

LEGAL MEASURES FOR THE CONTROL OF MARINE POLLUTION BY DUMPING *

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Abstract

Marine pollution by dumping is one of the six sources of marine pollution under the United Nations Convention on the Law of the Sea, 1982 (UNCLOS). UNCLOS requires the parties to have national laws to deal with such dumping as well as to cooperate on a regional and international levels. Thailand as a party to the UNCLOS has international obligations to implement the provisions of the UNCLOS. However, Thailand does not have domestic laws dealing with marine dumping, not to mention the fact that Thailand is not a party to the 1996 Protocol to the Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter, 1972 (1996 Protocol) which deals specifically with marine pollution by dumping. In addition, on a regional level among ASEAN members nine of which except Cambodia are also parties to the UNCLOS and have the same obligations to implement the UNCLOS, there is no specific regional agreement or arrangement on the prevention and control of marine pollution by dumping.

It is the purpose of this doctoral dissertation to analyse the problems of marine pollution by dumping, the lack of Thai laws on this issue as well as the lack of regional cooperation among ASEAN members on the matter. This dissertation thus takes a holistic approach by focusing on the obligatory measures required by articles 210 and 216 of the UNCLOS to prevent and control marine pollution by dumping on a national as well as

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regional levels. Such obligatory measures under the UNCLOS have been predicated by the 1996 Protocol on which obligations of Thailand under the UNCLOS would be based.

The study reveals that Thailand lacks domestic law to deal with marine pollution by dumping. Therefore, it is recommended that Thailand adopts law on the issue based on the provisions of the UNCLOS and the 1996 Protocol regardless as to whether Thailand intends to become a party to the 1996 Protocol. The study also indicates that there is no regional cooperation among the ASEAN members to prevent and control marine pollution by dumping despite the existing problem of marine dumping in the ASEAN region and the obligations under the UNCLOS requiring regional cooperation among the parties to the UNCLOS to which nine members of ASEAN except Cambodia are parties. It is thus recommended that the ASEAN members consider adopting a regional agreement or arrangement through such existing regional mechanism as the ASEAN Socio-Cultural Community Blueprint 2025 dealing with marine pollution by dumping on a regional basis.

Keywords: Legal Measures, Dumping, Marine Pollution, Dumping of Wastes and Other Matter, UNCLOS

1. Introduction

Seas have been used for a long time by human as dumping grounds for such wastes and matters as radioactive substances,¹ sewage² and toxic substances from pesticides³ from human land-based and marine activities. Such dumping has been carried out without regulations and consideration of its effects on the marine environment. Long and continuing practice of such dumping has caused accumulation and proliferation of marine pollution affecting marine environment including human health on a worldwide basis.⁴ Having realized the gravity of effects of such dumping practice on the marine environment and human health, the Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter of 1972 was adopted to provide global measures for the prevention and control of dumping of wastes and other matter. The Convention has undergone several amendments and finally superseded entirely by the 1996 Protocol to the Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter of 1972 (1996 Protocol) which entered into force on March 24, 2006. The underlying concept of the 1996 Protocol is to prohibit dumping of wastes and other matter from vessels, aircraft, platforms and other man-made structures at sea unless permitted by the states concerned as contemplated in Annex 1 of the Protocol.⁵

¹ United States Environmental Protection Agency, 'What was dumped into the Ocean Before 1972?' <<http://www.epa.gov/ocean-dumping/learn-about-ocean-dumping#prohibited>> accessed 15 August 2017

² Ibid.

³ Daniel Suman, *Regulation of Ocean Dumping by the European Economic Community*, 18 Ecology L. Q. 559 (1991) <<https://scholarship.law.berkeley.edu/cgi/viewcontent.cgi?article=1400&context=elq>> accessed 18 December 2017

⁴ Planet Aid, *How Ocean Pollution Affects Humans* <<http://www.planetaid.org/blog/how-ocean-pollution-affects-humans>> accessed 20 April 2018

⁵ 1996 Protocol to the Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter of 1972 (entered into force 24 March 2006) 1046 UNTS 120 (1996 Protocol), Art 4.

Before the 1996 Protocol was adopted, the UNCLOS, following the provisions of the 1972 Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter, also adopts as general measures for the prevention and control of marine pollution by dumping of wastes and other matter in Part XII. Thus, the provisions relating to dumping in Part XII of the UNCLOS are in line with those of the 1972 Convention. Thailand is not a party to the 1996 Protocol but is a party to the UNCLOS.⁶ Therefore, Thailand has international obligations to adopt and implement measures for the prevention and control of marine pollution by dumping at least as provided for in the UNCLOS. Specifically, article 210 of the UNCLOS requires states parties to the UNCLOS to adopt laws and regulations to prevent, reduce and control pollution of the marine environment by dumping.⁷ Paragraph 6 of the same article provides that such national laws, regulations and other measures as may be necessary shall be no less effective in preventing, reducing and controlling such marine pollution by dumping than the global rules and standards. Certainly, such global rules and standards for the prevention, reduction and control of marine pollution by dumping can be found in the 1996 Protocol. It is thus important that the measures contemplated in the 1996 Protocol be addressed and analyzed as the proper guidelines for Thailand to adopt and implement the obligations to prevent, reduce and control marine pollution by dumping required by the UNCLOS.

2. Meaning of “Dumping”

Although definition of “dumping” is provided for in article 1 paragraph 1(5) of the UNCLOS, this definition derives from the same term in

⁶ Oceans & Law of the Sea,

<https://www.un.org/Depts/los/reference_files/chronological_lists_of_ratifications.htm>
accessed 1 August 2018

⁷ United Nations Convention on the Law of the Sea, 1982 (entered into force 1 November 1994) 1833 UNTS 397 (UNCLOS), Art 10 para 1.

the 1972 Convention which has been superseded and replaced by the new definition in the 1996 Protocol. Thus, the current meaning of “dumping” is found in article 1 paragraph 4 of the 1996 Protocol. According to paragraph 4 of article 1 of the 1996 Protocol, “dumping” means

“1. any deliberate disposal into the sea of wastes and other matter of vessels, aircraft, platforms or other man-made structures at sea;

2. any deliberate disposal into the sea of vessels, aircraft, platforms and other man-made structures at sea;

3. any storage of wastes or other matter in the seabed and the subsoil thereof from vessels, aircrafts, platforms or other man-made structures at sea; and

4. any abandonment of toppling at site of platforms or other man-made structures at sea, for the sole purpose of deliberate disposal.”⁸

However, dumping does not include:

“1 .the disposal into the sea of wastes or other matter incidental to or derived from the normal operation of vessels, aircraft, platforms or other man-made structures at sea and their equipment other than wastes or other matter transported by or to vessels, aircraft, platforms or other man-made structures at sea operating for the purpose of disposal of such matter or derived from the treatment of such wastes or other matter on such vessels, aircraft, platforms or other man-made structures;

2. placement of matter for a purpose other than the mere disposal thereof provided that such placement is not contrary to the aims of this Protocol; and

3. notwithstanding paragraph 4.1.4, abandonment in the sea of matter (e.g. cables, pipelines and marine research devices) placed for a purpose other than the mere disposal thereof.”⁹

According to the above definition, the wastes or other matter or vessels, aircraft, platforms or other man-made structures at sea constitute

⁸ 1996 Protocol, Art 1 para 4.1.

⁹ 1996 Protocol, Art 1 paras 4.2 and 4.3.

“dumping” only when such wastes or other matter or vessels, aircraft, platforms or other man-made structures are deliberately or intentionally disposed of into the sea regardless of the actual effect of such dumping on the marine environment.¹⁰ Thus, a mere deliberate dumping of wastes or other matter is sufficient to constitute “dumping” in accordance with the definition in article 4 of the 1996 Protocol.

While dumping is generally prohibited under both the UNCLOS and the 1996 Protocol, certain wastes or other matter may be allowed for dumping subject to permission therefor by the states concerned.¹¹ Annex 1 of the 1996 Protocol lists the wastes or other matter that may be considered for dumping¹² taking into consideration of the objectives and general obligations set forth in articles 2 and 3 of the Protocol. Such wastes or other matter under Annex 1 include (a) dredged material (b) sewage sludge (c) fish waste or material resulting from industrial fish processing operation (d) vessels and platforms or other man-made structures at sea (e) inert, inorganic geological material (f) organic material of natural origin (g) bulky items primarily comprising iron, steel, concrete and similarly unarmful material for which the concern is physical impact and limited to those circumstances where such wastes are generated at locations such as small islands with isolated communities having no practicable access to disposal options other than dumping (h) carbon dioxide streams from carbon dioxide capture processes for sequestration.¹³

The 1996 Protocol also requires the states parties to prohibit incineration at sea of wastes or other matter¹⁴ and export of wastes or other

¹⁰ จุมพต สายสุนทร, *กฎหมายสิ่งแวดล้อมระหว่างประเทศ การคุ้มครองและรักษาสีงแวดล้อมทางทะเล*, (พิมพ์ครั้งที่ 3, วิญญูชน 2556) 240 (Jumphot Saisoonthorn, [*International Environmental Law : Protection and Preservation of the Marine Environment*] (3rd edn, Winyuchon 2560)

¹¹ UNCLOS, Art 210(3) and 1996 Protocol, Art 4 para 1.

¹² 1996 Protocol, Annex 2.

¹³ 1996 Protocol, Annex 1

¹⁴ 1996 Protocol, Art 5.

matter to other countries for dumping or incineration at sea¹⁵ whether or not such countries are parties to the 1996 Protocol.

3. Thailand's Environmental Policies

Thailand's environmental policies can be found in the Constitution B.E. 2560, the Twenty Year National Strategies (B.E. 2561-2580), the Policy and Plan for the Enhancement and Preservation of the Environmental Quality B.E. 2560-2579, the Twelfth National Economic and Social Development Plan (B.E. 2560-2564) and the Management Plan for Environmental Quality B.E. 2560-2564. However, the environmental policies of Thailand do not specifically focus on the prevention and control of marine pollution by dumping or from other sources. The policies merely focus on the conservation and management of marine and coastal resources on a sustainable basis. Since prevention and control of marine pollution from all sources including dumping are quite significant and urgent under the provisions of the UNCLOS, Thailand should consider adopting environmental policies which include specifically the prevention and control of marine pollution from all sources in order to reflect Thailand's preparation for the serious prevention and control of marine pollution not only on the worldwide but also on the regional ASEAN bases. Insofar as ASEAN is concerned, ASEAN environmental policy which relates to marine pollution merely focuses on marine pollution resulting from sea litter from land-based.¹⁶ The policy does not cover marine pollution by dumping of wastes and other matter according to articles 210 and 216 of the UNCLOS.

¹⁵ 1996 Protocol, Art 6.

¹⁶ ASEAN Conference on Reducing Marine Debris in ASEAN Region, <<http://environment.asean.org/wp-content/uploads/2017/12/Summary-of-ASEAN-Conference-on-Marine-Debris-26-Dec-2017.pdf>> accessed 10 July 2018

4. Thailand's Measures for the Prevention and Control of Marine Pollution by Dumping from Vessels

Currently, Thailand does not have a national law which directly implement the measures for prevention and control of marine pollution by dumping as contemplated in the 1996 Protocol. The Navigation in Thai Waters Act B.E. 2456 and the Fisheries Decree B.E. 2558 fail in major parts to prevent and control marine pollution by dumping due to lack of definition of “dumping” as found in the 1996 Protocol, insufficiency of spatial scope of application of the laws which do not cover “dumping” in the exclusive economic zone and continental shelf, lack of responsible agencies and punishment for violation.

5. Thailand's Measures for the Prevention and Control of Marine Pollution by Dumping from Aircraft

There is no direct law of Thailand dealing with dumping from aircraft. Specifically, the Air Navigation Act B.E. 2497 and the International Air Carriage B.E. 2558 fail to have the provisions dealing with dumping of wastes or other matter from aircraft. Nor does the Enhancement and Conservation of the National Environmental Quality Act B.E. 2535 have any provision dealing with dumping of wastes or other matter from aircraft both in terms of definition of “dumping” and of spatial scope of application.

6. Thailand's Measures for the Prevention and Control of Marine Pollution by Dumping from Platforms

Although sections 74 and 75 of the Petroleum Act B.E. 2514 deal with measures for the protection and preservation of the marine environment from pollution resulting from petroleum operation, their application is limited only to normal operation of the platforms. They do not deal with dumping of wastes or other matter from platforms.

However, sections 80/1 and 80/2 together with regulations prescribed pursuant thereto require the concessionaires to remove the platforms after termination of the concession. This requirement may be regarded as a measure towards prevention of abandonment and toppling of the platforms.¹⁷ It remains unclear whether such removal must be made entirely in order to prevent abandonment or toppling of such platforms.

7. Thailand's Measures for the Prevention and Control of Marine Pollution by Dumping from Other Man-Made Structures at Sea

Man-made structures at sea may be subject to section 117 of the Navigation in Thai Waters Act B.E. 2456 which is limited to those structures located within the 12 nautical mile territorial sea of Thailand. Therefore, application of this act is not extended to the exclusive economic zone and the continental shelf of Thailand. Dumping from other man-made structures at sea under Thai law is thus limited especially in terms of spatial scope of application.

8. Cooperation among ASEAN Countries for the Prevention and Control of Marine Pollution by Dumping

The ASEAN has ten member states, there are Brunei, Cambodia, Indonesia, Laos, Malaysia, Myanmar, the Philippines, Singapore, Thailand and Vietnam. Since nine ASEAN members except Cambodia are parties to the UNCLOS, they have the common obligations under the UNCLOS to cooperate among themselves for the prevention and control of marine pollution from all sources including dumping. Such cooperation may include, among other things, formulation and elaboration of international rules,

¹⁷ International Marine Organization, "Guidelines and standards for the removal of offshore installations and structures on the continental shelf and in the economic zone" <http://www.imo.org/blast/mainframe.asp?topic_id=1026> accessed 1 August 2018

standards and recommended practices and procedures consistent with the UNCLOS for the prevention and control of marine pollution by dumping,¹⁸ notification to other States deemed likely to be affected by pollution when becoming aware of cases in which the marine environment is in imminent danger of being damaged or has been damaged by dumping,¹⁹ elimination of effects of dumping and prevention on minimization of the damage resulting therefrom,²⁰ an undertaking of programs of scientific research and encouragement of the exchange of the information and data acquired about pollution by dumping.²¹

Currently, marine environmental cooperation among ASEAN countries is found in the ASEAN Socio-Cultural Community Blueprint 2025²² as a regional policy which is the guideline of ASEAN Working Group on Coastal and Marine Environment (AWGCME). However, the ASEAN Socio-Cultural Community Blueprint 2025 merely specifies a broad policy on protection and preservation of the environment. There is no specific agreement or arrangement on dumping has been established among ASEAN members. This Blueprint and AWGCME focus on the priority of sea litter especially plastic from land-based as well as from other bases in the seas of the ASEAN region.²³ Even though the marine environmental cooperation among ASEAN countries has not yet covered all areas of marine pollution, initiation among ASEAN countries regarding plastic litter in the sea is one significant step towards further regional environmental cooperation including marine pollution by dumping in the ASEAN region in the future.

¹⁸ UNCLOS, Art 197.

¹⁹ Ibid, Art 198.

²⁰ Ibid, Art 199.

²¹ Ibid, Art 200.

²² Association of Southeast Asian Nations, ASEAN Socio-Cultural Community Blueprint 2025, <<https://asean.org/storage/2016/01/ASCC-Blueprint-2025.pdf>> accessed 10 July 2018

²³ Supra note 16.

9. Conclusion

Insofar as pollution of the marine environment by dumping is concerned, Thailand has no specific law dealing directly with such pollution despite the fact that Thailand became a party to the UNCLOS seven years ago. The existing laws of Thailand lack both substantive measures and enforcement mechanism for the prevention and control of the marine environment by dumping. No definition of “dumping” can be found in any law of Thailand despite the same is provided for in article 1 paragraph 1(5) of the UNCLOS to which Thailand is a party. In addition, most laws of Thailand dealing with prevention and control of marine pollution do not extend beyond the territorial sea or the continuous zone. Virtually, Thai laws on the prevention and control of marine pollution do not apply in the exclusive economic zone and the continental shelf.

As required by the obligations under the UNCLOS especially articles 210 and 216 dealing with prevention and control of marine pollution by dumping, Thailand is obliged to implement such obligations by adopting measures for the prevention and control of marine pollution by dumping. To this end, it is perhaps appropriate to adopt a specific law dealing directly with marine pollution by dumping on the basis of the 1996 Protocol. In so doing, it is not necessary for Thailand to become a party to the 1996 Protocol if Thailand considers that it is not ready for any international obligations imposed by the 1996 Protocol. It is quite sufficient for Thailand to adopt certain provisions of the 1996 Protocol as measures for the prevention and control of marine pollution by dumping such as definition of dumping, spatial scope of application of such measures to cover the exclusive economic zone and the continental shelf of Thailand, enforcement organ, penalty for violation of the law.

Looking outside Thailand, regional cooperation among ASEAN countries towards prevention and control of all kinds of marine pollution imposed thereupon by the obligations under the UNCLOS is also significant, the ASEAN Socio-Cultural Community Blueprint 2025 provides a practical

tool for environmental cooperation among the ASEAN countries. Thailand and AWGCME should play a more active role in initiating any possible environmental cooperation to prevent and control marine pollution by dumping of wastes and other matter in the region.

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