

CONFERENCE PAPERS

MARITIME LAW IN THE ASIA-PACIFIC REGION

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The following collection of articles arose from a workshop held at Victoria University of Wellington's School of Law on 25-26 February 2016, hosted by the New Zealand Centre of International Economic Law. The aim of this gathering was to discuss maritime law issues confronting the Asia-Pacific region,¹ specifically those concerning maritime transport. This topic has received less attention than it deserves. First, because maritime law discussions tend to be dominated either by efforts at the international level, connected with the International Maritime Organization (IMO) and other global bodies, or by European and North American interests in particular. Second, because the maritime issues for which the region is most notorious tend to be those connected with disputed maritime boundaries, such as the South China Sea.

While global efforts towards uniformity are valuable, and territorial disputes will continue to loom large in the near future, the Asia-Pacific region's shipping sector nonetheless faces a unique set of opportunities and challenges that should be the focus of more interaction and research. It is home to 12 of the world's top 35 flag states, and 9 of the top 35 ship-owning states.² Countries within this region such as Korea and China are major ship-builders; Singapore and Shanghai boast enormous ports; Australia and Indonesia have expansive coastlines; while the Pacific Islands struggle with poor maritime infrastructure and infrequent shipping services. Increased maritime traffic across the region has heightened environmental concerns, whereas initiatives such as China's "One Belt, One Road" policy prompt deeper reflection on the nature of shipping connections between this region and the rest of the world.

Taking these matters into account, it might nonetheless be argued that the Asia-Pacific region is too diverse and divided for any successful efforts at regional cooperation in the maritime sphere. However, I believe the experience of this workshop suggests that we need to think harder, and more optimistically, in this regard. Henrik Ringbom's piece on the lessons this region may be able to draw from the European Union's efforts at regional cooperation highlights that much can be achieved without the need for "an EU-type powerful, constitutional, institutional or financial framework to be put in place".³ A local example of where more might be achieved concerns Hong Kong's efforts to curb air pollutions from ships visiting its port. As one of the four ports in the world "with the largest absolute emission levels" (the other three being Singapore, Tianjin, and Port Klang),⁴ Hong Kong has good reason to focus on emissions for environmental and health reasons. Therefore, after a disappointing level of success with a programme to have vessels voluntarily switch to low-sulphur fuels,⁵ in July 2015 Hong Kong brought into force a unilateral emissions regime for vessels at berth.⁶ However, the importance of shipping to Hong Kong's economy means that if vessel operators face higher costs when trading there, the port may lose business to competitors in the Pearl River Delta such as Shenzhen and Guangzhou, while perpetuating air pollution within the same geographic area. It has been proposed that this situation is ripe for a level of regional cooperation, for example by having the area designated an Emissions Control Area by the IMO under Annex VI of the *International Convention for the Prevention of Pollution from Ships* (MARPOL).⁷ While any such

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¹ For the purposes of the workshop and these articles, the region was defined as excluding the Eastern Pacific rim, and the countries in the South Asian Association for Regional Cooperation.

² United Nations Conference on Trade and Development, *Review of Maritime Transport 2015* (2015) 36 and 42.

³ Henrik Ringbom, 'The European Union and International Maritime Law – Lessons for the Asia-Pacific Region?' (2016) 30 *Australia and New Zealand Maritime Law Journal* 67, 76; see also David L VanderZwaag and Hai Dang Vu, 'Regional Cooperation in the South China Sea and the Arctic: Lessons to be Learned?' in Aldo Chircop et al (eds), *The Regulation of International Shipping: International and Comparative Perspectives* (2012).

⁴ International Transport Forum, *Shipping Emissions in Ports* (2014), at 19.

⁵ Civic Exchange, *Fair Winds Charter and Ship Emissions Control* (2015) <<http://www.civic-exchange.org/en/themes/Fair-Winds-Charter-and-Ship-Emissions-Control>> (initial voluntary scheme); *Hong Kong Marine Department Notice No 132 of 2012*; *Hong Kong Marine Department Notice No 91 of 2015* (incentive plan introduced, reducing port fees); *Hong Kong Wants Ship Emissions Standard Now* (19 March 2015) The Maritime Executive <<http://www.maritime-executive.com/article/hong-kong-wants-ship-emission-standards-now>>; Ernest Kao, *Berthing ships must use fuel with low sulphur under new Hong Kong law* (2 July 2015) South China Morning Post <<http://www.scmp.com/news/hong-kong/health-environment/article/1831427/berthing-ships-must-use-fuel-low-sulphur-under-new>>.

⁶ *Air Pollution Control (Ocean Going Vessels) (Fuel at Berth) Regulation 2015* (Hong Kong).

⁷ *International Convention on the Prevention of Pollution from Ships 1973 as modified by the Protocol of 1978 relating thereto* (MARPOL), 1973/1978, 1340 UNTS 62; *Protocol of 1997 to Amend the International Convention for the Prevention of Pollution from Ships, 1973, as Modified by the Protocol of 1978 Relating Thereto* (MARPOL Annex VI), 1997, reg 14.3.3; see Simon Ng, Veronica Booth and Freda Fung,

application would require a great deal of scientific and economic research, and law change within Macao and mainland China,⁸ Hong Kong's position provides an illustration of why regional cooperation is worth exploring in the Asia-Pacific region. Once specific problems are isolated, and the common interests of the countries involved identified, a diverse and difficult situation can resolve into a more manageable path to reform. And in a region that has ongoing disputes over boundaries and security, a focus on maritime transport – on which all states are reliant for trade – may provide a useful basis on which to encourage cooperation and build goodwill.

Another means of analysing maritime law in the Asia-Pacific is to determine the extent to which various countries are engaging with the IMO-led conventions that characterise much of international maritime law, and assess any region-specific factors that may be hindering deeper engagement. In this vein, Craig Forrest examines the current state of preparedness within South East Asia for transboundary marine pollution, highlighting some “startling gaps” in the regional coverage of otherwise widely-ratified conventions such as the *Oil Preparedness, Response and Co-operation Convention*.⁹ An example of the kind of decision-making that leads to such gaps is analysed in my article on New Zealand's lack of engagement with the air pollution standards of MARPOL Annex VI,¹⁰ while a different form of challenge is outlined in Chen-Ju Chen's contribution addressing Taiwan's position in respect of port state control.¹¹ Due to its lack of engagement with the IMO, connected with its uncertain status under international law, Taiwan has had to be innovative in the way it goes about engaging with internationally-agreed maritime regulatory standards to match what the rest of the region does under the auspices of the Tokyo Memorandum of Understanding on Port State Control.¹²

A different perspective on this theme is given by Shan Hong Jun and Liang Yun in their article on the “openness and inclusiveness” of Chinese maritime law, demonstrating how China's maritime law – and the 1993 Maritime Code in particular – has evolved to incorporate a wide range of international influences.¹³ For example, in the carriage of goods context, China has borrowed from both the Hague-Visby and Hamburg Rules to create a hybrid regime.¹⁴ The likelihood of a similar approach continuing to be applied is highlighted by James Zhengliang Hu and Siqi Sun, who suggest that China's law on the carriage of goods by sea needs updating, but do not advocate for the wholesale adoption of the Rotterdam Rules.¹⁵ Instead a hybrid regime that follows international commercial practices, while continuing to meet the particular needs and priorities of Chinese business is seen as preferable.¹⁶

Domestic law reform is also the subject of Souichirou Kozuka's article, focusing on Japan's ongoing work towards the reform of its maritime code of 1899. Japan's attitude towards the incorporation of international maritime conventions into its domestic law is complex, with a tendency to borrow from uniform law without necessarily acceding to the instrument at the international level.¹⁷ The extent to which Japan's approach in this regard through the current reform project remains to be seen, but it will no doubt provide an interesting model for China to examine when the time comes to reform its own maritime code, given the similarities between the two countries' method of engaging with the commercial aspects of international maritime law.

The final paper in the series, from Poomintr Sooksripaisarnkit, approaches the theme from a case law perspective, questioning whether Hong Kong's courts are growing increasingly comfortable with taking some steps away from English precedent when deciding admiralty cases. Drawing comparisons with related Australian and New Zealand decisions, he argues for example that the Hong Kong courts have been right to take a more independent approach

Working Towards a Quality Living Region: A Pearl River Delta Emission Control Area (2013) Civic Exchange <<http://www.civic-exchange.org/en/publications/164987050>>, 5.

⁸ Ling Zhu, Henning Jessen and Mingzhao Zhang, ‘The Way Forward for Hong Kong to Combat Vessel Source Emissions in the Pearl River Delta Region’ (2015) 46 *Ocean Development and International Law* 208, 218.

⁹ *International Convention on Oil Pollution Preparedness, Response and Cooperation*, 1990, 1891 UNTS 78; Craig Forrest, ‘State Cooperation in Combating Transboundary Marine Pollution in South East Asia’ (2016) 30 *Australia and New Zealand Maritime Law Journal* 78.

¹⁰ Bevan Marten, ‘Shipping and Air Pollution: New Zealand's Failure to Ratify MARPOL Annex VI’ (2016) 30 *Australia and New Zealand Maritime Law Journal* 90.

¹¹ Chen-Ju Chen, ‘The Tokyo MOU: Its Implications for Taiwan’ (2016) 30 *Australia and New Zealand Maritime Law Journal* 99.

¹² *Memorandum of Understanding on Port State Control in the Asia-Pacific Region (Tokyo MoU)*, 1993.

¹³ Shan Hong Jun and Liang Yun, ‘Openness and Inclusiveness: The Nature of Chinese Maritime Law and Legal Practices’ (2016) 30 *Australia and New Zealand Maritime Law Journal* 107.

¹⁴ *International Convention for the Unification of certain Rules relating to Bills of Lading (the Hague Rules)*, 1924, 120 LNTS 155; *Protocol to amend the International Convention for the Unification of Certain Rules of Law relating to Bills of Lading signed at Brussels on 25 August 1924 (the Hague-Visby Rules)*, 1968, 1412 UNTS 128; *United Nations Convention on the Carriage of Goods by Sea (the Hamburg Rules)*, 1978, 1695 UNTS 3.

¹⁵ *United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea (the Rotterdam Rules)*, 2008.

¹⁶ James Zhengliang Hu and Siqi Sun, ‘A Study on the Updating of the Law on Carriage of Goods by Sea in China’ (2016) 30 *Australia and New Zealand Maritime Law Journal* 114.

¹⁷ Souichirou Kozuka, ‘Japan's Maritime Law Reform in an International and Regional Context’ (2016) 30 *Australia and New Zealand Maritime Law Journal* 125, 133.

in respect of recent cases involving the relationship between *in rem* and arbitration proceedings, and the piercing of the corporate veil in the admiralty context.¹⁸ His article reminds us that it is not only through legislation that the Asia-Pacific region's approach to maritime law should be assessed, but also through countries' attitudes to dispute resolution and the way in which their courts go about interpreting and developing the law. In this regard Shan and Liang have pointed to the growing caseload of China's specialised maritime courts, and the Chinese Supreme People's Court's use of guidance cases to resolve ambiguities in aspects of China's maritime law.¹⁹

The workshop received generous support from both the Maritime Law Association of Australia and New Zealand (MLAANZ) and the New Zealand Law Foundation. I am incredibly grateful to these organisations for their commitment to scholarly research, and the value they place on enabling this research to be shared with a wider audience. I would like to thank Rozina Khan for her tireless assistance in organising the event, and my student James Kim for his assistance during the workshop, especially in providing participants with a scene-setting overview of the region's maritime sector. Tom Broadmore, Piers Davies, Chris Griggs, and Joanna Mossop were excellent workshop participants, bringing their deep and diverse maritime law experience to bear following each presentation. Professor Jay Batongbacal graciously shared his insights on the marine environmental implications of China's One Belt, One Road initiative with us. Professor Craig Forrest, along with his student editors Zack George and Erin Gourlay, have provided marvellous support during the publication phase. Finally, I would like to thank my colleague Professor Susy Frankel for guiding me through my first experience of running an academic event.

The articles collected here will play their part in bringing a scholarly perspective to the maritime law issues confronting the Asia-Pacific region, and in demonstrating the opportunities for ongoing study in this field. There is still much more to be done in this respect, and my hope in organising this project has been to develop some momentum for further cooperation.

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Wellington, June 2016

¹⁸ Poomintr Sooksripaisarnkit, 'Recent Admiralty Decisions in Hong Kong - Are the Courts Ready to Deviate from Their English Predecessors?' (2016) 30 *Australia and New Zealand Maritime Law Journal* 134.

¹⁹ Shan and Liang, above n 13, 109-111.