

Fordham Law School

FLASH: The Fordham Law Archive of Scholarship and History

Faculty Scholarship

1974

Environmental Protection by Coastal States: The Paradigm from Marine Transport of Petroleum

Joseph Sweeney

Fordham University School of Law

Follow this and additional works at: https://ir.lawnet.fordham.edu/faculty_scholarship



Part of the [Law Commons](#)

Recommended Citation

Joseph Sweeney, *Environmental Protection by Coastal States: The Paradigm from Marine Transport of Petroleum*, 4 Ga. J. Int'l. & Comp. L. 278 (1974)

Available at: https://ir.lawnet.fordham.edu/faculty_scholarship/829

This Article is brought to you for free and open access by FLASH: The Fordham Law Archive of Scholarship and History. It has been accepted for inclusion in Faculty Scholarship by an authorized administrator of FLASH: The Fordham Law Archive of Scholarship and History. For more information, please contact tmelnick@law.fordham.edu.

ENVIRONMENTAL PROTECTION BY COASTAL STATES: THE PARADIGM FROM MARINE TRANSPORT OF PETROLEUM

*Joseph C. Sweeney**

I. THE PROBLEM OF THE HIGH SEAS

Any study of the nature of conflicting State interests in the waters denominated as territorial sea or high seas can be expected to lose validity after only a short period of time because the law has been changing so rapidly that it is obsolete by the time the printers have set it in black letter. This is especially true where environmental concerns are involved. Nevertheless, it is always appropriate to begin with first principles developed by the father of international law.

Et . . . commune est omnium Maris Elementum, infinitum scilicet ita, ut possideri non queat, et omnium usibus accomodatum: sive navigationem respicimus, sive etiam piscaturam.

Mare igitur proprium omnino alicuius fieri non potest, quia natura commune hoc esse non permittit, sed iubet . . . ut si quid earum rerum per naturam occupari possit, id eatenus occupantis fiat, quatenus ea occupatione usus ille promiscuus non laeditur.¹

A famous Admiralty judge, Lord Stowell (then Sir William Scott) restated the principle of freedom of the seas from Grotius in the case of a French vessel engaged in the slave trade that had been intercepted on the high seas by a British vessel, but was ordered to be released because the British vessel had no right to stop and search. In that case the court said:

. . . all nations being equal, all have an equal right to the uninterrupted use of the unappropriated parts of the ocean for their navigation. In places where no local authority exists, where the subjects of

*Professor of Law Fordham University School of Law. A.B. Harvard (1954); J.D. Boston University (1957); LL.M. Columbia (1963).

¹H. GROTIUS, *MARE LIBERUM* 28-30 (R. Magoffin transl. 1916).

For . . . the sea is common to all, because it is so limitless that it cannot become a possession of any one, and because it is adapted for the use of all, whether we consider it from the point of view of navigation or of fisheries.

Therefore the sea can in no way become the private property of any one, because nature not only allows but enjoins its common use. . . . If any part of these things is by nature susceptible of occupation, it may become the property of the one who occupies it only so far as such occupation does not affect its common use.

all states meet upon a footing of entire equality and independence, no one state, or any of its subjects, has a right to assume or exercise authority over the subjects of another.²

The principle of freedom of the high seas enunciated by Grotius and interpreted by Lord Stowell is the theoretical foundation of the denial to any state, other than the state of the vessel's flag, of any right to interfere with the operations of a vessel on the high seas. It is a vital principle enshrined in the writings of the most important jurists.³ Recently, the late Wolfgang Friedmann succinctly summarized, the old law in a different context:

As a general principle of international law the freedom of the seas is less than three and one-half centuries old. It protects the surface of the seas, with the exception of territorial waters, from appropriation or exclusive use by any one state. * * * Except in times of war, the major maritime powers have always been supporters of the freedom of the seas since their navies were able to protect their commercial interests, including in most cases, their overseas colonies, their merchant fleets, and their fishermen. Between them they were powerful enough to maintain this freedom as a general doctrine of international law.⁴

When we turn from the teachings of the most highly qualified publicists to the jurisprudence of the International Court of Justice we find recognition of the broad principle of freedom of the seas in the *Fisheries Case*,⁵ yet that same decision also began the process of coastal State extension into the high seas⁶ that has fostered the principle of the natural

²The *Le Louis*, 165 Eng. Rep. 1464, 1475 (Adm. 1817).

³C. COLOMBOS, *INTERNATIONAL LAW OF THE SEA* 47-86, 285-463 (6th ed. 1967); 1 G. GIDEL, *LE DROIT INTERNATIONAL PUBLIC DE LA MER* 480-84 (1932); G. SCHWARZENBERGER, *A MANUAL OF INTERNATIONAL LAW* 133-39 (5th ed. 1967); M. McDUGAL and W. BURKE, *THE PUBLIC ORDER OF THE OCEANS* 730-998 (1962); 1 L. OPPENHEIM, *INTERNATIONAL LAW* 582-608 (8th ed. H. Lauterpacht 1955); 1 P. FAUCHILLE, *TRAITÉ DE DROIT INTERNATIONAL PUBLIC* 1021 (8th ed. by Bonfils 1925); P. JESSUP, *THE LAW OF TERRITORIAL WATERS AND MARITIME JURISDICTION* 75-112 (1927); 2 D. O'CONNELL, *INTERNATIONAL LAW* 704-27 (1965). See also *Restatement (Second) of Foreign Relations Law* 33-36 (1965).

⁴W. FRIEDMANN, *THE FUTURE OF THE OCEANS* 30-31 (1971).

⁵*Fisheries Case (United Kingdom v. Norway)*, [1951] I.C.J. 116:

The delimitation of sea areas has always an international aspect; it cannot be dependent merely upon the will of the coastal State as expressed in its municipal law. Although it is true that the act of delimitation is necessarily a unilateral act, because only the coastal State is competent to undertake it, the validity of the delimitation with regard to other States depends upon international law.

Id. at 132.

⁶*Id.* at 116:

In this connection, certain basic considerations inherent in the nature of the territorial sea, bring to light certain criteria which, though not entirely precise, can provide courts with an adequate basis for their decisions. . . .

prolongation of coastal State authority.⁷ Nevertheless, at least one State, Canada, has been unwilling to hazard its Arctic maritime coastal zone to the uncertainties of existing international law and has withdrawn its consent to the compulsory jurisdiction of the international court over disputes arising out of the Arctic Waters Pollution Prevention Act.⁸

The principle of freedom of the high seas is also contained in Article 22 of the *Convention on the High Seas*.⁹ This provision codified the

Among these considerations, some reference must be made to the close dependence of the territorial sea upon the land domain. It is the land which confers upon the coastal State a right to the waters off its coasts.

Finally, there is one consideration not to be overlooked, the scope of which extends beyond purely geographical factors: that of certain economic interests peculiar to a region, the reality and importance of which are clearly evidenced by a long usage.

Id. at 133.

⁷North Sea Continental Shelf (Federal Republic of Germany v. Denmark; Federal Republic of Germany v. Netherlands) [1969] I.C.J. 3:

[T]he rights of the coastal State in respect of the area of continental shelf that constitutes a natural prolongation of its land territory into and under the sea exist *ipso facto* and *ab initio*, by virtue of its sovereignty over the land, and as an extension of it in an exercise of sovereign rights for the purpose of exploring the seabed and exploiting its natural resources.

Id. at 22. Additional references to the international status of the high seas may be found in The Corfu Channel Case (United Kingdom v. Albania) [1949] I.C.J. 4 and The Case of the S.S. "Lotus" (France v. Turkey) [1927] P.C.I.J., ser. A. No. 10.

⁸Arctic Waters Pollution Prevention Act, I STAT. OF CAN. c. 47 (1969-70), reprinted in 9 INT'L LEGAL MAT'LS 543-52 (1970). Letter from the Canadian Ambassador to the Secretary General of the United Nations, April 7, 1970, in 9 INT'L LEGAL MAT'LS 598-99 (1970). Expositions of the Canadian position will be found in Beesley, *Rights and Responsibilities of Arctic Coastal States: The Canadian View*, 3 J. MARIT. L. & COMM. 1 (1971); Gold, *Pollution of the Sea and International Law: A Canadian Perspective*, 3 J. MARIT. L. & COMM. 13 (1971); Wilkes, *International Administrative Due Process and Control of Pollution — The Canadian Arctic Waters Example*, 2 J. MARIT. L. & COMM. 499 (1971); Legault, *The Freedom of the Seas: A License to Pollute?*, 21 TORONTO L.J. 173 (1971). Cf. Bilder, *The Canadian Arctic Waters Pollution Prevention Act: New Stresses on the Law of the Sea*, 69 MICH. L. REV. 1 (1970).

⁹Convention on the High Seas, April 29, 1958, [1962] 2 U.S.T. 2312, T.I.A.S. No. 5200, 450 U.N.T.S. 80.

Article 22

1. Except where acts of interference derive from powers conferred by treaty, a warship which encounters a foreign merchant ship on the high seas is not justified in boarding her unless there is reasonable ground for suspecting:

- (a) That the ship is engaged in piracy; or
- (b) That the ship is engaged in the slave trade; or
- (c) That, though flying a foreign flag or refusing to show its flag the ship is, in reality, of the same nationality as the warship.

2. In the cases provided for in sub-paragraphs (a), (b) and (c) above, the warship may proceed to verify the ship's right to fly its flag. To this end, it may send a boat under the command of an officer to the suspected ship. If suspicion remains after the documents have been checked, it may proceed to a further examination on board the ship, which must be carried out with all possible consideration.

customary international law respecting piracy (*de lege lata*),¹⁰ but made new law respecting the slave trade (*de lege ferenda*).¹¹ Nevertheless, the effect of the principle of absolute freedom of the high seas when applied to the problem of oil pollution of the oceans is either anarchic or misleading.

It is the argument of this discussion that *although world order prefers a multilateral solution to the Environmental problems caused by oil pollution, nevertheless the same world order will not condemn unilateral solutions which will have the necessary effect of extending coastal State interference with navigation and trade on the high seas.*

"Interference", means the exercise of a right at least to stop and detain a vessel, inquire about ownership, port of destination, port of loading, registration and insurance. It may also mean the exercise of a right to search and interrogate closely concerning all aspects of the voyage. Finally, it may mean the exercise of a right to board and man or to tow the offending vessel into a port of the offending vessel's flag State or a port of the flag of the intercepting warship. In that latter port an investigation for the purposes of transmission to the offending vessel's flag State could be conducted but no proceedings in the nature of Prize¹² could be held. The related word "intervention" has been used since 1969 in the narrower context of post-casualty actions by States.

3. If the suspicions prove to be unfounded, and provided that the ship boarded has not committed any act justifying them, it shall be compensated for any loss or damage that may have been sustained.

Thereafter, Article 23 makes provision for the hot pursuit of a vessel suspected of violations of law from the territorial waters of the coastal state to the high seas.

¹⁰See Articles 46 and 38-45 (defining piracy) of the Draft Articles adopted by the International Law Commission at its Eighth Session A/CONF. 13/L.17/Add. 1. See also the Summary Records of the Second Committee (High Seas: General Regime), A/CONF. 13/40 at 78-93 and the Summary Records of the Plenary Meetings, A/CONF. 13/38 at 2-22.

¹¹During the middle years of the nineteenth century bilateral conventions for the suppression of the slave trade were negotiated by European nations. The United Kingdom engaged with Portugal, Spain, Holland, Sweden, Brazil, France, Denmark, Sardinia, Russia, Austria, Prussia and the United States between 1814 and 1862. These treaties provided for reciprocal rights of stopping and searching vessels in order to suppress the trade. See discussion of this in I L. OPPENHEIM, INTERNATIONAL LAW 732-35, (8th ed. H. Lauterpach 1955).

However it proved to be impossible to negotiate reciprocal rights of visit and search in a multilateral context. See the 1926 Convention on the Suppression of Slavery Convention, September 26, 1926, 60 L.N.T.S. 253. M. McDUGAL & W. BURKE, *supra* note 3, at 879-85; C. COLOMBOS, *supra* note 3, at 457-63.

On the Geneva 1958 Law of the Seas Conference see Articles 46 and 37 of the Draft Articles adopted by the International Law Commission at its Eighth Session A/CONF. 13/L.17/Add. 1. See also the Summary Records of the Second Committee (High Seas: General Regime), A/CONF. 13/40 at 78-93 and the Summary Records of Plenary Meetings, A/CONF. 13/38 at 20-22.

¹²The Prize Jurisdiction of Admiralty courts is a proceeding *in rem* against enemy property captured during the existence of a state of war by a warship of the flag state of the Prize Court.

Before the First World War a few examples of interference on the high seas by States other than the flag State of the vessel could be found: suppression of piracy by the law of nations;¹³ suppression of the slave trade by bilateral agreement;¹⁴ the 1839 bilateral and the 1882 multilateral Convention on North Seas Fisheries;¹⁵ the 1884 multilateral Cable Convention;¹⁶ and the 1911 multilateral Convention on Pelagic Seals in the Bering Sea.¹⁷ Nevertheless, the attitude of international jurists remained to the effect that these anomalous provisions represented exceptions to the general rule of freedom of the high seas.

It is believed that an emerging rule of International Law, supported by the 1969 Convention on High Seas Intervention in Cases of Oil Pollution Casualties¹⁸ certainly permits endangered coastal States¹⁹ to

See 4 E. BENEDICT, *THE LAW OF AMERICAN ADMIRALTY* 318-42 (6th ed. A. Knauth 1940). See also Knauth, *Prize Law Reconsidered*, 46 COLUM. L. REV. 69 (1946).

¹³Supra, note 10. See also *In re Piracy, Jure Gentium* [1934] A.C. 586; *United States v. Smith*, 18 U.S. (5 Wheat.) 153 (1820).

¹⁴L. OPPENHEIM, *supra* note 11.

¹⁵The bilateral treaty of 1839 between the United Kingdom and France and the six nation multilateral 1882 Convention for the Regulation of the Police of the Fisheries in the North Sea Outside Territorial Waters Articles XXIX and XXX made special provisions for mutual and reciprocal rights of visit and search within the scope of the agreements. See First Schedule to the North Sea Fisheries Act. of 1883, 46 & 47 Vict., c.22. See also D. JOHNSTON, *THE INTERNATIONAL LAW OF FISHERIES* 358-365 (1965). It is understood that the power of arrest was seldom used. Aglen, *Problems of Enforcement of Fisheries Regulations*, PROC. OF 2ND ANNUAL CONF. OF LAW OF THE SEA INST. 19-22 (1967).

¹⁶Convention for Protection of Submarine Cables, March 14, 1884, 24 Stat. 989 (1885), T.S. No. 380. This Convention of 1884 has been in effect since May 1, 1888; thirty-eight States presently being bound. Although Article VIII provides that offenders will be punished under the law of the flag of the vessel causing the wilful or negligent breaking of cables, nevertheless, Article X creates a right in the warships of Contracting Parties to board and inspect suspected vessels other than warships of Contracting Parties. The principles of the 1884 Treaty were incorporated in the 1919 Treaty of Versailles. See generally 53 INTERNATIONAL LAW STUDIES, NAVAL WAR COLLEGE 157-78 (1959-60).

¹⁷Convention for the Preservation and Protection of Fur Seals in the North Pacific Ocean, July 7, 1911, 37 Stat. 1542 (1911), T.S. No. 564. Article I provides for trial of offenders before the flag state only, but also provides that warships of Contracting Parties have the right to seize suspected merchant ships of the other Contracting Parties, except within the territorial jurisdiction of one of the Parties. The 1911 Convention has been replaced by the Interim Convention on Conservation of North Pacific Fur Seals, Feb. 9, 1957, [1957] 2 U.S.T. 2283, T.I.A.S. No. 3948; 314 U.N.T.S. 105.

¹⁸Draft International Convention Relating to Intervention on the High Seas in Cases of Oil Pollution Casualties, Nov. 28, 1969. 1 J. MARIT. L. & COMM. 367-73. Article I of the Convention provides:

1. Parties to the present Convention may take such measures on the high seas as may be necessary to prevent, mitigate or eliminate grave and imminent danger to their coastline or related interests from pollution or threat of pollution of the sea by oil, following upon a maritime casualty or acts related to such a casualty, which may reasonably be expected to result in major harmful consequences.
2. However, no measures shall be taken under the present Convention against any

take action to interfere with the operations of polluting vessels outside of territorial water and that this justification, in the absence of a specific treaty right, will also be available for States not directly endangered. This seems to be a very dangerous assertion in the light of the command of the UN Charter that nations refrain from the use of force in international relations.²⁰ Nevertheless, it is submitted that the dynamic growth of international concern and positive international norms during the short period of time²¹ in which oil pollution of the oceans has been a problem will provide the necessary justification for such action. It is not necessary to attempt to make analogies to the universal crimes of piracy and slavery. Rather, there is an emerging principle of international law being produced by the continuous search for new solutions to the environmental problem as each preceding solution, inhibited by excessive cautions which pacify vigorous protests by industrial, financial and insurance interests, demonstrates its ineffectiveness.

Unfortunately it can never be determined whether the 1969 Intervention Convention codified or expanded customary law.

In an international forum, such as a denial of justice claim by a vessel

warship or other ship owned or operated by a State and used, for the time being, only on government non-commercial service.

See also Cundick, *High Seas Intervention: Parameters of Unilateral Action*, 10 SAN DIEGO L. REV. 514 (1973).

¹⁹The discussion of the problem based on customary international law depends on the sovereign right of self protection or self defense. Teclaff, *International Law and The Protection of the Oceans From Pollution*, 40 FORDHAM L. REV. 529 (1972); Hardy, *International Control of Marine Pollution*, 11 NAT. RES. J. 296 (1971); Dinstein, *Oil Pollution by Ships and Freedom of the High Seas*, 3 J. MARIT. L. & COMM. 363 (1972); Sweeney, *Oil Pollution of the Oceans*, 37 FORDHAM L. REV. 155 (1968); Goldie, *International Principles of Responsibility for Pollution*, 9 COLUM. J. TRANSNAT'L L. 283 (1970). See also R. BILDER, THE ROLE OF UNILATERAL STATE ACTION IN PREVENTING INTERNATIONAL ENVIRONMENTAL INJURY (Sea Grant Technical Report 1973); L. HYDEMAN & W. BERMAN, INTERNATIONAL CONTROL OF NUCLEAR MARITIME ACTIVITY (1960); and Falk, *Inability of the Traditional Forms of Political Order to Adopt to Modern Problems of International Pollution*, 9 COLUM. J. TRANSNAT'L L. 11 (1970).

²⁰U.N. CHARTER art 2:

The Organization and its Members, in pursuit of the Purposes stated in Article 1, shall act in accordance with the following Principles.

4. All members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.

7. Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter.

²¹Petroleum was not an important energy source for the propulsion of merchant vessels until after the First World War. Prior to that war most vessels were coal burning, the age of sail having gradually come to an end in the closing years of the nineteenth century. Losses by enemy action in the First World War were considerable and the replacement vessels used oil for propulsive purposes: the number of oil burning vessels in Lloyd's Register of Shipping, Register Books, having increased from 501 in 1914 to 3,822 in 1925.

owner, the State that seeks to protect the oceans from polluting vessels of other flags must not be guilty of an excess or abuse of power; accordingly, the exercise of State power on the high seas must be accompanied by such reasonable and salutary restraints as the circumstances permit.²² A restraint already found in the 1969 Convention on High Seas Intervention in Cases of Oil Pollution Casualties is the requirement of the coastal State to pay compensation to the extent of the damage caused by measures exceeding those necessary to mitigate or eliminate grave danger to the coastline.²³ This provision closely resembles the provisions of private law concerning the liability of the persons asserting a defense of self-defense or the defense of third persons when there has been an abuse of the defense.²⁴ A reasonable restraint which might be imposed on the State not directly endangered might be the requirement to pay compensation for any property actually damaged, in the sense of physical but not economic loss, when such State interferes on the high

²²Article III of the 1969 Draft International Convention Relating to Intervention on the High Seas in Cases of Oil Pollution Casualties, *supra* note 17 provides:

When a coastal State is exercising the right to take measures in accordance with Article I, the following provisions shall apply:

- (a) before taking any measures, a coastal State shall proceed to consultations with other States affected by the maritime casualty, particularly with the flag State or States;
- (b) the coastal State shall notify without delay the proposed measures to any persons physical or corporate known to the coastal State, or made known to it during the consultations, to have interests which can reasonably be expected to be affected by those measures. The coastal State shall take into account any views they may submit;
- (c) before any measure is taken, the coastal State may proceed to a consultation with independent experts, whose names shall be chosen from a list maintained by the Organization; . . .

Article V of the Convention provides:

- 1. Measures taken by the coastal State in accordance with Article I shall be proportionate to the damage actual or threatened to it.
- 2. Such measures shall not go beyond what is reasonably necessary to achieve the end mentioned in Article I and shall cease as soon as that end has been achieved; they shall not unnecessarily interfere with the rights and interests of the flag State, third States and of any persons, physical or corporate, concerned.
- 3. In considering whether the measures are proportionate to the damage, account shall be taken of:
 - (a) the extent and probability of imminent damage if those measures are not taken; and
 - (b) the likelihood of those measures being effective; and
 - (c) the extent of the damage which may be caused by such measures.

²³*Id.* Article VI, which provides:

Any Party which has taken measures in contravention of the provisions of the present Convention causing damage to others, shall be obliged to pay compensation to the extent of the damage caused by measures which exceed those reasonably necessary to achieve the end mentioned in Article I.

²⁴RESTATEMENT (SECOND) TORTS § 73-76 (1965). See also Perkins, *Self Defense Re-examined*, 1 U.C.L.A. L. REV. 133 (1954).

seas with vessels which represent a danger of pollution damage to the ocean environment.²⁵ Another reasonable restraint to be imposed on the State not directly endangered might be the requirement for such State to prove actual risks or even certainty of danger to the ocean environment. The right of a State not directly endangered to make regulations, based on potential dangers to the entire ocean environment, would be dubious and might be rejected as an unreasonable interference with the freedom of the high seas in the absence of multilateral authority.

At the present time the international problems of vessel pollution are dealt with conceptually in a fragmented manner. Deliberate oil spills that are part of ordinary vessel operations, regardless of damage, are treated under one set of treaties which have barely inhibited such operations. Accidental spills resulting in damage are treated under another set of treaties whereby the vessel owner is primarily liable and the cargo itself is secondarily liable through a compensation fund. State action by way of self-defense will be permitted to coastal states under another treaty. Of course, this fragmentation is the result of historical development and does not reflect an approach which is necessarily logical.

II. HISTORICAL DEVELOPMENTS OF INTERNATIONAL CONTROL EFFORTS FROM 1922 TO 1967

Ever since petroleum became an important energy source for the propulsion of vessels during the First World War, it has been recognized as a dangerous polluter of the ocean environment and there has been a continuous record of international concern about the problems of oil pollution from vessels. This concern has produced international legislation of increasing effectiveness despite concerted opposition from industry and public indifference.

In 1922 the United States Congress requested President Harding to call a conference of the maritime powers for the purpose of discussing effective means to prevent pollution of navigable waters.²⁶ The background of the call was a series of port fires, ascribed to polluted, oil-laden waters, especially a destructive one in Belfast, Northern Ireland.

²⁵There is no analogy from private law directly applicable. The defense of Public Necessity is a complete defense, without the requirement for payment of compensation. *U.S. v. Caltex, Inc.*, 344 U.S. 149 (1952). *Contra* *Burmah Oil Co. Ltd. v. Lord Advocate* (1964) 2 All E. R. 348. The defense of Private Necessity is not a complete defense. Compensation must be paid for damage done in conferring a benefit. *Vincent v. Lake Erie Transportation Co.*, 109 Minn. 456, 124, N.W. 221 (1910); RESTATEMENT (SECOND) TORTS §§ 197 and 263 (1965). See also Bohlen, *Incomplete Privilege to Inflict Intentional Invasions of Interests of Property and Personality*, 39 HARV. L. REV. 307 (1926).

²⁶42 Stat. 821-22 (Pub. Res., No. 65 of July 1, 1922).

There were also the complaints of local shellfish industries and conservationists who were beginning to notice the appearance of the tarred residues of crude petroleum upon the beaches paralleling the major sea lanes. An interdepartmental committee of government experts prepared an extensive report²⁷ for the Conference, which was finally convened by President Coolidge in 1926 in Washington. It was attended by representatives of thirteen maritime powers.²⁸ The Conference produced a Draft Convention which did not accept the United States position in favor of complete prohibition of oil discharge from sea-going vessels. Instead, a system of zones of the high seas varying from 50 to 150 nautical miles from the coast, and therefore extending beyond territorial waters, in which deliberate discharge would be prohibited of oil or oily mixtures if the oil content exceeded .05 of one percent, sufficient to constitute a film on the surface visible to the naked eye in daylight.²⁹ Enforcement was left to the flag state only which was under an international obligation to use all reasonable means to obtain compliance from their merchant fleets.

To encourage compliance by what was essentially a private industry in 1926, States were to enact incentive legislation by way of exemptions from tonnage dues to encourage the installation of separators which would remove the necessity for deliberate discharge of ballast sea water from cargo tanks. However, the Conference did not go so far as to require the installation of such separators even in new construction.³⁰ The Convention never achieved the necessary five ratifications and never became effective. We can speculate that the reasoning behind the failure to ratify was the continuation of many old vessels without separators, operated with marginal capital in cut-throat competition during a time of serious depression in world shipping preceding the great crash of 1929.

Several years after the Washington Conference the subject of oil pollution was referred by the United Kingdom to the League of Nations' Communication & Transit Organization. After two meetings of experts who used the experience of the 1926 Conference, the Organization prepared a new draft convention;³¹ however, the proposed international

²⁷Interdepartmental Comm., Report to the Secretary of State on Oil Pollution of Navigable Waters (1926). This valuable document summarizes the statutes and port rules then in effect in the United States, United Kingdom, Australia, Canada, Scandinavia, France, Italy, Spain, Portugal and the Netherlands.

²⁸United States, United Kingdom, Canada, Belgium, The Netherlands, Denmark, Norway, Sweden, France, Germany, Italy, Spain and Japan.

²⁹Preliminary Conference on Oil Pollution of Navigable Waters (1926) T.S. No. 736-A.

³⁰*Id.* 438-40.

³¹L.N. Rep. No. C/449/M/235 — 1935 — VIII of Oct. 26, 1935.

conference to be held under League of Nations auspices was never held due to the onset of political crises leading to the Second World War.

After the War the Charter of the United Nations presupposed that specialized agencies responsible for a wide range of economic problems would be established in relationship with the United Nations by means of agreements with the specialized agencies (to be established by multilateral convention).³² In 1948 the Economic and Social Council was authorized to conduct such negotiations with a preparatory group³³ attempting to establish the Intergovernmental Maritime Consultative Organization (IMCO). In February-March, 1948 the Conference to draft the multilateral convention to establish the organization was held in Geneva. Negotiations with the U.N. were concluded in that year, and the draft agreements were approved by the Economic and Social Council and the General Assembly at that time.³⁴ However, because of political disputes and economic differences concerning the international status of flag of convenience shipping,³⁵ the Intergovernmental Maritime Consultative Organization was not actually established until the entry into force of its multilateral convention in 1958.³⁶ Although the subject of oil pollution regulation would certainly be within the broad scope of the activities of the organization,³⁷ the United Kingdom government was finally persuaded that the subject matter was too important to postpone until IMCO should be established. Therefore, the British Government called an international conference in 1954 to consider oil pollution of the oceans, using as a basis of its work a study and questionnaire prepared by the Economic and Social Council.³⁸

³²U.N. CHARTER art. 57.

³³The preparatory group was the United Maritime Consultative Council, established in 1946, a successor group to the wartime organization, the United Maritime Authority. See 8 BRITISH SHIPPING LAWS, INTERNATIONAL CONVENTIONS OF MERCHANT SHIPPING 1249-53 (N. Singh 1963). The preparatory group consisted of Argentina, Australia, Belgium, Canada, France, Greece, India, Netherlands, Norway, Sweden, United Kingdom and United States. The Geneva Conference on the multilateral convention was attended by 32 members and several observers, however, the socialist nations did not participate in any of these preliminary activities. The first five ratifications (Canada, Greece, Netherlands, United Kingdom and United States) were quickly achieved, but the I.M.C.O. Convention required the ratifications of 21 States, of which 7 must have a total tonnage of 1,000,000 gross tons of shipping. See Article 60 of the Convention on the Intergovernmental Maritime Consultative Organization, *infra* note 36.

³⁴The Economic and Social Council approved the draft agreement on August 27, 1948. See E/1064 of August 31, 1948, and the General Assembly approved the draft agreement on November 18, 1948. See 1950 U.N.Y.B. 1007-8 and 1949 U.N.Y.B. 969-70.

³⁵Advisory Opinion on the Constitution of the Maritime Safety Committee of the Intergovernmental Maritime Consultative Organization, [1960] I.C.J. 150.

³⁶Convention on the Intergovernmental Maritime Consultative Organization, March 6, 1948, [1958] U.S.T. 621; T.I.A.S. No. 4044; 289 U.N.T.S. 48.

³⁷*Id.* art. I.

³⁸U.N. Docs. E/CN. 2/100 (1951) and E/CN 2/134 (1952).

The London Conference of May, 1954 was concerned with deliberate discharges of oil and oily mixtures from vessels operating within zones of the high seas in which such discharges would be prohibited. The Conference prepared a draft convention which went into effect four years later on July 26, 1958.³⁹ The scope of the Convention is restricted to non-naval vessels over 500 tons of gross tonnage.⁴⁰ Although actual prosecution for violation was reserved to flag states⁴¹ and no state other than the flag state was to have the right to interfere with suspected polluters on the high seas,⁴² there was a concession to coastal state demand for strict enforcement in a provision permitting Contracting Parties to board suspected vessels of other Contracting Parties *while in port* in order to examine the Oil Record Book.⁴³ The flag state (assuming it to be a Contracting Party) would be obligated to conduct an investigation of charges and to prosecute promptly, if, “. . . the Government in the territory of which the ship is registered is satisfied that sufficient evidence is available in the form required by law to enable proceedings against the owner or master of the ship to be taken. . . .”⁴⁴ There is a further obligation on Contracting States to insure that the penalties on flag shipping for ocean discharges in forbidden zones be at least as severe as the penalties for discharges in territorial waters.⁴⁵ The key provision concerning deliberate spills is the system of zones in which deliberate spills would be forbidden entirely.⁴⁶ A very slight intrusion into the area of ship construction control was the requirement that all ships shall be “. . . so fitted as to prevent the escape of fuel oil or heavy diesel oil into bilges the contents of which are discharged into the sea

³⁹International Convention for the Prevention of Pollution of the Sea by Oil, May 12, 1954, [1961] 3 U.S.T. 2989, T.I.A.S. No. 4900, 327 U.N.T.S. 3. At present forty-seven states are signatories thereto, of which France, Federal Republic of Germany, Greece, Italy, Japan, Liberia, Netherlands, Norway, U.S.S.R., U.K. and U.S.A. are major maritime powers.

⁴⁰*Id.* art. II. Whaling vessels and certain lake vessels were also excluded.

⁴¹*Id.* art. X.

⁴²*Id.* art. III (3).

⁴³*Id.* art. IX (2).

⁴⁴*Id.* art. X (2) It was the expectation of the drafters that a prima facie case where a deliberate spill was involved might be made by the Oil Record Book, a new business record required to be kept on all vessels within the scope of the Convention. *See* Annex B. to the Convention.

⁴⁵*Id.* art. VI.

⁴⁶*Id.* Annex A to the Convention. All sea areas within 50 miles from land were prohibited zones, and special regimes prohibiting discharges 30 miles from the coasts on the Adriatic Sea, 100 miles from coasts of the North Sea and the northeast Atlantic and 150 miles from portions of Australia were established. While there are analogies to contiguous zones approved in the Convention on the Territorial Sea and the Contiguous Zone, April 29, 1958 [1964] 2 U.S.T. 1606, T.I.A.S. No. 5639, 516 U.N.T.S. 205. Nevertheless, Article 24 of that convention restricts its applicability to customs, fiscal, immigration or sanitary regulations. *See generally* Wulf, *Contiguous Zones for Pollution Control*, 3 J. MARIT. L. & COMM. 537 (1972).

without being passed through an oily water separator."⁴⁷ Another novel obligation of Contracting Parties was the duty to construct and maintain facilities at each port to handle oily wastes.⁴⁸

The Convention did not deal with civil liabilities, but rather with penal or quasi-penal proceedings against the vessel, her owner and master, by the flag state. Nevertheless, the Convention did provide for emergency precautions to prevent or minimize the escape of oil following accidental damage or unavoidable leakage.⁴⁹ These latter provisions certainly appear to foresee the situation where a party injured by a discharge in a prohibited zone is attempting to use the penal statute as the standard of care in a negligence action.⁵⁰ Dissatisfaction with the regulatory aspects of this Convention soon led to demands for amendments even before the Convention became effective.

In 1958 at the Geneva Conference on the Law of the Sea a decision was made to add a provision imposing an affirmative duty on all states "to draw up regulations to prevent pollution of the seas by the discharge of oil from ships or pipelines or resulting from the exploitation and exploration of the seabed and its subsoil, taking account of existing treaty provisions. . . ."⁵¹

⁴⁷*Id.* art. VII.

⁴⁸*Id.* art. VIII.

⁴⁹*Id.* art. IV. The formulation of the defendant's burden of proof resembles that of the carrier's defense in the Warsaw Convention of International Aviation, article 20. International Convention for the Unification of Certain Rules Relating to International Transportation by Air, October 12, 1929, 49 Stat. 3000 (1929), T.S. No. 876, 137 L.N.T.S. 11.

⁵⁰However, the Convention is not self-executing in the sense that no further action by the legislature would be necessary to establish the penal responsibility. See generally W. PROSSER, *THE LAW OF TORTS*, 190-204 (4th ed. 1971); Morris, *The Role of Criminal Statutes in Negligence Actions*, 49 COLUM. L. REV. 21 (1949). In most jurisdictions of the United States unexcused violation of a regulatory statute is negligence per se. However, in Admiralty, under the rule of *The Pennsylvania*, 86 U.S. (19 Wall.) 125 (1873), the party accused of a statutory violation must prove that the violation did not and could not have contributed to the loss. Whether this rule can be extended beyond its traditional limits of collisions and strandings is questionable. *In re Seaboard Shipping Corp.*, 449 F.2d 132 (2d Cir. 1971), *cert. denied* 406 U.S. 949 (1972); *Petition of Long*, 439 F.2d 109 (2d Cir. 1971); cf. *In re Marine Sulphur Queen*, 460 F.2d 89 (2d Cir. 1972), *cert. denied* 409 U.S. 982 (1973).

⁵¹Convention on the High Seas, *supra* note 9 art. 24. It is generally considered that this convention is a codification of preexisting law rather than the development of new law. See Preamble to the Convention, "The States Parties to this Convention, Desiring to codify the rules of international law relating to the high seas . . ." The Conference adopted the provisions of the Draft of the International Law Commission (art. 48) without change. See Summary Record of Proceedings in the Second Committee, U.N. Doc. A/CONF. 13/40 at 92, and was accepted without debate by the Plenary. See Summary Record of Plenary Meetings, U.N. Doc. A/CONF. 13/38 at 22. One of the Preparatory Documents for the Conference was "Pollution of the Sea by Oil," U.N. Doc. A/CONF. 13/8 prepared by the Secretariat in addition to an earlier study by the United Nations Secretariat, "Pollution of the Sea by Oil," U.N. Doc. ST/ECA/41 (1956).

The 1954 Convention for the Prevention of Pollution of the Seas by Oil became the responsibility of IMCO in 1958 and a preliminary conference was held in 1959 to tighten the 1954 Convention.⁵² Finally, in 1962 under IMCO auspices a Second London Conference on Oil Pollution of the Seas was held which produced a series of amendments to the 1954 agreement.⁵³ The prohibited zones were extended to 100 miles from the nearest land in the northwest Atlantic, the northeast Atlantic, the Mediterranean Sea with the Adriatic and Black Seas, the Red Sea and the Indian Ocean with the Persian Gulf, Arabian Sea and the Bay of Bengal and the 150 mile Australian zones were extended further along the coast.⁵⁴ The eventual goal of a complete prohibition of deliberate discharges was to be achieved by ship construction controls: a requirement that new vessels of more than 20,000 tons of gross tonnage built after the effective date of the Convention be forbidden to discharge oil anywhere in the world unless the retention of the oil is "neither reasonable nor practicable."⁵⁵ Previously constructed ships were not required to be altered; however, the system of prohibited zones is to be tied into the reinforced obligation of states to construct facilities to receive oily wastes from ships other than tankers. Vessels travelling to ports with such facilities are forbidden to make deliberate discharges inside the prohibited zones.⁵⁶ These amendments came into force in 1967.

A second set of amendments were made in 1969⁵⁷ and a complete revision was effected in 1973.⁵⁸ Thus, as of March 1967, when the *Torrey Canyon* broke up after grounding in the high seas, there was a forty-five year history of international concern with the problems of deliberate oil pollution of the oceans and a rudimentary series of international

⁵²Coordinating Advisory Committee on Oil Pollution, Proceeding of the International Conference on Oil Pollution of the Sea, Copenhagen, 1959.

⁵³Prevention of Pollution of the Sea by Oil, Amendments to Convention of 1954, *adopted* April 11, 1962, [1966] 2 U.S.T. 1523, T.I.A.S. No. 6109, 600 U.N.T.S. 332 (effective May 18, 1967, as to arts. I-X, XVI & XVII; effective June 28, 1967, as to art. XIV.) [Hereinafter 1962 Oil Pollution Convention.]

⁵⁴*Id.* Annex A.

⁵⁵*Id.* art. III(c).

⁵⁶*Id.* art. III(b) (to be applicable three years after the effective date). Tankers are forbidden to discharge within the prohibited zones, art. III(a). A distinction is made between other ships under 500 gross tons and tankers under 150 gross tons, and tanker vessels above 150 gross tons and other ships above 500 gross tons are brought within the Convention. Art. II(1)(a).

⁵⁷Amendments to the International Convention for the Prevention of Pollution of the Sea by Oil, as amended October 21, 1969, 9 INT'L LEGAL MAT'LS 1 (1970). This is a composite text of the 1954, 1962 and 1969 texts.

⁵⁸International Convention for the Prevention of Pollution from Ships, *open for signature*, Jan. 15, 1974, IMCO Doc. MP/CONF/WP. 35 (1973); 12 INT'L. LEGAL MAT'LS 1319 (1973).

regulations. The focus of attention now shifted to accidental spills during the maritime transport of the petroleum.

III. INTERNATIONAL CONTROLS SINCE 1967: ACCIDENTAL SPILLS AND MONETARY DAMAGES

In 1967, as for the previous eighty years, there was no permanent international maritime organization to deal with all aspects of the uses of the seas. In 1889 the International Marine Conference met in Washington to prepare the International Regulations for Preventing Collisions at Sea. Thereafter, until the organization of IMCO, technical conventions concerned with ship operations such as load-lines,⁵⁹ safety of life at sea and ship construction,⁶⁰ and rules of the road⁶¹ were prepared as public law conventions with heavy government participation. In 1897 the Comité Maritime International (hereinafter C.M.I.) was organized in Belgium and over the years prepared a series of thirteen private law conventions, which were essentially concerned with shipowners' liabilities or non-liabilities. The subject matters were collision damages,⁶² salvage,⁶³ limitation of shipowners' liability,⁶⁴ carrier liability under bills of lading for cargo damage,⁶⁵ arrest of vessels in civil cases⁶⁶

⁵⁹International Convention Respecting Load Lines, July 5, 1930, 47 Stat. 2228 (1930), T.S. No. 848, 135 L.N.T.S. 301. This Convention has been replaced by the International Convention on Load Lines, April 5, 1966, [1967] 2 U.S.T. 1857; T.I.A.S. No. 6331; 640 U.N.T.S. 133. A closely related subject is the Convention for a Uniform System of Tonnage Measurement, June 10, 1947. N. Singh, *supra* note 33 at 633.

⁶⁰International Convention for the Safety of Life at Sea, May 31, 1929, 1929 A.M.C. 993. This convention was replaced by the International Convention for the Safety of Life at Sea, June 10, 1948 [1952] 3 U.S.T. 3450, T.I.A.S. No. 2495, which has now been replaced by the International Convention for the Safety of Life at Sea, June 17, 1960, [1965] 1 U.S.T. 185, T.I.A.S. No. 5780, 536 U.N.T.S. 27.

⁶¹International Regulations for Preventing Collisions At Sea, *incorporated in* International Convention for the Safety of Life at Sea, June 10, 1948, and now incorporated as Annex B to the International Convention for the Safety of Life at Sea, June 17, 1960. [1965] 1 U.S.T. 794, T.I.A.S. No. 5813. It is anticipated that new rules will become effective in 1976.

⁶²International Convention for the Unification of Certain Rules of Law with Respect to Collisions between Vessels, September 23, 1919. N. Singh, at 1047 (1963). The United States has never ratified this Convention, essentially because of the provisions eliminating the joint and several liability of the vessel owners to cargo damaged or lost because of collision. *See Sweeney, Proportional Fault in Both to Blame Collisions*, *STUDI IN ONORE DI GIORGIO BERLINGIERI* 549 (1964).

⁶³International Convention for the Unification of Certain Rules of Law respecting Assistance and Salvage at Sea, September 23, 1910, 37 Stat. 1658 (1913), T.S. No. 576.

⁶⁴International Convention for the Unification of Certain Rules relating to the Limitation of Liability of Owners of Seagoing Vessels, August 25, 1924, N. Singh, *supra* note 33 at 1058. The United States has not ratified either of these conventions. Revision will be undertaken by IMCO in 1975.

⁶⁵International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading, August 25, 1924, 51 Stat. 233 (1924), T.S. No. 931, 120 L.N.T.S. 155. Partial Revision

and maritime liens and ship mortgages.⁶⁷ These conventions were drafted by the various national private maritime law associations of admiralty lawyers and marine insurers with diplomatic conferences being called by the Belgian government to prepare the international conventions.

After 1958 IMCO proceeded cautiously and correctly to exercise its technical functions. Environmental protection was not the proper sphere of any international organization, certainly not IMCO or the C.M.I., and public awareness of pollution risks and disasters was not great.

In March 1967 the *Torrey Canyon*, a jumboized tanker, precursor of much larger tankers then being built and planned, broke up in the high seas off the Cornwall coast of Great Britain and caused a spill of 35,000,000 gallons of crude oil to spread along the English Channel to pollute important resort areas in England and France.⁶⁸ This spill received dramatic treatment in the press, and the hesitation of the British government in handling the stricken vessel emphasized the failings in domestic and international controls. Unfortunately, The *Torrey Canyon* spill was the first in a series of oil pollution disasters: The *Ocean Eagle* at San Juan; the *Delian Apollo* at Tampa Bay; The *Arrow* at Chedabucto Bayn, N.S.; the Santa Barbara Channel Drilling Spill; and the San Francisco Bay collision of two Standard Oil vessels, so that public excitement was unable to subside owing to the regularity of occurrence.

In April 1967 the British government submitted a note to the Third Extraordinary Session of the IMCO Council suggesting immediate consideration of technical measures that would prevent future disasters⁶⁹ and proposed changes in the international maritime law: vessel owner

of this Convention was attempted at Conferences in 1967-68 but the so-called Brussels Protocol (originally the Visby Rules) has not come into force. An extensive revision is now underway by an UNCITRAL Working Group.

⁶⁷International Convention Relating to the Arrest of Seagoing Ships, May 10, 1952, N. Singh, *supra* note 33 at 1126. The United States has not ratified this Convention.

⁶⁸International Convention for the Unification of Certain Rules of Law Relating to Maritime Liens and Mortgages, April 10, 1926, N. Singh, *supra* note 33 at 1087. The United States has not ratified this Convention. A new Convention has been drafted by the C.M.I. at its Plenary Session in New York in 1965.

⁶⁹See generally E. COWAN, OIL AND WATER: THE TORREY CANYON DISASTER (1968); Sweeney, *Oil Pollution of the Oceans*, 37 FORDHAM L. REV. 155 (1968); Nanda, *The Torrey Canyon Disaster: Some Legal Aspects*, 44 DENVER L.J. 400 (1967). The Report of the Liberian Board of Investigation is found at 1967 A.M.C. 569.

⁶⁹IMCO Doc. C/ES. III/3 of April 18, 1967. The suggested technical measures were: mandatory sea lanes, speed restrictions near land, shore radio control of offshore tankers and additional navigational aids, limitations on the use of automatic pilots, special training for tanker masters and crews, design control of tankers, special markings for tanker routes and periodic equipment tests.

liability independent of negligence; changes in the limitation of shipowners liability convention; compulsory insurance; and provisions concerning clean up costs. Responding to these far-reaching suggestions the IMCO Council referred the technical measures to appropriate committees and established a legal committee to review the British proposals.⁷⁰ The C.M.I. also established an international subcommittee, under the chairmanship of Lord Devlin to report with recommendations.⁷¹

During the next two and a half years there was an extensive debate, often simultaneously in domestic and international settings, concerning the legal issues and various alternative solutions raised by the maritime transport of petroleum. The debate continues to this day.

There are two independent centers of activity with two widely differing clienteles in which extensive debates over the pollution problem are now heard. In IMCO the clientele is ship operators and those nations dependent upon maritime transport in their international trade.⁷² In the General Assembly of the United Nations where effective power under the one nation one vote system⁷³ is in the hands of the developing states of Asia, Africa, and Latin America, the clientele is not yet effectively involved in maritime transport. Accordingly, the General Assembly has proven to be a far more sensitive forum for proposing radical solutions to environmental problems, especially while the General Assembly is engaged in a comprehensive review of important international maritime questions such as mineral resources of the ocean bottom, the breadth of the territorial sea, and the delimitation of the continental shelf.

Thus far IMCO has produced a two-tier system of compensation for oil spill damage, a convention codifying the right of endangered coastal states to intervene in pollution danger on the high seas, and an amendment and revision of the deliberate spill convention. The General Assembly has not yet produced a new text and must await the outcome of the 1974 Caracas Law of the Sea Conference or its possible sequel in Vienna in 1975 to determine further expansions of the rights of coastal states to combat pollution dangers.

⁷⁰IMCO Doc. C/ES. III/5 of May 8, 1967.

⁷¹Preliminary Report to an International Subcommittee of the International Maritime Committee (Torrey Canyon) of August 25, 1967. See also C.M.I. Doc. 1968, III, TC-3/2-68 for the questionnaire and answers submitted to the national maritime law associations by the C.M.I.

⁷²The November, 1969 meeting of the IMCO General Assembly was attended by the forty nine nations who were then members. Since that meeting the membership has expanded to 75 nations. Every major maritime power is a member of IMCO.

⁷³U.N. CHARTER, art. 2, para. 2; art. 9, para. 1; art. 18, para. 1. The membership of the United Nations in 1973 was 135.

A. *The Two Tier Compensation System*

In November 1969 IMCO considered a draft convention which had been prepared as a result of cooperation between the IMCO Legal Committee and C.M.I.⁷⁴ The most difficult topics concerned the nature of the liability and the amount to which that liability could be limited. The nature of the liability is really the problem of defenses, *i.e.*, if no defenses are permitted to the enterprise that has caused the damage, it is an absolute liability. If a restricted number of defenses centering around the concept of inevitable accident or "vis maior" are permitted, it is a strict liability. Whereas if a large number of defenses, including the concept of concurring negligence, is permitted, then it is a fault liability. The threat of enormous damages can be seen as a necessary incentive to guarantee careful operations, but if the damages from any one incident were permitted to be recoverable without limit, there is danger that the pollution risk might become uninsurable.

The Convention on Civil Liability⁷⁵ is based on fault, but the vessel owner has the burden of proving non-fault rather than the pollution claimant attempting to prove fault.⁷⁶ The liability for negligent or deliberate spills can be limited to 2000 gold francs or \$134 (1969) per ton⁷⁷ of net limitation tonnage up to a maximum amount of 210,000,000 gold

⁷⁴The C.M.I. had proceeded by its normal method: questionnaire, circulation of answers, informal committee discussion, preparation of a draft document, formal discussions to revise the draft and an international diplomatic conference. See Sweeney *supra* note 62. Following receipt of eighteen responses to the C.M.I. questionnaire, in which twelve national associations approved retention of the existing fault liability, a draft convention was prepared and approved by the C.M.I. Plenary in its April 1969, Conference in Tokyo. This draft was considered in Working Group II of the IMCO Legal Committee (Working Group I dealt with public international law questions) and the draft convention which was considered by the IMCO General Assembly in November 1969, can be said to be a joint effort of IMCO and C.M.I. See generally, Healy, *The C.M.I. and IMCO Draft Conventions on Civil Liability for Oil Pollution*, 1 J. MARIT. L. & COMM. 93 (1969) and Mendelsohn, *Maritime Liability for Oil Pollution—Domestic and International Law*, 38 GEO. WASH. L. REV. 1 (1969).

⁷⁵Draft International Convention on Civil Liability for Oil Pollution Damage, November 28, 1969, 9 INT'L LEGAL MAT'LS 45 (1969); 1 J. MARIT. L. & COMM. 373 (1970).

⁷⁶*Id.* art. III (2) provides:

No liability for pollution damage shall attach to the owner if he proves that the damage:

- (a) resulted from an act of war, hostilities, civil war, insurrection or a natural phenomenon of an exceptional, inevitable and irresistible character, or
- (b) was wholly caused by an act of omission done with intent to cause damage by a third party, or
- (c) was wholly caused by the negligence or other wrongful act of any Government or other authority responsible for the maintenance of lights or other navigational aids in the exercise of that function.

⁷⁷*Id.* art. V(1) and (9). The gold franc referred to is a Poincare franc, an artificial currency based on gold defined as, "a unit consisting of sixty five and a half milligrams of gold of millesimal fineness nine hundred."

francs or \$14,000,000 (1969). The limitation fund is to be established in a court of the state where the pollution damage has occurred.⁷⁸ Evidence of financial responsibility of insurance must be carried by every vessel which carries more than 2,000 tons of oil cargo.⁷⁹ Anxiety about the relatively low limitation of liability in the Convention centered about the belief that the cleanup costs and property damage from the *Torrey Canyon* had been about \$16,000,000 and the *Torrey Canyon* was a relatively small ship when compared with the new tankers being built with cargo carrying capacity five times that of the *Torrey Canyon*.⁸⁰ This anxiety was partially assuaged by a resolution of the Conference to establish an international fund, collected from charges upon cargoes of petroleum, that would provide coverage for pollution damages in excess of those for which the vessel owner was being held responsible.⁸¹

The final vote to approve the 1969 Convention reflected 34 in favor, 10 abstentions and 1 opposed (Canada). The Canadian position objected to the orientation of the provisions in favor of ship and cargo owning interests and away from environmental protection.⁸²

The 1971 Convention on the Compensation Fund was a direct out-

⁷⁸I have used the figures of \$134 and \$14,000,000 as 1969 United States equivalents. Since 1969 there have been two devaluations of the U.S. dollar (December 1971 & February 1973) and many currencies have been freed to float with the free market value of gold. The official price of gold in the United States in 1969 was \$35 per ounce, however, after August 15, 1971, convertibility into gold ceased. The official price of gold after the February 1973, devaluation was \$42. per ounce, however, as of March 1974, the free market price of gold was fluctuating between \$165 and \$179 per ounce.

⁷⁹1969 Civil Liability Convention, art. VII.

⁸⁰A U.N. Secretariat study estimated that between 1961 and 1971 total world production of petroleum increased from 1,162 to 2,478 million tons; the world tanker tonnage increased from 67 to 175 million tons DWT; the total number of tankers increased from 2,270 in 1951 to 6,292 in 1971 and the average size of tankers has more than doubled, the largest tanker in service in 1950 being 30,000 tons and in 1971 the largest tanker in service being 477,000 tons. A. Andreev, *Activities of the Intergovernmental Maritime Consultative Organization in the Field of Prevention and Control of Operational and Accidental Pollution Emanating from Ships*, in HAZARDS OF MARITIME TRANSIT, 29 (T. Clingan & L. Alexander eds. 1973). See also Schachter and Serwer, *Marine Pollution Problems and Remedies*, 65 A.J.I.L. 84 (1971).

⁸¹*Resolution on Establishment of an International Compensation Fund for Oil Pollution Damage*, 9 INT'L LEGAL MAT'LS 66 (1969) [hereinafter Resolution]. Resolutions on International Cooperation Concerning Pollutants other than Oil and Procedures for the Fund Convention were also appended to the text of the Convention. See 9 INT'L LEGAL MAT'LS 65, 67 (1969). See generally Hunter, *The Proposed International Compensation Fund for Oil Pollution Damage*, 4 J. MARIT. L. & COMM. 117 (1972); Doud, *Compensation for Oil Pollution Damage: Further comment on the civil liability and compensation fund conventions*, 4 J. MARIT. L. & COMM. 525 (1973).

⁸²Gold, *Pollution of the Sea and International Law: A Canadian Perspective*, 3 J. MARIT. L. & COMM. 13, 27-29 (1971). See also Henkin, *Arctic Anti-Pollution: Does Canada Make—or Break—International Law?* 65 A.J.I.L. 131 (1971).

growth of the Resolution⁸³ framed at the 1969 Conference on Civil Liability as a compromise position for those nations, like the United States, which had urged a stricter liability with a much larger limitation fund.⁸⁴ Those nations considered the goal of the fund conference to be a method to compensate all victims of oil pollution damage to 100% of their actual loss. Shipowning States on the other hand had argued that it was unfair to impose the entire pollution liability on the shipowner and that the cargo itself should become directly liable for such losses. In the United States there was criticism of the low limits of vessel liability as compared with the recently enacted Federal Water Quality Improvement Act of 1970.⁸⁵

A comparison of the 1969 Civil Liability Convention with the 1970 United States statute is in order at this time to analyze the depth and nature of domestic opposition to ratification of the 1969 Convention. The Convention covers vessels carrying oil in bulk, while the statute covers all vessels over 300 gross tons. The Convention forces all pollution damage claims into the fund, both cleanup and private damage claims, while the statute is applicable only to government cleanup costs, the remedies in private law against the vessel owner being untouched. The limitation on recovery of all claims under the Convention is \$134 (1969) per gross ton to a maximum limit of \$14,000,000 (1969) whereas the federal statutory fund limitation of \$100 (1974) per gross ton to a maximum limit of \$14,000,000 (1974) is available for government clean up costs alone. The nature of the liability under the Convention is almost a strict liability with defenses of act of war, inevitable accident or intentional conduct; the statutory liability is less strict with the above three defenses plus the negligence of intervening parties. A positive argument in favor of the Convention was that the liability as limited represented a great improvement over the maximum amount of the existing 1957 limitation of liability convention.⁸⁶

⁸³Resolution, *supra* note 81.

⁸⁴The position of the United States government favored strict liability with a limitation fund of \$150 per registered ton to a maximum of \$25,000,000. France proposed a higher limitation figure of \$175 per registered ton to a maximum of \$30,000,000, while Canada, Australia and New Zealand proposed \$450 per registered ton with no maximum limitation amount.

⁸⁵46 Stat. 91, 33 U.S.C. § 1161 (1970). The 1970 Statute has been reenacted in 1972 under the Federal Water Pollution Prevention and Control Act, P.L. 92-500, 33 U.S.C. § 1321 (1974 Supp.).

⁸⁶International Convention Relating to the Limitation of Liability of Owners of Sea-going Ships, October 10, 1957, *effective* May 10, 1968. Under this Convention a limitation fund is made up by multiplying the deadweight tonnage of empty cargo spaces (limitation tonnage) by 1000 gold francs. The United States has not ratified this Convention although there is a provision of domestic law permitting shipowners to limit their liability to the value of their interest in the vessel after a disaster. 46 U.S.C. §§ 183-189 (1970).

In November 1971 the governments of 49 States assembled at Brussels to consider a draft convention to constitute a special fund to supplement excess pollution losses not covered by the 1969 Civil Liability Convention. Again the two most controversial questions were the maximum amount to which the liability of the fund could be limited and the nature of the defenses which could be asserted against damage claimants.

The result of the deliberations was the provision that the fund would not be liable to pollution claimants if the cause of the spill was "an act of war, hostilities, civil war or insurrection" or from the use of a warship or other noncommercial governmental vessel.⁸⁷ Of course, the claimant must prove that the pollution damage "resulted from an incident involving one or more ships."⁸⁸ A limitation of Fund liability for any one incident of 450,000,000 gold francs or \$30,000,000 (1971) has been imposed.⁸⁹ Nevertheless, the General Assembly of the Fund is permitted to double the limitation figure to 900,000,000 gold francs if "having regard to the experience of incidents which have occurred and in particular the amount of damage resulting therefrom and to changes in monetary values."⁹⁰ The Fund Convention also has a complex system to indemnify individual shipowners for amounts paid out to claimants under the 1969 Civil Liability Convention in excess of the amount to which the liability might have been limited under the 1957 Convention⁹¹ on the condition that the pollution damage for which indemnification is being sought has resulted without the "actual fault or privity of the owner."⁹² Finally, the Fund is endowed with legal personality so that it may take an adversary position against pollution claimants and shipowners in litigation.⁹³ Accordingly, it can be seen that the goal of compensating all victims of oil pollution damage to 100% of their actual loss is still a distant goal.

⁸⁷Draft International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, December 18, 1971 art. 4(2)(a), 3 J. MARIT. L. & COMM. 624 (1972).

⁸⁸*Id.* art. 4(2) (b). Art. 4(3) provides that the Fund will not be liable for the contributory fault of the claimant.

⁸⁹*Id.* art. 4(4) (a). This is a total limitation which includes amounts which the Fund must pay by way of indemnification.

⁹⁰*Id.* art. 4(6). It should be noted that this Convention creates a new international personality, the Fund, Art. 2(1), with all the apparatus and organizational machinery normally possessed by international organizations: General Assembly, Secretariat headed by a Director, and an Executive Committee. Arts. 16, 28, 21.

⁹¹*Id.* arts. 2(2) and 7(4).

⁹²*Id.* art. 5. Special reliance is placed on the shipowner obligations arising under the 1954 Oil Pollution Convention, the 1960 Safety of Life at Sea Convention, the Rules of the Road, and the 1966 Load Line Convention. *Id.* art. 5(3).

⁹³*Id.* arts. 2(2) and 7(4).

B. Private Agreements within the Maritime Transport Industry

Tanker fleet owners, who also do retail business in petroleum products, have always been sensitive to the public relations problems created by large oil spills and have made large strides in accomodating some of their operations to public criticism. Thus, even before the 1954 Convention mandated the pollution free zones 50 miles off-shore, there was much voluntary compliance with the proposed prohibitions of the 1926 Conference and there were technical developments such as effective oily waste separators which ameliorated the deliberate pollution problem. The extensive debates on the 1969 Civil Liability Convention prompted the industry to organize a compensation scheme to forestall increasing public criticism. As of March 1974 the liability conventions drafted at Brussels in 1969 and 1971 are not yet in force, but the voluntary protections and guarantees established by the petroleum transport industry have been in force since October 6, 1969.

In the marine transport industry the vessel hull is insured to protect the vessel owner's investment against destruction of loss and the liability of the vessel and her owners for personal injury, property damage, cargo loss, and damages caused by oil pollution will be insured (or indemnified) through "clubs" of shipowners which have established P & I (protection and Indemnification) agreements. Large multinational corporations often are self-insurers of their fleets. However, the practice of reinsurance of liabilities of self-insurers and P & I clubs in excess of \$1,000,000 or more, or in alternating layers upward, is widespread. Thus, it is apparent that reinsurers would be reached in cases of large spills and P & I clubs would be primarily liable where the insurance is applicable. Accordingly, a special indemnification fund to ensure voluntary cleanup of spills was established by the agreement of owners of the major tanker fleets. The agreement comes into effect upon the occasion of a spill, regardless of fault, up to \$100 per gross registered ton to a maximum limit of \$10,000,000 for cleanup expenses undertaken by shipowners.⁹⁴

TOVALOP (The Tanker Owners' Voluntary Agreement Concerning Liability for Oil Pollution), administered by a new English corporation, the International Tanker Owners Pollution Federation, Ltd. was established when 50% of the privately owned fleets adhered to the agreement; by July 1972, 99% of such fleets were parties to the TOVALOP Agree-

⁹⁴Tanker Owners Voluntary Agreement Concerning Liability for Oil Pollution, 8 INT'L. LEGAL MAT'LS 497 (1969), art. VI.

ment.⁹⁵ This agreement pays governmental cleanup expenses only, not private damage claims.⁹⁶

The TOVALOP cleanup indemnity is supplemented by the CRISTAL (Contract Regarding an Interim Supplement to Tanker Liability for Oil Pollution) fund which will provide for payments to injured private individuals because of a spill that escaped from a vessel owned or chartered by a member of the fund.⁹⁷ The maximum amount for a spill is \$30,000,000,⁹⁸ to be raised by assessments on participating oil companies. Amounts paid out by tanker owners under TOVALOP and other existing obligations will be recaptured from the total amount of the fund.⁹⁹ The CRISTAL agreement will be phased out after the effective date of the 1971 Fund Convention.¹⁰⁰

C. Reform of the 1954 Convention by IMCO

The 1962 Amendments to the 1954 Oil Pollution Convention, effective in 1967, provided an efficient means for future changes to this international legislation through the use of the IMCO General Assembly.¹⁰¹ Therefore, in 1969 further amendments to the 1954 Convention were achieved, but again the deliberate oil spill was not prohibited. The totality of the 1969 changes might not have any great effect on the protection of the environment. Instead of the concept of prohibited zones, there is substituted a ban on discharges unless they are necessary¹⁰² and the necessary discharges must be in diluted form and as far from shore as possible.¹⁰³ Despite the continued exemption of tankers

⁹⁵TOVALOP, published by the International Tanker Owners Pollution Federation Ltd., January 1973 at 4.

⁹⁶Resolution, *supra* note 81, art. IV.

⁹⁷*Contract Regarding an Interim Supplement to Tanker Liability for Oil Pollution*, January 14, 1971, 2 J. MARIT. L. & COMM. 705 (1971), art. IV(A).

⁹⁸*Id.* art. IV(B). If the total damage exceeds this sum, then it shall be pro-rated among the claimants, art. IV(C).

⁹⁹*Id.* art. IV(B) (1), (2), (3) and (4).

¹⁰⁰*Id.* art. III(C).

¹⁰¹1962 Oil Pollution Convention, *supra* note 53, art. XVI. This article provides that proposals approved by a 2/3 majority of the Maritime Safety Committee are to be forwarded to a conference convened on the call of at least 1/3 of the General Assembly. Thereafter, amendments, "shall come into force for all Contracting Governments, except those which before it comes into force make a declaration that they do not accept the amendment. . ."

¹⁰²Oil Pollution Convention, *supra* note 57. Art. VII provides:

(1) As from a date twelve months after the present Convention comes into force for the relevant territory in respect of a ship in accordance with paragraph (1) of Article II, such a ship shall be required to be so fitted as to prevent, as far as reasonable and practicable, the escape of oil into bilges, unless effective means are provided to insure that the oil in the bilges is not discharged in contravention of this Convention.

(2) Carrying water ballast in oil fuel tanks shall be avoided if possible.

¹⁰³*Id.* art. I defines the term "nearest land" to be "from the base line from which the territorial

under 500 gross tons, the new arrangement differentiated between tankers and ships other than tankers as to the amount of diluted discharge which would be permissible. There is a total prohibition on the discharge by ships other than tankers of oily mixture with a content of more than 100 parts per one million parts of the mixture at a rate in excess of 60 liters per mile; diluted discharges below the prohibited level being permitted as far as practicable from land.¹⁰⁴ Each tanker is prohibited from discharging oily mixture with a content of more than one fifteen-thousandth part of her total cargo carrying capacity; diluted discharges below the prohibited level being permitted more than 50 miles from the nearest land.¹⁰⁵ The earlier 1954 provision concerning enforcement only by the flag State remains in effect, although the flag State is now required to inform IMCO as well as the complaining State of the results of proceedings.¹⁰⁶

It is uncertain to what extent pressures from the 1972 Stockholm Conference, the NATO Declaration, U.N. General Assembly Declaration and the need to forestall lengthy and divisive discussions in the 1974 Law of the Sea Conference dictated the necessity of the 1973 IMCO Conference. Nevertheless, a wide ranging conference on the subject of marine pollution met under IMCO auspices in November 1973 in London to consider a Draft Convention prepared since the 1971 Fund Conference. The scope of the 1973 Convention was marine pollution caused by discharges of oil, other noxious liquid substances carried in bulk, harmful substances not liquid but packaged, sewage, and garbage.¹⁰⁷

Prior to the 1973 IMCO Conference a general prohibition of the dumping of wastes in the ocean, to be enforced solely by the flag state, was approved by IMCO on December 29, 1972.

At this Conference the most difficult subject was coastal state jurisdiction over the high seas and expansion of the rights of Contracting Parties over ships of another flag. The drafters of the preparatory document presented alternative formulations of coastal state jurisdictions:¹⁰⁸

sea of the territory in question is established in accordance with the Geneva Convention on the Territorial Sea and the Contiguous Zone, 1958."

¹⁰⁴*Id.* art. III(a).

¹⁰⁵*Id.* art. III(b). However, this prohibition does not apply to the discharge of ballast water, "from a cargo tank which since the cargo was last carried therein, has been so cleaned that any effluent therefrom, if it were discharged from a stationary tanker into clean calm water on a clear day, would produce no visible traces of oil on the surface of the water. . ." nor to bilges. Art. III(C).

¹⁰⁶*Id.* art. X.

¹⁰⁷International Convention for the Prevention of Pollution from Ships, *supra* note 58, Annexes 1-5.

¹⁰⁸IMCO Doc. MP/CONF./4 of 23 Aug. 73, Art. IV.

(1) the coastal state to have concurrent jurisdiction with the flag state over discharge violations within the territorial sea but with no coastal state jurisdiction beyond the territorial sea; (2) the flag state to have jurisdiction over violations wherever occurring with an obligation to prosecute wherever the violation occurred, while the coastal state is to have jurisdiction either to prosecute violations within territorial waters or report them to the flag state. In addition a special new jurisdiction designated as "Port State Jurisdiction" was proposed which would involve the concurrent right with the flag state to prosecute violations on the high seas and the concurrent right with flag and coastal states to prosecute violations in the territorial sea. Eventually the Conference elected to continue the traditional approach to coastal state jurisdiction without creating any new types of jurisdictions; such public law questions being specifically reserved for the 1974 Caracas Conference on the Law of the Sea.¹⁰⁹

With respect to high seas interference with polluting vessels there was a proposal to permit Contracting States to "take more stringent measures, where specific circumstances so warrant, within their jurisdiction, in respect of discharge standards" but prohibiting regulations effecting ship design and equipment for pollution control *unless* the waters were "waters the particular characteristics of which, in accordance with accepted scientific criteria, render the environment exceptionally vulnerable."¹¹⁰ Such provision might have preserved Canada's special Arctic legislation and could have broader implications, however; it was not possible to obtain the required 2/3 majority in the Plenary Session.

The decision to postpone changes in the rights of coastal states emphasizes the weakest link in the traditional international law of the high seas—the coastal state or flag state which is either unable or unwilling to enforce its international obligations or even its domestic requirements. Thus, the comments of Schachter and Serwer on the 1969 Convention on Coastal State Intervention and the 1969 Civil Liability Convention remain valid today.¹¹¹

The burden of responsibility for acting to prevent oil pollution rests with states, but not all states are equipped to execute this responsibility. Capping blow-outs, detecting oil spills and identifying their origin, bombing a wrecked tanker in order to set its oil on fire, sinking an oil slick, skimming oil from the surface of the sea and any number of other measures which can, and which under existing and proposed treaties should, be taken by coastal states, are all measures which

¹⁰⁹ International Convention for the Prevention of Pollution from Ships, *supra* note 58, Art. 4.

¹¹⁰IMCO Doc. MP/CONF. 14 of 23 Aug. 73. art. VIII.

¹¹¹Schachter and Serwer, *supra* note 80 at 94.

require a considerable degree of technical expertise and extensive financial resources. This is true as well for many of the measures which states can and should require of the vessels operating under their own flags. Few states possess all the expertise they need or could use in this area. It might, indeed, be wasteful if all states did individually possess the capacity to take all possible measures for the control of oil pollution from ships Even wealthy countries may find it difficult to mobilize the necessary manpower, technology and hardware

Despite the reluctance of the 1973 Conference to make major changes in traditional maritime law concerning coastal state interference on the high seas, it did take positive steps with respect to pollution prevention through the mandated use of segregated ballast in new construction, thereby eliminating the need to carry water ballast in empty oil tanks,¹¹² and new and broader provisions for the port's jurisdiction to challenge the International Oil Pollution Certificate to be issued by the flag state.¹¹³ The format of the 1969 Amendments to the 1954 Convention concerning permissible diluted discharges has been preserved for existing tankers, but the total quantity of oil for permissible discharges by new tankers is reduced to one-thirty-thousandth part of the total cargo carrying capacity.¹¹⁴ Ships other than oil tankers with gross tonnage in excess of 400 gross tons must have oil discharge monitoring and control systems and oily water separators.¹¹⁵ A new concept of "special areas" reminiscent of the prohibited zones of the 1954 Convention has been added.¹¹⁶

D. Rewriting International Law in the General Assembly

Among the myriad questions considered in the lengthy Seabed Debates of the Sixth Committee of the General Assembly and in the Assembly itself has been the question of effective protection of the coastal zone and the ocean environment by coastal states. The debate led to the adoption of a series of resolutions to accomplish three objectives: create

¹¹²International Convention for the Prevention of Pollution from Ships, *supra* note 109; Annex I, Regulations 13-17.

¹¹³*Id.* art. 5(2), which provides, "Any such inspection shall be limited to verifying that there is not aboard 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. In that case, or if the ship does not carry a valid certificate, the Party carrying out the inspection shall take such steps as will ensure that the ship shall not sail until it can proceed to sea without presenting an unreasonable threat to the marine environment."

¹¹⁴*Id.* Annex I, Regulation 9(1) (a).

¹¹⁵*Id.* Annex I, Regulation 9(1)(b).

¹¹⁶*Id.* Annex I, Regulation 10.

the 1972 Stockholm Conference on the Human Environment,¹¹⁷ create the Law of the Sea Conference,¹¹⁸ and establish the principles of General Assembly Resolution 2566 requesting all states to take effective measures to prevent pollution of the marine environment.¹¹⁹ This is not the place to discuss the lawmaking effect of hortatory Resolutions of the General Assembly of unanimity or a near unanimity of the developing world. Certainly a Resolution cannot create new conventional law, but it does reflect emerging principles of customary international law.¹²⁰

The Stockholm Conference of 114 states in June 1972 produced a program of international action covering some 200 points and a Declaration on the Human Environment which it is hoped will some day be as highly regarded as the Declaration on Human Rights.¹²¹ The Conference also requested the establishment of a permanent international organization to be concerned with protection of the human environment.¹²² Within the new Declaration on the Human Environment there are general principles which demonstrate the development of international concern with the oil pollution problem, as for example, the Statement of Marine Principles:

States shall take all possible steps to prevent pollution of the seas by substances that are liable to create hazards to human health, to harm living resources and marine life, to damage amenities or to interfere with other legitimate uses of the sea.¹²³

The same thought is enlarged in Recommendation 86e of the Action Plan calling for the end of deliberate spills by 1975.¹²⁴

As this is being written the work is still continuing for the Caracas

¹¹⁷G.A. RES. 2850 (XXVI) of December 20, 1971. *See also* G.A. Res. 2398 (XXIII) of December 3, 1968; G.A. Res. 2581 (XXIV) of December 15, 1969; and G.A. Res. 2657 (XXV) of December 7, 1970.

¹¹⁸G.A. Res. 2749 and 2750 (XXV) of December 17, 1970. *See also* G.A. Res. 2340 (XXII) of December 18, 1967; G.A. Res. 2467 (XXIII) of December 21, 1968; and G.A. Res. 2564 (XXIV) of December 15, 1969.

¹¹⁹G.A. Res. 2566 (XXIV) of December 13, 1969. *See also* G.A. Res. 2467 (XXIII) of December 21, 1968.

¹²⁰J. BROWNIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 14 (2d ed. 1973). *See generally* O. ASAMOAH, *THE LEGAL SIGNIFICANCE OF THE DECLARATIONS OF THE GENERAL ASSEMBLY* (1966).

¹²¹The Universal Declaration on Human Rights, G.A. Res. 217 A (III) of December 10, 1948.

¹²²These Resolutions of the Stockholm Conference were approved by the General Assembly at the same time as the new United Nations Environmental Programme, to be headed by Maurice Strong of Canada, was established at Nairobi. *See* G.A. Res. 2997 (XXVII) of December 15, 1972.

¹²³General Principle 7 U.N. DOC. A/CONF. 48/14.

¹²⁴*Id.* Sec. 86e. On the Stockholm Conference and marine pollution, *see generally*, Butte, *Controlling Marine Pollution—World Task or National?*, 8 *STAN. J. INT'L STUDIES* 99 (1973); Thacher, *Assessment and Control of Marine Pollution: The Stockholm Recommendations and their Efficacy*, 8 *STAN. J. INT'L STUDIES* 79 (1973); and Bramsen, *Transnational Pollution and International Law*, 42 *NORDISK TIDSSKRIFT FOR INTERNATIONAL RET* 153 (1972).

Conference on the Law of the Sea. There is a serious danger of a stalemate on ocean pollution questions. The 1973 IMCO Conference deferred to the Law of the Sea Conference to develop new principles for the territorial sea and the high seas with respect to environmental protection, yet the Caracas Conference will not be a conference on the environment. There is a current of opinion among some of those preparing to attend the 1974 Conference that the pollution problem must be solved before the problem of state competence on the high seas can be resolved. Perhaps the patrimonial sea to a distance of 200 miles from the coast will include a coastal state guardianship, if not a jurisdiction based on sovereignty that will permit surveillance and even regulation of the world's tanker fleets to prevent pollution. It is possible that a threat of this nature could produce an accommodation by the shipowning nations which were able to prevent the port state jurisdiction from being established at the 1973 IMCO Conference. Caracas will not be the friendly forum for these nations that IMCO has been. It is not suggested here that the Caracas Conference invade the technical preserve that properly belongs to IMCO with respect to pollution prevention standards, but a modification of coastal state rights in the high seas near the territorial sea and the creation of a port state jurisdiction to enforce international pollution prevention regulations would be a positive step forward in the progressive development of international law. Alternative solutions to the enforcement of oil pollution control devices might be: establishment of an international force of ocean watchers to interfere or intervene in the operations of offending vessels; revision of the Contiguous Zone Convention to expand pollution protection zones of coastal states over the entire ocean surface by extending the median lines everywhere; or the establishment of the proposed port state jurisdiction in addition to existing jurisdictional rights. The latter solution seems to be the least offensive to the existing world order of the oceans and should be seriously considered.

CONCLUSION

The story of international control of oil pollution has been developed here, not as an illustration of the ideal path for the development of an effective regime for environmental safeguards, but rather as an illustration of the types of conflicting interests and compromises which will necessarily be made as the World Community attempts to select the most rational and just resolution of a human problem to which there are many rational responses. Although there are many sources of environmental damage to the oceans and the coastal zone, such as sewage, natural drainage, river systems and even the rainfall in the atmosphere

itself, there is one source which is controllable—the ocean transport of petroleum. Unfortunately, the efforts to control this source can imperil one of the most important industries of industrialized economies. It is a truism that for the foreseeable future there will be no adequate substitute for petroleum products to provide the energy for these industrialized economies. It is also a truism that oil is not now produced where it is needed and that it is a dangerous commodity, if not actually a hazardous commodity in a legal sense, at all stages of its production, transportation, refinement and consumption. In such a situation there are neither heroes nor villains, but a long slow process of accommodation to reach a viable solution. Such platitudes, however, will not resolve the real conflicts which can occur, as for example by the 1970 Canadian Arctic Waters Pollution Prevention Act¹²⁵ extending coastal state jurisdiction seaward one hundred nautical miles or the 1972 United States Ports and Waterways Safety Act¹²⁶ which requires unilateral establishment of minimum standards for design, construction and safe operation of liquid bulk carriers, regardless of flag.

The 1973 IMCO Convention passed difficult questions of coastal state interference with non-flag vessels to the 1974 Law of the Sea Conference, already overburdened with complex problems. Although one can be optimistic that the Law of the Sea Conference will review the necessities for coastal state interference with the maritime transport of petroleum and devise a new regime which will accommodate all interests, it is not probable. Therefore, the question may again return to IMCO. It is hoped that it will receive better treatment in future deliberations.

In the meanwhile, what is to be done with the 1969 Civil Liability Convention and the 1971 Fund Convention? It is submitted that it would be a mistake not to ratify these existing conventions now. In the interest of international uniformity and the progressive development of international law they should be ratified as an incentive for further developments as they become necessary. It is not certain that the fund levels will be insufficient or that the other inadequacies of approach will cause widespread suffering, but it is unlikely that a better result can be

¹²⁵*Supra* note 8.

¹²⁶Pub. L. No. 92-340, 33 U.S.C. §§ 1221-1227 (1974 Supp.). There is an interesting dictum in *State of Maryland v. Amerada Hess Corp.*, 350 F. Supp. 1060 (D. Md. 1972), that after July 1, 1974 when the Rules and Regulations for protection of the marine environment relating to vessel design and construction safety standards will have been promulgated that a cause of action in Admiralty on behalf of injured shoreside claimants will exist based on unseaworthiness, a type of liability without fault.

achieved in the IMCO forum at this time. It might be the best course for the United States to make a reservation with respect to Article III (4) of the 1969 Civil Liability Convention which provides: "No claim for compensation for pollution damage shall be made against the owner, otherwise than in accordance with this Convention" If reservation is not attempted or permitted, then the later treaty will become the supreme law of the land over the earlier (1972) provision of the Federal Water Quality Improvement Act and the (1972) Ports and Waterways Safety Act.¹²⁷

The conflicts between the domestic and international norms are not very great and, having made the appropriate reservation, the United States Congress could then reenact the earlier cleanup law which would become the supreme law of the land.¹²⁸ Perhaps one might be even bolder and propose that the United State should ratify the 1969 and 1971 Conventions without reservations and then reenact the old cleanup law and the Ports and Waterways Safety Act,¹²⁹ following Canada's example and trusting in the emergence of a rule of international law which will give broad powers of protection of the ocean heritage to coastal states and to the World Community.

¹²⁷Cook v. United States (The Mazel Tov), 288 U.S. 102 (1933).

¹²⁸Edye v. Robertson, 112 U.S. 580 (1884).

¹²⁹Cook v. United States (The Mazel Tov), 288 U.S. 102 (1933). Such legislation might leave the United States liable in an international forum for a denial of justice to a foreign shipowner who has suffered harm because of the difference between the domestic legislation and the treaty commitment. See generally A. FREEMAN, INTERNATIONAL RESPONSIBILITY OF STATES FOR DENIAL OF JUSTICE (1938); Lillich, *Toward the Formulation of an Acceptable Body of Law Concerning State Responsibility*, 16 SYRACUSE L. REV. 721 (1965). On the modern approach to reservations in multilateral agreements see K. HOLLWAY, MODERN TRENDS IN TREATY LAW (1967).