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The Campeche Bay Blow Out: A Strict Liability Approach to Damages Resulting from Offshore Drilling Accidents

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Abstract

Examines what avenues are open to establish a legal procedure to ensure compensation for parties injured as the result of accidents caused by offshore drilling rigs. Concludes that there is a need to impose strict liability standard on those parties engaged in offshore drilling for damages caused by such activities.

THE CAMPECHE BAY BLOW-OUT: A STRICT LIABILITY APPROACH TO DAMAGES RESULTING FROM OFFSHORE DRILLING ACCIDENTS

INTRODUCTION

On June 3, 1979, in the Bay of Campeche in the Gulf of Mexico, an exploratory well under the operational guidance of the Petroleos Mexicanos (PEMEX) company suffered a severe blow-out.[1] Since that date, experts have estimated that the runaway well discharged from 10,000 to 30,000 barrels of oil per day[2] which poses a serious threat to the surrounding marine environment.[3] Although massive efforts were made to alleviate this constant source of pollution,[4] the capping of the well was not completed for over

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1. 125 CONG. REC. E4437-38 (daily ed. Sept. 12, 1979) (remarks of Rep. Skelton) [hereinafter cited as Skelton Remarks].

2. Seib & Schlender, *Fighting the Slick*, Wall St. J., Sept. 4, 1979, at 1, col. 1.

3. The following is a pictorial description of the threat to the marine environment:

> The small helicopter banks away from an oil-blackened beach and whisks out over the Gulf of Mexico, dipping lower to give its passengers a close look at the water.
>
> As far as they can see, the sea is shiny with a sheen of light oil that has travelled northward 600 miles from a runaway Mexican oil well. Thick brown ribbons of heavy crude oil are laced through the green water like chocolate through a marble cake. The whole mess is headed for the beach, where oil has already turned waves the color of chocolate milk.

Id.

4. The first attempts at capping the well were performed by the Red Air Company of Houston. Although they met with initial success, the company finally abandoned the project after another uncapping of the well saying that "only a relief well driven into the oil formation from another direction would be likely to get the pressure down acceptably." This is a very difficult procedure because of the near zero visibility caused by escaping oil near the well head making it practically impossible to pinpoint where in the formation the relief wells should be drilled. One expert has been quoted as saying, "well-drilling is not as exact as shooting a rifle. Those wells could miss the formation and fail completely to relieve the pressure. That would mean starting from scratch." N.Y. Times, Oct. 5, 1979, at A18, cols. 3-5.

Another attempt to cap the well was made by Petroleos Mexicanos, with help from an American contractor, Brown and Root of Houston. They attempted to place a funnel over the blown well to pull off the oil before subsequently burning it harmlessly. The funnel, nicknamed " 'sombrero,' is an octagonal steel cone 40 feet in di-

nine months. Even the presence of international experts, many of whom are experienced in dealing with oil pollution caused by various mishaps, did not result in an immediate thwarting of the continuous flow of oil into the Gulf of Mexico.[5] Various opinions were rendered for the inexplicable failure to cap the IXTOC I well,[6] but most experts agree on one major point: the blow-out of IXTOC I has caused the worst oil spill ever known to mankind.[7]

There are two issues which arise out of this scenario. The first concerns who should be held liable for the damages inflicted by the oil pollution from the well. To address this problem it is relevant that the company Petroleos Mexicanos, the party who subcon-

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ameter and weighing 310 tons." Unfortunately, before the sombrero operation was about to commence, the heavy steel supporter used to keep it in place broke and the project had to be sent back to Houston for repairs. *Id.* at A18, cols. 5-6.

5. One of the reasons for the difficulty in capping the blown well was the general unpreparedness of the Mexican company to handle a spill of such magnitude. The Mexicans have recieved help from abroad, however, and the clean up crew was likened to a small army of men and equipment. Oil spill control companies from four countries—the United States, Britain, Norway, and France—have lent the Mexicans large amounts of equipment in hopes of stemming the continuous tide of crude oil. Seib & Schlender, *supra* note 2, at 1, col. 1.

The well was finally capped on March 23, 1980 after an estimated 3.1 million barrels of oil were lost. N.Y. Times, March 24, 1980, at A1, col. 1.

6. Some of the outside experts say that Mexico has been lax at handling the oil. Mr. Mohn of Norway, for example, says that Mexican officials instructed him to shut down his company's two skimmers at 6 each night so that Mexican crew members could comply with labor regulations forbidding them to work more than 10 hours a day . . . . "You don't ask the fire brigade to go home from a fire just because it's 6 o'clock."

Seib & Schlender, *supra* note 2, at 1, col. 1.

A French expert, Jacques Pichon, inventor of an oil skimmer, was dismayed to find inadequate facilities to store the scooped up oil. When asked to train Mexican crews on how the skimmers worked, Pichon had to demonstrate without an accompanying barge, thus spraying oil from in front of the skimmer right back in the ocean behind the skimmer.

And one American, Roy Hann, a professor of engineering at Texas A&M has stated when asked why the so-called experts were unable to cap the well sooner, that, "Everybody who's been hired by Mexico has been kissed off." *Id.* at 19, col. 1.

7. *Id.* However, prior to the capping, these experts pointed out in Mexico's defense that:

> Oil is spilling from the well under pressure never before encountered in the Gulf of Mexico; such high pressure hinders the capping of the well. Not only has a great amount of oil been spilled—more than the 1.6 million barrels lost when the supertanker *Amoco Cadiz* cracked open in the English Channel in 1978 and *caused the previous largest spill*—but it is especially difficult to pick up.

Id. (emphasis added).

tracted the drilling to Pemargo,[8] is a state-owned corporation.[9] Thus any suits which may be brought might ultimately result in the Mexican government being required to compensate those injured.[10] After the Mexican government was confronted with this possibility, its President, Jose Lopez Portillo adopted an adamant position refusing to consider compensation.[11] The second and more important issue to be addressed concerns what theory of liability should be utilized to resolve the dispute. Should a theory of strict liability be imposed on the wrongdoers or must an injured party pursue the traditional route of establishing a negligence claim? The question of liability for injuries caused by offshore drilling accidents uncovers a vacuum in international law.[12] The major sources of international law[13] deal mainly with oil pollution caused by vessels, thus leaving the question of liability for offshore drilling accidents unanswered.[14]

Although this may be a new field for regulation under international law, the problem of state responsibility for pollution caused by an offshore drilling accident is nevertheless an important one to resolve. The need for developing rules in this area is twofold: to resolve the specific issues involved in the Campeche Bay blow-out and to establish legal procedures to govern similar events in the future. Specifically, the Campeche Bay blow-out and the subsequent

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8. Letter from Douglas G. Caroom, Assistant Attorney General, State of Texas, to author (Jan. 18, 1980) (copy on file at the office of the FORDHAM INTERNATIONAL LAW FORUM).

9. N.Y. Times, Oct. 5, 1979, at A1, col. 1.

10. For the purpose of this Note, it will be assumed that the Campeche Bay blow-out will take the form of an international dispute between the United States and Mexico as sovereign states representing the interests of their nationals. It is true, however, that an American company, Sedco Inc., sold the rig which may have been defective to PEMEX and thus, Sedco as well as other private parties will be involved in any action. This Note, however, is using the Campeche Bay blow-out as an illustration of the dangers of offshore drilling and will not address the procedural aspects regarding joinder of necessary parties and determining the appropriate forum.

11. N.Y. Times, Oct. 5, 1979, at A1, col. 1.

12. Congressional studies have been conducted to establish grounds to hold Mexico liable for the spill and this research has resulted in a finding that existing treaties indicate that oil well mishaps are not covered. Skelton Remarks, *supra* note 1, at E4437-38.

13. Bilateral and Multilateral Treaties, Customary International Law, and General Principles of Civilized Nations are three of the major sources of international law. J. BRIERLY, THE LAW OF NATIONS 56-63 (6th ed. 1963).

14. Skelton Remarks, *supra* note 1, at E4437-38. *See also* 33 U.S.C. § 1321 (1976) (U.S. Government provisions on oil spill damage from rigs).

damage to the Texas shore have been the source of great controversy[15] even though the pollution problem in this incident is localized to the coastal shore of Texas. If, in fact, this dispute concerning compensation for pollution-related injuries rises to the level of a state-to-state conflict between the United States and Mexico, the decision in such a case would be influential in the resolution of incidents concerning similar extraterritorial injuries in the future. The possibility of similar pollution problems caused by offshore drilling mishaps is not to be taken lightly in lieu of the Campeche Bay blow-out and the seemingly endless expansion of companies into offshore drilling operations.[16]

The purpose of this Note is to examine what avenues are open to establish a legal procedure to ensure compensation for parties injured as the result of accidents caused by offshore drilling rigs. Part I focuses on the history of strict liability and the modern principles which make certain activities abnormally dangerous and thus appropriate subjects for a strict liability standard. Part II examines prior international disputes with an emphasis on whether a strict liability standard has been accepted by the international community. Given the fact that offshore drilling is a relatively unregulated activity, Part III analyzes the analogous problem of oil pollution caused by vessel discharge. This Note concludes that there is a need to impose a standard of strict liability on those parties engaged in offshore drilling for damages caused by such activities.

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15. Political fallout from the spill has spread to Texas almost as fast as the oil. The rig used in the drilling of the well was a product of Sedco Inc., a Dallas based company founded by W.P. Clements Jr., now the state's governor. Although Clements has tried to disassociate himself from the company by putting his interest in a blind trust, many Texans believe that there is a strong link between the company, now run by the Governor's son and the Governor himself.

After the spill had washed up along the shores of Texas, the Governor angered many Texans by initially calling the spill "much to-do about nothing" and by telling Mexicans that it would be "silly" for the United States or Texas to sue to recover damages. Seib & Schlender, *supra* note 2, at 19, cols. 1-2.

16. "Nevertheless, experts from many countries feel that the Ixtoc I experience will be valuable in future submarine gushers. The whole trend in oil exploration appears to be toward offshore and even deep-water reserves, and more major accidents seem inevitable." N.Y. Times, Oct. 5, 1979, at A18, col. 6. For a discussion of the probable increases in offshore drilling operations, *see* Nanda & Stiles, *Offshore Oil Spills: An Evaluation of Recent United States Responses*, 7 SAN DIEGO L. REV. 519 (1970).

I. *THE STRICT LIABILITY APPROACH*

A. *History*

The concept of strict liability was formulated in the famous English case, *Rylands v. Fletcher*,[17] which held a landowner strictly liable for damage to his neighbor's property caused by water escaping from a reservoir constructed on the landowner's property. In *Rylands*, there was no evidence of an intentional trespass or any negligence on the part of the defendant. Rather, the court emphasized that the non-natural use of one's property would lead to liability although there was neither the intention to do harm nor any negligence on the part of the defendant.[18] In the United States, this doctrine has been modified by the Restatement (Second) of Torts.[19] Today, the general principle regarding strict liability is as follows:

> (1) One who carries on an abnormally dangerous activity is subject to liability for harm to the person, land or chattels of another resulting from the activity, although he has exercised the utmost care to prevent the harm.
> (2) This strict liability is limited to the kind of harm, the possibility of which makes the activity abnormally dangerous.[20]

The Restatement (Second) continues by enumerating six factors which should be considered to determine if an activity is classified as abnormally dangerous.[21] Once an activity is classified as abnormally dangerous, fault for injuries proximately caused by the activity becomes irrelevant.

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17. L.R. 1 Ex. 265 (1866), *aff'd*, L.R. 3 H.L. 330 (1868).
18. L.R. 3 H.L. at 339-40.
19. *See* RESTATEMENT (SECOND) OF TORTS §§ 519-520 (1976).
20. *Id.* § 519.
21. *Id.* § 520 lists the following factors in determining if an activity is abnormally dangerous:
    (a). existence of a high degree of risk of some harm to the person, land or chattels of others;
    (b). likelihood that the harm that results from it will be great;
    (c). inability to eliminate the risk by the exercise of reasonable care;
    (d). extent to which the activity is not a matter of common usage;
    (e). inappropriateness of the activity to the place where it is carried on; and
    (f). extent to which its value to the community is outweighed by its dangerous attributes.

B. *Offshore Drilling: An Abnormally Dangerous Activity*

The issue of whether a strict liability standard should be applied for pollution caused by an offshore drilling mishap turns on whether offshore drilling is an abnormally dangerous activity. Since the Santa Barbara Oil Spill[22] and several blow-outs in the Gulf of Mexico,[23] there have been many suggestions made that offshore drilling operations should be restricted and possibly even prohibited.[24] In determining whether offshore drilling is suitable to be grouped in the abnormally dangerous category, it is appropriate to examine the activity in light of the Restatement (Second) factors.[25]

The first group of factors to be analyzed focus on the nature of the risk involved—*i.e.*, the degree of risk of harm, the likelihood that harm will result, and the inability to remove the risk.[26] First, as many offshore explorations involve unknown quantities of crude oil, the degree of risk in the event of an accident is relatively high. Although studies have shown that the degree of risk varies depending upon the location, time, and concentration of the oil spill,[27] there is no evidence that even the slightest oil spill is beneficial to the environment. Second, the likelihood of harm, is best exemplified by the Santa Barbara Oil Spill.[28] When oil, a toxic agent,[29] is thrust into the marine environment in large quantities, it is likely that ocean life will be harmed.[30] Third, the inability to

22. *See* 67 OIL & GAS J., Feb. 10, 1969, at 50.

23. For an account of these blow-outs, *see e.g.*, 68 OIL & GAS J., Jan. 19, 1970, at 23; 67 OIL & GAS J., March 31, 1969, at 40.

24. *See* Krueger, *International and National Regulation of Pollution From Offshore Production*, 7 SAN DIEGO L. REV. 541, 558 (1970).

25. In determining whether the danger is abnormal, the factors listed in Clauses (a) to (f) of this Section are all to be considered, and are all of importance. Any one of them is not necessarily sufficient in itself in a particular case, and ordinarily several of them will be required for strict liability. On the other hand, it is not necessary that each of them be present, especially if others weigh heavily. RESTATEMENT (SECOND) OF TORTS, Explanatory Notes § 520, comment f at 37 (1976).

26. *See* note 21 *supra*.

27. *See* Weller, *Oil: Its Properties and Environmental Effects*, in ASSESSING THE SOCIAL IMPACTS OF OIL SPILLS 115 (G. Enk ed. 1974).

28. *E.g.*, a damage suit in the amount of $1.3 billion dollars was filed against Union, the oil company involved in the offshore drilling at Santa Barbara for injuries caused by the blow-out. *See* R. EASTON, BLACK TIDE: THE SANTA BARBARA OIL SPILL AND ITS CONSEQUENCES 77 (1972).

29. Weller, *supra* note 27, at 115.

30. For an excellent overview of the effects of oil discharge from vessels and its

lessen the risk by use of reasonable care, is debatable. Many oilmen have maintained that their safeguards[31] at the sites have reduced the possibility of blow-outs and statistics[32] seem to lend support to this claim. To counter this argument, however, one can examine the events following the Campeche Bay blow-out and then ask whether merely minimizing the occurrence of spills is sufficient in light of the possible havoc caused by one spill. To analogize, nations have taken steps to minimize the risks caused by possible nuclear accidents,[33] yet these precautions are not sufficient to take that activity out of the realm of being abnormally dangerous.

The second group of factors to be examined in the determination of whether offshore drilling should be classified as abnormally dangerous focus on the community aspects—*i.e.*, whether the activity is one of common usage, appropriateness of the location and the utility of the activity balanced against the risk.[34] Although offshore drilling operations have greatly expanded,[35] it is doubtful that these increases are sufficient to enable offshore drilling to be considered an activity of common usage. Increased usage in and of itself does not make drilling an activity one of common usage because of the interplay of the other factors.[36] By comparison, increased usage in the automobile coupled with vast improvements in safety standards enabled driving automobiles to be taken out of the category of abnormally dangerous.[37] Unlike automobiles, however, the

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effects on the marine environment, *see* R. M'GONIGLE & M. ZACHER, POLLUTION, POLITICS, AND INTERNATIONAL LAW 28-38 (1979). Although it is true that tankers carry different grades of oil than oil taken directly from the ocean floor, the similarities in the overall effect make such a comparison worthwhile.

31. The principal safeguard used to prevent blow-outs is drilling mud which is continuously circulated to the bottom of the well to reduce pressure. Seib & Schlender, *supra* note 2, at 19, col. 2.

32. A United States Geological Survey says that about 16,000 wells have been drilled in federal waters since 1956 and that only eight blow-outs have been so large as to dump more than 100 barrels of oil. *Id.*

33. *E.g.*, *Proposed Amendments to the Atomic Energy Act: Hearings Before the Subcomm. on Energy and the Environment*, 95th Cong., 1st Sess. 1 (1977) (H.R. 18 was designed to improve licensing procedures as a safeguard against possible environmental disasters).

34. *See* note 21 *supra*.

35. *See* note 16 *supra*.

36. *See* note 25 *supra*.

37. The following are two early cases which held that automobiles are not ab-

nature of offshore drilling prohibits it from becoming commonly used because of the high levels of technology involved. The next consideration is the appropriateness of the activity to the place where it is conducted. There is no doubt that as land sites used for oil drilling begin to dry up, tapping of unknown quantities of oil off coastal shores will become necessary. Perhaps, however, the location of these offshore wells should be evaluated beforehand at length to minimize the effect of possible future accidents. It is true that the public need to have greater exploration and exploitation of oil is great, but it should be remembered that the dangers incident to the operation are characteristic of the drilling itself, not of the land where the drilling occurs.[38] Finally, the last and probably most important factor to be analyzed is the balancing of the risk threatened with the utility of the activity. With the current societal dependence on oil and without sufficient alternative energy resources it seems likely that expansion will continue. In light of such disasters as the Santa Barbara spill[39] and the various blow-outs in the Gulf of Mexico,[40] however, it is appropriate to advocate that the companies involved in offshore drilling at least should be held to a higher standard of liability if such activities, in fact, result in pollution of the marine environment.

In further support of this argument, there is one relevant state court case, *Green v. General Petroleum Corporation*,[41] which treats oil drilling as an abnormally dangerous activity and thus an appropriate subject for a strict liability standard. In *Green*, the plaintiffs brought an action to recover damages for injuries to their property as the result of the blowing-out of an oil well on defendant's property.[42] Similar to the *ex gratia* payments made by the United States to Japan in 1955,[43] the plaintiffs utilized the traditional doctrine of *sic utere tuo ut alienum non laedas*[44] as a rationale for imposing liability. The defendants, however, asserted that

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normally dangerous: Wing v. London General Omnibus Co. [1909] 2 K.B. 652; Phillips v. Britannia Hygenic Laundry Co. [1923] 1 K.B. 539.

38. *See* RESTATEMENT (SECOND) OF TORTS, Explanatory Notes § 520, comment i at 39-40 (1976).

39. *See* note 22 *supra*.

40. *See* note 23 *supra*.

41. 205 Cal. 328, 270 P. 952 (1928).

42. *Id.* at 330, 270 P. at 952.

43. *See* note 75 *infra* and accompanying text.

44. The literal translation is "use your own property in such a manner as not to injure that of another." BLACK'S LAW DICTIONARY 1238 (5th ed. 1979).

"there were no preliminary indications that a 'blow-out' was imminent, and that the well was the 'wildest' ever encountered by its drillers in their experience."[45] The Supreme Court of California sided with the plaintiffs' argument and affirmed the doctrine of strict liability for injuries to the plaintiffs' property occasioned by the blowing-out of an oil well during drilling operations by the defendant.[46] It is true that the oil drilling in *Green* was conducted on land but in spite of this distinguishing factor the practice of drilling offshore does not appear to be any less hazardous. The following statement in *Green* is particularly applicable to the present dispute involving the offshore operations at Campeche Bay:

> Where one, in the conduct and maintenance of an enterprise lawful and proper in itself, deliberately does an act under known conditions, and, *with knowledge* that injury may result to another, proceeds, and injury is done to the other as the direct and proximate consequence of the act, however carefully done, the one who does the act and causes the injury should, in all fairness, be required to compensate the other for damage done.[47]

With this precedent in *Green*, the classification of offshore drilling as an abnormally dangerous activity subject to strict liability standards seems to be proper.

II. *PRIOR INTERNATIONAL DISPUTES CONCERNING STATE RESPONSIBILITY*

A. *Background*

Although there is a strong argument that offshore drilling is an abnormally dangerous activity, and thus an appropriate subject for a strict liability standard, there is a need to examine how the doctrine of strict liability has been applied in some prior international disputes.[48] Assuming that the dispute arising out of the Campeche Bay blow-out will ultimately be between the United States and Mexico for damages from the spill, these prior international disputes will reveal how the doctrine of strict liability has been ac-

45. 205 Cal. at 331, 270 P. at 954.

46. *Id.* at 334, 270 P. at 955.

47. *Id.* at 333-34, 270 P. at 955 (emphasis added).

48. The disputes which will be examined are the Trail Smelter Arbitration, 3 R. Int'l Arb. Awards 1938 (1941), the Corfu Channel Case, 1947 I.C.J. 4, and the United States *Ex Gratia* Payments to Japan, 32 DEP'T STATE BULL. 90 (1955).

cepted, if at all,[49] as a viable standard to be used in the resolution of extraterritorial injuries.

B. *Trail Smelter Arbitration*

The Trail Smelter Arbitration between the United States and Great Britain[50] (on behalf of Canada) arose out of a complaint by the United States that the emission of sulfur dioxide fumes by a zinc smelter works in British Columbia poisoned fisheries, trees used for lumber, trees used for fruit growing, and livestock in the state of Washington.[51] The case went to arbitration pursuant to the Ottawa Convention between the United States and the Dominion of Canada.[52] The Tribunal, established by the Ottawa Convention, answered four questions which the parties believed to be relevant for a resolution of the problem.[53] In answering these questions the Tribunal recommended that the smelter be held to a stringent standard of proof for injuries caused by the smelter's operations.[54]

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49. "Although the development of international law doctrines of strict liability may still be, to a large extent, *de lege ferenda*, there would appear to be, here and now, a considerable weight of opinion favoring their reception to provide the rules of decision in certain fields of international relations." *See* Goldie, *Liability for Damage and the Progressive Development of International Law*, 14 INT'L COM. L.Q. 1189, 1225 (1965).

50. In effect, the Trail Smelter Arbitration was between a Canadian smelter company and the United States but the dispute was elevated to a state versus state level pursuant to a Convention between the United States and the then Dominion of Canada signed at Ottawa, April 15, 1935 and ratified by the parties at Ottawa on August 3, 1935. Convention for Settlement of Difficulties Arising from Operation of Smelter at Trail, B.C., *signed* April 15, 1935, *ratifications exchanged*, Aug. 3, 1935, United States—Dominion of Canada, *reprinted in* 3 R. Int'l Arb. Awards 1907 (1959) [hereinafter cited as Ottawa Convention].

51. 3 R. Int'l Arb. Awards 1911, 1911-22 (1935).

52. Ottawa Convention, *supra* note 50.

53. The following is a list of four questions addressed by the Tribunal:

(1) Whether damage caused by the Trail Smelter in the State of Washington has occurred since the first day in January, 1932, and if so, what indemnity should be paid therefor?

(2) In the event of the answer to the first part of the preceding question being in the affirmative, whether the Trail Smelter should be required to refrain from causing damage in the State of Washington in the future and, if so, to what extent?

(3) In the light of the answer to the preceding question, what measures or régime, if any, should be adopted or maintained by the Trail Smelter?

(4) What indemnity or compensation, if any, should be paid on account of any decision or decisions rendered by the Tribunal pursuant to the next two preceding questions?

3 R. Int'l Arb. Awards at 1939.

54. The Tribunal stated:

In addition, in determining if liability should exist for future harm, the Tribunal advocated that indemnity should be paid despite the fact that there might be full compliance with the régime.[55] The language used by the Tribunal points to the development of a concept of liability without fault.[56]

There is at least one school of thought, however, which differs from this particular interpretation of the Trail Smelter Arbitration.[57] This contrary view claims that as the Tribunal did not have to decide "in an either/or sense,"[58] between a standard of strict liability and negligence, the case should not be construed to promulgate a standard of strict liability to settle future disputes concerning pollution-related injuries. This argument, however, fails to confront the imposition of liability for future claims against the smelter "notwithstanding the maintenance of the régime."[59] This language alludes to a notion of liability regardless of whether there was any intentional or negligent conduct on the part of the Canadian corporation for any future pollution-related injury in the United States caused by the smelter. Trail Smelter, in this respect, represents a

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> . . . under the principles of international law, as well as of the laws of the United States, no State has the right to use or permit the use of its territory in such a manner as to cause injury by fumes in or to the territory of another or the properties or persons therein, when the case is of serious consequence and the injury is established by clear and convincing evidence.

3 R. Int'l Arb. Awards at 1965. Note that the effect of using a strict liability standard rather than a negligence standard is to shift the burden of proof from the plaintiff to the defendant. If the defendant fails to show that the injury was caused by some "Act of God" or fault of the plaintiff's then the defendant will be held liable. *See* Sweeney, *Oil Pollution of the Oceans*, 37 FORDHAM L. REV. 155, 174-77 (1968).

55. The Tribunal set up a régime consisting of two technical consultants as well as a meteorologist adequately trained to make periodic observations concerning effects of emitting gases on the environment. This meteorologist was to be employed at the Smelter. In addition, the Tribunal was to meet at least once in 1939 to check to see that the maximum emission standards established were being complied with. 3 R. Int'l Arb. Awards at 1934-36.

56. The Tribunal stated:

> [i]f any damage as defined under Question No. 2 shall have occurred since October 1, 1940, or shall occur in the future, whether through failure on the part of the Smelter to comply with the regulations herein prescribed or *notwithstanding the maintenance* of the régime, an indemnity shall be paid for such damage . . . .

3 R. Int'l Arb. Awards at 1980 (emphasis added).

57. *See* Hardy, *International Protection Against Nuclear Risks*, 10 INT'L COMP. L.Q. 739, 751 (1961).

58. *Id.*

59. *See* note 56 *supra*.

departure from the traditional use of a negligence standard[60] to impose liability for extraterritorial injuries.

C. *The Corfu Channel Case*

In the Corfu Channel[61] dispute between Albania and Great Britain, the Albanians refused to grant the British a right of innocent passage through the North Corfu Strait. After the Albanians reiterated their position, the British sent two cruisers and two destroyers to test the conviction of the Albanians to carry out their threats that they would fire upon any intruding British ship.[62] When these ships entered the Strait, they were damaged severely by mines of unknown origin.[63] As a result of this incident, the British sent a large force of minesweepers into Albanian waters with the intent of cleaning the Strait of any other possible mines.[64] These vessels uncovered many other mines of German make.[65] As a result of this discovery, the British submitted the case to the International Court of Justice[66] to rule on whether they had a right of innocent passage in the North Corfu Strait and whether they should be compensated by the Albanian government for damage to their vessels and for injuries sustained by their crew members.[67] The International Court handed down a three part decision. First, the Court held that Albania, where it had knowledge of the presence of a minefield in its territorial waters, had a duty to warn an approaching British squadron of the danger and, for its failure to do so, was responsible for the resulting damage and loss of life and was obligated to pay compensation to the United Kingdom.[68] Second, the Court decided that the passage of British ships through the North Corfu Channel was permissible and not a violation of Al-

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60. For an example of a traditional negligence case which employs the four basic elements of a negligence cause of action—duty, breach of that duty, proximate cause, and injury—see Palsgraf v. Long Island R.R. Co. 248 N.Y. 339, 162 N.E. 99 (1928).

61. United Kingdom v. Albania (Corfu Channel Case) [1948] I.C.J. 4, *reprinted in* AMERICAN BAR ASSOCIATION, INTERNATIONAL COURT OF JUSTICE OPINION BRIEFS 1 (1978) [hereinafter cited as OPINION BRIEFS].

62. OPINION BRIEFS, *supra* note 61, at 1.

63. *Id.*

64. *Id.*

65. *Id.*

66. *Id.*

67. *Id.* at 2.

68. *Id.*

banian sovereignty.[69] Third, the Court determined that the unilateral decision by the British to sweep the remaining mines after the initial incident was a violation of Albanian sovereignty.[70]

Although the elements of a negligence cause of action[71] were never proved here per se, the International Court did rely on the Albanian's omission to warn the British as a basis for finding Albania negligent. There is authority for the belief that the Corfu Channel Case strikes a severe blow to the existence of a standard of strict liability in international law.[72] The case, however, is significant in any discussion of strict liability for offshore drilling mishaps because of the International Court's imputation of knowledge to Albania concerning the existence of the mines without actual proof of such knowledge.[73] By analogy, parties involved in offshore drilling operations undertake these lawful enterprises with the knowledge that if an accident occurs, damage to the environment will ensue. If knowledge of a dangerous situation was sufficient in Corfu Channel to establish a basis of liability, then parties involved in the abnormally dangerous activity of oil drilling should be treated similarly. Although this case does not show that strict liability has been accepted as a viable standard in customary international law[74] for imposing liability for abnormally dangerous activities, the effect of the case is to impute knowledge to parties engaged in dangerous activities without actual proof of their negligence.

D. Ex Gratia *Payments to Japan*

A third dispute concerning extraterritorial injury involving two sovereign nations was the Japanese Fisheries case. In March and

69. *Id.*

70. *Id.* at 2-3.

71. *See* note 60 *supra*.

72. Hardy, *supra* note 57, at 758.

73. *See* Goldie, *International Principles of Responsibility for Pollution*, 9 COLUM. J. TRANSNAT'L L. 283 (1970). Basically there was no malevolence or neglect which would have had to been proven by the United Kingdom. *Id.* at 307.

74. Custom in its legal sense means something more than mere habit or usage; it is a usage felt by those who follow it to be an obligatory one. There must be present a feeling that, if the usage is departed from, some form of sanction will probably, or at any rate ought to, fall on the transgressor. Evidence that a custom in this sense exists in the international sphere can be found only by examining the practice of states; that is to say, we must look at what states do in their relations with one another and attempt to understand why they do it . . . .

J. BRIERLY, *supra* note 13, at 59-60.

April of 1954, the United States conducted atmospheric nuclear tests at the Pacific Proving Grounds in the Marshall Islands.[75] A problem developed, however, when certain Japanese fishermen near the Marshall Islands were injured severely as a result of these tests. The subsequent question which arose was on what basis of liability, if any, should the United States be held liable. After a diplomatic exchange of notes,[76] the United States on January 4, 1955 agreed *ex gratia* to compensate the Japanese for their injuries which were caused by the fallout from the atmospheric tests.[77] As the note from United States Ambassador Allison indicates, the United States never attempted to resolve the question of liability in this case.[78] By making *ex gratia* payments, the United States in effect accepted responsibility without any proof of negligence. Thus, the skirting of the liability issue leaves open the question of whether a strict liability standard should be utilized to settle such international disputes. Although the question of liability in this case was unresolved, these payments to Japan were symbolic of the United States adherence to the traditional doctrine of *sic utere tuo ut alienum non laedas*.[79] This principle does not choose between a standard of strict liability or a negligence standard per se but it is useful in establishing the principle that a nation should bear responsibility for those acts which cause injury to another nation. The payments to Japan seem to be an indication that the United States would bear responsibility for damage caused while engaged in an abnormally dangerous activity[80] without proof of negligence. Ab-

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75. 32 DEP'T STATE BULL. 90 (1955). Although atmospheric testing is now banned by the Nuclear Test Ban Treaty, at the time of these tests, nuclear atmospheric testing was an accepted practice in international affairs.

76. *Id.*

77. In United States Ambassador Allison's Note to Japanese Deputy Prime Minister and Foreign Minister Mamoru Shigenistsu, the following was stated:

> I now desire to inform Your Excellency that the Government of the United States of America hereby tenders, *ex gratia*, to the Government of Japan without reference to the question of legal liability, the sum of two million dollars for purposes of compensation for the injuries or damages sustained as a result of nuclear tests in the Marshall Islands in 1954.

Id.

78. *Id.*

79. *See* note 44 *supra* and accompanying text.

80. If the same analysis using the RESTATEMENT (SECOND) factors is carried through for the testing of nuclear weapons as was done for offshore drilling, there is little doubt that the former as well as the latter will be considered an abnormally

sent political factors, a United States demand for reciprocal treatment for similar extraterritorial injuries caused by another nation's engagement in an abnormally dangerous activity would not be unreasonable.[81]

III. *OIL POLLUTION CAUSED BY VESSELS*

A. *History*

In examining how the international community should handle the problem of liability for offshore drilling accidents, it may be beneficial to consider the analogous problem of pollution caused by vessels. Not only has the marine environment been threatened by the discharges of oil from vessels in the ordinary course of their voyages but ocean life has suffered additionally with the era of the supertanker.[82] The rise in the amount of exported oil creates a higher probability that accidents will occur.[83] As a result of the increased evidence of vessel-related spills, the international community has met several times in the last thirty years to discuss various safeguards to protect the marine environment.[84]

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dangerous activity because of the inability to remove the high level of risk involved. *See* note 21 *supra*.

81. An example of how reciprocity works in international law is the most favored nation (MFN) status awarded to certain nations concerning trade agreements. The rationale behind (MFN) is simple, "if every country observes the principle, all countries will benefit in the long run through the resulting more efficient use of resources." SENATE COMM. ON FINANCE, 93D CONG., 1ST SESS., THE MOST FAVORED NATION PROVISION 1 (Comm. Print 1973).

82. As the quantity and capacity of the tankers increase, it is apparent that the magnitude of their accidents will also increase. To show the growth in oil exports, it is interesting to note that the percentage of the oil exported in 1938 compared to that consumed worldwide was 34% while in 1973, 61% of all oil consumed was exported. R. M'GONIGLE & M. ZACHER, *supra* note 30, at 15.

83. *Id.*

84. *See, e.g.*, 1973 International Convention for the Prevention of Pollution from Ships, I.M.C.O. Doc. MP/CONF/WP. 35, *reprinted in* 12 INT'L LEGAL MATERIALS 1319 (1973); International Convention Relating to Intervention on the High Seas in Cases of Oil Pollution Casaulities, Brussels, Nov. 29, 1969, 26 U.S.T. 765, T.I.A.S. 8068, *reprinted in* 9 INT'L LEGAL MATERIALS 25 (1970) [hereinafter cited as Intervention Convention]; International Convention on Civil Liability for Oil Pollution Damage, Brussels, Nov. 29, 1969, *reprinted in* 9 INT'L LEGAL MATERIALS 45 (1970) [hereinafter cited as Liability Convention]; Convention on the High Seas, Geneva, April 29, 1958, 13 U.S.T. 2312, T.I.A.S. No. 5200, 450 U.N.T.S. 82; International Convention for the Prevention of Pollution of the Sea by Oil, London, May 12, 1954, 12 U.S.T. 2989, T.I.A.S. No. 4900, 327 U.N.T.S. 3.

B. *Effect of Treaties Concerning Oil Pollution Caused by Ships*

These international treaties were designed to put pressure on nations transporting oil to curb pollution of the oceans by vessel discharge in particular[85] and vessel accidents in general.[86] Oil, although the main culprit in the world's eye after such disasters as the *Torrey Canyon*[87] and the Santa Barbara Oil Spill[88] was not viewed as the only possible threat to the marine environment. An examination of Article 25 of the 1958 Convention on the High Seas reveals that the international community was also fearful of the dumping of radioactive wastes and other harmful agents.[89] Although this 1958 Convention dealt solely with vessels as the modus operandi for pollution, the rationale, *i.e.*, the protection of the environment, is still a continuing goal of the international community today.

In particular, the International Convention Relating to Intervention on the High Seas in Cases of Oil Pollution Casualties,[90] should be examined closely. At Brussels, the parties to this convention reaffirmed a conscious awareness that the marine environment was being threatened by oil pollution, but went further by saying that there was a need to take "measures of an exceptional character" to protect the high seas.[91] Basically, the parties to this convention were given the power to take all reasonable steps necessary to protect their "coastline or related interests"[92] from danger caused by the threat of oil pollution. The parties, however, were careful not to establish a carte blanche right of intervention and specifically limited all measures to combat pollution by requiring the steps taken to be commensurate to the damage threatened.[93]

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85. For an in-depth analysis of operational discharge from a vessel, see Teclaff, *Controlling Operational Oil Pollution from Ships*, in 1977 FORDHAM CORPORATE LAW INSTITUTE, INTERNATIONAL MARITIME REGULATION 477 (J. Sweeney ed. 1978).

86. R. M'GONIGLE & M. ZACHER, *supra* note 30, at 16-20.

87. *Id.* at 20.

88. *See* note 22 *supra*.

89. Article 25(2) of the Geneva Conference of 1958 states: "All States shall cooperate with the competent international organizations in taking measures for the prevention of pollution of the seas or air space above, resulting from any activities with radioactive materials or other harmful agents." 13 U.S.T. at 2319, T.I.A.S. No. 5200 at ____, 450 U.N.T.S. at 96.

90. Intervention Convention, *supra* note 84.

91. *Id.*

92. *Id.* art. I(1).

93. *Id.* art. V.

As far as the question of liability was concerned, there was a companion agreement signed, also at Brussels, on the same day.[94] This agreement was designed to codify international rules relating to questions of liability and compensation for damage caused by the "escape and/or discharge" of oil from ships.[95] Although "escape" was not defined specifically in the Convention, its presence broadens the area of liability to cover all tanker accidents which result in oil being freed into the marine environment. The crux of this liability convention was to establish a standard of strict liability for pollution caused by the release of oil by ships into the high seas.[96]

As an outgrowth[97] of this liability convention, The International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage was held at Brussels in 1971.[98] In short, the focus was to create a fund which could be used to ease the burden which had been imposed on shipowners under the Liability Convention of 1969.[99] With a standard of strict liability for oil pollution caused by ships in effect, the international community did not want to create such harsh conditions as to unduly discourage shipowners from the vital transport of oil around the globe. Thus, the 1971 Convention was implemented to alleviate those fears of the shipowners by creating a relief fund which could be used to ease the possible financial hardships imposed by strict liability.

CONCLUSION

If the Mexican government had followed the United States precedent in the Japanese Fisheries case, the question of which theory of liability the Mexicans should be held to would be moot. Although their refusal to compensate those injured by the spill is contrary to the recognized doctrine of *sic utere tuo ut alienum non*

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94. Liability Convention, *supra* note 84 and accompanying text.

95. *Id.*

96. Art. III of the Liability Convention states: "[t]he owner of a ship at the time of an incident, or where the incident consists of a series of occurrences . . . shall be liable for any pollution damage caused by oil which has escaped or been discharged from the ship as a result of the incident." Liability Convention, *supra* note 84, art. III.

97. One of the resolutions ratified by the parties to the Liability Convention was to draft a scheme to establish an international fund to lessen the heavy burden caused by strict liability for pollution causing accidents. *See* 9 INT'L LEGAL MATERIALS at 66-67 (1970).

98. 11 INT'L LEGAL MATERIALS 284 (1972).

99. *Id.*

laedas, this refusal at last may serve to initiate some type of multilateral liability convention in order to establish a set of definitive rules governing liability for offshore drilling accidents in particular and other pollution-related extraterritorial injuries in general. If such a convention were to take place, an approach similar to the one taken by the Brussels Liability Convention imposing strict liability for oil pollution by ships should be recommended. One reason to avoid using a fault standard in offshore drilling accidents is that the party doing the drilling is not likely to be overly cooperative in making relevant evidence available to the injured party. This evidentiary problem is compounded by the fact that the rigs themselves, which might have been defective, are often lost in the depths of the oceans after such explosions and are not likely subjects for analysis. Perhaps the most compelling reason to employ a strict liability standard, however, is the fact that there is no justifiable reason to have a different standard of liability for ship-related pollution and rig-related pollution of the environment by the freeing of oil. With the major concern of the international community being the protection of the environment from harmful agents such as oil, the fact that there is a difference in modus operandi between ships and offshore drilling rigs should be secondary. Given the acceptance of strict liability in the Trail Smelter Arbitration, the utilization of such a standard in the pending litigation surrounding the Campeche Bay blow-out could foster greater usage of this doctrine in international law. By making nations liable for environmental accidents caused by offshore drilling without proof of fault, those nations involved in an abnormally dangerous activity such as offshore drilling might reevaluate their policies thus averting future environmental catastrophies.

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