

A Legal Consideration on Port State Jurisdiction and Port State Control in respect of the Prevention of Vessel-Source Marine Pollution

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국문초록

전통적 국제법 구조 하에서 기국은 일차적으로 선박 안전성 확보 및 해양오염방지에 대한 책임이 있었다. 하지만 편의치적제도의 도입으로 과거 수십 년 동안 기국통제는 현저히 약화되어 왔으며, 이는 심각한 해양사고와 해양오염사고로 이어졌다. 따라서 국제사회는 해양오염의 방지와 경감을 위한 포괄적인 규제를 기국만으로는 해결하기 어렵다는 인식아래 기국통제를 탈피하고 항만국

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규제를 통해 해양환경보호에 기여하고자 하였다. 항만국은 유엔해양법협약 하에 자국 관할 수역 내에서 국제규칙을 준수하지 않는 선박에 대하여 입법 및 집행 관할권을 행사할 수 있으며, 타국의 공해나 배타적 경제수역에서 해양오염과 관련한 국제해사협약 등의 국제규칙을 위반한 선박에 대하여 소송을 제기할 수 있다.

항만국통제는 항만국이 자국의 관할해역에서 해상의 안전과 해양환경보호를 위해 외국적 선박을 대상으로 물적·인적분야의 국제기준에 적합한지를 점검하여 위반 시 당해선박에 대해 출항정지 및 억류를 포함한 적절한 조치를 취할 수 있도록 해준다. 또한 항만국통제는 연안국의 영해에서 국제 관습법상 당연히 인정되는 연안국의 주권 및 관할권으로서 선박의 물적 결함이나 인적 결함을 중요한 사전통제의 대상으로 하여 선박기인해양오염에 대한 원천적인 통제를 가능하게 해준다. 그에 반해, 유엔해양법협약 제218조의 항만국관할권 대상은 국제규칙이나 기준에서 정하고 있는 배출기준 위반에 관한 것으로, 선박의 설비나 구조, 장비 등의 기준미달은 포함되지 않는다. 이러한 항만국관할권은 해양관할권에 대한 전통적인 규칙으로부터 이탈된 것으로 보인다. 실무상에서도 항만국통제는 국제해운에 대한 방해도 적고 해양오염에 대한 사전예방적 조치의 성격을 가지고 있어서 항만국관할권 보다 실효성 있다고 할 수 있다. 그러나 선박의 사고상 또는 운영상 배출을 사전에 예방하여 우리 해역에 대한 해양환경보호 뿐만 아니라 세계 해양의 환경보호를 위해서는 사전예방적 차원의 항만국통제 뿐만 아니라 사후 규제적 차원의 항만국집행관할권도 적극적으로 행사해야 할 것이다. 본 논문은 선박기인해양오염 방지를 위한 항만국관할권과 항만국통제에 대한 법적기초 및 그 내용에 대해 구체적으로 살펴보고자 하며, 나아가 항만국통제 및 항만국관할권이 선박기인해양오염 방지에 기여하는 바를 언급하고자 한다.

주제어 : 항만국통제, 항만국관할권, 선박기인해양오염, 항만국통제의 지역협력 체제, 일반적으로 수락되어지는 국제규칙 및 기준, 해양오염방지협약, 해상인명안전협약

I . Introduction

Over the last few years, accidental discharges or operational discharges from ships have resulted in negative consequences on the global marine environment.¹⁾ To prevent marine pollution from ships, the International Maritime Organisation (“IMO”) has adopted international conventions concerning the international standards and regulations for safety and anti-pollution, including the International Convention for the Safety of Life at Sea in 1974 (“SOLAS”), and the International Convention for the Prevention of Pollution from Ships, as modified by the Protocol of 1978 (“MARPOL”). These conventions are global strategies designed to combat marine pollution from ships. Although the IMO has adopted well-made conventions, they may not be effective enough to prevent marine pollution from ships if parties or non-parties of the IMO conventions do not observe the provisions of these conventions. Therefore, in order to make sure that there is compliance with these IMO conventions, it is important that states should effectively control their vessels wherever they are.

Generally, with respect to vessel-source marine pollution, the flag state has primary responsibility to regulate and control the vessel flying its flag under the United Nations Convention on the Law of the Sea 1982 (“LOSC”) and customary international law. With the advent of the flag of convenience (“FOC”), flag state control has been weakened. The flag state may be unable or unwilling to take proper measures to control or prevent vessel-source marine pollution. To fill the legal gap of enforcement, the LOSC stipulates that the port state can exercise their power to prevent, reduce, and control vessel-source marine pollution within the ports. In addition, the state can

1) M/V Torrey Canyon (1967), M/V Amoco Cadiz (1978), M/V Exxon Valdez (1989), M/V Erika (1999), M/V Prestige (2002), and M/V Heibai Spirit (2007) Cedre, ‘Spills’(Cedre) <<http://wwz.cedre.fr/en/Our-resources/Spills/Spills>> assessed 18 July 2017.

prevent marine pollution resulting from sub-standard ships by exercising port state control in accordance with the IMO conventions and domestic laws relating to the procedure of port state control. As a global ship inspection regime, port state control is significantly contributing to prevention of vessel-source marine pollution. To prove whether port state control can be considered an effective way to combat vessel-source marine pollution, this study will explore the following matters.

First and most crucially, the research will deal with the weaknesses and failures of flag state jurisdiction over vessel-source marine pollution. Next, it will describe port state jurisdiction under the LOSC over the breach of international standards and regulations relating to the prevention of vessel-source marine pollution. It will then examine, from a theoretical perspective, the legal source of port state control regarding vessel-source marine pollution and its contribution to combating marine pollution from ships. Lastly, this study will look at the meaning of the regional memorandums of understanding (“MoU”) regime on port state control and recent developments.

The purpose of this study is to introduce the legal basis for port state jurisdiction and port state control regarding the prevention of vessel-source pollution at the international and domestic level and comprehend the principle of the regional MoUs for facilitating port state control. Simply put, this research may contribute to better understanding for recent development of ship inspection regime under regional MoUs in practical aspect and the application of port state control under domestic laws of major shipping countries.

II . Traditional Jurisdiction over Vessel-Source Marine Pollution: Flag State Jurisdiction and Its Problems

1. Flag State Jurisdiction under LOSC

Under customary international law, a flag state has the primary responsibility with respect to vessel-source marine pollution. On the high seas, the flag state is able to exercise the exclusive right for legislative jurisdiction and enforcement jurisdiction regarding a ship which flies their flag.²⁾ The principle was illustrated in Article 1 of the 1952 Brussels Convention for the Unification of Certain Rules Relating to Penal Jurisdiction in Matters of Collisions or Other Incidents of Navigation.³⁾ Moreover, in the Lotus case, Permanent Court of International Justice (“PCIJ”) held that “vessels on the high seas are subject to no authority except that of the state whose flag they fly.”⁴⁾ A flag state is wholly responsible for ensuring the ships’ safety and the manning of their ships and the preventing vessel-source marine pollution.⁵⁾ Historically, flag state jurisdiction has been affected by Article 5 of the 1958 Convention on the High Sea and reflected in Article 92 of the LOSC.⁶⁾ Article 92(1) of the LOSC stipulates that a flag state has an exclusive jurisdiction over the ships flying its flag on the high seas, “except for exceptional cases expressly provided for in international treaties or in this Convention.”⁷⁾ Moreover, Article 94(1) of the LOSC requires a flag state to exercise effectively its jurisdiction and control in administrative,

2) Article 211(2) and 217 of LOSC; Z. Oya Ozcayir, *Port State Control* (1st edn, LLP 2001), p. 22.

3) Article 1 of the 1952 Brussels Convention for the Unification of Certain Rules Relating to Penal Jurisdiction in Matters of Collisions or Other Incidents of Navigation, 'In the event of a collision or any other incident of navigation concerning a sea-going ship and involving the penal or disciplinary responsibility of the master or of any other person in the service of the ship, criminal or disciplinary proceedings may be instituted only before the judicial or administrative authorities of the State of which the ship was flying the flag at the time of the collision or other incident of navigation.'; Ademuni Odeke, “Port State Control and UK Law” *Journal of Maritime Law and Commerce* 28(1997), p. 658.

4) S. S. Lotus (France v. Turkey), 1927 P.C.I.J. (ser. A), No. 10.

5) Article 94 of LOSC

6) George C. Kasoulides, *Port State Control and Jurisdiction: Evolution of the Port State Regime* (1st edn, Martinus Nijhoff Publishers 1993), p. 63.

7) Article 92(1) of the LOSC

technical, and social matters over ships flying its flag.⁸⁾ Under Article 94(2)(3) the flag state must “ensure a register of ships flying its flag, documenting the names and particulars of each ship, and must ensure safety at sea with regards to the construction, equipment, and seaworthiness of ships, the qualification and training of seafarers, and the prevention of collisions.”⁹⁾ Such flag state duties play a significant role in the prevention of vessel-source marine pollution.¹⁰⁾

In terms of flag state jurisdiction for the prevention of marine pollution from ships under LOSC, this is prescribed in Articles 211 and 217. Above all, these articles indicate that the flag state must adopt anti-pollution laws and regulations to protect the marine environment from ships flying their flag or listed in their registry, which “at least have the same effect as that of generally accepted international rules and standards established through the competent international organization or general diplomatic conference.”¹¹⁾ Although the LOSC does not explicitly describe the definition of ‘generally accepted international rules and standards’, it could presumably be related to IMO conventions such as MARPOL and the International Convention for the Control and Management of Ships’ Ballast Water and Sediments Convention (“BWM”),¹²⁾ which entered into force on 8 September 2017.¹³⁾

8) '[T]he requirement was originally adopted in the Second Committee at LOSC I for the purpose of strengthening the concept of genuine link with regard to the nationality of a ship, by indicating matters over which the coastal State should exercise its jurisdiction', Ozcayir, *Supra* note 2, p. 65; A/CONF.13/C.2/L28 (1958), Art. 29, Para. 1, LOSC I, IV off. Rec. 123 (Italy); A/CONF. 13/L.93 (1958).

9) Article 94(2)(3) of LOSC

10) Ozcayir, *Supra* note 2, p. 65.

11) Article 211(2) of LOSC

12) IMO, 'Global Treaty to Halt Invasive Aquatic Species to Enter into Force in 2017' (8 Sep 2016) <<http://www.imo.org/en/MediaCentre/PressBriefings/Pages/22-BWM-.aspx>> accessed 3 July 2017.

13) Robin R. Churchill and Alan V. Lowe, *The Law of the Sea* (3rd edn, Manchester University Press 2008), p. 346; John Warren Kindt, "Vessel source marine pollution and the Law of

In addition, Article 217 of the LOSC deals with enforcement jurisdiction by a flag state. A flag state can exercise enforcement jurisdiction over ships flying its flag that committed the violation of anti-pollution laws and regulation, and enact penalties adequate in severity to discourage violations.¹⁴⁾ The flag state may “investigate and prosecute any violations of international standards”, and “while conducting investigation of the violation, flag states may request assistance from other states”.¹⁵⁾ Further, the “flag state must promptly inform the requesting state and IMO of actions taken against the violators”, ensure that “their ships carry on certificates required by international rules and standards”, and inspect their ships periodically.¹⁶⁾ A flag state must observe the international rules and standards in respect of design, construction, equipment, and manning.¹⁷⁾ Under flag state jurisdiction, and in accordance with LOSC, there is one theoretical question as to whether a flag state is able to arrest their ship in the exclusive economic zone (“EEZ”) of another state, since the LOSC does not provide explicitly the relevant provisions. According to Professor R. R. Churchill, subject to Article 58(2) of the LOSC, Article 92 of the LOSC would be applied in the EEZ providing the vessel is flying their flag.¹⁸⁾ Coastal states do not have the right to arrest foreign vessels that breach anti-marine pollution laws and regulations in the EEZ.¹⁹⁾ Thus, a flag state may have only right

Sea” *Vanderbilt Journal of Transnational Law* 17(1984), p. 314; Donald R. Rothwell and Tim Stephens, *The International Law of the Sea* (1st edn, Hart Publishing 2010), p. 355.

14) Article 217(5),(6) of LOSC

15) Article 217(7) of LOSC

16) Article 217(3) of LOSC

17) Alan Khee-Jin Tan, “The Regulation of Vessel source marine pollution: Reconciling the Maritime and Coastal State Interests” *Singapore Journal of International & Comparative Law* 1(1997), p. 365.

18) Article 58(2) of LOSC, ‘Articles 88 to 115 and other pertinent rules of international law apply to the exclusive economic zone in so far as they are not incompatible with this Part.’

19) Churchill and Lowe, *Supra* note 10, pp. 348-349.

to arrest vessels flying its flag in the EEZ of foreign state under Article 92 of LOSC.

2. The Problems and Weakness of Flag State Jurisdiction

As mentioned above, the flag state not only has primary responsibility for a ship but can also enforce legislative and juridical jurisdiction, as a traditional enforcement regime, with regards to the violation of pollution laws committed by their vessel. However, in practice, there exist weaknesses and limitations in relation to flag state jurisdiction as follows.²⁰⁾

(1) The Issues related to Flag of Convenience

First and foremost, the introduction of the concept of FOC caused the weaknesses of flag state control. Generally, the FOC means that the ship owner can gain economic incentives by choosing the nationality of its vessel to foreign countries. In addition, the term FOC is often replaced with ‘flags of necessity’, ‘shadow flags’, ‘cheap flags’, ‘open registries’, and ‘flags of opportunity’, to name but a few.²¹⁾ Under the FOC, the ship owner can reduce of crew costs and taxes by registering the nationality of the vessel in FOC states that are known to be lax in safety and environmental rules, rather than registering in their own state.²²⁾

The definition of ‘FOC’ was generally originated from *the Report of the Committee of Inquiry into Shipping* (“Rochdale Report”), published by the

20) 이윤철·민영훈. “선박기인 해양오염에 대한 국가관할권의 한계와 문제점 및 향후 발전과제”, 「해사법연구」 제19권 제2호, 한국해사법학회, 2007, 28-29쪽.

21) Tamo Zwinge, “Duties of Flag States to Implement and Enforce International Standards and Regulations And Measures to Counter Their Failure to Do So” *Journal of International Business and Law* 10(2010), p. 299.

22) Ozcayir, *Supra* note 2, p. 25.

UK Parliament. This report referred to the six criteria involved in determining the status of FOC.²³⁾ Under the Rochdale report, the majority of FOC states are not developed countries, but rather are developing countries such as Liberia, Mongolia, Panama, the Bahamas, Malta, Cyprus, the Marshall Islands, and so on.²⁴⁾ These FOC countries are attracting the shipowner by offering attractive political and commercial advantages (i.e. providing the minimum amount of relevant laws and standards). Namely, open registry countries can sustain a steady financial flow through registration fees.²⁵⁾

The 2016 United Nations Conference on Trade and Development (“UNCTAD”) indicated that the world tonnage of registering a foreign flag was 70.2% of the total.²⁶⁾ Panama, Liberia, and the Marshall Islands were major FOC countries, and when combined amounted to approximately 41% of world tonnage.²⁷⁾ But for years, the FOC has resulted in serious maritime accidents and pollution incidents due to the failure of administrative and technical control over ships flying their flags. Even though FOC states contract parties to IMO conventions in respect of the safety of ships and the control of marine pollution from ships, they tend not to ensure the ships' safety and preservation of vessel-source marine pollution under their domestic laws and regulations. FOC countries are unable to ensure well-educated

23) H. Edwin Anderson, “The Nationality of Ships and Flags of Convenience: Economics, Politics and Alternatives” *Tulane Maritime Law Journal* 21(1996), p. 158; Carlos Felipe Llins Negret, “Pretending to be Liberian and Panamanian Flags of Convenience and the Weakening of the Nation State on the High Seas” 46(2016) *Journal of Maritime Law and Commerce*, pp. 4-5; Board of Trade, Committee of Inquiry into Shipping. Report of the Working party (Comnd 4337) (London: H.M.S.O, 1970) (Chairman: Viscount Rochdale).

24) ITF, ‘Flags of convenience’ (International Transport Workers’ Federation) <<http://www.itfglobal.org/en/transport-seafarers/in-focus/flags-of-convenience-campaign/>> accessed 5 July 2017.

25) Negret, *Supra* note 15, pp. 5-6.

26) United Nations Conference on Trade and Development, ‘Review of Maritime Transport 2016’ (United Nation, 2016), p. 44.

27) United Nations Conference on Trade and Development, *op.cit.*

and trained labour effectively, and execute properly laws and regulations that are generally accepted international rules and standards. Besides, the major problematic aspect of the FOC is that FOC countries are unable to verify whether the ship flying its flag meet the requirements of generally accepted international rules and standards.²⁸⁾ The weakness of enforcement jurisdiction by FOC countries may result in serious marine pollution incidents. While the FOC regime gives a ship owner economic, political, and social-environmental incentives, it entails enforcement issues that provide more lax regulations than international rules and standards.

(2) Shortcomings of Flag State Jurisdiction

In addition to the weaknesses of flag state control, fundamental limitations of flag state jurisdiction over vessel-source marine pollution exist. First, a flag state can exercise full enforcement and prescriptive jurisdiction in its territory.²⁹⁾ However, a flag state may be unable to exercise enforcement jurisdiction in case that the vessel caused marine pollution in a foreign state's territorial sea or internal waters, since this could lead to a violation of the coastal state's sovereignty.³⁰⁾ Second, due to the vast geographical features of the high sea, a flag state may be difficult to identify whether a vessel has committed illegal discharges without any clear evidence such as a testimony of the crew or voluntary notice from their vessel.³¹⁾ Third, a flag state has no motivation to enact domestic laws and regulations over the prevention of marine pollution from ships and CDEM since an act of

28) Anderson, *Supra* note 15, p. 163.

29) Daniel Bodansky, "Protecting the Marine Environment from Vessel source marine pollution: UNCLOS III and Beyond" *Ecology Law Quarterly* 18(1991), p. 736.

30) Daniel Bodansky, *op.cit*

31) A. Legat Richard, "Port State Jurisdiction over Vessel source marine pollution" *Harvard Environmental Law Review* 2(1977), p. 456.

pollution arising from vessels flying their flags has no effect on the maritime zone of a flag state.³²⁾ Furthermore, it is undeniable that the FOC system that provides lax laws and regulations than international standards is a major factor to weaken the flag state jurisdiction.

III. Port State Jurisdiction over Vessel-Source Marine Pollution under LOSC

1. Access to Ports under Customary International Law

Without doubt, as ports are within a state's territory they fall under its sovereignty. Thus, a port state can exercise their jurisdiction over a foreign vessel voluntarily within their ports. However, there are no clear provisions under LOSC as to whether a foreign vessel has a right to access a state's port.³³⁾ Under customary international law, in the 1958 *Saudi Arabia v. Aramco arbitration*, the arbitrator commented that "according to a great principle of public international law, the ports of every State must be open to foreign merchant vessels and can only be closed when the vital interests of the State so require."³⁴⁾ Accordingly, in *Nicaragua v. USA*, the ICJ held that "by virtue of its sovereignty [...] the coastal State may regulate access to its port."³⁵⁾ While some people advocated that a foreign vessel would be granted the right of access to a port, no general customary international law relating to the right of access to a port by a foreign vessel exists.³⁶⁾

32) Bodansky, *Supra* note 21, p. 737.

33) Rothwell and Stephens, *Supra* note 10, p. 55.

34) *Saudi-Arabia v. Arabian American Oil Company (Aramco)* (1963) 27 ILR, s. 236.

35) *Nicaragua v. the United States*, 1986 I.C.J. Rep. 14, 111.

36) G. Brugmann, *Access to Maritime Ports* (Norderstedt, Books on Demand, 2003); Robin Churchill, "Port State Jurisdiction Relating to the Safety of Shipping and Pollution from

Louise asserted that “there is no evidence of a rule of general international law requiring states to open its ports to all foreign vessels or even to all merchant vessels. While there is a presumption that ports are open unless a state indicates otherwise, it is a presumption only and not a legal obligation.”³⁷⁾

Moreover, subject to Article 211(3) of the LOSC, a port state can establish “particular requirements for the prevention, reduction and control of pollution of the marine environment as a condition for the entry of foreign vessels into their ports or internal waters”, giving due publicity to such requirements and notice to the IMO.³⁸⁾ In this regard, the United States, Japan, Spain, and South Korea announced that they prohibited single-hull oil tankers from approaching their ports or entering into their internal waters by adopting more stringent laws and regulations at the domestic level than international standards.³⁹⁾ By virtue of Article 211(3) of the LOSC, a port state would be granted the right of control regarding access to their port, meaning that a port state may inspect and prosecute a foreign vessel that violates marine pollution laws and regulations by exercising port state jurisdiction once the vessel voluntarily enters the port.⁴⁰⁾ However, exceptions do exist to a port state’s authority over foreign vessels in their port.⁴¹⁾ Firstly, a port state cannot exercise its power with respect to sovereign

Ships- What Degree of Extra territoriality?”, *International Journal of Marine and Coastal Law* 31(2016), p. 447.

37) Louise de La Fayette, “Access to Ports in International Law”, *International Journal of Marine and Coastal Law* 11(1996), p. 22.

38) Article 211(3) of the LOSC

39) Eric R. Jaworski, “Developments in Vessel-based pollution: Prestige oil Catastrophe Threatens West European Coastline, Spurs Europe to Take Action against Aging and Tankers”, *Colorado Journal of International Environmental Law and Policy* (2002), p. 106

40) Article 211(3) of the LOSC; Ho-Sam Bang, “Port State Jurisdiction and Article 218 of the UN Convention on the Law of Sea” *Journal of Maritime Law & Commerce* 40(2009), p. 294.

41) Ted L. McDorman, “Port State Jurisdiction: A comments of Article 218 of the 1982 Law of the Sea Convention”, *Journal of Maritime Law and Commerce* 28(1996), p. 309.

immune ships.⁴²⁾ Secondly, in order to exercise port state authority, a foreign vessel must have voluntarily entered the port.⁴³⁾ Thirdly, in state practice, the authority of port state is limited under the circumstance of a ship in distress or *force majeure*.⁴⁴⁾ A port state may refuse access to a foreign vessel if there is the risk of marine pollution, even if the vessel is in distress. This example was illustrated in the M/V Prestige accident.⁴⁵⁾ The fourth situation is that a port state should inevitably permit access to their port as a result of bilateral or multilateral treaties of 'Friendship, Commerce, and Navigation', such as Article XI of the 1994 General Agreement on Tariffs and Trade.⁴⁶⁾ So, with the exception of the above-stated circumstances, a port state not only has the right to control all access of foreign vessels to its ports, but it can also exercise prescriptive and enforcement jurisdiction in accordance with LOSC, which will be explained in more detail below.

2. The Legal Basis for Port State Jurisdiction under LOSC

(1) Analysis for Article 218 of LOSC

Article 218 of the LOSC prescribes enforcement jurisdiction by a port state over a foreign vessel within its port that has violated pollution regulations. Pursuant to Article 218(1) of the LOSC, port states may investigate and institute legal proceedings in respect of discharge violations from ships that

42) Rothwell and Stephens, *Supra* note 10, p. 56

43) Ho-Sam Bang, "Is Port State Control an effective means to combat vessel source marine pollution? An Empirical Survey of the Practical Exercise by Port States of Their Powers of Control", *International Journal of Marine and Coastal Law* 28(2008), p. 720.

44) Erik Jaap Molenaar, *Port and Coastal States in the Oxford Handbook of the Law of the Sea* (Oxford University Press, 2015), p. 6.

45) Molenaar, *op.cit.*

46) Churchill and Lowe, *Supra* note 10, p. 63.

occurred on the high seas, internal waters, territorial seas, and EEZ of other states.⁴⁷⁾ Especially, the exercise of port states' enforcement jurisdiction over foreign vessels that violated discharge standards on the high seas is considered as the 'effect' principle.⁴⁸⁾ As regards legal proceedings that deal with illegal discharges or marine pollution committed by a foreign vessel occurring in the coastal waters of a third state, Article 218(2) of the LOSC indicates that port states can institute legal proceedings against a foreign vessel that caused a discharge violation in the maritime zone of a third state in cases where: "that state, the flag state, or a state damaged or threatened by the discharge violation, or unless the violation has caused or is likely to cause pollution in the internal waters, territorial sea or EEZ of the State instituting the proceedings."⁴⁹⁾ However, the flag state has the right to pre-empt such a situation and institute legal proceedings over their vessel subject to Article 228(1) of the LOSC, even though a port state can institute legal proceedings concerning a foreign vessel that has committed discharge violations in the maritime zone of a third state in the case where "the flag State, or a State [is] damaged or threatened by the discharge violation".⁵⁰⁾ Article 218(3) of the LOSC regulates the obligation of the port state to "comply not only with the requests of the flag state but also with requests from all other states for investigation in respect to possible discharge violations in the maritime zone of the requesting state".⁵¹⁾ Lastly, Article 218(4) of the LOSC provides that: "[t]he evidence and records of

47) Article 218(1) of LOSC

48) Tatjana Keselj, 'Port State Jurisdiction in respect of Pollution from Ships: The 1982 United Nations Convention on the Law of the Sea and the Memoranda of Understanding', *Ocean Development & International Law* (1999) 30, p. 135.

49) Article 218(2) of LOSC

50) Article 218(2) of LOSC; D. M. Dzidzornu, 'Coastal state obligations and powers respecting EEZ environmental protection under Part XII of the UNCLOS: a descriptive analysis' (1997), *Colorado International Journal Environmental Law & Policy* 8(1997), p. 311.

51) Article 218(3) of LOSC.

the case, together with any bond or other financial security posted with the authorities of the port State, shall in that event be transmitted to the coastal State. Such transmittal shall preclude the continuation of proceedings in the port State; proceedings may be suspended at the request of the coastal state when the violation has occurred under its jurisdiction.”⁵²⁾

Given that port states may exercise their enforcement jurisdiction over foreign vessels that have caused illegal discharges on the high seas or in the maritime zone of another state, subject to Article 218 of the LOSC, these provisions have been defined as an “innovative expansion of jurisdiction in international law.”⁵³⁾ However, a foreign vessel must have voluntarily entered into their port, but not under the condition of distress or *force majeure*, in order to exercise port state enforcement jurisdiction.⁵⁴⁾ Under customary international law, one state can enact laws for foreign vessels to prevent vessel-source marine pollution and enforce their legislation or international rules or standards voluntarily within the local ports.⁵⁵⁾ A state cannot exert their power over a violation committed by ships that occurred outside its territorial waters, with the exception of when a request is made by a flag state or a state damaged or threatened by the discharge violation.⁵⁶⁾

Undoubtedly, a flag state has exclusive jurisdiction over its ships on the high seas in accordance with Articles 211(2) and 217 of the LOSC. However, even though a flag state has the right of control over its vessel anywhere, a flag state may be unable to properly exercise its power.⁵⁷⁾ Article 218 of the LOSC may supplement the flag state control by providing extraterritorial jurisdiction to the port state.⁵⁸⁾ The term ‘applicable international rules and

52) Article 218(4) of LOSC.

53) Kasoulides, Supra note 6, p. 126.

54) Bang, Supra note 31, p. 300.

55) 이운철 민영훈, 전계논문, 33쪽

56) McDorman, Supra note 32, p. 322.

57) Bang, Supra note 31, pp. 299-300.

standards' is limited to IMO conventions that have been ratified or accepted by a sufficient number of IMO member states.⁵⁹⁾ Non-binding documents such as Codes, Resolutions and Guidelines would be excluded from the scope of 'applicable international rules and standards'.

On the other hand, when a port state is exercising the physical inspection of a foreign vessel, a port state must comply with the procedure of investigation over foreign vessels pursuant to Article 226(1) of the LOSC.⁶⁰⁾ A port state may only investigate a foreign vessel for an examination of such certificates, records, or other documents that the vessel is required to carry by generally accepted international rules and standards, or of any similar documents that it is carrying. In state practice, with the development of port state control and the regional MoUs, a port state can sufficiently obtain and collect the effective evidence for the violation of discharges through a variety of ship's official documents.⁶¹⁾ Thus, a port state does not need to carry out a further physical inspection of a foreign vessel in the modern shipping industry.

(2) Analysis for Article 219 of LOSC

Whilst Article 218 of the LOSC deals with port state enforcement jurisdiction for the violation of discharge standards, Article 219 of the LOSC grants an expanded enforcement jurisdiction to take measures relating to ensuring the seaworthiness of ships. As an interpretation of Article 219 of the LOSC, this provision is closely associated with international rules and standards concerning construction, design, equipment, and manning ("CDEM"). In other words, the term "the violation of applicable international

58) McDorman, *Supra* note 32, p. 322.

59) Erik Jaap Molenaar, *Coastal State Jurisdiction over Vessel-Source Pollution* (Kluwer Law International 1998), p. 169.

60) Article 226(1)(a) of LOSC.

61) 이윤철 민영훈, 전계논문. 34쪽.

rules and standards relating to seaworthiness of vessels and thereby threatens damage to the marine environment” is interpreted as the breach of IMO conventions such as SOLAS, International Convention on Standards of Training, Certification and Watchkeeping for Seafarers, 1978(“STCW”), International Regulations for Preventing Collisions at Sea 1972(“COLREG”), International Convention on Load Lines 1966(“LL”), and Maritime Labour Convention 2006 (“MLC”), etc. In case of the violations mentioned, port states may take administrative measures to prevent the vessel from sailing under Article 219 of the LOSC.⁶²⁾ This principle offers a significant legal basis for port state control and the regional MoU, and permits the detention of foreign vessels within their ports or off-shore terminals. Article 218 of the LOSC offers the port state enforcement jurisdiction relating to the violation of discharge standards already committed by a foreign vessel, whereas Article 219 of the LOSC enables a port state to take administrative action for international CDEM rules and standards over a foreign vessel to prevent vessel-source marine pollution beforehand.⁶³⁾

IV. Development of Port State Control over Vessel-Source Marine Pollution

1. The Concept of Port State Control

62) Article 219 of LOSC, ‘Subject to section 7, States which, upon request or on their own initiative, have ascertained that a vessel within one of their ports or at one of their off-shore terminals is in violation of applicable international rules and standards relating to seaworthiness of vessels and thereby threatens damage to the marine environment shall, as far as practicable, take administrative measures to prevent the vessel from sailing. Such States may permit the vessel to proceed only to the nearest appropriate repair yard and, upon removal of the causes of the violation, shall permit the vessel to continue immediately.’

63) 이윤철 민영훈, 전계논문, 35쪽.

(1) The Meaning of Port State Control

Generally, the IMO has defined port state control as “the inspection of foreign ships in national ports to verify that the condition of the ship and its equipment comply with the requirements of international regulations and that the ship is manned and operated in compliance with these rules.”⁶⁴⁾ Additionally, John Hare has defined port state control as: “a concept [that] involves the powers and concomitant obligations vested in, exercised by, and imposed upon a national maritime authority (or its delegee) by international convention or domestic statute or both, to board, inspect and where appropriate detain, a merchant ship flying a flag foreign to that state in order to ensure compliance by that ship with all applicable international safety at sea instruments and with any domestic legislative maritime safety requirements.”⁶⁵⁾

Port state control is recognized to be “the most visible example of port state jurisdiction in action.”⁶⁶⁾ A port state may take administrative measures over a foreign vessel within the local ports to verify whether such vessels follow international rules and standards relating to ship safety, the prevention of vessel-source marine pollution, and crew manning and adherence to municipal laws.⁶⁷⁾ Over the last century, port state control has played a significant role in the prevention of marine pollution from ships. Especially, IMO conventions, which are known as SOLAS, LL, MLC, and STCW conventions, have had a great effect on the enhancement of port state control. The provision related to port state control under these conventions

64) IMO, ‘Port State Control’ (IMO, 2017) <<http://www.imo.org/en/ourwork/msas/pages/port-statecontrol.aspx>> assessed at 18 July 2017.

65) John Hare, “Port State Control: Strong Medicine to Cure a Sick Industry”, *Georgia Journal of International and Comparative Law* 26(1997), p. 571.

66) Bevan Marten, *Port State Jurisdiction and the Regulation of International Merchant Shipping* (Springer International Publishing, 2014), p. 46.

67) Z. Oya Ozcayir, The impact of Port state Control on Pollution at sea; in Bars Soyer and Andrew Tettenborn (eds.), *Pollution at Sea*, (1st edn, Informa 2012), p. 277.

renders port state control officer able to take administrative measures over sub-standard foreign vessels, including permitting them to detain ships and rectify deficiencies prior to departure. These administrative action have a considerable effect on the ship owner, charterer, and crew. The ship owners or charterers may suffer enormous economic loss and reputation damage from off-hire, detention due to providing sub-standard ships.⁶⁸⁾ Shipping companies should try to comply with international rules and standards, as well as national laws relating to the prevention of vessel-source marine pollution, to avoid such detention. Thus, port state control is playing a significant role in preventing accidental or operational discharges from ships by eliminating sub-standard ships within the modern shipping industry.

(2) The Distinction between Port State Jurisdiction and Port State Control

The LOSC does not define port state control, but it does provide an interpretation of jurisdiction. Although port state control is the most practical way to exercise port state jurisdiction, in practice a few differences exist between the two. First and foremost, whilst port state control means that the port state is able to take administrative power over sub-standard foreign vessels, port state jurisdiction means that a port state can prosecute foreign vessels that breach regulations and rules concerning the prevention of vessel-source marine pollution.⁶⁹⁾ A port state cannot exercise the right to prosecute a foreign vessel under the port state control regime. With regard to the prosecution over a foreign vessel under port state jurisdiction, R. R. Churchill has pointed out that: “neither under the conventions nor under the various memoranda are port states given the right to prosecute

68) Bang, *Supra* note 31, p. 722.

69) Bang, “Recommendations for Policies on Port State Control and Port State Jurisdiction”, *Journal of Maritime Law & Commerce* 44(2013), p. 119.

foreign vessels for failure to comply with the required standards. However it follows from the jurisdiction which states enjoy in their internal waters under customary international law that a port state may make breach of an international standard by a foreign vessel committed in its port, or committed before the ship entered the port but continuing there, an offence under its municipal law, and prosecute offenders.”⁷⁰⁾

Thus, the right to prosecute a foreign vessel is an important difference between port state jurisdiction and port state control. Another is that port state jurisdiction is enforcement jurisdiction, and thus juridical jurisdiction rather than legislative jurisdiction. This is because port state control falls under the element of legislative jurisdiction, i.e., the authority of port state control should originate from domestic law.⁷¹⁾

2. The Legal Basis for Port State Control over Vessel-Source Marine Pollution

(1) IMO Conventions

IMO conventions play an important role in exercising port state control over sub-standard vessels. Such conventions relate to the ship's safety, the prevention of marine pollution from ships, and the training and manning of crews, which have prescribed the exercise of port state control. That is, IMO conventions provide significant legal sources regarding port state control. This section will examine relevant IMO conventions in relation to the prevention of vessel-source marine pollution, focusing on SOLAS, MARPOL, AFS, and BWM.

1) SOLAS

70) Churchill and Lowe, *Supra* note 10, p. 276.

71) Bang, *Supra* note 57, p. 120.

Since the tragic disaster of the S/S Titanic, the Inter-Governmental Maritime Consultative Organisation⁷²⁾ realised the need for international regulation relating to the safety of merchant ships, and the first version of SOLAS was adopted in 1914.⁷³⁾ The SOLAS Convention of 1974 came into force in May 1980 as a result of modifications and amendments. The SOLAS aims to provide the minimum requirements for the construction, equipment, and operation of ships, compatible with their safety. Under the SOLAS, it is prescribed that flag states are primarily responsible for ensuring the minimum standards for ship safety and certifications pursuant to its regulations.⁷⁴⁾ In addition, this convention stipulates that contracting states can exercise the inspection of a foreign vessel 'if there are clear grounds for believing that the ship and its equipment do not substantially comply with the requirements of the Convention'.⁷⁵⁾ Regulation 19 of the SOLAS Chapter I, which describes general provisions, stipulates that a port state authority can exercise the right to control foreign vessels within their ports in order to maintain valid certificates through the inspection of a port state control officer. In addition, regulation 6.2 of Chapter IX deals with port state control relating to the International Safety Management ("ISM") Code. Regulation 4 of the SOLAS Chapter XI provides port state control on operational requirements.

2) MARPOL

MARPOL is the most significant legal framework to combat marine

72) The IMO was known as the Inter-Governmental Maritime Consultative Organization until 1982. The IMO was established in Geneva in 1948 and came into force ten years later, meeting for the first time in 1959. : IMO, 'Introduction to IMO' (IMO, 2017) <<http://www.imo.org/en/About/Pages/Default.aspx>> assessed at 18 July 2017.

73) Yvonne Baatz et al., *Maritime Law* (3rd edn, Informa Law, 2014), p. 340.

74) Yvonne Baatz et al., op.cit

75) IMO 'International Convention for the Safety of Life at Sea (SOLAS), 1974' (IMO, 2017) <[http://www.imo.org/en/About/Conventions/ListOffConventions/Pages/International-Convention-for-the-Safety-of-Life-at-Sea-\(SOLAS\),-1974.aspx](http://www.imo.org/en/About/Conventions/ListOffConventions/Pages/International-Convention-for-the-Safety-of-Life-at-Sea-(SOLAS),-1974.aspx)> accessed 19 July 2017.

pollution from international shipping activities in the world. The IMO adopted the MARPOL in 1973, and it was amended by the Protocols of 1978 and 1997.⁷⁶⁾ The main objectives of MARPOL are to regulate and control the following: pollution from oil by ships, pollution from noxious liquid substances carried in bulk by ships, pollution from harmful substances carried by the sea in packaged form, pollution from sewage and garbage, and air pollution from ships.⁷⁷⁾ Each Annex of the MARPOL is applied to approximately 90% of the world tonnage.⁷⁸⁾ As a result, this convention contributes to the prevention of vessel-source marine pollution from ships in the modern shipping industry. Article 5(2) of the MARPOL stipulates that a port state can exercise administrative measures over foreign vessels within their ports or off-shore terminals, to ensure that vessels have valid certificates in accordance with the conventions.⁷⁹⁾ That is, if the vessels do not have a valid certificate pursuant to the MARPOL, the port state can take appropriate action either in the form of detaining the foreign vessel or permitting it to proceed to the nearest shipyard for repair.⁸⁰⁾ Further, “the inspection of [a] foreign vessel should be limited to verifying that there is on board a valid certificate, unless there are clear grounds for believing that the condition of the ship or its equipment does not correspond substantially with the particulars of that certificate.”⁸¹⁾ A valid certificate refers to the International Oil Pollution Prevention Certificate and other certifications for

76) Yoshifumi Tanaka, *The International Law of the Sea* (Cambridge University Press 2013), p. 277; Jeff B. Curtis, “Vessel source Oil Pollution and MARPOL 17/78: An International Success Story?”, *Environmental Law* 15(1985), p. 679.

77) IMO, ‘Pollution Prevention’ (IMO, 2017) <<http://www.imo.org/en/OurWork/Environment/PollutionPrevention/Pages/Default.aspx>>accessed 20 July 2017.

78) IMO, ‘Status of Conventions’ (IMO, 13 Sep 2017) <<http://www.imo.org/en/About/Conventions/StatusOfConventions/Documents/Status%20of%20Treaties.pdf>> accessed 20 July 2017.

79) Article 5(2) of MARPOL.

80) Bang, *Supra* note 31, p. 724.

81) Ozcayir, *Supra* note 2, p. 44.

marine pollution prevention equipment.⁸²⁾ Additionally, when a port state control officer inspects a foreign vessel, he or she follows the procedure of port state control, as outlined by IMO Resolution A. 1052(27), since the MARPOL does not provide details about a specific procedure for inspecting foreign vessels.⁸³⁾

3) AFS

Generally, the bottoms of vessels have been coated by anti-fouling paint to repel sea life such as algae and molluscs, and this treatment is defined by the IMO as “a coating, paint, surface treatment, surface or device that is used on a ship to control or prevent attachment of unwanted organisms”.⁸⁴⁾ The major issue of anti-fouling systems is that they involve the use of lime, arsenic, and metallic compounds when coating the hull of a vessel. While such compounds help to remove barnacles and other sea life that attach themselves to the bottom of vessels, they also leach into the sea water. The removal of sea life benefits vessels because it reduces fuel consumption and improves the ship speed, but studies conducted by the IMO indicate that the compounds used in the process have a harmful impact on the marine environment, contaminating the water and killing marine life. In particular, organotin tributyltin, an anti-fouling paint that was used in the 1960s, has been found to ‘cause deformations in oysters and sex changes in whelks’. Hence, in order to prohibit the use of harmful anti-fouling paints or systems, the IMO adopted the International Convention on the Control of Harmful Anti-Fouling Systems on Ships (“AFS”) in 2001, and this convention came into force in 2008. With respect to port state control, Article 11.1 of the

82) Bang, *Supra* note 31, p. 725.

83) Ambrose Rajadurai, “Regulation of Shipping: The Vital Role of Port State Control”, *Australian and New Zealand Maritime Law Journal* 18(2004), p. 91.

84) IMO, ‘Anti-fouling system’ (IMO, 2017) <<http://www.imo.org/en/OurWork/Environment/Anti-foulingSystems/Pages/Default.aspx>> accessed 24 August 2017.

AFS Convention stipulates that parties can ‘inspect ships on request of another Party, if a request for an investigation is received and sufficient evidence that the ship is operating or has operated in violation of the Convention is provided’.⁸⁵⁾ Article 11 of the AFS articulates that ‘a ship to which this Convention applies may, in any port, shipyard, or offshore terminal of a Party, be inspected by officers authorized by that Party for the purpose of determining whether the ship is in compliance with this Convention’.⁸⁶⁾ On the basis of Article 11 of the AFS, the state can take administrative measures, including detaining ships that have violated this convention. In addition, in order to achieve the exercising port state control regarding AFS effectively, the IMO adopted an inspection guideline for use in assessing anti-fouling systems. Hence, each party can inspect a foreign vessel and check its relevant certifications, in order to ascertain whether the foreign vessel complies with the AFS pursuant to the resolution MEPC.208 (62).

4) BWM

As long as global trade or goods are transported by ships, the use of ballast water is inevitable for the ship operations in order to maintain stability and prevent over stressing of the ship. However, ballast water transferred by ships has a great impact on marine species and marine ecosystems due to the spread of invasive marine species such as bacteria, microbes, small invertebrates, eggs, cysts, and larvae of various species.⁸⁷⁾

In 1903, scientists discovered the Asian phytoplankton species *Odontella* (*Biddulphia*) *sinuises* in the North Sea.⁸⁸⁾ The related study found that

85) Article 11.1 of the AFS; IMO Resolution, MEPC.208 (62), Guidelines for inspection of anti-fouling systems on ships, 2011.

86) Article 12 of AFS.

87) IMO, ‘Ballast Water Management’ (IMO, 2017) <<http://www.imo.org/en/OurWork/Environment/BallastWaterManagement/Pages/Default.aspx>> accessed 23 February 2017.

88) S. Gollasch, M. David, M. Voigt, E. Dragsund, C. Hewitt, and Y. Fukuyo, “Critical review

ballast water harmed the marine environment. Nevertheless, there was no appropriate response to preserve the marine environment from invasive marine species carried by ballast water of ships until the 1970s,⁸⁹⁾ at which point a number of scientists and communities recognised the serious damages occurring to the marine ecosystem caused by ballast water. As a result, the MEPC began to pay close attention to the damage caused by ballast water in the 1980s, in order to preserve the marine environment, and this was at the request of Australia and Canada, which had experienced serious damage to their coastal regions from invasive marine species transported by the ballast water of ships.⁹⁰⁾ After a few years of complex discussions between IMO member states, the IMO adopted the BWM in 2004 and the BWM Convention came into force on 9 September 2017.⁹¹⁾

In terms of port state control for the BWM Convention, Article 9 articulates that ‘ships to which the Convention applies may, in any port or offshore terminal of another Party, be subject to inspection by officers duly authorized by that Party for the purpose of determining whether the ship is in compliance with the Convention’.⁹²⁾ Also, Article 3.3 of the BWM provides the principle of ‘no more favourable treatment’. Furthermore, the IMO adopted a resolution to provide guidelines for port state control under the BWM in 2014. This resolution helps the maritime authority to exercise port state control by providing a procedure for this control. In other words, the port state control officer can inspect foreign vessels to ensure that they comply

of the IMO International Convention on the management of ships’ ballast water and sediments”, *Harmful Algae* 6(2007), p. 588.

89) IMO, *Supra* note 75.

90) Saiful Karim, *Prevention of pollution of the Marine Environment from vessels: The potential and limits of the International Maritime Organisation* (Springer International Publishing AG, 2014), p. 68.

91) Article 9 of BWM.

92) IMO, Resolution MEPC.252(67), Guidelines for Port State Control Under the BWM Convention, 2014.

with the standards of the BWM, which focus on ballast water treatment record books, relevant certification, ballast water treatment systems, and ballast water sampling. The BWM is predicted to herald great changes in the modern shipping industry, since there is the need for vessels to install additional ballast water treatment systems that are approved by the IMO. Although ship owners will face financial and regulatory burdens, such changes are vital contributions to the protection of the marine environment.

(2) Municipal Laws

Evidently, the IMO conventions can be considered as a significant legal source in applying port state control over foreign vessels. Further, many states underpin the legal effect for port state control by promulgating their domestic law consistent with international rules and standards. In this light, the relevant domestic legislations of the United Kingdom, the United States, Australia, and South Korea relating to port state control will be briefly examined in the following sections.

1) United Kingdom

The European region follows the Directive on port state control 95/21/EC, which was adopted in June 1995. The Directive stipulated that all EU member states should adopt the relevant provisions of this Directive in their domestic laws no later than 30 June 1996. Thus, the United Kingdom enacted the Merchant Shipping (port state control) regulations in 1995 (S.I. 1995, No. 3128), regarding the enforcement of port state control over foreign vessels, which is the implementation of the Directive on port state control 95/21/EC. This regulation has been consistently modified by the amendments of EU Directives. Currently, the United Kingdom implements the Merchant Shipping (Port State Control) Regulations 2011, as amended by the Directive

2009/16/EC.⁹³⁾

Part 1 of the regulations provides the scope of application, the procedure of ship inspection, and administrative measures against sub-standard ships. In particular, the United Kingdom set an annual inspection target of at least 25% of foreign vessels within their ports, which was succeeded by Paris MoU. Part 2 of the regulations deals with the rights of compensation and appeal procedures concerning detained vessels, whereas Part 3 of the regulations addresses ‘the familiarity of the crew with essential procedures and operations relating to the safety of the ship’.⁹⁴⁾ Moreover, section 95 of the Merchant Shipping Act stipulates that the UK government can exercise their power to detain sub-standard vessels in their ports or internal waters. Enforcement of port state control by the United Kingdom was implemented by the Maritime and Coastguard Agency.⁹⁵⁾

2) United States

In the United States, when a foreign vessel enters a US port or internal waters, the vessel is inspected by the United States Coast Guard (“USCG”) in compliance with domestic laws and international standards and rules concerning the prevention of marine pollution and the ship’s safety.⁹⁶⁾ Such provisions of port state control refer to Title 46 of the United States Codes (“USC”), Chapter 33.⁹⁷⁾ Vessels falling under the SOLAS Convention are granted reciprocity pursuant to Chapter 46 of USC 3303(a).⁹⁸⁾ Further, 33 Codes of Federal Regulations provide regulations on navigation safety and

93) Ozcayir, *Supra* note 2, pp. 187–188.

94) Ozcayir, *op.cit.*

95) Maritime and Coastguard Agency (2017) <<https://www.gov.uk/government/organisations/maritime-and-coastguard-agency/about>> accessed 24 August 2017.

96) Hare, *Supra* note 53, p. 582.

97) Hare, *op.cit.*

98) Hare, *op.cit.*

the prevention of marine pollution from ships that affect foreign vessels. The United States does not provide any relevant agreements or regional MoU regarding port state control.⁹⁹⁾ Instead, the USCG authority of port state control gives rise to statutes, regulations, and IMO conventions under the USCG Marine Safety Manual, Section D of port state control.¹⁰⁰⁾

3) Australia

Australia's port state control is implemented by the Australian Maritime Safety Authority ("AMSA"), pursuant to the AMSA Act 1990. With regards to the inspection of a foreign vessel, authority is illustrated in the Navigation Act 2012, s. 190AA, the Protection of the Sea (Prevention of Pollution from Ships) Act, 1983 s.27A, and Marine Order 11 – Substandard Ships. In particular, an AMSA officer can inspect and detain unseaworthy or sub-standard vessels subject to s. 257 and s. 248 of the Navigation Act 2012.¹⁰¹⁾ In addition, as an active member of the Indian Ocean MoU and the Tokyo MoU, the AMSA observes the procedure of port state control and shares the inspection data.

4) South Korea

South Korean port state control is implemented by a port state control officer, on behalf of the Ministry of Oceans and Fisheries. The national law for enforcement of port state control is prescribed by Articles 68 and 69 of the Ship Safety Act.¹⁰²⁾ These articles deal with the procedure of port state

99) Ozcayir, *Supra* note 55, p. 270.

100) The United States Coast Guard, 'The United States Coast Guard Marine Safety Manual Volume II: Materiel Inspection' (USCG, 2017) <https://media.defense.gov/2017/Mar/29/2001723817/-1/-1/0/CIM_16000_7B.PDF> accessed 22 July 2017.

101) The Australian Maritime Safety, 'Port State Control in Australia' (AMSA, 2017) <<https://www.amsa.gov.au/forms-and-publications/fact-sheets/PSC-Fact-Sheet.pdf>> accessed 22 July 2017.

control, the legal source of port state control, the authority of the port state control officer, and the remedy of unlawful ship detention. In addition, as a key member of the Tokyo MoU, South Korea is contributing to the improvement of this MoU.

(3) IMO Resolution relating to the Procedure for Port State Control

IMO Resolution A. 1052(27) provides “basic guidance on the conduct of port State control inspections and afford[s] consistency in the conduct of these inspections, the recognition of deficiencies of a ship, its equipment, or its crew, and the application of control procedures”.¹⁰³⁾ Thus, these procedures allow port state control officers to inspect and take administrative measures over a foreign vessel falling under the provisions of SOLAS, STCW, MARPOL, LL, Tonnage, and the AFS Convention. It should be remembered that non-party vessels of relevant conventions should not be given favourable treatment. This principle can be observed in Article I (3) of the SOLAS Protocol 1988, Article 5(4) of MARPOL, Article X (5) of STCW, and Article 3(3) of the AFS. In practice, these procedures play an important role when enforcing port state control over a foreign vessel.¹⁰⁴⁾

(4) The EC Directives on Port State Control

When it comes to the port state control regime in the EU, Directive 95/21/EC – Port state control in the EU, adapted in 1995, comes into play. This EU Directive aims to enhance the safety of vessels and prohibits

102) Ministry of Government Legislation, ‘Ship Safety Act’ (MOLEG, 2017) <<http://www.moleg.go.kr/english/korLawEng?pstSeq=52735>> accessed 22 July 2017.

103) IMO Resolution, A. 1052(27), Procedures for Port State Control, 2011.

104) Section 1.5 of IMO Resolution, A. 1052(27)

sub-standard ships from accessing ports. In addition, the Directive affects the establishment of administrative measures for the inspection of vessels to EU member states. This EC Directive provides an important legal regime for the Paris MoU.¹⁰⁵⁾ Currently, EC Directive 95/21/EC has been modified by Directive 2009/16/EC of the European Parliament and of the Council of 23 April 2009.

3. The Contribution of Regional MoUs on Port State Control to prevent, reduce and control Marine Pollution from Ships

(1) Historical Background

Regional MoUs on port state control originated from the 1978 Hague Memorandum on Port State Control (“Hague Memorandum”) between North Sea states. In 1976, with the adoption of ILO Convention No. 147 on minimum standards, it was determined that a port state can inspect a foreign vessel’s safety and seafarer’s working conditions within their port.¹⁰⁶⁾ Eight North Sea states signed ILO Convention No. 147 by the Hague Memorandum in 1978, thus enforcing it. The purpose of the Hague Memorandum was ‘the surveillance of seagoing ships in order to ensure that requirements stated under ILO Convention No. 147, as well as other Conventions, were met’.¹⁰⁷⁾ However, the Hague Memorandum does not effectively prevent marine pollution. The EC, therefore, wished to create an effective proposal to eliminate sub-standard ships. In 1980, a conference of European ministers, who were in charge of maritime safety, adopted a proposal in relation to

105) Ozcayir, *Supra* note 55, p. 279.

106) Z. Oya Ozcayir, “The use of Port State Control in Maritime Industry and Application of the Paris MoU”, *Ocean and Coastal Law Journal* 14(2009), p. 208.

107) George Kasoulides, “Paris Memorandum of Understanding: A Regional Regime of Enforcement”, *International Journal of Estuarine and Coastal Law* 5(1990), p. 180.

the reduction and control of sub-standard ships for the purpose of the prevention of marine pollution and ensuring safety. Eventually, a second ministerial conference of 14 North Sea states signed and approved the implementation of the Paris MoU on port state control in January 1982, which was the first MoU.¹⁰⁸⁾ Furthermore, the EU members adopted a mandatory port state control, and so EC Directive 95/21/EC on port state control came into force in 1996. As such, the Paris MoU has had a considerable impact on the establishment of other MoUs. Currently, there are nine regional MoUs as follows: the Paris MoU, the Vinadel Mar Agreement, the Tokyo MoU, the Caribbean MoU, the Mediterranean MoU, the Indian Ocean MoU, the Abuja MoU, the Black Sea MoU, and the Riyadh MoU. Besides, the United States does not involve in a regional MoU, but they operate their own port state control system (by USCG).

(2) The Principle of Regional MoU on Port State Control

The regional MoU is not an international treaty or convention, but rather an administrative agreement that encourages the parties within an MoU to stabilise the standards of port state control and to prevent marine pollution from ships and sub-standard ships by enforcing regional MoU on port state control.¹⁰⁹⁾ This principle can be well observed in the preamble of each regional MoU. For example, the Paris MoU, which is one of the leading MoUs in the shipping industry, indicated that its objective is to ‘eliminate the operation of sub-standard ships through a harmonized system of port State control’.¹¹⁰⁾ Also, the Tokyo MoU’s main objective is to: “establish an

108) Ho-Sam Bang & Duck-Jong Jang, “Recent Developments in Regional Memorandums of Understanding on Port State Control”, *Ocean Development & International Law* 43(2012), p. 171.

109) Ozcayir, *Supra* note 2, p. 211.

110) Paris MoU (Paris MoU, 2017) <<https://www.parisMoU.org/about-us/organisation>> accessed

effective port state control regime in the Asia-Pacific region through co-operation of its members and harmonization of their activities, to eliminate sub-standard shipping so as to promote maritime safety, to protect the marine environment and to safeguard working and living condition on board ships.”¹¹¹⁾

Based on the principle of the regional MoU, each maritime authority that is part of a regional MoU is able to verify whether vessels comply with international rules and standards. The MoU provides for ‘a total number of inspections, expressed in terms of a percentage, that each of the states party to the relevant MoU shall conduct’.¹¹²⁾ In general, there is no discrimination regarding the foreign vessel of a flag in each MoU. Also, if there are no ‘clear grounds’ for inspection, the ship will be inspected at intervals of six months in each MoU. Under this system, the port state control officer will take action when deficiencies in foreign vessels are found within the ports as follows: (1) rectification of deficiencies prior to departure; (2) rectification of deficiencies in the next port, under specific conditions; and (3) rectification of (minor) deficiencies (only) within fourteen days; and (4) the detention of the ship.¹¹³⁾

(3) Recent Development of Regional MoU

Recently, the Paris and Tokyo MoUs replaced the inspection regime from the target factor system to a New Inspection Regime (NIR). The Paris MoU adopted the NIR of the European Union Directive 2009/16/EC in 2011, and the Tokyo MoU introduced its NIR in 2014.¹¹⁴⁾ The previous

23 August 2017.

111) Tokyo MoU, ‘Memorandum of Understanding on Port State Control in the Asia-Pacific’ (Tokyo MoU, 2017) <<http://www.tokyo-MoU.org/>> accessed 23 August 2017.

112) Keselj, *Supra* note 39, p. 144.

113) IMO Resolution, A. 1052(27), Procedures for Port State Control, 2011.

target factor system was to computerize and digitize the index of the ship safety management by considering type of ship, age of ship, flag, classification, inspection data, and the interval of inspection so as to sort the priority of inspection.¹¹⁵⁾ According to the calculation system, it was divided into four levels (very high, high, medium, and low). If the foreign ship classified as high priority, the port state control officer can inspect it within their port regardless of the interval of inspection. However, the target factor system does not include the evaluation index of shipping company safety management in the scoring criteria. Thus, the Paris and Tokyo MoUs introduced the NIR in order to control sub-standard ships more intensively. The NIR is also known as the Ship Risk Profile (“SRP”). The Paris MoU defined the NIR by saying that “the SRP Calculator can be used to evaluate if a ship will be considered as High Risk Ship (“HRS”), Standard Risk Ship (“SRS”) or Low Risk Ships (“LRS”).¹¹⁶⁾ The performance of a shipping company in a safety management system is considered one of the most important evaluation criteria. That is, the index of a shipping company’s performance will take into account historical inspection data such as the number of detentions and deficiencies in order to complete inspection of all vessels. Simply put, the NIR can be said to be a more stringent inspection system compared with the target factor system. In particular, under the NIR, if a shipping company does not fulfil the requirement of the safety management system, then their vessels should be frequently inspected by the port state control officer in the port of the regional MoU. As a result, the NIR is conducive to the elimination of sub-standard ships and the prevention of marine pollution by

114) European Maritime Safety Agency, 'Port state Control' (EMSA, 2017) <<http://www.emsa.europa.eu/psc-main/new-inspection-regime.html>> accessed 23 August 2017; Memorandum of Understanding on Port State Control in the Asia-Pacific (2017) <http://www.tokyo-mou.org/inspections_detentions/NIR.php> accessed 23 August 2017.

115) Ozcayir, *Supra* note 2, p. 223.

116) Tokyo MoU, *Supra* note 99.

encouraging companies to maintain their ships' safety. Similar to the Paris and Tokyo MoUs, other MoUs will need to consider the introduction of the NIR so as to harmonize the port state control system, ensure maritime safety, and prevent marine pollution from sub-standard ships.

V. Conclusion

When it comes to vessel-source marine pollution, the flag state has the primary responsibility over ships flying their flags. However, with the advent of FOC, flag state control has become increasingly weak, as the flag state is unable or unwilling to exercise proper action concerning ship safety and the prevention of marine pollution from ships. The LOSC allows the port state or coastal state to exercise prescriptive and enforcement jurisdiction over foreign vessels. In particular, Article 218 of the LOSC stipulates that the port state can take appropriate action over a foreign vessel in the case of the violation of international pollution standards and rules or illegal discharges in their maritime zone, when accessing the ports. In other words, in order to make sure that enforcement jurisdiction is exercised by the port state, it should be revealed that the vessel either unlawfully discharged or violated pollution laws and regulations. While port state jurisdiction allows a port state to undertake investigations or institute proceedings against vessels that committed discharge standards from outside their maritime zone, a port state is not easy to exercise its enforcement jurisdiction without proper evidences. Port state jurisdiction is concerned with the violation of discharge standards, not CDEM. For this reason, Article 218 of the LOSC merely plays an *ex post facto* jurisdiction role.¹¹⁷⁾

117) D. Devine, "Port State Jurisdiction: A Judicial Contribution from New Zealand", *Marine Policy* 24(2000), p. 216; Henrik Ringbom, *The EU Maritime Safety Policy and International*

Meanwhile, port state control contributes to the prevention of vessel-source marine pollution by allowing a port state to take administrative measures over sub-standard ships. This is concerned with *a priori* jurisdiction subject to Article 219 of the LOSC.¹¹⁸⁾ The legal source of port state control relating to the prevention of marine pollution from ships can be observed in IMO conventions such as SOLAS, MARPOL, BWM, and the AFS Convention. Each IMO convention provides the provision of port state control, which stipulates that the state can inspect foreign vessels that visit their ports in order to ascertain whether they comply with IMO conventions. In addition, the IMO has adopted the procedure of port state control in order to harmonise the implementation of the ship inspection and maximise the effectiveness of port state control among regional agreements. On that basis, each state can implement port state control through their domestic laws. Furthermore, as specific example of port state control, regional MoUs are significantly dedicating to the development of port state control by eliminating port shopping, providing ship inspection information for the purpose of consistency for the port state control system among regional MoUs, and securing the effectiveness of port state control through a systematic approach that ensures the safety of ships and the prevention of vessel-source marine pollution. A port state can detain the vessels or require vessels to rectify deficiencies through port state control if the vessel does not comply with IMO conventions. Such administrative action may result in reputation damage and economic loss of the ship owner and charterer. Shipping companies should try to avoid ships' detention by properly complying with IMO conventions. At present it goes without saying that port state control has a great impact on the contribution to the prevention of vessel-source marine pollution from ships, as well as the elimination of sub-standard ships in

Law (M. Nijhoff Pub, 2008), p. 362.

118) 이윤철 민영훈, 전제논문, 36쪽.

the modern shipping industry.

This study has analysed port state jurisdiction under LOSC and examined the legal basis for port state control at the international and domestic level to prevent vessel-source pollution. Further, this study also referred to the contribution of regional MoUs and the recent development of the Paris and Tokyo MoUs in relation to the ship inspection regime to activate port state control. As concluding remark, this study wishes to emphasize that there is a need to consistently enhance and harmonise the port state control regime, as an *a priori jurisdiction*, through regional MoUs and the IMO instruments following the rapid change of the modern shipping industry.

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[Abstract]

A Legal Consideration on Port State Jurisdiction and
Port State Control in respect of the Prevention of
Vessel-Source Marine Pollution

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Traditionally, the responsibility for securing the ships' safety and the protection of the marine environment falls under a flag state flying its flag under international law. However, with the introduction of FOC regime, flag state control has weakened over the last few decades and this circumstance had resulted in severe maritime accidents and pollution incidents. Thus, the international community have been tried to contribute to the protection of the marine environment through the port states' regulation under the recognition of that the flag state could be difficult to solve the issue of comprehensive regulation for the prevention and reduction of marine pollution. Under the LOSC, a port state may exercise legislative and enforcement jurisdiction over the ship that violated international rule and standards in their maritime zone and may institute proceedings over a foreign vessel that violated international rules and standards and IMO conventions relevant to marine pollution in the high sea or EEZ of another state.

Port state control allows a port state to take proper measures over foreign vessels (e.g. ships' detention or a port embargo) by verifying as to

whether the ships comply with international rules and standards in respect of the safety of ships, certification and training of seafarers, crew competence and working conditions, in order to ensure maritime safety and protect the marine environment in their maritime zone. As a naturally acknowledged coastal states' jurisdiction or sovereignty in the territorial sea under customary international law, besides, port state control enables a port state to fundamentally control vessel-source marine pollution by targeting ships' physical defect or human defect as a prior measure. In contrast, port state jurisdiction based on Article 218 of the LOSC is not concerned with ships' construction, equipment and design, but the violation of discharge standards referred in 'generally accepted international rules and standards'. Such port state jurisdiction seems to have a different viewpoint from traditional rule for maritime jurisdiction. In practice, port state control can be more effective measure than port state jurisdiction because port state control has low disturbance for international shipping and can play a role as a priori measure in preventing marine pollution. However, it should be kept in mind that a port state should actively exercise port state jurisdiction of the post-regulation level along with the exercise of port state control of a precautionary level to protect the marine environment of the global ocean and regional sea areas by preventing accidental discharges or operational discharges from ships beforehand. This study looks at in-depth the legal basis for port state jurisdiction and port state control as well as contents related to them. Further, this study wishes to refer to the contribution of port state jurisdiction and port state control to combat vessel-source marine pollution.

Key words : Port State Control, Port State Jurisdiction, Vessel-Source Marine Pollution, Regional MoU on Port State Control, Generally Accepted International Rules and Standards, MARPOL73/78, SOLAS