The EU Ship-Source Pollution Directive and Recent Expansions of Coastal State Jurisdiction

Alan Khee-Jin Tan

Over the past decade, the European Commission has responded in a muscular fashion to pollution by ships in ‘Community waters’. The political pressure for such a response arose from several major pollution incidents involving foreign-flagged tankers carrying heavy oil. The most serious of these incidents were the Erika and Prestige tanker spills in 1999 and 2002 off the coasts of France and Spain, respectively. As a result, the Commission as well as the EU member states have taken an avowedly pro-environment stance at the International Maritime Organisation (IMO) to tighten regulation over shipping, through measures that include the acceleration of the phasing-out of single-hulled vessels, the prohibition of such vessels’ passage through EU waters and the declaration of a large Particularly Sensitive Sea Area in Western European waters.

A more recent and controversial move entails the legislation of criminal penalties against various actors for causing pollution from ships within EU waters, even in circumstances where such pollution is non-intentional or accidental. These measures – adopted in the form of the EU Ship-Source Pollution Directive of 2005\(^1\) – have been pursued unilaterally, as opposed to at the IMO. The Directive has given rise to considerable concern within the maritime industry, particularly among non-EU ship-owners. The main criticism has been that it conflicts with EU member states’ obligations under general international law – in particular, the IMO’s MARPOL 73/78 Con-

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This chapter examines recent moves in the EU (and elsewhere, as in Australia) to expand coastal state jurisdiction over shipping activities where such jurisdiction is either lacking or questionable under existing international law. It is argued that recourse to the IMO must be maintained for the continued stability of the international rule-making process, even if coastal states may feel that their moves are justified by pressing environmental imperatives.

**ISSUES**

In 2005, a coalition of shipping industry interests lodged a challenge to the Directive’s validity before the High Court of Justice of England and Wales. In July 2006, the High Court issued its decision,\textsuperscript{3} referring the Directive to the European Court of Justice (ECJ) after finding that there were well-founded arguments for challenging its validity. In essence, the Directive raises the following issues, which correspond to the points canvassed before the ECJ:

1. Under the MARPOL 73/78 Convention, an exception exists under Regulation 11(b), Annex I, for discharges resulting from damage to a ship or its equipment.\textsuperscript{4} The exception does not apply, however, if the owner or the master has acted either with intent to cause damage, or recklessly and with knowledge that damage would probably result.\textsuperscript{5} MARPOL 73/78 is silent as to the conduct of parties other than the owner or master. Under the Directive, discharges within the exclusive economic zone (EEZ), straits used for international navigation or the high seas will attract criminal liability ‘if committed with intent, recklessly or by serious negligence’.\textsuperscript{6} In this regard, there is no liability for the owner, master or crew


\textsuperscript{4} The wording of Regulation 11, Annex I is similar to that in Regulation 6, Annex II. The Annexes contain regulations for the prevention of pollution by oil and noxious liquid substances in bulk, respectively. These regulations now appear as Regulation 4(2), Annex I and Regulation 3(2), Annex II in the revised versions of the two Annexes that came into force on 1 January 2007. This chapter uses the old numbering, as did the ECJ.

\textsuperscript{5} MARPOL 73/78, Annex I, Regulation 11(b)(ii).