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The Role of the International and Regional Conventions as reflected under the national law in Protecting Kuwait Marine Environment from Ships Oil Pollution

Dr. Talal Aladwani^(*)

Abstract:

The Arabian Gulf is considered one of the most crowded seas, where a very high number of commercial ships and tankers are trading it. Further, because the Arabian Gulf is semi enclosed area, it was classified as a sensitive and polluted water. This study aims to introduce international treaties that are concerned with protecting the marine environment from pollution resulting from oil tankers. This study was divided into five sections: First, the laws concerned with the safety system in ships are discussed in this article. Secondly, the requirements that must be followed regarding the efficiency of the marine crew is covered. Third, the administrative departments of marine companies and establishments (such as ports) will be addressed. Fourth, International treaties concerning the civil liability compensation for marine pollution resulting from oil tankers is brought up in this article. The last part is devoted to detailing the importance of ratifying the relevant treaties and their scopes in protection of the environment. This study deals with the best practical to adopt, implement and enforce such treaties into the Kuwaiti legal system (maritime and environmental related laws). This study follows the academic research methodology.

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Introduction

Population of the Gulf are relying on the sea as a major resource of food and water. Marine and coastal water are critical for the ongoing supply of several essentials, such as freshwater and seafood. The Gulf area contains the world's main crude oil shipping routes⁽¹⁾. This would make the Gulf vulnerable to be degradable by the operational, accidental or intentional discharge of oil from shipping⁽²⁾.

Discharge of oil from shipping is of major concern and can occur either by accidental or operational discharge⁽³⁾. Accidental discharge (oil spills) may result from ships collisions or when ships are in distress at sea, i.e. engine failure, fire, explosion, running aground etc⁽⁴⁾. Much can be done to minimize accidents, but there will always be unfortunate circumstances and situations that give rise to accidents. Operational discharge, i.e. non-casual-related) often arise during routine bunkering operations and are usually caused by negligence/lack of care. Other operational discharges, i.e. discharge of bilge water, fuel oil sludge, tank washings etc., are deliberate in the sense that the discharge is intended (and permitted by the relevant legislation) however, because

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- (1) Hans-Jorg el al., Protecting the Gulf's Marine Ecosystems from Pollution, (Birkhauser, 2008), p. VIII.
 - (2) In 2020 the states bordering the Gulf, Bahrain, Iran, Iraq, Kuwait, Oman Qatar, Saudi Arabia and the UAE produced 13.41 million barrels of oil per day. See Amna Puri-Mirza, Total Export Volume of the GCC Countries, cited in <https://www.statista.com/statistics/1106229/gcc-exports-of-crude-oil/>, last visited on 7.6.2021. Oil flows through the Strait of Hormuz account for roughly 40% of all world traded oil. More than 14 tankers bases through the gulf everyday see Anthony H. Cordesman (26 March 2007). "Iran, Oil, and the Strait of Hormuz" Center for Strategic and International Studies.
 - (3) Ships with an average exceeding 9 ships a day are entering Port of Shuwaikh only. See https://www.marinetraffic.com/en/ais/details/ports/252/Kuwait_port:KUWAIT
 - (4) ITOPF has indicated that Kuwait has experienced a number of spills associated with tanker operations at oil terminals, several of which claimed to be from unknown source. (see ITOPF report on Kuwait available in <https://www.itopf.org/knowledge-resources/countries-territories-regions/countries/kuwait/>) For example, 13th of August, 2017, more than 35000barels was spilled at alZour sea area. In this incident, it was argued by one of the environment activist that "the government had failed to issue a statement communicating the severity of this disaster. There was no warning people against fishing or entering the polluted area", cited in <https://www.cbc.ca/news/world/kuwait-battles-oil-spill-in-persian-gulf-waters-1.4245702> (last visited in 24.3.2021)

the quantity of pollutant contained in the discharged water exceeds the permitted amount, this will result in the discharge being performed negligently. Such discharge can be avoided. There is an extensive international effort attempted to prevent, reduce and mitigate pollution⁽⁵⁾ at sea and reduce the degradation of the marine environment. This article focuses on regulations and will outline the national, regional and international instruments related to the protection from oil marine spills. It will demonstrate some of the issues and attempted to provide solutions to some of the problems. This article, however, is not exhaustive. Therefore, this article concentrates on the international conventions and national laws,⁽⁶⁾ which are of a greatest practical relevance to title of this article and that certain subject-areas where non-specifically maritime laws or less relevant are treated in less detail if its cover in this article⁽⁷⁾.

- (5) Article 1(4) of UNCLOS defines “pollution of the marine environment” as the introduction by man, directly or indirectly, of substances or energy into the marine environment, including estuaries, which results or is likely to result in such deleterious effects as harm to living resources and marine life, hazards to human health, hindrance to marine activities, including fishing and other legitimate uses of the sea, impairment of quality for use of sea water and reduction of amenities. EPA defines pollution of the marine environment “the activities that directly or indirectly by adding, extract substances or energy to and from the marine environment, on which may result harm to the human or to the natural substances or to the echo system or that may obstruct marine activities or rescue the nature quality of the water.
- (6) the international conventions are separated to several types: first, the type that set a particular standard of construction and maintenance so that ships withstand the peril of the sea, i.e. SOLAS. Second, related to the training and the competency of the crew so that to minimize human error as much as possible, i.e. STCW. Third, related to safety management system for ships, port and shipping companies which ensure early identification of risks by risk assessments and thus to minimize of risks. Fourth, related to the liability regimes which imposed on the shipowner to pay compensation for the pollution victims, so shipowners, insurer and cargo owners do their utmost to avoid the imposed liability, i.e. CLC and Fund conventions. Fifth, related to the imposed criminal liability and fines for pollution incidents.
- (7) There are several international conventions lay down general principles and objectives which are not necessarily directly applicable to or enforceable against ships, though they have general influence on protecting the marine environment: 1- the Convention Biological Diversity (The Convention establishes the role biological diversity for people, food security, medicines, fresh air and water, shelter, and a clean and healthy environment. The CBD covers all biological diversity including the marine environment); 2- the 1992 Basel Convention on Hazardous Wastes (control of transboundary movements of hazardous wastes and their disposal) 3- the 1992 United Nations Framework Convention on Climate Change and its Kyoto Protocol (a framework convention on climate change)

1. Historical development of Kuwait marine related regulations

Environmental regulations of Kuwait go back to 1960s. However, during that era there were multiple incompatible detached regulations rather than one law that embraces comprehensive regulations for the protection of the environment⁽⁸⁾. a major legislation related marine pollution is the 1964 Kuwait Law on Prevention of Pollution of Navigable Waters by Oil (Law No.12/64), as amended in 1976,⁽⁹⁾ clearly derives much from OILPOL 54⁽¹⁰⁾. Later, the Municipality of Kuwait issued the law no.15 of 1972 to deal with environmental protection⁽¹¹⁾. There was no specialized environmental entity, i.e. Environmental Protection Authority, to deal with the matters related to the protection of the environment, thus, the Municipality Council had been empowered as the concern authority to issue regulations and laws concerning the protection of the environment⁽¹²⁾. Until 1976, a supreme committee was established by a Decree of the Council of Ministers. The committee was entrusted to develop the general framework for the protection of the environment and to combat pollution. It also was charged with setting scientific and health criteria that promote industrial and urban development and the exploitation of the natural resources while ensuring the public and industrial safety and the protection of the environment in general⁽¹³⁾. The committee's efforts resulted in promulgation of the

(8) Sari, Georgy S., The New Environmental Protection Law No.42 of 2004 according to the latest amendments No. 99 for the year 2015, Analytic study with the most important recommendations and amendments, Kuwait, Dar Al Kuttab institution, 2016, p.6

(9) Law No.111 of 2014 amended Annex 3 of Law 12/64

(10) Similar provisions being promulgated into many national laws because of the need to conform with international efforts in the area required by the International Convention for the Prevention of Pollution of the Sea by Oil of 1954 as amended in 1962. For example, in the UK: The Prevention of Oil Pollution Act 1955, in Nigeria: Oil in Navigable Waters Act 1968.

(11) Municipality of Kuwait was the legislator, until the merging of the EPA

(12) Control and management of the environment in terms of environment and regulations have been collectively executed by the Ministry of Public Health, the University of Kuwait, Shuaiba Industrial Authority and the Municipality of Kuwait. Responsibilities for official pollution control and management were assigned in the 1960's to the Occupational Health Development which was then a part of the Ministry of Public Health.

(13) Y. AlSultan, Dhia AlBaker, The Development and Experience of Kuwait in Environment Protection and Environmental Impact Assessment, (1989) Impact Assessment, 57, at p. 61

law No.62 of 1980 established a unified legislative and institutional framework for the protection of the environment in Kuwait⁽¹⁴⁾. The second article of the law provided for the establishment of the Environment Protection Department (EPD) and the environment Protection Council⁽¹⁵⁾. The law No.62 of 1980 is considered the principal law for the protection of the environment and could be considered an outcome of the various efforts discharged by many organisations particularly those concerned with the development and provision of public services. In 1995, Environmental Protection Act was established, in which objectives is to establish an environmental public authority to manage the different aspects of the environment⁽¹⁶⁾.

Environment issues were simply not perceived as such in the 1960s-1990s, or were subordinated to other more pressing matters, such as the petrochemical booming in Kuwait. Unlike developed countries where the cost of pollution steered the government to shift in the emphasis of the law to reflect newer environmental concerns. It is undeniable that in more recent years environment law in Kuwait, at least theoretically, have moved on from limited environment framework to encompass a much wider range of adverse changes to the natural environment and to meet the emerging environmental challenges, in accordance to some of the international conventions. The environment public authority has established the Environmental Protection Act EPA under law No. 42 of 2014, as amended by law No.99 of 2015.

The new act aims at protecting and maintaining the natural balance of the environment and its resources; combating the pollution and environmental degradation in all its forms⁽¹⁷⁾. The main provisions related to the protection of the marine environment from ships are summarized below.

It must be said that, unlike some jurisdictions where their maritime

(14) The declared objectives demonstrate that the council was created to established

(15) The declared objectives show that the council was created to established an explicit policy regarding environmental protection and pollution control in Kuwait. In addition, the council has the authority to coordinate between concerned bodies conducting activities or assignments related to the environment and the pollution control programs.

(16) Articles 2-3, EPA 1995, as amended by law No. 16 of 1996

(17) Article 3(1)-(2), EPA

trade laws embrace some provisions related to marine pollution, the Kuwait Maritime (Trade) law provisions do not deal specifically with marine pollution, except for provisions which, indirectly relates to the implication of the international regulations related to marine pollution preventions⁽¹⁸⁾.

However, environment is a matter which is of concern in areas other than the strictly maritime and therefore, pollution regulations occur in other context than the Maritime (Trade) Law⁽¹⁹⁾.

2. Development of international legal framework

Large pollution incidents⁽²⁰⁾ had initiated international pressure to develop international instruments regulating the subject-area of pollution prevention, reduction (including the intervention by States), pollution liability and compensation and prevention of dumping of pollutants are ones that are heavily regulated by a number of important international conventions⁽²¹⁾. The international regime for the protection of the marine environment includes the legal and jurisdiction frame work for prevention, reduction and control of marine pollution from ships based

(18) See T.Aladwani, IMO Conventions as incorporated under Kuwait Maritime Law, (2019) ALQ, p.13

(19) Law No.62 of 1980 was promulgated with a unified legislative and institutional framework, namely the Environment Protection Council (EPC), to the protection of the environment in the Kuwait. The law is under the control of the Ministry of Health with the member of several ministries. Currently, it is the Environment Protection Authority that is in charge generally on the environment protection in Kuwait.

(20) For example, the incident of Torrey Canyon on route from Kuwait To Wales in 1967, consequently, the first international regime on liability and compensation for oil pollution damage see Patrick Griggs CBE, “Torrey Canyon”, 45 Years On: Have We Solved All the Problems?’ in Baris Soyer and Andrew Tettenborn (eds), Pollution At Sea: Law and Liability (Informa, London, 2012) 3; Exxon Valdez oil spill in 1989 in Alaska, consequently, OPA 1990 establishment, see Exxon Shipping Co. v Baker, (2008) 554 U.S. 471

(21) The 1954 London Convention on the Prevention of Pollution by Oil as amended in 1962, 1969, 1971 and 1978. A reaction to the severity of the major pollution incidents had resulted to the establishment of MARPOL Convention in replacement of 1954 Convention. For further information on the IMO and its Conventions, see T. Aladwani, IMO Conventions as incorporated under Kuwait Maritime Law, (2019) ALQ. See further “Brief History of IMO” cited in <http://www.imo.org/en/About/HistoryOfIMO/Pages/Default.aspx> (Last visited 24.3.2021)

on two mutual depending bodies of law:⁽²²⁾ first, it is the international framework or jurisdictional instruments establishing general rules and principles, i.e. the UNCLOS Convention⁽²³⁾. Second, it is the international regulatory regime that adopts technical rules and standards aimed at ensuring compliance with the general rules and principles, i.e. MARPOL Conventions (the most important regulations governing the prevention of pollution by oil from ships), SOLAS Convention, STCW Convention etc⁽²⁴⁾. See table lists some important international legal and other instruments the IMO has adopted for prevention, preparedness, response and cooperation as regards marine pollution from ships.

3. Regional convention and protocol

a) *Kuwait Convention*

The Kuwait Regional Convention for Co-operation on the Protection of the Marine Environment from Pollution, 1978 (The Kuwait Convention) and the Protocol concerning Regional Co-operation in Combatting Pollution by Oil and Other Harmful Substances in Cases of Emergency of the same year (Kuwait Protocol) emerged from the Conference on the Protection and Development of the Marine Environment and Coastal Areas held in April, 1978 in Kuwait⁽²⁵⁾. All the states attending the conference were signed the Kuwait Convention and the Kuwait Protocol.

Article 1 and 2 of the convention provides certain definition and scope of geographical coverage. Article 3 of the convention provides general and basic obligations of the contracting states, one of which

(22) The causes and circumstances (whether intentional or accidental) of oil spills by ships, that international regimes contribute to eliminate, attributed from collisions, groundings, hull failures, equipment failures, fires and explosions etc. See, ITOPFL, Oil Tanker Spill Statistics 2017, (2018), at p. 10, cited in https://www.itopf.org/fileadmin/data/Photos/Statistics/Oil_Spill_Stats_2017_web.pdf (last visited on 24.3.2021)

(23) See Md Mahabat Uddin and Md Saif Karim, "Prevention, Reduction and Control of Marine Pollution from Ships", as chapter 4 in Hassan, Daud & Karim, Saiful (Eds), International marine environmental law and policy, (Routledge, 2018), at p. 61.

(24) See T.Aladwani, IMO Conventions as incorporated under Kuwait Maritime Law, (2019) ALQ.

(25) Represented by Kuwait, Bahrain, Iran Iraq, Oman, Qatar, Saudi Arabia and the UAE.

that it is imposed on all of the contracting states to “take all appropriate measures...to prevent, abate and combat pollution of the marine environment in the Sea Area” and to “establish national standards, law and regulations” in order to attain the purpose of the convention. Article 4 provides that all contracting states shall “take all appropriate measures to prevent, abate and combat pollution in the Sea Area caused by international or accidental discharges from ships, from dumping wastes by ships...”. The Contracting States are to co-operate in dealing with pollution emergencies, in scientific and technological fields and in technical assistance⁽²⁶⁾. Importantly, the contracting states undertake to co-operate in the formulation and adoption of appropriate rules and procedures for the determination of: (a) civil liability and compensation for pollution damage (b) liability and compensation for damage resulting from violation of obligations under the present Convention and its protocol⁽²⁷⁾. Several articles then provide for the establishment of the Regional Organisation for the Protection of the Marine Environment (ROPME) consisted from a Council and Secretariat whose purposes are set in detail.

b) Kuwait Protocol

Contracting States shall co-operate to promote a contingency plan for combating pollution in various specific means⁽²⁸⁾. The protocol provides for the establishment of the Marine Emergency Mutual Aid Center and defines its objectives and functions⁽²⁹⁾. Its primary objectives are essentially to assist the Contracting States in combatting pollution and preparation of anti-pollution regulations and emergency contingency plans and procedures, to co-ordinate training programs, to provide information system and to liaise with other similar organisation, particularly IMO⁽³⁰⁾. Each Contracting State shall establish a regional

(26) Articles 9, 10 and 12

(27) Article 13

(28) Article 2

(29) Article 3. The protocol then set procedures in Articles 7-11 to report any pollution or threat in any Contracting States, which are required to combat the pollution, assessing the nature and determining the appropriate action by taking specific steps, including: combatting the pollution, assessing the nature and extent thereof, determining the appropriate action or call on for assistance of any other Contracting State.

(30) As it then was IMCO. The purposes of the International Maritime Organization, as summarized by Article 1(a) of its Convention, are “to provide machinery for =

authority within the State to fulfil the State's functions under the Kuwait Protocol and such regional authority shall cooperate and coordinate its activities with regional authorities in the other Contracting States⁽³¹⁾.

As discussed above that the Kuwait Convention and the Kuwait Protocol call for the ratification of the major relevant International Conventions and the enactment of domestic anti-pollution and civil liability regulations and procedures into the national law.

4. The role of UNCLOS in relation to the IMO in preventing pollution from ships

Prior to the emerging of the 1982 United Nations Convention Law of the Sea (UNCLOS), states had limited right of involvement to any oil incident outside their internal and territorial waters. The UNCLOS stretched the jurisdiction of the states' rights and obligations to 200 nautical miles, that is the (EEZ). The International Convention 1969 and its protocols,⁽³²⁾ enabled states to take action outside the territorial water, i.e. the high seas, if there is imminent pollution threats believed to be occurred from shipping incident. Such intervention power is consolidated under the Kuwaiti system in Article 67 of Kuwait environment law⁽³³⁾. One can safely mention that the UNCLOS purposed as the umbrella convention for global ocean affairs, provides the jurisdictional framework for the prevention of marine pollution from

= cooperation among Governments in the field of governmental regulation and practices relating to technical matters of all kinds affecting shipping engaged in international trade; to encourage and facilitate the general adoption of the highest practicable standards in matters concerning maritime safety, efficiency of navigation and prevention and control of marine pollution from ships".

(31) Article 12

(32) International Convention Relating to Intervention on the High Seas in Cases of Oil Pollution Casualties, 1969, came into force May 6, 1975. The original convention covered only some types of oil but its 1973 Protocol extended to other substances. The list of substances has further been revised in 1991, 1996 and 2002 with successive protocols modifying the list of substances to which the convention applies.

(33) Similar intervention power of the UK government is found in the Merchant Shipping Act 1995, similar to Kuwait Maritime Law.

ships. UNCLOS establishes the flag,⁽³⁴⁾ coastal,⁽³⁵⁾ port states'⁽³⁶⁾ prescriptive and enforcement jurisdiction for prevention of such pollution. Article 194 further elaborates on the measures to be taken by states, individually or jointly as appropriate, consistent with UNCLOS, to prevent, reduce and control pollution of the marine environment from any source. The UNCLOS further had contributed to protect the marine environment by imposing duties on all States to protect and preserve the marine environment⁽³⁷⁾. Article 211,⁽³⁸⁾ for example, designs general international rules and standards regarding prevention, control and reduction of vessel-source pollution and re-examine them from time to time, as necessary. It also urges states to adopt relevant "international rules and standards", represented by a "competent international organisation", namely, the International Maritime Organisation (IMO)⁽³⁹⁾.

It is required from States Parties to UNCLOS to ensure that ships flying their flag or foreign ships under their jurisdictions apply generally accepted IMO rules and standards regarding safety and prevention and control of pollution through IMO Conventions⁽⁴⁰⁾. Non-compliance with these IMO provisions would result in sub-standard ships and violate the basic obligations set forth in UNCLOS concerning safety of navigation and prevention of pollution from ships.

(34) UNCLOS, Article 94 (duties of the flag state)

(35) UNCLOS, Article 220 (enforcement by coastal states)

(36) UNCLOS, Article 218 (enforcement by port states)

(37) UNCLOS, Article 192 (general obligation)

(38) For example Article 211(1) of the UNCLOS states that "States, acting through the competent international organization or general diplomatic conference, shall establish international rules and standards to prevent, reduce and control pollution of the marine environment from vessels and promote the adoption, in the same manner, wherever appropriate, of routing systems designed to minimize the threat of accidents which might cause pollution of the marine environment, including the coastline, and pollution damage to the related interests of coastal States. Such rules and standards shall, in the same manner, be re-examined from time to time as necessary."

(39) Although the UNCLOS does not expressly refer to the IMO as the 'competent international organisation' for the purpose of Article 211(1)

(40) IMO called for steps to be taken to: Ensure that penalties for violation of... requirements relating to the prevention of marine pollution from ships... particularly financial sanctions against those who operate polluting ships, are severe enough to discourage violations of such requirements. See IMO Resolution A499 (XII) 19 Nov. 1981.

Under UNCLOS Article 220, state may detain and prosecute a foreign ship voluntarily present in one of its ports for violation pollution laws in its territorial sea or EEZ, or may inspect ships in the territorial sea for such violation there and, where the evidence so warrants, institute legal proceedings against ship, which may include its detention⁽⁴¹⁾. The UNCLOS derogates the rights of innocent passage if the marine environment protection was not observed⁽⁴²⁾. Article 94 of the UNCLOS imposed an obligation on the flag state to take measures for ensuring pollution prevention and safety at sea in conformity with “generally accepted international regulations, procedures and practices”⁽⁴³⁾.

5. Technical Convention related to standard and maintenance of ships

a) The SOLAS Convention

Standards for ship's safety are contained in the International Convention for the Safety Life at Sea (SOLAS) 1974. The purpose of SOLAS⁽⁴⁴⁾ contains provisions for the standard of ship's safety and maintenance. SOLAS contains rules which govern the minimum standards for the construction of ships, the safety equipment and the standard that ships must operate in order to avoid accident and thus keep marine environment safe. In other words, SOLAS is the foundation of the technical framework for the safety of ships which in its absence would impact on the marine pollution. It is the responsibility of the States and ports to ensure the implementation and the enforcement of the regulations of SOLAS for all ships entering their territory⁽⁴⁵⁾. This means that governments must ensure that the ships which trade under its flag or entering its territorial water are surveyed when they are first

(41) UNCLOS Article 220(1) &(2)

(42) UNCLOS Art. 21. However, legislation regarding the construction of ships has to be based on international agreement rather than national standards Art. 21(2)

(43) See the table for IMO convention which deemed to govern safety at sea and pollution prevention.

(44) International Convention for the Safety of Life at Sea, adopted on November 1, 1974 and entered in force on May 25, 1980 with the Protocol of 1988 as amended (hereinafter “SOLAS”). A full list of amendments and ratifications is available at <http://www.imo.org/about/conventions/statusofconventions/pages/default.aspx> [accessed Feb, 12 2019]

(45) It is the role of the IMO to regularly review SOLAS Convention and to draft any necessary amendments.

registered, in order to verified their compliance with SOLAS, and thus safe to the environment⁽⁴⁶⁾. A fairly new code, namely the International Safety Management (ISM) Code,⁽⁴⁷⁾ has been introduced and inserted into the SOLAS Convention as Chapter 9. The code became mandatory for all ships, excluding warships or governmental operated ships, used for non-commercial purposes⁽⁴⁸⁾.

b) The related provisions under the Kuwaiti Maritime Law

As discussed above that the purpose of the SOLAS Convention is to promote safety of life at sea by establishing rules which govern the safe construction of ships and in order to avoid accident and accidental pollution from spills in the seas. It is the responsibility of the state for the enforcement of the provisions of the conventions. The provisions under the Kuwaiti Maritime Law can be summarized under three headings of Ship's Safety Documentation, Ship's Inspection Procedures and Penalties.

(i) Ship's safety documentation

Pursuant to Articles 23-37 of the Kuwaiti Maritime Law provide that every ship registered in Kuwait shall carry on board a basic set of safety and related certifications and other documents which are specified in detail under the provision of the Kuwaiti Maritime Law⁽⁴⁹⁾.

(46) See SOLAS Art.1. for example, the EU follows Directives 2009/21/EC of the European Parliament and of the Council of April 23, 2009 on compliance with the flag State requirements and 2009/15/EC of the European Parliament and of the Council of April 23, 2009 on common rules and standards for ships inspection and survey organisations and for the relevant activities of maritime administrations, and Regulation (EC) No 391/2009 of the European Parliament and of the Council of April 23, 2009 on common rules and standards for ship inspection and survey organisations.

(47) The Code establishes safety management objectives and requires a safety management system in order to enhance the compliance with SOLAS and other international conventions. See <http://www.imo.org/en/OurWork/HumanElement/SafetyManagement/Pages/ISMCode.aspx>

(48) For the United Kingdom see the Merchant Shipping (International Safety Management (ISM) Code) Regulations 1998, SI 1998/1561 reg.3. On the ISM Code and Regulations see P. Anderson, *ISM Code: a practical guide to the legal and insurance implications*, 3rd edn (London, 2015)

(49) Article 25 of the Kuwaiti Maritime Law

The basic documents are a Navigation License, Load-Line certificates⁽⁵⁰⁾ and Certificates of Safety or Seaworthiness,⁽⁵¹⁾ though other specified documents include logbooks, health certificates, cargo manifest, passports and licenses of the crew etc. Unlike some gulf countries laws,⁽⁵²⁾ there is no provision to provide that Classification Society surveys may, in some circumstances, be recognized for the purposes of compliance with the relevant safety equipment as required by SOLAS Convention. However, recognition was given in a relevant ministry decree. Article 25 of the Kuwaiti Maritime Law provides the benchmark upon which the condition for safety certificates will be granted in the light of the SOLAS Convention and the Load-line Convention. The law is not clear whether this means only those international conventions that Kuwait had ratified,⁽⁵³⁾ i.e. SOLAS and Load-line convention, are the benchmark in determine the safety certificates of the ship. There are further detailed provisions as to how applications for such certificates are to be made, the terms upon which such certificates will be issued, their period of validity and their issuance by Consuls of the Kuwait abroad.⁽⁵⁴⁾ The standard of safety documentations to be expected from foreign-registered ships inside the Kuwaiti water according to the relevant International Conventions in force in Kuwait. Whereas, some states do not limit the compliance to safety requirement to only ratified conventions, they require foreign ships to comply with the safety requirements of the relevant International Conventions without a limit to what their laws imposed, i.e. ratified conventions. The authority that boarded and inspected the ship have the power, by Article 32 of the Kuwaiti Maritime Law, to detain it if necessary if the authority have ground to believe not to be in compliance with SOLAS⁽⁵⁵⁾. It should be mentioned that certi-

(50) This certificate is required under different convention, namely, the Loadline 1969 Convention

(51) See, T. Aladwani, The supply of containers and Seaworthiness- The Rotterdam Rules perspective, *Journal of Maritime Law and Commerce*, (2011) 42, 185.

(52) See Article 52 of The UAE Maritime Law 1981 (Law No.26 of 1981); Article 19 of the Bahrain Maritime Law 1982 (Law No. 23 of 1982); Article 21 of the Qatar Maritime Law 1980 (Law No. 15 of 1980).

(53) See T. Aladwani, International Maritime Organisation conventions as incorporated under Kuwaiti Law, *ALQ* vol. 4 2019 due to be published

(54) Pursuant to Articles 26-28.

(55) The Paris Memorandum of Understanding (Paris MOU) s.3, gives the power to Port State the power to detain any ships, which do not comply with SOLAS and thus likely to threatening life or environment.

ificates and documents required under national law are important means of pollution prevention. This is obvious from reading Article 219 of the UNCLOS where,

(ii) ship inspection procedure

Inspections is an important tool for the governments to ensure ships' compliance with the provisions of SOLAS Convention or to impose the provisions relevant to SOLAS requirements. Article 30(1) of the Kuwaiti Maritime Law provides that the relevant marine administration shall, at all time, have the right to control and inspect any Kuwaiti ships or foreign ship inside the territorial waters of Kuwait. For ships registered in Kuwait, Article 30(2), specify what facts documents shall be the subject of verification by such inspection. These include the fact of the ship's registration, her navigation license, the physical safety and seaworthiness of her equipment, her crewing standards, medical and health services etc⁽⁵⁶⁾. Article 30 of the Kuwaiti Maritime Law is compatible with Article 94 of UNCLOS, in a way that the formal article (Article 30(2) of the Kuwaiti Maritime Law) distinguishes different types of penalties to be imposed with respect to violations committed by foreign ships in the one hand and national (Kuwait flag ships) in the other hand. For foreign flag ships, Article 30(3)-(4) of the Kuwaiti Maritime Law reflects Article 226 of UNCLOS, where inspection is basically to be verify that the ship in question meets the relevant international standards, i.e. SOLAS of national laws and regulations or applicable international rules and standards relating to vessel-source pollution. Article 30(4) of the Kuwaiti Maritime Law, reflects Article 226(1)(a) of UNCLOS, which provides that investigations or inspection conducted by States shall not unduly delay foreign vessels, and physical inspections, when necessary, shall be limited to an examination of such certificates, records or other documents as the vessels are required to carry by generally accepted international rules and standards. Article 31 of the Kuwaiti Maritime Law gives rights of boarding and inspection of ships registered in Kuwait to the Consuls of Kuwait and to representatives of the appropriate authority, i.e. port state. This reflects Article

(56) For critical detailed study on the physical and legal seaworthiness of the ships, see T. Aladwani, A comparative study of the obligation of due diligence to provide a seaworthy vessel under The Hague/Hague-Visby Rules and the Rotterdam Rules, (2016, Giuffre Publisher, Italy).

217(2) of UNCLOS where it extends Article 94(3) to the protection of the marine environment. It requires the flag state to ensure that its vessels are prohibited from sailing until they can proceed to sea in compliance with the requirements of international rules and standards with regard to design, construction and equipment of ships. Such obligation has been enumerated under the Kuwait Maritime Law in Article 31, which provides that Kuwait flag state may not permit ships to sail unless they comply with the international standard. Provisions of Article 31 must be also read together with the safeguards included in Articles 228 of UNCLOS.

(iii) penalties

One tool for enforcement is imposing penalties on culpable parties. Article 36⁽⁵⁷⁾ of the Kuwaiti Maritime Law provides details provisions on the penalties against the various culpable parties, i.e. shipowner, his agent or master who is in breach of safety requirements set out in the laws, in particular to have on board the ship the relevant certificates and other documentations required by the laws. One may rightly ask whether the penalty set out is adequate to deter a potential culpable parties from polluting the seas.

6. The prevention of pollution through setting a standard for the operations of ships and the reduction of accident and operational pollution: the OILPOL 54 Convention and the MARPOL Convention

The International Convention for the Prevention of Pollution of the Sea by Oil 1954, as amended in 1962 and 1969 (OILPOL 54) was the first multilateral Convention related to marine pollution and has been ratified by the countries owning virtually the entire worlds tanker tonnage. OILPOL 54 deals with areas such as the prohibition and prevention of oil pollutants, the carriage on board ships of oil record books and investigations into contraventions of the Convention. Howe-

(57) The following shall be punished with imprisonment for not more than two months and with a fine not exceeding KD 2000 or with either such penalty: - a shipowner who fails to report to the Survey and Registry of Ship Office any such damage or alteration as is provided for in Article 27 hereof;...any person who violates the implementing regulations and rules which regulate work in ports and navigation in the territorial waters.

ver, OILPOL 54 is superseded by a new standard that deals with the operations of ships and the reduction of accident and operational pollution under the International Convention for the Prevention of Pollution from Ships, 1973,⁽⁵⁸⁾ as modified by the Protocol of 1978 relating thereto (MARPOL 73/78). MARPOL 1978 which also includes the 1973 MARPOL entered into force on 2nd October, 1983 (along with Annexes I and II). MARPOL 73 is more comprehensive than OILPOL 54 and, in particular, covers not only oil pollution but also pollution by noxious liquid substances, from contaminated packages, sewage and garbage. It also contains stringent provisions governing the avoidance of pollution in “special areas” which expressly include the Red Sea and the Arabian Gulf. MARPOL generally prohibits discharge of oil, chemical, sewage and garbage from ships unless specific preconditions are met, including those on discharge rate, discharge speed and distance from the nearest coast⁽⁵⁹⁾. MARPOL has been extended and modified by several successive protocols. It contains regulations for prevention of oil pollution (Annex I), prevention of pollution by hazardous and noxious substances in bulk (Annex II) and harmful substances in package form (Annex III), sewage and garbage pollution from ships (Annex IV and V) as well as air pollution from ships (Annex VI)⁽⁶⁰⁾. Only the first two Annexes are compulsory for member States. However, the non-obligatory character of the Annexes has not prevented extensive ratifications. Contracting States are obliged to establish criminal liability and disciplinary proce-

(58) See <http://www.imo.org/en/OurWork/Environment/PollutionPrevention/OilPollution/Pages/Background.aspx>, (last visited on 24.3.2021)

(59) See MARPOL, Annex 1, Ch.: 3(C), regulation 15 (control of discharge of oil from machinery spaces for all ships) & Annex 1, Ch.: 4(C), regulations 34 (control of discharge of oil for the cargo area of oil tankers)

(60) The air pollution regulations related to sulphur oxide (SOx) and nitrogen oxide (NOx) emissions from ship exhausts and prohibit deliberate emissions of ozone depleting substances. The current global cap is 3.5% which will be 0.5% on and after 1 January 2020. Whereas, special areas, namely, Emission Control Areas (ECA) are established and lower emissions than the global cap on the sulphur content of fuel oil are established for such areas, 0.1% since 1 January 2015. Greenhouses gases from shipping which are probably between 1.5-3.0 per cent of the global emissions are not regulated under any international or national instruments yet and are excluded under 1997 Kyoto Protocol art2.2 from the general counting of greenhouse gas emissions. Annex VI of MARPOL seek to regulate such emissions. But see s.25 of the UK Draft Climate Change Bill where power is granted to the Secretary of State to count such emission in this respect.

dures for violations of MARPOL and SOLAS. Other than Contracting States, also European Law by the EU Ship Source Pollution Directive has implemented the MARPOL 73/78⁽⁶¹⁾.

a) The related provisions under the Kuwaiti Maritime Law

The 1964 Kuwait Law on Prevention of Pollution of Navigable Waters by Oil (Law No.12/64), as amended in 1976,⁽⁶²⁾ clearly derives much from OILPOL 54. This law was superseded by the Environment Protection Act (EPA), which is the relevant national that enacted MARPOL. The marine protection related provisions of the EPA will be briefly summarized as follow:

(i) Prohibition of pollution in the marine boundaries

Article 68 stipulates that disposing of oil, waste, harmful substances, whatever its cause, source or quantity, within the prohibited seas is a criminal offence⁽⁶³⁾. Article 72 provides that ships are prohibited to pollute by discharge or escape of oil or oily mixture or any harmful substances in the prohibited areas, and ships are bound to discharge their pollutant to the right receiving facilities⁽⁶⁴⁾. This article reflects regulations 43 of MARPOL,⁽⁶⁵⁾ which is compatible with Article 1(4) of UNCLOS. However, the latter applies to all sources of marine pollution, including the introduction of energy into the marine environment, where MARPOL only addresses discharge from ships⁽⁶⁶⁾. The predeces-

(61) See Dir.2005/35/EC

(62) Law No.111 of 2014 amended Annex 3 of Law 12/64

(63) Article 68 provides that prohibited seas are internal water, territorial sea (extends to 12 NM from the base line), contiguous zone of the territorial sea (extends to 24 NM from the baseline) and the water adjacent to the territorial sea (which is extends to 50 NM from the baseline).

(64) Unlike the predecessor law 12/64 where Article 1(2), provides that the prohibition of pollution by discharge or escape of oil or oily mixtures includes not only ships, but also shore installation or oil transport facility into the territorial and internal waters of Kuwait. The discharge of pollutants from Land based installations or transport facilities are provided in different article.73

(65) The international maritime community represented by the IMO urge the importance of establishing reception facilities to implement the provision of the MARPOL, at the same time, the Marine Environment Protection Committee (MEPC) is keen to encourage the Member States of MARPOL to take this step and fulfil the obligation of the treaty for the purpose of establishing the reception facilities.

(66) As defined in Article 2(3) of MARPOL.

sor law (12/64) provides that relevant ministry may change the provisions, i.e. the prohibited areas, in accordance with any amendment to other international convention ratified by Kuwait⁽⁶⁷⁾. This provision is not provided under the new law.

(ii) Oil record books

Unlike the predecessor law (12/64) where the carrying of the oil record books is imposed only on ships that is registered under the Kuwait flag. Article 78 of the current law provides that all ships⁽⁶⁸⁾ carrying harmful or pollutant should carry oil record book in which the master should enter all necessary information as required by the international requirements. International requirements are not defined under the law. The International requirements in this article may refer to MARPOL regulations⁽⁶⁹⁾.

Article 78 provides that all ships carrying harmful materials or pollutants to have on board an oil cargo book for the entries of all details related to the carried cargo, port of destination and all measures imposed by international requirements.

(iii) Penalties and defences

The predecessor law (12/64), Articles 5 and 6 provide that fines are imposed on the polluter for breach of the law and recovery of remedial costs of pollution and the rehabilitation of the environment from the owner of the ship or the oil transport facilities. Except for maintaining the ship, saving life at sea or preventing serious damage to cargo or despite the owner of the ship took all reasonable measures to prevent and stop pollution, but discharge is resulted⁽⁷⁰⁾. This exception is not

(67) Annex I to the law

(68) Article 3 of the predecessor law (12/64), provides that ships which are registered in Kuwait of a particular size must carry oil record book in which entries for all cargo operations, ballasting operations, bunkering operation should be, accidental discharge, exceptional discharge must be recorded.

(69) Annex I, regulations 17 and 36. See IMO circular MEPC.1/Circ 736/Rev.1 for Guidance for the Recording of Operations in the Oil Records Book (25 August 2011)

(70) In order for such a defense to succeed the person in charge must notify the respective authority in such a style as the law indicated and entry must be made in oil record book as required by the law.

included under the new law. This is to say that the general international principles namely, 'polluter pays'⁽⁷¹⁾ applies under the Kuwait law and that the system of liability in Kuwait, currently, strict. In other words, if pollutant has been discharges in the prohibited seas from a ship or oil transport facility, the owner or operator thereof shall, without proof of fault or negligence be liable for the loss or damage specified in the law occurring as a result thereof.

The law gives the Ministry the power to detain any ship causing pollution⁽⁷²⁾.

(iv) Pollution prevention equipment and contingency plan

Ships pass through prohibited seas must be equipped to prevent pollution and recycle waste in accordance with international standards, as specified in Article 70⁽⁷³⁾.

Article 71 stipulates that all inland locations, oil transporting ships of 150 tons or more and all other ships over 400 tons to maintain an oil contingency plan and provide for the necessary equipment and supplies for the implementation of such plan to combat oil pollution. This provision is in compliance with regulation 37 of MARPOL.

(v) Administration and enforcement of pollution control

Article 81 lists the responsibilities of the authority to determine: the condition, certificates on the Kuwaiti ships as well as the procedures of inspecting them in accordance with the local and international regulations (the provision is silent on the foreign ships calling Kuwaiti ports), to determine the certificate of grantee for all ships and port fa-

(71) Kuwait has ratified the Civil Liability Convention 1992 (CLC 92) which imposes strict liability on the owner of the ship causing pollution damages. Article III(1) of the CLC 92. The polluter pays principle is an environmental policy principle which requires that the costs of pollution be borne by those who cause it. See Polluter Pays Principle- Mapping Environmental Justice, , EJOLT, available on line at: [Tracing Environmental Law Principles within the Qatari Legal System HS Vol.182 Article9.pdf](#), last visited on 8.6.2021.

(72) The ship release is subjected to provision of appropriate security.

(73) Article 7 of Law 12/64, provides that the relevant ministry may issue regulations for the fitting of pollution prevention and control equipment for registered Kuwaiti ships and penalties for breach of such regulations. Such regulations were issued shortly after the promulgation of the Law no.12/64.

cilities, conciliation on the violations matters, to determine the cases where the ships is to be detain, procedures for inspecting ships and port facilities and the extent of the pollutant port reception facilities⁽⁷⁴⁾ at the oil terminal for reception of residuals and oily mixtures.

7. Civil liability from oil pollution

Civil liability for oil pollution is covered by several international conventions. The large amount of oil carried on oil tankers made them in higher risk of causing extensive pollution damage, so they are treated differently than all other ships. The 1969 Civil Liability Convention (1969 CLC) established strict but limited liability from the shipowner, required compulsory insurance and direct action against the insurer⁽⁷⁵⁾. The 1992 Civil Liability Convention (1992 CLC) is the updated version of the convention⁽⁷⁶⁾. Both 1969 and 1992 conventions are each supplemented, as a higher tier of compensation, with International Fund for Compensation for Oil Pollution Damage (IOPC Fund or Fund Protocol)⁽⁷⁷⁾ 1971⁽⁷⁸⁾ / 1992 respectively. Nonetheless, the 1971 Fund Convention is ceased to be in forced⁽⁷⁹⁾. Thus, only the 1992 CLC is currently active. The 1992 Fund⁽⁸⁰⁾ Protocol was established provides additional compensation to victims of oil pollution in cases where compensation of under the CLC cannot be paid if the liability of the shipowner is exempted or insurer of the shipowner is financially cannot provide compensation. Additionally, the Fund convention will pay compensation if the limit of the liability for oil pollution is higher than

(74) See below subtitle, Port reception facilities (PRF)

(75) International Convention on Civil Liability for Oil Pollution Damage, Brussels, which came into force on 19.6.1975. The protocol to the International Convention on Civil Liability for Oil Pollution Damage 1992, which came into force on 30.5.1996, has been used as an interim solution to increase the low limits of liability agreed within the 1969 CLC.

(76) Date of entry into force 30 .5.1996, ratified by 138 States, of which Kuwait is party therein. , see the status of International Maritime Organisation Conventions at <http://www.imo.org/> accessed 27 Feb. 2019

(77) Hereinafter Fund Protocol

(78) Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, November 27, 1992.

(79) In May 24, 2002.

(80) The wide ratification of the 1992 CLC by 138 States and the Fund Protocol by 116, see the status of International Maritime Organisation Conventions at <http://www.imo.org/> accessed 27 Feb. 2019

the maximum ceiling of cover for the CLC Convention. Despite the wide ratification of the 2003 Fund Convention, Kuwait has not ratified the convention. Another compensation fund,⁽⁸¹⁾ namely, Supplementary Fund Protocol, is considered as a third tier for compensation should the first tier (1969 / 1992 CLC) and the second tier (1992 Fund Protocol) are insufficient to meet compensation needs in certain circumstances in some Contracting States to that convention”⁽⁸²⁾ Kuwait has not ratified the 1992 Supplementary Fund Protocol. Thus, the Supplementary Fund will not contribute to liability of pollution in Kuwait water, because the Supplementary Fund is the third tier of liability available only in those States which are Party to it. It is essential to mention that all contribution involved in collecting the amount of compensation for oil pollution from tankers in all of the three tiers comes from the oil importers States, by saying that, Kuwait would not contribute in case any liability incurred by oil pollution from oil tanker.

a) Related provisions under the Kuwaiti Maritime Law

The EPA is the concern law that enacted some of the provisions of the CLC Convention⁽⁸³⁾.

(i) Insurance requirement

Article 82 of the EPA Law provides that owners of ships carrying pollutants or equipment to store and transport oil and other harmful matter within the prohibited sea, specified in article 68, are required to pay a deposit or provide a financial guarantee to the authorities to be held in case of an accident as specified under the executive regulations. Certificates as a proof of evidence shall be submitted to the authorities on the entrance of the ship to the Kuwait territorial waters. Article 82 of the EPA Law reflects the requirement under the CLC that imposes on

(81) Date of entry into force 3.3.2005, ratified by 32 States. , see the status of International Maritime Organisation Conventions at <http://www.imo.org/> accessed 27 Feb. 2019

(82) IMO LEG/CONF.14/20 the Preamble to the Supplementary Fund. The establishment of the 2003 Supplementary FUND was a response to a European Union White Paper on Environmental Liability.

(83) There are no recent examples for cases related to the implementation of the CLC Convention. For old case law, see B. AlAwadhi, Legal aspects of maritime pollution with particular reference to the Arabian (Persian) Gulf, (Kuwait Time Press, 1985), at p. 94-101.

ships “carrying more than 2,000 tons of oil in bulk as cargo required to maintain insurance or other financial security”⁽⁸⁴⁾ except the EPA generalised this obligation, i.e. financial guarantee or financial guarantee, to all sizes of ships.

(ii) Pollution liability

Pursuant to Article 84 of the EPA Law, the pollutant person can limit his liability for compensation not exceeding KD 15 million or KD 80 per ton of the ship’s registered tonnage for any accident in the prohibited sea area. Article 85 specified certain circumstances, in which pollutant may not be able to limit his liability if it is proved that that pollution incident was caused by; incompliance with the environmental standards, negligence, willful misconduct or in violation with the safety and navigation regulations. The limitation of liability sum shall, at all times, not to include cleaning, expenses to remove pollution, mitigation cost or the rehabilitation of the environment. This is also dealt with in Article 85.

This article coincides with the exception under Article 5(2)⁽⁸⁵⁾ of the CLC except that the latter provides that negligence has to be committed with the knowledge that such damage would be probably resulted from the act or negligence.

It is not clear whether the cost of hindering public utilities is under the limitation of liability compensation, even if the harm to the third party exceeded the maximum limited ceiling.

8. The implication of international convention under the Kuwaiti Environment law

a) Port reception facilities (PRF)

MARPOL sets out requirements for port reception facilities, and all parties to MARPOL are obliged to provide reception facilities for ships calling at their ports. This requirement also recognized under Article 211(6) of UNCLOS, reception facilities are especially necessary

(84) Article 7(2) of CLC 1992.

(85) Article 5(2) of the CLC reads that “if it is proved that the pollution damage resulted from his personal act or omission committed with the intent to cause such damage, or recklessly and with knowledge that such damage would probably result”

in “special areas” where, because of the vulnerability of these areas to pollution, more stringent discharge restrictions are required. Kuwait environment law has stated under Article 82(1) that the executive regulations should numerate the condition for licensing port reception facilities⁽⁸⁶⁾. Since the emerging of the law in 2014, there is no means of improving the availability and use of port waste reception facilities in Kuwait. Part from regular meetings with related national entities, there is no progress in this regard⁽⁸⁷⁾. Question emerged itself in case of oil pollution from ships; would the liability of the oil pollution be partially imposed on the part of the port authority or the government for their contributing negligence from not facilitating PRF. This is more likely to happen if a ship calling Kuwaiti ports cannot dispose of their oil mixture wastes in port, they will have no option but to dispose of them at sea,⁽⁸⁸⁾ on which the result might likely to detain the ship at next port of call⁽⁸⁹⁾. Equally true, with a lesser extent, MARPOL also provides that these reception facilities should each case, be adequate for the reception of wastes from ships without causing undue delay to the ships using them⁽⁹⁰⁾. This might be possible channel for claims when rea-

(86) IMO has introduced a system for certification, survey and provision for reception facilities.

(87) IMO has developed a number of guidelines, one of which has been published as a Comprehensive Manual on Port Reception Facilities, the manual provides guidance on matters such as waste management strategy, type and quantity of ship-generated wastes, planning, choice of location, collection and treatment, financing and cost recovery, and cooperation of port and ship requirements.; see also, MEPC adopted Guidelines for ensuring the adequacy of port waste reception facilities (resolution MEPC. 83(44)) see also, Report of the marine environment protection committee on its forty-second session, (MEPC. 42) has proposed terms of reference for the working Group on port reception facilities included the following elements: definition of adequacy; parameters for reception facilities; methodology and general action plan; measures for improved communications; criteria for inadequate reception facilities; generic port waste management plan; and analysis of successful port waste reception facilities.

(88) Article 72 states that “It is strictly prohibited for all ships, whatever the nationality, to dispose (or discharge) oil, waists or harmful substances into the sea. All ships shall discharge their waists only in designated receiving facilities.”

(89) Despite the international principles “pollutant pays” the shipowner may subrogate his claim or part of his claim by proving the contributing negligence of the port.

(90) MEPC 42 in 1998 agreed that, to achieve «adequate reception facilities “, the port should have regard to the operational needs of users and provide reception facilities for the type and quantities of waste from ships normally using the port without causing undue delay for the ships. MEPC 44 in 2000 adopted resolution =

ding Article 7(1) of MARPOL establishes that port states should make all possible efforts to avoid a ship being unduly detained or delayed in connection with such investigation. This is because while ships are subject to both survey and certification by the flag state and port state control, the responsibility for providing reception is a matter only for port state, and progress in this regards in Kuwait has not been satisfactory. In nutshell, the existence and adequacy of port reception facilities is essential for the implementation of MARPOL. Simply prohibition the discharge of hazardous substances and wastes from ships at sea will have no effect in the absence of adequate reception facilities, for if ships cannot dispose of their wastes in port, they will have no option but to dispose of them at sea.

b) Investigation of an alleged violation

MARPOL⁽⁹¹⁾ and UNCLOS⁽⁹²⁾ conventions sets out obligations on the flag state to provide for immediate investigation and where appropriate institute proceedings in respect of the alleged violation in regards to pollution or the safety of the ships. Such obligation should be included in the Kuwaiti law. According to UNCLOS and MARPOL, law or supplementary regulations to such law should explains that proceeding to be brought in respect of the alleged proceeding without delay in accordance to the Kuwaiti law. Further, supplementary regulations should also contain the procedures of informing the requesting state and IMO of action taken and its outcome. That information must be available to all states.

c) The enforcement of the international regulations

As mentioned above, while UNCLOS defines flag, coastal and port State jurisdiction, IMO instruments specify how State jurisdiction

= MEPC.83(44) which stated that adequate facilities can be defined as those which: mariners use; fully meet the needs of the ships regularly using them; do not provide mariners with a disincentive to use them; contribute to the improvement of the marine environment; meet the needs of the ships normally using the port; and allow for the ultimate disposal of ships 'wastes to take place in an environmentally appropriate way. see also revision of the IMO Comprehensive Manual on Port Reception Facilities, IMO, 1999 edition.

(91) MARPOL, Articles 4 and 6

(92) UNCLOS article 217(4) -(5).

should be exercised so as to ensure compliance with safety and shipping anti-pollution regulations. The enforcement of these regulations is primarily the responsibility of the flag state. As other flag state, Kuwait must exercise the voluntary access to port implied acceptance by the foreign ship in order to ensure compliance with IMO anti-pollution related regulations. One way to ensure the enforcement of the IMO regulations is by imposing sanctions for violating, for example, MARPOL Convention, by port state even if the violation is committed outside of the port. IMO does not regulate the nature and extent of coastal state and port state jurisdiction. Hence, the enforcement of routing measures adopted at IMO relies primarily on the exercise of coastal state and port state jurisdiction. We can see that Kuwait does not enforce the international regulations, i.e. IMO regulations properly. It seems that the Kuwaiti Law had relied heavily on penalties as punishment for any contravention of its rules and regulations. For example, no penalties beyond the levying of fines are exacted and thus the measures pursued have had little on the elimination of oil pollution, as discussed below.

d) The imposition of penalties

The EPA Law chapter 7⁽⁹³⁾ contains provisions on penalties. Article 141 provides that intentionally causing pollution in Kuwaiti territorial waters in violation to Articles 71⁽⁹⁴⁾ & 72⁽⁹⁵⁾ leads to either a minimum fine of KD 50,000 but not exceeding KD 200,000 and/or a maximum of one year in prison. There is no prison sentence for unintentional pollution as stipulated in Article 142 that unintentional pollution in Kuwaiti territorial waters leads to minimum KD 30,000 up to maximum KD 50,000. Article 145 provides that failure to take action to prevent or reduce pollution, to take precautionary measures, report a polluting incident after it occurs, ships with no financial guarantee⁽⁹⁶⁾ or ships with no required equipment as per the international regulations will face a minimum fines of KD 10,000 up to KD 50,000 fine. Article 143 also

(93) Articles 128- 157

(94) Article 71 Imposing a duty on ships to carry on board anti-pollution emergency plan for oil tankers over 150 tones and all other ships over 400 tones.

(95) Article 72 provides that ships are prohibited to pollute by discharge or escape of oil or oily mixture or any harmful substances in the prohibited areas, and ships are bound to discharge their pollutant to the right receiving facilities

(96) under Article 82.

provides that dumping sewage or other harmful materials by oil tankers⁽⁹⁷⁾ leads to KD 1,000,000 fine. For repeated pollution offences, sentences will be doubled⁽⁹⁸⁾.

Leaving ships or installation within Kuwaiti territorial waters without permission will incur on the part of the shipowner imprisonment to a maximum of two years and a minimum fine of KD 10,000 but not exceeding 100,000 they are liable to pay compensation for harm caused to the environment in accordance with Article 146. The sanctions (penalties or fines) envisaged in the law are not adequate and stringent enough and do not envisage all cases of contravention to the law. For example, there is no provisions to impose fines for unregistered, unrecorded ships, ships with no international certificates or provisions to provide that entry into Kuwaiti territorial waters without permission leads to fines or prison. Furthermore, no case law, information or materials are available which indicate that such penalties as those provided in articles 142, 145 and 146 have been effectively applied, and that they thence contribute to eliminate the problem of oil pollution⁽⁹⁹⁾.

There is no provision to, possibly, impose, the almost universal practice, individually, on the owner and the master of a ship liability for the same pollution incident. Article 83 imposes liability merely on the owner or the master of the ship liability. Despite that it may come as a surprise to many to learn that shipowners and their insurers routinely indemnify the masters of their ships against fines imposed upon them for oil pollution⁽¹⁰⁰⁾.

(97) The law has differentiated between oil tankers and other commercial ships. The latter will be fined not exceeding KD 30,000.

(98) It is not clear whether the word sentence meant to hold the meaning of fines or fines and sentences.

(99) It has been illustrated that the incidence of oil pollution, convicted during 1971 and 1972 for polluting territorial waters of Kuwait, did not decrease substantially as a direct result of the increase in fines. See Badria AL Awadhi, Legal aspect of maritime pollution with particular reference to the Arabian (Persian) Gulf, (Kuwait, 1985), at p.87.

(100) And, incidentally, for other criminal offences too- for example failure to maintain safe working conditions on board of ship as required under Article 70 of the environment law of Kuwait

e) Defences

Despite the fines which courts in Kuwait may impose, pursuant to Article 83 of the EPA,⁽¹⁰¹⁾ for oil pollution offences, the fact remains that, the provisions of the EPA Law provide that with the no negligence defence afforded to defendants, i.e. polluter, these offences are seen not to impose strict liability according to the principle 'polluter pays'. Pursuant to Article 153,⁽¹⁰²⁾ Pollution that resulted from no negligence on the part of the polluter, the offence tends to be perceived as being not really criminal, and thus no penalties is imposed.

Various defences or exemptions are available to defendants where the discharge was necessary to secure the safety of the ship or to save life, where it resulted from damage to the ship,⁽¹⁰³⁾ or when incident of pollution is resulted from force majeure⁽¹⁰⁴⁾. The person causing such pollution is exempted from all penalties, however, they remain liable for cleaning up the pollution. More generally, Article 153 (b) & (c) contain a defence where the defendant shows that he took all reasonable precautions to avoid the commission of the offence. Thus, accidental discharge that caused by an unknown defect on the ship with no intention or act of negligence to cause the defect, the person causing such

(101) Article 83 of the EPA reads that: The following shall be liable for pollution in the restricted marine areas referred to in Article (68) of this Law:

The owner of the ship or aircraft, or captain, if the pollution is caused by a ship or aircraft

The owner or operator of the facility if the pollution is caused by facility.

The owner, its used or holder of the device, if the pollution is caused by a device for keeping oil or polluted materials.

The owner of the ship or its captain or the owner of the facility who leaves the same prior to obtaining the permission of abandoning it.

(102) The penalties stipulated in this law shall not be applicable to pollution cases resulting from:

Securing the safety of lives or means of transportation or goods.

The unloading operations resulting from a fault incurred by the ship or aircraft or the devices of either of them, provided it should not have taken place by the person in charge of any of them with the purpose of breaking down or damaging the same, or due to negligence. In all cases, it is conditional that the person in charge of any of them should have taken, prior to the fault and thereafter, all necessary precautions sufficient for prevention or reducing pollution effects, and shall immediately notify the competent department.

(103) Article 153

(104) Article 166

pollution is exempted from all penalties. The provision did not specify the standard of proof required from the polluter, i.e. exercise due diligence to avoid the incident, in order to exonerate himself. Hypothetically, if one assumes that the burden of proof that is not clearly specify is on the part of shipowner, it remains that in order to for shipowner exonerate himself from penalties, he would misuse such defence by demonstrate misleading facts that leading to exonerate him from negligence that caused the pollution. Especially, that prosecutors only have to demonstrate that a prohibited discharge occurred and, provided the defendant is willing to plead guilty (as he usually is), this is all the persecution hence does. The prosecutor does not see it as their responsibility and nor do they have the resources not the knowhow to routinely provide information to the court about the precise circumstances in which the offence occurred, or about whether and to what extend the defendant was culpable- even where the evidence may suggest that the discharge of oil was intentional. The environment protection law took into consideration this problem by dedicating the tasks of the prosecutors to a “environmental prosecutors” as stated in Article 171, in order to carry out all the investigation and allegation related to environment matters within two years of the establishment of the law. Nonetheless, still no specialized environmental prosecutor has been established yet.

Thus, to avoid that, the provision should impose on the part of the shipowner the burden to proof that the cause of pollution was not made by his personal act or omission, committed with the intend to cause such damage, or recklessly⁽¹⁰⁵⁾ and with knowledge that such damage would probably result⁽¹⁰⁶⁾.

These exceptions are conditioned by shipowner taking adequate measures to prevent the machinery from failure and that steps are taken to eliminate and prevent the pollution. The law does not provide on

(105) Recklessness in criminal issues means “faulty judgment, lack of skill or knowledge, and ignorance of something which should be known. Recklessness is represented in a positive action taken by a person without considering its danger or the consequences it might have” See Williams, Glanville, Recklessness in Criminal Law, *The Modern Law Review* (1953): 234-236

(106) This approach is not difficult to implement as the Kuwaiti court have stated that the intentional ignorance of the facts to avoid prosecution may be deemed the equivalent to actual knowledge. See Kuwait S.C article 309 section 199, Criminal Law, P.43 (2011)

whom the burden of proof is imposed, whether on the defendant shipowner or the plaintiff, in order to exonerate the shipowner from liability. It is believed that Kuwaiti courts should resort to the incorporated international convention into the Kuwaiti system, namely, the Civil Liability Convention (CLC), which impose a strict liability on the part of the polluter. In this context means that the claimant needs only to prove that the pollution damage suffered was caused by an oil covered by the convention which came from a ship covered by the convention. There is no need to prove fault of the shipowner⁽¹⁰⁷⁾. It can be suggested that the related provision must provide a clear statement demonstrating that the burden of proof is on the shipowner or the carrier⁽¹⁰⁸⁾.

Furthermore, even with the establishment of the environment prosecution, one obvious difficulty which stands in the way of bringing prosecutions is identify the ships responsible, particularly when the offence is committed in a busy shipping lane.⁽¹⁰⁹⁾ This is partly a problem of the limited resources available for offence detection and law enforcement.

9. The implementation of the environmental law

The poor implementation by the environmental administration is one of the biggest obstacles to the proper enforcement of environmental laws in Kuwait. Poor administrative and implementation procedures of the governmental authorities responsible for protecting the environment and combating pollution leads to increased levels of pollution⁽¹¹⁰⁾. It can be said that one of the main reason for poor administrative procedures in this regard is conflicting administrative duties and responsibilities among the different entities , i.e. ministries or environmental administrative agencies. This results to the failure of these administrative agencies to assume and execute their legal duties and responsibilities. For example, there is a lack of clarity of environmental responsibilities and competencies. In the one hand, the law of the environmental protection

(107) Yvonne Baatz, *Maritime Law*, (Sweet & Maxwell, 2nd Edition), p. 433

(108) It can be suggested that the provision might reads as "no liability for pollution damage shall attach to the owner if he or she proves that the damage..."

(109) See Owen Lomas, *The prosecution of marine oil pollution offences and the practice of insurance against fines*, 1 JEL (1989), at p. 51

(110) <http://www.mohamoon-kw.com/default.aspx?Action=DisplayNews&ID=5728> (last visited in 24.3.2021)

states that the EPA has authority over all issues relating to environmental protection and combating pollution. However, in reality the Ministry of Communications is the authority charged with protecting the marine environment and combating the pollution of such environment⁽¹¹¹⁾. Such undefined responsibility and authority amongst different stakeholders has led to unascertained duties and thus failure to perform them⁽¹¹²⁾. An example of this obstacle is the Kuwaiti government's failure to deal with the issue of the port receiving facilities⁽¹¹³⁾ as discussed above⁽¹¹⁴⁾. In addition, the majority of employees working the EPA lack experience in legal and environmental issues for the reason that the law establishing the EPA does not impose requirement for such experienced employee. Despite Article 4⁽¹¹⁵⁾ of the Environment Protection Law stipulates that the authority should have a general manager with experience and specialized in fields related to the environment, the majority of the general

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- (111) The personal in charged in the EPA has refused to discussed, at the EPA executive regulations workshops, chapter four of the law (related to marine environment) with the author. For the reason that they have not drafted chapter four and that has been entirely left to be drafted by the Ministry of Communication.
- (112) Ambiguity and unclear understanding may arise due to the words "relevant authority" that have been referred to in different provisions of the law for 10 times in Articles (23, 30, 37, 38, 39, 57, 69, 86, 107, 111 and 123). For example, in article 69 states that "The EPA in cooperation with other relevant authority" establish a national marine pollution plan..."
- (113) Article 72 provides that ships, regardless to their nationality, are prohibited to pollute by discharge or escape of oil or oily mixture or any harmful substances in the prohibited areas, and ships are bound to discharge their pollutant to the right receiving facilities.
- (114) See under subtitle Port reception facilities (PRF)
- (115) Article (4) Environmental Protection Act states that "The Enforcement Higher Council shall be formed under the chairmanship of the Prime Minister or the First Deputy Prime Minister and the membership of a number of ministers to be selected by the Chairman of the Enforcement Higher Council. The EPA's Director General shall be a member of the Enforcement Higher Council and he shall act as a reporter of the Council, The Enforcement Higher Council shall include in its membership three persons who shall be duly competent and experienced in the environment protection field whose appointment shall be made by virtue of a decree for four years' renewable energy or another similar qualification, and such decree shall decide their remuneration. The Council shall issue the internal regulations that regulate the working procedures therein and the manner of adopting its decisions. The Enforcement Higher Council shall, within the general policy of the government, take all necessary measures that protect the territorial areas against pollution, of whatever source, and achieve the objectives provided for in this law"

managers of the EPA, including the current one, do not have either the specialty nor the experience in environmental issues. Furthermore, the EPA do not have qualified personal to run and manage the research boat that kept unused since they purchased it for several millions. This leads to the failure to be able to identify causes and sources of pollution and hence to effectively combat the pollution. As a result, implementation of the law will suffer from a lack of motivated participation and as a result the environment suffers from a lack of integrated and appreciative strategic planning.

10. Lack of clear provisions in the law

The law contains a certain number of definitions. The drafting of some is not clear and sometimes confusing as discussed above.

The law makes multiple references to the “executive regulations” to be taken to determine further details of the law. However, no regulations for the marine pollution chapter was provided yet. The task of providing such regulations is being dedicated to the Ministry of Communication. Those regulations are essential to implement the law and effectively combat pollution, for example, to cover inspection, detention and penalties, as required by the provisions of MARPOL. Further executive regulations are important to make the application of law. For example, the law imposes requirement of reception facilities in all ports, however, there are no guidance or provisions on managing the reception facilities and that none of the Kuwaiti ports implemented such regulations.

11. Some possible solution

Failure by Kuwait to ratify mode of the major International Conventions which are designed to directly or indirectly prevent the marine environment is to be regretted. This failure is partly remedies by the provisions of the domestic legislation related to the prevention of marine environment. Apart from being patchy, such legislation relied too much on implementing international conventions which are slow in being enacted in Kuwait after ratification. The large state’s owned fleets, particularly of oil tankers and large container carriers, are generally comprised of modern ships meeting the highest international standards. At the other end of the scale, however, is a large group of

small tonnage often used for coastal or inner gulf trade, which is barely controlled by the relevant authorities and whose safety standards are often highly suspect.

The implication of the provisions of the Environment Protection Act would enhanced the EPA's employee environmental awareness and performance through training courses and through their participation in conferences on environment⁽¹¹⁶⁾.

The ambiguous articles of the Kuwaiti Environment law should be rephrased to be clear and applicable in a precise manner. Proper coordination with legal expert to review the law related explanatory and executive notes.

Competent environmental courts should be established to consider environmental cases, and judges experienced in environmental issues and environment law should be appointed in such courts. A new approach to the level of fines would, of course, require advice and training for court and their clerks.

If the object of the law is to make shipowner and masters take all possible precautions to avoid oil pollution then, even in cases of minimal culpability, the fines imposed must be substantial or else there will be insufficient incentive to comply. This is all more important because the chances of offences, for the explained reasons above, being detected are low.

It is interesting question as to with which regime, the ratified international conventions or Kuwait domestic pollution related provisions the court will enforce compliance. There will doubtless be a tendency in the court to prefer the provisions of domestic legislation over the international conventions.

Port state control should be strengthened and training provided for inspectors and administration staff as necessary so that the standards of

(116) The Authority shall be concerned with all works, tasks and activities that protect the environment in the country, including but not limited to the following: (10) Setting the general framework for environmental education and awareness programs, increasing the level of environmental awareness as well as achieving the positive community participation in environmental protection.

shipping operating in Kuwait are improved, seeking technical assistance technical assistance from IMO as appropriate and necessary.

Strengthening the measures for the protection of Kuwaiti water through ratification and proper implementation of the relevant international conventions.

Conclusion

The main approach for fighting pollution is the proper command and control, environmental management, through national and international laws. Enforcement of regulations, however, remains a generic problem not only in Kuwait but in all regional countries⁽¹¹⁷⁾. However, while there is a new establishment of Kuwaiti environment law as a comprehensive regulatory instruments to protect the environment, it generally lacks an international prospective and the progress in its implementation has been generally slow. Adding to this problem, the institutions suffer from a lack of adequate manpower and expertise, and often the power to implement the enacted regulations.

Pollution prevention remains largely untried in Kuwait. It very known to all that a series of techniques and technologies imposed by international regulations, i.e. port receiving facilities, could be used to reduce the amount of pollution generated from ships and other sources. One can imagine the lack of implementation to the national and international laws, for example, implication required by the international regulations and laws, i.e. national contingency plan, which should have been taken decades ago, are being started with initiative meeting very soon. Despite the initiatives of ROPME and the EPA, the efforts are patchy at best. Commitments by the EPA management have yet to be translated into realistic and implementable strategies with well-defined goals to cope with the implementation and discharging of the obligation from the regional and international conventions and treaties, which are being signed by Kuwait. ROPME/MEMAC should provide, by having legal experts in the field, appropriate assistance to member states wishing to sign or ratify IMO's conventions.

(117) UNEP, Overview on Land-based sources and activities affecting the marine environment in the ROPME sea area, (1999), UNEP Regional Seas Reports and Studies No. 178

Appendix

TABLE Major IMO Instruments exclusively relate to the Prevention, Preparedness, Response and Cooperation for Marine Pollution irrespective of whether the introduction of polluting substances into the sea is the result of an accident involving a ship or derives from ship-related operational discharge.

from Ships

<i>Convention and other instruments</i>	<i>Issues covered</i>
International Convention for the Prevention of Pollution from Ships, 1973 (MARPOL 73/78)	Oil pollution Noxious liquid substances carried in bulk Harmful substances carried in packaged form Sewage Garbage Air pollution Energy efficiency and GHG emissions Special areas
International Convention on Oil Pollution Preparedness, Response and Co-operation, 1990 (OPRC) Protocol on Preparedness, Response and Co-operation to Pollution Incidents by Hazardous and Noxious Substances, 2000 (OPRC-HNS Protocol)	Pollution preparedness and response, intervention and cooperation
International Convention Relating to Intervention on the High Seas in Cases of Oil Pollution Casualties, 1969 (Intervention)	
International Convention for the Control and Management of Ships' Ballast Water and Sediments, 2004 (BWM)	Ships' ballast water and sediments

<i>Convention and other instruments</i>	<i>Issues covered</i>
Guidelines for the Control and Management of Ships' Biofouling to Minimize the Transfer of invasive aquatic species, 2011 (Biofouling Guidelines)	Biofouling and harmful anti-fouling
International Convention on the Control of Harmful Anti-fouling Systems on Ships, 2001(AFS)	
International Convention for the Safe and Environmentally Sound Recycling of Ships, 2009 (Hong Kong Convention)	Recycling of ships
Resolution A.982(24) on Revised Guidelines for the Identification and Designation of Particularly Sensitive Sea Areas (PSSAs), 2006	Particularly sensitive sea areas
International Convention on Civil Liability for Oil Pollution Damage, 1992 (CLC, 1992) Replacing the 1969 CLC	Liability and compensation for marine pollution
International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, 1992 (FUND, 1992), Replacing the 1971 Fund Convention	
International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea, 2010	
International Convention on Civil Liability for Bunker Oil Pollution Damage, 2001	

دور الاتفاقيات الدولية والإقليمية المصادق عليها في حماية البيئة البحرية الكويتية من التلوث النفطي للسفن

الدكتور/ طلال حمد العدوان

ملخص الدراسة

تعتبر مياه الخليج من أكثر البحار التي تقتض بالسفن التجارية بشكل عام وناقلات النفط بشكل خاص. وبما أن الخليج وخصوصاً الجزء الشمالي بما في ذلك المياه الكويتية تعتبر منطقة مغلقة لذلك تم تصنيفها مياه عالية الحساسية وقابلة للتلوث. تهدف هذه الدراسة على التعريف بالمعاهدات الدولية والتي تختص في حماية البيئة البحرية من التلوث الناتج عن ناقلات النفط. تم تقسيم هذه الدراسة إلى خمس أقسام: أولاً ما يختص بالقوانين المعنية بنظام السلامة في السفن. ثانياً المتطلبات الواجب اتباعها بما يختص بكفاءة الطاقم البحري. ثالثاً الأقسام الإدارية للشركات والمنشآت البحرية (مثل الموانئ). رابعاً: المعاهدات الدولية المختصة في التعويضات المدنية للتلوث البحري الناجم عن ناقلات النفط. والجزء الأخير مخصص لتفصيل أهمية المصادقة على المعاهدات المختصة وما ينتج من ذلك في حماية للبيئة. تتطرق هذه الدراسة إلى أفضل السبل العملية في تطبيق تلك المعاهدات والحاجة إلى إعادة صياغة القانون البحري الكويتي وقانون البيئة. تتبع هذه الدراسة منهجية البحث الأكاديمي المكتبي.

- كلية القانون الكويتية العالمية - الدوحة - دولة الكويت،

مجلة الحقوق

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