



AFE BABALOLA
UNIVERSITY
ADO EKITI, NIGERIA

THE JOURNAL OF SUSTAINABLE DEVELOPMENT LAW AND POLICY

Volume 3 Issue 1 Spring 2014

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VESSEL-SOURCED POLLUTION: A SECURITY THREAT IN MALAYSIAN WATERS

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ABSTRACT

Vessel-sourced pollution is one of the major sources of marine pollution and it encompasses accidental discharge of oil, intentional discharge of oil (like discharge from ballast tanks), chemicals, dumping, etc. The United Nations Convention on the Law of the Sea (UNCLOS), 1982 and some other conventions make provisions concerning protection of marine environment and this has the support of many other regional, national and global institutions. In Malaysia, the consent of the relevant authority is required for a discharge of oil that is above the quantity allowed under the law. However, despite the fact that there have been enormous regulations on the pollution of the marine in Malaysia, it appears that pollution by vessels is still on the increase. The legal framework stipulating conditions for discharge of oil at seas are well founded in many jurisdictions like Malaysia but some of the legal regulation appears to be inadequate, thereby threatening sea's environment and causing the irreparable damage to marine resources and human safety. This paper considers the number of ships that traverse the straits of Malacca and the implications of pollution arising therefrom. It recommends for consent of the appropriate authority and a stiffer penalty for every discharge of oil by vessel in order to avert hazardous damage arising from pollution by ships.

Keywords: Vessel-Sourced, Pollution, Security, Threat, Malaysian, Waters.

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1. INTRODUCTION

It is saying the obvious that marine environment represents a great economic value to a nation that is endowed with sea. Malaysia like other coastal nations has the right to explore and exploit its living and non-living marine resources.¹ A nation with sea in order to benefit from it enacts laws on its usage in addition to other international instruments to minimize pollution from ships. The term 'pollution' includes any introduction by man of any substance into the marine environment which results or is likely to result in such deleterious effects to harm marine activities and becomes hazardous to human health.² The tremendous sophistication in appreciating the dangers to the earth's environment and the irreparable damage which may be caused by human activity has resulted in increased conscious effort by government and non-governmental organisation to invoke legal protection of not only marine environment but the environment generally. The results of these efforts include the ratification of Conventions, Protocol, Treaties, etc. to tackle the menace of marine pollution. It has been somewhat difficult to address this menace at ports because it is not a matter that concerns environment in isolation, but it relates to human activities which are perhaps responsible for the dilemma.

The 1954 International Convention for the Prevention of Pollution of the Sea by Oil generally prohibits the discharge of oil by ships within 50 miles of land and the International Convention for the Prevention of Pollution from Ship 1973 is concerned with all forms non-accidental pollution from the ships. Therefore, the 1973 Convention supersedes the 1954 Convention³ as it was ratified later. Other conventions in this regard include International Convention for the Prevention of Pollution from Ships 1973/78 (MARPOL), Rio Declaration 1992, United Nations Convention on the Law of the Sea (UNCLOS) 1982, etc. Importantly, International Maritime Organization (IMO) in the wake of the spill from the Liberian tanker Torrey Canyon which impacted the British coastline drafted the Intervention Convention in 1975, yet flag states cannot always be relied upon to contain pollution from marine casualties before they adversely affect coastal nations. Before the entry into force of the Intervention Convention in 1975, coastal

1 Muhammad Rosni Othman, 'A New Management Structure for Malaysian Economic Exclusive Zone' (2012), Vol.4 No.1, TIJOSS, p.49.

2 UNCLOS 1982, Article 1(1) (4).

3 Shaw M.N, *International Law*, (3rd edn, Grotius Publication Limited, 1991), p. 555. See also Frank .V, *The European Community and Marine Environmental Protection in the International Law of the Sea*, (Martinus Nijhoff Publishers, 2007), at p.187.

states had no right to take action against spills outside of their territorial waters, notwithstanding the fact that the incident might impacted their waters or coastlines. The Intervention Convention gives states who are signatories, the right to intervene in the high seas if considered necessary to protect their interests after due notification of the flag state.

Furthermore, the 1982 Convention specifically makes provisions concerning protection of marine environment and interestingly it has the support of many other national, regional and global institutions. It has been asserted that vessel-sourced pollution is one of the major sources of marine pollution and it includes intentional discharge of oil (like discharge from ballast tanks), accidental discharge of oil, chemicals, dumping,⁴ etc. However, despite the fact that there have been enormous regulations on the pollution of the marine, it appears that the menace is still on increase or higher degree. The paper considers the number of ships that traverse the straits of Malacca and the implications of pollution arising therefrom. The principal question considered in this paper is whether the relevant laws in Malaysia are sufficient to address the menace of oil discharge or pollution by ships in Malaysian waters having regards to the provisions of EQA1974 which only requires consent of the relevant authority in the case of discharge of oil above the allowable quantity?

This paper is divided into six sections. The first section is this introductory part which talks about conceptual framework on pollution. The second section discusses various ideas postulated by scholars on marine pollution especially the IMO which has developed strategies and a global programme with the aims of assisting on the prevention of marine pollution. The third section examines how pollution constitutes security threat in Malaysian waters. Section four of this paper highlights striking clause in the Malaysian Environmental Quality Act 1874 on the issue of maximum allowable limit of discharge or pollution a person or a ship is allowed to discharge into the environment without the consent of the licensing authority. The fifth section considers the Straits of Malacca as the most convenient route linking the East Asia to the Middle East oil producers, Africa and Europe. It also looks at the implications of heavy shipping activities in the Straits of Malacca. While the six section is the concluding segment of this paper. It recommends that consent of the appropriate authority and a stiffer penalty for every discharge of oil by vessel in order to avert hazardous damage would protect marine environment and ensure minimal pollution.

4 Sohn L.B and Noyes J.E, *Cases and Material on the Law of the Sea* (Transnational Publisher, 2004), p.684.

2. IMPLEMENTING THE INTERNATIONAL FRAME- WORK ON MARINE POLLUTION

There have been increased global interests and efforts from States to minimize pollution from ships through cooperative actions. One of the principal means of achieving this objective is through interaction with the International Maritime Organisation (IMO). The IMO is an established agency of the United Nations saddled with the mandate to address the problem of marine-based pollution. Since the inception of the IMO in 1958, it has developed comprehensive sets of treaty, non-treaty instruments, strategies and global programmes, to prevent and control marine pollution from vessel-source.⁵

Under international law, port states have jurisdiction to control the overboard discharges of foreign-flagged ships. The major focus of environmental enforcement is fundamentally applicable to overboard activities, but in the result of pollution violation convictions, port states have been using their power to control onboard activities on cruise vessels through plea bargain agreements establishing environmental observance programmes.⁶ It has been argued that the only effective way of preserving environmental control policy is to provide a virile incentive for the shipping industry to purposefully regulate shipboard environmental activities.⁷

However, developing states in particular are faced with administrative, technical and legal wherewithal to implement the provisions of these major conventions.⁸ Developing and developed nations often rely on marine resources and yet lack capacity to combat and reduce marine pollution that is threatening these marine resources. Thus, in spite the efforts of the international maritime community, oil spillage by ships continue to occur at sea

5 The strategies include: Encouraging widest acceptance and implementation of the standards at the global level; encouraging the widest practicable standard in matters of marine pollution from ships and maritime safety; providing effective legal, technical and scientific cooperation of governments for the prevention of pollution by vessels; strengthening the national and regional efforts to prevent and control pollution; and helping the IMO's members particularly the developing states to implement these strategies. See A Blanco-Bazan, "The Environmental UNCLOS and the Work of IMO in the Field of Prevention of Pollution from Vessels" in Andrew Kirchnerer (ed), *International Marine Environmental Law: Institutions, Implementation and Innovations*, (Kluwer Law International, 2003), p. 31. Ibid. See also Frank .V, (no.8) at p.90.

6 Wright A.S, 'Beyond the Sea and Spector: Reconciling Port and Flag State Control Over Cruise Ship Onboard Environmental Procedures and Policies'(Fall 2007) Vol.18, Duke Environmental Law & Policy Forum, pp.215-216. See also the decision of the court in *Spector v Norwegian Cruise Line Ltd* (2005) 545 U.S 119,129.

7 Ibid at p. 217.

8 Ibid, at p.715.

which precipitate pollution of the ports and marine environment as a whole. It is not surprising that at a time when greater efforts are being put in place to gear-up economic growth and when international trade is on the increase, the pressure of the increment or economic development is more complex on the ports. Accordingly, this economic development would ordinarily bring about expansion of ports which will involve land dredging and reclamation which naturally poses environmental hazards to the marine environment and health safety of the nation.⁹

3. HOW DOES VESSEL- SOURCED POLLUTION CONSTITUTE SECURITY THREAT IN MALAYSIAN WATERS?

One may wonder about the nature of pollution by ships that could be regarded as security threat. The position is that where there is a wanton discharge of oil by a ship, and such discharge is intentional or of high magnitude, it is regarded as maritime security. The vessel-sourced operational, intentional or accidental discharge arises when pollutants such as oily-water, noxious liquids, sewage, garbage, or contaminated ballast water are released into the marine environment.¹⁰ In other words, in the maritime law perspective, it is intentional damage and/or unintentional but severe pollution that are considered as maritime security.¹¹ In order to face these challenges of pollution that can threaten maritime security, the Malaysian parliament has passed a series of legislations for the smooth running of marine environment, however, effectiveness of these legal arrangement or regime in combating the menace in Malaysian waters are issues which this research addresses.

There is a need for adequate legal regulation to decongest marine environment from the threat of avoidable pollution. The threat of pollution resulting from oil spillage in ports will be alarming if there is insufficient legal framework to combat it. Thus, the occurrence of oil spillage might have a catastrophic effect on the public and health security of states where the legal regime is weak. In order to face these challenges of pollution control that can

⁹ Ibid. See also Frank .V, (no 5) at p.90.

¹⁰ Juita Ramli, 'Dumping in Malaysian Seas: An Assessment of the Present Situation vis-à-vis International Legal Regimes' (1998), vol.3 (1), Asia Pacific Journal of International Law, p.24.

¹¹ Klein .N, *Maritime Security and the Law of the Sea*, (Oxford University Press: New York, 2011), 318.

threaten marine environment, the Malaysian parliament have passed a series of legislations for the smooth running of waters, however, effectiveness of these legal arrangement or regime in combating the menace are issues to reckon to with.

It is sacrosanct that the primary responsibility of controlling or regulating pollution from ships rests with the flag state which is the country of origin of ships, yet some flag states have been unwilling to discharge this onerous duty due to lack of infrastructure and the flag of convenience which has now become the practice of ship owners.¹² Therefore, the exercise of powers of control and jurisdiction by the port state over the vessel-source pollution has become imperative due to the lackadaisical attitude of flag states.

3.1 Ship Pollution Incident of Pangkor

The issue of pollution threatens the security of marine environment because the aftermath of any inadequacy with regard to negligible discharge by ships calling at ports will seriously affect the populace taking a cue from the number of ships traversing the Straits of Malacca as an instance.¹³ A vivid example of ship pollution incident is the 1995 pollution incident where there was a dumping of 42 drums of potassium cyanide near a jetty on the island of Pangkor in Perak State, Malaysia is still fresh in memory. The incident resulted in the killing of thousands of fish in three farms and the total estimate of the loss was put at RM 350,000 (about USD120, 000) as of 1996. The inadequacy of the legal framework was responsible for thwarting the apprehension of the offender and the investigation of the case.¹⁴ Research has shown that while it is not feasible to predetermine the impacts of a specific discharge by a ship with any certainty, it is possible to assess the susceptibility of discharge in an area to a particular maritime port. It was argued that sensitivity index mapping of the area where the discharge occurred was considered appropriate at the time of oil pollution, however reservation have been expressed subsequently that such an approach did not

¹² See Ho-Sam B, 'Port State Jurisdiction and Article 218 of the U.N Convention on the Law of the Sea' (April, 2009), Vol.40, No.2, JMLC, pp. 291-292. See also Hare J. 'Port State Control: Strong Medicine to Cure a Sick Industry' (1996-1997) vol. 26, JICL, pp.571-572, Odeke A, 'Port State Control and U.K Law' (1997), 28 JMLC, at pp. 657 & 659.

¹³ Mohd Azmi bin Mohd Rusli, 'The Application of Transit Passage Regime in Straits Used for International Navigation: A Study of the Straits of Malacca and Singapore' (2011), vol.4 no.4, Asian Politics and Policy, p.554.

¹⁴ Juita Ramli, 'Dumping in Malaysian Seas: An Assessment of the Present Situation vis-à-vis International Legal Regimes', (1998) Vol.3, Asian Pacific Journal of Environmental Law, p. 26.

take into consideration the actual sensitivity of coastal resources and values for a discharge in coastal areas.¹⁵

Arguably, the above is just the tip of an iceberg given the various discharges in marine environment which threatens the security of a port state. It is certain that laws are in place but the adequacy, effectiveness and implementation of the laws is a major concern.

3.2 *Dumping of Oil by Ships: The Position of EQA 1974*

There are many legal frameworks enacted in Malaysia for the purpose of preventing discharge of oil by foreign ships but the major enactment is the Environmental Quality Act.¹⁶ Other includes the Merchant Shipping (Oil Pollution) Act,¹⁷ Environmental Quality (Scheduled Wastes) Regulations,¹⁸ Exclusive Economic Zone Act¹⁹ and Continental Shelf Act.²⁰ All these Acts talk about the responsibilities and obligations of public and private sectors over the issue of discharge of oil in the maritime environment. In fact, the Yang Di-Pertuan Agong²¹ has the discretion to make regulations concerning measures to be taken in any safety zone for the protection of the marine living resources from harmful agents like discharge of oil at sea ships.

The Environmental Quality Act (hereinafter referred to as EQA) came into operation on the 15th April, 1975 with the core objective of preventing pollution. This enactment was amended in 1996 through the Environmental (Amendment) Act that came into force on 1st August, 1996. The EQA is presently the primary law on pollution control in Malaysia.²² A striking

15 Pourvakhshouri S.Z, Shattri B.M, Zelina Z.I and Noordin A. 'Decision Support System in Oil Spill Management International Archives of Photogrammetry, Remote Sensing, and Spatial Information Sciences' (12 – 14 July 2006) Vol. XXXVI - Part 2 Vienna, ISPRS Technical Commission II Symposium, 93. Also available at <http://www.isprs.org/proceedings/XXXVI/part2/pdf/pourvakhshouri.pdf> (accessed on (25/4/12)).

16 Environmental Quality Act, 1974.

17 Merchant Shipping (Oil Pollution) Act.

18 Environmental Quality (Scheduled Wastes) Regulations, 1989.

19 Exclusive Economic Zone Act 1984.

20 Continental Shelf Act, 1966.

21 Malaysia operates a parliamentary system of government with head of government and ceremonial head. The Yang-di Pertuan Agong is the ceremonial head or head of state who acts in accordance with the advice of the Cabinet. The Prime Minister on the other hand is the head of government appointed among the Cabinet members. The practice in Malaysia is similar to that of the British government except in certain instances where some distinguishable approaches appear. For example, the ceremonial head is rotational in Malaysia among the Yang di Pertuan Agong for a specified period while in Britain, the Queen is the permanent ceremonial head. See Ahmad Ibrahim, 'Malaysia as a Federation' (1974) 7, *Journal of Malaysia and Comparative Law*. See also Sharifah Suhana Ahmad, *Malaysian Legal System*, (Butterworth, 1999), p. 69. See also, Tun Mohammad Suffian Bin Hasim, *An Introduction to the Constitution of Malaysia* (2nd edn, Malayan Law Journal, 1976), pp. 18-19.

feature of the latest enactment is that dumping activities by ships which was hitherto not part of the previous enactment was included. The inclusion of dumping in the latter enactment supposes that discharge of oil and wastes into the Malaysian territorial seas by ships is an offence except through the conditions specified under section 21 of the Act. The Act provides:

No person shall unless licensed, discharge or spill any oil or mixture containing oil into Malaysian waters in contravention of the acceptable conditions specified under section 2.²²

It was argued that for a ship to be allowed to discharge oil at sea, the condition specified by the Minister in consultation with Environmental Quality Council²³ is a prerequisite. However, a critical examination of the provisions of the Act and other related enactments shows that the Minister has not specified the conditions.²⁴ This failure on the part of the relevant authority to specify conditions for discharge is a serious aberration or lacuna on the legal framework and it will give room or opportunity for non-observance or compliance with the provisions of the law on the discharge of oil in the Malaysian sea. It is contended that the Department of Environment which is saddled with the enforcement of the law vis-a-vis oil spillage and dumping lacks enforcement mechanism, thus, it has to rely on other agencies like MMEA.²⁵

4. HIGHLIGHTS OF THE LEGAL FRAMEWORK ON LICENSE FOR DUMPING OIL

The Malaysian Environmental Quality Act raises the question of license under part III, section 11 as a prerequisite for the discharge of oil into Malaysian sea. This presupposes that a ship is not allowed to discharge oil into Malaysian water except a license in respect thereof has been granted by the licensing authority. Accordingly to the Act under consideration, the licensing authority in this regard by virtue of section 10 is the Director General. A particular striking clause in this legal regime is the issue of maximum

22 Maizatun Mustafa, *Environmental Law in Malaysia*, (Wolters Kluwer, 2011), p. 49.

23 See generally sections 27, 29 and 34B of the EQA as amended.

24 Maizatun Mustafa, (no. 22) at p.49.

25 Juita Ramli, at (no.15) p.34.

26 Kasmin Sutarji, 'Enforcing Ship-based Marine Pollution for Cleaner Sea in the Straits of Malacca' (2010), 3(Special Issue), *Environmental Asia*, p. 62.

allowable limit of discharge or pollution a person or a ship is allowed to discharge into the environment without the consent of the licensing authority.²⁷ There appears to be problem with this provision, in the first place a person or ship should not be allowed to discharge any quantity of waste into the water or sea except with the consent and approval of the relevant authority. The stipulation of a particular quantity means that if a discharge is not up to the maximum allowable, the consent of the minister and other authority may be dispensed with before a discharge takes place. The provision of this law is silent where for instance, the discharge is being carried out or done by persons or ships in piece meal and each of the discharge is not up to the minimum quantity specified under the Act. For this reason, it is recommended that discharge of whatever quantity into the sea should be with the consent of the appropriate authority who shall in turn determine the quantity to be discharged and the appropriate sum to be paid, anything sort of this may render the Act ineffective as regard prohibition of discharge of oil. It flows therefore from the above that the authority vested with the power of inspection will have to apply certain measures in order to tame the hazardous impact of the substance discharged. It is interesting to mention that the amount to be paid by the ship owners to the authority for the discharge will be used to liquidate the expenses incurred to clear such discharge and this will avert the side effects of such discharge to the port and marine environment generally.

It also merits mentioning that where a licensed ship has failed to observe the terms and conditions for the discharge of oil into the marine environment in Malaysia, the maximum liability is RM 25,000 (over USD8, 300.00) or imprisonment for a period not exceeding 2 years or both and RM1,000 (About USD330) every day upon the continuation of the offence after the notice has been served.²⁸ Apart from the fact that the maximum penalty may not be adequate if compared with what is obtainable in neighboring jurisdiction like Singapore where the maximum penalty is USD 500,000.00.²⁹ The Singapore Prevention of Pollution at the Sea also empowers the Maritime and Port Authority (MPA) to take preventive measures to prevent pollution, including denying entry or detaining ships. Therefore, there is a

²⁷ EQA section 11 (c).

²⁸ Section 16.

²⁹ See for example, the Prevention of Pollution at the Sea Act, 1990. This Act came into force on 1st February, 1991. This Act to give effect to the International Convention for the Prevention of Pollution from Ships 1973 as modified and added to by the Protocol of 1978, and to other international agreements relating to the prevention, reduction and control of pollution of the sea and pollution from ships, etc.

need to modify this provision of the law, as it appears that monetary liability sometimes fail to serve as deterrence for the continuation of an offence by the offenders. It is therefore recommended that in the case of continuation of the offence after the service of the notice on the offending ship through the company or owner, the subsequent line of action should be to commence criminal prosecution against the offender or denial of access to such ship by the Malaysian Port Authority. This prosecution may be commenced by the environmental department in consultation with the office of the Attorney-General and the offending ship may be detained pending the outcome of the criminal prosecution. By this suggestion, owners of ships may be wary of their activities with regard to wanton discharge as they would not want to run at lost which could arise from the detention of their ships.

Furthermore, Malaysia as a sovereign state has unfettered right to exploit her natural resources and protect the marine environment through policies. It is on this premise that the Exclusive Economic Zone³⁰ prohibits discharge or escape of oil from ships resulting in damage or pollution of the marine environment and where such occur within the exclusive economic zone of Malaysia, the owner and master of the ship may be liable jointly and severally. The liability of the owner and master of the ship is extended to the compensation for the damaged property. Importantly, claims in this respect may be filed before the Session Court or Magistrate of First Class Grade the High Court, in Malaysia depending on which of these courts have jurisdiction over the amount claimed.³¹

It is observed that the provision of the EQA is silent on the main concept of discharge, place, deposit or disposal of pollutant substances by ships. Although these words may be interpreted to include dumping activities, there is a need for the Act to go further to ascertain the limitation and extent of their application vis-à-vis pollution at a Malaysian Exclusive Economic Zone. Therefore, the requirement of further subsidiary legislation in this regard may be necessary in order to combat marine pollution by ships.³² It may be argued also that although the Act address the issue of dumping activities, the provisions appear to be insufficient or imprecise for the effective management of dumping at sea.³³ Hence, for Malaysia to achieve the targeted goal on prevention of discharge by ships, there is a need for the

30 The Exclusive Economic Zone Act, 1984.

31 Ibid, Section 40(4). See also Maizatun Mustafa, (no. 22) at p.225.

32 Juita Ramli (no. 25) at p. 35.

33 Ibid, 39.

provision of "Port Reception Facility" possibly near the ports to avert any large extent discharge at sea.³⁴

Port Reception Facility is a kind of palliative measure provides by any international shipping ports to collect oily mixtures, residues and garbage that are generated from a sea going ships. Where this kind of arrangements are in place at a port, it must be such that the receiving process can be performed as quick as possible to avert undue delay of ships and must be sufficient to receive the capacity of the dirty to be discharged.³⁵ The IMO has encouraged state parties to provide good reception facilities in order to achieve effective implementation of provision of the MARPOL on prohibition of discharge of oil at sea by ships. Therefore, the acceptance of the 1996 Protocol to the London Convention in this respect will be of immense assistance to realise the benefit of contracting states and to avoid security threats likely to be the resulting effect of wanton discharge of oil in Malaysian waters.

4.1 Efficacy of the MMEA Act on Pollution by Ships.

It is essential to mention that prior to the establishment of the MMEA, there were about eight agencies in existence enforcing over 40 federal laws, agreements and regulations in Malaysia.³⁶ One of the main objectives for setting up the MMEA was to resolve the interface between the security agencies with regards to operations, functions and jurisdictions.³⁷ The intention of the Malaysian parliament in promulgating the MMEA Act may be gleaned from the long title to this legislation itself which is basically on the enforcement of any breach of law in the use of maritime zone. However, the question is whether the coming into force of the Act could achieve its aims of adequate enforcement mechanism against erring ships.

A number of flaws are noticeable from the Act. First, the Act is more concerned about the aftermath of failure to observe maritime ethics. The Act is silent on any preventive strategy or measure put in place at ports to thwart any act that can expose ports and of course placing the nation generally under pollution threats. Second, the Act only talks about suppression of the commission

³⁴ This proposition is the main objective of the London Convention and the 1996 Protocol.

³⁵ See Marine Insight, available at <http://www.marineinsight.com/marine/marine-news/featured/what-is-port-reception-facility/> (accessed on 26/04/14).

³⁶ Irwin U.J. Ooi, 'The Malaysian Maritime Enforcement Agency Act 2004: Malaysia's Legal Response to the Threat of Maritime Terrorism' (2007) 21 A&NZMLJ at p.75. See also Zulkifli Bin Abu Bakar, 'Strengthening Comprehensive and Cooperative Security in the Asia Pacific: Enhancing Maritime Security- Law Enforcement in Malaysia.' Available at www.isis.org.my/files/24APRWEB/Zulkifli_Abu_Bakar.pdf (accessed on 27/11/12).

³⁷ Ibid.

of an offence in maritime zones and not specifically at ports, which invariably makes it impossible for the Malaysian Maritime Enforcement Agency (MMEA) to enforce the law.³⁸ It is argued that MMEA Act will achieve its main objective of maintaining law and order at maritime zones if its enforcement starts from ports because ports are the routes of all maritime security threats.

Furthermore, the principle of hot pursuit in the case of wanton discharge of oil by ships which is an established practice under customary international law in article 111 of the 1982 UNCLOS is obviously not included under the MMEA Act. The right of hot pursuit can be exercised by the MMEA where a foreign ship violates the national laws like the MMEA Act that are applicable in Exclusive Economic Zone, Contiguous Zone, and Territorial sea. If the provision is inserted under the Act, the MMEA would have the right as an agency of a coastal state to pursue foreign flagged ship that violates Malaysian national laws through the high seas.³⁹ In the case of *M/V Saiga No.2 (St Vincent and the Grenadines v Guinea)*⁴⁰, where the International Tribunal on the Law of the Sea (ITLOS) emphasised the need for a stringent approach to be taken with respect to Article 111 of the UNCLOS 1982. Therefore, in case of violation like indiscriminate discharge of oil, firearms, bombs, importation of prohibited goods, etc. by foreign ships which culminated in hot pursuit, the MMEA as well as prosecutor would be able to refer to national law which a foreign ship has breached without necessarily referring to international convention.⁴¹ It has however been asserted that MMEA lacks adequate mechanism for a right of hot pursuit in the case of indiscriminate discharge of oil by ships because its Bombardier 415 multi-purpose amphibious aircraft which detect oil slick at sea, cannot stop ships for oil slick and its activities could be disturbed by weather.⁴² Even still there is a need for continuous training of the MMEA's officers, otherwise the purchase of more or strong aircraft may not yield positive result.⁴³

38 For a better appreciation of this argument, see the long title to this enactment which is very specific on the area of operation of the agency, the maritime zone of Malaysia.

39 Abdul Ghafur H, *Public International Law: A Practical Approach*, (3rd edn, Sweet and Maxwell Asia, 2011), p.285. See also Malcolm. E, 'The Law of the Sea' in Malcolm Evans (ed), *International Law*, (Oxford University Press, 2010), pp. 667-668.

40 This case was decided on the 1st July, 1999.

41 Abdul Ghafur .H, and Mustafa Maizatun, 'Reforming Laws Relating to the Protection of the Marine Environment in Malaysia' being a report submitted to the Law Reform Committee, Prime Minister's Department Malaysia on 15/10/11, pp. 53-54.

42 Kasmin Sutarji (no. 26) at p. 63.

43 Similar view was expressed concerning the Australia Navy. See Gough .A, 'ADF Amphibious Capacity: Implications for Navy' in Gilbert G.P and Davitt R.J (eds), *Australian Maritime Issues 2005*, (Sea Power Centre, 2005), p.63.

Fourth, the MMEA Act is silent on the qualification of a civil servant to be appointed as the Director General of the MMEA. There is a need to advance in the composition of the MMEA to be able to ride away port insecurity arising from oil slick. It is saying the obvious that port security is one of the ways of protecting national security, for this reason, appointment of competent personnel in the composition and appointment of MMEA's members will be a synergy to a safe port. Knowledge of port, pollution and maritime security affairs should be an essential qualification of a person to be appointed as the Director-General of the MMEA. Since the MMEA is now the sole agency of maritime enforcement in Malaysia, this gap needs to be addressed by inserting a provision in the MMEA Act that will make only civil servants with requisite knowledge of port, pollution, maritime security is appointed as the Director General. Where this is lacking, it is doubtful if the agency would achieve its mandate if a non-technocrat is put at the helm of affairs. Where a Director-General who is not a technocrat in port, pollution and maritime security is appointed to manage maritime affairs, obviously he would lack the sense of controlling, directing and managing other officers of the MMEA and all other security agencies involved in the struggle to build national security at border ports. Accordingly, there is need for a provision under the MMEA Act that will make it obligatory for a person to be appointed as the Director General of the MMEA to have a military background.

In addition to the above, the problem of managing law enforcement agencies is an obstacle in the wheel of the MMEA. It is no doubt that the seas are susceptible to threats of ships, accidental spills, illegal fishing, etc. which have given rise to degradation of the marine environment.

5. SHIP TRAFFIC IN THE STRAITS OF MALACCA AND ITS IMPLICATIONS ON THE POLLUTION OF THE MALAYSIAN MARITIME DOMAIN

The Straits of Malacca is an important sea lane in the Southeast Asia because it represents the most convenient route linking the East Asia to the Middle East oil producers, Africa and Europe. It was also reported that more than 80 per cent and 90 per cent of China's and Japan's oil respectively pass through this route.⁴⁴ The presence of heavy ships traversing the Straits

⁴⁴ Stommy-Annika M, and Grob F, 'Piracy and World Trade: The Economic Cost' in Mair S, (ed), *Piracy and Maritime Security*, (Germany Institute for International and Security Affairs, 2011), 22.

is greatly affecting the route⁴⁵ and the narrow nature of the Straits could make it easy for attackers to commandeer a ship.⁴⁶ It is saying the obvious that discharge of waste and oil spillage are characteristics of shipping activities and because of a high number of ships traversing the Straits of Malacca, the risk of incidents like an accident which could cause oil spillage is very high. Between 1978-2003, 888 accidents were reported to have occurred in the Straits of Malacca while 24 accidents were reported from 2005-2010. This means that between 1978-2010, there were 912 shipping accidents that occurred in the Straits of Malacca. From the 2010 Report of the shipping traffic in this route, 74,133 vessels traversed the Straits of Malacca. It was also indicated in the Report under consideration that 150,000 vessels are projected to pass through the lane in year 2020. The Report which shows shipping traffic in this important route between 2000-2010 is shown below:

Shipping Traffic in the Strait of Malacca, 2000 – 2010
(with the Year 2020 Projection)

Year	Number of Vessels
2000	55, 957
2001	59, 314
2002	60, 034
2003	62, 334
2004	63, 636
2005	62, 621
2006	65, 649
2007	70, 718
2008	76, 381
2009	71, 359
2010	74, 133
2020 (projection)	150, 000

Source: Marine Department of Malaysia (Mohd Hazmi Bin Mohd Rusli, 2012)

⁴⁵ Mohd Hazmi bin Mohd Rusli, 'The Application of Transit Passage Regime in Straits Used for International Navigation: A Study of the Straits of Malacca and Singapore' (2012) vol.4, No.4, Asian Politics and Policy, p.552. See also Guilfoyle D, *Shipping Interdiction and Law of the Law*, (Cambridge University Press, 2009), 54.

⁴⁶ Ibid. See also Valencia M, *The Proliferation Security Initiative: Making Waves in Asia*, (Routledge, 2005), 19.

6. CONCLUSION

In this paper, it has been shown that the general scheme of the Malaysian Environmental Quality Act is not geared towards prevention of environmental pollution but is control oriented. Therefore, to achieve the main objective of the Act preventing oil spillage by ships, there is a need for adequate enforcement mechanism. This paper also recommends that for the MMEA to achieve its mandate as the sole maritime enforcement agency in Malaysia, appointment of a qualified person as the head of the agency is one of the plausible solutions confronting the agency. It is also the position of this paper that the maximum penalty imposed for wanton discharge of oil is unreasonable if compared with what is obtainable in a neighboring country of Singapore. Although, it is argued that monetary penalty may not serve as a deterrent, but increment in the penalty up to that of Singapore might be adequate to reduce wanton discharge of oil in Malaysian waters.