designated under Annex V.
In addition, Particularly Sensitive Sea Areas have been adopted by the MEPC since 1991 with the Great Barrier Reef of Australia as the first PSSA. Currently, 14 PSSAs have been designated by IMO.

Also in accordance with article 211(6) of UNCLOS, the IMO Assembly, at its twenty-fourth session, (November-December 2005), adopted *revised Guidelines for the Identification and Designation of Particularly Sensitive Sea Areas* (PSSAs) (resolution 982(24)). An application for a PSSA designation may come from IMO Member States only and should contain, inter alia, a proposal for the relevant associated protective measures aimed at preventing, reducing or eliminating the threat or identified vulnerability. Associated protective measures for PSSAs are limited to actions that are to be, or have been, approved and adopted by IMO, for example, a routeing system such as an area to be avoided.

***

Within the framework of articles 212(3) and 222 of UNCLOS, IMO is the appropriate forum for States to establish regulation applicable to vessels to prevent, reduce and control pollution of the marine environment from or through the atmosphere.

IMO's work on the subject goes back as far as 1990, when the MEPC started to work on air pollution from ships. In 1997, after extensive discussion at the MEPC and relevant technical sub-committees, a new Annex on prevention of air pollution from ships was adopted. Furthermore, the international conference of Parties to the MARPOL Convention adopted a resolution inviting IMO's Marine Environment Protection Committee (MEPC) to consider what CO_2 reduction strategies for ships might be feasible. Although international shipping is generally recognized as the most energy efficient mode of mass transportation of cargo – approximately 90% of the world's goods are transported by sea – and is only a relatively modest contributor to overall CO_2 emissions – estimated to be 2.7% in 2007, it was nonetheless acknowledged by IMO Member States that a global approach to further improve international shipping's energy-efficiency and effective emission control was needed as, in the long term, sea transport is expected to continue to grow apace with world trade.

After a great deal of research, study and technical development work, new regulations aimed at improving the energy efficiency of international shipping were adopted in July 2011. They added a new chapter 4 to Annex VI of the MARPOL Convention, and their most important provisions make mandatory the application of two key technical and operational measures - the Energy Efficiency Design Index (EEDI), for new ships, and the Ship Energy Efficiency Management Plan (SEEMP) for all ships.

Similarly also under Annex VI of MARPOL 73/78, the category of "Emission Control Areas" (ECA) were introduced, in which more stringent controls on emissions of sulphur oxide (SO_x), nitrogen oxide (NO_x) and particulate matter are required.

***

Finally, I should like to mention an important area of IMO's work that incorporates regulation both for environmental protection and safety of navigation. Article 234 of UNCLOS refers to Ice-covered areas. Among many IMO initiatives for appropriate navigational and environmental regulation for Arctic and Antarctic shipping, arguably the most important is the development of a mandatory polar code. The move to develop the polar code followed the adoption, in 2009, of Guidelines for ships operating in polar waters, which sets out additional provisions deemed necessary for the polar areas beyond the requirements of existing conventions. But, whereas the Guidelines are recommendatory, the IMO membership has agreed that the polar code would be a mandatory instrument.

Work to finalize the code at the end of this year is well underway, with IMO's committees and sub-committees making special efforts to ensure the completion date is adhered to.

***

IMO has over the decades initiated and thereafter complemented many of the existing provisions in the Law of the Sea Convention, being pragmatic and focusing on technical requirements which are consistent with these provisions. In fulfilling its mandate, IMO incidentally also expanded beyond what is explicitly stipulated in UNCLOS, still these regulations are subject to the jurisdictional limits provided in UNCLOS.

Thank you.

***

Having delivered the above address, Mr. Sekimizu further provided his views on the development of concepts of environmental protection at IMO covering:

- establishment of IMO in 1948,
- 56 years of activities of IMO in the fields of maritime safety and pollution prevention;
- the Stockholm Conference on the Human Environment in 1972;
- adoption of UNCLOS in 1982;
- the Earth Summit in Rio de Janeiro in 1992 and Agenda 21 as well as the concept of sustainable development;
- the World Summit on Sustainable Development in 2002;
- Rio+20 Conference in 2012; and
- a concept of the Sustainable Maritime Transportation System generated by the IMO Secretariat in consultation with shipping industry representatives.

Finally, he expressed sincere appreciation to Judge Yanai for the opportunity provided to address the Tribunal and pledged his commitment to enhance further cooperation and collaboration between ITLOS and IMO.
