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WORLD MARITIME UNIVERSITY
Dalian, China

**A Study on the Legal Problems
Related to Places of Refuge**

By
Yang Wenzhi
China

A dissertation submitted to the World Maritime University in partial
Fulfillment of the requirements for the award of the degree of

MASTER OF SCIENCE
IN
MARITIME AFFAIRS

(MARITIME SAFETY AND ENVIRONMENT MANAGEMENT)

2006

Dedicated to:
My mother, Shuying, Wang
and
My father, Hongjin, Yang

DECLARATION

I certify that all the material in this dissertation that is not my own work has been identified, and that no material is included for which a degree has previously been conferred on me.

The contents of this dissertation reflect my own personal views, and are not necessarily endorsed by the University.

Yang Wenzhi

Date: 20th March, 2006

Supervised by:

Han lixin, the Professor of Law College of Dalian Maritime University

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Title: **A Study on the Legal Problems
Related to Places of Refuge**

Degree: **MSc**

Abstract

Maritime incidents have been accompanying the shipping industry since its earliest time. In emergent situations, it is imperative for the ship to seek and enter a place of refuge to save the ship and rescue the crew. Nevertheless, since the 1970s, denying the access was not a rare phenomenon, but on an increasingly regular basis, due to the modern preoccupation with protection of the marine environment.

In this dissertation, a brief look is taken at the three high-profile accidents where the entry of places of refuge was denied. The definition of it and the difference among the relevant expressions are discussed in order to give a clear description of the problem. Both the existing international conventions and the customary law are examined to clarify whether the coastal State has a duty to accommodate a ship in distress in the contemporary context. Some problem areas and deficiencies in the current international regime on liability and compensation for pollution damage are identified and discussed. To encourage the accommodation of ships in distress, the suggestion of the coastal State's immunity from liability is analyzed. The necessity, feasibility of the establishment of a new convention on places of refuge and its main contents are addressed and discussed as a legislation solution to the problems of places of refuge. China's attitude and measures with regard to the problems are presented. In the last section, the dissertation concludes the results of the analysis and argument in this subject.

Key Words: places of refuge, obligation, liability, compensation, pollution, environment

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ABBREVIATIONS

ABS	American Bureau of Shipping
BIMCO	Baltic and International Maritime Council
CLC	International Convention on Civil Liability for Oil Pollution
CMI	Comite Maritime International
HNS	International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea
ICJ	International Court of Justice
IAPH	International Association of Ports and Harbors
IMO	International Maritime Organization
INTERTANKO	International Association of Independent Tanker Owners
LOF	Lloyd's Standard Form of Salvage Agreement
ISU	International Salvage Union
IUMI	International Union of Marine Insurers
OPRC	International Convention on Oil Pollution Preparedness, Response and Cooperation
SAR	International Convention on Maritime Search and Rescue
SDR	Special Drawing Rights
SOLAS	International Convention for Safety of Life at Sea
UNCLOS	United Nations Convention on the Law of the Sea

Chapter I

Introduction

Maritime incidents have been accompanying the shipping industry since its earliest time. The safety of a ship and its crew may be imperiled as the result of the external factors such as the stress of weather, force majeure, or the internal factors such as the occurrence of structure or equipment failure, or more frequently the human errors. There are various reasons that may render a ship in distress. Maritime accidents may occur anywhere at any time. And in such emergent situations, it is imperative for the ship to seek and enter a place of refuge to save the ship and rescue the crew.

1.1 The Importance of the Study

It is an old and widely-accepted customary law to assist a ship in distress including the provision of a place of refuge by the coastal States. Commercial vessels, or even warships and fishing vessels are entitled to enter safe waters without the coastal State's permission. Nevertheless, the right of entry has changed a lot in the recent times, especially since the 1970s. Denying the access was not a rare phenomenon, but on an increasingly regular basis. This is to a large extent due to the modern preoccupation with protection of the marine environment and the prevention of pollution. The environmental requirements are becoming more and more

demanding. A stricken vessel carrying hundreds of thousands of tones of oil or noxious cargoes will impose enormous risks on the coastal environment, or the safety of the local inhabitants.

The calamitous consequences from the refused vessels in recent time have provoked widespread repercussions and aroused intensive attention within the international maritime community and even around the whole world. The problem of places of refuge is brought to the forefront of the international maritime discussion. Without clarifying the legal uncertainty, the symptom of 'Not In My Back Yard' will still prevail and the next Prestige will happen.

1.2 Objectives of the Study

The objectives of this dissertation are as follows:

- To demonstrate the significance and necessity of providing places of refuge;
- To define places of refuge;
- To distinguish the place of refuge from the other related expressions;
- To clarify the obligation of coastal States in the contemporary context;
- To identify the gaps of the generally-applicable international liability and compensation regime for pollution damage;
- To provide a legal solution of the elaboration of an international convention on places of refuge.

1.3 Order of Presentation

To achieve the objectives of the dissertation, Chapter II in this paper will introduce the three high-profile accidents in relation to the place of refuge and discuss the specific definition of it and address the difference of the relevant expressions in order

to give a clear description of the problem. Chapter III will focus on whether the coastal State has a duty to accommodate a ship in distress in the contemporary context. Liability and compensation for pollution damage will be delineated in Chapter IV to examine whether the international regime can provide adequate and prompt compensation. The necessity and feasibility of the establishment of a new convention on places of refuge and its main contents will be construed in Chapter V. China's attitude and measure to solve the problems will be articulated in Chapter VI.

1.4 Scope and Methodology

During the preparatory work of the dissertation, several legal experts and professors from World Maritime University and Dalian Maritime University provided some constructive suggestions and proposals on how to carry out the study. By means of extensive literature review, the author examined the status quo of the problems on places of refuge. In particular, the majority of the proposals on places of refuge submitted by IMO Party States during IMO Subcommittees' meetings and the CMI reports, as well as related papers were collected and examined to support the study. Two fundamental problems of places of refuge are discussed and a legislation solution is presented in this paper.

Chapter II

The General Concept of Places of Refuge

The problem of places of refuge is not new but the recent notorious maritime casualties stimulated the maritime community to cope with this problem. It deserves recalling these accidents to show the significance of places of refuge. In the wake of these accidents, the new term of ‘places of refuge’ is created by the International Maritime Organization (IMO) to solve the problem. What is the place of refuge? Is there any difference between it and the previously commonly used terms, such as ‘port of refuge’, ‘safety haven’ and ‘place of safety’? In this Chapter, these questions will be examined in detail.

2.1 The Stimulus to Tackle the Problem of Places of Refuge

Places of refuge play a vital role for rapid and effective assistance to ships in distress. For example, a ship can use a place of refuge to unload its cargo of fuel oil or to carry out repairs so that the situation does not become worse and perhaps not lead to oil pollution. However, coastal states are usually reluctant to allow disabled vessels, particularly oil tankers and similar vessels carrying hazardous cargo, to enter their waters as these vessels may pose high risks of environmental and property damage and human life losses. This reluctance has been exemplified by quite a number of maritime incidents where vessels in distress have been refused access of places of

refuge usually during the course of salvage operations. In recent years, three high-profile incidents, namely the Erika, the Castor and the Prestige, brought to international notice the severe consequences of not permitting a vessel entering a 'place of refuge' when in distress or the need of shelter to effect repairs or to transfer its cargo.

2.1.1 The Erika

On December 11, 1999, the Erika, a twenty-five year old tanker registered in Malta, laden with 31,000 tonnes of heavy fuel oil, was en route from Dunkirk (France) to Livorno (Italy). The Erika ran into very rough sea conditions with the force 8 to 9 wind and 6 m swell. The tanker was faced with structural problems off the Bay of Biscay and the master reported cracks in the deck plating but the ship master informed the French authorities that the situation was under control after transfers from tank to tank, and that he was heading to the port of Donges, at reduced speed. Later on the captain allegedly requested permission to enter the French port of Saint Nazaire for serious structure problems. On the 12, at 6:05 a.m. he sent a Mayday call: the ship was breaking up. At 8:00 a.m. the same day, the Erika spilt in half in international waters, about thirty miles south of Penmarc'h (Southern Brittany).

The French Navy and Coastguard, assisted by the British Royal Navy with well-equipped large helicopters evacuated safely all of the 26 crew members. And the incident caused extensive pollution to the surrounding area. The quantity of oil spilt was estimated between 7,000 and 10,000 tonnes. Erika's captain was subsequently arrested for violating France's domestic environmental law. This incident was described as the worst oil disaster in European history at that time. (IOPC Fund, 2004)

2.1.2 The Castor

The fully laden 31,068 dwt tanker Castor, built in 1977, was in the course of a voyage from Constanza, Romania to Lagos, Nigeria in December 2000. This vessel developed a large crack on the main deck in the western Mediterranean off the coast of Morocco, encountering heavy weather including seas of more than 8 meters and Force 12 winds.

In order to lighten the cargo for the relief of the stresses in the vessel, the nearly-crippled tanker sought permission for entering into sheltered waters in which it could offload its cargo. However Castor's requests were subsequently denied by the authorities of many Mediterranean countries including Morocco, Algeria, France, Gibraltar, Greece, Italy, Malta, Spain and Tunisia, mainly because of concerns that the ship's cargo would ignite and pose the high risk of explosion. In addition her cargo of gasoline did not fall within the categories of "persistent oil" as recognized by the International Oil Pollution Compensation Fund (IOPC Fund) as a serious cause of marine pollution.

After almost forty days as a homeless pariah, as no place of refuge was granted to the laden Castor, and the salvors were obliged to perform a ship-to-ship transfer on the high seas after towing the vessel over 2,000 miles around the western Mediterranean. Fortunately this was completed successfully. Nevertheless it should be noted that the refusal of entrance to sheltered waters and the risky at-sea transfer operation in exposed waters could have resulted in loss of vessel and the possible environmental disaster. (ABS, 2001)

2.1.3 The Prestige

This Bahamian registered ABS classed oil tanker of 42,820 tons gross laden with about 77,000 tonnes of heavy fuel oil was underway from Ventspils, Latvia to Singapore on 13th of November 2002. The vessel developed a substantial starboard list in heavy seas some 30 miles off Cape Finisterre, Spain. As a result of the list, the vessel lost main propulsion and began to drift. Soon thereafter, a Spanish helicopter arrived to evacuate 24 members of the crew; the master, chief engineer, and chief mate stayed on board to control the vessel. A request by the salvors to the Spanish authorities to allow them to bring the casualty into a sheltered place of refuge to transfer cargo and make repairs was declined, and the order was given that the Prestige should be towed away from the coast. The weather conditions deteriorated and over the next five days, the Prestige suffered additional structural damage while being towed to an undeclared location. Finally, on 19 November about 0800, the Prestige broke in two and subsequently sank about 133 nautical miles off the coast of Spain, six days after the initial casualty. The majority of her cargo went to the bottom with the vessel, from which it continues to leak slowly, but a substantial quantity of fuel oil had already escaped from the vessel.

It is estimated that, around 40,000 tons of heavy fuel oil carried by the Prestige spilled along coastlines from Galicia to southern France over a stretch of about 2,000 kilometers, and severely affected marine wildlife and habitats and caused inestimable damage to marine capture fisheries, shellfish farming and the tourism industry in the area. A ban on all fishing and shellfish harvesting over an extensive area was imposed by the Spain authorities as the consequence of oil pollution. The Prestige sinking is considered to be one of the worst environmental catastrophes in history and the ecological damage could last for decades. (ABS, 2003)

These incidents highlight the urgent need to tackle the spiny problem of places of

refuge although it is not a new one. INTERTANKO and BIMCO (2002) jointly stated:

“The Prestige incident highlights the concerns of shipowners surrounding coastal states’ continued reluctance to admit ships into ports of refuge. When ships are not granted such refuge, the potential for a serious incident is frequently increased and the safety of the crew jeopardized. The emergency transfer of cargo and other measures to aid the stricken vessel may be similarly hindered with a consequent increased threat to the environment.”

Granting places of refuge can be a positive way to avoid or mitigate the threat of pollution. These recent incidents indicate the importance of the place of refuge issue and the environmental risk posed by not being able to handle a place of refuge request promptly and effectively.

2.2 The Concept of Places of Refuge

2.2.1 The Definition of Places of Refuge

Pursuant to IMO Guidelines on places of refuge for ships in need of assistance (IMO, 2003a), a place of refuge is defined as “a place where a ship in need of assistance can take action to enable it to stabilize its condition and reduce the hazards to navigation, and to protect human life and the environment”. This definition may be construed in a very broad perception. A seaport may be one option but not necessarily the most appropriate under particular circumstances. Maddern (2003, p101-102) referred a ‘place of refuge’ as “a sheltered area of coastline where a ship in distress may seek shelter from the wind and swell”.

Every organizations or individuals may give their various definitions on places of

refuge. Despite these concepts may be expressed in different terms, the essence is the same: a place to provide sufficient shelter and protection so that further actions can be taken to mitigate the threat or consequences of a casualty. When a ship is in distress, what it needs is access to relatively sheltered waters so that operations may be performed to make the ship and its cargoes safe with minimum risk to either the ship, the coastal State, the environment or the salvors. There is no absolute need for accommodation in a port. Moreover, sheltered waters may provide much better guarantees to limit overall risks than ports. Pollution controls are indeed easier to carry out in such sheltered waters because, in case of an accident, the environment, safety and economy of the port is not endangered and, the ship being close to the shore, pollution remains limited to a restricted area.

2.2.2 Distinction between Places of Refuge and Other Related Terms

“Places of refuge” is a new term to maritime practices. Before the invention of this term by the IMO, there are several commonly-used expressions where ships require the access to a port or other sheltered area both in the shipping practices and in the academic research works. The term of place of refuge is more appropriate in the contemporary context.

First, places of refuge derive from the concept of port of refuge but they are significantly different in two aspects. One is the scope of the geographical area. The notion of a place of refuge is broader than port of refuge in spatial terms. A place of refuge may be protected anchorages, an inlet or other sheltered area and is not merely confined to a port. The term of ‘port of refuge’ may be misleading as what a ship in distress needs is not necessarily a port.

“Although the term ‘ports of refuge’ had been widely used in shipping practice, it did not appear in any of the relevant conventions (i.e. UNCLOS,

SOLAS, Salvage, OPRC, etc.). Use of the word ‘port’ might be too narrow and restrictive *vis-à-vis* the envisaged scope of the geographical area which might, in case of an emergency, be able to provide facilities and services (including putting in place contingency arrangements) to ships in distress, in particular laden tankers.”(IMO, 2003b)

The other aspect is the commercial implication of port of refuge. A “port of refuge” is a commercial shipping term in common usage where a vessel deviates to a port in order to take repairs that will then enable it to continue on its voyage. There are references to ports of refuge in the maritime “Contracts of Carriage” in Charter Parties and in Bills of Lading clearly demonstrating a commercial orientation rather than a legal one(Owen, 2000, p10). In addition, ‘the port of refuge has a particular meaning in general average as an unintended destination resulting from the general average act’ (Chircop, 2006a, p8).

Second, with the separation of the rescue of crew and the assistance to ships, the place of refuge more restrictedly indicates the help of ships to a certain extent. However, “safe haven” as ‘the oldest of these’ infers or hints that saving life is involved (Chircop, 2006a, p6). Coastal states would seem to have no problem with providing a safe haven in order to save life, but simply from consideration of the commercial interests of ships and cargoes, coastal states would appear to be reluctant to accommodate the disabled ships. This subtle difference is reflected in the scope of applicability of the IMO Guidelines on places of refuge for ships in need of assistance (IMO, 2003a). Where a ship is in need of assistance but safety of life is not involved, these guidelines should be followed.

Finally, the connotation of the place of safety is more coherent and uniform with that of the place of refuge in spatial terms, but it is more generally used in the salvage

operation and regulated by the contracts between the ship and the salvors. The term of the place of safety is addressed in the LOF 2000 (LORD'S, 2000). Under it, the contractors agree to use their best endeavours to save the property and to take the property to the place of safety. When the property is in a safe condition in the place of safety, the Contractors' services shall be deemed to have been performed.

In addition, it is worth noting whether there is any difference between the ship in need of assistance and the ship in distress. The latter is quite widely used in recent research papers on places of refuge. The ship in need of assistance means in the IMO Guidelines "a ship in a situation, apart from one requiring rescue of persons on board, that could give rise to loss of the vessel or an environmental or navigational hazard". Distress is defined in the 1979 International Convention on Maritime Search and Rescue as amended (IMO,1998), as "a situation wherein there is a reasonable certainty that a person, a vessel or other craft is threatened by grave and imminent danger and requires immediate assistance". It is so evident that the great differentia between a situation which requires immediate assistance and that in need of assistance. This differentia may lead to quite different decisions on granting or denying a place of refuge. But in practice, it is usually hard to perceive distinctly the exact time and the severity in a specific situation.

Chapter III

The Coastal State's Obligation to Accommodate Ships in Distress

As analyzed in the section 2.1, the severe consequences of pollution damage following these maritime accidents, where the access to the places of refuge is denied by coastal States, awaken and astonish the maritime community. Do the coastal States have the right to refuse the entry of a foreign ship in distress and simply turn it away from their waters? Is there any legal basis to oblige the coastal States to offer a place of refuge to a ship in distress? In this section, the related international conventions are discussed to examine whether the obligation to offer a place of refuge is clearly set up. Then from the perspective of the customary international law, it is analyzed whether the right of entry of ships in distress can provide the legal basis to oblige the coastal State to accommodate a ship in distress.

3.1 The Analysis on the Existing International Conventions

3.1.1 United Nations Convention on the Law of the Sea

United Nations Convention on the Law of the Sea (1982) (UNCLOS) is referred to as the constitution of the oceans which sets up the fundamental rights and obligations of States. The analysis of relevant provisions of UNCLOS may be instructive on whether ships in distress have the right of entry into places of refuge.

Geographically places of refuge are usually located in the territorial sea or the internal waters. Access to such places implicates the passage through the territorial sea or internal waters. Subject to UNCLOS, ships enjoy the right of innocent passage through the territorial sea. Article 18 defines “passage” as “navigation through the territorial sea for the purpose of traversing that sea without entering internal waters or calling at a roadstead or port facility outside internal waters; or proceeding to or from internal waters or a call at such roadstead or port facility.” and requires such passage to be continuous and expeditious but it does include stopping and anchoring if “incidental to ordinary navigation or are rendered necessary by force majeure or distress or for the purpose of rendering assistance to persons, ships in danger or distress”. Article 19 states: “Passage is innocent so long as it is not prejudicial to the peace, good order or security of the coastal State.” Since these indices are highly subjective, an attempt is made to enhance objectivity by providing a list of activities, the engagement in which would render passage non-innocent. It is arguable that the open-ended formulation suggests that what constitutes innocent passage is at once objective and subjective (Agyebeng, 2005, p19). And the wilful and serious pollution is not deemed innocent. This provision does not mean that unintentional pollution is innocent under all circumstances. The list of acts in Article 19 is unlimited so that serious pollution which is not wilful may be called not innocent as well (Van Der Velde, 2003, p481). And Agyebeng(2005, p39) cited that in the case of Iran, Bahamas and Belize there is no requirement that the pollution be willful to render passage non-innocent.

It is debatable that ships in distress have the right of entry on the basis of innocent passage. First, the purpose of the passage is to navigate through the territorial sea more than anything else. And passage should be a not-stop and quick sailing through the territory sea. If places of refuge are in the territorial sea, the entry will

stop there and not merely pass through it. Second, stopping and anchoring may be part of the passage if necessary by force majeure or distress. However ship masters or salvors usually seek access voluntarily. Murray (2002, p5) notes that “the exercise of the right of entry implies that ships are forced into the territorial sea such that not entering the territorial sea is impossible. In both the Erika and the Castor cases, the masters requested permission to enter from the coastal state.” Another rationale is that ships seeking places of refuge, particularly vessels carrying large volumes of crude oil or hazardous cargo, may risk coastal environments and threaten the safety of local populations from actual or potential pollution spillage or explosion. Under these circumstances passage may not be construed as innocent.

Moreover the right of innocent passage is not absolute and limited by the coastal State's right to adopt laws and regulations relating to it under Article 21, in respect of the conservation and preservation of marine environment and its living resources and the prevention, reduction and control of pollution. And foreign ships exercising the right of innocent passage are obliged to comply with the laws and regulations of the coastal state. Article 25 provides that, in case of ships proceeding to internal waters or a call at a port facility outside internal waters, the coastal State 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. This presumably implies that the coastal state may prevent ships that not meet the conditions from passing through the territorial sea, or prohibit the entry of the territorial sea.

Under Article 98, the coastal State has the obligation to establish, operate and maintain an adequate and effective search and rescue service. And, both the SOLAS Convention (IMO, 2004) and the SAR Convention (IMO, 1998) further articulate the requirements on the rescue of persons in distress at sea. But beyond

the humanitarian duty to assist, none of the Conventions stipulates any provision on what is to be done with the ship in cases of force majeure or distress such as the accommodation of such ships.

On the opposite side, States have an obligation to protect and preserve the marine environment in pursuance of Part XII of UNCLOS. Under Article 194, states shall take all necessary measures to prevent, reduce and control pollution of the marine environment from any source. The maritime leper, the disabled laden tankers, will manifestly impose pollution risks or actually have caused pollution damage to the marine environment. Refusal of entry may perceptibly be regarded by some States as the necessary measures to prevent or mitigate the pollution damage. Article 194 also requires States shall ensure that activities under their jurisdiction or control not to cause pollution damage to other states and their environment, and that pollution does not spread beyond the areas where they exercise sovereign rights. Subject to Article 195, in taking these measures, states shall not transfer directly or indirectly damage or hazards from one area to another or transform one type of pollution to another. If the access to places of refuge is denied by coastal state, there is little room to debate that damage or hazards of pollution are transferred from one area to another. Article 199 requires states to develop and promote contingency plans. Article 221 confirms that states have the right to take measures beyond the territorial sea proportionate to the actual or threatened pollution damage to protect their coastline upon a maritime casualty which may reasonably be expected to result in major harmful consequences. It is conceivable that such a measure can be taken in the territorial sea where the coastal State has sovereignty.

3.1.2 The International Convention on Salvage

In the Salvage Convention (IMO, 1989), Article 9 provides that coastal states have

the right to take measure to protect its coastline from pollution or the threat of pollution in event of a maritime casualty, including the right to give directions in relation to salvage operations. The directions may include both the permission and the refusal of a place of refuge. Under certain circumstances, where, for example, there are imminent and severe threats to their marine environment, coastal states may refuse the salvor's request of access. Article 11 requires that states should consider the need for cooperation between salvors, other interested parties and public authorities whenever regulating or deciding upon matters relating to salvage operations such as admittance to ports of vessels in distress or the provision of facilities to salvors.

Under these provisions in such a way of wording, it can not be concluded that the Salvage Convention is intended to confirm the right of access, or to deny it. At most, it can be merely interpreted as a recommendation to grant a place of refuge. 'In any case, an agreement between salvor and salvaged to make for a particular port should not be to the detriment of third parties or the coastal State'(IMO, 2001a). Additionally, during the preparatory works, different stakeholders attempted to include the obligation of coastal states to offer places of refuge in the Convention but the effort failed. As a private law convention, it was not the proper instrument to public law duties of states. The Convention only contains "a rather empty exhortation" with regard to offering places of refuge (Gaskell, 1991, p247). 'The result is an uncertain mix of private and public law provisions within the Salvage Convention, and the public law provisions are, unfortunately, vague and equivocal'(Mukherjee, 2006, p278).

3.1.3 The International Convention on Oil Pollution Preparedness, Response and Cooperation

Parties to this Convention (IMO, 1990) shall undertake, individually or jointly, to take all appropriate measures to prepare for and respond to an oil pollution incident. Article 3, 4, 5 and 6 set up requirements on oil pollution emergency plans, reporting procedures, actions on receiving an oil pollution report and the establishment of a national system for responding promptly and effectively to oil pollution incidents, including a national contingency plan.

This Convention does not explicitly mention the admission of ships in distress to a place of refuge, but 'it does envisage the development by States of oil pollution response contingency plans, and some States have such plans which expressly provide for the possibility of admission to their ports or havens of ships in distress which may prove to threaten pollution' (Shaw, 2003, p331). But taking into account places of refuge does not necessarily mean that the State has to admit the entry. The entry may be one option of measures on the comprehensive assessment of relevant factors and risks involved.

3.1.4 The International Convention Relating to the Intervention on the High Seas in Cases of Oil Pollution Casualties

The Convention (IMO, 1969) affirms the right of a coastal State to take such measures on the high seas as may be necessary to prevent, mitigate or eliminate grave and imminent danger to its coastline or related interests from pollution by oil or the threat thereof, following upon a maritime casualty which may reasonably be expected to result in major harmful consequences. And the measures taken by the coastal state under the Intervention Convention must be proportionate to the actual or threatened damage. When a coastal state orders a damaged ship to be towed or set on fire, the danger imposed by such ship must be exceptionally categorized into the grave and imminent one. Ships seeking entry do not necessarily pose such risk.

3.1.5 Summary

From the above analysis, the relevant international conventions do not expressly give any answer to the question whether coastal states have the duty to allow ships in distress entry to places of refuge. Regarding this question, these conventions are very ambiguous and equivocal to varying degrees, even contradictory and inconsistent by different ways of interpretation. It is irrational to directly conclude neither that coastal states have the duties to allow ships in distress entry, nor that they have the rights to refuse entry. But some conventions such as the Salvage Convention and the OPRC Convention indirectly recommend the accommodation of ships in distress.

3.2 The Analysis of the Customary International Law on the Right of Entry for Ships in Distress

In accordance with the previous analysis, the existing international conventions do not explicitly oblige the coastal State to grant the access for ships in distress. But as Van Hooydonk (2003, p427) pointed out, during the preparatory work on the Convention on the International Regime of Maritime Ports, the right of access was regarded as being so self-evident and absolute that the parties to the convention considered that it is not necessary to make specific mention of it in the convention. And Frank(2005, p55) stated that the existence of this customary humanitarian right of access into ports has never been codified in international conventions, but is expressly acknowledged by writers, by IMO's members, international, European and national courts and different bilateral treaties. So it is of great necessity to recall whether the right of entry for ships in distress does exist or not in this modern shipping era and if so, whether or not such a right of entry will render the coastal States oblige to offer a place of refuge in any circumstances. The author thinks the

old customary law has changed in the recent years and is not absolute since the circumstances have changed greatly. The following four arguments may rationalize that the right of access is limited.

3.2.1 The Lack of Uniform States' Practice

International custom, as a source of international law, is referred to as 'evidence of a general practice accepted as law' by the Statute of the International Court of Justice (ICJ) (Cassese, 1986, p180). In order to establish the existence of a rule of mandatory customary international law, two fundamental elements are indispensable on the orthodox legal theory (Churchill, 1983, p7). The first is a general and consistent practice adopted by States. The second element is the so-called *opinio juris*- the conviction that the practice is one which is either required or allowed by customary international law, or more generally that the practice concerns a matter which is the subject of legal regulation and is consistent with international law. The degree of generality and consistency required may vary according to the subject matter, and the positive obligations, as where a state is obliged to do something, may require a more general and consistent practice than a norm which gives a state privileges (Dixon, 2000, p29-39).

Under the customary right of entry, the coastal State is obliged to offer places of refuge. Such a positive obligation needs a greater degree of generality and consistency. However, according to the findings of a questionnaire conducted by CMI (2002) on the information of member states' dealing with casualties needing places of refuge, at least 17 ships in distress have been repeatedly refused entry by many coastal States since the 1970s. The practice adopted by States in recent years is not in conformity with the customary law. The frequent refusal of entry may at least imply that the general practice of States has changed and the conviction that

there is a legal duty to grant entry has been abandoned by States.

3.2.2 The Separation of the Rescue of Crew and the Assistance to Ships

The long-standing customary right of entry in distress has evolved essentially from humanitarian considerations. 'It is firmly entrenched and time-hallowed. It might be argued that at the time when it evolved it could have been absolute in nature and not admitting of exceptions' (Devine, 1996, p229-230). Previously, to rescue the crew, the ship usually had to be granted the place of refuge. The two affairs were entangled with each other. But the capabilities of rescuing crew on board a ship in distress indeed have made a significant progress world widely during recent several decades, especially with the advent of the helicopter. At least it is very likely to rescue the crew quickly and relatively safely by the coastal States, either individually or jointly, without entering a port or sheltered waters. The entry into ports of ships is not indispensable for the rescue of crew. The modern rescue technology makes it possible the separation of the rescue of crew and the assistance to ships and cargoes.

Once the rescue of crew has been successfully carried out, the obligation of assistance to ship crew is seemingly discharged by the coastal State. This opinion is confirmed by the *Toledo* case. In 1995, the M.V. *Toledo* carrying potash was refused refuge, had to be beached in the UK, and eventually towed out and scuttled after the crew were airlifted. And the Irish High Court of Admiralty rejected the claim against its government. Chircop (2006b, p218-219) summarized the court's consideration as:

In effect, the court prioritized the humanitarian dimension of the right of refuge, divorcing self-preservation interests of those on board from the safety of the ship and cargo. By doing so, this led the court to believe that once the public authorities discharged their duty by airlifting the crew, they

were able to then further prioritize the perceived interests of the coastal state (i.e., lack of suitable refuge areas, threat to gas platforms and the possibility of bunker oil pollution) when deciding on whatever other action may be taken in relation to the ship and cargo.

3.2.3 The Conflict with the Obligation to Protect the Marine Environment

Under several international conventions as discussed in the section 3.1, coastal States have the obligation to protect and preserve the marine environment. A disabled ship carrying large quantities of oil or dangerous cargoes may cause serious or irreversible damage in the environmental sensitive areas. It is possible too that virtually every sizable vessel is a potential threat to the environment if only because of the source of its propulsion-invariably oil or nuclear power (Devine, 1996, p229-230). Under these circumstances the assistance to ships may conflict with the obligation to protect the marine environment. If so, States can turn away vessels in distress if they can demonstrate that the threat to ship and cargo are outweighed by the threat to the interests of the coastal state concerned (Browne, 2003, p7). And the International Association of Ports and Harbors (IAPH) (IMO, 2002) confirmed that this right of entry was in conflict with the right of self-protection of any sovereign State and port if a ship in distress posed a serious threat to a fundamental interest of the State or port, such as the protection of marine environment.

3.2.4 The Flexible Nature of Customary Law

Customary law is dynamic and flexible as it is responsive to changing needs as expressed by state practice (Chircop, 2006b, p229). It develops by spontaneous state practice and reflects changing community values (Dixon, 2000, p34-35). Over the last thirty years coastal states have increasingly had more control over their

territorial sea for the purpose of preventing pollution and protecting coastal populations (Murray, 2002, p6-7). The increasing global appreciation of the need to protect and preserve the marine environment arguably further enhances the coastal state's power and justification to prohibit the distressed ship's entry. The customary right of entry will spontaneously change with the coastal State's needs to protect the marine environment. Although it is difficult to define with the precise moment that the contrary conduct ceases to be unlawful, the frequent refusal may be a symbol to manifest that the customary law is changing on account of its flexible nature.

3.2.5 Summary

Therefore, the right of entry in distress, as a customary international law, does exist but it is not an absolute one. It may be limited under certain circumstances. This customary law does not provide the legal base to oblige coastal States to offer a place of refuge in any situations.

3.3 The General Obligation to Offer Places of Refuge Subject to Specific Exceptions

As analyzed in the sections 3.1 and 3.2, the coastal State's obligation is full of uncertainty. The ambiguity may lead to the next *Prestige* and will be harmful to the improvement of maritime safety and the protection of marine environment. In the author's opinion, the coastal State should have the general obligation to offer places of refuge to ships in distress subject to specific exceptions. The general obligation to grant places of refuge should be established under usual circumstances. But the coastal State should be entitled to turn the crippled vessel away in exceptional situations.

First, the coastal State has the obligation to protect the marine environment under international conventions. Without the granting of places of refuge, the disabled tankers may severely pollute the coastal environment and cause enormous damage. The serious consequences of oil spills have been demonstrated by the *Erica* and the *Prestige* casualties. Experiences have shown that the most effective way to prevent or mitigate the pollution damage is to offer the place of refuge. In a place of refuge, a ship can unload its cargo of fuel oil or to carry out repairs. Even if the oil spills out, the pollution can be contained in a restricted area and related measures can be taken much easier. So the environmental risk would be minimized by providing a place of refuge promptly and effectively. Second, from a broader view, the establishment of such an obligation is helpful to prevent or mitigate hazards and damage imposed on both the coastal States and the vessels. In emergency situations, granting a place of refuge will lead to a win-win situation. A ship in distress is not a problem that only afflicts the ship and the cargo owners. In most cases, offering the place of refuge to the ship in distress is in favor of the coastal State's interests. Third, without such an obligation, the coastal State will presumably have no liability when the access is refused without sound reasons. Such discretionary power will lead to turning the vessel away more frequently and wider spread of the attitude of 'Not In My Back Yard'. Finally, the access to places of refuge may directly affect the successful salvage operation. A salvor's claim for a reward is dependent on a successful result. "If states are too flippant about denying a place of refuge, it will obviously discourage salvors. A return to the days when salvors refused to salvage 'leper ships' is certainly not desirable" (Mukherjee, 2006, p297). Due to these four reasons, it should be incumbent upon the coastal State to grant places of refuge.

However if the access will impose a grave threat on the vital interests, the coastal State should have the right to deny the access. The specific exceptions may

encompass the safety of local inhabitants, the unique feature of environment value, and other vital interests.

Chapter IV

Civil Liability and Compensation for Pollution

Damage from Ships in Relation to Places of Refuge

With regard to places of refuge, the civil liability and compensation for pollution damage are also fundamental concerns of coastal States. Enormous financial risks may hamper their decision on the accommodation of a ship in distress. An effective and efficient system of liability and compensation may facilitate the decision-making and encourage the permission of entry. 'If automatic compensation is feasible and economically reasonable, it could be an incentive for ports when considering the entrance of a ship in their waters' (Mari Darbra Roman, 2006, p135).

Pollution damage may be primarily caused by oil either as cargo or as bunker, hazardous and noxious substances and nuclear materials. When a foreign ship is allowed into places of refuge and pollution damage ensues, the coastal state may greatly concern the person who will be held liable for the pollution damage and the possibility of full and prompt compensation under the international liability and compensation regime.

4.1 The Liability for Pollution Damage under Circumstances of Places of Refuge

Currently there are mainly three international conventions which establish the

liability regime for pollution damage, namely the 1992 International Convention on Civil Liability for Oil Pollution (the CLC) (IMO, 2003c), the 1996 International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea (the HNS Convention) (IMO, 1996) and the International Convention on Civil Liability for Bunker Oil Pollution Damage, (the Bunker Convention) (IMO, 2001b). But the HNS Convention and the Bunker Convention have not entered into effect. When distressed ships enter into places of refuge and caused pollution damage, these conventions are also applicable in the specific place-of-refuge situations.

4.1.1 The Shipowner's Liability for Pollution Damage

Under these three conventions the owner of the vessel which caused pollution damage is liable regardless of whether or not he was actually at fault, subject to very few exceptions, i.e., the strict liability regime is established. Claims for pollution damage under the CLC and the HNS Convention can be made only against the registered owner causing the damage or his pollution liability insurer-the so called channeling of liability. But the Bunker Convention does not follow liability channeling provisions and the shipowner has a broad meaning including the registered owner, the bareboat charterer, the manager and operator.

In the place-of-refuge situations, the shipowner would be prima facie held liable for the pollution damage whether the place of refuge is granted or not. But there are some exceptions subject to which shipowners may be exonerated from his liability under these conventions. Once the owner can successfully invoke any one of these exceptions, he will not be held liable. Furthermore if the owner proves that the pollution damage resulted wholly or partially either from an act or omission done with intent to cause damage by the person who suffered the damage or from the

negligence of that person, the owner may be exonerated wholly or partially from his liability to such person. When the coastal states respond negligently in the event of places of refuge that are granted or not, and ensuing oil spills or other dangerous substance cause damage, it may presumably be held as liable due to its negligent decision. One possible scenario will be that where the coastal State negligently accommodates the distressed ship in an unsuitable port. In such cases, the shipowner may be exonerated wholly or partially from his liability.

4.1.2 The Coastal State's Liability in the Place-of-refuge Situations

Where coastal states decide to grant or deny a place of refuge and pollution damage ensues, some exception is available to the shipowner under the international liability conventions or the Fund is insufficient to meet all claims, some claimants may seek to bring claims against the States. These would arouse another problem of whether the coastal states may be held as liable to compensate the claimants. In light of the responses to the second questionnaire submitted to National Associations (CMI, 2003, P318-326), the majority of the states consider that they would not have a liability for granting or denying a place of refuge when pollution damage ensues, neither within the jurisdiction nor within the jurisdiction of the neighbouring country. A few responders considered that there could be a liability where the Authority acted negligently if it should be proved that there would be a close causative link between the decision and the ensuing damage. But the United States government would accept or assume liability if no alternative source of funding was available or if the discharging vessel had a complete defense to any claim.

Moreover under the 1982 UNCLOS, some provisions may have certain relationship to the liability of the States in the place-of-refuge situation. Article 232 confirms that States shall be liable for damage or loss attributable to them arising from

measures when such measures are unlawful or exceed those reasonably required in the light of available information. These measures include those taken by States to avoid pollution arising from maritime casualties. And to grant or deny places of refuge is without any uncertainty to be listed among them. Furthermore, under Article 194 the States shall ensure that activities under their jurisdiction or control not to cause pollution damage to other states and their environment, and that pollution does not spread beyond the areas where they exercise sovereign rights. Subject to Article 195, in taking these measures, states shall not transfer directly or indirectly damage or hazards from one area to another. These two provisions may be of some implication to the liability of the States when the pollution damage ensues within the jurisdiction of another country in a place-of refuge situation.

So the reasonableness of the coastal state's decision to grant or deny a place of refuge will be presumably the key to determine whether the state is liable or not. Once the state can prove that its decision is reasonably made on the basis of objective and sound assessment of relevant factors and risks in light of available information at the time of the decision, he may considerably or almost completely rule out the possibility to be held as liable. After all, it is not his decision but the disabled ship that is the origin of the pollution. A close causative link between the decision and the ensuing damage is hardly proved where the coastal state passes the reasonableness test.

At the international level, guidelines on places of refuge for ships in need of assistance have been established by IMO in 2003. At national level, a few states have their own national guidelines on places of refuge in conformity with the IMO guidelines. There are some specific criteria and requirements on how to assess the relevant factors and risks and measures to be taken by coastal States when deciding

on the accommodation of a ship in distress in these guidelines. The standard of care required from a state in such circumstances would possibly be assessed on the basis of the IMO guidelines. So they inevitably will form and clarify the criteria to test the reasonableness of the coastal state's decision. It is quite understandable that the IMO guidelines will have close implications for the threshold of negligence.

However, where the coastal State made negligently decision to grant or deny the access, it would be very likely that the State can not be compensated for its damage and even may be liable to compensate third parties who suffer damage. Under these circumstances, several difficult questions such as the contributory negligence, inevitable accident in the agony of the moment and causation will arise (Mukherjee, 2006, p292). The most difficult is how to prove the close causative link between the negligent decision and the ensuing damage. In some jurisdictions, it will be relatively easy that the coastal State may be held liable where the so-called 'but for' is accepted. In other jurisdictions, the causation may not be subject to the 'but for' test. The chain of causation will be checked. And Hetherington (2003a, p369) construed in more detail that:

A claimant who wishes to sue the port authority that has refused access would, presumably, have a difficult burden of showing that, had access been granted to the stricken vessel, the ensuing damage would not have been occasioned. That would require a great deal of speculation by a Court as to what would have happened in the event that a port of refuge had been provided. It would, no doubt, be difficult for a Court to reach such a conclusion if the damage sued upon took place at or shortly after the time at which a place of refuge had been denied. If, however, a considerable time had elapsed such a conclusion might be easier to reach.

4.1.3 The Coastal State's Immunity from Liability

In order to encourage coastal States to admit vessels in distress to enter places of refuge and protect them from claims, they may enjoy the right of responder immunity under international liability Conventions. The International Association of Ports and Harbors (IAPH, 2002) also regarded it appropriate to consider a legal framework for immunity for those responding to ships in distress or offering them shelter and more generally in the event of an accident, a liability that is incumbent on the ship rather than the port. Two aspects may rationalize this proposition.

First, granting places of refuge may be regarded as one essential measure during the salvage operation. It goes without saying that granting places of refuge is significant to successful salvage operation. A port or the sheltered area is a vital link in every salvage operation. Otherwise it is ridiculous and unthinkable that the problem of places of refuge aroused such great attention and gave such priority in the maritime community. Moreover, under the 1989 Salvage Convention, salvage operation is defined as any act or activity undertaken to assist a vessel or any other property in danger in navigable waters or in any other waters whatsoever. Granting places of refuge is consistent with the notion of salvage operation. Although in some situations to protect the marine environment has the priority and to assist a vessel is secondary, it is hardly to achieve the goal to protect the marine environment without granting a place of refuge to assist a vessel. So admitting ships to enter a place of refuge is in reality one measure and activity during the salvage operation. Under Article III (4) of the CLC and Article 7(5) of the HNS Convention, no claims for compensation for pollution damage may be made against any person performing salvage operations with the consent of the owner or on the instructions of a competent public authority. From the salvage aspect, the coastal State may enjoy

the right of responder immunity.

Second, granting places of refuge may be considered as preventive measures. When a pollution accident really happens or there is a severe and imminent danger causing pollution damage, the coastal State's decision to accommodate a ship in distress by all means have the express and specific purpose and intention to prevent or mitigate the pollution damage. So it may be categorized into the measures to prevent or mitigate the pollution damage. Wu (2002, p108) stated that:

‘The 92 Conventions have enlarged the scope of application by covering threat removal measures taken before an actual oil discharge occurs. This new wording should encourage governments and shipowners to take immediate action in a threat situation in order to prevent or minimize pollution’.

Under Article I (7) of the CLC and Article 1 (7) of the HNS Convention, ‘preventive measures’ is defined as any reasonable measures taken by any person after an incident has occurred to prevent or minimize pollution damage. And Under Article I (8) of the CLC and Article 1 (8) of the HNS Convention ‘incident’ means any occurrence, or series of occurrences having the same origin, which causes pollution damage or creates a grave and imminent threat of causing such damage.

From these two definitions it can be easily concluded that granting places of refuge can be characterized as preventive measures provided that the decision is reasonably made. Under Article III (4) of the CLC and Article 7(5) of the HNS Convention, no claims for compensation for pollution damage may be made against any person taking preventive measures. Professor Mukherjee(2006, p293) confirmed this view in the opposite way that refusing negligently to give a polluting vessel a place of refuge by a coastal State was associated with the duty of mitigation, a principle that is recognized to be of universal application. And Hetherington (2003b, p463) more

directly suggested a new sub-paragraph to be inserted into the liability Conventions to make it clear that States, port authorities and other persons granting a place of refuge should be immune from claims for compensation. Therefore, from the pollution prevention aspect, the coastal State may also enjoy the right of responder immunity.

In addition, under Article III (4) of the CLC and Article 7(5) of the HNS Convention, if the damage resulted from their personal act or omission, committed with the intent to cause such damage, or recklessly and with knowledge that such damage would probably result, these persons will lose the right of responder immunity. Such a provision can also act as the deterrent to the coastal states to make decisions recklessly.

4.2 The Compensation for Pollution Damage in Relation to Places of Refuge

The recovery of the coastal State's costs and damage is also a fundamental correlative to the accommodation of ships in distress. A pollution casualty may incur substantial damage and costs and the subject of compensation therefore deserves thorough examination.

4.2.1 The General Compensation Regime for Pollution Damage

The compensation regime for pollution damage is a two-layer system. The first layer of compensation is set up by the CLC, the HNS Convention and the Bunker Convention. The 1992 International Oil Pollution Compensation Fund (the IOPC Fund) created by the 1992 International Convention setting up the Oil Pollution Compensation Fund (IMO, 2003d), and the HNS Fund comprise the second layer of compensation.

Under the first layer, the shipowner will normally be entitled to limit his liability to an amount based on the gross tonnage of the vessel involved in the incident. But he will be deprived of the right to limit his liability under some conditions. The registered shipowners are required to maintain insurance or other financial security, and to carry on board each tanker a certificate attesting to the fact that such cover is in force. And claims for pollution damage may be brought directly against the insurer or provider of financial security up to the owner's limit of liability whether or not the owner is entitled to limit his liability. But the provisions of the compulsory insurance are not applicable to the owners of small ships. If the owner is incapable of assuming their financial obligations to satisfy the claims for oil pollution damage or the insurer can invoke the defenses, the coastal state may not be compensated for the damage in the place-of-refuge situation.

And as analyzed in previous sections 4.1.1 and 4.1.2, if the shipowner can invoke the exceptions or the coastal State acts negligently, in some cases the coastal State will not get compensated either. Especially if the coastal state that permits the access to places of refuge only ratified the CLC, this may make great trouble to the coastal states for the ensuing pollution damage as there is no second layer of compensation. But as the two-tier compensation regime is integrated into the HNS Convention the shipowner's defenses are relatively less important under this Convention than under the CLC when coastal states permits the ships enter places of refuge. In case of bunker oil pollution, there is no second layer of compensation. But the shipowner includes not only the registered owner, but also the bareboat charterer, the manager and operator. This notable shift to multiple liabilities reflects the need to make up for the absence of a second tier of supplementary compensation (Mason, 2003, p10).

Under the second layer of compensation, the IOPC Fund or the HNS Fund may

compensate claimants for the pollution damage in cases where the totality of claims exceed the shipowner's liability limit or where compensation is not obtainable from a shipowner who is exonerated from liability or who is incapable of assuming their financial obligations and whose insurance is insufficient to satisfy the claims for oil pollution damage. So if coastal states are Parties to the Fund, the possibility of full compensation for pollution damage related to places of refuge will be substantially increased.

But the IOPC Fund or the HNS Fund shall incur no obligation under some circumstances. In addition, the maximum compensation by is also limited. After the Erica and the Prestige incidents, the IOPC Fund limit has been greatly enhanced through the endeavors of maritime community. The maximum amount was increased by some 50% from 135 million SDR to 203 million SDR including the amount under the CLC in 2003. And when the aggregate of claims against the IOPC Fund from any one incident exceeds the maximum amount, there shall be a pro rata distribution. The 1992 Fund's payments were limited to 15% of the loss or damage actually suffered by the respective claimants in the Prestige accident (IOPC Fund, 2004).

It is important to note that under the Article 4 (3) of the Fund Convention and the Article 14 (4) of the HNS Convention, if the Fund proves that the pollution damage "resulted wholly or partially either from an act or omission done with the intent to cause damage by the person who suffered the damage or from the negligence of that person", the Fund may be exonerated wholly or partially from its obligation to pay compensation to such person. However, under the same Article, the Fund confirms that "there shall be no such exoneration of the Fund with regard to preventive measures". Under Article I (7) of the CLC and the Article 1 (7) of the HNS

Convention such measures are defined as “any reasonable measures taken by any person after an incident has occurred to prevent or minimize pollution damage”. So provided that the measures taken by the coastal states can be categorized into the preventive measures, at least part of the losses of coastal states and ensuing damage will be recoverable, for example the costs of cleaning-up operations, the costs of disposing of recovered oil and associated debris and the costs of removing oil from a damaged tanker posing a serious pollution threat.

It is even thought in a tentative manner by Røsæg (2004, p45-47) that the key to obtaining compensation of coastal states in a place of refuge situation lies in whether the decision on providing places of refuge can be characterized as preventive measures. If so, the measures and ensuing damage and losses will be compensated by the Fund irrespective of contributory negligence on behalf of the person taking the preventive measures. Gausi (2006, p312) concluded that it might well be the case that measures taken by a state, prima facie preventive, resulting however to be negligent, may still qualify for compensation from the IOPC Fund 1992, as the threshold of reasonable measures can possibly be higher in domestic law than the threshold triggering liability in terms of negligence, in the sense that something can be negligent but still within the ambit of reasonableness required in law.

4.2.2 The Provision of Financial Guarantee

To ensure that compensation for damage is indeed available and to confirm the shipowner's or the insurer's financial capability, it is understandable for coastal State to require the provision of financial securities or bank guarantees by the shipowner when places of refuge are granted. But the author holds that the financial requirement or condition should not have the final say to decide whether the access is granted or not. The provision of a guarantee should act to facilitate the

decision-making and encourage the access.

The provision of financial guarantee is reasonable for coastal State but such requirement should be elaborated in the international legal instrument such as a convention on places of refuge which will be discussed in the next chapter, to avoid the unilateral or regional measures. The present status is lack of uniformity. Under some legal instruments, the provision of financial guarantee should be taken into account as one of the related factors in the decision process, such as in the IMO Guidelines on places of refuge for ships in need of assistance (IMO, 2003a) and the Bonn Agreement (1980). And the European Commission proposed amendments to Directive 2002/59/EC (Commission of the European Communities, 2005). In accordance with the proposed provision, coastal States would be entitled to require presentation of a financial guarantee, prior to accommodating a ship in distress in a place of refuge. Under the Spanish Royal Decree 210/2004, the requirement goes much further and it requires the shipowner to denounce the right of limitation of liability (Lloyd's List, 2004).

The most practical method to meet the financial requirement is to formulate a pre-designed standard letters of undertaking or other similar forms. It is conducive to negotiate the substantive clauses of the standard letters under the IMO or the CMI to ensure the wide acceptability by the coastal States and the providers of such guarantees. It is noted that the criteria to determine the amount of the guarantee should be based on objective, technical and transparent assessment of related factors. In accordance with such criteria, the amount of guarantee will be acceptable and reasonable.

The standard letters of undertaking designed to suit the specific place-of-refuge circumstance is not without support and can be achievable. In reality, a draft

standard form of letter of guarantee has been proposed by the International Group of P and I Clubs (IMO, 2004b) to provide appropriate security when granting a vessel refuge in the absence of the entry-into-force of all the liability Conventions. In the draft letter, a certain amount of guarantee is available and the right of limitation of liability is preserved. And Hetherington (2003b, p465-467) also regarded that the P&I letters of undertaking was preferable as a potential model.

The pre-designed standard form of letters of undertaking will not only serve the initial objective to ensure that compensation is available, but also get more gains. There is no need to spend much time on the negotiation of the terms and clauses of an agreement. This will facilitate the decision in emergency situations.

Chapter V

An International Legislative Solution to the Problems of Places of Refuge

In the author's opinion, it is the optimal option to establish an ad hoc international convention on places of refuge under the auspices of IMO to solve the wide-range and complex problems as addressed in the Chapter III and Chapter IV. Such an idea gets support from some flag states, the shipping industry and several writers (Frank, 2005, p60). The International Association of Ports and Harbours (IAPH), the International Salvage Union (ISU), and the International Union of Marine Insurers (IUMI) are strong advocates for an International Convention to be developed in this area (CMI, 2004, p390).

5.1 The Necessity to Develop a New International Convention on Places of Refuge

'Does one really have to await another shipping disaster before international maritime law is adjusted? A new catastrophe purely provoked by the unclarity of the law in this field and by the lack of a co-ordinated policy of coastal states is in no way a fanciful hypothesis' (Van Hooydonk, 2000).

The author regards that the four rationales suggest the necessity to establish an ad hoc framework at the international level to settle the problems on places of refuge.

5.1.1 The Legal and Financial Uncertainty

Currently there is no single specific international law where there is a legal requirement to oblige coastal States to allow a distressed ship into a place of refuge or allow coastal States to refuse the ship's entry. On the basis of the analysis of the Chapter III, the existing conventions are vague and ambiguous. And the customary right of entry is also limit in the current situation. Under these conditions, it is very likely that the coastal State will refuse the access because of the massive environmental risks and the attitude of 'Not In My Back Yard'. In addition, the absence of a clarified legal regime which sets out the rights and obligations of the States leads to bad decision-making, wasted effort and time potentially leading to bad outcomes (CMI, 2004, p390).

And the liability and compensation for pollution damage is a great concern but also problematic for coastal States when admitting the access and damage ensues. The coastal State may be exposed to substantial financial risks. However, without having a principal rule to establish the rights and obligations, it is preposterous to consider responsibility and liability (Timagenis, 2003, p379).

5.1.2 The Requirement to Settle Disputes

UNCLOS Articles 197 and 211 make requirements on States to establish international rules, standards and recommended practices and procedures to prevent, reduce and control pollution of the marine environment from vessels on a global basis and, as appropriate, on a regional basis, directly or through competent international organizations. And under Article 235 States shall cooperate in the development of international law relating to liability and compensation for damage and the settlement of related disputes to assure prompt and adequate compensation.

Moreover in the resolution A/RES/57/141 on Oceans and the law of the sea, the General Assembly of the United Nations (2002) noted:

‘with deep concern the extremely serious damage of an environmental, social and economic nature brought about by oil spills as a result of recent maritime accidents which have affected several countries; and therefore calls upon all States and relevant international organizations to adopt all necessary and appropriate measures in accordance with international law to prevent catastrophes of this kind from occurring in the future’.

5.1.3 The Lack of Uniformity in Legislation

The national legislation on places of refuge and State practice vary from one country to another. There is lack of uniformity under current circumstances. Some countries permit the access for ships in distress. Under Norway Regulation of 23 December 1994 No.1130 (CMI, 2002, p128-129) foreign, non-military vessels are entitled to enter a port of refuge for the reasons of force majeure or distress. Under some national legislation, there may be no obligation to provide a place of refuge. The Spanish Royal Decree 210/2004 makes it clear that Spain is not obliged to provide a safe refuge and that all decisions on such requests will continue to be taken on a case-by-case basis (Lloyd's List, 2004). In addition, as analyzed in the section 4.2.2, the financial guarantee as a condition of entry is also lack of uniformity. To avoid the unilateral legislation, an international convention is necessary.

5.1.4 The Inadequately Adopted Actions

The three notorious accidents rendered the problem of places of refuge the highest priority on the Organization’s agenda and in December 2003, the IMO Assembly, at its 23rd Session, finally adopted the Guidelines on Place of Refuge for Ships in Need

of Assistance. The IMO guidelines recognizes that it is difficult to handle maritime casualties in open areas and the most effective manner for preventing and minimizing the spread of pollution following a maritime accident would be to transfer the cargo to another ship and to repair the casualty in a sheltered place. Accepting a ship in distress, however, may endanger the coastal state's environment, its security and economic interests. It is for the coastal state to decide whether or not to grant access on a case-by case basis. It is encouraged to accommodate the ships whenever reasonably possible after weighing all factors and risks involved in a balanced manner. And the focus of the guidelines is paid to the operational and procedural matters in assessing the relevant factors and risks and taking necessary measures. Shaw (2003, p343) considered that:

‘Executive action by a coastal state which is not part of a coordinated international initiative is like the case-by-case solution of a legal problem. It may deal with the immediate problem but it establishes no universal principle of international law or practice, and gives no guidance to the luckless master of a distressed vessel. In terms of the harmonization of international maritime law in all its aspects it is a failure.’

At regional level, Article 20 of the EU Directive 2002/59 on a Community Vessel Traffic Monitoring and Information System (European Community, 2002, p10) requires Member States to draw up plans and procedures to accommodate ships in distress, taking into account operational and environmental constraints. But it confirms that the acceptance of a vessel into a place of refuge is always subject to authorization by the competent port state authority. The Directive, therefore, does not create an express legal duty for EU coastal states to open their ports to vessels in trouble, but solely compels Member States to balance interests in accordance with the IMO guidelines.

Although these initiatives are positive steps forward on the operational matters which facilitate the coastal States' decision-making against objective criteria, it is definitely true that EU and IMO rules on place of refuge leave the decision whether or not to grant access to ships in trouble entirely up to the coastal States. Furthermore, they do not touch the issues of liability of the coastal States where there is an unjustified refusal and those of financial risks where pollution damage ensues. And the guidelines are soft law lack of mandatory force and unenforceable. Indeed, they do not provide the final solution to the problem of places of refuge.

5.2 The Analysis on the Feasibility of the New International Convention on Places of Refuge

The elaboration of such an international convention would certainly have many advantages such as the improvement of the clarity and uniformity of maritime law and the avoidance of unilateral or fragmented regional legislation. And ultimately such an international convention is conducive to the realization of both the environment protection and the successful salvage of the vessel and its cargo. Such an international convention will be feasible and attainable.

First of all, the failure of the two previous attempts in codifying the right of entry into an international convention does not mean that this time the establishment of the convention will fail as well, as the circumstances and conditions are not the same at present. During the development of the Convention on the International Regime of Maritime Ports, the right of access was regarded as being so self-evident and absolute that it is considered that it is not necessary to make specific mention of it in the convention itself. But currently the right of entry is not deemed absolute. The coastal State's decision in the place-of-refuge situation is lack of uniformity. There is great need to clarify the right of entry in a mandatory international convention.

In the preparatory work on the 1989 Salvage Convention, it was considered that the Salvage Convention fundamentally as a private law convention was not a proper instrument to elaborate such public law duties of the coastal States. But now the convention is an ad hoc legal instrument particularly formulated to cope with the problems on places of refuge.

And there is a compelling need to establish an international convention. Griggs (2003, p164-165) concluded that the area of the law covered by a convention was not suitable for harmonization because there was no “compelling need” after analyzing the success or failure of a convention. Absence of need is one of the obstacles to uniformity of maritime law. The enormous impact of the disasters such as the Erica and the Prestige should in itself be considered to constitute a compelling need (Van Hooydonk, 2003). The maritime leper problem needs to be tackled at the global level.

The ultimate objective of such a convention is to prevent or minimize hazards and damage imposed on both the coastal States and the vessels. It does not simply try to impose an obligation on the coastal State. When a ship has suffered an incident, the best way of preventing damage or pollution from its progressive deterioration would be to lighten its cargo and bunkers, and to repair the damage. Such an operation is best carried out in a place of refuge. Such a convention contains a comprehensive framework to assist coastal States to determine places of refuge for ships in need of assistance and respond effectively to requests for such places of refuge. As analyzed in the section 3.3, in emergency situations, granting a place of refuge will be beneficial to both the coastal State’s and ship’s interests. Turning away a distressed vessel usually poses a greater threat to the environmental, economic and social interests. In reality, the coastal State is the beneficiary of the convention.

Most importantly, the major obstacle will be that the States will not accept an express obligation to grant places of refuge. Such a legal duty will curtail the sovereignty of the coastal State. It should be noted that the coastal State's obligation of accommodation of a distressed ship is not absolute. Under some circumstances the coastal State is entitled to refuse an entry. Such an obligation is established on the balance of both the prerogative of a ship in need of assistance to seek a place of refuge and the prerogative of a coastal State to protect its coastline. When safety of life is not at stake, the absolute priority is to be given to protection of the environment and other vital interests of the coastal States where there is a grave and imminent danger, and the commercial interests of the ship and cargo would be secondary. The obligation to some extent is to compel the coastal State to make a reasonable decision on granting or denying a place of refuge.

Furthermore, the ratification of the convention will fill the gaps in the international liability and compensation regime to a certain degree. As discussed, the HNS Convention and the Bunker Convention have not come into effect, and although the Draft Wreck Removal Convention is closer to adoption by the IMO diplomatic conference(IMO, 2005), there may be a long way to go before it comes into effect. Whether the coastal State can get compensation for HNS and bunker pollution damage and wreck removal expenses will be full of uncertainty. And the compulsory insurance, direct action and financial conditions such as a bank guarantee or the letter of undertaking from the P&I Club will ensure prompt compensation. A fund on places of refuge will increase the probability of full compensation. And the responder immunity will make the coastal State exonerated from the additional claims or the recourse action of the shipowers. In addition, worries on the incompatibility with the existing international liability and compensation regimes can be eliminated as well in a proper manner. Ringbom

(2004, p137-182) suggested:

‘A new instrument should therefore preferably be developed at a global level, where it could be specifically confirmed that the liability regime arising from a place of refuge situation constitutes *lex specialis* in relation to the liability and compensation rules which apply to other incidents. The instrument would primarily apply as between parties to it, but there is nothing to exclude a CLC-like arrangement, by which the required financial security can be equally made available to ships flying the flag of non-parties’.

5.3 The Analysis on the Main Content of the New International Convention on Places of Refuge

The establishment of a new international convention is to solve the problems on places of refuge. The main ingredients and general principles should be fully discussed and incorporated into it. They, *inter alia*, include:

(a) The obligation to accommodate the ship in distress. As analyzed in the chapter II, the right of entry is no longer an absolute one and in conflict with the protection of the marine environment. The absolute obligation on coastal State is not appropriate choice and without sound legal basis. However a case-by-case approach as set up in the IMO guidelines provides the coastal State too much discretionary powers although it is much preferred by many organizations and writers. The rational option is to assume the obligation to offer places of refuge, but it is subject to express and exhaustive exceptions that mean to threaten the vital interests of the coastal State. And the coastal State should take the burden of prove that its decision is reasonable if the access is denied. Consequently the criteria of reasonableness should be addressed.

(b) The requirements related to places of refuge in the contingency plan. This item may comprise the person or body that has the power to decide, the decision-making mechanism, the right of coastal State to give directions to the operation, and the provisions of facilities and equipments for assistance, salvage and pollution response. And places of refuge should be designated in advance but where there is a request to enter a place of refuge, the designation should be based on a case-by-case analysis. The pre-designated place of refuge may be the first choice but not necessarily the only one as there is 'no perfect place of refuge suitable for all vessels in all situations'(Linden, 2006, p61). And the IMO guidelines establish the pertinent requirements and criteria on the factors and risks and operational procedures. The guidelines should be incorporated into such an instrument. The decision-making mechanism will be as much as possible to ensure that the decision is based on the objective and technical assessment.

(c) The liability and compensation. This aspect will cover a wide range of topics as discussed in the Chapter III. First of all, the provision of financial guarantees as a condition of entry should be set up to ensure that compensation for damage is indeed available and to confirm the shipowner's or the insurer's financial capability. And the financial guarantees should not be restricted to compensate for the pollution damage but include other costs or expenses such as wreck removal expenses. Second, the coastal State's liability should be articulated when the decision is made negligently and damage ensues. In order to encourage granting entry, the coastal State should enjoy the right of responder immunity when such entry is reasonably permitted. Finally, the legitimacy and necessity of the establishment of a fund should be considered to ensure that full and prompt compensation.

Chapter VI

Places of Refuge in China

China has a very long coastline spotted with many large busy ports open to foreign vessels. Problems of places of refuge are also on the agenda of Chinese government. The status quo in China makes it urgent further legislation.

6.1 The Status quo of Place of Refuge in China

6.1.1 The Potential Requests to Grant Places of Refuge in China

Since 1970s, with the adjustment of the structure of energy supply of China and implementation of energy strategy, the freight traffic of imported oil has greatly increased. In 2004, the import quantity of crude oil in China is about 120 million tons (Su & Zhu, 2006, p13). As the majority of oil is transported by ships, the probability of vessels in distress and the risk imposed on the coastal environment have increased correspondingly. According to the statistics of Wang (2005), during the recent three decades, some 200 oil spill incidents have occurred and almost 30,000 tons of oil have spilled or leaked. From 90's, the number of incidents has increased rapidly, and in 2000, 38 incidents of leaking oil happened. In accordance with these facts, China will be confronted with the problems of places of refuge as well.

6.1.2 The Existing National Legislation on Places of Refuge

According to the Article 11 of The Law on Maritime Traffic Safety (1983), under unexpected circumstance, such as malfunction of machine, maritime disasters or seeking shelter from the weather, a non-military vessel of foreign nationality, when do not have the time to obtain the approval, may enter into the internal waters and ports with reporting immediately to the competent authority and obey orders. Pursuant to this Article, ships in distress are entitled to enter internal waters and ports.

However, the Ministry of Communications of China proposed to amend the 1983 Law on Maritime Traffic Safety. Under the proposed provision, not all non-military vessels of foreign nationality in distress or in casualty have the right to enter ports or places of refuge without the competent authority's approval. Ships carrying flammable, explosive, noxious, radioactive or other pollutive cargoes are excluded. Such vessels in distress or in casualty shall obey the Maritime Administrative Authority's directions.

Albeit the proposed amendments are not into effect yet, the changes indicate the Chinese government's attitude toward the problems of places of refuge. Ships in distress are no longer entitled to enter places of refuge under all circumstances. The right of entry is limited on the grounds that the dangerous cargoes may risk the marine environment or local interests. This change is in conformity with the international legislation trend.

6.2 The Way Ahead

The settlement of general principles on China's rights and obligations as a coastal

State is a real advance to solve the problems on places of refuge. However, decisions relating to places of refuge encompass a wide range of environmental, social, economic, and operational issues. There are still a series of measures that should be definitely taken so as to respond efficiently in the place-of-refuge situations. A more complete and reliable legal framework should be established.

To complement the general principles set out in the Law on Maritime Traffic Safety, the national or provincial contingency plan should include the accommodation of ships in distress for responding promptly and efficiently to requests of entry. Such plan should take into consideration the operational and environmental constraints and draw up necessary arrangements and procedures, when feasible, including the provision of adequate facilities and equipments.

Decisions on the entry into places of refuge should be based on objective and technical assessment and evaluation of related factors. And the IMO Guidelines should be directly implemented in China or be operationalized by developing its own guidelines.

In addition, if pollution damage ensues, the Chinese Government would not accept liability whether the permission of entry is granted or not under the power of the Maritime Safety Administration, unless the victim can prove that the denial was illegal and there was the direct causal link between the denial and the damage(CMI, 2003, p318-320). However, the China's law system for oil damage compensation is not clear at present, as there are no special laws or rules to regulate liability and compensation for pollution damage. Furthermore, China neither ratifies the Fund Convention, nor there is any national oil pollution fund established. It is very likely that the victims can not get satisfactory compensation. During these days, to establish a better liability and compensation regime is a hot topic in China.

All these legislative measures are consistent with the development of an international convention on places of refuge. China would more positively participate in the activities to solve the problems at the international level.

Chapter VII

Conclusion

No matter how the technology will be advanced and the safety standard and management improved, the maritime accident can not be totally eliminated. 'In reality it is likely that as long as there is shipping, then there will be ships in distress, and there will need a safe haven to dock in'(Sturgeon, 2002, p4). With the unilateral or regional activities taken by some countries and organizations, the international legal framework warrants careful analysis and discussion to clarify the uncertainty and deficiencies. In this paper attempts has been made to analyze two fundamental problems on places of refuge, whether the coastal state is obliged to accommodate the ship in distress and whether the international liability and compensation regime for pollution damage is satisfactory or not. The elaboration of an international convention on places of refuge is discussed as the final solution to the problem. And the status quo and further actions with regard to places of refuge in China are presented. The key points of the paper can be concluded as:

The recent notorious maritime casualties, where places of refuge are refused, agitated the maritime community and demonstrated the great significance to accommodate ships in distress. In the wake of these accidents, the new term of 'places of refuge' is created by the IMO to solve the problem. Due to the difference among the previously-used expressions and the changed conditions, the place of refuge is more

appropriate in the contemporary context.

The international conventions do not give sound answers to the coastal State's obligation to accommodate ships in distress, albeit recommending doing so can be interpreted under some conventions. From the perspective of customary law, the obligation to assist ships in distress is also limited in the contemporary context since great changes have taken place. The author the view that general obligation to offer places of refuge subject to specific exceptions should be set up to clarify the legal uncertainty.

Under the current international liability and compensation regime, the coastal State may be held liable for their negligent decision. To encourage the entry, the coastal State may be entitled to immunity as its decision has great implications with salvage operation and pollution prevention. The compensation is not satisfactory as under several scenarios, the coastal State may not be compensated adequately and promptly. And the provision of financial guarantee is reasonable and feasible to fill the deficiencies in the current regime.

To establish an ad hoc international convention on places of refuge is the best choice to solve the complex and wide-range problems on places of refuge. It is necessary and feasible to elaborate such a convention on the basis of several reasons. In the convention, the fundamental ingredients should be encompassed.

China as a coastal State is faced with potential requests to offer places of refuge. Although the right and obligation to accommodate ships in distress are settled in its national legislation, a more complete legal framework should be developed to tackle the problems.

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