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Criminal Liability for Vessel-Source Pollution in China: Law and Practice

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Abstract

This article addresses criminal liability for vessel-source pollution in China. It describes relevant Chinese legislation regarding criminal liability for vessel-source pollution, analyses why a criminal case pertaining to vessel-source pollution has yet to be brought in Chinese courts and presents suggestions on how to improve the current regime.

Keywords

vessel-source pollution; criminal liability; China; marine environment

Introduction

Maritime transport is responsible for 12% of global marine pollution.¹ At the same time, civil and criminal liability creates a strong incentive to put controls in place and to implement measures to prevent vessel-source pollution.² China has emerged as a major shipping nation. With the growth of its economic power, China's maritime power has also expanded rapidly.

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¹ International Shipping Facts and Figures—Information Resources on Trade, Safety, Security, Environment, Maritime Knowledge Center (International Maritime Organization, London, 2011) p. 24.

² Gotthard Gauci, 'Protection of the Marine Environment through the International Ship-Source Oil Pollution Compensation Regimes' (1999) 8 (1) *Review of European Community & International Environmental Law* 29.

In 2011, Chinese ownership of vessels ranked 4th in the world and Chinese shipowners controlled 8.91% of the total world deadweight tonnage (DWT).³ As a consequence, China is becoming increasingly assertive in its maritime endeavours.⁴

The shipping industry has made an important contribution to the rapid development of the Chinese economy. However, 18,000 kilometres of China's coastline have become seriously polluted. Following serious oil tanker spill accidents, such as *Erika* (1999) and *Prestige* (2002) in the European Union (EU), the *Exxon Valdez* (1989) in Alaska and the *Hebei Spirit* (2007) in South Korea, China is well aware of the potential for vessel-source pollution in its own waters, both from large events, such as in the above examples, and from other sources, such as accumulated pollution from operational discharges. The heightened risks in recent times as a result of the expansion of the Chinese shipping industry and the rapid growth in its economy mean that China is all the more interested in taking adequate measures to prevent this pollution.

This article examines Chinese law and practice on the imposition of criminal liability for vessel-source pollution. It describes relevant Chinese legislation regarding criminal liability for vessel-source pollution, analyses why a criminal case pertaining to vessel-source pollution has yet to be brought in Chinese courts, and presents suggestions on how to improve the current regime.⁵

³ United Nations Conference on Trade and Development Review of Maritime Transport 2012, p. 41; http://unctad.org/en/PublicationsLibrary/rmt2012_en.pdf.

⁴ Keyuan Zou, 'China's Ocean Policymaking: Practice and Lessons' (2012) 40 (2) *Coastal Management* 158.

⁵ In order to collect primary sources for this research, the author interviewed several members of the Chinese delegation at the 62nd Session of the Marine Environment Protection Committee (MEPC) of the IMO in London on 1 July 2011. The author then travelled to China. From August 2011 to February 2012, the author conducted semi-structured interviews in 10 major port cities along China's coast (Dalian, Guangzhou, Haikou, Tianjin, Ningbo, Qinhuangdao, Qingdao, Shanghai, Shenzhen and Yantai). Unpublished (internally published) documents from the China Maritime Safety Administration (MSA) were collected. Semi-structured interviews were mainly conducted with representatives from shipping companies, China's specialized maritime courts and the MSA. Secondary information was obtained through Chinese and English literature, newspaper and internet review.

Chinese Statutory Law

Criminal Law

China's current environmental criminal law is the sum of the relevant legal norms concerning the protection of the ecosystem in the 1997 Criminal Law⁶ and other legislation. The provisions of the Criminal Law expressly stipulate environmental crimes and specific penalties, and other legislation has different forms, which often refer to the provisions of the Criminal Law.⁷ The 1997 Criminal Law consists of 2 parts, 15 chapters and 451 articles. Part I (General Provisions) deals with: (1) The aim, principles and applicable scope of the Criminal Law; (2) Crime; (3) Punishment; (4) The application of punishment; (5) Other provisions. Part II (Specific Provisions) covers: (1) Crimes of endangering national security; (2) Crimes of endangering public security; (3) Crimes of disrupting the order of the socialist market economy; (4) Crimes of infringing upon citizens' personal rights and democratic rights; (5) Crimes of damaging property; (6) Crimes of obstructing the administration of public order; (7) Crimes of impairing the interests of national defence; (8) Crimes of corruption and bribery; (9) Crimes of dereliction of duty; (10) Crimes of servicemen's transgression of duties.

Art. 13 of the 1997 Criminal Law provides that a crime refers to:

An act that endangers the sovereignty, territorial integrity and security of the State, splits the State, subverts the State power of the people's democratic dictatorship and overthrows the socialist system, undermines public and economic order, violates State-owned property, property collectively owned by the people, or property owned by citizens, infringes on the citizens' rights of the person, their democratic or other rights, and any other act that endangers society and is subject to punishment according to law. However, if the circumstances are obviously minor and the harm done is not serious, the act shall not be considered a crime.

In the Criminal Law, no specific offence relates to marine pollution. Art. 338, 'Considerable Accident with Environmental Pollution', is the offence most likely to fit with the Marine Environmental Protection Law (MEPL). Art. 338

⁶ Decree of the President of P.R. China, No. 83, Criminal Law of P.R. China, as amended on 25 Dec. 1999, 31 Aug. 2001, 29 Dec. 2001, 28 Dec. 2002, 28 Feb. 2005, 29 June 2006, 28 Feb. 2009 and 25 Feb. 2011.

⁷ Michael G. Faure and Hao Zhang, 'Toward a more effective environmental criminal law in China' in Paul Martin, Zhiping Li, Tianbao Qin, Anel Du Plessis and Yves Le Bouthillier (eds), *Environmental Governance and Sustainability* (Edward Elgar, UK, 2012) 105, 106.

is referred to in section 6, ‘Crimes of Impairing the Protection of Environment and Resources’, of Chapter 6, Part 2. This provision was amended in 2011 as follows:

If a person or persons in violation of the regulations of the State, discharges, dumps or treats radioactive waste, waste containing pathogen of infectious diseases, toxic substances or other hazardous waste, causes major environmental pollution, they shall be sentenced to fixed-term imprisonment of not more than three years or criminal detention and shall also, or shall only, be fined; if the consequences are especially serious, the person or persons shall be sentenced to fixed-term imprisonment of not less than three years but not more than seven years and shall also be fined.⁸

In contrast to its predecessor, it is notable that “serious consequences of heavy losses of public or private property or human casualties” is no longer a condition for the application of sanctions for environmental crimes.

Art. 338 of the Criminal Law applies to both individuals and legal persons. In theory, shipowners and seafarers therefore might be prosecuted under Art. 338. The provision does not differentiate between recklessness and intention. It seems that where major pollution is caused by the discharge of pollutants from vessels, Art. 338 can be invoked to impose criminal liability. The law is unclear on whether oil or oily waste is hazardous waste. Some scholars argue that crude oil cannot be considered as waste, as it is one of the most important raw materials for industry.⁹ For example, in the EU, in the recent European Court of Justice (ECJ) case C—188/07, *Commune de Mesquer v. Total France SA and Total International Ltd*, the Court (Grand Chamber) ruled that hydrocarbons accidentally spilled at sea following a shipwreck, mixed with water and sediment and drifting along the coast of a Member State until being washed up on that coast, constituted waste in the meaning of Art.1(a) of

⁸ Decree of the President of P.R. China (No. 41), Eighth Amendment to the Criminal Law, 2011. Previous Art. 338 of the Criminal Law: “Whoever, in violation of the regulations of the State, discharges, dumps or treats radioactive waste, waste containing pathogens of infectious diseases, toxic substances or other hazardous wastes on the land or in the water bodies or the atmosphere, thus causing a major environmental pollution accident which leads to the serious consequences of heavy losses of public or private property or human casualties, shall be sentenced to fixed-term imprisonment of not more than three years or criminal detention and shall also, or shall only, be fined; if the consequences are especially serious, he shall be sentenced to fixed-term imprisonment of not less than three years but not more than seven years and shall also be fined.”

⁹ Thomas Richter, ‘Interdependencies between Criminal Law and Oil Pollution Regulation in China’ in Michael G. Faure and James Hu (eds), *Prevention and Compensation of Marine Pollution Damage: Recent Development in Europe, China and the US* (Kluwer Law International, Leiden, 2006) p. 70.

Directive 75/442, as amended by Commission Decision 96/350.¹⁰ The EU's practice might be interesting for China to consider.

There is no clear definition of "hazardous waste" in the Chinese Criminal Law. The Supreme Court of China adopted a judicial clarification on the imposition of criminal sanctions for environmental pollution in 2006.¹¹ It does not define "hazardous waste" either. Furthermore, this judicial clarification is no longer valid since the Criminal Law was amended in 2011. In the future, a new judicial clarification from the Supreme Court is needed for the application of Art. 338.

Environmental Protection Law

China adopted its first Environmental Protection Law (EPL) in 1979, a year after the beginning of China's economic reform and open-door policy. In 1989, the EPL was amended and has never been changed since. As provided by Art. 43, if a violation of this law causes a serious environmental pollution accident, leading to serious consequences of heavy losses of public or private property or human injuries or death of persons, the person directly responsible for such an accident shall be investigated for criminal responsibility according to law. The EPL refers to the Criminal Law without, however, clearly citing specific articles to impose criminal liability for environmental pollution.¹²

Marine Environmental Protection Law (MEPL)

Over the last three decades China has promulgated a series of statutes and regulations to address the threat of vessel-source pollution. These include the 1983 Maritime Transport Safety Law (MTSL),¹³ the 1982 Marine Environmental Protection Law (MEPL), as amended in 1999, and more recently the Islands Protection Law (IPL), adopted in 2009.¹⁴ This was followed by the

¹⁰ Para. 1, Judgment of case C-188/07, *Commune de Mesquer v Total France SA and Total International Ltd*, 24 June 2008; <http://curia.europa.eu/juris/liste.jsf?language=en&num=C-188/07>.

¹¹ Judicial Interpretation on the Application of Imposing Criminal Sanctions over Environmental Pollution, No. 4, 26 June 2006. Supreme Court of P.R. China (in Chinese).

¹² It is worth noting that the EPL might be amended in 2013. The National People's Congress recently published the latest draft of an amended EPL for public discussions. The draft only refers to the Criminal Law without mentioning damage caused (proposed Art. 39). For the draft amendments to the EPL, see Nengye Liu, 'Criticism Levelled at China's Revised Environmental Protection Law' (2013) 1 *IUCN Academy of Environmental Law e-Journal*.

¹³ Decree of the President of P.R. China (No. 7), Maritime Transport Safety Law, Standing Committee of National People's Congress Gazette, Issue No. 4, 1983, pp. 19–25 (in Chinese).

¹⁴ Decree of the President of P.R. China (No. 22), Islands Protection Law, Standing Committee of National People's Congress Gazette, Issue No. 1, 2010, pp. 20–25 (in Chinese).

adoption of the Regulation on the Prevention and Control of Marine Pollution from Vessels ('the 2010 Regulation') in 2010. The 2010 Regulation replaced the 1983 Regulation on the Prevention and Control of Vessel-Source Pollution ('the 1983 Regulation'). China is also actively involved in the ratification and implementation of the relevant international conventions that deal with vessel-source pollution, such as the United Nations Convention on the Law of the Sea (LOSC),¹⁵ the International Convention for the Prevention of Pollution from Ships and its Protocol of 1978 (MARPOL 73/78),¹⁶ the International Convention for the Safety of Life at Sea (SOLAS)¹⁷ and the International Convention on the Control of Harmful Anti-Fouling Systems for Ships (Anti-Fouling Convention).¹⁸

The 1999 MEPL is the most important law for the protection of the marine environment under China's jurisdiction. It contains 10 chapters with 98 articles. Chapter 8 deals specifically with vessel-source pollution. According to Art. 62(1) of the 1999 MEPL, no vessels and their related operations may discharge in the sea areas under the jurisdiction of the People's Republic of China any pollutants, wastes, ballast water, vessel garbage or other harmful substances into the sea in violation of the provisions of this Law. The 1999 MEPL itself does not clarify the discharge standards. In practice, the MSA follows the latest standards set by MARPOL and its amendments.¹⁹ The 1999 MEPL requires all ships to possess anti-pollution equipment. Moreover, ports, harbours, loading stations and shipyards are to be equipped with reception facilities.²⁰ The 1999 MEPL provides that vessels carrying hazardous goods must be approved by the Maritime Safety Administration (MSA) before entering or leaving a port.²¹

Art. 5 of the 1999 MEPL sets out the jurisdiction of different departments for the protection of the marine environment. The Ministry of Environmental Protection (MEP) shall provide guidance, co-ordinate and supervise nationwide environmental protection work. The MEP shall also be responsible for

¹⁵ United Nations Convention on the Law of the Sea, (1982) 21 (6) *ILM* 1261–1354.

¹⁶ International Convention for the Prevention of Pollution from Ships, (1973) 12 (6) *ILM* 1319–1444; Protocol of 1978 Relating to the International Convention for the Prevention of Pollution from Ships, 1973, (1978) 17 (3) *ILM* 546–578.

¹⁷ International Convention for the Safety of Life at Sea, 1974, (1975) 14 (4) *ILM* 959–978.

¹⁸ AFS/CONF/26, 18 Oct. 2001, Agenda item 8; <http://www.imo.org>.

¹⁹ Interviews with MSA staff (Dalian, Qinghuangdao, Tianjin, Yantai, Qingdao, Shanghai, Ningbo, Guangzhou, Shenzhen and Haikou).

²⁰ Art. 62 (2), 1999 MEPL.

²¹ Art. 67, 1999 MEPL.

the prevention and control of marine pollution from land-based and coastal construction projects. The State Oceanic Administration (SOA) is in charge of the supervision and administration of the marine environment. The SOA is responsible for organizing surveys, surveillance, supervision, assessment and scientific research of the marine environment. It is also the SOA's responsibility to prevent and control marine pollution caused by marine construction projects and dumping. The MSA is authorized to deal with vessel-source pollution. However, marine pollution caused by fishing vessels shall be within the jurisdiction of the Fisheries Administration.²²

Chapter 9 of the 1999 MEPL sets administrative, civil and criminal liabilities for marine pollution. Most of the sanctions that can be used for the prevention of vessel-source pollution are administrative measures. Art. 91 (3) seems to be the only link between the 1999 MEPL and the Criminal Law.²³ It provides that in case of significant pollution of the marine environment resulting in major damage (great loss of public or private property/bodily injury or death of another person), criminal liability shall be imposed. According to the explanation of the Standing Committee of the National People's Congress, this article was added to the 1999 MEPL in accordance with Chapter 6, Section 6 on Crimes of Impairing the Protection of Environment and Resources in the Criminal Law.²⁴ However, as mentioned above, the Criminal Law had already been amended in 2011. 'Serious consequences of heavy losses of public or private property or human casualties' are no longer a condition for the application of sanctions for environmental crimes. Therefore, the 1999 MEPL is no longer compatible with the Criminal Law.

Chinese Law in Practice

In theory, it is possible to impose criminal liability for vessel-source pollution under Chinese law. In 2010, China imported 239.31 million tonnes of crude oil and 36.88 million tonnes of refined oil.²⁵ 95% of these were carried by maritime transport. China has experienced 718 oil spill accidents from

²² Only one exception is that pollution in non-fishing ports caused by fishing vessels will be under the jurisdiction of the MSA.

²³ See Faure and Hu, n. 9 above, p. 68.

²⁴ The major revisions of the 1999 MEPL, published by the National People's Congress of P.R. China: www.people.com.cn/zgrdxw/news/200004/04/lf30302.html (in Chinese).

²⁵ Table 9, 2010 National Report on Economic and Social Development Statistics, National Bureau of Statistics of China (in Chinese).

1998 to 2008, from which 11,749 tonnes of oil have leaked into the sea.²⁶ As demonstrated by the pollution from the vessel *Al Samidoon* in 2001, the collision of *Cape Bowen and Genmar Transporter* in 2004, and the *Arteaga* in 2005, the risk of serious oil spill accidents in Chinese coastal waters has become very high. Nevertheless, no Chinese court has yet imposed criminal liability for vessel-source pollution.²⁷ The possible reasons for this are explored below.

Policy Concerns

China adopted “Sustainable Development” as one of the principles for economic development planning in 1996.²⁸ The marine environment is a matter of concern for four reasons: 1) the littoral and adjoining areas have the heaviest population concentration in the world; 2) these areas have one of the heaviest concentrations of industry in the coastal zone in the world; 3) there is a heavy concentration of the world’s shipping routes; 4) there is considerable potential for oil and gas exploitation in offshore areas.²⁹ This probably explains why China has promulgated a series of statutes and regulations to address the threat of vessel-source pollution in the past years.

However, it is fair to say that China is not a pro-coastal State which puts coastal environmental protection as its priority. The Chinese representative to the International Maritime Organization (IMO) clearly stated that China’s major interests in the IMO are shipping-related.³⁰ The last three decades have witnessed the rapid growth of the Chinese shipping industry. To date, 90% of China’s exports and imports are carried by maritime transport.³¹ The shipping industry plays a vital role for the Chinese economy. For example, the China Ocean Shipping (Group) Company (COSCO), China’s largest shipping

²⁶ Ministry of Transport & Legislative Affairs Office of State Council, P.R. China, *The Legislative Interpretation of 2009 Regulation on the Prevention and Control of Marine Pollution from Vessels*, China Communications Press, Beijing 2010, p. 2 (in Chinese).

²⁷ C.Y. Jin, Y.C. Jiang, ‘Criminal Liability for Ship-Source Pollution’ (2010) 6 *China Maritime Safety* 28 (in Chinese).

²⁸ China Agenda 21, White Paper on China’s Population, Environment and Development in 21st Century, <http://www.acca21.org.cn/english/>.

²⁹ Y. Hui, ‘Case Study of China’, in E. Franckx (ed.), *Vessel-Source Pollution and Coastal State Jurisdiction: The Work of the ILA Committee on Coastal State Jurisdiction Relating to Marine Pollution (1991–2000)* (Kluwer Law International, Leiden, 2001) p. 201.

³⁰ Interviews with one staff member of the Maritime Unit of the Chinese Embassy to the United Kingdom/Chinese Representatives to the IMO, during the 62nd Session of the Marine Environment Protection Committee (MEPC) of the IMO in London on 1 July 2011.

³¹ Ministry of Transport & Legislative Affairs Office of State Council, P.R. China, *The Legislative Interpretation of 2009 Regulation on the Prevention and Control of Marine Pollution from Vessels* (China Communications Press, Beijing, 2010) p. 1 (in Chinese).

company, owns and controls over 800 modern merchant ships consisting of 56 million DWT. COSCO's shipping lines cover over 1,600 ports in more than 160 countries and regions worldwide.³² Although China is interested in protecting its marine environment, these concerns take a back seat to its shipping economy. The two cases discussed below illustrate where Chinese priorities lie.

First, in 2008 when the Anti-Fouling Convention entered into force, the Chinese painting industry had just commenced the Dichlorodiphenyltrichloroethanes (DDT) project to replace Tributyltin (TBT).³³ It took 3 years for the DDT painting products made by Chinese companies to be ready for the market. This is one reason why China only adopted the Anti-Fouling Convention in 2011. China is willing to implement Anti-fouling Convention for the protection of marine environment, but only when the domestic industry is ready.

Second, China has yet to ratify the International Convention on Ballast Water Management for Ships (BWM Convention).³⁴ The BWM Convention was adopted in 2004 with the specific focus of controlling the threat of invasive species from ballast water. Although the BWM Convention is not yet in force, some states, e.g., the United States, Australia, and Brazil, have been pro-active and have implemented domestic measures consistent with the provisions of the BWM Convention.³⁵ The BWM Convention will enter into force 12 months after the ratification by 30 states that represent at least 35% of the gross tonnage of the world's merchant shipping.³⁶ As of 30 April 2013, 36 countries have ratified the Convention. Ratifying states include Canada, EU Member States (Denmark, Sweden, Netherlands, France and Spain), shipping powers (Norway and South Korea), small island countries (Maldives, Cook Islands, Marshall Islands and Tuvalu) and developing economies, such as Mexico, Brazil, Egypt, Kenya and South Africa. The combined merchant

³² Fleet of COSCO, www.cosco.com/en/fleet/index.jsp?leftnav=1/1/3.

³³ TBT compounds are considered toxic chemicals which have negative effects on humans and the environment.[1] Tributyltin compounds are moderately to highly persistent organic pollutants that biomagnify up the marine food web. One common example is leaching of TBT from marine paints into the aquatic environment, causing irreversible damage to the aquatic life. See Focus on IMO, 2002, Anti-fouling Systems; <http://www.imo.org/OurWork/Environment/Anti-foulingSystems/Documents/FOULING2003.pdf>.

³⁴ BWM/CONF/36, 16 Feb. 2004, Agenda item 8; <http://www.imo.org>.

³⁵ C.L. Hewitt, 'Marine Biosecurity Issues in the World Oceans: Global Activities and Australian Directions' (2003) 17 *Ocean Yearbook* 193–212.

³⁶ Article 18 (1), BWM Convention.

fleets of countries that have ratified the Convention constitute approximately 29.06% of the gross tonnage of the world's merchant fleet.³⁷

China's major concern regarding accession to the BWM Convention is the potential heavy cost of implementing the Convention for its shipping industry.³⁸ The BWM Convention applies to ships entitled to fly the flag of a state which is party to the Convention and ships that operate under the authority of a Convention party.³⁹ It is obligatory for ships to meet new ballast water management (bwm) and control requirements set by the BWM Convention. These obligations vary in accordance with the construction date of the vessel.⁴⁰ Regulation D-3 of the BWM Convention requires that to comply with the Convention, bwm systems must be approved by the Administration, taking into account the Guidelines for approval of bwm systems (G8). Only developed states, such as Germany, Norway, Denmark, South Korea and Japan, currently have the scientific and financial capacity to produce studies and technologies for the effective treatment of ballast water.⁴¹ Chinese companies have also been working on ballast water treatment technology. However, Chinese companies are not ready to provide a bwm system for Chinese vessels from their own technology.⁴² The installation of new bwm systems bought from developed countries will be a heavy burden for the Chinese shipping industry.

Moreover, China is now one of the world's biggest suppliers of seafarers.⁴³ Seafaring has proved to be an attractive option to China's 225.42 million rural

³⁷ Status of Multilateral Conventions and Instruments in Respect of which the International Maritime Organization or its Secretary-General Performs Depositary or Other Functions, as at 30 April 2013, p. 499; <http://www.imo.org/About/Conventions/StatusOfConventions/Documents/Status%20-%202013.pdf>.

³⁸ Interviews with the Chinese Representative to the 62nd Session of the Marine Environment Protection Committee (MEPC) of the IMO in London on 1 July 2011.

³⁹ Art. 3 (1), BWM Convention.

⁴⁰ Section B—Management and Control Requirements for Ships, Section D—Standards for Ballast Water Management, Regulations for the Control and Management of Ships' Ballast Water and Sediments, BWM Convention.

⁴¹ Table (2)—List of ballast water management systems that make use of Active Substances which received Final Approval from IMO (until Oct 2012); <http://www.imo.org/OurWork/Environment/BallastWaterManagement/Documents/table%20updated%20in%20October%202012%20including%20TA%20information.pdf>.

⁴² BalClor Ballast Water Management System developed by Qingdao Sunrui Corrosion and Fouling Control Company is so far the only one which has received final approval by the IMO.

⁴³ Seafarer supply covers two different employment groups: officers and ratings. China ranks first in the world with 90,295 ratings and a share of 12.1%. For supplying officers, China comes second in the world with 51,511 officers. UNCTAD Review of Maritime Transport 2011, p.158; http://unctad.org/en/Docs/rmt2011_en.pdf.

migrant workers and in particular to those from the poorer inland areas. This is due to its high remuneration relative to shore-based jobs.⁴⁴ Having recognised the links between the development of high-quality seafarers and rural development, the Chinese government has proposed an ambitious plan to become a world-leading supply nation of seafarers in 2020.⁴⁵ In the “*Hebei Spirit*” case in South Korea, the criminalization of seafarers was strongly criticized by the international shipping community and the International Transport Workers’ Federation.^{46, 47} The Chinese Shipowners Mutual Assurance Association echoed such sentiments on its official website.⁴⁸ It is also a concern for the MSA that “what comes around goes around”.⁴⁹ Therefore the imposition of criminal liability on seafarers under Chinese law might result in exposing Chinese seafarers to the risk of facing criminal cases abroad.

Problematic Relationship between the MEPL and the Criminal Law

The appropriate authority to deal with vessel-source pollution in China is the MSA.⁵⁰ The MSA is required by the 1999 MEPL to impose administrative sanctions (e.g., fines, detentions) on vessels that are in violation of Chinese legislation. However, the MSA must bring criminal cases to a local court in order to impose criminal sanctions.

Problems exist with the relationship between the 1999 MEPL and the Criminal Law. Art. 91 of 1999 MEPL merely mentions that a violation will be punished according to applicable law without specifying which of those provisions would be found in the Criminal Law. Moreover, Art. 91(3) of 1999 MEPL provides that ‘significant pollution’ and ‘major damage’ can result in criminal liability for vessel-source pollution. It is noted that 1999 MEPL uses

⁴⁴ Wu Bin, ‘Seafarer Supply and Rural Development in China: Survey Findings and Policy Implications’ (2010) p. 4; <http://www.nottingham.ac.uk/cpi/documents/funded-projects/seafarers-report.pdf>.

⁴⁵ China Water Transport, 28 August 2009; http://epaper.zgsyb.com/html/2009-08/28/node_9.htm (in Chinese).

⁴⁶ The two seafarers, Captain Jasprit Chawla and Chief Officer Syam Chetan, of the oil tanker “*Hebei Spirit*” were sentenced in December 2008 for their involvement in polluting Korea’s western coast in December 2007 when their oil tanker was hit by a runaway barge and spilled more than 10,000 tons of crude oil into coastal waters. See www.itfglobal.org/transport-international/ti34criminal.cfm.

⁴⁷ Moves towards criminalisation “definitely getting worse”, *Transport International Magazine*, Issue 34, Jan. 2009, www.itfglobal.org/transport-international/ti34criminal.cfm.

⁴⁸ http://www.cpiweb.org/showonenews.jsp?news_id=567 (in Chinese).

⁴⁹ Interviews with the Chinese Representative to the 62nd Session of the Marine Environment Protection Committee (MEPC) of the IMO in London on 1 July 2011.

⁵⁰ Art. 5, MEPL.

the same terms as the Chinese version of the LOSC.⁵¹ Neither the 1999 MEPL nor any other Chinese law defines “significant pollution” or “major damage”. Those terms are subjective and are therefore difficult to enforce. Furthermore, the provision not only requires that the accident was caused “in violation of the 1999 MEPL”, but also that it caused “major damage” (great loss of public or private property/bodily injury or death of another person). In this situation not only the illegality, but also the required result mean that the law would only intervene at a very late stage. In addition, the burden of proof for the public prosecutor would be very onerous.⁵² All these factors make Art. 91(3) of the 1999 MEPL very difficult to be applied in practice.

Ways Forward

The Need for a Better Regime

In the author’s opinion, China needs a better criminal liability regime to punish and prevent serious vessel-source pollution.

China has yet to experience a serious oil tanker spill disaster on the scale seen in other parts of the world. Nevertheless, as mentioned above, the risk of serious vessel-source pollution is very high. According to Art. 73 of the 1999 MEPL, the maximum fine to be imposed for illegally discharging pollutants or other substances into the sea is only 200,000 RMB (i.e., around 25,000 Euros).⁵³ This amount is certainly not enough to deter illegal discharge from vessels.

In 2011, China experienced the worst oil spill disaster from offshore oil exploitation platforms in its history. In the Bohai Bay oil spill disaster, ConocoPhillips China (the managing company of the oil exploitation platforms), a subsidiary of the U.S.-based oil company ConocoPhillips, reported that 2,500 barrels of oil and mud leaked from two of the company’s platforms in the Penglai 19–3 oilfield.⁵⁴ The disaster not only caused serious pollution in almost 7% of China’s Bohai Bay, it also raised numerous questions relating to the adequacy of China’s current liability regime for oil pollution. The questions for Chinese law include: (1) which party shall be sued? The oil field is owned by the state-owned China National Offshore Oil Corporation and managed by ConocoPhillips China. (2) Who can bring the case to court?

⁵¹ Art. 220 (5) (6), LOSC.

⁵² See Faure and Zhang, n. 7 above, pp. 123–124.

⁵³ This figure is based on the exchange rate as of 18 May 2013.

⁵⁴ Oil spill in China’s Bohai Sea rises to 2500 barrels: http://news.xinhuanet.com/english2010/china/2011-08/12/c_131045663.htm.

Fishermen? Local government? NGOs? Maritime authorities (in this case, the SOA)? (3) What is the legal basis for claiming compensation under Chinese law? (4) As this disaster is caused by human elements, could criminal liability be imposed on individuals responsible for this disaster? None of these questions are adequately addressed under current Chinese law. In the end, the SOA decided to set up a legal team and sue ConocoPhillips in the Tianjin Maritime Court based on Art. 90 of the 1999 MEPL.^{55, 56} Local fishermen, NGOs and lawyers were not satisfied with this action. As a result, 30 fishermen in Shandong province filed a lawsuit against ConocoPhillips in the Southern District Court of Texas, United States.⁵⁷

The author considers that under existing Chinese law a criminal suit could be brought in this case, in addition to the civil case. However, as discussed above, the ambiguous nature of what constitutes serious pollution for the purposes of imposing criminal sanctions, the lack of clear implementation guidelines, and the failure of the law to designate responsible agencies, mean that if serious oil tanker spill disasters occur in the future, current Chinese legislation is ill equipped to address such issues. This is unfortunate as criminal charges could actually provide the incentive needed for shipowners and authorities to put preventive measures in place. There is no doubt that economic interests are the priority for the Chinese government in the field of shipping. Despite this, staff from the Shanghai MSA, China's most advanced MSA branch, also recognizes that an effective criminal liability regime should be in place to address serious vessel-source pollution in sea areas under China's jurisdiction.⁵⁸

How to Improve the Current Regime?

The author agrees with Michael Faure's suggestions for a more effective environmental criminal law in China, including (1) fundamental rewriting of Art. 338 of the Criminal Law; (2) clearly stating the relationship between the administrative law and criminal law; and (3) stating the conditions where

⁵⁵ Announcement on Recruiting Law Firms on Behalf of the State Oceanic Administration to Claim Compensation in Bohai Bay Oil Spill Disaster Case, North China Sea Branch of the State Oceanic Administration, 15 Aug. 2011 (in Chinese).

⁵⁶ It says: "For damage to marine ecosystems, marine fishery resources and marine protected areas which causes heavy losses to the State, the department invested with power by the provisions of this law to conduct marine environment supervision and administration shall, on behalf of the State, put forward compensation demand to those held responsible for the damage."

⁵⁷ Bohai Bay oil spill lawsuits filed in US, http://www.chinadaily.com.cn/china/2012-07/03/content_15545125.htm.

⁵⁸ Interview with the member of of the Chinese delegation at the 62nd Session of the Marine Environment Protection Committee (MEPC) of the IMO in London on 1 July 2011.

criminal liability will be imposed as clearly as possible.⁵⁹ Art. 338 was amended in 2011 so that ‘Serious consequences of heavy losses of public or private property or human casualties’ are no longer a condition for the application of criminal sanctions. In the short term, judicial clarification from the Supreme Court of China could elucidate the relationship between the MEPL and the Criminal Law. In the long run, amendments to the 1999 MEPL should take into account this problematic relationship to ensure compatibility with the Criminal Law.

In practice, the MSA is the appropriate authority to inspect and monitor vessels to identify illegal discharges. China’s MSA is a centralized system. This means that individual offices within MSA bureaucracies are not responsible to superiors within local governments; rather, they are directly controlled by their functional administrative superiors and have only a consultative relationship with local government. This arrangement is due to the international and technical nature of the shipping industry. The State Council of P.R. China has stated that if the MSA finds that criminal liability is applicable to vessel-source pollution in a particular case, the MSA should transfer the case to local police departments for further investigation and prosecution.⁶⁰ The development of a mechanism to coordinate the activities of the MSA and police departments is therefore needed.

Special maritime courts exist in addition to the local courts in important port cities (Tianjin, Dalian, Shanghai, Ningbo, Xiamen, Qingdao, Wuhan, Guangzhou, Beihai and Haikou).⁶¹ Instead of the Civil Procedure Law, the Maritime Special Procedure Law is applied to cases in these specialized maritime courts. According to Art. 7 of the Maritime Special Procedure Law, the maritime court at the place of pollution, the place of damaging consequences, or the place where pollution prevention measures are taken shall have jurisdiction in an action brought in respect of pollution damage to the sea caused by discharge, spill or dumping of oil or other hazardous substances from ships, by production or operation at sea, or by ship demolition or repair.⁶² Nevertheless, the Supreme Court of China has interpreted this section so that criminal cases relating to vessel-source pollution are beyond the maritime courts’ jurisdiction.⁶³ The author, however, considers that there is merit in referring

⁵⁹ See Faure and Zhang, n. 7 above, pp. 126, 127.

⁶⁰ Art. 3, Regulation on Transferring Possible Criminal Cases from Administrative Departments to the Police Department, Decree of State Council, No. 310, 9 July 2001 (in Chinese).

⁶¹ List of China’s courts, Supreme Court of China; www.court.gov.cn/jgsz/qgfym/ (in Chinese).

⁶² Maritime Special Procedure Law of P.R. China, Decree of the President of P.R. China, No. 28, 25 Dec. 1999 (in Chinese).

⁶³ Rules on the Jurisdiction of the Maritime Court, Supreme Court of P.R. China, N. 27, 2001 (in Chinese).

such cases to the specialized maritime courts as they would be more capable than local courts in dealing with vessel-source pollution.

Conclusions

There is a gap between statutory law—i.e., the law on the books—and the law in practice on the issue of criminal liability for vessel-source pollution in China. This is due to the Chinese government's prioritization of economic concerns, as well as the vague provisions of current legislation. The high risk of vessel-source pollution in sea areas under China's jurisdiction requires a better regime to deter pollution and deal with possible cases in the future. It is suggested that the relationship between the 1999 MEPL and Criminal Law should be re-drafted in the near future to ensure that criminal liability is enforceable in practice. Furthermore, a coordination mechanism is needed between the MSA and the police department. China's specialized maritime court system, although not currently allowed to deal with criminal cases, would be the suitable forum to hear cases concerning criminal liability for vessel-source pollution.

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