Malaysia's Commitments Under International Conventions and the need for a Harmonized Legal Regime Regulating Marine Pollution

by

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Malaysia is a party to a number of international conventions dealing with marine pollution. As a party, Malaysia is duty bound to comply with these international undertakings and to adopt national legislation as necessary in order to implement these conventions within its territory. As a maritime nation with resource-rich seas and invaluable mangroves, atolls and coastal areas, the clean and pollution-free seas are a matter of life and death for Malaysia. The present paper finds that Malaysia has a sound and viable National Environmental Policy and adequate legal regime to cope with challenges of the present-day marine pollution issues. The paper, however, submits that systematic harmonization or fine-tuning of the Malaysian marine pollution legislation is necessary on the basis of a holistic rather than piecemeal approach in order to smoothly implement whatever Malaysia has undertaken under international conventions.

I. Introduction

Since Malaysia is a coastal State with invaluable mangroves and atolls and coastal areas, surrounded by resource-rich seas, to make the Malaysian maritime areas to be clean and pollution-free is a matter of grave concern for the country. Malaysia is a party to UNCLOS 1982 and a number of international maritime environmental conventions, which lay down important rules to be followed by states parties to prevent and control marine pollution. As a party, it is obligatory for Malaysia to make its national laws to be in line with the conventions. The present paper first of all identifies the international marine environmental conventions that are binding on Malaysia and scrutinizes each of these conventions in order to ensure what are the responsibilities of Malaysia under these conventions. The second part of the paper is an analysis of the Malaysian statutes which form the legal regime regulating marine pollution in Malaysia. The paper finds that Malaysia has a sound and viable National Environmental Policy and adequate legal regime to cope with challenges of the present-day marine pollution issues. The paper, however, submits that systematic harmonization or fine-tuning of the Malaysian marine pollution legislation is necessary on the basis of a holistic rather than piecemeal approach in order to smoothly implement whatever Malaysia has undertaken under international conventions.

II. International conventions on marine pollution that are legally binding on Malaysia

International environmental law is mostly treaty-based.[1] The protection of the marine environment is the subject of a number of international conventions. Malaysia is a party to the following conventions that deal directly with marine pollution:

(1) United Nations Convention on the Law of the Sea, 1982;
(2) International Convention for the Prevention of Pollution from Ships, 1973, as modified by the Protocol of 1978 relating thereto (MARPOL 73/78);
(3) International Convention on Oil Pollution Preparedness, Response and Co-operation (OPRC), 1990;
(4) International Convention on Civil Liability for Oil Pollution Damage, 1992 (the 1992 CLC); and
(5) International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage 1992 (the 1992 Fund Convention).

'*Pacta sunt servanda*' or the rule that treaties are binding on the parties and must be performed in good faith is the fundamental principle of customary international law, reaffirmed in Article 26 of the Vienna Convention on the law of Treaties 1969. The binding force of a treaty and its effects concern in principle the States parties only, and not their nationals.[2] Therefore, if treaties contain provisions affecting rights and duties of nationals of States parties, each State is bound to make sure that these rights and duties are consistent with the requirements of the treaty. According to the domestic law of many States this may require the enactment of a statute by the Parliament. According to the Malaysian practice, a treaty will become part of the law of Malaysia only when the Parliament passes a statute, giving legal effect to the treaty in Malaysia.

III. The United Nations Convention on the Law of the Sea (UNCLOS) 1982 and the regulation of marine pollution

The United Nations Convention on the Law of the Sea (UNCLOS) is a very influential global convention, with 153 States parties (as at 8 Feb 2007) including Malaysia. Its provisions on the protection and preservation of the marine environment are considered by many as reflecting generally applicable rules of customary international law.[3] As a party to UNCLOS, Malaysia is obliged to comply with the principles laid down in the Convention. In general, Malaysia is obliged:

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[1] Abdul Ghafur Hamid @ Khin Maung Sein, *Public International Law: A Practical Approach*, (Kuala Lumpur: Pearson-Prentice Hall, 2006), 358

[2] See generally McNair, *Law of Treaties*, 78-110.

[3] Philippe Sands, *Principles of International Environmental Law*, (Cambridge: Cambridge University Press, 2nd. ed., 2003), 396.

(1) to protect and preserve the marine environment;[4]
(2) to exploit its natural resources with sound environmental policies and in accordance with its duty to protect and preserve its marine environment;[5]
(3) to take all measures necessary to prevent, reduce and control pollution of the marine environment, using the '*best practicable means*' at their disposal and in accordance with their capabilities;
(4) to ensure that activities under its jurisdiction or control are so conducted as not to cause damage by pollution to other States and their environment;
(5) to prevent pollution of the marine environment by addressing particular sources of pollution: pollution from land-based sources, pollution from sea-bed activities, pollution from activities in the Area, pollution by dumping; pollution from vessels, and pollution from or through atmosphere.
(6) to monitor the risks and effects of pollution of the marine environment and to carry out "*environmental impact assessment*" of activities under its jurisdiction or control.

As far as the enforcement of marine pollution regulations is concerned, UNCLOS reflects a balanced compromise of the powers of coastal states, port states and flag states.

Prescriptive (legislative) jurisdiction: The legislative competence of *coastal states* has been reduced by UNCLOS in respect of the kind of regulations which may be adopted, but increased in respect of the geographical area to which such regulations may be applied. In the territorial sea, the coastal state may prescribe pollution regulations for foreign vessels in innocent passage, provided such regulations do not 'apply to design, construction, manning or equipment of foreign ships unless they are giving effect to generally accepted international rules or standards'.[6] Where territorial sea consists of straits subject to the regime of transit passage, the coastal state's legislative competence is even more restricted. Here pollution regulations may be adopted only if they give 'effect to applicable international regulations regarding the discharge of oil, oily wastes and other noxious substances in the strait.'[7]

While UNCLOS has restricted the scope of coastal States' legislative competence in their territorial sea, it has increased the geographical scope of their legislative competence by giving them certain powers to legislate for marine pollution from foreign vessels in their exclusive economic zone

[4] Article 192, *ibid*.
[5] Article 193, *ibid*.
[6] Article 21 (2), *ibid*. This is because the flag state has exclusive legislative competence in respect of 'design, manning, or equipments' of ships'.
[7] Article 42 (1), *ibid*.

(EEZ).Under Article 211 (5), a coastal State may adopt pollution legislation for its EEZ which conforms and gives effect to 'generally accepted international rules and standards established through the competent international organization.'

Enforcement jurisdiction: Turning now to enforcement jurisdiction, Article 217 of UNCLOS provides that *flag states* shall enforce (in the sense of judicial jurisdiction) violations of pollution laws applying to their ships wherever committed. In particular, flag states must lay down penalties adequate in severity to discourage violations; prohibit their vessels from proceeding to sea unless they comply with the requirements of international rules and standards; ensure that their vessels carry the certificates required by such rules; periodically inspect their vessels; and investigate alleged violations of the rules by their vessels.[8]

Enforcement by *coastal States* is governed by Article 220. Where a foreign vessel is suspected of having violated during its passage through the territorial sea the coastal state's anti-pollution legislation or applicable international rules relating to pollution from ships, the coastal state may undertake physical inspection of the vessel and , where the evidence so warrants, institute legal proceedings.[9] The coastal state has a power of arrest in accordance with rules governing the right of innocent passage. Where the pollution from the foreign vessel is 'wilful and serious', then the passage of that vessel is no longer innocent,[10] and so the coastal state has unrestricted jurisdiction.

Where an alleged violation takes place in the EEZ and the vessel is navigating in the EEZ or territorial sea of a state, the coastal state may require the offending vessel to give information required to establish whether a violation has occurred. Where the alleged violation in the EEZ has resulted in a substantial discharge causing or threatening significant pollution of the marine environment, the coastal state may undertake physical inspection of the vessel in the EEZ or territorial sea if the vessel has refused to give the necessary information or has given incorrect information.[11] But only where the alleged violation has resulted 'in a discharge causing major damage or threat of major damage to the coastline or related interests of the coastal state, or to any resources of its territorial sea or EEZ' may the coastal state arrest the vessel.[12]

[8] Article, 217, *ibid*.
[9] Article 220 (2), *ibid*.
[10] Article 19 (2)(h), *ibid*.
[11] Article 220 (5), *ibid*.
[12] Article 220 (6), *ibid*.

IV. International Convention for the Prevention of Pollution from Ships, 1973, as modified by the Protocol of 1978 relating thereto (MARPOL 73/78)

The main international convention regulating pollution from vessels is MARPOL 73/78. The detailed rules on pollution from ships are set out in six Annexes to the Convention. All States parties must accept Annexes I and II, but the other Annexes are voluntary. As Malaysia is a party to Annexes I, II, and V, it is legally bound to comply with the provisions of these annexes.

Annex I of MARPOL 73/78 deals with the prevention of pollution by oil. Any operational discharge of oil or oily mixtures from an oil tanker is prohibited except when all the following conditions are satisfied:

(1) the tanker is not within a special area;
(2) the tanker is more than 50 nautical miles from the nearest land;
(3) the tanker is proceeding en route;
(4) the instantaneous rate of discharge of oil content does not exceed 30 litres per nautical mile[13];
(5) the total quantity of oil discharged into the sea does not exceed, for tankers delivered on or before 31 December 1979, 1/15,000 of the total quantity of the particular cargo, and for tankers delivered after 31 December 1979, 1/13,000 of the total quantity of the particular cargo; and
(6) the tanker has in operation an oil discharge monitoring and control system and a slop tank arrangement as required under the Annex.[14]

What is important is that any discharge of oil or oily mixture by an oil tanker 'within 50 nautical miles from the nearest land' or 'within a special area' is prohibited and is a violation of MARPOL 73/78. It is innovatory for MARPOL 73/78 to introduce the concept of 'special area', which is considered to be so vulnerable to pollution by oil due to oceanographic and/or geographic situations. Eight areas are designated by the IMO as 'special areas': the Mediterranean Sea, the Baltic Sea, the Black Sea, the Red Sea, the Gulf area, the Gulf of Aden, the Antarctic and the North East European Waters.

All the littoral states of the Straits of Malacca - Malaysia, Indonesia and Singapore - are parties to MARPOL 73/78. As the Straits are constantly used by a huge number of oil tankers and are vulnerable to major oil spills, it is submitted that the littoral States, with the support of user

[13] The old regulation of 60 litres per nautical mile was revised by the 1992 Amendments, entered into force on 6 July 1993.
[14] Regulation 34, Annex 1, MARPOL 73/78, as amended up to date.

countries, should seek the recognition by the IMO of the Straits as a 'special area' under the Convention.

The 1992 amendments to Annex I made it mandatory for new oil tankers to have double hulls. Further amendments were adopted in 2001 to bring in a global timetable for accelerating the phase-out of single-hull oil tankers. The timetable will see most single- hull oil tankers eliminated by 2015 or earlier.

Annex II establishes Regulations for the control of pollution by noxious liquid substances in Bulk. Some 250 substances were evaluated and included in the list appended to the Annex. The discharge of their residues is allowed only to reception facilities until certain concentrations and conditions are complied with. In any case, no discharge of residues containing noxious substances is permitted within 12 miles from the nearest land.

Annex V relates to the prevention of pollution by garbage from ships and it applies to all ships. Perhaps the most important feature of the Annex is the complete ban imposed on the dumping into the sea of all forms of plastic. The Annex regulates different types of garbage and specifies the distances from land and the manner in which they may be disposed of.

V. International Convention on Oil Pollution Preparedness, Response and Co-operation, 1990 (OPRC)

Malaysia is a party to the 1990 London International Convention on Oil Pollution Preparedness, Response and Cooperation Convention (1990 OPRC Convention),[15] which promotes international cooperation in the event of a major oil pollution threat. Its provisions are applicable to ships, offshore units, sea-ports and oil-handling facilities.

The first requirement of the Convention is to have 'oil pollution emergency plans'. Each State party shall require that ships flying its flag have on board a shipboard oil pollution emergency plan as required by and in accordance with the provisions adopted by the IMO. Likewise, each state party shall require that authorities in charge of sea ports, operators of offshore units[16] and oil handling facilities under its jurisdiction have oil pollution emergency plans.

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[15] Done at London on 30 November 1990, in force 13 May 1995. Malaysia acceded to the Convention on 30 July 1997 and the Convention entered into force in respect of Malaysia on 30 October 1997.

[16] "Offshore unit" means any fixed or floating offshore installation or structure engaged in gas or oil exploration, exploitation or production activities, or loading or unloading of oil.

States parties to the Convention are also required to make it compulsory for all the masters of the ships flying their flags, and persons in charge of offshore units, sea ports and oil handling facilities to report without delay any incident of a discharge or probable discharge of oil to the state authorities in accordance with the IMO guidelines.[17]

The Convention mandates states parties to have in place 'national and regional systems for oil pollution preparedness and response'. In addition, each Party, either individually or through bilateral or multilateral co-operation is required to establish: stockpiles of oil spill combating equipment, the holding of oil spill combating exercises and the development of detailed plans for dealing with pollution incidents. The Convention provides for IMO to play an important coordinating role.

VI. The 1992 Civil Liability Convention and the 1992 Fund Convention

The old regime for civil liability for damage caused by oil pollution operates within the framework of two international conventions: the 1969 International Convention on Civil Liability for Oil Pollution Damage (1969 CLC) and the 1971 International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage (1971 Fund Convention). This old regime was amended in 1992 by two Protocols. The amended Conventions are known as The *1992 Civil Liability Convention* (1992 CLC) and the *1992 Fund Convention*, both of which entered into force on 30 May 1996. The International Oil Pollution Compensation Fund 1992 (1992 Fund) was set up under the 1992 Fund Convention.

Malaysia's position: Malaysia acceded to the 1969 CLC and 1971 Fund Convention on 6 January 1995. After the original civil liability regime was amended in 1992, Malaysia has become a party to both 1992 CLC and 1992 Fund Convention on 9 June 2005.

Territorial application of the two conventions: The old regime applies to oil pollution damage suffered in the *territorial sea* of a State party. Under the new regime (1992 CLC and 1992 Fund Convention), however, the geographical scope is wider, with the cover extended to pollution damage caused in the *exclusive economic zone* (EEZ) of a State party.

Subject-mater application: Pollution damage is defined in the original Conventions as loss or damage caused by contamination. The definition of 'pollution damage' in the 1992 Conventions includes the costs of reasonable preventive measures, i.e. measures to prevent or minimize pollution damage. The 1969 and 1971 Conventions apply to damage caused or measures taken after oil

[17] Article 4, *ibid*.

has escaped or been discharged. Under the 1992 Conventions, however, expenses incurred for preventive measures are recoverable even when no spill of oil occurs, provided that there was a grave and imminent threat of pollution damage.

Compulsory insurance: The ship-owner is obliged to maintain insurance to cover his liability under the Convention.

Two-tier compensation system: The 1992 Conventions establish two-tier compensation system: tanker owners and their insurers are liable to pay compensation as the first tier. Supplementary compensation (second tier) is paid by the Fund, which is financed by oil receivers in States parties. The convention is devised in such a way that the major stake holders have to contribute to the liability. It imposes the primary liability to pay compensation on the ship-owners and the secondary liability on the cargo-owners by making contributions to the Fund from which supplementary compensation is paid.

Ship-owner's liability: Under the Civil Liability Conventions, the ship-owner has strict liability for pollution damage caused by the escape or discharge of persistent oil from his ship. This means that he is liable even in the absence of fault on his part. He is exempt from liability only if he proves that: the damage resulted from an act of war or grave natural disaster, was wholly caused by an act or omission by a third party, or by negligence of government authorities.

The ship-owner is normally entitled to limit his liability to an amount determined by the size of ship (registered tonnage). The original limits under the 1992 CLC were increased by the Legal Committee of the IMO for incidents occurring on or after 1 November 2003. The maximum liability for ships not exceeding 5,000 units of gross tonnage is 4,510,000 SDR[18], for ships between 5,000 and 140,000 units of gross tonnage is 4,510,000 SDR plus 631 SDR for each additional unit of tonnage, and for ships 140,000 units of gross tonnage or over is 89,770,000 SDR.

Contributions to the International Oil Pollution Compensation Fund (IOPC): The IOPC Fund is financed by contributions paid by persons who have received in the relevant calendar year in excess of 150,000 tonnes of crude oil or heavy fuel oil in ports or terminal installations in a State party, after carriage by sea.

The obligation of the 1992 Fund: The IOPC Fund pays compensation when those suffering oil

[18] Special Drawing Rights issued by the IMF.

pollution damage do not obtain full compensation under the applicable CLC. The maximum amount payable by the 1992 fund was increased to 203 million SDR for incidents occurring on or after 1 November 2003. This maximum amount includes the sum actually paid by the ship-owner (or his insurer) under the Convention.

VII. Malaysia's legal regime regulating marine pollution

Unlike the constitutions of many other countries in the world, the Federal Constitution of Malaysia lacks any provision relating to the protection of the environment or prevention of pollution. The environmental protection in Malaysia, therefore, has to rely entirely on the Government's environmental policy[19], relevant statutes passed by Parliament, and rules and regulations. The bulk of environmental laws in Malaysia relate to environmental protection in general and there are only a few of them specifically relevant to the protection of the marine environment.

A. The Environmental Quality Act 1974 and the regulation of marine pollution

The main legislation in Malaysia for environmental protection is the Environmental Quality Act 1974 (EQA), which deals with "the prevention, abatement, control of pollution and enhancement of the environment". The general scheme of the Act, however, appears to be control oriented rather than geared towards prevention.[20] Two limitations can be identified in the Environmental Quality Act 1974, which clearly go against effective regulation of marine pollution.

The territorial application of the EQA is limited: First, the scope of the territorial application of the Act is limited only to the "Malaysian waters", which is defined as "the territorial waters of Malaysia".[21] Therefore, the Act is applicable only within the territorial sea of Malaysia, which may extend up to 12 nautical miles from the baselines. The Act is not at all applicable to the Exclusive Economic Zone (which may extend up to 200 nautical miles from the baselines) and the Continental Shelf of Malaysia.

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[19] The Thrust Four of the 9th Malaysia Plan (2005-2010) - "To improve standard and sustainability of quality of life" - undertakes to address the issue of 'ensuring better protection of the environment and more efficient usage of natural resources', in line with the 9th Principle of Islam Hadhari: 'safeguarding of the environment'. "National Policy on the Environment" which integrates the three elements of sustainable development: economic, social and cultural development and environmental conservation was formulated and approved in 2002.

[20] Terri Mottershead (ed.), *Environmental Law and Enforcement in the Asia-Pacific Rim*, (Sweet & Maxwell Asia, 2002), 273.

[21] Section 2, Environmental Quality Act, 1974.

The subject-matter application of the EQA is limited: At the time when EQA was drafted, the need for the protection of the marine environment was not so seriously felt like today and it appeared that the drafters had more in mind about land-based pollutants. The EQA has only two provisions which directly relate to marine pollution and can be said as far short of the effective regulation of the modern threats of marine pollution. Section 27 of the Act prohibits discharge or spillage of any oil or mixture containing oil without license into Malaysian waters in contravention of the acceptable conditions specified under section 21. The perpetrator shall be liable to a fine not exceeding 500,000 ringgit or to imprisonment not exceeding 5 years or to both.[22] There are some defences for the perpetrator.[23]

Section 29 prohibits discharge of environmentally hazardous substances, pollutants or wastes without license into the Malaysian waters in contravention of the acceptable conditions. The punishment is the same as in Section 27. A Sessions Court in West Malaysia or a Magistrate of the First Class in East Malaysia has jurisdiction to try any offence under the Act.[24] "Polluter pays" principle can be found in Section 46E of the Act, which provides that if any other person has suffered loss or damage to property by reason of the commission of an offence, the offender has to pay compensation for loss or damage to property or any other costs or expenses.

B. Merchant Shipping Ordinance 1952 [25]

This is one of the oldest legislation adopted on the basis of the British Merchant Shipping Act. Under Section 306 D, where there is an escape or likely escape of oil or harmful substance from a ship that may pollute or likely to pollute Malaysian waters, the Director of Marine, in consultation with the Director-General of Environmental Quality, may issue notice to the owner of the ship requiring to take certain steps to prevent or reduce the pollution. Under Section 306 F, if the requirement is not complied with, the owner is guilty of an offence and liable to a fine not exceeding 50,000 ringgit per day throughout the default period.

Although Part VA of the Merchant Shipping Ordinance deals with marine pollution, it is not at all clear whether it has complied with any international convention on marine pollution, in particular MARPOL 73/78, to which Malaysia is a party.

C. Merchant Shipping (Oil Pollution) Act 1994 (as amended in 2005)

Merchant Shipping (Oil Pollution) Act 1994 was passed by Parliament in 1994 to give legal

[22] Section 27, *ibid*.
[23] Section 28, *ibid*. Defences include to secure the safety of the vessel, and to save human life.
[24] Section 46, *ibid*.
[25] Federation of Malaya Ordinance No. 70 of 1952, as amended up to date.

effect to the 1969 Civil Liability Convention and 1971 Fund Convention. When Malaysia acceded to the 1992 CLC and 1992 Fund Convention in 2005, sweeping amendments to the Merchant Shipping (Oil Pollution) Act 1994 were made for the statute to be in accord with the two new Conventions on civil liability for oil pollution damage to which Malaysia is a party. It is very much commendable to pass a comprehensive statute like this, in compliance with international conventions which are legally binding on Malaysia.

Merchant Shipping (Oil Pollution) Act 1994 (as amended in 2005) almost entirely complies with the 1992 CLC and the 1992 Fund Convention. The significant advancement of the Act is the expansion of Malaysia's jurisdiction in respect of marine pollution to include the Exclusive Economic Zone of Malaysia. It can be said that this statute fills the gap in the territorial application of the Environmental Quality Act 1974 and the Merchant Shipping Ordinance 1952, both of which have legal effect only within the territorial sea of Malaysia. The Act defines 'pollution damage' as in the Conventions and imposes strict liability on the owner of the ship for pollution damage caused by the ship in any area of Malaysia (territorial sea or EEZ). If compensation given by the ship-owner is not adequate, as a second tier, the victim of oil pollution damage can claim from the International Oil Pollution Compensation Fund (IOPC) or the Fund. The Statute acknowledges the legal personality of the Fund, which is capable of assuming rights and obligations and of being a party in any legal proceedings before a court in Malaysia.[26]

D. Exclusive Economic Zone Act 1984

The Exclusive Economic Zone Act 1984 establishes the new legal regime of the EEZ of Malaysia, which may extend to 200 nautical miles from the baselines, and also regulates activities on the continental shelf of Malaysia. Part IV of the EEZ Act deals with protection and preservation of the Marine environment. The person in charge of the protection and preservation of marine environment under the EEZ Act is the Director General of Environmental Quality.

Offences under the EEZ Act

According to the EEZ Act, there are two major offences. Under section 10, if any oil, mixture containing oil or pollutant is discharged or escaped into the EEZ from any vessel, land-based source, installation, device or aircraft, from or through the atmosphere or by dumping, it is an offence and the owner, master, occupier, or person in charge is liable to a fine not exceeding one million ringgit.[27]

[26] See Section 16(1), Merchant Shipping (Oil Pollution) Act 1994 (as amended in 2005).
[27] Section 10, the Exclusive Economic Zone Act, 1984.

Under section 14, where Malaysia's coastline or any segment or element of the environment or related interest, including fishing, in the EEZ is damaged or is threatened to be damaged as a result of a discharge or escape under section 10, the Director General may issue directions or take actions to remove, disperse, destroy or mitigate the damage or threat of damage. Any person who fails to comply with these directions is guilty of an offence and liable to a fine not exceeding ten thousand ringgit. The owner and the master of the vessel or the owner and the person in charge of the installation or device, as the case may be, are liable jointly and severally for all costs and expenses incurred to remove, disperse, destroy or mitigate the damage or threat of damage and such costs and expenses are the first charge on any property or interest held by such person.

The Director General may detain any vessel from which the oil, etc. escaped or was discharged, in the circumstances under section 14.[28] The court may, on the application of the Director General, order the sale of such vessel and the application of the proceeds of the sale towards the payment of the fine and the costs and expenses incurred.[29]

Section 36(1) of the EEZ Act is unique in that it confers full jurisdiction on the Malaysian courts to try offences under the Act and that this jurisdictional provision prevails over any other written law to the contrary. The section reads: "*Notwithstanding any written law to the contrary*, any offence committed under this Act or any applicable written law *shall be deemed to have been committed in Malaysia* for the purpose of conferring jurisdiction on a court to try that offence, and a Sessions Court or a Court of a Magistrate of the First Class shall each have full jurisdiction and powers for all purposes under this Act or such written law".[30]

Civil liability under the EEZ Act

Section 40 of the EEZ Act provides for a sort of 'compensation system' for pollution damage in the EEZ or on the continental shelf of Malaysia. In the event of damage caused to any person or property in or on, or to any segment or element of the environment or related interests within, the EEZ or continental shelf, the owner and the master of the vessel, or the owner and the person in charge of the installation or device, as the case may be, from which pollution originated, are liable jointly and severally for such damage. Liability extends to the payment of compensation for any damage caused to a person, vessel, facility, structure used in any activity, including fishing and related activities, in the EEZ or on the continental shelf. Compensation is also to be

[28] Section 15(1), *ibid*.
[29] Section 15(4), *ibid*.
[30] Section 36(1), *ibid*, emphasis added.

paid for policing and surveillance activities and activities for the protection of the environment and shipping necessitated by the damage.

Since Malaysia has the Merchant Shipping (Oil Pollution) Act 1994 (as amended in 2005) as the main civil liability statute, a comparative study needs to be made between the two enactments. As far as the scope of application is concerned, the provisions of the EEZ Act is much wider because the Merchant Shipping (Oil Pollution) Act is limited only to one pollutant (oil) and one source (vessel), whereas the EEZ Act goes far beyond that and covers other types of pollutants and other types of sources (land-based, off-shore installations, atmospheric, and dumping). Nevertheless, there is an overlapping area, namely, oil pollution originating from vessels. Significant differences in the two statutes are: (1) the compensation provision under the EEZ Act is very general whereas the compensation system under the MS (Oil Pollution) Act is much more specific and applies the two-tier mechanism, based on the 1992 CLC and 1992 Fund Convention; and (2) the authority in charge of marine pollution provisions under the EEZ Act is the Director General of Environmental Quality whereas the authority in charge of the MS (Oil Pollution) Act is the Director of Marine. As there are no cross references in the two statutes, adjustments needs to be made.

E. The need for harmonization and adjustments

A coastal state has three main maritime areas; the territorial sea, the exclusive economic zone and the continental shelf.

Legal regime governing marine pollution in the territorial sea: As far as the territorial sea of Malaysia is concerned, we will find two statutes that govern marine pollution in that area: the Environmental Quality Act 1974 and the Merchant Shipping Ordinance 1952. But it appears that there is lack of harmony between the two. First, under the former, discharge or spill in the territorial sea of oil or oily mixture itself is an offence whereas under the latter, such a discharge is not an offence. Only failure to comply with the Director's requirement or prohibition is an offence; the penalty is fine only and no imprisonment at all. The authority to oversee the regulation of marine pollution under the former statute is the Director General of Environmental Quality, whereas the authority for the latter statute is the Director of Marine. It is quite obvious that the Merchant Shipping Ordinance is not at all effective to prevent and punish maritime pollution and needs a major overhaul.

In respect of the Environmental Quality Act, it should effectively cover pollution by all types of modern pollutants that come from all sources of pollution. it is submitted that since the Environmental Quality Act is the main statute that we have to rely on to regulate marine

pollution in the territorial sea of Malaysia, its provisions concerning marine pollution should be updated in order that they are in accord with the modern needs of Malaysia as a major maritime nation, the relevant international conventions to which Malaysia is a party, and well-established international practice.

Legal regime governing marine pollution in the EEZ and on the continental shelf: With respect to the EEZ of Malaysia, we have adequate legislation to prevent and control marine pollution. The Merchant Shipping (Oil Pollution) Act 1994 (as amended in 2005) is a very up to date and effective statute in dealing with civil liability for oil pollution damage, which is applicable both in the territorial sea and the EEZ of Malaysia. The most comprehensive statute for the regulation of marine pollution in the EEZ is the EEZ Act 1984, which is wide enough to be applicable to all types of pollutants and all sources of pollution. The EEZ Act provides for a reliable penalty provision plus a compensation system that makes the polluter to pay for any damage to person, property, or environment. As far as the continental shelf of Malaysia is concerned, the Continental Shelf Act, 1966, appears to be not very helpful because it is based on the definition of 'continental shelf', taken from the old1958 Geneva Convention on the Continental Shelf. Malaysia as a party to UNCLOS 1982 has an obligation to follow its definition of continental shelf by amending the Continental shelf Act. In any case, it is fortunate that the provisions of the EEZ Act 1982 takes care of marine pollution not only in the EEZ but also in respect of the continental shelf.

VIII. Conclusion

Malaysia is bound by the international marine environmental conventions to which it is a party. The most important obligation as a party is to perform the provisions of the conventions in good faith. If it is necessary to implement the convention within the territory of Malaysia, or if its provisions will affect the rights and duties of the Malaysians, it is imperative for Malaysia to promulgate a new statute or amend existing statutes to be in accord with the convention.

Malaysia has responsibilities for the prevention and control of marine pollution both as a coastal state and as a flag state. As a coastal state Malaysia must prevent and regulate all types of pollutants (not only oil) that come from all sources of pollution (vessel-based, land-based, from air space, sea-bed activities, dumping, etc.) in its entire maritime territory (territorial sea, EEZ, continental shelf). As a flag state, Malaysia needs to regulate all Malaysian ships (flying the Malaysian flag) to be in strict compliance with safety regulations and requirements under international conventions and IMO resolutions for prevention and control of marine pollution. Tankers registered in Malaysia need to follow requirements under MARPOL 73/78, and the 1990 OPRC Convention.

A critical examination of the Malaysian statutes regulating marine pollution demonstrates the fact that there is an apparent lack of harmonization among them. It is submitted that a proper harmonization is inevitable which may require amendments to the Merchant Shipping Ordinance 1952 and some adjustment of the Environmental Quality Act 1974.

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