
Legal Framework on the Marine Environment Protection of Straits used for International Navigation: Has It Been Effective in the Straits of Malacca and Singapore?

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There are approximately 116 straits used for international navigation around the world. Some of them are important international maritime chokepoints, namely the Dover Strait, Hormuz Strait, Straits of Malacca and Singapore and the Russian straits across the Northeast Arctic Passage. Due to the high number of navigational traffic going through these straits, vessel-source pollution is endemic in these waters. This article examines the applicable international legal framework on protection of the marine environment of straits used for international navigation such as Part XII of the United Nations Convention on the Law of the Sea and other related legal measures like International Maritime Organization conventions on protection of the marine environment. This article concludes by stating that the present framework is not sufficient in properly balancing two vital interests in the maritime world – protection of the marine environment vis-à-vis shipping.

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I. Introduction

The United Nations Convention on the Law of the Sea 1982 (“UNCLOS”), especially Part XII, provides a framework for the protection and preservation of the marine environment. It emphasizes the prevention, reduction and control of marine pollution. Most of the provisions on the protection and preservation of the marine environment are also customary laws binding all States.

The primary purpose of this paper is to discuss the international legal framework on the protection of the marine environment of straits used for international navigation from vessel-source pollution. This paper elaborates Part XII of the UNCLOS specifically examining the legal effect of Article 233 of the UNCLOS and other related measures like the International Maritime Organization (“IMO”) conventions on protection of the marine environment of the Straits of Malacca and Singapore. This paper is composed of four parts including a short Introduction and Conclusion. Part two will examine the key conventions relating to the protection and preservation of the marine environment of straits used for international navigation including Part XII of the UNCLOS. Part three will discuss the nexus between Part XII and Article 233 of the UNCLOS.

II. Part XII of the UNCLOS

Part XII of the UNCLOS relates to the protection and preservation of the marine environment. The first article of Part XII of the UNCLOS provides that all States have a general obligation to protect and preserve the marine environment.¹ Article

¹ Article 192 of the UNCLOS reads: “States have the obligation to protect and preserve the marine environment.” Article 192 is an important component of the comprehensive approach of Part XII of the UNCLOS on safeguards of the marine environment; this provision reiterates the preamble of the UNCLOS and Principle 7 of the Stockholm Conference that all States have the obligation to protect and preserve the marine environment. The term ‘States’ in Article 192 refers to all States and does not only refer to State-parties to the UNCLOS. See M. NORDQUIST, IV UNITED NATIONS CONVENTION ON THE LAW OF THE SEA 1982: A COMMENTARY 36-40 (M. Nordquist, et al. eds., 1991); HAZMI RUSLI, *Protecting Vital*

192 of the UNCLOS is further supported by Article 194(1) that provides:

States shall take, individually or jointly as appropriate, all measures consistent with this Convention that are necessary to prevent, reduce and control pollution of the marine environment from any source...

The employment of the terms ‘obligation’ and ‘shall’ in both Articles 192 and 194 respectively shows that the duty relating to protection of the marine environment is an important responsibility so that all States must be committed to achieving this end.² Even though the UNCLOS has provided a legal framework, the rules provided are largely general in application and as such, it requires States to devise more detailed international rules and regulations. Article 197 of the UNCLOS reads:

States shall cooperate on a global basis and, as appropriate, on a regional basis, directly or through competent international organizations, in formulating and elaborating international rules, standards and recommended practices and procedures consistent with this Convention, for the protection and preservation of the marine environment...

Article 211 of the UNCLOS provides the regulations for preventing, reducing and controlling the marine environment pollution from vessels.³ Like Article 197, Article 211 also provides the duties of States in establishing international rules and standards to prevent, reduce and control pollution that results from shipping activities.⁴ It elucidates three types of state jurisdictions on the regulation of marine pollution and the standards of ships; namely, the coastal State,⁵ the port State⁶ and the flag State

Sea Lines of Communication: A Study of the Proposed Designation of the Straits of Malacca and Singapore as a Particularly Sensitive Sea Area, 57, OCEAN & COASTAL MGMT. 79-80 (2012).

- ² Norquist contended that even though Articles 192, 194 and 197 of the UNCLOS employ the word ‘shall,’ the scope of the possible obligation is qualified and never absolute. *See id.* at 36.
- ³ R. CHURCHILL, *The UNCLOS regime for protection of the marine environment- fit for the twenty-first century?*, in RESEARCH HANDBOOK ON INTERNATIONAL MARINE ENVIRONMENTAL LAW (R. Rayfuse ed., 2015).
- ⁴ Article 211(1) reads: “States, acting through the competent international organization or general diplomatic conference, shall establish international rules and standards to prevent, reduce and control pollution of the marine environment from vessels...”
- ⁵ Article 211(4) of the UNCLOS states: “Coastal States may, in the exercise of their sovereignty within their territorial sea, adopt laws and regulations for the prevention, reduction and control of marine pollution from foreign vessels... Such laws and regulations shall, **not hamper** innocent passage of foreign vessels.” [Emphasis added]
- ⁶ Article 211 (3) of the UNCLOS prescribes States to “establish particular requirements for the prevention, reduction and control of pollution of the marine environment as a condition for the entry of foreign vessels into their ports or internal waters...”; A port State has been defined as “a sheltered place where ships may load or discharge cargo and embark or disembark passengers, which makes use of both natural conditions and artificial installations, and which offers facilities for the movement of passengers and goods by water and land, subject to a special administration to secure this traffic

jurisdictions.⁷

Theoretically, a port State could have the status of a coastal State, but the latter may not necessarily possess the status of the former unless ships voluntarily come into its port. Therefore, the port State jurisdiction is only relevant when the coastal State exercises jurisdiction in relation to its port.⁸ The former President of the International Tribunal on the Law of the Sea (“ITLOS”), Dr. Thomas Mensah, contended that the difference between the jurisdictions of port States and coastal States be in the scope of their jurisdictions; while port State jurisdiction is essentially a right to control, coastal state jurisdiction is a right to regulate.⁹ It is therefore crucial to examine the different jurisdictions possessed by the port State, the coastal State, and the flag State in determining the extent of enforcement powers that the littoral States of the Straits of Malacca and Singapore have in regulating shipping traffic transiting the Straits.

A. Port State Jurisdiction

International law dictates that the internal waters of a coastal State are regarded as part of the territory of that State where, unlike the territorial sea, vessels generally have no right of innocent passage to sail through that part of the maritime zone.¹⁰ Ships are subject to the territorial jurisdiction and control of the port State when they enter the internal waters or ports of that State.¹¹ The port State is entitled to take necessary actions against any offending ships that have caused marine pollution in its territorial waters or Exclusive Economic Zone (“EEZ”) should the offending ship subsequently enter its internal waters to call at its port.¹²

The 2010 Pacific Adventurer oil spill incident off the coast of Queensland, Australia, is a notable example to explain the enforcement powers of a port State.¹³ This 23,737

functions.” See M. GEORGE, *LEGAL REGIME OF THE STRAITS OF MALACCA AND SINGAPORE* 359 (2008).

⁷ Article 211(2) specifies the jurisdiction of flag States that: “States shall adopt laws and regulations for the prevention, reduction and control of pollution of the marine environment from vessels flying their flag or of their registry.”

⁸ Ø. Jensen, *Coastal State Jurisdiction and Vessel Source Pollution: The International Law of the Sea Framework for Norwegian Legislation*, FNI Report 3/2006 14 (2006), available at <http://www.fni.no/pdf/FNI-R0306.pdf> (last visited on May 9, 2016).

⁹ E. FRANCKX, *VESSEL-SOURCE POLLUTION AND COASTAL STATE JURISDICTION: THE WORK OF THE ILA COMMITTEE ON COASTAL STATE JURISDICTION RELATING TO MARINE POLLUTION 1991-2000*, 71 (E. Franckx ed., 2001).

¹⁰ R. CHURCHILL & A. LOWE, *THE LAW OF THE SEA* 61-5 (1999). See also B. MARTEN, *PORT STATE JURISDICTION AND THE REGULATION OF INTERNATIONAL MERCHANT SHIPPING* 1-4 (2014).

¹¹ UNCLOS art. 25(2). For details, see *supra* note 8, at 15. See also J. W. KINDT, *MARINE POLLUTION AND THE LAW OF THE SEA* 1188-9 (1986).

¹² UNCLOS art. 218.

¹³ Australian Transport Safety Bureau, *Loss of Containers from Pacific Adventurer of Cape Moreton, Queensland, Mar.*

DWT general cargo vessel suffered damage, while plying through rough waters generated by Cyclone Hamish.¹⁴ The ship had been holed during turbulence, which resulted in a spill of 270,000 liters of bunker oil into the Moreton Bay area, not far from the port of Brisbane.¹⁵ When the Pacific Adventurer was towed into the port of Brisbane, an investigation was conducted on board the ship and a tort suit was instituted against the four shipping companies and the ship's Master, with each facing a count of discharging oil into the ocean.¹⁶

In principle, the port State has unrestricted jurisdiction to enforce its laws against any ships and those on board within its own internal waters if the internal waters fall exclusively within the territorial sovereignty of the port State.¹⁷ Enforcement measures of a port State include the inspection of vessels visiting its ports to ensure whether they meet IMO requirements regarding safety and marine pollution prevention standards.¹⁸ If the vessels do not meet these requirements, the port State may allow or deny access to any vessels seeking to gain entry into its port. The Prestige oil spill in 2002 is a good example to illustrate this. The tanker Prestige, loaded with 77, 000 tons of fuel oil, was navigating through stormy waters and suffered an accident about 45 miles off the Spanish coast of Galicia.¹⁹ In distress, the tanker was approaching Galicia. Due to the fear of causing severe pollution of the marine environment, however, the Spanish authorities denied her entry into a safe harbor and sent her off-shore in a north-westerly direction.²⁰ This incident shows that the port State has the power to deny access to any vessel at risk of entailing adverse environmental consequences.

The port State also possesses the jurisdiction to take enforcement action against any vessel calling into its ports with regard to the offences against international rules

11, 2009, at 1-5, available at https://www.atsb.gov.au/media/1568984/mo2009002_prelim.pdf (last visited on May 8, 2016).

¹⁴ *Id.* at 1-5.

¹⁵ S. Collyer, *Pacific Adventurer Spill: Four Companies and Master to Stand Trial*, Lloyd's List DCN(2010), available at <http://www.lloydslistden.com.au/archive/2010/july/07/swire-captain-to-stand-trial-for-pacific-adventurer-spill> (last visited on May 8, 2016).

¹⁶ *Id.*

¹⁷ *Supra* note 8, at 15. See also B. F. Fitzgerald, *Port State Jurisdiction and Marine Pollution Under UNCLOS III*, 11 *MLAANZ J.* 31 (1995). See also CHURCHILL & LOWE, *supra* note 10, at 61-5.

¹⁸ See INTERNATIONAL ORGANIZATIONS AND THE LAW OF THE SEA 41-2 (The Netherlands Institute for the Law of the Sea ed., 2000).

¹⁹ E. Giménez, *The Prestige Catastrophe: Political Decisions, Scientific Counsel, Missin Markets and the Need for an International Maritime Protocol* 7-8 (2003), available at <https://ideas.repec.org/p/fda/fdaeeec/171.html> (last visited on May 9, 2016).

²⁰ *Id.* at 7-8.

and standards committed beyond the port State's national jurisdiction.²¹ This can be illustrated by the *Evoikos* and *Orapin Global* collision in the Singaporean waters of the Strait of Singapore on October 15, 1997, which affected the marine environment of Singapore's south coast as well as the south-western coast of Peninsular Malaysia. The *Evoikos* was anchored in the Port of Singapore at Pulau Bukom and the *Orapin Global* was anchored off south-western Johor.²² Following the incident, on October 20, the Singaporean Police arrested the Masters of the two vessels.²³ As an affected coastal State, under the UNCLOS, Malaysia made a request to Singapore, as a port State, to take appropriate legal action against the Masters of both vessels. The Masters of the *Orapin Global* and the *Evoikos* were tried and charged for negligent navigation under Singaporean laws.²⁴ Ultimately, the Master of the *Orapin Global* was sentenced to two months in jail, and to a fine of SGD 11,000, while the Master of the *Evoikos* was sentenced to three months in jail and fined SGD 60,000.²⁵

In spite of the right to innocent passage within territorial waters, a port state could make requirements of ships that voluntarily enter its port.²⁶ The Port Klang Authority, *e.g.*, mandatorily requires vessels to employ pilots when navigating within the port's pilotage district.²⁷ Unless otherwise authorized or exempted, all vessels within Port Klang's limit must be piloted and the passage of a vessel may be denied if this requirement is not fulfilled by the Master of the vessel.²⁸

Considering Article 218 of the UNCLOS, port State's enforcement jurisdiction

²¹ G. Kasoulides, *Global and Regional Port State Regimes*, in *COMPETING NORMS IN THE LAW OF MARINE ENVIRONMENTAL PROTECTION: FOCUS ON SHIP SAFETY AND POLLUTION PREVENTION* 122 (H. Ringbom ed., 1997). Article 218(3) of the UNCLOS reads: "When a vessel is voluntarily within a port or at an off-shore terminal of a State, **that State shall... comply with request from any State** for investigation of a discharge violation...believed to have occurred in, caused, or threatened damage to the internal waters, territorial sea or exclusive economic zone of the requesting State." [Emphasis added]

²² Mark Heah Eng Siang, *Prevention and Combat of Oil Pollution in Singapore and the "Evoikos" Oil Spill Incident on 15 October 1998*, PAJ Oil Spill Symposium, Oct. 7-8 1998, available at http://www.pcs.gr.jp/doc/esymposium/12172/98_mark-heau-e.pdf (last visited on May 9, 2016).

²³ Master's Lawlessness or Authorities Fair Game (Befälhavarens rättslöshet Eller Myndigheters lovliga byte) at 26 <available only in Swedish>, available at <http://lnu.diva-portal.org/smash/get/diva2:515732/FULLTEXT01> (last visited on May 10, 2016)

²⁴ *Id.* at 7-8.

²⁵ M. Chalos, *Should I Go Down With the Ship, Or Should I Rot in Jail-A Modern Master's Dilemma* *Maritime Studies*, available at <http://www.austlii.edu.au/au/journals/MarStudies/2003/26.html> (last visited on May 9, 2016).

²⁶ H. Ringbom, *Preventing Pollution from Ships- Reflections on the 'Adequacy' of Existing Rules*, 8 *REV. E.C. & INT'L ENVTL.* 23 (1999).

²⁷ See *PORT KLANG MALAYSIA: MARINE INFORMATION HANDBOOK* (2008), available at <http://www.pka.gov.my/phocadownload/port%20klang%20marine%20handbook%20updated%20%20may%202010.pdf> (last visited on May 9, 2016).

²⁸ *Id.*

has been regarded as an innovative expansion of national jurisdiction because it extends the enforcement powers of regulating the prevention and the penalties for marine pollution incidents to the port State, which had traditionally been left exclusively to the discretion of the flag State.²⁹

B. Coastal State Jurisdiction

When a ship passes through the territorial waters of a State and subsequently enters any of its ports, that State possesses the status of a ‘port’ State. If a ship merely navigates through the territorial waters of a State without entering any of its ports, that state is regarded as a ‘coastal’ State. The coastal State has jurisdiction over its territorial sea (the right of innocent passage), to regulate but not to control.³⁰ Article 220 of the UNCLOS provides enforcement jurisdiction³¹ for a coastal State to take action against polluting ships at sea, in the form of inspection, detention or by instituting a legal proceeding.³² The powers in this respect are stronger in the territorial sea than the EEZ of that State.³³ In addition, the coastal State has the power to take action against recalcitrant vessels under the jurisdictional balance, which, based on the practice of international law, leans heavily in favor of navigational interests.³⁴ This means that coastal States cannot hamper innocent passage unless the vessel is deemed to conduct a threatening act.³⁵ In that case, pursuant to Article 25(3) of the UNCLOS, the coastal State may temporarily suspend the right of innocent

²⁹ G. Kasoulides, *Global and regional port state regimes*, in *COMPETING NORMS IN THE LAW OF MARINE ENVIRONMENTAL PROTECTION* 121 (H. Ringbom ed., 1997)

³⁰ R. A. Legatski, *Port State Jurisdiction Over Vessel-Source Marine Pollution*, 2 *HARV. ENVTL L. REV.* 456-60 (1977). See also A. E. Boyle, *Marine Pollution Under the Law of the Sea Convention*, 79 *AM. J. INT’L L.* 357-62 (1985), available at <https://www.jstor.org/stable/2201706> (last visited on May 9, 2016).

³¹ On territorial sea, Article 220(2) of the UNCLOS reads: “Where there are clear grounds for believing that a vessel navigating in the territorial sea of a State has, during its passage therein, violated laws and regulations of that State adopted in accordance with this Convention ... that State ... may undertake physical inspection of the vessel relating to the violation and may ... institute proceedings, including detention of the vessel.” On EEZ, Article 220(3) reads: “Where there are clear grounds for believing that a vessel navigating in the exclusive economic zone or the territorial sea of a State has, in the exclusive economic zone, committed a violation of applicable international rules and standards for the prevention, reduction and control of pollution from vessels ... that State may require the vessel to give information regarding its identity and port of registry, its last and its next port of call and other relevant information required to establish whether a violation has occurred.”

³² E. J. MOLENAAR, *COASTAL STATE JURISDICTION OVER VESSEL-SOURCE POLLUTION* 245-6 (1998).

³³ B. Fitzgerald, *Port State Jurisdiction and Marine Pollution under UNCLOS III*, 11 *MLAANZ J.* 35 (1995), available at <http://www.austlii.edu.au/au/journals/ANZMarLawJl/1995/2.pdf> (last visited on May 8, 2016).

³⁴ H. RINGBOM, *REVIEW OF EUROPEAN COMMUNITY & INTERNATIONAL ENVIRONMENTAL LAW* 25 (1999). See also Boyle, *supra* note 30, at 357-62.

³⁵ MOLENAAR, *supra* note 32, at 250.

passage for such a vessel.³⁶ This situation also applies to the States bordering straits. Unlike the innocent passage regime which can be temporarily suspended, States bordering straits possess just limited powers as they legally have no right to impede navigation under Article 233 of the UNCLOS. More details will be discussed in the following sections.

C. Flag State Jurisdiction

A flag State refers to the State whose flag is flying on the ship.³⁷ Customary international law indicates that ships are bound by the laws of the flag State.³⁸ The earliest effort to codify the principle of flag State jurisdiction was undertaken by the International Law Commission through the Draft Articles concerning the Law of the Sea of 1956. It is now governed by Part VII of the UNCLOS.³⁹ Every State is required to take such measures for ships flying their flag as are necessary to ensure safety at sea.⁴⁰ The flag State jurisdiction system has been developed from the concept that vessels were considered a part of the State's territory and that there exists a factual link between the ship and the State in which it is registered,⁴¹ even if the ship is navigating the high seas.⁴² This is provided for in Article 92 of the UNCLOS, which reads: "Ships shall sail under the flag of one state only and ... shall be subject to its exclusive jurisdiction on the high seas."⁴³

As regards the enforcement jurisdiction, vessels flying their flag or on their registry should comply with any international laws including the UNCLOS on the prevention, reduction and control of vessel-source of pollution of the marine environment.⁴⁴ In this context, the flag State also has the power to conduct an investigation of any vessel that would have violated any applicable international rules or standards on the control of vessel-source pollution, irrespective of where

³⁶ Article 25(3) of the UNCLOS provides: "The coastal State may...suspend temporarily in specified areas of its territorial sea the innocent passage of foreign ships if such suspension is essential for the protection of its security."

³⁷ M. KACHEL, PARTICULARLY SENSITIVE SEA AREAS: THE IMO'S ROLE IN PROTECTING VULNERABLE MARINE AREAS 55 (2008).

³⁸ Article 94 of the UNCLOS provides that: "Every State shall effectively exercise its jurisdiction and control in administrative, technical and social matters over ships flying its flag."

³⁹ C. Goodman, *The Regime for Flag State Responsibility in International Fisheries Law-Effective Fact, Creative Fiction, or Further Work Required?*, 23 AUSTRALIAN & NEW ZEALAND MAR. L. J. 157 (2009).

⁴⁰ *Id.* at 157.

⁴¹ D. VANDER ZWAAG et al., GOVERNANCE OF ARCTIC MARINE SHIPPING 10 (2008).

⁴² *Supra* note 8, at 11-2.

⁴³ UNCLOS art. 92(1). For details, see D. MOMTAZ, A HANDBOOK ON THE NEW LAW OF THE SEA VOL. 1, 406-7 (R.-J. Dupuy & D. Vignes eds., 1991). See also INTERNATIONAL ORGANIZATIONS AND THE LAW OF THE SEA 40-1 (2000); M. KACHEL, PARTICULARLY SENSITIVE SEA AREAS: THE IMO'S ROLE IN PROTECTING VULNERABLE MARINE AREAS 54-5 (2008).

⁴⁴ UNCLOS art. 217(1). See also MOMTAZ, *id.* at 407.

the violations occurred, and thereafter to institute legal proceedings against such a vessel.⁴⁵ The rights of flag States have remained largely unchanged, but their responsibilities have grown considerably,⁴⁶ encompassing areas including ship safety standards and crew training⁴⁷ as well as the control of vessel-source of marine pollution.

Although widely acknowledged, this principle remains one of the most frequently debated.⁴⁸ This is due to both the weaknesses of flag state jurisdiction which is decentralized in nature, and lack of sanctions under international law against recalcitrant flag States.⁴⁹ Furthermore, the competitive nature of the shipping industry has directly or indirectly compelled shipping companies to seek to reduce operating costs and increase returns, which ultimately resulted in ‘open registers’ or “flags of convenience.”⁵⁰ Generally, this “flags of convenience” registration system is preferred as it has a relaxed enforcement of international regulations that allow ship owners to register ships cheaply without having to meet the conditions for registration set by stricter administrations.⁵¹ Therefore, ships may be registered in a State whether or not that State has any substantive connection to the ship concerned.⁵²

The practices has made it difficult to find a genuine link⁵³ between the vessel

⁴⁵ UNCLOS art. 217(4). See KINDT, *supra* note 11, at 1187-8.

⁴⁶ *Supra* note 39.

⁴⁷ The flag State has the responsibility to ensure that the vessel and its crew are fit for sailing. Article 217(2) of the UNCLOS reads: “States shall...take appropriate measures in order to ensure that vessels flying their flag or of their registry are prohibited from sailing, until they can proceed to sea in compliance with the requirements of the international rules and standards ... including requirements in respect of design, construction, equipment and manning of vessels.”

⁴⁸ *Supra* note 39.

⁴⁹ R. WARNER, PROTECTING THE OCEAN BEYOND NATIONAL JURISDICTION: STRENGTHENING THE INTERNATIONAL LAW FRAMEWORK 38 (2009).

⁵⁰ Nearly two-thirds of the world’s trade is carried on ships from open registries. Panama, Liberia, the Bahamas and the Marshall Islands are currently the four largest open registries in the world. See D. J. Mitchell, *The Threat to Global Shipping from Unions and High-Tax Politicians: Restrictions on Open Registries Would Increase Consumer Prices and Boost Cost of Government*, in IV Prosperitas: A Policy Analysis from the Center for Freedom and Prosperity Foundation 3-4 (2004).

⁵¹ R. WARNER, PROTECTING THE OCEAN BEYOND NATIONAL JURISDICTION : STRENGTHENING THE INTERNATIONAL LAW FRAMEWORK (2009). See also J. MANSELL, FLAG STATE RESPONSIBILITY: HISTORICAL DEVELOPMENT AND CONTEMPORARY ISSUES 5-6 (2009); *supra* note 39, at 159-61; *supra* note 6, at 246-7, available at http://www.malaysianbar.org.my/index.php?option=com_docman&task=doc_view&gid=2922; SHIPPING INDUSTRY GUIDELINES ON FLAG STATE PERFORMANCE 4-5 (2003). available at <http://www.dohle-yachts.com/wp-content/uploads/2015/12/FlagStatePerformanceGuidelines.pdf> (all last visited on May 10, 2016)

⁵² *Supra* note 39, at 159-60.

⁵³ Genuine link is defined in the United Nations Convention on Conditions for Registration of Ships of 1986 (hereinafter Registration Convention) as “the existence of a competent national maritime authority in the flag State,” and the

and the State where it was registered, causing further complications for flag State enforcement jurisdiction.⁵⁴ This is because the nationality of shipping company would be different from that of the flag on the ship.⁵⁵ In 2001, most open registries, namely, Panama, Liberia, the Marshall Islands and the Bahamas were categorized under the ‘modest category’ in terms of their capacity to regulate the ships on their registers.⁵⁶ In 2003, about 63 per cent of all reported ship losses at sea (measured by tonnage) were accounted for by just 13 flags of convenience registers with the five worst performers being Panama, Cyprus, St. Vincent and the Grenadines, Cambodia, and Malta.⁵⁷ Table 1 below categorizes States into their levels of regulatory capacity.

Table 1: Grouped Flag State Rankings based on Regulatory Capacity⁵⁸
(Flag State Audit, 2003)⁵⁹

Regulatory Capacity	Flag
High	Danish Second Register, German Second Register, Kerguelen Islands, Netherlands, Norwegian Second Register, Norway, Philippines, United Kingdom
Good	Bermuda, Canary Islands, Cayman Islands, Cyprus, Estonia, Hong Kong, Isle of Man, Latvia, Madeira, Netherlands, Antilles, Russia, Singapore, Turkey, Ukraine
Modest	Antigua and Barbuda, Bahamas, Barbados, Belize, Bolivia, Equatorial Guinea, Liberia, Malta, Marshall Islands, Panama, Vanuatu
Poor	Cambodia, St. Vincent and the Grenadines

effective control by the latter over the companies which own the ships flying its national flag will henceforth be “the obligatory minimum elements” for the link between the ship and the flag to be considered as genuine. The Registration Convention has been ratified by only a few States and has yet to enter into force. See D. Momtaz, *The High Seas*, in A Handbook on the New Law of the Sea vol. 1. 403-4 (R.-J. Dupuy & D. Vignes eds., 1991). See also *supra* note 39, at 159-60.

⁵⁴ *Supra* note 39, at 159-60.

⁵⁵ *Supra* note 53.

⁵⁶ M. Richardson, *Crimes under Flags of Convenience-in a depressed shipping market, poor nations sell flags for criminal venture*, 127 MAR. STUD. (2002), available at <http://www.tandfonline.com/doi/abs/10.1080/07266472.2002.10878692> (last visited on May 9, 2016).

⁵⁷ *Id.*

⁵⁸ Note: States in bold are among the largest open registries in the world.

⁵⁹ MANSELL, *supra* note 51, at 173

Nevertheless, after 12 years, the 2015 flag State performance index has shown an improvement in the regulatory capacities of the four largest open registries in the world such like Panama, Liberia, Barbados, and the Marshall Islands.⁶⁰ The 2015 index indicated that these four States have generally ratified the key IMO Conventions pertaining to safety of navigation and control of vessel-source of marine pollution as well as complied well with global IMO standards of safe shipping regarding flag.⁶¹ The report in the previous 2014/2015 edition of the flag State performance index also showed positive indicators for these four largest open registries in the world.⁶²

It is undeniable that the enforcement of international maritime instruments is often reliant upon the jurisdiction of flag and port States.⁶³ Certain of these international regulations preceded the UNCLOS. Nevertheless, through Part XII, the Convention has acknowledged the application of these important international regulations to prevent, reduce, and control the marine environment pollution from vessel-based sources.⁶⁴ These international rules act as supplements to the UNCLOS as they provide more detailed rules and regulations than are generally established by the UNCLOS.⁶⁵ The international rules on the protection and preservation of the marine environment developed almost concurrently with those regarding the safety of navigation at sea. Undeniably, the protection of the marine environment could be promoted through the navigation safety of vessels plying the seas.⁶⁶

III. Legal Effect of Article 233 of the UNCLOS

Part III of the UNCLOS relates specifically to straits used for international navigation. Article 42(1) (a) & (b) of the UNCLOS allows States bordering straits used for international navigation to pass domestic laws and regulations on the protection of the marine environment which apply to foreign ships transiting such straits. Article 42(1) of the UNCLOS provides:

⁶⁰ International Chamber of Shipping, 2015 Shipping Industry Flag State Performance Table (2015), available at <http://www.ics-shipping.org/docs/flag-state-performance-table> (last visited on May9, 2016).

⁶¹ *Id.*

⁶² *Supra* note 60

⁶³ *Supra* note 51, at 5-6.

⁶⁴ A. KHEE-JIN TAN, VESSEL-SOURCE MARINE POLLUTION: THE LAW AND POLITICS OF INTERNATIONAL REGULATION 3-11 (2006).

⁶⁵ P. SANDS, PRINCIPLES OF INTERNATIONAL ENVIRONMENTAL LAW 136-8 (2d ed. 2003).

⁶⁶ MARK HEAH ENG SIANG, *Safety of Navigation in the Singapore Strait*, 2 SING. J. INT'L & COMP. L. 497-8 (1998).

Subject to the provisions of this section, states bordering straits may adopt laws and regulations relating to transit passage through straits, in respect of all or any of the following: (a) the safety of navigation and the regulation of maritime traffic, as provided in Article 41; (b) the prevention, reduction and control of pollution, by giving effect to applicable international regulations regarding the discharge of oil, oily wastes and other noxious substances in the strait.

If reading Article 233 of the UNCLOS together with Article 42(1) (a) & (b), it may imply that in the event of a pollution incident, States bordering straits may carry out a physical inspection on the polluting ship to establish the violation,⁶⁷ an act that could be perceived as impeding or hampering navigation.⁶⁸ Nevertheless, this is not as uncomplicated as it may seem to be. Article 233 must be also read together with Article 42(2) of the UNCLOS that provides:

Such laws and regulations shall not discriminate in form or in fact among foreign ships or in their application have the practical effect of denying, hampering or impairing the right of transit passage...

Part III is also silent on procedural and enforcement matters; it does not provide any guidelines for States bordering straits on how to enforce their safety of navigation and marine pollution laws against offending vessels.⁶⁹ In some ways, the collective readings of Articles 42(1) (a) & (b), 42(2), and 233 of the UNCLOS imply that the right of transit passage through straits is inviolable so that the bordering States should have no enforcement powers against vessels which breach their safety of navigation and marine pollution laws.⁷⁰ Article 233 of the UNCLOS further imposes a limit on the limits that have been set by Article 42(1) (a) & (b) and (2).⁷¹ On this, Kindt explained that:

These provisions basically mean that states bordering narrow straits may enforce the

⁶⁷ Article 220(2) of the UNCLOS provides that: "Where there are clear grounds for believing that a vessel navigating in the territorial sea of a State has, during its passage therein, violated laws and regulations of that State adopted in accordance with this Convention or applicable international rules and standards for the prevention, reduction and control of pollution from vessels, that State ... may undertake physical inspection of the vessel relating to the violation..."

⁶⁸ See *Limits Imposed on the Contents and Application of the Law and Regulations*, in A HANDBOOK ON THE NEW LAW OF THE SEA, vol. 2, 967-70 (R.-J. Dupuy & D. Vignes eds., 1991).

⁶⁹ R. SATIVALE, *Transit Passage in the Straits of Malacca*, MIMA BULL. 11-2 (2003).

⁷⁰ *Supra* note 68.

⁷¹ *Id.* at 968.

IMO's standard regarding vessel-source pollution. These states may not interfere with the right of transit passage by utilising a claim of protection the marine environment. In any conflict between the rights...of transit passage and the right to protect the marine environment, the freedoms of navigation must prevail.⁷²

Article 233 has confirmed that transit passage is non-suspendable and thus reiterates the position of the UNCLOS in favoring the right of transit passage over the protection of the marine environment of straits.

A. Interpretation of Article 233

Even though Article 233 is a specific provision in the UNCLOS on environmental safeguards of straits, it has deficiencies in this regard. First, the initial sentence of Article 233 provides that Sections 5, 6 and 7 of Part XII of the UNCLOS do not affect the legal regime of straits used for international navigation. These sections contain provisions relating to pollution control and the procedural and enforcement measures for States to take action against recalcitrant ships, respectively. Therefore the exception of Sections 5, 6 and 7 leave States bordering straits without any procedural and enforcement guidelines to be followed.⁷³ The second part of Article 233 provides that a State bordering a strait may only take appropriate enforcement measures if either a ship has violated the laws and regulations referred to in Article 42, paragraph 1(a) and (b),⁷⁴ or a ship is causing or threatening to cause to major damage to the marine environment of the straits. Section 5 of Part XII covers the types of pollution under the UNCLOS, while Article 233 has expressly excluded the application of Section 5 of Part XII to straits used for international navigation. This leaves a gap in the regulatory regime for protecting and preserving the marine environment of these straits, particularly in relation to the kinds of pollution covered by Article 233. Articles 42(1) (a) & (b) do not appear to be compatible with Article 42(2) which provides that laws and regulations passed by States bordering straits shall not hamper or impair the right of transit passage of navigating vessels.⁷⁵

How can then States bordering straits take enforcement measures against recalcitrant

⁷² KINDT, *supra* note 11, at 1193.

⁷³ *Supra* note 6, at 73-7. See J. A. DE YTURRIAGA, STRAITS USED FOR INTERNATIONAL NAVIGATION: A SPANISH PERSPECTIVE 180-3 (1991).

⁷⁴ Articles 42(1)(a) & (b) of the UNCLOS reads that: "States bordering straits may adopt laws on safety of navigation and on prevention, reduction and control of vessel-source of marine pollution by giving effect to applicable international regulations governing these matters."

⁷⁵ GEORGE, *supra* note 6, at 77

ships if they are forbidden to hamper or impede the smooth navigation of vessels? It is impractical to take enforcement action against such ships if the option to suspend their transit is unavailable. However, Caminos asserts that States bordering straits do have enforcement safeguards only available in certain circumstances.⁷⁶ Caminos' observation implies that States bordering a strait cannot unilaterally enforce measures to protect the marine environment of the strait *per se*; the environmental protection measures must instead be related to providing or ensuring the safety of navigation of transiting vessels. The second limb of Article 233 emphasizes that only pollution to some degree that could cause major damage would allow States bordering straits to take appropriate enforcement action against the offending ship. Both limbs would mean that a strait State can only take enforcement measures under Article 233 when the vessel in question has committed an act or acts in violation of Articles 42(1) (a) & (b) that has caused, or threatens to cause, major damage to the marine environment of the strait.⁷⁷ The question then is what the terms "appropriate enforcement measures" and 'major damage' mean. Does the term "appropriate enforcement measures" connote that States bordering straits could hamper or intercept the passage of vessels?

Article 26 of the Vienna Convention on the Law of Treaties of 1969 ("VCLT") provides: "Every treaty in force is binding upon the parties to it and must be performed by them in good faith."⁷⁸ In the *Nuclear Tests* case, the ICJ reiterated that one of the basic principles governing the creation and performance of legal obligations, whatever their source, is the principle of 'good faith.' Trust and confidence are inherent in international co-operation, particularly when co-operation in many fields is becoming increasingly essential.⁷⁹ In the *the Gabčíkovo-Nagymaros Project* case, the ICJ commented that the principle of 'good faith' obliges the parties to apply a treaty in a reasonable way and in such a manner that its purpose can be realized.⁸⁰ Taking the ICJ's definition of good faith in the *Gabčíkovo-Nagymaros* case into consideration, the reasonable way to apply Article 233 of the UNCLOS for its own purpose is to allow States bordering straits to intercept or hamper the passage of recalcitrant vessels. This is because Article 233 was introduced to protect and

⁷⁶ H. Caminos, *The Legal Regime of Straits in the 1982 United Nations Convention on the Law of the Sea*, in RECUEIL DES COURS 172 (1987-V). [Emphasis Added]

⁷⁷ *Id.* at 172-3.

⁷⁸ VCLT art. 26.

⁷⁹ *Nuclear Tests Case (Austl. v. Fr.)*, Judgment, 1974 I.C.J. 268 (Dec. 20), available at <http://www.icj-cij.org/docket/files/58/6095.pdf> (last visited on May 8, 2016).

⁸⁰ *Gabčíkovo-Nagymaros Project (Hung. v. Slovak.)*, Judgments, 1997 I.C.J. ¶ 7 (Sept. 25), available at <http://www.icj-cij.org/docket/files/92/7375.pdf> (last visited on May 8, 2016). *See id.* at 78-9.

preserve the marine environment of straits used for international navigation.⁸¹

The term ‘good faith’ is also laid down at Article 300 of the UNCLOS which provides that: “State parties shall fulfil in *good faith* the obligations assumed under this Convention...”⁸² However, Article 300 may not legally justify States bordering straits to suspend navigation of any recalcitrant vessels as Articles 42(1) (a) & (b), 42(2) and 233 of the UNCLOS have explicitly limited the enforcement powers of the States bordering straits.⁸³

Furthermore, Article 233 does not provide whether or not the transit passage can be terminated or suspended should the vessel commit an act or acts in violation of Articles 233, 42(1) (a) & (b). This omission prompted the Spanish delegation to the Third UN Conference on the Law of the Sea (“UNCLOS III”) to comment on Article 233:

Article 233 has to be considered discriminatory against states bordering straits, inasmuch as it is precisely their geographical narrowness that creates greater risks of accident which could cause damage to the marine environment. Apart from being unjust, this provision is poorly drafted...⁸⁴

With regard to the definition of the term ‘major damage,’ Nordquist contends that even though the term is not clearly defined, it can be seen as referring to major maritime calamities in the shipping history such as Amoco Cadiz.⁸⁵ In addition, Koh suggested two crucial factors: (1) The occurrence of accidents in the concerned strait as a result of a breach of a navigation rule⁸⁶ and (2) the extent of the damage that occurred following the type of ships and goods carried.⁸⁷

Any maritime casualties that occur in straits may cause pollution detrimental

⁸¹ *Supra* note 76, at 171-2.

⁸² There is existing co-operation mechanism between the littoral States and the users of the Straits of Malacca and Singapore as recommended in Article 43 of the UNCLOS. This ongoing co-operative mechanism is a good example to illustrate this. Due to the lack of support given on the part of the users particularly private stakeholders of the Straits, there have been calls back in 2007 to propose the littoral States to consider lodging a report to the International Tribunal of the Law of the Sea citing the users for violating Article 300 of the UNCLOS on good faith and abuse of rights. See Mohd Nizam Basiron, *Special Focus: Symposium on the Enhancement of Safety of Navigation and the Environmental Protection of the Straits of Malacca and Singapore*, 14 MIMA BULL. 23-5 (2007)

⁸³ The collective readings of Articles 42(1)(a) & (b), 42(2) and 233 of the UNCLOS have resulted in the regulatory powers of States bordering straits to be very limited, so that transit rights of vessels could not be suspended by utilizing a claim to protect the marine environment. See *supra* note 11, at 1193

⁸⁴ *Supra* note 73, at 180.

⁸⁵ NORDQUIST, *supra* note 1, at 301.

⁸⁶ KHENG LIAN KOH, STRAITS IN INTERNATIONAL NAVIGATION: CONTEMPORARY ISSUES 162-3 (1982).

⁸⁷ *Id.*

to the economic survival of the States bordering them. Therefore, if the views by Nordquist and Koh are put together, ‘major damage’ could be defined and interpreted as “any forms of pollution caused by navigating vessels that may socio-economically affect the well-being of the coastal population that benefits directly or indirectly from the economic activities generated from the usage of the straits.” Beckman commented on the effect of the ‘major damage’ to the enforcement powers of States bordering straits as follows:

If a vessel exercising the right of transit passage violates obligations under Article 39(2)⁸⁸, but the vessel in question does not come into port, and the violation in question does not cause or threaten major damage to the marine environment of the straits, the rights of the littoral state are more limited. The littoral state would not have the right to interfere with the passage of the vessel or a right to arrest it. However, the littoral state would not be without a remedy. It could make a formal complaint to the flag state of the offending vessel, alleging violation of the 1982 UNCLOS.⁸⁹

Beckman’s interpretation is that until the term, ‘major damage’ is clearly defined, the powers of States bordering straits to intercept the passage of vessels in straits used for international navigation would remain limited.

Given the ambiguous wording of Article 233, consultations were held among the delegations from the States bordering straits in the negotiation process of the UNCLOS III. At that time, they tried to reach a common understanding regarding the purpose and meaning of Article 233 of the UNCLOS in its application to the Straits of Malacca and Singapore.⁹⁰ A letter was sent by the representative of Malaysia, Z.B.M. Yatim, to the President of the UNCLOS III containing an annex which indicated the understandings reached and the statement made relating to Article 233 of the draft UNCLOS in its application to the Straits of Malacca and Singapore.⁹¹ The understandings were as follows:

(a) Laws and regulations enacted by States bordering straits under Article 42(1) (a) refer

⁸⁸ Article 39(2) of the UNCLOS underlines the duties of ships while transiting straits used for international navigation. Ships exercising transit passage must comply with generally accepted international regulations, procedures and practices for safety at sea as well as for the prevention, reduction and control of pollution from ships.

⁸⁹ R. BECKMAN, TRANSIT PASSAGE REGIME IN THE STRAITS OF MALACCA: ISSUES FOR CONSIDERATION 250 (2004).

⁹⁰ Letter dated 28 April from the representative of Malaysia to the President of the Conference, U.N. Doc. A/CONF.62/L.145 (1982), available at http://legal.un.org/diplomaticconferences/lawofthesea-1982/docs/vol_XVI/a_conf-62_1-145.pdf (last visited on May 9, 2016).

⁹¹ *Id.*

- to laws and regulations on TSS and the determination of under keel clearance;⁹²
- (b) Any violation on the limitation of under keel clearance would be deemed to be a violation of Article 233, and states bordering the Straits of Malacca and Singapore may take appropriate enforcement measures as provided by Article 233 to prevent the passage of the vessel. Such an act cannot be deemed as hampering, denying and impairing transit passage as enumerated in Article 42 of the UNCLOS;⁹³
 - (c) States bordering the Straits of Malacca and Singapore may take appropriate enforcement measures against ships that have caused or are threatening to cause major pollution to the marine environment of the Straits;⁹⁴
 - (d) Although the wording of Article 233 has excepted the application of Sections 5, 6 and 7 of Part XII, states bordering the Straits of Malacca and Singapore may observe the provisions on safeguards in Section 7 of Part XII in taking appropriate enforcement measures as provided in Article 233 against recalcitrant ships;⁹⁵
 - (e) Article 42 and 233 do not affect the rights of states bordering straits to take action against ships which are not in the exercise of transit passage;⁹⁶ and
 - (f) Anything contained in the letter regarding Article 233 is not intended to impair the sovereign immunity of ships enumerated in Article 236 and the duties of ships and aircraft during transit passage in Article 39.⁹⁷

Letters signed by both Indonesia's M. Kusumaatmadja⁹⁸ and Singapore's T.T.B. Koh⁹⁹ confirm the statement and the contents of the letter sent by Malaysia's representative. These understandings were subsequently acknowledged by the main user States of the Straits; namely, Australia, France, Germany, Indonesia, Japan, the UK and the US.¹⁰⁰ Since Article 233 was attributed to Malaysia,¹⁰¹ the determination

⁹² *Id.*

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ NORDQUIST, *supra* note 1, at 388-9. Upon ratifying the UNCLOS in 1994, Malaysia made a declaration reiterating the letter sent by its representative to the President of UNCLOS III on the application of Article 233 to the Straits of Malacca and Singapore, available at http://www.un.org/depts/los/convention_agreements/convention_declarations.htm (last visited on May, 9, 2016)

⁹⁸ Letter dated 29 April 1982 from the representative of Indonesia to the President of the Conference, U.N. Doc. A/CONF.62/L.145/ADD.1, 250-1 (1982), available at http://legal.un.org/diplomaticconferences/lawofthesea-1982/docs/vol_XVI/a_conf-62_1-145_add-1.pdf (last visited on May, 9, 2016)

⁹⁹ Letter dated 29 April 1982 from the representative of Singapore to the President of the Conference, U.N. Doc. A/CONF.62/L.145/ADD.2, 250-1 (1982), available at http://legal.un.org/diplomaticconferences/lawofthesea-1982/docs/vol_XVI/a_conf-62_1-145_add-2.pdf (last visited on May 9, 2016).

¹⁰⁰ MOLENAAR, *supra* note 32, at 316-8.

¹⁰¹ M.George, *Transit Passage and Pollution Control in Straits under the 1982 Law of the Sea*, 33 OCEAN DEV. & INT'L L. 198 (2002), available at <http://www.tandfonline.com/doi/abs/10.1080/00908320290054765?journalCode=uodl20> (last

of under keel clearance is brought within the scope of Articles 41 and 42(1) (a) of the UNCLOS, while the violation of under keel clearance limits is deemed that of Article 233.¹⁰²

From the wording of Malaysia's letter, it seems that the understanding was only intended to be effective in relation to the navigational safety measures of that time. The understanding, *e.g.*, refers to laws and regulations under Article 42(1) (a) on Traffic Separation Scheme ("TSS") and the determination of under keel clearance. It does not, however, refer to prospective measures on the safety of navigation and marine environmental protection such as the ongoing development of the Marine Electronic Highway ("MEH") project, the potential designation of all or part of the Straits of Malacca and Singapore as a Particularly Sensitive Sea Area ("PSSA") and as a Special Area under MARPOL 73/78. Could States bordering straits then intercept the transit of vessels violating these subsequently introduced navigation safety measures? This remains open to question until these future measures are fully implemented in the Straits of Malacca and Singapore and they have been considered by member States of the IMO.

George contends that the legal validity of the letter from the Malaysian representative to the UNCLOS III may be questioned.¹⁰³ It is not an amendment to Article 233 as it was only a letter written by the representative of Malaysia to the President of the Conference.¹⁰⁴ She argued that the statement had very limited legal significance for the user States.¹⁰⁵ However, this might not be entirely true. In 1977, the IMO came up with Resolution A.375(X) that set out the provisions pertaining to the TSS designation and the minimum under keel clearance requirement of 3.5 meters.¹⁰⁶ Therefore, the letter of 1982 indeed had legal significance as it had the effect of reiterating the application of TSS and the minimum under keel clearance requirement in the Straits of Malacca and Singapore that, thus far, have been strictly followed by ships plying the Straits.

B. The Application of Article 233 to State Practices

Article 233 has been applied to State practice in the Straits of Malacca and Singapore

visited on May. 9, 2016).

¹⁰² *Supra* note 32, at 316-8.

¹⁰³ GEORGE, *supra* note 6, at 79.

¹⁰⁴ *Id.* at 79.

¹⁰⁵ *Id.* at 79.

¹⁰⁶ Navigation through the Straits of Malacca and Singapore. G.A. Res. 476(XIII), U.N. Doc. A/RES 476(VII), available at <http://www.sjofartsverket.se/pages/5121/476.pdf> (last visited on May 9, 2016).

themselves. Statistics show that for the 25-year's period between 1975 and 2000, six casualties took place in the Straits of Malacca and Singapore which have caused major damage to the marine environment.¹⁰⁷ There are three incidents after 1994 when the UNCLOS came into force, such as the grounding of the *MT Natuna Sea* in 2000, the collision of the *MV Ostende Max* with the *MT Formosa Product Brick* in 2009 as well as the collision between the *MV Waily* and *MT Bunga Kelana 3* in 2010. Here, Article 233 was applied by littoral States of the Straits of Malacca and Singapore.

First, the grounding of the *MT Natuna Sea* took place on October 3, 2000 nearby the Sambu Islands, Indonesia.¹⁰⁸ The Sambu Islands are located in the Strait of Singapore between Singapore and Batam Island. The tanker, carrying about 523,088 barrels of crude oil struck a reef in Batam waters, spilling approximately 20 percent of its total cargo.¹⁰⁹ The incident resulted in serious pollution to Indonesian waters, causing the Indonesian authorities to suspend the passage of the vessel and to detain it in Batam. Subsequently, the Batam local government signed a Memorandum of Understanding with the London Steam Ship Owners Mutual Insurance Association Ltd, the insurer of the vessel, to release the vessel with a guaranteed bond for it to sail to Singapore for dry docking.¹¹⁰

Second, a British registered tanker, *MV Ostende Max*, collided with the *MT Formosa Product Brick*, a Liberian-flagged tanker in 2009, causing minor naphtha spills in the Strait of Malacca off the coast of Port Dickson.¹¹¹ The collision set the *MT Formosa Product Brick* ablaze.¹¹² Even though the spill was minor, because the collision had damaged both tankers seriously, they could not navigate again. Remaining at sea, both tankers are at risk of causing or threatening to cause major damage to the marine environment of the Strait. The passages of both vessels were suspended and they were anchored off Port Dickson's port limit.¹¹³

Third, the application of Article 233 of the UNCLOS can also be illustrated in the 2010 collision between the *MV Waily* and *MT Bunga Kelana 3* in the TSS area within

¹⁰⁷ M. N. Basiron & Tan Kim Hooi, *The Environmental Impact of Increased Vessel Traffic in the Straits of Malacca and Singapore*, 14 MIMA BULL. 16 (2007).

¹⁰⁸ E. Agoes, *Indonesia's Law and Regulations concerning Pollution of the Sea by Oil: Case Studies on Compensation For Oil Pollution Damages*, in PREVENTION AND COMPENSATION OF MARINE POLLUTION DAMAGE: RECENT DEVELOPMENTS IN EUROPE, CHINA AND THE US 114-5 (M. Faure & J. Hu eds., 2006).

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ H. Foo, *Nine sailors feared dead*, NEW STRAITS TIMES, Aug. 21, 2009, available at <https://www.highbeam.com/doc/1P1-169477426.html> (last visited on May 9, 2016).

¹¹² P. Dickson, *No Oil Spills Near Burning Tanker*, Bernama.com, Aug. 19, 2009, available at <http://maritime.bernama.com/news.php?id=434366&lang=en> (last visited on May 9, 2016).

¹¹³ *Supra* note 111.

the Strait of Singapore.¹¹⁴ As a result of the collision, both vessels sustained damage and the *MT Bunga Kelana 3* spilled about 2,000 tons of light crude oil into the sea. Subsequently, the passage rights of both vessels were suspended and they were anchored in the Port of Singapore.¹¹⁵

C. Defining ‘Major Damage’

Without a proper definition of ‘major damage’ in the UNCLOS, State practice as described in these three instances demonstrates that the term is being interpreted consistently with the combined views of Koh and Nordquist on this matter; that is to say the ‘major damage’ refers to oil spill incidents that have devastating effects such as those of the *Exxon Valdez* or *Amoco Cadiz* and where such incidents may cause or are likely to cause environmental harm to the coastal population.¹¹⁶ As far as the enforcement powers of States bordering straits are concerned, this definition seems to be the most feasible and is virtually being adopted into practice. These State practices tend to show that States bordering straits have the power to suspend vessels exercising transit passage if they cause major damage to the Straits. Therefore, Kindt’s view that the UNCLOS favors transit passage over the protection of the marine environment is accurate, but this may only be the case as long as ships in transit do not cause major pollution of the marine environment of the straits. However, these relatively few instances do not entirely clarify the term, ‘major damage,’ but it is still debated.

In this regards, George has argued that so-called unimpeded transit passage for all ships should be equitably adjusted to logically enable States bordering straits to properly exercise their regulatory and enforcement powers against recalcitrant ships.¹¹⁷ Because the UNCLOS does not provide a precise definition of ‘major damage’ transiting vessels is not strictly prohibited to pollute the marine environment of the straits if the damage caused is relatively minor. If the term, ‘major damage’ in Article 233 is interpreted in a restrictive way, this could be viewed as a violation of Article 192, which provides general obligations of Part XII to protect and preserve the marine environment. Undeniably, the core difficulty is that there is no

¹¹⁴ Maritime and Port Authority of Singapore (MPA), Collision Between MT Bunga Kelana 3 and MV Waily in the Singapore Strait (2010), available at http://www.news.gov.sg/public/sgpc/en/media_releases/agencies/mpa/press_release/P-20100525-1.html (last visited on May 9, 2016).

¹¹⁵ *Id.*

¹¹⁶ *Supra* note 1, at 301.

¹¹⁷ GEORGE, *supra* note 6, at 84.

definition for major or minor damage provided in the UNCLOS.¹¹⁸ Article 233 needs further interpretation to be effective.¹¹⁹ Article 233 would be contrary to the preamble of the UNCLOS, which is to promote “a legal order for the seas and oceans which will facilitate international communication, and will promote the ... protection and preservation of the marine environment.” To remedy this inconsistency, Article 233 could be amended as follows:

- (a) There could be a clear nexus between Part III of the UNCLOS and Article 233;¹²⁰
- (b) Since Sections 5, 6 and 7 of Part XII are not applicable in so far as Article 233 is concerned, specific provisions on procedural and enforcement guidelines could be articulated in relation to marine pollution in straits used for international navigation. In other words, Article 233 could clarify whether the States bordering straits have the right to suspend the transit of vessels should they violate or abuse their transit passage rights by polluting the marine environment of the strait;¹²¹
- (c) The phrase ‘major damage’ in Article 233 should be adequately defined;¹²²
- (d) The application of Articles 42(2) and 44 on non-suspension of transit passage could be qualified to take into account instances of major pollution by transiting vessels;
- (e) Like the regime of innocent passage where the UNCLOS explains the circumstances of which the passage is deemed to be no longer innocent, the UNCLOS could also clearly enunciate when and how transiting ships and vessels cease to exercise the right of transit passage and what are the rights of littoral states to prevent passage which breaches other provisions of the UNCLOS relating to marine pollution;
- (f) Since Article 233 excludes the application of Section 5 of Part XII, this article could stipulate the types of pollution it deals with;¹²³
- (g) Given that Article 233 does not stipulate any links with Part III of the UNCLOS, there should be an explanation on how it is to be applied; does it apply to all straits used for international navigation or only is restricted to straits where transit passage is applicable? This would take into account that not all straits used for international navigation are subjected to the regime of transit passage.

In the straits used for international navigation, transit passage can be applied or not. Since there is no nexus between Article 233 and Part III of the UNCLOS, it is unclear

¹¹⁸ M. GEORGE, AN ALTERNATE REGIME OF LIABILITY AND COMPENSATION FOR OIL POLLUTION FROM TANKERS IN THE STRAITS OF MALACCA AND SINGAPORE 236-7 (2000).

¹¹⁹ *Id.* at 236-7.

¹²⁰ GEORGE, *supra* note 6, at 73-7.

¹²¹ *Id.*

¹²² *Id.*

¹²³ *Id.*

which type of straits it applies to. Article 233 of the UNCLOS mentions specifically that States bordering straits may take action against any ships that have breached their marine pollution laws enacted based on the provision of Article 42(1) of the UNCLOS. Article 42(1) states that: “Subject to the provisions of this section, states bordering straits may adopt laws and regulations relating to transit passage through straits...” As this provision is explicitly related to transit passage, Article 233 is understood to apply only to straits used for international navigation where transit passage is applicable.

As global shipping has been steadily rising, the UNCLOS and the related IMO conventions would be more significant in curtailing the risk of marine pollution and ensuring safe navigation at sea. Singapore and Port Klang are among the busiest ports in the world situated along the Straits of Malacca and Singapore. It is therefore crucial to briefly examine the incorporation of the international law provisions on protection of the marine environment of straits into the littoral States’ domestic applications.

IV. Conclusion

The UNCLOS is now regarded as the constitution that governs the laws on the protection and preservation of the marine environment. It acknowledges and recognizes the operations of many important international conventions; namely, MARPOL 73/78, COLREGs and SOLAS, all of which were created by the IMO. Part XII of the UNCLOS confers an obligation on all States to devise and formulate international regulations to protect and preserve the marine environment.

The nexus between Part III and Article 233 of Part XII of the UNCLOS is unclear. The language used in Article 233 is ambiguous, to the extent that it can cause confusion in its implementation. Article 233 only allows the littoral States to take appropriate measures against the vessels transiting straits used for international navigation if they have caused ‘major damage’ to the marine environment of the strait. As a result of the uncertainty in the interpretation of the term, ‘major damage,’ it is arguable that transiting vessels may indirectly be permitted to pollute the strait if the pollution is minor.

Based on these findings, the authors would conclude the following. First, Article 233 of the UNCLOS is not effective in assisting the States bordering straits to protect and preserve the marine environment of their territorial straits. Second, it is not

too simplistic to contend that the UNCLOS favors shipping over the protection of the marine environment of straits. In order to supplement the limited enforcement powers of States bordering straits, the UNCLOS has recommended that voluntary co-operation be fostered between States bordering straits and the user States to protect and preserve the marine environment of straits. Nevertheless, given that this co-operation is voluntary in nature, there is a need for the international maritime community to come up with international regulations to better protect the marine environment of straits used for international navigation.

