

CHAPTER – 4

JURISDICTION OVER VESSEL SOURCE POLLUTION

In the previous chapter, the legal regime, both in the national and international level, for the various operational issues of shipping in connection with the prevention and control of pollution were discussed. Another related issue at this stage is to examine how international regulation shapes jurisdiction of states to prescribe the substantive rules and to bring them to bear upon the relevant target actors. Having studied the substantive content of the international rules and standards, it is imperative to understand how the jurisdiction to prescribe and enforce these rules is allocated among the different state actors.

In the context of marine pollution regulation, jurisdiction refers to the competence of the states to prescribe and enforce legislation against vessels engaged in pollution. Thus “prescriptive” or ‘legislative’ jurisdiction relates to the states competence to enact or promulgate substantive pollution control standards. These standards are often internationally agreed upon, even though international law may also endorse the prescription of national standards under certain circumstances. “Enforcement” jurisdiction is the jurisdiction to prevent or punish the actual violation of the relevant standards. “Adjudicative jurisdiction” is the power of national courts or tribunals to adjudicate prosecutions against a vessel or a person for transgressions of prescribed standards. International convention on the law of the sea (LOSC) and IMO instruments do not always draw clear distinctions between enforcement and adjudicative jurisdiction.

Therefore, an attempt is made in this chapter to review the different types of jurisdiction of various authorities and their limitations against prescription and enforcement of various measures against the violation of the technical standards and the regulations/conventions related to vessel source pollution.

It may be noted that the national law relating to the jurisdiction of the various maritime zones are given in Marine Zone Act, 1976. This is notably the most important legislation that governs the various maritime zones. The Act classifies the various zones

as territorial waters, continental shelf and Exclusive Economic Zones (EEZ). The territorial waters and contiguous zone of India extends to 12 and 24 nautical miles respectively from the base line. The continental shelf of India and the Exclusive Economic zone (EEZ) are not considered here as the study is limited to water in the port limits which falls within in territorial waters. The Central Government has exclusive jurisdiction to preserve and protect the marine environment as well as prevent and control marine pollution. Besides the MZA, 1976, Coastal Regulation Zone Notification, 1991 (as amended upto1997) was also issued by the Central Government under the Environmental Protection Act, 1986. Under this, the Central Government has unambiguous provisions to protect ecologically sensitive areas (Zone-1) and marine habitats from the threats of industrial development.

The two important international conventions related to the subject of study are the MARPOL 73/78 convention and the Convention on the Law of the Seas (LOSC convention). These conventions prescribe technical standards on various maritime issues concerning vessel source pollution.

Article 9(3) of the International Convention MARPOL 73/78, requires that jurisdiction be construed in the light of international law in force at the time of application or interpretation of MARPOL. Jurisdiction may be defined as the power of a State to affect under international law the conduct of others, by measures of regulation, adjudication or enforcement¹. Such international law as set forth in the United Nations Convention on the Law of the Sea (UNCLOS), 1982 describes the circumstances, safeguards, and geographical zones of Coastal, Flag and Port State jurisdiction, among other things. Thus, for many Parties to MARPOL, international law affects how MARPOL will be enforced².

Under International law, the two pertinent features relating to a state's prescriptive jurisdictions are the "extent" and "content" of jurisdiction. The term extent relates to the

1. Hatapaa, Marine Pollution in International Law; p-51.

2. MARPOL: how to do it –an IMO Publication, Page 18.

physical or geographical area within which prescriptive jurisdiction may be exercised. Content determines what substantive standards may be prescribed, that is, whether the standards should be internationally agreed standards or unilateral national ones.

States generally enjoy unfettered prescriptive jurisdiction within their own territories, including their internal waters and territorial seas. In relation to marine pollution control, states may generally prescribe their own national discharge standards for internal waters and territorial seas, subject to general right of ships to innocent passage in the latter³. Beyond the territorial sea prescriptive jurisdiction must be specifically conferred by international law, both in relation to its extent and content.

The other critical aspect of jurisdiction relates to the capacity of states to enforce the prescribed national or international standards. What is important at this stage is to decide as to who is to enforce the prescribed legislation and by what means this is going to be done. The first part of the question is often settled under the international law by defining clearly which state or states is having enforcement authority. Enforcement jurisdiction must be conferred on one or more of the flag, coastal or port state control. Regarding the means by which enforcement is to be carried out, three major types of enforcement provisions have been given by IMO instruments; inspection of ships, action against violations and reporting of compliance. Flag states should exclusively prescribe and enforce generally accepted international standards against their own flag vessels.

Regarding the substance that flag states may prescribe and enforce, the flag state should use national laws, based on International conventions. Flag state must ensure while enacting national laws that the flag state laws shall have at least the same effect as the international standards. International standards represent the “minimum” threshold for the flag states, which may prescribe national standards that are more stringent. In fact,

3. Refer LOSC, art.19

in reality it is seen that the national laws of most of the developed countries are more stringent.

Many flag states, especially open registries, flag vessels seldom sail into their ports. Hence, any potential damage caused by these vessels would be to the marine environment of high seas or of the areas under the jurisdiction of other states. Moreover, many of the developing flag states lack the requisite manpower and financial resources to enforce standards vigorously. Those flag states mostly have the income from registration of ships. Due to this, minimum standards have to be imposed on flag states by various regulatory instruments including MARPOL 73/78 and LOSC.

Coastal states, on the other hand, possess the incentive and inclination to regulate shipping as pollution affects their areas. Under International law, the protection of internal waters and the territorial sea could justifiably be based on the sovereignty which coastal states enjoy over these waters. Even for pollution occurring beyond territorial sea, the coastal areas are severely affected. As per LOSC and IMO marine pollution instruments, the international standards represent maximum level permitted for coastal state prescription beyond territorial sea. Only in special areas, coastal states can take actions beyond that as it will interfere with the right of free navigation.

In addition to the flag and coastal states, the LOSC and IMO have also recognized the role of the port states. The port state jurisdiction was indented to act as a countervailing force against the potential excess of the coastal state jurisdiction. For establishing the division of prescriptive and enforcement jurisdiction powers among the three states stated above, LOSC had adopted the zonal division method. The details of the powers of the three states are discussed below.

4.0 Forms of Jurisdiction:

While discussing jurisdiction, it is essential to distinguish the difference between a State's competence to prescribe legislative jurisdiction for individual ships and its competence to enforce legislation thus prescribed (enforcement jurisdiction). The legislative or enforcement jurisdiction that a State has in respect of a particular vessel

varies depending on whether it is a Flag, Coastal or Port State. Article 5(4) of the Convention MARPOL 73/78 clearly specifies that all States, in implementing MARPOL are required to apply its requirements so that ships of non-Parties to MARPOL 73/78 receive no more favourable treatment than ships of Parties⁴.

4.1 Flag State Jurisdiction:

(a) Legislative jurisdiction and obligations of the Flag State:

Flag State legislative jurisdiction is provided for in Article 211(2) of the LOS Convention, which calls for the flag State to adopt laws and regulations for the ‘...prevention, reduction and control of the marine environment from vessels flying their flag or of their registry. Such laws and regulations shall at least have the same effect as that of generally accepted international rules and standards established through the competent international organization or general diplomatic conference’. Together with Article 94, Article 211(2) redefines in stronger terms the principle of flag State jurisdiction. The provision applies to all types of pollution standards, which at a minimum shall have ‘the same effect’ as that of generally accepted international rules and standards.

The primary responsibility for the regulation of ships lies with the jurisdiction of Flag State. Flag States are required to conform to generally accepted international regulations, procedures and practices found in the Articles, Protocols, Annexes, unified interpretation of the Annexes, and IMO circulars and publications relating to MARPOL 73/78. The Flag State has the responsibility in ensuring that its vessels comply with the technical standards set by MARPOL 73/78. It must survey and inspect vessels at periodic intervals and must issue certificates showing that, according to their size and type, its ships are in compliance with the Annexes⁵. Administrations are required to conduct surveys of ships to confirm the existence of all mandatory equipments and procedures, to approve those equipments and procedures and to ensure that the condition of the ship as stated on any certificate issued matches with the actual condition of the vessel. Ships and equipments

4. Please refer to Article 5(4) of MARPOL 73/78

5. For details refer to Article 5 of MARPOL. The Annexes mentioned are annexes of MARPOL 73/78.

are subjected to mandatory initial, periodic and intermediate surveys as detailed in the respective Annexes. Unscheduled inspections and surveys after an accident occurs or a defect is discovered are also authorized for the verification of the compliance.

Administrations are required to ensure that ships under whose authority they are operating carry the various certificates issued to them, in valid condition, demonstrating compliance with various Annexes of MARPOL. Where a Flag State authority finds non-compliance with the Annexes, the authority must withhold the applicable certificates or withdraw any certificates previously issued until compliance with the terms of the certificate is achieved. Further, Flag States must prohibit non-compliance vessel from sailing until they can proceed to sea in compliance with MARPOL or can proceed to the nearest repair yard without presenting an unreasonable threat to the marine environment. Valid certificates provide prima facie evidence that the ship complies with the requirements of MARPOL⁶.

(b) Enforcement jurisdiction of the Flag State:

The flag State is obliged to enforce its regulation under Article 217(1) of the LOS Convention. This includes both national and international regulations. Additionally, Article 94(1) imposes on the flag State a duty to exercise effective jurisdiction over its vessels.

MARPOL 73/78 obliges Administrations to prohibit violations of the Convention. Further, as per Articles 4(1) and 6(4), Administrations are required to investigate reports of violations and, if sufficient evidence is available, institute proceedings in accordance with its law⁷. If the alleged violation occurs in the jurisdiction of another coastal or Port State, the Flag State must receive evidence from the affected Party and may ask for further or better evidence to enable proceedings to be brought. As per Article 4(1) of MARPOL 73/78, Administrations are further required to establish appropriate sanctions

6. See MARPOL 73/78, Article 5(1).

7. See Articles 4(1) and 6(4) of MARPOL 73/78.

for violations. In cases when allegations of a violation are reported by a State other than the Flag State, after receiving the reports, the Flag State must inform the reporting State and IMO of the action taken by it in response to the allegation⁸.

In the case of ships which are registered under **Flags of Convenience**, the following technical measures are adopted. Rather than criteria of management, ownership, the nationality of the crew etc., the only connection between the State and ship, is the registration. Vessel operators turn to flags of convenience for a variety of reasons. Flagging out may enable an operator to evade taxation and avoid the necessity of employing the mariners of the nations concerned. Additionally, many States offering a flag of convenience are not parties to important conventions protecting the environment. Thus, international law has sought to establish the obligation of a 'genuine link' between the flag State and the vessel⁹. The first attempt is codified in Article 5(1) of the High Seas Convention. The flag State shall in particular effectively exercise jurisdiction and control in administrative, technical and social matters over ships flying their flags. Moreover, under Article 10(1) measures shall be taken with regard to the prevention of collisions and the construction, equipment, and seaworthiness of ships. In taking such measures, Article 10(2) requires States to conform to 'generally accepted international standards' and to take steps necessary to ensure the observance of these standards. The wording of Articles 5 and 10 makes it, however, clear that the duties of all States are not equal as these duties are predominantly contained in treaties. Also, the measures which States are obliged to take depend upon the merely vague notion of 'generally accepted international standards'.

(c) Adjudicative jurisdiction:

Adjudicative jurisdiction is the power of national courts or tribunals to adjudicate prosecutions against a vessel or a person for transgression of prescribed standards.

8. For details refer to Article 4(3) of MARPOL 73/78.

9. Please refer case C-221/89, *R v. Secretary of State for Transport, ex parte Factortame Ltd.*, 1999 E.C.R. I-3905; Case C-246/89, *Commission v. United Kingdom*, 1991 E.C.R. I-4585; case C-286/90, *Anklagemyndigheden v. Peter Micheal Poulsen and Diva Navigation Corp.*, 1992 E.C.R. I-6019; case C-280/89, *Commission v. Ireland*, 1992 E.C.R. I-6185 and case C-62/96, *Commission v. Greece*, 1997 E.C.R. I-6725.

International agreements such as UN Convention LOSC (Law of the Sea) and IMO instruments do not always draw clear distinctions between enforcement and adjudicative jurisdiction.

4.2 Jurisdiction of the Coastal State:

Though the primary responsibility of the flag State, a ship will also be subject to coastal State jurisdiction. As ports usually lie within the territory of the coastal State, the concept of Port State jurisdiction is only relevant when the Coastal State exercise jurisdiction in relation to its ports. When a State exercises its jurisdiction over foreign ships navigating in the different maritime zones adjacent to its coastline, the State acts in the capacity of Coastal State.

(a) Legislative jurisdiction:

As per LOS convention, in internal waters the coastal State enjoys sovereignty and foreign vessels enjoy in principle no right of navigation. They are subject to the jurisdiction of this State's courts as well as its legislative and enforcement jurisdiction. Coastal States also claim authority over the territorial sea, generally characterised as sovereign. The jurisdiction extends specifically to exclusion or regulation of passage by foreign ships, to prescription and application of law to practically all activities within the area and to exclusive exploitation of resources. The major opposing claim on behalf of all States in the territorial sea is customarily expressed in terms of a right of innocent passage. The law must thus strike a reasonable balance between the interests of the coastal State and the needs of international navigation. Beyond the territorial sea all vessels enjoy, in principle, freedom of navigation. However, the coastal State has sovereign rights over the natural resources within its EEZ and jurisdiction with regard to the protection and preservation of the marine environment. The contiguous zone covered by Article 33 of the LOS Convention seems irrelevant for coastal State jurisdiction over vessel source pollution.

Article 2(1) of the LOS Convention acknowledges the coastal State unrestricted legislative competence within internal waters. Port State legislative jurisdiction is also provided for in Article 25(2) of the LOS Convention, stating: 'In the case of ships proceeding to internal waters or a call at a port facility outside internal waters, the coastal

State also has the right to take the necessary steps to prevent any breach of the conditions to which admission of those ships to internal waters or such a call is subject'.

However, the ICJ in the *Aramco* arbitration stated that, 'according to a great principle of public international law, the ports of every State must be open to foreign vessels and can only be closed when the vital interests of the State so require.'¹⁰ Belonging to the internal waters of the coastal State, a right of free access to a port can nevertheless in principle only arise by virtue of an international agreement or by unilateral allowance. There are further specific rules regulating this matter, *inter alia*, with regard to land locked States.¹¹ However, there exists a right for the coastal State to prescribe conditions for the entry into ports. The ICJ stated in the *Nicaragua* case that it is 'by virtue of its sovereignty that the coastal State may regulate access to its ports'.¹² Furthermore, the LOS Convention provides for legislative jurisdiction in Article 211(3). States may 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'. However, Article 211(3) is of procedural character. The only requirement laid upon the port State when more stringent regulation is established, is the duty to inform the IMO. When two or more States harmonize their requirements for entry into ports, the IMO is also to be informed of the cooperation and which States participating.¹³

The port State sovereignty over its internal waters may include the right of denying ships access to port. There is much doubt if the right of denying access also applies when vessels are in distress. The disaster of *Prestige* illustrated the importance of clarity in this respect. The Spanish Government rejected the request of entry from the ship. It sank in the EEZ and polluted the coasts of Portugal, France and Spain. In order to preserve

10. ILR, Vol.27, p-212.

11. LOS Convention, Art. 131.

12. ICJ Report, 1986, p-14 at p-111, para 213.

13. LOS Convention, Art.213(3).

human life, it can be argued for a clear customary right of entry to ports.¹⁴ Consequently, on the brink of a major pollution accident, there is much doubt to whether a right of entry can be claimed. If the crew has been rescued, the port State may have good reasons to deny access in respect of the environmental consequences that can follow.

As regards to MARPOL 73/78 convention, Article 4 (2) requires that Coastal States (Parties) prohibit violations and establish sanctions for any violation of the Convention that occurs in their jurisdiction. In the territorial sea, the Coastal State enjoys sovereignty, and with it the power to apply national law, subject to conformity with generally accepted principles of international law. Some Coastal States claim an Exclusive Economic Zone (EEZ) in accordance with the principles described in UNCLOS Part V. In the EEZ, the Coastal State has jurisdiction with regard to the protection and preservation of the marine environment, thus MARPOL 73/78 may be applied consistent with this grant of jurisdiction.

(b) Enforcement jurisdiction of the Coastal State:

According to LOS convention, foreign ships in the internal waters of a coastal State fall within the territorial jurisdiction of that State. The internal waters of a coastal State are the sea on the landward side of the baselines from which a territorial sea is measured. This is a part of its territory, where a State is recognized full sovereignty and jurisdiction as codified in Article 2(1) of the LOS Convention. This implies that the coastal State is free to regulate vessel activity in its internal waters in the same way as on its land territory. Enforcement jurisdiction within internal waters is in principle also unrestricted. Enforcement though takes place only in cases where the coastal State's interests to any extent are threatened. Internal affairs onboard a ship, are most often left to the jurisdiction of the flag State. Contrary, in cases where the marine environment is threatened by pollution, the coastal State will have good reasons to intervene.

Other than the requirement contained in Article 4(2), either to cause proceedings to be taken in accordance with Coastal State law or to furnish information and evidence

14. Churchill and Lowe, *The Law of the Sea*, p-63.

regarding the violation to the Flag State Administration of the ship involved, MARPOL 73/78 does not address specifically the enforcement jurisdiction of Coastal States. If a foreign vessel is voluntarily in a port of an affected State, that State may institute proceedings for any violation of MARPOL 73/78 that has occurred within the territorial sea or EEZ of the Coastal State. If a foreign vessel is navigating in the territorial sea of a Coastal State and there are clear grounds for believing that, during its passage in the territorial sea, the vessel has committed a violation of the Coastal State's laws implementing MARPOL 73/78, the Coastal State may inspect the vessel, and if the evidence so warrants, institute proceedings.

If a foreign vessel is navigating in the territorial sea or EEZ of a Coastal State and there are clear grounds for believing the vessel has committed a violation of the Coastal State's laws implementing MARPOL 73/78 in the EEZ, the Coastal State may require the vessel to give its identity, ports of call and other relevant information to establish whether a violation has occurred. If that violation results in a substantial discharge or threatens significant pollution to the marine environment in the EEZ, the Coastal State may inspect the vessel if the vessel refuses to give the information requested or if the information requested is manifestly at variance with the evidence. When there is clear objective evidence that the violation has in fact resulted in a substantial discharge or threatens significant pollution of the marine environment in the EEZ, the Coastal State may institute proceedings. However, for violations occurring in the EEZ, the Coastal State must suspend proceedings and transfer them to the Flag State if the Flag State also institutes proceedings within specified time limits. Coastal States instituting proceedings against a foreign vessel must notify the Flag State and IMO of any measures or proceedings taken for violations of MARPOL 73/78, except that for violations occurring in the territorial sea, only proceedings need be reported.

4.3 Jurisdiction of the Port State:

(a) Legislative jurisdiction of the port state:

Article 4(2) of MARPOL 73/78 requires Parties to prohibit violations of the Conventions and provide for sanctions for violations within their jurisdiction, including in ports. If conditions for entry into port involve requirements for the prevention,

reduction and control of pollution, however the Port State must give due publicity to such requirements to IMO.

(b) Enforcement Jurisdiction of the Port State:

Port State jurisdiction is provided for in Article 25(2) and Article 218 (1) of LOS convention. Article 25(2) gives a port State the right to take ‘necessary steps’ (proportional to the breach involved) to prevent breach of the conditions for entry. The port State may undertake investigations in respect of any discharge from the ship outside the internal waters, territorial sea or the EEZ when vessels are voluntarily within its ports. The criterion is that the pollution is a violation of applicable international rules and standards¹⁵. The same provision regulates the situation when a vessel within ports has polluted another State’s EEZ, territorial sea or internal waters. Proceedings may only be instituted when requested by the flag State, or the State damaged or threatened by discharge. However, if the maritime zones of the port State itself is polluted or threatened by pollution, proceedings may be effectuated. Investigations with respect to Article 218 (1) can take place in both cases. It may be noted that Article 218 of the LOS Convention contains an important jurisdictional tool: a flag State have no longer exclusive competence over discharges on the high seas.¹⁶

As regards to compliance enforcement, in addition to Flag State, Port State is also authorized by MARPOL 73/78. A Port State can exercise enforcement jurisdiction against any vessel visiting its ports to ensure compliance with and to detect violations of MARPOL 73/78. The jurisdictional rights of Port States are mainly the following:

(i) Inspection of Certificates:

The mandatory certificates that are required to be on board are inspected by authorized Port State Control Officers. If there are clear grounds for believing the condition of the ship or its equipment is not substantially in compliance with the terms of the certificate, a more thorough inspection is carried out and where non-compliance is revealed, Port States must not allow such ships to sail unless they can do so without

15. LOS Convention, Art. 218

16. LOS Convention, Art.228 authorises flag state to a certain extent to suspend and restrict institution of proceeding initiated by others.

presenting an unreasonable threat of harm to the marine environment. The Port State's most effective sanction is therefore to detain the vessel in port until it can be repaired to a suitable standard or directed to a repair yard and report the matter to the Flag State. The Port State may also report to the Flag State for taking appropriate action, or Port State may initiate proceedings under its own law for any violation that arises from non-compliance with the Convention¹⁷.

(ii) Inspection to detect violations of the discharge standards:

Article 6 of MARPOL 73/78 specifies that a Port State Control Officer may inspect a ship in any port for the purpose of verifying whether the ship has discharged any harmful substances in violation of the MARPOL regulations. When a discharge violation is noticed, the same is to be reported to the Flag state and Flag States must then bring proceedings if satisfied that the evidence is sufficient. The requirement for Flag States to bring proceedings, however, does not pre-empt the right of the Port States to bring their own proceedings for violations which occur in the territorial sea or internal waters of the Port State, or which cause major damage to the Port State¹⁸.

On receipt of request from any party along with sufficient evidence, the Port State may inspect a ship to investigate whether the ship has discharged harmful substances or effluents containing harmful substances in any place, provided the Port State also receives sufficient evidence from the requesting party¹⁹.

(iii) Extended Port State enforcement jurisdiction:

In addition to the power to investigate and initiate proceedings for violations occurring within Port State, the Port State has the power to investigate and take proceedings for discharge violations wherever they have taken place. This power covers violations within the internal waters, territorial seas and EEZ of another State. In such cases, the Port State may only take proceedings in response to a request from States damaged or threatened by the discharge violation, or in response to a request by the Flag State concerned. However, the affected Coastal State does enjoy a right of pre-emption,

17. Please refer to Article 4(2), MARPOL 73/78.

18. See MARPOL 73/78, Article 4(2).

19. Refer MARPOL 73/78, Article 6(5).

that is, it can request that any investigation, records or proceedings by the Port State be suspended and transferred to the Coastal State.

Except in cases of violations occurring inside the territorial sea of a Coastal State, or a violation causing major damage to the Coastal State, the Flag State may insist on taking control of any proceedings for any violation which occurs outside the territorial sea of the Coastal or the Port State. The Flag State must continue the proceedings, and it loses the right of pre-emption and it repeatedly disregards its obligation of effective enforcement of international regulations.

The Coastal or Port State, in exercising any of the enforcement powers, must not act in a discriminatory fashion. Also the States should not delay a vessel longer than essential for purposes of investigation. In imposing sanctions for violations, States may impose only monetary penalties, except in the case of a willful and serious discharge violation of MARPOL 73/78 that occurs in the territorial sea of the affected State²⁰. States Parties to MARPOL also should take due care to reflect the above mentioned provisions in enabling national legislation.

4.4 Jurisdiction over Ship Source Pollution: Indian related cases:

The Madras²¹ and Madhya Pradesh²² High Court relied upon international law as the basis for treating the territorial waters of India as falling within the confines of the territory of India, without entering into question concerning the reception of the Municipal law of India. Though the SC of India has not so far authoritatively indicated its attitude towards the operation of customary international law within the municipal law within the municipal sphere, the trend of judicial decisions on the high courts as well as of SC appears to be that Indian Courts could apply the principles of customary international law as part of the law of the land, unless such principles are inconsistent with Indian statutes. The SC of India confirmed that 'territorial limits of India would

20. See Article 7(2) of MARPOL 73/78.

21. A.M.S.S.V.M &Co v. Tate of Madras, A.I.R. 1954, Madras 291.

22. Manganese Ore v. Regional Commissioner of Sales Tax, 1974, M.P.I.J., 639

include territorial waters in India' though it did not indicate the basis upon which it arrived at this view²³.

The Indian cases decided by British Indian Courts, in 1871, the Bombay High Court in *Reg v. Kasty Ram*²⁴ held that an offence committed within 3 miles from the coast of British India should be treated as having been committed within the territorial limits of British India and was punishable under the provisions of the Indian Penal code. Also as early as Nov, 1876, the Court of Crown Cases Reserved held, in the celebrated case of *R.V. Keyn*²⁵, that the territory of England ended at low water mark and that international law could not enlarge the area of British Municipal law which could only be done by an act of parliament.

Further, the status of waters in the Palk Bay and Gulf of Mannar was the subject matter of a decision of the HC at Madras, as early as 1904, in *Anna Kumaru v. Muthupayal*²⁶. The court held that the Pak bay and the Gulf of Mannar were integral parts of the British dominions, having regards to their configuration and dimensions and their effective occupation by the British with the acquiescence of other nations.

4.5 Analysis on jurisdiction regime:

It may be stated that the LOSC has succeeded in establishing broad consensus among the states on the jurisdictional principles governing the exploitation and protection of the oceans. With the adoption of LOSC, what were formerly fragmented pieces of conciliatory efforts have now been redefined into a single comprehensive regime aimed at securing an acceptable political balance among the competing maritime and coastal industries. Although the LOSC tightened flag state responsibility by obliging these states to enforce pollution control measures, to investigate alleged violations by their vessels and to impose adequate penalties if there is sufficient evidence, it remains doubtful if the majority of the flag states will ever observe these obligations. Also, what constitutes "sufficient evidence" as stated in the convention will depend on the incentives of the

23. B.K.Wadeyar v. M/s Daulatram, A. I.R., 1961,SC.311.

24. *Reg.v. Kasty Ram*, Bombay High Court Reports (Crown Cases), vol.VIII,1871,p.63.

25. *R.V.Keyn*, (876) 2 Ex.D.63.

26. *Annakumaru Pillai v. Muthupayal*, ILR.,no: 14, 27 Madras 551.

individual states to monitor and investigate violations.

Past experience has shown that the procedures for the flag state investigations are lengthy and produced too few convictions. Where violators have been found to be guilty, the penalties imposed by the authorities have been manifestly inadequate. Due to this, the reliance on flag state enforcement brought out by earlier instruments and reaffirmed by LOSC does little to improve substantially upon the regulation of vessel source pollution. Besides, IMO does not have any enforcement authority to take meaningful action against recalcitrant flag states. Thus, it is seen that the LOSC does not adequately remedy the problem of lack of incentives which has been one of the main problems for flag state enforcement.

The recently established particularly sensitive sea area (PSSA) regime represents another IMO mechanism which can be employed to recalibrate the balance struck between the maritime and coastal interests without upsetting the underlying UNCLOS-III consensus. The PSSA scheme as conceived at IMO, specifically allows coastal states to propose special national measures which may go beyond the prevailing international standards to be applied in ecologically sensitive ocean areas within and outside the territorial sea.

Pursuant to PSSA scheme, IMO has to date promulgated a host of Associated Protective measures (APMs) prescribing traffic lanes, compulsory pilotage, ship reporting systems, Vessel Traffic Systems (VTS), Areas To Be Avoided (ATBAs), no anchoring areas and other special measures to be taken by ships when traversing a designated PSSA with sensitive ecological characteristics ²⁷. The PSSA concept seeks practically to reconcile the coastal state's desire for enhanced prescriptive and enforcement jurisdiction with the international community's interest in avoiding navigational impediments.

27. See Ship Reporting Systems under SOLAS, reg. V/8-1.

MARPOL 73/78 Convention obliges contracting Parties to enforce laws and regulations relating to the prevention, reduction and control of pollution of the marine environment from vessels flying their flag and from foreign vessels operating within their jurisdiction. Prosecution is the ultimate form of ensuring compliance. It is seen that there is no consensus internationally for the characterization of MARPOL offences. Civil law jurisdictions usually treat such offences as “minor”, “serious” or “aggravated” according to the severity of the damage caused. Some common law jurisdictions treat these as “strict” or “absolute” liability offences. The offence would be treated as one of “strict liability” subject to affording the violator the defense of due diligence. In this case, the onus would be on him to show that he took all reasonable precautions and exercised all due diligence to avoid the commission of the offence.

Another problem faced with MARPOL 73/78 is that before prosecuting offences, some common concerns like jurisdiction, presentation of evidence, standards of proof of violation, the nature of sanctions imposed (administrative, civil and penal) and the rights of the assured etc are to be considered. Also a Government seeking to proceed against a person accused of violating MARPOL 73/78 must first establish jurisdiction over the accused or any property that may be subject to seizure and forfeiture. This procedure is very lengthy and often does not produce adequate results.

When developing the systems for prosecuting MARPOL offences, the Government should understand their own judicial, administrative and enforcement constraints. Government should provide a range of options to the enforcement authorities for the prosecution of violations like for example, at magistrate level, higher civil court level and at criminal court level. Hence, while amending the MARPOL 73/78 all the above deficiencies need to be corrected.
