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Lawmaking and Implementation in International Shipping: Which Law Do We Obey?

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Secretary-General, Dr Mandaraka-Sheppard, Ladies and Gentlemen,

It is a pleasure to be here. I am very grateful Aleka for the kind invitation.

Like the earlier speakers, I must congratulate the IMO on its 60th anniversary. I realized with some dismay when preparing for this event that I have known the IMO for over half that time. Indeed, I used to know it as IMCO; and as a young lawyer in the Foreign Office I used to deal with its then Legal Counsel, Tom Mensah, on important matters like privileges and immunities. Subsequently, I participated in many IMO meetings on such diverse issues as the Turkish Straits, Indonesia's archipelagic sea-lanes, and the revision of the SUA Conventions.

I have always been struck by the efficiency and directness of the Organization's working methods. Two minutes maximum for an intervention, I think. It is very different at the United Nations in New York or Geneva.

Appropriately enough, the subject-matter this evening seems to put the spotlight on the IMO. Is it really as effective as we like to believe? If it is, why do States, why in particular does the European Union, sometimes feel the need to go further and faster? Is it 'just' a problem of uneven, even

inadequate enforcement by flag States? Would all have been well in the *Intertanko* case, which Tom Mensah has just referred to, if the Community had been a party to MARPOL? Would the relationship be easier if the EU were a member of the IMO? Would there be more of that 'sense of ownership' referred to by the Secretary-General. Birgit drew attention to the importance of 'active participation' by Member States and industry. This participation is a very personal matter. I have always been struck by the enthusiasm and positive approach of delegates here, as compared with the cynicism you find in some other organizations. As you will see, I am following Aleka's example, asking questions! It is so much easier than answering them.

Aleka's questions are daunting. I shall try to address briefly those that relate to courts and tribunals. And I shall say a word about the EU. But before doing so, I shall give my own answer to the general question posed by the title of today's panel. My answer is rather simple. You must obey all of the applicable laws, under the various legal systems. This may be one or more domestic legal systems, EU law, as well as any public international law that is applicable directly by virtue of domestic legal system. Where it is not possible to do so (and such cases are likely to be rare), the problem is essentially a political one, to be solved through political channels. The law and lawyers cannot solve everything.

But perhaps you find that answer not only simple, but simplistic, and downright unhelpful. No doubt you will say so in the discussion.

Aleka asked, first, which courts and tribunals are competent to decide a dispute (where there is a conflict of laws)? And, second, 'supposing a court or tribunal gets it wrong, what then?' Is there a court which can determine the issue definitively?

As Tom Mensah has emphasised, it is in the nature of the shipping business that it is constantly having to operate under different legal systems. But it is not unique in this respect. The same is true of almost any large business in today's world. Uniformity in the applicable rules is important, but it is never going to be perfect. For one thing, each legal system will have its own dispute settlement mechanisms, typically the courts, which will work more or less well. And most legal systems have a supreme court or courts that keep the legal system in order, as it were. That is true of national legal systems, such as the law of England and Wales. It is true of EU law. It is not true of public international law, except in limited fields, such as the World Trade Organization.

In the modern international law of the sea, we have what is frequently called a 'proliferation' of international courts and tribunals. And they only have jurisdiction over part of the law, and generally only between States (including for this purpose the European Community). Proliferation is a relatively new phenomenon. It took off on the 1990s. Some people profess to be concerned. Dire consequences are predicted for the coherence of the international legal system if international courts come to differing views about the law. There is no supreme court of international law, so the law will be forever fractured. This concern has led some to propose that the

International Court in The Hague should be given an appellate role. That is unrealistic – States are unlikely to agree - and in my view unnecessary.

In my view, the 'proliferation' of international courts and tribunals is, on balance, a good thing - and not only for lawyers! For shipping interests there is the possibility, in certain circumstance, of bringing a direct action on the international level. Businesses, as well as individuals, may bring actions in Strasbourg under the European Convention on Human Rights. They can sometimes bring actions against foreign Governments under investment protection treaties. Under the United Nations Convention on the Law of the Sea, which has now, I believe, 157 parties (including the European Community and, I think, all its Member States), ship-owners (with the consent of the flag State) can go to the International Tribunal for the Law of the Sea in Hamburg, to secure the prompt release of a ship and its crew. There have been a number of cases. In the most recent one, Japan successfully took action against the Russian Federation over the detention of fishing vessels in the Russian Far East. This procedure is also available where ships are detained in connection with pollution offences, and not only for tankers such as in the first case to come to the law of the Sea Tribunal in Hamburg, the *Saiga* case, to which Tom Mensah referred and over which he presided.

Part XV of the Law of the Sea Convention makes complex provision for the compulsory third-party settlement of disputes under the Law of the Sea Convention. It provides for the compulsory jurisdiction to the International Court of Justice in The Hague, the International Tribunal for the Law of the Sea in Hamburg (known as 'ITLOS'), or inter-state arbitration. Since the

Convention covers a very wide range of matters, many disputes of keen interest to the shipping industry potentially fall within its terms.

The *MOx Plant* litigation, brought by Ireland against the United Kingdom, concerned pollution of the Irish Sea from a nuclear plant at Sellafield. It well illustrates the effect of the 'proliferation' of different international tribunals. I do not have time to go into details, and anyway two of the arbitrators are on this evening panel. First there was a case before an arbitral tribunal established under the OSPAR Convention, which found that the UK had not violated that Convention. Second, Ireland commenced proceedings before an arbitral tribunal under the Law of the Sea Convention. Pending the constitution of the tribunal, Ireland sought and was granted interim measures of protection by ITLOS. The case proceeded to a hearing before the arbitral tribunal, again presided over by Tom Mensah. But during the actual hearing, it became apparent that the European Commission was about to commence proceedings against Ireland in the ECJ on the ground that Ireland had violated Community law by bringing proceedings under the Law of the Sea Convention instead of in Luxembourg. The arbitral tribunal suspended its own proceedings in order to see what would happen in Luxembourg. When Ireland lost the ECJ case, tribunal's proceedings were discontinued.

Another case involving parallel proceedings is the Swordfish litigation, brought by Chile against the EC in ITLOS, and by the EC against Chile in the WTO. The case is still pending before a five-member Chamber of the Hamburg Tribunal.

The choice of a court can of course be central to the outcome of a case. In retrospect, one might wonder what would have happened if, instead of Luxembourg, proceedings challenging the Directive at issue in *Intertanko* had gone to arbitration under the Law of the Sea Convention. One lesson of the *Intertanko* judgment is that it is up to EU Member States to ensure that action by the Community does not place them in breach of their treaty obligations. They cannot always rely on the ECJ to save them.

The short answer to Aleka's second question is that the court which decides an issue definitively is the highest court of the legal system concerned (where there is such a court), such as the ECJ for the EU law. In the case of the public international law of the sea, there is no such court - though decisions of the ICJ and of ITLOS are likely to be accorded great weight. Questions of international law may also fall to be decided by national courts of the ECJ; but these are likely to carry less weight. While there is no system of binding precedent in international law, courts do naturally pay high regard to their own previous decisions; and there is a growing sense of mutual judicial respect or comity among international courts and tribunals.

There are a number of issues to bear in mind when considering the merits of litigation before international courts and tribunals. First, there is quite often no international court or tribunal with jurisdiction. Even where there is, it may well be that no State is willing to the shoulder the burden of initiating legal proceedings against another State. The burden can be a considerable one, both politically and in terms of resources. Then, international litigation, like any litigation, can also take a considerable time. In the meantime, the problem may remain unresolved - though this can be mitigated by

provisional measures of protection, which are now held to be legally binding at the international level as domestically. International litigation may harden positions, and distracting the attention of those who might otherwise be resolving the matter. But it may have a positive effect, concentrating the mind and encouraging a solution. This happened, for example, in the ICJ case between Finland and Denmark over the construction of a bridge over the Great Belt; and it happened in the ITLOS case between Singapore and Malaysia over *Land Reclamation*.

And what, Aleka asked, if a court 'gets it wrong'? That of course is always a risk. That risk is another factor which States will weigh before commencing proceedings.

Things are likely to be very awkward if a court 'gets it wrong'. It is difficult to ignore a judgment. The judgments of international courts are binding only for the parties to the case. But, as I have said, they often carry great weight, so ignoring them is a risky option.

One can always have another go, and try to persuade the court (or possibly another court) to review its position or distinguish the earlier case, narrowing its effects.

At the end of the day, it may be possible to change the legal position through legislation; in the international system, through the adoption of a new convention. This is what happened after the World Court's famous *Lotus* judgment of 1927, though it took until 1952 for the judgment to be reversed by the adoption of the Brussels Convention (now article 108 of the

Law of the Sea Convention). Such action requires political will, which is not always present.

I return to the EU. Is it the villain of the piece? Well, to some extent it is, or at least this is the perception. There seems to be a tendency to react, in haste and without much reflection, to the latest shipping disaster. Or to seize upon the latest incident to push through proposals that have been on the stocks for some time. This is not a good way to legislate. And then there is a tendency to blame what is seen as an 'out-of date' Law of the Sea Convention for failure to act ahead of time. I commend a very interesting book by Henrik Ringbom, published just a couple of months ago, on *The EU Maritime Safety Policy and International Law*.

But this is something of a caricature. The Commission, and the European Parliament, may sometime be guilty. And their views are obviously influential. But it is ultimately the Council of Ministers that has to approve the proposals. In other words, national Governments. And at that level the pressures to maintain the basic framework of the international law of the sea are considerable.

We should not lose sight of the wider interests at stake. The interests of commercial shipping is only one aspect of the navigational provisions of the Law of the Sea Convention. The straits and archipelagic sea-lanes provisions of the Convention, for example, are also vital for crucial military activities. Of course, there may be different views among the 27 Member States as to what the international law of the sea requires. Not all of them are major shipping nations or naval powers. Their interests differ.

Pressure groups and public opinion differ. But perhaps, on the whole, the EU has, despite the alarms, not done as badly as its reputation among law of the sea community might lead one to suppose.

The EU sometimes needs to explain its position better. I attended a conference earlier this year in Singapore where almost all participants, and especially the Americans, were attacking the EU for its assaults upon freedom of navigation and its disregard for the law of the sea. There were answers to many of the criticisms. But there was no one from Brussels to defend the EU. Often what was being attacked were proposals that had not, or not yet, been adopted. What appears in a Green Paper will not necessarily appear in a White Paper. What appears in a Commission proposal will not necessarily be adopted as law at the end of the day. Vigilance is needed, by Member States, third States, and the industry. Vigilance is especially needed when urgent action is being contemplated in Brussels.

One recurring theme, in Brussels and here at the IMO, is the inadequacy and unevenness of enforcement, especially by a number of flag States. This is being addressed, but the problem seems pretty intractable. That lies behind many of the proposals for exorbitant coastal State jurisdiction. Another problem is the slowness of the traditional procedures for the adoption and entry into force of international conventions. As Birgit mentioned, the IMO has pioneered the tacit approval of updating amendments to its conventions. But it can still be much quicker to adopt Community legislation, especially where this done by way of an emergency package.

A third theme heard in Brussels is that the 1982 Law of the Sea Convention, negotiated some thirty years ago, is in some respects outmoded, overtaken by technology and new threats and concerns. This is a misguided view. The balances struck in the package deals of the 1970s have stood the test of time. For the most part they are flexible, looking forward to the future development of international rules and standards. The IMO is of course the competent international organization under the Convention for shipping matters. Even the rules in the Convention can be adjusted at the margins, through new international agreement, uniform practices and agreed interpretation. The removal of oil platforms is a good example. But these need to go with the grain of the Convention. Moves radically to amend the Convention's regime for shipping are unlikely to succeed or to lead to a better framework; and we could well see other parts of the Convention unravel. And unilateral attempts to change international law in this field are equally, if not more, hazardous. I am glad there are not too many Athenians present!