

# **COMPREHENSIVE STATE JURISDICTION OVER VESSEL-SOURCE OIL POLLUTION IN INTERNAL WATERS AND TERRITORIAL SEA**

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## **Abstract**

State has prescriptive and enforcement jurisdiction under international law to exercise over the vessel for the prevention of vessel-source oil pollution within internal waters and territorial sea. A state may operate in the United Nations Convention on Law of the Sea 1982 as the 'flag State', the 'coastal State' or the 'port State' with the subject of obligation to protect and preserve the marine environment. Vessel-source oil pollution may be caused by shipping activities and accidents at sea. Vessel-source oil pollution is one of the major issues for the protection of the marine environment. This paper analyses the role of the State jurisdiction to control the vessel-source oil pollution by implementing the provisions of the United Nations Convention on the Law of the Sea 1982, International Convention for the Prevention of Pollution from Ships (MARPOL73/78), and other regulatory conventions. States need to enact sufficient national laws by ratifying the international conventions on marine pollution to protect vessel-source oil pollution. When exercising jurisdiction, to effective control over vessel source oil pollution, all of the Coastal/ port and flag State need to cooperate on that matter. In addition, States need to manage the navigational system to protect the collisions and grounding.

**Keywords:** Vessel-Source Oil Pollution, Jurisdiction, Coastal State, Flag State, Port State

## **Introduction**

State Jurisdiction over vessel-source oil pollution deals with prescriptive and enforcement jurisdiction intends to prevent, reduce, and control oil pollution in the marine environment. Vessel-source oil pollution may arise as a result of collisions and groundings, but also in the course of ordinary cargo operations, such as loading and unloading or bunkering activity at sea. The major international legal framework of vessel-source oil pollution is the UNCLOS 1982, MARPOL 73/78, and other international instruments under the auspices of the International Maritime Organization. Coastal State jurisdiction is exercisable in the internal waters, territorial sea, and Exclusive Economic Zone in respect of maritime safety and marine pollution matters. Nevertheless, this paper focus on the jurisdiction of the State over vessel-source oil pollution within internal waters and territorial sea. This paper also provides not only the ineffective control of flag State jurisdiction to their registered ships but also the complement of the port /coastal States enforcement jurisdiction to control the vessel-source oil pollution. Therefore, this paper analyzes the coastal State jurisdiction together with the port and flag State jurisdiction. The Coastal States have jurisdiction over foreign-flagged vessels navigating in its internal waters and territorial sea. Port States have jurisdiction to inspect vessels voluntarily visiting their ports and internal waters to enforce internationally recognized and generally accepted standards for the protection of the marine environment. Flag States have exclusive jurisdiction over vessel-source pollution concerning vessels flying their flags, irrespective of the location of the vessel.

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## **Aims and Objectives**

The purpose of this paper is to analyze the extent to which the States can exercise their jurisdiction over vessel-source oil pollution in internal waters and territorial sea. It aims to explore how to cooperate by the coastal State/ port State and flag State exercising their effective jurisdiction for the protection and prevention of vessel-source oil pollution.

## **Material and Methods**

To achieve the goal of this paper, UNCLOS 1982, MARPOL 73/78, and regulatory conventions under the auspices of the IMO Conventions are studied. This paper applies a qualitative research method by using primary and secondary data. As a primary source, domestic laws, international conventions, and in-depth interviews with experts from the Department of Marine Administration, Ministry of Transport and Communication, Republic of the Union of Myanmar. As a secondary source, uses scholar's articles, and cases.

## **Causes of Vessel-Source Oil Pollution**

Vessel-source oil pollution within the maritime zones of coastal States can cause serious damage to the marine environment and the shores of the coastal States. Vessel-source oil pollution due to even one vessel incident can harm the marine environment of many coastal States.

Shipping introduces many pollutants to the marine environment, as a result of the normal operation of vessels and also from marine casualties following collisions and groundings.<sup>1</sup>

Accidental oil spills from tanker such as the Torrey Canyon 1967, the Exxon Valdez 1989, Alaska in 1989, and the Prestige 2002, have attracted a great deal of attention. However, oil spills account for only about 10 percent of the oil released into the environment each year. A much greater volume of oil entering the marine environment comes from discharges from the normal operation of vessels.<sup>2</sup>

Operational vessel-source pollution is produced by the normal operation of ships. For example, vessels with oil-burning diesel engines discharge some oil with their bilge water. Oil tankers washed their oil tanks using jets spraying seawater and disposed of the oily residue at sea.<sup>3</sup>

Besides, empty tankers also use seawater as ballast, and this water, containing residues of oil, has of course to be pumped out before a new cargo can be taken on board.<sup>4</sup> Therefore, considerable amounts of operational discharge of oil caused oil pollution at sea.

Major maritime disasters, such as the sinking of the oil tanker the Torrey Canyon raised public awareness of the risks of accidental pollution. The international rules and standards regarding the prevention of pollution of the sea by vessels are developed in conventions drawn up under the auspices of the IMO, ILO, and UNCLOS 1982.

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<sup>1</sup> Rothwell, Donald R, Alex G Oude Elferik, Karen N Scott, Tim Stephens, *The Oxford Handbook of the Law of the Sea*, 1<sup>st</sup> Edition, Oxford University Press, 2015, p.376.

<sup>2</sup> Rothwell, Donald R. and Tim Stephens, *The International Law of the Sea*, Oxford and Portland, Oregon, Hart Publishing, 2010, p.339.

<sup>3</sup> Tanaka, Yoshifumi, *The International Law of the Sea*, 1<sup>st</sup> Edition, Cambridge University, 2012, p.257.

<sup>4</sup> Churchill, R.R. and A.V. Lowe, *The law of the Sea*, Manchester University, 3<sup>rd</sup> Edition, 1983, p.339.

### Regulations under MARPOL 73/78 Regime

MARPOL (73/78) is the most important multilateral convention under IMO auspices designed to reduce pollution from ships.

MARPOL 73/78 seeks to achieve the complete elimination of international pollution of the marine environment by oil and other harmful substances and the minimization of accidental discharge of such substances.<sup>1</sup>

Following the wreck of the Liberian oil tanker the **Torrey Canyon** off the coast of the United Kingdom in 1967, the international shipping community recognized the need to regulate shipping to reduce the incidence of oil pollution.

The liability regime did not sufficiently promote preventive action. The IMO's response to tackling incidents of oil pollution (both accidental and operational) has been the formulation of MARPOL Annex I, which is intended to improve tanker safety. Relating to the monitoring and handling of oily water, the segregation of ballast tanks, as well as crude-oil washing systems are provided Annex I<sup>2</sup>.

Crude oil washing was made mandatory under MARPOL 73/78 which states that every crude oil tanker which is 20000 dwt and above must be fitted with COW system for every cargo hold tank.<sup>3</sup> Annex I of MARPOL 73/78 also provides that a tanker must not discharge any oil whatsoever within fifty miles of the nearest land or in certain special areas.<sup>4</sup>

Under Article 198 of UNCLOS 1982 and Article 8 and Protocol 1 of the MARPOL (73/78), a ship involved in a pollution incident must report the details to the authorities of a States party, to the flag State, and any other State likely to be affected.<sup>5</sup> Under the terms of the MARPOL 73/78 tanker must be equipped with oil discharge monitors and control (ODM#C) systems. The system must effectively monitor the effluent discharge through those overboard outlets permitted by MARPOL 73/78 and also cover the gravitational discharge of ballast water from cargo tanks.<sup>6</sup>

Under Article 4(1) and Article 6(4) of the MARPOL Convention, a flag State is obliged to institute criminal proceedings against any of its vessels suspected of having violated the Convention.<sup>7</sup> Concerning the enforcement jurisdiction of the coastal State over pollution from ships, Article 4(2) of the MARPOL 73/78 provides that whenever violations have occurred within their jurisdiction, enforcement shall be in form of either the institution of proceedings by national law or referring the related information and evidence to the flag State.<sup>8</sup>

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<sup>1</sup> Tanaka, Yoshifumi, *The International Law of the Sea*, 1<sup>st</sup> Edition, Cambridge University, 2012, p.277.

<sup>2</sup> Eddings, George, Andrew Chamberlain and Holly Cola m, *Shipping Law Review*, Tom Barnes, 6th Edition, 2019, p-1.

<sup>3</sup> Annex 1, regulation 13 of International Convention for the Prevention of Pollution from ships 1973/1978

<sup>4</sup> Abdulla, Ahmed Adham, *Flag, coastal and port State jurisdiction over the prevention of vessel source pollution in International Law: Analysis of Implementation by the Maldives*, University of Wollongong, 2011, p.102.

<sup>5</sup> Churchill, R.R. and A.V. Lowe, *The law of the Sea*, Manchester University, 3<sup>rd</sup> Edition, 1983, p.355.

<sup>6</sup> Kasoulides George C., *Port State Control and Jurisdiction: Evolution of the port State Regime*, Martinus Nijhoff Publishers, 1993, pp.139-140.

<sup>7</sup> Churchill, R.R. and A.V. Lowe, *The law of the Sea*, Manchester University, 3<sup>rd</sup> Edition, 1983, p.345.

<sup>8</sup> Yang, Haijiang *Jurisdiction of the Coastal State over Foreign Merchant Ships in Internal Waters and the Territorial Sea*, Springer Berlin, 2006, p.228.

MARPOL 73/78 is very important for the elimination of international pollution of the marine environment.

### **The Allocation of State Jurisdiction under the UNCLOS 1982**

A State can exercise a different range of functions in the UNCLOS 1982 as the flag State, the coastal State, or the port States. Flag State jurisdiction is exercised based on nationality. Port State may exercise jurisdiction over vessels visiting its ports. The Coastal States have jurisdiction over foreign-flagged vessels navigating in its national waters.

Under the UNCLOS 1982, vessel-source pollution is regulated by flag States, coastal States, and port States.<sup>1</sup> States shall establish international rules and standards to prevent, reduce and control pollution of the marine environment from vessels and promote the adoption of routing systems designed to minimize the threat of accidents that might cause pollution of the marine environment.<sup>2</sup>

### **Flag State Jurisdiction over Vessel-Source Pollution**

The flag State has the primary responsibility to regulate vessel-source marine pollution. Flag states are required to adopt laws to regulate pollution from their vessels which at least have the same effect as those international regulations for vessels flying their flag.<sup>3</sup>

Flag States are assigned a very important role in the protection of the marine environment and the punishment of pollution violations. Failure by the flag State to exercise criminal prescriptive jurisdiction over ship-source pollution will result in serious discharge violations falling outside the reach of criminal law altogether unless such violations may be prosecuted in a non-flag State. International law is rather vague on flag State's obligations to adopt sanctions for environmental violations.<sup>4</sup>

Under UNCLOS 1982, the flag State has primary responsibility for its ship, including criminal jurisdiction, even when the ship is outside the flag State's territorial waters.

Flag States have an obligation to take necessary measures to ensure safety at sea concerning the construction, equipment, and seaworthiness of ships, the manning of ships, labor conditions and the training of crews, the use of signals, the maintenance of communications, and the prevention of collisions.<sup>5</sup>

Flag States have to ensure that each ship is in charge of master and officers who possess appropriate qualifications, in particular in seamanship, navigation, communications.<sup>6</sup> MARPOL73/78 and Safety of Life at Sea 1974 require flag States to inspect and survey ships and issue certificates of seaworthiness.<sup>7</sup>

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<sup>1</sup> Tanaka, Yoshifumi, *The International Law of the Sea*, 1<sup>st</sup> Edition, Cambridge University, 2012, p.280.

<sup>2</sup> Article 211 (1) of the United Nations Convention on the Law of the Sea 1982.

<sup>3</sup> Tanaka, Yoshifumi, *The International Law of the Sea*, 1<sup>st</sup> Edition, Cambridge University, 2012, p.280.

<sup>4</sup> Pozdnakova, Alla, *Criminal Jurisdiction Over Perpetrators of Ship-Source Pollution*, Martinus Nijhoff Publishers, 2013, p.29.

<sup>5</sup> Article 94 (3) of the United Nations Convention on the Law of the Sea 1982.

<sup>6</sup> Rothwell, Donald R, and Tim Stephens, *The International Law of the Sea*, Oxford and Portland, Oregon, Hart Publishing, 2010, p.361.

<sup>7</sup> *Ibid*, p.360.

Inadequately trained or unqualified crews are a major factor in the cause of shipping accidents. Therefore, Flag States require inspecting the vessel whether it may observe international rules and standards contained in Standards of Training, Certification and Watchkeeping for Seafarers 1978 for maritime safety.

Flag State may exercise judicial jurisdiction in respect of violations committed anywhere by its vessels. Where the vessel is in the territorial sea or port of another State, the flag State may not arrest it, but may nevertheless institute criminal proceedings against it before its own courts provided the ship-owner or master is within the State, or the vessel returns to the flag State.<sup>1</sup>

Flag State shall, at the written request of any State, investigate any violation alleged to have been committed by vessels flying their flag. If satisfied that sufficient evidence is available, flag State shall without delay institute such proceeding by their laws.<sup>2</sup>

Flag State and other State shall co-operate in the conduct of any inquiry held by that other State into any such marine casualty or incident of navigation.<sup>3</sup> The repeated disregard by a flag State of its obligations to supervise the vessels flying its flag may grant the coastal or port States enforcement jurisdiction.<sup>4</sup>

Flag States have a primary role to play in maritime safety but the power of flag State control is often weakened by the practice of flags of convenience (FoC).<sup>5</sup> In the case of **Erika 1999**, It was clear that the Maltese authorities had given a certificate to a ship whose condition was not sufficiently safe; the French courts could not hold the flag State liable for the harm caused along its coasts.<sup>6</sup> It was evidenced that the deficiency of inspection on the vessel and the use of FoC.

The **Nottebohm case** demanded the presence of a genuine link between the flag State and the ship bearing its nationality and required the flag State to exercise effective jurisdiction over its ships.<sup>7</sup> In such cases, effective controls being exercised by port States can be very useful for the aim of marine environment protection, as specified in the UNCLOS 1982.<sup>8</sup>

The increasing of substandard ships is one of the major issues to cause maritime disasters. Therefore, combating substandard shipping and reinforcing flag State control has become a primary objective of ocean policy at the global and regional levels.<sup>9</sup>

Flag State has to ensure safety at sea concerning the seaworthiness of ships. It needs to exercise effective jurisdiction by the flag State to control the substandard ship for the protection of pollution to the vessel flying its flag. The failure to reduce the use of the flag of convenience has

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<sup>1</sup> Churchill, R.R. and A.V. Lowe, The law of the Sea, Manchester University, 3<sup>rd</sup> Edition, 1983, p.345.

<sup>2</sup> Article 217 (6) of the United Nations Convention on the Law of the Sea 1982.

<sup>3</sup> Article 94(7), Ibid.

<sup>4</sup> Article 228, Ibid.

<sup>5</sup> Faure, Michael G. and James HU, Prevention and Compensation of Marine Pollution Damage: Recent Developments in Europe, China and the US, Kluwer Law International, 2006, p.8.

<sup>6</sup> Erika case 1999.

<sup>7</sup> ICJ Reports 1955, p.23.

<sup>8</sup> Faure, Michael G. and James HU, Prevention and Compensation of Marine Pollution Damage: Recent Developments in Europe, China and the US, Kluwer Law International, 2006, p.8

<sup>9</sup> Frank, Veronica, The European Community and Marine Environmental Protection in the International Law of the Sea, Martinus Nijhoff, 2007, p.190.

led to the development of port State control as a means of strengthening the weak jurisdiction of flag States.

### **Port State Jurisdiction over Vessel-Source Pollution**

Port State has three major jurisdictional powers concerning the protection and preservation of the marine environment in the port and internal waters such to regulate port entry, undertake port State control and port enforcement, and the duty to cooperate with port States to maintain uniform regional standards.

Port State enforcement jurisdiction in the UNCLOS 1982 is an innovative expansion of jurisdiction in international law. Prevention and punishment of marine pollution incidents left exclusively to the discretion of the flag State are now delegated to a truly universal system of control and surveillance.<sup>1</sup>

The port State is always a coastal State although the reverse is not always true. UNCLOS 1982 has granted specific rights and obligations to this special category of a coastal State, especially in terms of enforcement action of the applicable rules and standards for the protection and preservation of the marine environment.<sup>2</sup> Port States have full jurisdiction to regulate issues of navigations, pilotage, and pollution and such laws are commonly enforced on all vessels in ports.<sup>3</sup>

The weakness of flag State enforcement of international rules and standards, primarily concerning safety, environment, and labor conditions, it has been found necessary to step up coastal/port State competence over foreign ships to ensure that the relevant rules and standards.<sup>4</sup>

Port State jurisdiction refers to the right of a State to exercise jurisdictional powers over vessels entering its ports and to deny such access. Such jurisdictional powers may allow a port State to exert legislative and enforcement powers according to the relevant provisions of the UNCLOS 1982.<sup>5</sup> UNCLOS 1982 authorizes a port State to undertake investigations and institute a proceeding in respect of discharges from a ship ‘voluntarily within a port or at an offshore terminal’ in violation of applicable international rules and standards.<sup>6</sup>

“Port State” is usually followed by “port State control” and “port State jurisdiction”.<sup>7</sup> Port State may exercise enforcement jurisdiction in respect of discharges in the internal waters, territorial sea, or exclusive economic zone of another State, at the request of that State or the flag State or third State damage or threatened by discharge violation.<sup>8</sup>

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<sup>1</sup> Kasoulides, George C., *Port State Control and Jurisdiction: Evolution of the port State Regime*, Martinus Nijhoff Publishers, 1993, p.126.

<sup>2</sup> Gavouneli, Maria, *Functional Jurisdiction in the Law of the Sea*, Martinus Nijhoff Publishers, 2007, p.44.

<sup>3</sup> Ibid, p.48.

<sup>4</sup> Yang, Haijiang *Jurisdiction of the Coastal State over Foreign Merchant Ships in Internal Waters and the Territorial Sea*, Springer Berlin, 2006, p.41.

<sup>5</sup> Keselj, Tatjana, *Port State Jurisdiction in Respect of Pollution from Ships: The 1982 UNCLOS and the Memoranda of Understanding*, 1999, p.128.

<sup>6</sup> Article 218(1) of the United Nations Convention on the Law of the Sea 1982.

<sup>7</sup> Pamborides, G.P., *International Shipping Law: Legislation and Enforcement*, ANT.N. Sakkoulas Publishers, 1999, p.47.

<sup>8</sup> Gavouneli, Maria, *Functional Jurisdiction in the Law of the Sea*, Martinus Nijhoff Publishers, 2007, p.45.

Port States may detain a foreign vessel that violates applicable international rules and standards relating to seaworthiness and the threatened damage to the marine environment.<sup>1</sup>

Port State control has become increasingly familiar to the public with the advent of the Paris Memorandum of Understanding 1982. Port State control is a regime designed to help ensure, by inspection and detention in ports where necessary that foreign merchant ships comply with international standards in respect of ship safety, environmental protection and labor conditions mainly laid down by the IMO and the International Labor Organization.<sup>2</sup>

As to the regional cooperation, the EU legislation concerning port State control is built on IMO Resolutions and the Paris Memorandum of Understanding.<sup>3</sup> EU share information between the regional States and they can know much rapidly which vessels could be unseaworthy.<sup>4</sup> It gives the port State a legal basis for refusing entry to the substandard ship. Port State may check to visit foreign ships and may refuse entry to substandard ships in its ports.

The EU legislation is concerning prevention and liability for marine oil pollution. When the States do not apply the rules, they will have to appear before the court of justice and maybe convicted and failure to comply will lead to penalties.<sup>5</sup> The EU has significant power to regulate the national laws and policies of the member States for maritime safety and the protection of the environment.

In the case **Commission of European Communities V. Italian Republic** 1998 before the European Court of Justice (ECJ)<sup>6</sup>, the court concluded in the case that by not adopting the laws, regulations, and administrative provisions necessary to implement the Directive 95/21 EC, Italy had failed to fulfil its obligations under that Directive and the EC Treaty.<sup>7</sup>

Myanmar signed Indian Ocean MoU on Port State Control in 1-August-2017 to increase maritime safety and the protection of the marine environment and the importance of improving living and working conditions on board ships.<sup>8</sup>

Enforcement jurisdiction is still weak to combat marine pollution, especially since flag States are not held responsible for damages incurred by their registered vessels. Port State enforcement is not sufficient to combat all forms of pollution and its role should be supplemented by a rigid coastal State enforcement regime and effective traffic control systems, offshore monitoring stations and surveillance systems.<sup>9</sup>

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<sup>1</sup> Article 219 of the United Nations Convention on the Law of the Sea 1982.

<sup>2</sup> Yang, Haijiang Jurisdiction of the Coastal State over Foreign Merchant Ships in Internal Waters and the Territorial Sea, Springer Berlin, 2006, pp.97-98.

<sup>3</sup> Faure, Michael G. and James HU, Prevention and Compensation of Marine Pollution Damage: Recent Developments in Europe, China and the US, Kluwer Law International, 2006, p.8.

<sup>4</sup> Rodriguez, Ronald Becerra, Flags of Convenience Regulation within the European Union and its Future on International Trade, No.11, 2011, p.21.

<sup>5</sup> Faure, Michael G. and James HU, Prevention and Compensation of Marine Pollution Damage: Recent Developments in Europe, China and the US, Kluwer Law International, 2006, p.22.

<sup>6</sup> Case C-315/ 98, ECJ.

<sup>7</sup> Yang, Haijiang Jurisdiction of the Coastal State over Foreign Merchant Ships in Internal Waters and the Territorial Sea, Springer Berlin, 2006, p.107.

<sup>8</sup> Department of Marine Administration, Ministry of Transport and Communication, Republic of the Union of Myanmar.

<sup>9</sup> Kasoulides, George C., Port State Control and Jurisdiction: Evolution of the port State Regime, Martinus Nijhoff Publishers, 1993, p.129.

Port States jurisdiction is a major role to play in combating sub-standard vessel operations and reducing vessel source oil pollution. Port States may inspect and detention the vessels for violation of international pollution standards laid down by the IMO and the ILO.

### **Coastal State Jurisdiction over Vessel-Source Oil Pollution**

Intending to complement the flag State's responsibility for vessels, UNCLOS 1982 allows coastal States to exercise legislative and enforcement jurisdiction to regulate vessel-source pollution.

In the marine pollution regulation, 'jurisdiction' refers to the competence of States to prescribe and enforce legislation against vessels engaged in pollution. Thus, legislative jurisdiction relates to the State's competence to enact or promulgate substantive pollution control standards. These standards are often internationally agreed upon, even though international law may also endorse the prescription of national standards under certain circumstances.<sup>1</sup>

There are three general types of vessel-source pollution standards: (1) discharge standards (2) construction, design, equipment, and manning standards, and (3) restrictions and regulations related to navigation. The principal international discharge standards are contained in the MARPOL 73/78.<sup>2</sup> At the international level, navigation standards have been limited to ship routing measures, traffic separation schemes (TSS), speed limits, and general safety measures.<sup>3</sup>

Concerning marine pollution control, States may generally prescribe their own discharge standards for their internal waters and territorial seas, subject only to the general right of ships to the innocent passage in the territorial sea.<sup>4</sup> Coastal State needs to adopt the vessel-source pollution standards and CDEM standards under the international standards for control of vessel-source oil pollution.

Concerning navigation, one of the most important aspects of COLREGS 1972 relates to TSS. TSS and other systems for routing ships have been adopted by the IMO in most major congested shipping areas, resulting in significantly fewer collisions and casualties.<sup>5</sup> TSS is also important as the collision and maritime casualties may cause vessel-source oil pollution.

Article 211 (4) and Article 21 (1) (f) of the UNCLOS 1982 empower coastal States to adopt laws to regulate vessel-source pollution within their territorial sea. Such laws and regulations must not hamper the innocent passage of foreign vessels.<sup>6</sup>

Coastal State may require vessels in its internal waters or port to comply with international standards impose national CDEM or discharge standards or prohibit access by foreign ships altogether, except those in distress.<sup>7</sup>

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<sup>1</sup> Tan, Alan Khee-Jin, *Vessel-Source Marine Pollution: The Law and Politics of International Regulation*, Cambridge University Press, 2005, p.176.

<sup>2</sup> Bodansky, Daniel M., *Protecting the Marine Environment from Vessel Source Pollution: UNCLOS III and Beyond*, *Ecology Law Quarterly*, Vol. 18:719, University of Georgia School of Law, 1991, P.728-729.

<sup>3</sup> *Ibid*, p.730.

<sup>4</sup> *Ibid*, p.177.

<sup>5</sup> Rothwell, Donald R. and Tim Stephens, *The International Law of the Sea*, Oxford and Portland, Oregon, Hart Publishing, 2010, p.362.

<sup>6</sup> Tanaka, Yoshifumi, *The International Law of the Sea*, 1<sup>st</sup> Edition, Cambridge University, 2012, p.281.

<sup>7</sup> Bodansky, Daniel M., *Protecting the Marine Environment from Vessel Source Pollution: UNCLOS III and Beyond*, *Ecology Law Quarterly*, Vol. 18:719, University of Georgia School of Law, 1991, p.745.



When a vessel is voluntarily within a port or at an offshore terminal of a State, that State may institute proceedings in respect of any violation of the laws and regulations of that State concerning vessel-source pollution when the violation has occurred within the territorial sea or the EEZ that State.<sup>1</sup>

A question arises as to whether the coastal States can exercise jurisdiction on the matter in marine spaces beyond their territorial sovereignty, on the high seas. This question was vividly raised in the 1967 Torrey Canyon incident. In response to this question, IMO adopted the International Convention relating to Intervention on the High Seas in Cases of Oil Pollution Casualties 1969 (High Seas Intervention Convention 1969).<sup>2</sup>

Article I (1) of this convention explicitly allows the parties to take such measures on the high seas as may be necessary to prevent, mitigate or eliminate grave and imminent danger to their coastline or threat of pollution of the sea by oil following upon maritime casualty.<sup>3</sup>

According to this convention, If the vessel is in the territorial sea, the coastal State can take any measures it considers appropriate.<sup>4</sup> In this situation, the vessel will have ceased to enjoy the right of innocent passage and will be subject to the sovereignty of the coastal State.

In the Prestige incident 2002, it appears that moves by coastal States to ban sub-standard ships from entering their ports may progressively extend the event to denying passage through the territorial sea, even if the ship is ostensibly still in innocent passage.<sup>5</sup>

Where several coastal States have been affected by a discharge violation involving the same vessel, all asserted jurisdiction to punish the perpetrator. An example of this is the sinking of the Prestige.<sup>6</sup> Eurojust concluded that Spain was better suited to prosecute than France.<sup>7</sup>

Regarding pollution, the passage is non-innocent if the vessel, while in the territorial sea, engages in any act of willful and serious pollution contrary to the Convention.<sup>8</sup> Minor discharges but intentional may warrant an immediate response by the coastal authorities.<sup>9</sup>

Infringements of MARPOL 73/78 provisions, particularly for intentional violations or falsification of records, can result in both the vessel Management Company and seafarers being liable to criminal prosecutions. If found guilty, large fines amounting to millions of dollars may be imposed under applicable national laws, and in serious cases perpetrators may even face imprisonment.<sup>10</sup>

In **M/V Pac Antares 2019** case, Pacific Carriers Limited was sentenced on 1<sup>st</sup> Dec 2020 in federal court before U.S District Court Judge Louise Flanagan in New Bern, North Carolina.

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<sup>1</sup> Article 220 of the United Nations Convention on the Law of the Sea 1982.

<sup>2</sup> Tanaka, Yoshifumi, *The International Law of the Sea*, 1<sup>st</sup> Edition, Cambridge University, 2012, p.287.

<sup>3</sup> Tanaka, Yoshifumi, *The International Law of the Sea*, 1<sup>st</sup> Edition, Cambridge University, 2012, p.287.

<sup>4</sup> Churchill, R.R. and A.V. Lowe, *The law of the Sea*, Manchester University, 3<sup>rd</sup> Edition, 1999, p. 353.

<sup>5</sup> Tan, Alan Khee-Jin, *Vessel-Source Marine Pollution: The Law and Politics of International Regulation*, Cambridge University Press, 2005, p.209

<sup>6</sup> Pozdnakova, Alla, *Criminal Jurisdiction over Perpetrators of Ship-Source Pollution*, MartinusNijhoff, 2013, p.156.

<sup>7</sup> Ibid, p.157.

<sup>8</sup> Tan, Alan Khee-Jin, *Vessel-Source Marine Pollution: The Law and Politics of International Regulation*, Cambridge University Press, 2005, p.207.

<sup>9</sup> Pozdnakova, Alla, *Criminal Jurisdiction over Perpetrators of Ship-Source Pollution*, MartinusNijhoff, 2013, p.102.

<sup>10</sup> Abdulla, Ahmed Adham, *Flag, coastal and port State jurisdiction over the prevention of vessel source pollution in International Law: Analysis of Implementation by the Maldives*, University of Wollongong, 2011, p.48.

PCL was sentenced to pay a fine of \$ 12,000,000.00 placed on probation for four years and ordered to implement a comprehensive Environmental Compliance Plan as a special condition of probation.<sup>1</sup> In this case, it was convicted for concealing the illegal discharge of oil-contaminated waste and falsified entries in the ship's official oil record book. Therefore, the coastal State, U.S has jurisdiction to punish the PCL company for the violation of the Act to prevent pollution from ships in the U.S.

In practice, many States have imposed criminal liability for serious pollution violations, including discharges from ships. States are free to enact criminal sanctions for pollution and related offences committed by foreign vessels within their internal waters, ports and the territorial sea.<sup>2</sup>

In Myanmar, offences and penalties relating to oil pollution are provided in section 88 of Myanmar Port Authority Law 2015.<sup>3</sup> In the Myanmar Territorial Sea and Maritime Zones Law 2017, there is no enforcement mechanism relating to vessel-source oil pollution within the territorial sea by marine casualties. The Myanmar Merchant Shipping Act [INDIA ACT XXI, 1923.] need to amend, it is a supportive law to solve the shipping and pollution problem.

Monetary penalties only may be imposed for violations of national laws and regulations or applicable international rules and standards committed by foreign vessels in the territorial sea, except in the case of a willful and serious act of pollution.<sup>4</sup> UNCLOS 1982 does not limit the imposition of monetary penalties or pollution fees over vessels that have caused major damage to the marine environment of the coastal State.

The International Convention on Civil Liability for Oil Pollution Damage of 1992 and the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage of 1992 attempted to overcome the difficulties which may be faced by the victims of oil pollution.<sup>5</sup>

In 2003 a supplementary fund was established by a protocol to the 1992 Fund Convention, increasing the limit for any one incident to 750 million SDR, or around US\$ 540 million, inclusive of liability under the 1992 CLC.<sup>6</sup> The 1992 CLC Conventions govern the liability of ship-owners for oil pollution damage. The CLC 1992 is implemented in most coastal States, although the United States remains a notable non-signatory.

The Bunker Oil Pollution Convention 2001 is the ship owner's strict liability for bunker oil pollution and the compulsory insurance requirement, providing victims with an easy footing to obtain the compensation that is comparable to the CLC regime.<sup>7</sup>

Myanmar has acceded to the MAROPL Convention Annex I and II since 1988 and has recently deposited for acceptance to Annex III, IV, and V on 5<sup>th</sup> April 2016. Myanmar has acceded to the CLC 1992 on 12 July 2016. But Myanmar has not yet acceded to the Fund Convention 1992.

<sup>1</sup> [https://www.justice.gov/opa/pr/singaporean-shipping-company-fined-12-million-multi-district-case-concealing-illegal?fbclid=IwAR2iJmgOb0An63IOBd9Q309kwQQ5cuZfW-MFRk8s04Bap\\_53YErCbu-Bybc](https://www.justice.gov/opa/pr/singaporean-shipping-company-fined-12-million-multi-district-case-concealing-illegal?fbclid=IwAR2iJmgOb0An63IOBd9Q309kwQQ5cuZfW-MFRk8s04Bap_53YErCbu-Bybc)

<sup>2</sup> Pozdnakova, Alla, Criminal Jurisdiction over Perpetrators of Ship-Source Pollution, MartinusNijhoff, 2013, p.314.

<sup>3</sup> Section 88 of Myanmar Port Authority Law 2015.

<sup>4</sup> Article 230 of the United Nations Convention on the Law of the Sea 1982.

<sup>5</sup> Churchill, R.R. and A.V. Lowe, The law of the Sea, Manchester University, 3<sup>rd</sup> Edition, 1983, p.359.

<sup>6</sup> Rothwell, Donald R, Alex G Oude Elferik, Karen N Scott, Tim Stephens, The Oxford Handbook of the Law of the Sea, 1<sup>st</sup> Edition, Oxford University Press, 2016, p.397.

<sup>7</sup> Gahlen, Sarah Fiona, Civil Liability for Accidents at Sea, Springer-Verlag Berlin Heidelberg, 2015, p. 170.

Myanmar has acceded to the BUNKER Convention 2001 on 19 January 2018 and SOLAS 74 on 11 November 1987 and COLREG 72 on 11 November 1982 and STCW 78 on 4 May 1988.

Myanmar acceded to the International Convention on Oil Pollution Preparedness, Response and Cooperation (OPRC 1990 Convention) on 15 December 2016. The treaty will require Myanmar vessels and operators of offshore units to carry an oil pollution emergency plan or similar arrangements co-ordinate with national systems for oil spill responses.<sup>1</sup> Therefore, DMA submitted the National Contingency Plan to the President's office to implement the contingency plan.

As ASEAN cooperation, on 28 November 2014, Ten ASEAN countries signed the Memorandum of Understanding on ASEAN Cooperation Mechanism for Joint Oil Spill Preparedness and Response 2014 in Mandalay. The Regional Oil Spill Contingency Plan provides for a mechanism whereby the ASEAN Member States can request and provide mutual support in response to any oil spills.<sup>2</sup>

In Myanmar, Fortunately, there has been no major disastrous pollution incident recorded yet in any port of Myanmar other than that some minor incidents in the Yangon River and off the coast of Myanmar. Even though very few oil spill accidents have happened in the Yangon River and Myanmar waters, monetary compensation nor legal action for any single case has ever been recorded.<sup>3</sup>

The oil spill accidents within the Yangon area and off the coast of Myanmar are; M.V Satyavati in 1995, M.V Asean Liberty in 2001, M.V Cosmic Leader in 2008, M.V PhucHai Moon in 2011, OSV Penrith in 2013, M.T MyanAung in 2013, M.V Aziza in 2015, M.V Dong Thien Phu Silver in 2016. These cases have not been heard in court but are recorded in the history of marine pollution incidents.<sup>4</sup>

China has finished constructing a deep-sea port for oil tankers on Madae Island, Kyaukphyu, and Rakhine region since 2013.<sup>5</sup> The crude oil tanker, United Dynamic docked at Made Island in Rakhine State on 9 April 2017.<sup>6</sup> In such a way that, from 2015 onwards, Myanmar become an oil receiver country in million tons per annum, consequently, oil pollution risk is likely to be significant.<sup>7</sup>

Deep-sea port is oil or natural gas import or export facilities. Therefore, deep-sea port law should enact in Myanmar. Accessing of very large oil tankers entering Myanmar's waters may cause serious pollution problems. The mainly facing problem is how to solve if there were serious oil pollution happened in Myanmar waters. Nowadays, vessel-source oil pollution is a contemporary issue not only seaports but also coastline would cause marine environmental problems.

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<sup>1</sup> Albert Embankment International Maritime Organization, London SE1 7SR, OPRC.1/ Circ.80, 15 Dec 2016, p.1.

<sup>2</sup> <https://worldmaritimenews.com/archives/265874/asean-member-states-adopt-regional-oil-spill-contingency-plan/>

<sup>3</sup> Department of Marine Administration of Myanmar.

<sup>4</sup> Naing, CAPT KoKo, Director, Maritime Safety, Security and Environmental Protection Division, Department of Marine Administration, Ministry of Transport and Communication, Republic of the Union of Myanmar.

<sup>5</sup> <https://consult-myanmar.com/2013/09/01/myanmar-deep-sea-port-to-dock-300000-tonne-oil-tankers-on-madae-island/>

<sup>6</sup> Myanmar Times Journal, January 6, 2019, p.1.

<sup>7</sup> Naing, CAPT KoKo, Director, Maritime Safety, Security and Environmental Protection Division, Department of Marine Administration, Ministry of Transport and Communication, Republic of the Union of Myanmar.

In comparison, the US is still a party to the 1958 Conventions; the US is not a party to the UNCLOS 1982. But the US enacted many national laws to solve the pollution problem within its national waters. US is a party to the OPRC 1990 Convention. The U.S had implemented a National Contingency Plan (NCP) before the UNCLOS 1982 negotiations began. The Clean Water Act 1972 and the Oil Pollution Act 1990 all assigned responsibility for the NCP to the US. The US enacted the Deepwater port Act 1974. The OPA 1990 extends to all oil pollution in the United States, including incidents occurring within its territorial sea.

In the US, Port and Tanker Safety Act 1978 prohibits tank vessels from operating in U.S navigable waters if they have a history of accidents or pollution incidents, fail to comply with applicable laws or regulations, discharge oil or hazardous substances in violation of the law of treaty, fail to comply with VTS requirements.<sup>1</sup> The U.S Coast Guard is also the regulatory and enforcement agency for the safety of life and property at sea and protection of the marine environment.<sup>2</sup>

China is the world's largest net crude oil importer. China has ratified several international conventions relating to pollution liability arising from accidents, e.g. 2001 Bunker Convention, and the 1992 CLC. Application of the 1992 Fund Convention is limited to the Hong Kong Special Administrative Region, and China established a separate domestic fund in 2012, the China Oil Pollution Compensation (COPC) Fund.<sup>3</sup> China has developed national legislation on ship-source pollution, response and compensation.

Under the Marine Environmental Protection Law 1999 of China, In the case of severe pollution, those responsible for the pollution will be prosecuted under criminal law.<sup>4</sup>

In 2002, tanker TASMAN SEA was involved in a collision at the entrance to the port of Tianjin, spilling over 200 tons of Champion Export crude. The Court of Appeal and the Supreme Court of China held that many environmental items claimed were not in line with the principles stipulated in CLC 92. As such, a final settlement of approximately CN¥ 24 million was made in 2010, including lost income and environmental damage.<sup>5</sup>

Small tanker SHAN HON 12 (336 GT) sank at the mouth of the Yangtze River on 30th December 2012, while carrying approximately 400 MT of sludge oil cargo. Shanghai Maritime Court confirmed the owner of SAN HONG 12 was financially incapable to meet the financial liability for pollution damage. As such, claims for clean-up and restoration costs were submitted to the COPC Fund. These payments make SHAN HONG 12 the first case received compensation for coastal environmental restoration work following a shipping incident in China.<sup>6</sup>

UNCLOS 1982 merely allows States to regulate pollution from vessels and limits their jurisdiction to the application of generally accepted international rules and standards contained in

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<sup>1</sup> 33 U.S.C. S. 1228 of the Port and Tanker Safety Act 1978.

<sup>2</sup> Final Report of the U.S. Commission on Ocean Policy, The Evolution of Ocean Governance Over Three Decades, Review of U.S. Ocean and Coastal Law, Appendix 6 to An Ocean Blueprint for the 21st Century, Washington, D.C., 2004, pp.136-137.

<sup>3</sup> Zhang, Ann Shengwen, Environmental Damage Compensation in China following Ship Sourced Oil Spills, Retrieved from: <https://www.itopf.org/fileadmin>.

<sup>4</sup> Yang, Haijiang Jurisdiction of the Coastal State over Foreign Merchant Ships in Internal Waters and the Territorial Sea, Springer Berlin, 2006, p.232.

<sup>5</sup> Tianjin Maritime Bureau Vs Infinite Shipping Co. Ltd, Tianjin Maritime Court, December 25, 2004.

<sup>6</sup> Zhang, Ann Shengwen, Environmental Damage Compensation in China following Ship Sourced Oil Spills, Retrieved from: <https://www.itopf.org/fileadmin>

the relevant multilateral agreements. UNCLOS 1982 does not provide specific standards for forms of vessel-source oil pollution. Standards for vessel-source oil pollution are provided by international conventions. The Coastal States may prescribe their discharge and navigational standards for their internal waters and territorial sea. The exclusive jurisdiction of the flag State is not absolute therefore coastal and port States are granted in varying degrees a share of legislative or enforcement jurisdiction with the flag State. Concerning vessel-source oil pollution, when the violation has occurred with the internal waters and territorial sea, the coastal State may take physical inspection and may institute proceedings, including the detention of the vessel relating to the violation. Coastal states have jurisdiction to intervene in incidents occurring beyond their territorial sea following the grounding of the *Torrey Canyon*, and resulted in the conclusion of the 1969 Intervention Convention.

### **Findings**

Safety of navigation at sea is a very important role in the prevention of vessel-source oil pollution. Flag States are assigned a vital role in the protection of the marine environment and the punishment of pollution violations. The flag State is responsible for the inspection of the vessel and its seaworthiness, ensure safety, pollution prevention, and the certificate of the crew. Failure by the flag State to exercise jurisdiction over vessel-source oil pollution will result in serious discharge violations. Port State enforcement is not sufficient to combat all forms of pollution. It needs to supplement by a rigid coastal State enforcement jurisdiction. Collisions and groundings of ships severely damage the marine environment of the coastal States. Thus, States need to implement effective navigational systems. Besides, inadequately trained, or unqualified crews are a major factor in the cause of shipping accidents. Therefore, Seafarers need to be cautious to evade marine harm and losses. The increasing of substandard ships is one of the major issues to cause maritime disasters. These phenomena may cause serious vessel-source oil pollution. The failure to reduce the use of flag of convenience has led to the development of Coastal /port State jurisdiction as a means of strengthening the weak jurisdiction of flag States. When exercising jurisdiction, to effective control over vessel source oil pollution, all of the Coastal/ port and flag States should cooperate. The States need to enact effective national laws in line with international standards and implement enforcement mechanisms to control vessel-source oil pollution. To respond, vessel-source oil pollution, laws and procedures adopted by the States are to be re-examined from time to time, as necessary. States need to effort to strengthen the jurisdiction to reduce vessel-source oil pollution. Myanmar is a member of many IMO conventions relating to marine pollution however the problem is weak in national legislation and enforcement in Myanmar.

### **Conclusion**

Vessel-source oil pollution is considered not only a national but also an international problem. Oil pollution due to the oil spill and shipping accident may impact the sustainable development of the marine environment. In the vessel-source oil pollution, jurisdiction is the competence of States to prescribe and enforce legislation against vessels involved in pollution. States generally enjoy prescriptive jurisdiction within their internal waters and territorial sea. Concerning vessel-source oil pollution, enforcement jurisdiction may be conferred on one or more of the flag, coastal, or port State. Coastal State may institute proceedings in respect of any violation of national laws enacted based on UNCLOS 1982, or applicable international rules and standards

relating to vessel-source oil pollution. Flag states have exclusive jurisdiction over vessel-source oil pollution to vessels flying their flags. However, where its vessels are in the internal waters or territorial sea of another State, there exists concurrent jurisdiction with that State. The Port States have a major role to play in combating sub-standard vessel operations and reducing vessel source pollution in the ports and internal waters of States. The weakness of UNCLOS 1982 relating to the vessel-source pollution is supported by the various IMO conventions and other regulatory convention. Ship-owner is liable but the pollution damage exceeds his liability and to relieve ship-owner liability and to get sufficient compensation for oil pollution, Myanmar needs to accede to the Fund 1992. As a member of OPRC 1990, Myanmar needs to implement the national and regional oil spill contingency plan for responding promptly and effectively control to any oil spills within Myanmar's waters. Therefore, the National Contingency plan has been approved by the National Disaster Management Committee chaired by Vice- President and submitted to the president's office for official promulgation. Additionally, Deep-sea port law needs to be enacted in Myanmar. The Coast guard is also required to effectively control Myanmar's waters and facilitate law enforcement in the coming future.

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