CIVIL LIABILITY OF THE SHIPOWNER FOR OIL POLLUTION DAMAGES IN THE CONTEXT OF THE 1969 INTERNATIONAL CONVENTION ON CIVIL LIABILITY FOR OIL POLLUTION DAMAGE

BY

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A thesis submitted to the Faculty of Graduate Studies and Research in partial fulfillment of the requirements for the degree of

MASTER OF LAWS

McGill University
INSTITUTE OF COMPARATIVE LAW

Montreal
May 1981

ABSTRACT

The subject of this thesis is the shipowner's liability for oil pollution damages in the context of the 1969 International Convention on Civil Liability for Oil Pollution Damages. The bulk of this thesis, therefore, represents a systematic analysis of that convention. The International Convention on the Establishment of an International Fund for compensation for Oil Pollution Damage, TOVALOP and CRISTAL will be examined as a corollary to the 1969 Convention. Attempts were made to suggest changes and possible future developments where appropriate The law has been stated on the basis of material available to me on December 31, 1980. However, whenever possible, the attempt was made to provide more up-to-date information.

This study is necessarily limited in scope. It is beyond the scope of this research to examine in detail the causes and effects of marine pollution and even the effect of oil pollution on the marine environment which is indeed a complex problem. The thesis will be confined as much as possible to the question of liability and indeed only to one aspect of liability: the shipowner's.

It is also beyond the scope of this study to deal in full with the problem of insurability although it is mentioned where appropriate -

This research has been organized in the following manner:

Chapter 1 is the introduction of the thesis;

Chapter 2 provides a legal framework for the phenomenon of marine pollution;

Chapter 3 provides an analytical review of the Civil Liability Convention;

Chapter 4 provides an analytical review of the Fund Convention

Chapter 5 is an analysis of proposed changes to the Civil Liability Convention by the Legal Committee of IMCO together with other related proposals;

Chapter 6 highlights the most important clauses and articles of TOVALOP and CRISTAL;

Chapter 7 deals with the problem of state liability

The conclusion is in Chapter 8.

RÉSUMÉ

La présente thèse a pour sujet la responsabilité du propriétaire du navire pour les dommages causés par la pollution par le pétrole dans le contexte de la Convention internationale sur la responsabilité civile pour les dommages causés par la pollution par le pétrole de 1969 (la "Convention sur la responsabilité civile"). En conséquence, la majeure partie de cette thèse constitue une analyse systématique de cette convention. La Convention internationale sur l'établissement d'un fonds international pour compensation des dommages cuasés par la pollution par le pétrole (la "Convention sur le fonds international"), la TOVALOP et le CRISTAL seront aussi examinés, étant dérivés de la Convention de 1969. Là où c'était approprié de le faire, nous avons tenté de suggérer des modifications et des voies possibles de développement pour le futur. Nous avons exposé le droit en nous fondant sur la documentation qui nous était accessible au 31 décembre 1980. Toutefois, nous avons tenté de fournir, dans la mesure du possible, une information plus à jour.

La portée de la présente étude est nécessairement limitée. Examiner en détail les causes et les effets de la pollution maritime, de même que le problème complexe des effets de la pollution par le pétrole sur l'environnement marin, dépasse le cadre de cette recherche. Cette thèse sera limitée, autant que possible, à la question de la responsabilité et même à un de ses aspects, celle du propriétaire du navire.

Même si nous y avons fait référence là où c'était approprié, il n'appartient pas, non plus, au domaine de cette étude de se pencher sur le problème de l'assurabilité.

La présente recherche a été agencée de la façon suivante:

Le chapitre 1 en est l'introduction.

Le chapitre 2 fournit le cadre légal pour l'analyse du phénomène de la pollution maritime.

Le chapitre 3 fait une revue analytique de la Convention sur la responsabilitlé civile.

Le chapitre 4 fait une revue analytique de la Convention sur le fonds international.

Le chapitre 5 analyse les modifications que le Comité légal de l'IMCO propose d'apporter à la Convention sur la responsabilité civile, de même que d'autres propositions connexes.

Le chapitre 6 met en relief les clauses et les articles les plus importants de la TOVALOP et du CRISTAL.

Le chapitre 7 traite du problème de la responsabilité de l'état.

Le chapitre 8 renferme la conclusion.

ACKNOWLEDGEMENTS

I would like to express gratitude to Professor de Mestral, my thesis supervisor for his guidance and assistance. I would also like to thank Dr. Busha, Deputy Director, Legal Division, IMCO for advising me, and Mr. Popp of Transport Canada for being most cooperative and helpful and in providing me with the latest documents from IMCO.

The assistance of the Law Library staffs of McGill University, Columbia University and New York University is also acknowledged.

My special words of gratitude to my close friends Jessie Durnford and Rodney Birrell who corrected this thesis and helped to make it more fluent.

And last but not least, my parents for the financial aid that has made my studies at McGill University possible and enjoyable.

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1. INTRODUCTION

> "A point has been reached in history when we must shape our actions throughout the world with a more prudent care for their environment consequence. Through ignorance or indifference we can do massive and irreversible harm to the earthly environment on which our life and well-being depend. Conversely, through fuller knowledge and wiser action, we can achieve for ourselves and our posterity a better life in an environment more in keeping with human needs and hopes. There are broad vistas for the enhancement of environmental quality and the creation of a good life. What is needed is an enthusiastic but calm state of mind and intense but orderly work. For the purpose of attaining freedom in the world of nature, man must use knowledge to build, in collaboration with nature, a better environment. To defend and improve the human environment for present and future generations has become an imperative goal for mankind-a goal to be pursued together with, and in harmony with, the established and fundamental goals of peace and of world-wide economic and social development."[1]

There are three principal ways in which the marine environment is being disturbed by man: pollution emanating from activities on land, pollution discharged from ships and pollution via the atmosphere. It is only with the second and, indeed, only one aspect of the second, namely the shipowner's liability for oil pollution, that this thesis is concerned.

It is well known that land-based sources of pollution are responsible for the largest quantities of pollutants released into the marine environment. Some estimate as much as 90%. This fact should always be borne in mind when considering the

problem of marine pollution from ships because "even if this source of pollution were to be fully eradicated, the problem of preservation of the marine environment would be neither fully nor even substantially settled."[2]

Unfortunately, until the Third United Nations Conference on the Law of the Sea the three areas have been dealt with separately with no concept of the overall protection of the marine environment.

It is only comparatively recently that there has been any kind of international regulation dealing with the marine environment. Traditionally all were entitled to enjoy freedom of the seas. Coastal states then developed territorial zones which were subject to "innocent passage." Thus, instead of treating the vast expanses of oceans as the "common heritage of mankind"[3], where no nation has a right to anything without international approval, nations have used the oceans with little hindrance and have regulated only piecemeal as a result of some disaster[4] such as the Torrey Canyon and Amoco Cadiz incidents and then only with much bickering and in - fighting with economic and political rather than environmental considerations being of top priority.

The international sea conventions are fraught with competing interests. The conventions, rather than being constitutional conferences, for the large part become little more than border

disputes: parties have as their top priorities the protection and improvement of their own rights, not the good of the whole. Tensions are visible between the economic interests of the maritime states, for whom less regulation and more freedom of the seas is more profitable, on the one hand, and on the other, the environmental interests of the coastal states in the protection of their coastlines and offshore waters. These countries clearly advocate more regulation and less freedom of the seas.

Another tension can be seen between the coastal states and the flag states, especially the so-called "flag of convenience"[5] states such as Liberia and Panama. This tension arises over the question of enforcement of regulations. The coastal states are concerned that the flag states are not interested enough in protecting others' coastlines to ensure that their ships meet the "generally accepted international standards" enforced by the conventions. The coastal states, therefore, want to have the power to enforce those standards on any ship entering their ports, their territorial seas (generally considered to be 12 miles) and possibly their economic zones (200 miles), when they have a far better opportunity and greater interest to inspect the ships than do the flag states.

The result of these tensions is far less effective regulation than should be in existence for true protection of the marine environment. The generally accepted international

standards are too low to satisfy coastal state interests. These countries then react with unilateral national regulations and enforce these higher standards on ships entering their ports. Unfortunately, the result is a mish mash of varying degrees of both international and national regulation.

International contribution to the regulation of oil pollution by ships has been the following. As early as 1926, the United States hosted an international conference on the control of oil pollution from ships. This attempt failed, however, to produce an acceptable convention. It was not until 1954, at the instigation of the British government, that an international agreement on the prevention of pollution by oil was reached, the International Convention for the Prevention of Pollution of the Sea by Oil. In 1958 the Inter-Governmental Maritime Consultative Organization (IMCO) was formed to administer the 1954 convention, its 1962, 1969, 1971 amendments and to develop new conventions to deal with pollution from ships: the International Convention Relating to Intervention on the High Seas in Cases of Oil Pollution Casualties, 1969; the International Convention on Civil Liability for Oil Pollution Damages (C L C), 1969; the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage (the Fund Convention) 1971; the International Convention for the Prevention of

Pollution from Ships, 1973; the Protocol of 1978 relating to the International Convention for the Prevention of Pollution from Ships 1973.

The subject of this thesis is the discussion, principally in the contest of the CLC and Fund Convention, of the problem of responsibility, liability and compensation for damages caused to the marine environment and other economic interests by oil pollution from ships. This thesis does not, therefore, deal with the prevention of oil pollution per se although this is where the real fight against oil pollution lies. Notwithstanding measures to prevent oil pollution,[6] so much oil is being transported on the seas that accidents, due to the inevitable element of human failure, are bound to happen. A system of responsibility, liability and compensation must, therefore, be established in order to deal effectively with the results of these accidents: oil pollution damages. In other words, this thesis is only concerned with the situation where pollution has already taken place.

Although almost all the recent conventions on marine pollution deal with the question of civil liability for oil pollution damages, the C L C and the Fund Convention are the only ones to provide a detailed set of provisions on this issue and is, therefore, the most important international contribution to the solution of the problem of

civil liability for oil pollution damages. It is the discussion of these conventions both from an analytical and from a dynamic perspective that represents the core of this research.

Rules of liability for pollution damages have been most developed in the areas of oil pollution and nuclear materials. Liability is strict or absolute:

a non-fault regime. Further, liability is channelled: one particular person (the superior for example) is charged with compensating the victims. Thus, the victims know against whom to direct their claims and are spared the time and expense of claiming against more than one defendant without knowing the proportion of their respective faults. Liability is limited by establishing ceilings to the amounts which may be claimed. This limitation seems generally to go hand-in-hand with absolute liability regimes. Finally, compensation funds are established for pollution damages. These developments are peculiar to limited areas of marine pollution and are far from being the norm.

State liability is even farther away from becoming part of the conventional law on marine pollution. At present, the International Commission is drafting treaty articles on

this problem of state responsibility. Their results might directly affect the questions of responsibility and liability for oil pollution damages.

The basic purpose of the CLC and the Fund Convention is to provide for a uniform comprehensive system of recovery for damage caused by contamination resulting from the risk created by the marine transportation of bulk oil cargoes.[8] In other words, these conventions try to respond to the need for recompense for damage after a discharge of oil from a ship carrying oil in bulk as cargo, whether the discharge be large or small, intentional or accidental, legal or illegal.

The central feature and fundamental principle of the C L C is that the owner of a polluting vessel will be strictly liable "for any pollution damage caused by oil which has escaped or has been discharged from the ship",[9] subject only to certain very limited exceptions.

The nature of liability, as expected, was the most controversial question considered at the Conference. While a substantial number of the delegations advocated basing liability on fault with a reversal of the burden of proof, a majority were in favor of the principle of strict liability. Of these, some wanted the ship held strictly liable, while others advocated imposing such liability on the cargo. A few supported a Canadian proposal which would have made the ship strictly liable up to a specified monetary limit, beyond which the cargo would have been liable.

In the end, what threatened to be a deadlock was resolved by the adoption of a species of strict liability, but with sufficient exceptions to make it insurable to the same limits of coverage as would have been available had liability been based on fault, with the burden of proof reversed.[10]

Another very sensitive issue at the 1969 Civil Liability Convention was the limitation of liability. As will be seen, the solution adopted at the Conference left some delegations most unhappy. However, it is submitted that compared to the International Convention Relating to the Limitation of the Liability of Owners of Seagoing Ships 1957,[11] a substantial improvement was at the time acheived.[12] An entire chapter has been, therefore, dedicated to the rule of liability and its limitations.

According to the C L C the Courts of any state where pollution damage has occured retain jurisdiction to hear and determine the claims of the victims. It is not to be supposed that the interpretations of each national judiciary system will be in every respect identical with all others. There was never any serious discussion in these negotiations, of devices to achieve greater consistency, such as reference to advisory tribunals, or perhaps to the International Court of Justice. On the other hand, from the standpoint of providing adequate compensation for victims of pollution damage, the importance of international consistency of

interpretation should not be overemphasized. By and large, national courts will be adjudicating claims of their own nationals and, interpretations inconsistent with the broad purpose of compensation might even be reversed in national legislatures. Forum-shopping, if it arises, may be a pressure for consistency, and in any case, will be seen as a small price to pay for the status quo by nations so jealous of national prerogatives as to oppose international tribunals. Moreover, interpretation has its limits.

Finally two other important features of the C L C should be mentioned in this introduction. The first is that the owner of any ship registered in a contracting state and carrying more than 2,000 tons of oil in bulk (as cargo) must maintain insurance or other financial security amounting to the owner's total liability under the Convention. The second is that a plaintiff may sue the insurer directly without having to sue the shipowner. [13] Consequently it is much easier and more effective to enforce judgements.

2. MARINE POLLUTION: A LEGAL FRAMEWORK

Although the subject of this thesis is limited to the analysis of the problem of liability and compensation for oil pollution damages caused by ocean-going vessels, it is important to indentify the legal framework in which this analysis will be conducted. The C L C and the Fund Convention were motivated by a fortuitous event (the Torrey Canyon disaster) and were not the culmination of international negotiations. The C L C has been viewed as an exception to the classic norms and freedoms recognized by international law.

Experience has shown that the first approaches to international problems are fragmentary and limited to the particular areas where need has emerged. The C L C and the Fund Convention are no exception.

2.1 Marine Pollution

There are many forms of marine pollution, biological, chemical and physical, its causes and effects are diverse and complex, produced over a long period of time as a result of many different human activities. The definition of marine pollution adopted by many United Nations bodies is:

> Introduction by man, directly or indirectly, of substances or energy into the marine environment (including estuaries) resulting in such deleterious effects as harm to living resources, hazard to human health, hindrance to marine activities including fishing, impairment of quality for use of sea water and reduction of amenities.[14]

The ocean cannot absorb the increasing amount of waste materials man has brought to it. This is especially true of the fragile coastal zone with its abundance of sea life. Mankind is becoming increasingly dependent upon these resources which are being threatened by serious damage. Eventually all pollution becomes marine pollution: it is the sewer for air and land with rivers for conduits. From the land comes human and animal waste, industrial and agricultural chemicals through sewage and rivers. From the atmosphere, pesticides, PCBS, automotive combustion by-products are blown out to sea. On the sea, ships accidentally and intentionally dump hazardous cargoes. Ocean dumping of waste is often intentionally carried out to escape the jurisdiction of state territory thereby escaping regulation. Finally, there is the exploitation of the seabed.

For the purposes of this paper marine pollution may be divided into six main headings: (1) marine pollution caused via the atmosphere by land-based activities; (2) the disposal of domestic and industrial wastes; (3) radioactive pollution; (4) the disposal of military materials; (5) ship-born pollutants; and (6) pollution resulting from offshore mineral

exploitation. Headings (1), (2) and (5) are the principal causes of marine pollution at present.[15] It is important to note that land-based sources of pollution, including outflow from rivers and pollutants vaporised into the air, account for by far the largest portion of marine pollution, some estimating as much as 90%.[16] States have exclusive control over this kind of pollution. Seabased activities can be divided into exploitation of the seabed (approximately 5%) and pollutants from ships the remaining 95%.[17] Marine pollution caused by ships can be divided into two further categories: that resulting from acts performed in the course of normal ship operations and pollution resulting from accidents. The former is caused mainly by rinsing out empty oil tanks with sea water. The International Convention for the Prevention of Pollution of the Sea by Oil, 1954 (amended in 1962, 1969 and 1971) and the 1973 International Convention for the Prevention of Pollution from Ships have provided for increasingly strict controls on this now diminishing practice.

The other kind of ship pollution is that caused by a bulk carrier - usually a tanker - spilling its cargo because of an accident, a storm, a collision or by running aground. This problem has become more acute in the past 20 years because of the size of the tankers, VLCCs (Very Large Crude Carriers), 200,000 to 500,000 tons, thus increasing the risk of substantial harm.

2.2 Pollution and Freedom of the Seas

In the 1960s there was much debate over the concepts of the sea being res nullius - belonging to noone - and res communis - the "commons" approach, embodied in 1970 by the United Nations General Assembly as "the common heritage of mankind". The importance of this debate lies in the question of control and jurisdiction. With freedom of the seas[19] no state has a right to take action against a foreign ship on the high seas. In fact, however, this freedom has been curtailed: all ships must carry the flag of some state before it is free to travel on the high seas. Flag states not only have a right but also at times an obligation to regulate their ships. Furthermore, each coastal state has a territorial zone, now set at 12 miles, which is the exclusive jurisdiction of that state subject only to "innocent paasage"-

A second alternative to freedom of the seas is "national territoriality", the ocean is divided into zones for each territory. No state is allowed to encroach on or damage the others' zones. These two concepts, freedom of the seas and national territoriality, are both individualistic, based on a policy of laissez-faire: everyone is allowed to do everything as long as it does not interfere with others. Pollution regulation is made more difficult.

The third alternative - res communis - is based on a different approach: the whole ocean perceived as a genuinely common resource subject to community management: no one is allowed to do anything without permission. This approach, if adopted, would be by far the most effective way to regulate marine pollution. However, any serious discussion of this approach is on the wane, and it is doubtful at this time that it can be considered as a serious alternative.[20]

In fact the freedom of the seas could be an effective way of controlling marine pollution if the states exercised the powers they have over their own territory. Their refraining from doing so has resulted in a de facto freedom of individual ships to disregard the interests of others. It is easy to see why this has happened: unilateral action by states affects only their own ships and those who enter their territorial zone. It is only by international action that regulation can have any real effect. It is here that the tensions between the conflicts of interests of different states can be most clearly seen and have their most deleterious effect. Flags of convenience states have no interest in enforcing regulations on their ships. Coastal states with their desire for strict regulation only have power over ships entering their ports. Unilateral national action is unsatisfactory: it would be impossible for ships to comply with dozens of different kinds of regulations, no doubt conflicting and of different standards in order to be able to enter the required ports. The

only real solution is cooperation: freedom of the seas as a basis but with more of a "commons" spirit.

2.3 Rules of International Law

Three existing bodies of law are of interest for this paper: general principles of international law not specifically related to the law of the sea; general principles of the law of the sea such as Article 2 of the Geneva Convention on the High Seas; rules specifically dealing with pollution of the sea. The latter may be divided into general rules on pollution such as Articles 24 and 25 of the Geneva Convention, specific conventions on pollution such as the 1954, 1969, 1971 and 1973 IMCO Conventions and regulations designed to prevent pollution or reduce the risks thereof, such as rules to prevent collision. This latter category goes beyond the purposes of this paper and will not be dealt with.

2.3.1. General Principles of International Law

The general principles of law, which were applied in such cases as the well-known Trail Smelter [21] and Corfu Channel cases, [22] are applicable to "international" sources of marine pollution. [23] The court held in the former case that:

> under the principles of international law .... no State has the right to use or permit the use of its territory in such a manner as to cause injury by fumes on or to the territory of another or the properties of persons therein, when the cause is of serious consequence and the injury is established by clear and convincing evidence. [24]

This basic principle is applied to water pollution, in particular to rivers. There is no reason why it should not also be applied to the ocean. States should have just as much obligation to control the activities of their ships at sea as the use of their own territory. The concept of the ship as territoire flottante confirms this view. States should have just as much right to have their oceans (as "common heritage") protected even if their is no violation of sovereignty, no injury caused to the territory of another as where pollution occurs on the high seas.

The court in the Corfu Channel case applied the above principle to the sea. Albania was held to have an obligation to prevent the use of its territory in such a way as to infringe upon the rights of other states to navigate through the Channel.[25] Although the most serious effect of interference with the ocean is its effect on the sea's resources such as fisheries, rather than transportation, it is submitted that the Corfu Channel case is readily applicable to this form of interference: marine pollution. The language of the court was very broad:

> Such obligations are based ... on certain general and well-recognized principles, namely: elementary considerations of humanity, even more exacting in peace than war; the principle of the freedom of maritime communication; and every state's obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States.[26]

It will be noted that in effect both these cases are centered upon the problem of state liability. This subject is dealt with in more detail in Chapter 7.

2.3.2. General Principles of the Law of the Sea

The 1958 Geneva Convention on the High Seas sets forth many general principles of the law of the sea. No other ratified convention has taken its place in this respect.

The preamble states that the Convention's provisions are "generally declaratory of established principles of international law". Art. 2(1) lays down the principle of the freedom of the seas: the high seas are open to all nations, no state may validly purport to subject any part of them to its sovereignty. However, the freedom is limited in Art. 2(1), (2): "These freedoms.....shall be exercised by all states with reasonable regard to the interests of other states in their exercise of the freedom of the high seas." This is similar to the principle enunciated in the Trail Smelter and Corfu Channel cases: the enjoyment of one's own rights must not cause injury to another.[27]

It has occasionally been suggested that Art. 2(1) allows the freedom to pollute the ocean. This is obviously not within the spirit of Art. 2. No state has a right to downgrade this "common heritage" in which every state has an equal right. Furthermore, the "reasonable regard to the interests of other states" of Art. 2(2) should effectively counteract any possibility of such an interpretation.

Arts. 4 and 5 assign maritime jurisdiction, the right of control of ships, to the flag states. Art. 10 requires the flag state to take such measures, in conformity with "generally accepted international standards", as are necessary to ensure safety at sea. The control given to the flag states have caused the well-known problem of the flags of convenience whose states have no political or economical interest in anti-pollution regulation. The result of this is lack of any effective international agreements or standards. Coastal states with their important environmental interests react by unilaterally imposing their own standards as was seen in 1970 when Canada enacted the "Artic Waters Pollution Prevention Act" establishing a 100 mile anti-pollution zone. This situation is unsatisfactory and likely to cause much jurisdictional dispute. For effective control of marine pollution agreement and teamwork are essential. The placing of control in flag states resulting in flags of convenience is a great hindrance to such cooperation. The eradication of flags of convenience states would be a major step towards improving the situation.

2.3.3. Rules Specifically Dealing With Marine Pollution

2.3.3.1. General Rules on Pollution

The High Seas Convention included two articles on the kinds of pollution that were of concern at that time.

Art. 24 obliges states to "draw up regulations to prevent pollution of the seas by the discharge of oil from ships". Art. 25 obliges states to "take measures to prevent pollution of the seas from the dumping of radioactive waste" and to "co-operate with the competent international organizations" in taking measures for the prevention of pollution from "any activities with radioactive materials or other harmful agents". It will be noted that maritime transport of natural gas in 1958 was only just beginning and was not, therefore, specifically dealt with in this convention. However, the "other harmful agents" of Art. 25(2) could be applied to oil thus creating a general obligation to prevent oil pollution. Unfortunately, none of the most likely offenders are parties to the High Seas Convention.[29] Thus, Art. 25(2) will be of little effect in the battle against oil pollution.

2.3.3.2. Specific Conventions on Pollution

There have been four main conventions dealing with oil pollution: the 1954 Convention for the Prevention of Pollution of the Sea by Oil, with amendments in 1962 and 1969, the 1969 Convention on Civil Liability for Oil Pollution

Damage, the 1971 Fund Convention and the 1973 Convention for the Prevention of Pollution from Ships.

The 1954 Convention prohibits the discharge of oil or oily mixture. Originally the prohibition was limited to certain zones, however, the 1969 amendments have abolished this restriction.[30]

The 1973 Convention (and its 1978 Protocol) endeavoured to update the 1954 Convention. It attempted to take into account other ship-generated wastes, such as sewage and garbage, and an attempt was made to control the release of noxious substances other than oil from vessels. No reference to responsibility and liability is made in this Convention. This may be attributed to the fact that responsibility and liability for damage caused by ship-generated pollution is dealt with in the C I C. and Fund Convention, the main subject of this thesis.

By far the greatest amount of marine pollution regulation has been centered on pollution by oil from ships. Although such effort in this field is to be commended, there is an imbalance: discharge from ships accounts for approximately only 10% of all marine pollution.[31] Apart from the recent ocean dumping conventions[32], a fishing convention[33], the Stockholm Conference and other regional agreements, too little has been done at an international level to regulate the other

far more serious forms of pollution. While oil is generally broken down by natural process, persistent synthetical chemicals coming from land based sources are known to accumulate in fish and sea animals and present a serious threat to their continued existence. This disequilibrium is a direct result of such disasters as the Torrey Canyon incident: public opinion was so outraged at the damage that was so visibly done that the international community was forced to take action in this particular area.

Another more controversial method is the use of adjacent zones. At present the contiguous zone[35] can extend no farther than 12 miles from the base-line by which the territorial sea is measured. This zone is to protect the state's own territory from damage which might otherwise result from activities taking place in the zone. As long as this zone does not exceed 12 miles there is unlikely to be much dispute. More controversial, though, is the proposal for a zone extending to 100 or 200 miles (as Canada did in the Arctic,) allowing for measures against foreign vessels in this area which is regarded as high seas by most nations. This is unsatisfactory for it will inevitably lead to jurisdictional disputes. Furthermore it is in this area that the bulk of mineral exploitation activities take place,

this is the locus of the heaviest concentration of ocean shipping traffic, this is the area which receives the most concentrated effluents from land-based activities and it is in this area that the greatest potential for ecological and economic harm exists because of its adjacency to the coasts and also because it contains the bulk of commercially exploitable living resources of the ocean and of ocean life. It is this area, therefore, that requires the highest standard of regulation for which international agreement and jurisdiction is the only effective method. Coastal states cannot regulate pollution emanating from surrounding states. Ships cannot be expected to fulfill the varying requirements of all the different states. Freedom of the seas would be substantially impaired which would only worsen relations between states, leading to abuse and discrimination.[36]

It is true that the above reasoning should apply to the 12-mile zone as well, if not with more force. However, some compromises must be reached. Although international regulation would be the most effective way of dealing with the problem, until sufficient international standards are in force coastal states cannot be expected to leave their coastal lines almost wholly unprotected.

3. THE 1969 INTERNATIONAL CONVENTION ON CIVIL LIABILITY FOR OIL POLLUTION DAMAGE

The impetus following the concern generated by the Torrey Canyon disaster was responsible for the establishment by the Council of IMCO of a new Legal Committee.[37(A)] This Committee was immediately charged with several legal issues among which one of the most challenging was concerning all questions relating to the nature (whether absolute or not), extent and amount of liability of the owner or operator of a ship or the owner of the cargo (jointly or severally) for damage caused to third parties by accidents suffered by the ship involving the discharge of persistent oils or other noxious or hazardous substances and in particular whether it would not be advisable:-

(a) to make some form of insurance of the liability compulsory;

(b) to make arrangements to enable governments and injured parties to be compensated for the damage due to the casualty and the costs incurred in combating pollution of the sea and cleaning polluted property.

The International Legal Conference on Marine Pollution Damage was convened by the Assembly of IMCO as the culmination of the first part of the work arising from this mandate.

The Assembly and Council accepted the offer of premises and facilities by the Government of Belgium in the Palais des Congrès in Brussels, where the Conference was held for a period of three weeks from 10 to 29 November 1969. The result was the International Convention on Civil Liability for Oil Pollution Damage discussed hereafter.[37 (B)]

3.1 Jurisdiction

3.1.1. Territorial Jursidiction of C L C

Article II defines the geographical scope of the Convention: "This Convention shall apply exclusively to pollution damage caused on the territory including the territorial sea of a contracting state and to preventive measures taken to prevent or minimize such damage." It is quite clear that the nationality, domicile or residence of the defendant is irrelevant, the sole criterion being one of territory. Unfortunately, the description of territorial jurisdiction in the C.L.C. text is sufficiently ambiguous to suggest more questions than it settles.[38] The Convention does not establish its own measure of the breadth of a nation's territorial sea, leaving the door open to many potential problem areas with regard to the jurisdictional scope of the C.L.C. The universal lack of uniformity concerning the extent of the territorial sea is a well recognized international

problem.[39] The gravity of this problem and the difficulities its solution involves were well demonstrated at the 1958 and 1960 Geneva Conferences on the Law of the Sea.[40] Both Conferences failed in their attempts to satisfy the need for a uniform limit of the extent of the territorial sea. On the first occasion, the majority necessary for ratification was lacking, while on the second, the strong opposition of both Communist and Arab states was fatal to an agreement. The concern that serious diplomatic problems of dramatic proportions can arise from implementation of a treaty applying to so diversely defined a jurisdiction is well founded.[41] Professor Black has put forward the idea that "the enjoyment of exclusive and extended offshore rights for one purpose encourages a state to attempt to acquire territorial jurisdiction for all purposes, resulting in jeopardy to other states' regional interests and freedom of the seas". This position, which summarized the view of the United States Department of State,[42] is not, however, immune from criticism.

When Professor Black says that if the United States recognizes extended territorial limits of other states with regard to the C.L.C., it may later be forced to concede greater territorial mileage in connection with other areas of international significance,[43] he seems to overlook the urgent and imperative necessity of solving a specific prob-

lem with a specific set of regulations, irrespective of the indirect effect that this set of regulations may also have as precedents .

Although it is true that national sovereignty apparently has combined with national self-interest to impede any realistic agreement on the important question of uniform delineation of territorial sea,[44] it is also true that this problem is too important to be left unsolved. The establishment of what can be defined as "pollution zones", where all member states can exercise territorial jurisdiction exclusively for pollution "control" purposes, may be more acceptable to the international community by avoiding the controversial definition of "territoria sea."

Article II does create a "benefit" even in favour of non-contracting states or their nationals in cases where reasonable preventive measures are taken on the high seas or on the territory of contracting or non-contracting states in order to prevent or minimize pollution damages to a contracting state, irrespective of who implemented these measures.

Reasonable preventive measures taken to prevent contamination of off-shore installations are excluded by Article III, irrespective of where such measures are taken, because such installations cannot qualify as being part of the territory of a contracting state.

The Convention clearly applies not only to territorial seas but also to the terra firma of a contracting state.[45] It should be noted that because the C.L.C. defines "pollution damage" rather than "incident" in terms of location within

the territory or territorial sea of a contracting state, the owner of a polluting vessel could be liable for pollution damage to the territory whether the incident occurred within the territorial sea, in the contiguous zone or even on the high seas.[46]

3.1.2. Subject Matter Jurisdiction

3.1.2.1 Damages Recoverable

Article I, paragraph 6 defines pollution damage as:

> "loss or damage caused outside the ship carrying oil by contamination resulting from the escape or discharge of oil from the ship, wherever such escape or discharge may occur, and includes the cost of preventive measures and further loss or damage caused by preventive measures."

It is submitted that the ambiguity of the definition of pollution damage is one of the weaknesses of the C.L.C. because conceivably a defendant could argue that his discharge did not cause any "damage". Also, it would have been better to predicate liability on more specific "clean-up costs" for discharge or escape of oil.

The vagueness of the term "damage" and the wording of Article I itself may allow a shipowner to assert that an oil spill did not cause "pollution damage" as defined in Article I(6) or to assert that the spill would not have caused "pollution damage" and, therefore, government clean-up efforts did not constitute a "preventive measure" because they were not reasonable.[47]

Although as Abshire[48] recognizes, "it seems very unlikely...that such an allegation would be made in any case where the government has found it necessary to engage in clean-up activities, even if no other damage occurred"[49] a clear wording and definition of the term "damage" would at least achieve the result of preventing groundless and expensive litigation.[50]

This problem, however, is not as easy to solve as it appears at first sight. Civil liability in fact comes into existence only if the plaintiff suffers damage. It would be highly artificial to have civil liability vest on a certain act by the defendant if this act does not produce any damage. It would be, therefore, preferable to widen the definition of damage in order to encompass clean-up activities where there is a threat of an oil spill but a spill does not subsequently occur.

3.1.2.2. Remoteness of Damage

Article III (1) places all liability on the shipowner only for "pollution damage". The definition in Article I (6) contains three separate elements:

1. loss or damage by contamination;
2. costs of preventive measures;
3. further loss or damage caused by preventive measures.

The alternative basis of the definition, i.e. damage or preventive measures, seems to indicate that a government of a state which suffered no actual pollution damage after a timely change of wind direction sends a slick across a channel to a neighboring state, but which had deployed substantial preventive measures while its coast appeared threatened, could sue in its own courts. This would be true even though the measures employed were purely defensive in nature in that they fended off the approaching slick and did nothing to remove any volume of oil or reduce eventual exposure to the neighboring state.[51]

3.1.2.2.1. Loss or Damage by Contamination

The damage in order to be recoverable under the convention must be caused by contamination. Two important claims are, therefore, excluded: (i) damages caused by the oil subsequently igniting, or exploding and (ii) the claim of a shipowner whose ship has had to take action to avoid oil, whether or not ignited, which has been discharged by another ship.

The Draft Articles specifically included the former damages. It was thought that no difference in result should occur if a ship explodes or catches fire, and, as a consequence, oil escapes and causes damage by contamination or if the damages are caused by the oil subsequently

igniting or exploding. It was felt to be particularly unjust, especially with regard to those private defendants left without the advantages of the C.L.C. and, consequently, without benefit from the Fund Convention, to leave this last kind of damage to the lex fori.

As will be seen in Chapter 5 this issue has been recently debated by the Legal Committee of IMCO but no change has resulted heretofore.

It can be safely said that personal injury, if caused by unignited oil, is recoverable under the C.L.C. because it is possible to qualify this damage as caused by contamination. The wording of Article III (1)[52] clearly indicates that more than just physical damages caused by contamination is recoverable. However, the word "loss" remains undefined in the Convention. The burden of interpretation is left to the lex fori.

3.1.2.2.2. Cost of Preventive Measures

Article I (7) defines preventive measures as "any reasonable measures taken by any person after an incident has occurred to prevent or minimize pollution damage."

The first requirement of this definition is that the preventive measures must be reasonable. This is an important safeguard for the shipowner especially in the light of Article II because he will be answerable for the cost of preventive

measures but only if there is reasonable ground to believe that these measures were necessary to avoid or minimize damages in the territorial waters or territory of the polluted state.[53]

A problem could arise with measures reasonable in their essence but unreasonable in quantitative terms, i.e. when too much detergent is employed in an operation. Again the application of the "reasonable measures" test would render the expenses irrecoverable.

The second requirement in the defintion of Article I (7) i.e. that preventive measures are only those taken "after an incident has occurred" seems to give rise to a logical contradiction. The C.L.C. definition of incident[54] is "that occurrence or series of occurrences that give rise to oil pollution damage", and we have seen that pollution damage means "loss or damage....resulting from the escape or discharge of oil from the ship".[55] It is, therefore an inescapable conclusion that only measures taken after oil spills from the ship are recoverable under the Convention.[56]

The C LC's neglect of preventive action is understandable only if this convention were meant to be read together with the 1969 International Convention Relating to Intervention on the High Seas in Cases of Oil Pollution Casualties[57] in which a contracting state is authorized to take "any action" necessary to prevent or minimize pollution

damage resulting from a maritime disaster. However, a dangerous gap may arise if any state were to ratify only the Liability Convention and not the Intervention Convention. It would have been certainly better to give the term "preventive measures" its natural and logical meaning.

3.1.2.2.3. Further Loss or Damage Caused By Preventive Measures

Due to the high toxicity of dispersants, it is quite conceivable that the remedial activity could itself cause damage. As we have seen above, the Convention, at Article I (6), includes such "derivative losses" under pollution damage but without further qualification. This physical damage, in order to be recoverable, does not need to be caused by contamination, but merely by preventive measures. It would appear that a wider interpretation is here to be placed on the word "loss" than on the first limb of the definition of pollution damage.[58]

3.1.2.3. Definition of Ship

Article I(1) defines ship as "any sea-going vessel and any seaborne craft of any type whatsoever actually carrying oil in bulk as cargo". Article XI(1) excludes government war ships and government ships in non-commercial service. The above definition clearly outlines the restricted nature

of the problem dealt with by the Convention.

The Convention excludes coverage of pollution damage caused by ships not carrying oil in bulk i.e. ships carrying oil only in the form of slops. Although the "hazard generated by this contingency is not nearly so great as that of oil tanker disasters since the volume of oil not in bulk is far less",[59] it is submitted that its exclusion is one of the weaknesses of this Convention.[60] These kinds of incidents are left totally unregulated as far as civil liability is concerned because the 1954 Convention on Prevention of Pollution by Oil merely assesses penalties for the discharge of deballast and bilge waters and leaves parties responsible for clean-up without civil remedies. Article III (1) prevents a possible conflict of interpretation by including the escape of any oil from a combination carrier partly laden with bulk oil cargo and partly with dry cargo.

The definition of ship clearly excludes lake and river vessels irrespective of the fact that they carry "bulk oil charges". Drilling barges and semi-submersible, fixed or floating platforms, semi-submersible or submerged oil storage installations - in short any offshore installations and pipelines of any kind are all excluded.

As Abecassis rightly observes "the C.L.C. is almost exclusively a tanker convention; the only dry cargo vessels covered by it being those few carrying oil in their deep tanks,

for instance for places too out-of-the way to merit a special tanker visit." [61]

The combined effect of Articles III (1) and I (1) is quite curious: a tanker on a ballast voyage, even though she carries bunkers and slops is not covered by the Convention whereas a tanker carrying oil in bulk as cargo is covered even if the oil which actually escapes and causes damage is bunker oil.[62] The very logic of this anomaly is hard to explain and justify.

A last interesting problem can arise in relation to Article III (1) providing that oil shall have "escaped or been discharged from the ship". One might wonder whether a pipe connecting a tanker either to a terminal, to another ship, or to a single buoy mooring, is part of the ship so that the Convention will apply in case of a spill due to the break of such a pipe. No clear answer can be given and probably a more precise definition of ship may be necessary if the intention were to comprise such a casualty. It seems however, unlikely that a court would hold the pipe to be part of the ship especially where there is no identity in the ownership of the ship and the pipe.

3.1.2.4. Definition of Oil

The C.L.C. defines oil as "any persistent oil such as

crude oil, fuel oil, heavy diesel oil, lubricating oil and whale oil, whether carried on board a ship as cargo or in the bunkers of such a ship". It is clear that the criteria that inspired the draftsmen was the difficulty of oil removal. This explains why gasoline and kerosene, for instance, do not fall within this category even if they can cause serious hazards to the environment. The soundness of these criteria is doubtful and will be analyzed later in this work.[63] Furthermore, the definition itself leaves some problems unsolved because the key word "persistent" is nowhere defined in the Convention and it is not clear whether slop and bilge oils are included in the definition of oil given in Article I(5).

Professor Abecassis points out that "the preamble to C.L.C. twice refers to 'pollution', a phrase usually taken to import an element of harm" and continues by observing that "few, if any, straight-chain paraffin or other animal or vegetable oils leave a residue which can be regarded as harmful.[64]

It is submitted that the alteration in the environmental balance rather than the element of "harm" should be the factor to take into consideration. In other words, the latter elements may, not must, be contained in the former.[65] Abecassis draws the conclusion that "'persistent' should be limited to hydrocarbon mineral oils and whale oil. The hydrocarbon mineral

oil to be, covered apart from those listed, may be scientifically taken to be those which, after evaporation has ceased, leave a harmful residue".[66] He also disagrees with the suggestion of Doud[67] that "oil be taken to be persistent if it has actually caused damage" because in his opinion it suffers from the defect of being applicable only ex post facto. Abecassis adds that it does not solve the question of whether a plaintiff can recover if his clean-up has been so successful that no damage (as opposed to loss) has been suffered.[68] It is submitted that this critique lacks legal and substantive consistency because, in such a case, according to the combined effect of Articles III(1) and I(6), the "expense" would be qualified as the "cost of preventive measures". The fact that no damage has in fact occurred would be irrelevant and the plaintiff would be able to recover.

As far as slop and bilge oil are concerned it is not altogether clear whether they are included in the definition of oil. Although slop is carried only in laden tankers there seems to be no sound reason for excluding slop oil or bilge oil from the C.L.C., and there are good reasons for including them.[69] It seems arbitrary to include the bunkers of laden tankers but to exclude slops and bilges carried in laden tankers.

It has been suggested that the clause should be taken

illustratively, so that oil is not limited to oil carried as cargo and as bunkers.[70] Unfortunately, to leave to the lex fori the burden of interpreting this clause increases the risk of contradictory interpretations.

3.1.2.5. Definition of Incident

The Convention comes into play[71] only in case the oil "has escaped or has been discharged from the ship as a result of the incident."[72]

Article I(8) defines incident as being "....any occurrence, or series of occurrences, having the same origin, which causes pollution damage." It is clear, therefore, that the plaintiff in order to place liability on the shipowner has to prove, to begin with, the existence of an identifiable event causing damage.[73] This is a conditio sine qua non because it is beyond the scope of the C.L.C. to indemnify victims for damage caused by unidentified spills. In such a case, as it will be seen later in chapter 4 , the international revolving fund set up by the Fund Convention would offer relief.

3.1.2.6. Definition of State of the Ship's Registry

The last definition which deserves particular attention is that of "state of the ship's registry".[74] Article I(4) defines it as the state in which the ship is registered or,

in case of an unregistered ship, the state whose flag the ship is flying. Professor Black rightly observes that "as a result, important questions of treaty enforcement and execution of judgments, depend on the cooperation of the flag state" and that "the very success of the treaty depends on the determination of its contracting members and the receptiveness of non-signatories".[75] This is particularly true in light of the phenomenon of the "flag of convenience" and in consequence many loopholes appear that could enable owners to escape liability.[76]

3.1.3. Personal Jurisdiction

Article I(2) defines a person as "any individual or partnership or any public or private body, whether corporate or not", including a state or any of its constituent subdivisions. The definition is very broad. It is certainly a merit of the Convention that it gives *locus standi* to a very wide range of parties on condition, of course, that they establish pollution damage.

Article I(3) defines "owner" who by virtue of Article III(1) is liable for pollution damage, as "...the person or persons registered as the owner of the ship or, in the absence of registration, the person or persons owning the ship." However, in the case of a ship owned by a state and operated by a company which in that state is registered

as the ship's operator, "owner" shall mean such company.

It is clear from the reading of this article that the draftsmen decided to place no liability at all either upon the salvor of the ship whose oil has escaped or upon the owner's servant or agent. Article III(4) reinforces this position by providing that:

> "no claim for compensation damage shall be made against the owner otherwise than in accordance with this Convention. No claim for pollution damage under this Convention or otherwise may be made against the servants or agents of the owner".

This article is one of the key articles of the Convention because it compels a victim of pollution damage to rely exclusively on the Convention. On the other hand, if for any reason the Convention does not apply to the facts, the victim will be free to avail himself of the remedy provided for by the lex fori. What should be emphazised is that assuming that the damage suffered is pollution within the meaning of the Convention, the plaintiff does not have any choice: if the Convention exempts the owner from liability any other remedies which, but for the Convention, would have been available to him in respect of his pollution damage against the owner, are denied. [77]

Article III(5) preserves all the rights and recourses the shipowner has vis-a-vis third parties. Abecassis[78] gives the example of "any indemnity (the shipowner) may have ne-

gotiated with a bareboat charterer, or any right of action he may have against the owner of a ship which has collided with his".

As we have seen above, the second part of Article III(4) excludes the possibility of bringing an action against the servant or the agents of the shipowner. What is rather surprising is that "there are no similar provisions relating to salvors or bareboat charterers, or to others in control of the ship, who might under the law of a particular state be liable for pollution damage". [79]

3.1.3.1. The Position of Charterers

There are three types of charterers:

a) The Voyage Charter

This kind of charterer leases the ship for one single voyage and his contract with the owner is no more than a contract of carriage. The shipowner retains control and possession of the vessel, which will be navigated and managed by him. [80] The master and crew will continue to be under the owner's employment. [81]

b) The Time Charter

The ship is leased for a fixed time and for as many voyages as can be completed within the charter period. The ship will continue to be subject to the owner's management

and possession.[82]

c) The Bareboat or Demise Charter

This charterer takes full responsibility for the management of the ship and her operations. He becomes, in effect the owner pro hoc vice.[83] The master and crew will be the charterer's employees.

The draftsmen of the C.L.C. decided, after some hesitation to hold the shipowner solely responsible even in case of a bareboat or a demise charter. The opposite solution would have been preferable.[84] The U.S.S.R. delegation explained why:

> "Firstly, the burden of liability must induce a person to take all measures for prevention of pollution and for minimizing a loss when pollution has occurred. Such measures can be taken only by the operator as the person exercising control of operation and management of the ship. On the other hand the owner of the ship in many cases (when the ship is under demise charter etc.) has no control over the operation and management of the ship.
>
> Secondly, conditions of insurance of liability for pollution damage will depend on circumstances arising during the operation of the ship (voyage, destination, nature of goods carried, etc.). The owner who does not operate the ship will not be in a position to provide proper insurance of liability."[85]

In any event, what is even more surprising is the fact that on one hand the salvor and the bareboat charterers of a vessel are not considered as owners or operators (and therefore are not held liable for any violation of the Convention), and on the other hand, they are not "protected" as the servants and the agents of the owner by the second part of Article III(4).[86]

The result is that where the party in control of the ship can be sued under the lex fori,[87] the plaintiff will have the possibility of bringing two actions. The first one against the owner as provided by Article III of the C.L.C. and the second against the salvor or the bareboat charterer under the lex fori.

It is therefore quite apporpriate to observe that "the attempt to channel liability for pollution damage to the owner has failed at least in part, and that the Convention's silence on the question of bareboat charterers and others is a casus omissus".[88] It would have been preferable to provide that where neither the owner nor the bareboat charterer are guilty of actual fault or privity and the owner has instituted limitation proceedings and has paid into court the limit of his liability, the bareboat charterer is granted immunity.[89]

3.1.3.2. The Position of the Salvor

Salvors are summoned by a shipowner or chartered acting as his agent, immediately following an incident, regardless of whether or not oil has actually been spilled. The salvors will then have more or less exclusive control, as determined by the contract, over the whole of the salvaging operation. Unless the salvor can be proven to be at fault, the ship or cargo owner is responsible for the entire operation, including

any damages caused to third parties. Thus, the main responsibility for oil pollution damage rests on the owners of ship and cargo. It is possible, however, that the salvor also be responsible in part for such damage, creating or aggravating it. Salvors cannot avoid this risk in their operations. Despite technical progress, the element of human failure is ever present.

The position, the liability and the protection accorded to the salvor in his hazardous undertakings, differ somewhat to that of the owner. The salvor's liability, in practice, is small. This in spite of, but also because of his being excluded from the relevant organizations, C.L.C., TOVALOP, and CRISTAL; they accord the salvor no protection nor, however, any liability, for the victim is generally assured of receiving reparation from other sources.

The salvor certainly does not come under the definition of "ship" in C.L.C. or TOVALOP.[90] Although he may fit into the category of preventive measures of the C.L.C., the latter limits itself exclusively to the protection and liability of the shipowner. Thus, the owner under C.L.C. is strictly and absolutely responsible vis-a-vis third parties.[91] This is so even if the salvor is at fault. If, for some reason, the victim cannot recover from the shipowner (he is exonerated by a provision of C.L.C., he is unable to fulfill his financial obligations, or the damage

exceeds the limit of his responsibility) the victim will then proceed directly to the International Fund to obtain his reparation, provided this latter is not exonerated.

If the claimant is a state, he may file his complaint with TOVALOP where there is a presumption of liability against the owner. This presumption does not apply to the salvor. If the shipowner succeeds in his defense against the state, the latter may proceed to CRISTAL[92] where strict liability is the criterion for reparation, the sole condition being that the shipowner be a member of TOVALOP and the cargo owner a member of CRISTAL. Thus, only the existence of damages and the identity of the ship need be proven, not a difficult task. However, CRISTAL is not a substitute for the common law, the victim must chose between the two. Furthermore, he is only second in line for obtaining damages, coming after the shipowner.

Also, to obtain damages through CRISTAL, the victim must have exhausted all other remedies. Thus, if there is a possible action against the salvor at common law, it must be taken first. It is only in connection with CRISTAL that it would be advantageous for a victim to pursue the salvor.

It is only at common law that a salvor can be held liable. The owner, strictly liable, is reserved the right to institute actions against third parties. Causing pollution being outside the contract, the action lies in tort. The International

Fund may be subrogated in the rights of those whom it has benefitted. The victim, as a last resort, can take such action. In order to succeed in a tort action at common law, the plaintiff must prove damage, fault or negligence as well as a proximate causation link; not an easy task. As M. Dubois[93] points out:

> "Indeed, save under exceptional circumstances where the faulty intervention of the salvor would clearly be the sole and direct cause of the escape of oil which produced the damage, it will be practically impossible to distinguish, in a polluting oil slick, between the quantities of oil escaped from the ship under the effect of the incident or of natural elements and the quantities which, in a second surge, may be attributable to the negligent action of the salvor".

The common law would thus seem to be an indirect form of protection for the salvor. An apparent drawback at common law is the lack of limit to the amount of damages a defendant would have to pay were the plaintiff to succeed in his action. The salvor, however, would be with every likelihood sharing responsibility with the shipowner. It is highly improbable, therefore, that the sum be unreasonable.

Salvors nevertheless sought to obtain a certain measure of formal protection for the risks of causing damage. First, the P & I Clubs and the salvors devised various contractual formulas, "P & I Pollution Indenmity Clause (P.I.O.P.I.C.), being one of them. This plan being abandoned, the P&I Clubs and the "International Salvage Union" drew up another insurance

scheme in 1975. Salvors are allowed up to $20 million per salvage craft in civil liability. Where more than three crafts are used in one incident there is a limit of $40 million. Where the salvors are working under a contract, $20 million is allotted for each incident with a deductible of $50,000.

Salvors are indispensable in controlling oil pollution damage. Despite technical expertise there is always an element of human failure creating for the salvor risks of aggravating the damage they are attempting to curb. They must be assured of sufficient protection for taking these risks. As the present organizations, C.L.C., TOVALOP, CRISTAL, have excluded them, ordinary insurance schemes are their only resort at present. It has been suggested that an organization comparable to C.L.C. be set up for them. However, as Dubois suggests "the salvor would then have to give up - in exchange for financial limitation of his liability which, in practice, scarcely makes sense - the often comfortable ground of the common law criterion of fault liability".[94] His solution, on the other hand, would be in the form of a "Code of Salvage Operations for Oil Tankers", an operating manual drawn up by the combined expertise of shipowners and salvors together. The success of similar procedural codes of the Oil Companies' International Marine Forum (OCIMF) and The International

Chamber of Shipping (ICS) indicates this as being a worthwhile project. Furthermore such a professional organization would probably produce a more speedy and efficient result than IMCO whose prospective "Manual on Oil Pollution", with its section on salvors, might take too long to be put into force.

3.1.3.3. The Position of State-Owned Vessels

As has been seen above, Article XI(1) excludes the applicability of the C.L.C. to warships or other ships owned or operated by a state and used only on Government non-commercial service. This kind of exclusion even if regretable is not surprising being a constant in all international conventions.

Article XI(2) specifies that:

> "with respect to ships owned by a contracting state and used for commercial purposes, each state shall be subject to suit in the jurisdictions set forth in Article IX and shall waive all defenses based on its status as a sovereign state".

This second provision of Article XI provoked the furious reaction of the U.S.S.R. and its satellite states. The U.S.S.R. dissent was based on the following reasons:

a) the article infringes the public international law doctrine of soverieon immunity;

b) the article is of no practical value because any owner of a ship[95] in order to limit his liability under the Convention has to establish a fund, as

> required by Article V, in the Court...of one of the states mentioned in Article IX of the Convention. In such a case, a Court of that state will be fully competent to consider all the aspects of liability, calculation of damage, as well as division and distribution of the fund.[96]

It is doubtful whether the principle of sovereign immunity can be invoked in such a case[97] and, in any event, to accept it would place the U.S.S.R. ships in privileged position. The fact that the U.S.S.R. would establish a fund in order to limit its liability does not change the substantial problem, to wit that, by invoking the sovereign immunity doctrine, it will be able to avoid a trial for lack of jurisdiction of an otherwise competent court. The real reason for this position might be that the U.S.S.R. is seeking to reserve a right to escape arrest of a ship on the ground of sovereign immunity and to settle all claims out of court purely by negotiation .[98]

Abecassis suggests that "the best conclusion to be drawn, at present, is that of an action in rem for oil pollution damages. The plea would be refused if the ship were a pure trading vessel; in an action in personam, the matter is more open to doubt, but the balance of probabilities is that the same result would follow".[99]

3.1.4. Jurisdiction and Claims' Procedure

3.1.4.1. Competent Courts

Article IX states that only the judiciary of the state where the pollution damage has occurred will have the necessary authority to adjudicate the claim. Paragraph I states more precisely that "where an incident has caused pollution damage in the territory, including the territorial sea of one or more contracting states, or preventive measures have been taken to prevent or minimize pollution damage in such territory including the territorial sea, action for compensation may be brought in the courts of any such contracting state or states...", and paragraph II, each contracting state "shall ensure that its Courts possess the necessary jurisdiction to entertain such actions for compensation".

The provision of Article IX(1) eliminates the administrative weakness of the 1954 Convention on Prevention of Pollution of the Sea by Oil that provides for punishment of violators not by the discovering nation but by the nation registering the ship. However, the literal interpretation of this Article seems to go even further than the intention of the draftsmen and at least at first sight, it would appear that any action against any possible defendant (i.e. shipowner, bareboat or demise charterer) is barred in any forum except in the courts

of any contracting state or states where the pollution damage has occured. This interpretation, even if justified by the literal reading of Article IX, is illogical. There is, in fact, no reason to bar the action against the bareboat charterer or the salvor in a contracting state other than the one in which damage has been suffered. It must be remembered that the Convention channels liability exclusively on the shipowner and that neither the bareboat nor the demise charterer are considered for the purpose of allocating liability. Their liability is not regulated by the Convention: why then deny a plaintiff the right to bring an action in the country where the bareboat charterer responsible for the pollution damage is resident? It has been suggested that "it appears reasonable to interpret the phrase 'actions for compensation' as meaning 'actions for compensation under this Convention'".[100] An amendment to the Text of Article IX to the effect of making this "reasonable interpretation" the only possible interpretation would be however highly advisable.

The Convention has left unsolved a more delicate problem whose far reaching implications have been made evident by the Amoco Cadiz case currently litigated in the United States.[101] Whereas there seems to be little doubt that the court of a contracting state would dismiss an action brought against the shipowner if the pollution damage occurred in another contracting

state, it is not certain what would happen to the same action if it were brought in the court of a non-contracting state where the shipowner is resident. As mentioned above, the Amoco Cadiz case is illustrative of this problem.

This litigation consists of several actions, now transferred to the United States District Court, Northern District of Illinois. On March 16, 1978, the tanker Amoco Cadiz, while under tow after having lost both an anchor and its hydraulic steering mechanism, went aground on rocks off the northwest coast of France. In rough water, the disabled ship broke apart on the rocks and disgorged its cargo of approximately 220,000 tons of crude oil, causing extensive environmental and economic loss. All actions in this litigation relate to this sea disaster.

France is a party to the C.L.C. whereas the U.S.A. is not. Taking advantage of this fact France is trying to recover in excess of $300 million, well above the limits provided by the Convention.

Standard Oil Company (Indiana), Amoco Transport Company, (herein "Transport"), the Liberian corporation that owned the Amoco Cadiz, Amoco International Oil Company, a Standard subsidiary that is engaged in international oil operations and is the parent of Transport and Claude Phillips, the director of International's marine operations claimed that:

> "pursuant to the International Convention on Civil Liability for Oil Pollution Damage, a multilateral treaty to which France is a signatory, actions for damages from marine oil pollution may be brought only in the courts of countries that either suffered pollution damage or took steps to prevent the damage". [102]

Accordingly, the Amoco parties asked the Illinois court to dismiss any claims that may be filed against them by oil pollution claimants and to direct those claimants to file their claims in the Tribunal of Brest, France, a French court in which Transport has already deposited approximately $16,750,000 for payment of claims.

However, there seems to be no provision under Illinois or (U.S.A.) Federal law to prevent France from suing in the United States. As of this moment, this jurisdictional problem has not been debated by the District Court of Illinois but, it is considered highly unlikely that the Court will dismiss on this ground.

The conference was powerless vis-a-vis the occurence of such a situation. Only a "universal" ratification of the C.L.C. would be able to cure it.

3.1.4.2. Prescription

Article VIII states that:

> "rights of compensation under this Convention shall be extinguished unless an action is brought thereunder within three years from the date when the damage occurred. However, in no case, shall an action be brought after six years from date of the incident

which caused the damage. Where this incident consists of a series of occurrences, the six years period shall run from the date of the first occurrence".

This latter provision that the subsequent escape of oil from a tanker which had sunk or run aground has, however, a potential serious drawback. Professor Swan[103] rightly observes that this lenghty limitations period could, in conjunction with the constitution of a limitation fund, result in substantial delay in the payment of claims. This result is inconsistent with the choice of absolute liability which, among other things, is a means of expediting compensation by eliminating the need for protracted investigation and litigation over the issue of fault. It is hoped that the court could declare partial, prorated distributions in much the same way liquidators and administrators make preliminary distributions which are often justified by such things as priorities among claimants, marshalling of assets, and future replenishment of the fund, none of which could apply to the pollution damage situation. It is possible that the administering court would refuse distribution until the right to present claims had terminated.

3.1.4.3. Recognition and Enforcement of Judgments

Article X states that:

"(1) Any judgment given by a Court with jurisdiction in accordance with Article IX which is enforceable

in the state of origin where it is no longer subject to ordinary forms of review, shall be recognized in any contracting state except:

(a) Where the judgment was obtained by fraud;

(b) Where the defendant was not given reasonable notice and a fair opportunity to present his case;

(c) A judgment recognized under paragraph 1 of this Article shall be enforceable in each contracting state as soon as the formalities required in that state have been compiled with.

The formalities shall not permit the merits of the case to be reopened".

An interesting problem arises with the notice that must be given to the defendant. The word "reasonable" is not defined by the Convention either in terms of time or in terms of who might be a sufficient agent for receipt of service. Professor Swan says that:

> "it seems clear beyond paradventure that personal, in-state service of process is not required, but it is equally clear that the defendant is entitled to a fair opportunity to contest the claim. By failing to require an informal notice of claim within a reasonably prompt time after the claimant has identified the shipowner and by having a generous statute of limitation, the Convention would seem to deprive the owner of an opportunity of prompt investigation".[104]

It is doubtful whether the draftsmen really intended to deprive the owner of such an opportunity.

From a procedural point of view it would be therefore preferable to amend Article X by requiring service to the shipowner of an informal notice from the discovery of his identity.

3.2 The Rule of Liability and its Limitations

3.2.1. The Nature of Liability And On Whom The Liability May Be Imposed

There was considerable discussion at the Brussels Conference on whether the liability for pollution damage should be strict or based on fault or negligence. There was even more debate on the question of who should shoulder the liability: the owner of the ship, the owner of the cargo or both.

Although at the Conference the two issues, to wit the nature of liability and on whom the liability may be imposed, were kept separate, they were discussed together by all the delegations. The same approach will be used in this chapter.

As far as the basis of liability is concerned the authors of the I.M.C.O. draft ultimately submitted to the Conference two alternatives:[105] "alternative A" was based on the traditional concept of fault while "alternative B" was based on the more controversial concept of risk.

More specifically, "alternative A" established the liability of the shipowner for any pollution damage caused by escape of oil from his ship, unless he proves that the damage was caused by no fault either in the operation, navigation nor in the management of the ship. The owner is, in any case, held liable for pollution damage caused by oil deliberately discharged from his ship, whether or not he can prove absence of fault, except when oil is deliberately discharged

for the purpose of saving life at sea.

One might characterize this approach as one of fault liability but with a rebuttable presumption of fault. The shipowner, that is presumed to be at fault, must therefore prove the contrary if he wants to divest himself from liability.

The second alternative proposed by the I.M.C.O. draftsmen, "alternative B", inspired by France and Ireland and supported among other countries by the United States[106] and Germany established a regime of "vicarious liability" of the shipowner. He is held responsible for all pollution damages provoked by discharge or escape of oil from his ship. The draft however gave to the shipowner several defenses later embodied in Article III paragraph 2 and 3. It is, therefore, more correct in this situation to speak of "strict" rather than "absolute" liability since the owner may be absolved by the intervention of certain extraordinary causes.

Prior to commencing a detailed analysis, a general scheme outlining the problems dealt with by the conference should be provided. The Conference was asked to decide firstly the basis of liability with the choice between (a) strict liability and (b) liability based on fault with the burden of proof shifted to the shipowner, and secondly, whether the imposition of liability should be (a) on the cargo or (b) on the ship.

In this latter hypotheses the Conference had further to decide whether to channel liability on the shipowner or on the operator of the ship.

The question of which participants in the ocean carriage venture should be held liable is uniquely complex and delicate but crucial. Professor Swan gives an excellent perspective of the magnitude of the problems when he points out that:

> "(O)wning companies (often drastically under capitalized) usually finance their vessels by assigning as collateral charter revenues generated by long-term charters to the major oil companies. Thus, the de facto owners are the shippers (cargo owners) who retain operational control over the tankers for ten to fifteen years and whose 'charter hire' in effect, pays the mortgage. These arrangements can be even more complex in certain instances where the owning company bareboat (demise) charters the vessel to a second company which in turn may enter into an operating contract with a third company (often an affiliate of the owning company) for fueling, crewing, and victualing. Then the demise charterer time-charters the vessel to an oil company. To these practices, add the doctrine of pierce the corporate veil, frequent changes of ownership and registration of older vessels, the marine insurance concept of abandonment, and the practice of registering vessels through nominees in undeveloped countries, and the dimensions of the problem become evident".[107]

3.2.1.1. Strict Liability of the Cargo

It was quite clear from the outset of the Conference that the main difficulty was that the coastal states wanted strict liability whereas maritime states preferred liability based on fault. The growing worries of states with long coastlines were well synthesized by the position taken by

McGovern, the representative of Ireland.[108] He pointed out that if the Convention was to give adequate protection to the coastal states, there would have to be strict liability, and that could not be imposed on the ship, but would have to be imposed on one of the other interests involved. In the opinion of his country, from the point of view both of expedience and of principle, liability should be on the cargo. The reason for this choice should be found in the fact that it was the cargo which caused the damage and not the ship, as was clear from the Torrey Canyon case.[109]

The delegation which more exhaustively pleaded the cause of the supporters of the concept of strict liability was the French delegation. Mr. Douay[110] said that strict liability seemed to be the only way of ensuring optimum compensation for the victims by placing liability on the party causing the pollution. He maintained that the shipowner should still be considered the liable party in cases of pollution damage as set out in the I.M.C.O. draft.

It was true that the system finally decided upon had raised many difficulties. Certain delegations had therefore been led to devise a different system in which liability would lie with the cargo owner - considered to be the person most solvent since he had the backing of the oil industry. Pollution would be considered to be a risk inherent in the goods and not in their carriage.

In fact, since the risk derived from the nature of the goods and from the particular form of carriage used, the problem needed restating. Once the principal of strict liability was accepted, the party which would have to be considered liable was the party responsible for the goods during their transport on the high seas - i.e., the carrier, who was the only person who could prevent casualties and, should a casualty occur, whether or not due to a fault on his part, the only person who could prevent pollution from occurring. There were some who held that the person to be penalized should be the person who received the greatest profit from the goods carried - i.e., the cargo owner - but it had to be remembered that the cargo owner too could readily avert possible claims by legal devices, such as the establishment of subsidiary companies which would be the nominal importer of the oil and hence the bearer of the liability. If such companies became insolvent, the real owner of the cargo would still be immune from claims.

Consequently, for practical reasons connected both with maritime insurance and the specific nature of sea carriage of oil, the liable party should be the shipowner. Some of those in favor of cargo liability held that the system of shipowners' strict liability did not provide an adequate safeguard, since it covered the shipowner exclusively; but it was doubtful

whether any improvement would be provided by a supplementary third party system covering the goods, for it was by no means certain that insurers would be prepared to cover the purely maritime risks of sea carriage of oil or that they would be financially capable of doing so. Also, to place liability on the cargo would be bound to raise difficulties concerning the insurance certificates, particularly as regards their validity. The principle of strict liability attaching to the cargo owner, therefore, came up against the same difficulties as the principle of shipowners' liability and caused further insurance complications because the person taking out the insurance was not the person responsible for the thing insured.

The principle of cargo liability also ran counter to factors connected with the specific nature of sea carriage of oil, the cargo owner himself often being the shipper; also, the destination of oil was often uncertain at the start of a voyage, and in such Contracting States were safeguarded only if the cargo destination was in a Contracting State.

Shipowners' strict liability would be in accordance with the ordinary law applied to carriage and with ordinary maritime law, and would enable the Convention under consideration and the 1924 and 1957 Conventions[111] to be applied simultaneously in cases where pollution damage was accompanied by ordinary

damage. Operators' liability was recognized only for nuclear ships, where the operator could readily be indentified, and secondly where, in one incident, there was deliberate discharge as well as accidental spillage, since there would be difficulty with regard to the basis for apportioning liability between the shipper (who in existing legislation was considered liable for the spillage of bunker oil) and the cargo owner, who would be held liable for the accidental leakage of oil in carriage.

The French delegation therefore agreed with the United Kingdom that only the draft I.M.C.O. Articles should be discussed although maintaining that strict liability was the only possible basis for guaranteeing compensation for victims.

3.2.1.2. Strict Liability of the Ship

A similar position was taken by the German delegation which expressed its favor for a regime of strict liability. Mr. Herber[100] said that a risk run by third parties should be compensated by imposing on those carrying the goods, what in the opinion of his delegation, could only be strict liability. He further said that that was indeed, in most national laws, the practice in fields such as road and air transport or of dangerous industrial plant. Liability based on fault, even with reversal of proof, could not be regarded as a sufficient guarantee, particularly since the concept of fault was quite

likely to be interpreted in different ways by the Courts of contracting States and a uniform application of the Convention could not, therefore, be expected.

With regard to the imposition of liability, his delegation was unhesitatingly in favor of liability on the ship and, more specifically, on its operator. The element of "control"[113] of the operator on the cargo was emphasized. He was in a position to preclude or reduce to a minimum the risk arising out of the carriage of goods and moreover it was always easy to identify him or at least to identify the shipowner.[114]

3.2.1.3. Liability of the Ship Based on Fault

The United Kingdom support of fault liability, as was pointed out by Lord Devlin, had no idealogical basis.[115] Whereas Liberia was concerned with the fact that "the only acceptable idea was liability based on fault, a concept which had proved satisfactory for a long time in traditional maritime law", the U.K. delegation was by far more concerned with what can be described as the insurability problem.

The American Institute of Marine Underwriters indicated limits of insurability as follows:

(1) If the basis of liability is negligence (including the doctrine of reversal of burden of proof) the probable insurable limit available in the world market would

be in the area of $100 per gross registered ton or $10,000,000 for each accident or each vessel, whichever proves to be the lesser;

(2) if the doctrine of absolute liability were enforced, probable maximum world market would be in the area of $67 per gross registered ton or $5,000,000 for each accident of each vessel, again whichever amount is the lesser.

The brokers also felt that permitting a direct action against the insurer would negate any possibility of insurance of such vessels.[116]

British underwriters were even more drastic in their action by saying that they would not insure where there is submitted liability for negligence, where non-fault liabilities are "unrealistic" and there is an "unqualified right of direct action against the insurer".[117] The Civil Liability Convention seems to have deferred somewhat to these considerations in opting for lower liability limits and permitting a limited range of defenses against direct action brought against the insurer.

3.2.1.4. Joint Strict Liability on Ship and Cargo

The Canadian delegation firmly believed that because of the ultra-hazardous nature of the cargo the liability for damage should not depend upon fault. The Government of Canada submitted for consideration by the Conference an amendment[118] to the I.M.C.O. draft (alternative B) so as to create a

regime of joint strict liability on ship and cargo with first liability up to a fixed amount on ship and remaining liability on cargo. Canada considered that the owner and shipper should be collectively liable as the transport of oil is a joint venture between these two parties. Unfortunately, the Canadian proposal for joint and several liability was not a hard and fast one and was not fully and deeply discussed during the Conference. Ultimately only Ghana, Indonesia and Yugoslavia supported it.

3.2.1.5. Liability on the Shipowner or the Operator of the Ship

The balance of advantages as between owner and operator is a very fine one. So fine that the U.K. had been in favor of liability resting on the operator but had, during the Conference, come to the opposite conclusion.[119] The U.K. delegation had been particularly influenced by the mechanism of the Convention; if proceedings were taken against an owner who could later prove that he was not the operator, both time and money would have been wasted. Mr. Newman for the U.S.A.[120] pointed out that any liability on the operator would be incompatible with the envisaged scheme of compulsory insurance, since countries would have to continually issue and revoke insurance certificates as the terms of a charter changed.

Nevertheless, 24 delegations voted in favor of liability resting on the owner and only 13 for liability resting on the operator. It is submitted that the opposite result would have been desirable. Both Germany and Italy[121] criticized the United States' objection that it might not always be easy for third parties to find out who the operator was: that could be easily overcome by presuming a registered owner to be the operator unless the contrary was proven. That had been the Italian system for 25 years and it had proven to be quite satisfactory. The problem of registering operators was therefore beyond the scope and the interest of the Convention.

3.2.1.6. Absolute Liability

Almost no weight was given at the Conference to an hypothesis of absolute liability as solution for the problem of damages to coastlines caused by oil leakage or spillage from a modern supertanker. This is quite surprising because, at least prima facie, from the point of view of the victim, the most efficient system of protection would be one based on absolute liability. As a practical matter, in fact, it is virtually impossible to prove negligence on the part of the owners of the tanker and even a regime of strict liability similar to the one adopted by the Conference may, under certain circumstances, leave the damaged party underprotected.

From an economic point of view a theory of absolute liability might be acceptable. Today, more than ever before when damage to property is caused without fault, the oil industry is better able to insure against it than an innocent property owner. The profits of the oil industry and the maritime industry can better afford the burden than an owner of coastal property. Oil at a reasonable price is desirable, but it should be priced to bear all of its costs including the hidden costs of cleaning up pollution which may not be carried fortuitously by others.

With absolute liability, the settlement of disputes would be quicker, there would be less litigation and it would be less costly to arrive at a settlement. In addition, the imposition of absolute liability will encourage maritime care. If shipowners know that they must pay the bills for the errors of their builders and crews, they will be encouraged to take extra measures of care. That will benefit maritime commerce as well as property owners.[122]

A legal justification for establishing a regime of absolute liability was suggested by Sweden in the following terms:[123]

> "Oil pollution is not a typical maritime risk; it is one created by the vices of the product itself. An industrial plant involving risks of that kind would have an absolute liability. For that reason, liability for oil pollution should be absolute and should be borne by the oil industry itself."

If a regime of absolute liability were to be established, liability could be placed on the shipowner, the cargo owner or on both. Crude oil is not inherently dangerous and, therefore, it is not ultra-hazardous *in se*:[124] it is only the enormous quantity of oil that super tankers might carry on a single voyage that makes its transport an ultra-hazardous activity. The justification for holding the shipowner liable rests, therefore, on the fact that by transporting oil in huge quantities (even 1 million tons per voyage) he is carrying on an ultra-hazardous activity. On the other hand, it is the cargo, not the carrier, which actually causes the oil pollution damage. Therefore, the cargo owner might be held responsible because he owns the cargo of oil, oil in such an amount to make the cargo an ultra-hazardous commodity. Since the cargo would be primarily liable and the cargo owners would necessarily insure the liability, it is argued that this would act as an incentive for them to select the best ships and safest routes. The burden would fall directly on all consumers[125] of oil products where it properly belongs since it is this form of enterprise that has created the risk.

However, a difficulty is connected with the insurance and insurablility of the cargo because it often damages during the voyage and it would be impossible to police a requirement of compulsory insurance.

Underwriters, who play a key role in making any insurance plan work, prefer to insure the carrier rather than the shipper

(cargo owner) who is not always recognizable. The reasons are the following:

(a) The shipper (cargo owner) may be often identified as a well-known oil company but he may also be a totally different person sometimes not clearly identifiable as to his financial and legal status;

(b) more than one shipper (cargo owner) may be interested in the same shipment with different shares;

(c) the shipper (cargo owner) is not the forwarding agent.

If a regime of absolute liability should be established the best solution would be to hold both the shipowner and the cargo owner jointly liable. In order to avoid practical difficulties one solution might be to adopt a scheme similar to the one advocated by Canada,[125] i.e. first, liability up to a fixed amount on the ship and the remaining liability on the cargo. Another solution would be to apply the traditional concept of joint and several liability.

3.2.1.7. Strict Liability on the Shipowner

Once it was decided that the liability must be channeled to the ship, the thesis supporting a regime of vicarious liability without specific exceptions was not maintainable without breaking a cornerstone both of common and civil law. This regime would be, in fact, admissible only for personal injury[127] and not for property damage even if this damage is wide and persistent.

The opposition of the maritime countries was so strong that without the compromise suggested by the U.K. and developed by the Conference, the Convention would never have been ratified. As a matter of fact, the supporters of the theory of vicarious liability have obtained merely a nominal victory. With all the specific exceptions provided for in Article III it can be said that the principle of fault liability with reversed burden of proof has been accepted with the only exception of the fault of a third party. Only in this latter case is it possible to speak of vicarious liability of the shipowner who is barred from proving absence of fault.

According to one author[128] "it would seem to be most desirable to employ a system of liability which is compatible with both common law and civil law systems." Strict liability[129] is acceptable to common law lawyers trained in the doctrine of Ryland vs. Fletcher[130] (placing liability on the defendant who allows a dangerous substance to escape from his land[131]) and is familiar to the civil law lawyers trained in the doctrine of objective responsibility under the Napoleonic Code.[132]

3.2.2 Exemption From Liability

Four general exceptions that can absolve the shipowner from liability are found in Article III (2).

The first exception arises if the shipowner is able to prove that the damage "resulted from an act of war, hostilities,

civil war, insurrection..."[133] As it has been submitted by one writer[134] "this exemption evidences the C.L.C.'s hesitation to impose absolute liability, since it is likely that the owner would have no control in an incident generated by such activities".

The second exception exempts the owner in cases of natural phenomena of "exceptional, inevitable and irresistable character".[135]

Those familiar with maritime legislation will note the careful avoidance in this article of the familiar "act of God" wording. The C.L.C. omitted the act of God terminology for two reasons: (1) in the interest of wide ratification, since Communist countries and civil law nations have excised the term from their legal vocabularies and (2) in an attempt to define more closely what is meant by the exception in order to obtain a more uniform international interpretation. There seems to be, however, little divergence between the interpretation that might be given to the term "act of God" as opposed to the wording of Article III (2)(a) of the C.L.C.

Professor Abecassis,[136] on the contrary, shares the opinion of Lord Hawke[137] who places key importance on the adjective "irresistible" and feels that the exception is more limited than the familiar "act of God". He continues by saying that "it seems clear that the phrase does not cover hurricanes for these are negotiable by some ships, but would encompass tidal waves."

Professor Forster[138] commenting on Section 2 of the Merchant Shipping (Oil Pollution) Act 1971, whose wording is almost identical to the C.L.C. article under consideration, says that:

> "Where the phenomen is to be inevitable (the fact that he had done his reasonable best) will be not enough and it is in fact irrelevant. If another could have succeeded in averting the occurrence, then the occurrence is not inevitable and there is no defense. It is submitted that what must be shown is that in no circumstances could the phenomenon be avoided."

As far as contributory negligence is concerned, in this second exception, an interesting viewpoint is expressed by Professor Black[139], who rightly observes that:

> "The exceptions following the natural disaster clause of the C.L.C. treaty includes the carefully worded phrases 'wholly caused'. If the omission of 'wholly' from the natural phenomena category was deliberate, then the event does not have to be the sole causation. The owner might be exonerated even if he himself were negligent."

This view opens the door to a problem of uncertain solution, to wit whether the doctrine of contributory negligence enters into this particular aspect of liability. Furthermore, it blatantly contrasts with Abecassis' position that the exception of Article III(2)(a) "is far narrower than the defense of 'inevitable accident' allowed in maritime law, which is that the accident could not have been avoided by the exercise of ordinary care and maritime skill".[140]

The third exception exempts the owner if he can prove that the discharge "was wholly caused by an act or omission

done with intent to cause damage by a third party".[141] Whereas it is true that this provision "clearly covers the sadly increasing occurrence of terrorist action"[142] it seems, nevertheless, to establish "a burdensome requirement, because in many cases it would be extremely difficult for the owner to prove that a third party actually intended to cause damage".[143] However, Professor Black submits that if the approach of the American tort law is followed, "all that would be needed to prove intent would be a showing of an intent to perform the act with substantial certainty that the damage will follow."[144]

Professor Abecassis rightly observes that the inclusion of the word "wholly" keeps outside the scope of the exclusion the situation where a government deliberately damages the stricken ship, thereby causing a discharge or further discharge "because in such a case the discharge will be at least partly caused by the ship being striken".[145] However, this third exception because of the anomalous position of the charterers as outlined in chapter 3 represents, it is submitted, one of the real weak points of C.L.C. The author fully shares the view of Professor Black when he says that:

> "if the courts do not hold the charterer as an owner, the owner could conceivably escape responsibility if he proves that the charterer intended to discharge oil or bilge wastes. In that case the injured party would be without a remedy because the C.L.C. imposes liability on the owner. The third party question seems sufficiently ambiguous to weaken the entire foundation of the liability imposed by the treaty."[146]

The fourth and last exception is provided for by the second paragraph of Article III that exempts the shipowner if he proves that the damage "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".[147]

Because of the poor and unclear drafting it would appear that this clause applies only to negligence or other wrongful acts performed in connection with the maintenance of the navigational aids, so that if the government in question has failed to place a light on a particular hazard, such failure is outside the scope of the exception; whereas if it has placed a light there but has failed to maintain it so that it goes out, it will be within the exception.[148] It would be regrettable if such a result were achieved at the time of litigation and a change to clarify the wording of this article would be welcome.

The wording of paragraph 3 of Article III [149] is quite interesting because it would seem that the court has the discretion to exempt the owner according to the evaluation of the conduct of the victim; if the damage was intentionally provoked by the victim he will not be able to engage the shipowner's liability, whereas if the victim was only negligent, it is possible that the court engages, even only partially, the shipowner's liability

3.2.3 Limitation of Liability[150]

Article V(1) of the Convention states that "The owner of a ship shall be entitled to limit his liability under this Convention in respect of any one incident...". It is important to note that this article applies only to the owner of the ship and "his liability under this Convention". Although these restrictions may seem logical, as it is only the owner who has any liabilities under the Convention, the absence of the right to limit on the part of others does produce certain anomalous situations.

The following are examples of such anomalies. A plaintiff pursues an innocent shipowner who limits his liability under the Convention, and a negligent salvor who may or may not be able to limit his liability. The compensation received is greater than if there had been no salvor. It is unlikely that the shipowner can include the salvor's contractual claim under PIOPIC in the C.L.C. limitation fund. The owner can only limit his liability under the Convention. That liability is "for any pollution damage caused by oil which has escaped or been discharged from the ship as a result of the incident" (Art. III(1)). Pollution damage is defined by Article 1(6) as, "loss or damage caused outside the ship by contamination". "Pollution damage" is, therefore, actual loss or damage, and is not itself a

liability for actual loss or damage. The claim of a salvor under an indemnity clause is a contractual claim for indemnity against liability for pollution damage; it is not a claim for pollution damage. The shipowner would not have been liable to the salvor in the absence of the contract. There is nothing in C.L.C. to suggest that his liability to the salvor in contract is a liability "under this Convention". Thus, the owner, because of the salvor, is liable for a greater amount than is provided for by his limitation fund. The owner may be able to mitigage this further liability by establishing a separate limitation fund under another convention or lex fori.

Another such anomaly is caused by the shipowner demise chartering his vessel. The plaintiff pursues the innocent owner and the charterer, whose negligent master and crew are his servants. The owner limits his liability under the C.L.C. The charterer may or may not be able to limit his liability under another convention or the lex fori. The result is more reparation for the plaintiff than if there had been no charter. If the charterer is able to limit his responsibility, can he include the shipowner's contractual indemnity claim in such limitation? This depends on the provisions under which he seeks to limit himself. An example is the 1957 Brussels Limitation Convention.[151] By Articles I(1) and

(6) of that convention the charterer may limit his liability in respect of claims arising from such occurrences as property damage.

The shipowner's contractual claim certainly arises from property damage, as does the plaintiff government's tort claim.

Article V(2) states "if the incident occurred as a result of the actual fault or privity of the owner, he shall not be entitled to avail himself of the limitation provided in paragraph 1 of this Article". The 1957 Limitation Convention has an identical provision. Article V(2) is likely to give rise to as many varying interpretations as the 1957 Convention has certainly already done. It should be noted that states like the U.K. and Bahamas have denied the right to limit under the C.L.C. to those ships registered in a country which is party to the 1957 Convention but not to the C.C.C. in accordance with treaties with certain countries. The result is a considerable reduction of the shipowner's liability. Where there has been oil pollution damage only, the reduction is 50 % (from 2,000 to 1,000 francs per ton).

Article XII states that:

> "This Convention shall supersede any International Conventions in force or open for signature, ratification or accession at the date on which the Convention is opened for signature, but only to

the extent that such a Convention would be in conflict with it; however, nothing in this Article shall affect the obligations of Contracting States to non-Contracting States arising under such International Conventions."

Article V(1) states that the maximum limit of liability for a single incident is "an aggregate amount of 2,000 francs for each ton of the ship's tonnage. However, this aggregate amount shall not in any event exceed 20 million francs". It was thought that the Poincare' franc would provide a uniform value for a fund in all countries. The official rate rather than the free market rate was chosen. Article V (9) states:

"The amount mentioned in Article V(1) shall be converted into the national currency of the state in which the fund is being constituted on the basis of the official value of that currency..."

However, because of the world currency crisis, leading to the floating of the major currencies, the unit of account was changed to the Special Drawing Right of the I.M.F. in 1976. States not allowed to use the S.D.R. may use the Poincare franc; the conversion rate to be as near as possible to the real value obtained by the S.D.R.

The maximum limit of liability is 210 million francs, being the maximum insurable liability in 1969 - approximately $14 million. In fact, the P & I Clubs can now offer $50 million for a spillage. The problem would be at the lower end of the tonnage scale now remedied, however, by the 1971 Fund Convention.

Article V(8) of the C.L.C. states that "claims in respect of expenses reasonably incurred or sacrifices reasonably made by the owner voluntarily to prevent or minimize pollution damage shall rank equally with other claims against the fund". Unlike other conventions, the C.L.C. not include costs incurred before oil is actually spilled. This restriction is incorporated in the narrow definition of pollution damage in Article 1(6) - "loss or damage...resulting from the escape or discharge of oil from the ship...".

It is questioned whether "voluntarily" is a propitious word. Costs incurred by the owner which, by law, must be so incurred, may not be considered voluntary and would not, therefore, be included.

By Article V(3) the owner must create a fund amounting to the total limit of his liability. It is to be placed in the charge of a court or similar authority in any of the contracting states. The claimants receive proportionate compensation from this fund only, not from arrested property, which must be returned to the rightful owners. The C.L.C. fund does not extend, however, to non-contracting states, nor to non-pollution damages in contracting states. The owner's liability can,therefore,exceed his limitation fund under the C.L.C.

It is only where all plaintiffs are contracting states that the owner can establish one fund. It is, therefore, to the owner's advantage that a large number of states join the Convention, despite his liability being strict rather than based on fault.

3.2.4. Joint and Several Liability

Article IV states:

> "When oil has escaped or has been discharged from two or more ships, and pollution damage results, therefore, the owners of all the ships concerned, unless exonerated under Article III shall be jointly and severally liable for all such damage which is not reasonably separable."

It will be noted that almost one-third of oil pollution damage is caused by collisions.

The plaintiff may recover the full amount of damages from either of the colliders, limited, of course, by their liability funds. Thus, the proportionate amount of damage caused by each is irrelevant. Although this rule duplicates the common law and Admiralty law in the common law countries, Article IV is still a necessary provision for it ensures that the rule will apply without fail in unusual cases.

The Convention leaves such problem areas as contribution, the effect of limitation and the separation of damages to the lex fori.

The essence of joint and several liability, as in Article IV, is the plaintiff's privilege to sue one defendant for the full amount of compensation. If his claim is not thereby satisfied, he may pursue the other. How is this basic principle affected by the limitation funds? As Abecassis[152] points out, "the entitlement to limitation under Article V is designed not to limit P's [plaintiff's] ability to recover but to limit the owner's maximum liability so as to enable him to obtain insurance." Thus, if the limitation funds are large enough, the plaintiff should be able to receive the full extent of his claim. Naturally, the plaintiff should not recover twice. Should there be more than one plaintiff, they should be compensated rateably from each fund.

The Convention also leaves to the lex fori the situation where a ship has two owners.

Article IV applies only where the damage is not reasonably separable. The treaty unfortunately does not indicate who is to have the burden of proof. It is reasonable to assume that the burden would lie on the ship which had lost the least oil. As Professor Swan points out, "this burden would seem almost insuperable with present methods of identification".[153] However, techniques such as "active tagging" by using chemical and mechanical tracers as "license plates" to identify the origin of the shipment and carrier are

being developed. These techniques should be of great help in conjunction with sophisticated sampling methods and quantitive anaylsis.

It is important to note that the criterion to be used in determining separability is not the same as is applicable in apportioning liability. In the latter it is the quality of the parties' act before the collision that is relevant; in the former it is the nature of events taking place after the collision that is important.

The following are examples of situations which fall outside the scope of Article IV. Where oil has spilled from only one ship, the other being dry, or where contaminating oil or chemicals escaped from the ship's double-bottomed fuel tanks only, the requirement of "oil in bulk as cargo" being spilled from "two or more ships" is not fulfilled. Article III applies to the oil spiller, the other ship is governed by the lex fori. The former alone will be liable subject to a right of recourse based on fault against the latter. Article IV does not apply where an owner and a non-owner (a bareboat charterer for example) are involved. The above article regulates only "the owners of all ships concerned".

The Convention has left certain important areas to the lex fori. In so doing, it has made the way for the increasing

importance of concept of fault in the strict liability regime of the Convention. Thus, the owner, though strictly liable, will not necessarily be responsible for all damages incurred. This is in line with Article III(5) which allows the owner a right of recourse against others who have been at fault.

4. THE 1971 INTERNATIONAL CONVENTION ON THE ESTABLISHMENT OF AN INTERNATIONAL FUND FOR COMPENSATION FOR OIL POLLUTION DAMAGE

The International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage 1971 (the "Fund Convention") was established by I.M.C.O. as a result of a conflict in the 1969 Conference on the issue of the liability of a shipowner.[154] The two main goals of the Fund Convention, discussed in the Preamble, Arts. 2, 4 and 5, were provided for in the Resolution passed by the 1969 Conference: victims of oil pollution damage should be properly compensated on the basis of strict liability; the shipowner should be reimbursed for the additional financial burden imposed by C.L.C.

The Fund Convention was designed as a sequel to C.L.C.: their definitions are the same, the Fund Convention acquires its jurisdiction where C.L.C. stops. A state must be party to C.L.C. before registering with the Fund Convention.

The Convention established "The International Oil Pollution Compensation Fund" to provide compensation for oil pollution damage. The Fund is a legal person in contracting states with rights and obligations under the laws of that state.

Article 3(1) states that compensation under Article 4 is only for, "pollution damage caused on the territory including the territorial sea of a Contracting State, and to preventative measures taken to prevent or minimize such damage." It is

irrelevant where the ship was in fact registered, as long as the damage was caused in the right place.[155]

Article 4(1) states that:

> "For the purpose of fulfilling its function under Article 2, paragraph 1(a), the Fund shall pay compensation to any person suffering pollution damage if such a person has been unable to obtain full and adequate compensation for the damage under the terms of the Liability Convention,
>
> a) because no liability for the damage arises under the Liability Convention;
>
> b) because the owner liable for the damage under the Liability Convention, is financially incapable of meeting his obligations in full and any financial security that may be provided under Article VII of that Convention does not cover or is insufficient to satisfy the claims for compensation for the damage; an owner being treated as financially incapable of meeting his obligations and a financial security being treated as insufficient if the person suffering the damage has been unable to obtain full satisfaction of the amount of compensation due under the Liability Convention after having taken all reasonable steps to pursue the legal remedies available to him;
>
> c) because the damage exceeds the owner's liability under the Liability Convention as limited pursuant to Article V, paragraph 1, of that Convention or under the terms of any other international convention in force or open for signature, ratification of accession at the date of this Convention.
>
> Expenses reasonably incurred or sacrifices reasonably made by the owner voluntarily to prevent or minimize pollution damage shall be treated as pollution damage for the purposes of this Article."

The Convention is limited in the same way as C.L.C.; the plaintiff must have suffered pollution damage. The same definition

is given by both the Fund Convention and C.L.C. for this term. C.L.C. exempts itself from compensation in Articles III(2) and XI(1). The Fund Convention applies, therefore, in these two exceptions, subject to its own exemptions, as provided by Article 4(2)(a). This article includes pollution damage resulting from an act of war, hostilities, civil war or insurrection and where Article X(1) C.L.C. applies damage caused by warships. The result is that Article 4 (1) applies to damage resulting from a natural phenomenon of an exceptional, inevitable and irresistible character; damage caused by an act or omission done with intent to cause damage by a third party (terrorist acts, for example); damage caused by the negligence or other wrongful act of any authority responsible for the maintenance of navigational aids.

Article 4(1)(b) applies where the owner is insolvent and either he is uninsured vis-a-vis C.L.C. or else that insurance has failed. Professor Abecassis[156] gives an example of this paragraph applying:

> "where an incident has been caused by a small ship carrying less than 2,000 tons of oil in bulk as cargo, and which is uninsured because it does not need to be under C.L.C. In such a situation the shipowner who may be in a small way of business... could easily become insolvent."

The most frequently used section will probably be paragraph (c) which is self-explanatory.

A most important provision is the last sentence which parallels C.L.C. It provides an important incentive to the shipowner to take immediate action following a spill. He will be compensated even where he has been negligent or guilty of wilful misconduct.

Article 4(2)(b) limits compensation to damage proven to have been caused by one or more ships. Article 4(3) follows C.L.C. in exempting itself partially or completely in cases of contributory negligence or intentional causative acts of the claimant.[157]

Article 4(4) limits compensation as follows:[158]

> "(a) Except as otherwise provided in sub-paragraph (b) of this paragraph, the aggregate amount of compensation payable by the Fund under this Article shall in respect of any one incident be limited, so that the total sum of that amount and the amount of compensation actually paid under the Liability Convention for pollution damage caused in the territory of the Contracting States, including any sums in respect of which the Fund is under an obligation to indemnify the owner pursuant to Article 5, paragraph 1, of this Convention, shall not exceed 675 million francs.
>
> (b) The aggregate amount of compensation payable by the Fund under this Article for pollution damage resulting from a natural phenomenon of an exceptional, inevitable and irresistible character, shall not exceed 675 million francs.

The above limit applies only to Article 4. However, amounts payable under Article 5 - shipowner relief - as well as amounts

"actually paid" under C.L.C. are deductible from 675 million francs to reach the required limit. It is odd that the Convention provides only for amounts paid by the C.L.C. for damage on the territory of a contracting state, omitting entirely territorial sea. The result is more Fund money available when clean-up measures are undertaken within the territorial sea than within internal waters or on the actual territory of the state.

Art. 4(4)(a) must be read in conjunction with Article 4(4)(b). The maximum limit of 675 million francs applies to the whole of the event, not to each separate spillage when more than one tanker is involved.

Article 4(5) states that:

> "Where the amount of established claims against the Fund exceeds the aggregate amount of compensation payable under paragraph 4, the amount available shall be distributed in such a manner that the proportion between any established claim and the amount of compensation actually recovered by the claimant under the Liability Convention and this Convention shall be the same for all claimants."

This is an example of unfortunate drafting in the Convention. "Proportion between" is a meaningless phrase in English. It has been suggested[159] that the above provides for:

> "A rateable distribution so that a/(b+c) is the same for all claimants, where a equals a claimant's established claim against the Fund, b equals what he actually recovered under C.L.C. and c equals what the Fund

ought to pay him under Article 4 where a shipowner is claimant, one must assure that sums offset against the limitation fund pursuant to Article V(8) of C.L.C. are to be counted as 'sums recovered' thereunder."

By Article 4(6) the Assembly of the Fund can extend the 650 million francs limit to 900 million francs, making room for monetary fluctuations and needs established by the claims record.

According to Articles 3(2) and 5, a shipowner can only apply for compensation if his ship is registered in a state which is party to the Fund Convention and to C.L.C. The damage, however, may be caused in a state which is party to C.L.C. only, not to the Fund Convention. Compensation is provided for measures taken to prevent or minimise such damage.

Article 5(1) states:

"For the purpose of fulfilling its function under Article 2, paragraph 1(b), the Fund shall indemnify the owner and his guarantor, for that portion of the aggregate amount of liability under the Liability Convention which:

a) is in excess of an amount equivalent to 1,500 francs for each ton of the ship's tonnage or of an amount of 125 million francs, whichever is less, and

b) is not in excess of an amount equivalent to 2,000 francs for each ton of the said tonnage or an amount of 125 million francs whichever is the less,

provided, however, that the Fund shall incur no obligations under this paragraph where the pollution damage resulted from the wilful misconduct of the owner himself."

Paragraph (6) is the maximum limit of C.L.C. Thus, with limitation from C.L.C. and compensation from Articles 4 and 5, and provided that the maximum liability of the Fund is reached, a shipowner's liability will be limited to the lesser of 1,500 francs per ton or 125 million francs for any one incident. C.L.C.'s limit is the lesser of 2,000 francs per ton or 210 million; Article 5 reimburses the shipowner down from that limit to the lesser of 1,500 francs per ton or 125 million francs. Article 4(1) compensates the shipowner for clean-up costs not applicable to C.L.C.

The mention in Article 5(1) of indemnification of a shipowner against his liability under C.L.C. without his having to bear a portion of any limitation fund would seem to indicate that the right to relief under the Fund Convention is not dependant on the shipowner being able to limit his liability under C.L.C.

Article 5(3) states that:

"The Fund may be exonerated wholly or partially from its obligations under paragraph 1 towards the owner and his guarantor, if the Fund proves that as a result of the actual fault or privity of the owner:

a) the ship, from which the oil causing the pollution damage escaped, did not comply with the requirements laid down in:

   i) the International Convention for the Prevention of Pollution of the Sea by Oil 1954, as amended in 1962; or

   ii) the International Convention for the Safety of Life at Sea 1960; or

iii) the International Convention on Load Lines 1966; or

iv) the International Regulations for Preventing Collisions at Sea 1960; or

v) any amendments to the above mentioned Conventions which have been determined as being of an important nature in accordance with Article 16(5) of the Convention mentioned under (i), Article 9(e) of the Convention mentioned under (ii) or Article 29(3)(d) or 4(d) of the Convention mentioned under (iii), provided, however, that such amendments had been in force for at least twelve months at the time of the incident;

b) the incident or damage was caused wholly or partially by such non-compliance.

The provisions of this paragraph shall apply irrespective of whether the Contracting State in which the ship was registered or whose flag it was flying, is a party to the relevant instrument."

The Fund must, therefore, prove three things to escape whole or partial liability under Article 5(3): an event occurred (or failed to occur) which constituted the actual fault or privity of the owner; as a result of that event or failure the breach of a provision of one of the named Conventions occurred; the breach wholly or partially caused the incident or damage. [160] Although the latter two may be present fairly frequently, the first requirement is not common. The fund is thus not easily exonerated, a situation mitigated only a little by the court's tendancy to give a broad interpretation of the meaning of "actual fault or privity of the owner". Nevertheless, the above provision is an attempt to provide an incentive for shipowners

to comply with oil pollution prevention and ship safety conventions.

Articles 6 to 10 deal with the more detailed makings of the Convention. Article 6 establishes three years from the date of damage as the prescription period for the institution of an action. Article 7 provides that the action should be instituted in the same jurisidiction as the action against the owner under C.L.C. for the same incident. However, if the Fund is not applicable to that jurisdiction then the claim must be made in a contracting state where pollution damage was caused by the same incident, otherwise, at the Fund's headquarters.

Contributors to the Fund are those who receive oil in a Contracting State either directly by sea or by some other method, bringing in oil which has been carried by sea to a non-contracting state. Such oil must exceed 150,000 metric tons during a calendar year. Thus, it is the oil companies, not the governments who are parties to the Convention. The pollution damage is thereby distributed between the shipowner and cargo interests.

The Fund, it should be remembered, is only open to those who are members of C.L.C.

5. AMENDMENTS AND CHANGES UNDER CONSIDERATION

5.1 Introduction

Although the C.L.C. does represent "un progres dans le domaine du droit international de la responsabilite"[147] and a serious effort to deal with the growing problem of oil pollution of the sea, the Convention is far from being immune to ambiguity and shortcomings.

In this chapter proposed amendments and changes to the C.L.C. will be examined together with proposals that, even if not directly affecting the Convention, have a bearing on the problem of shipowner's liability.

5.2 Extension to Bunkers of Dry Cargo Ships and of Tankers Not Carrying Oil in Bulk as Cargo

It has already been seen in Chapter 3 that the combined effect of Articles III(1) and I(1) is such that a tanker on a ballast voyage, even though she carries bunkers and slops, is not covered by the C.L.C. whereas a tanker carrying oil in bulk as cargo is covered even if the oil which actually escapes and causes damage is bunker oil.

The problem is not purely one of reconciliation of logic with text drafting but it is also a practical one. The damages caused by the bunkers of a 500,000 ton ship can be more devastating than the damages caused by the sinking of a small

tanker. Yet the former are not covered by the C.L.C. There is certainly an anomaly in the fact that a plaintiff's right to recover under the favourable strict liability regime of the Convention should depend on whether or not the source of the oil was a tanker carrying oil in bulk as cargo.[162]

It is submitted that because the C.L.C. is a "tanker convention" the validity of the point is undisputable. This is also the prevailing view of the international shipping industry as it has been pointed out during the 32nd Session of I.M.C.O.'s Legal Committee.[163] What, on the contrary, does not seem to be advisable is an extension of the C.L.C. to the bunkers of dry cargo ships.

Apart from the practical complications connected with the extension of the compulsory insurance provisions to 18,000 ships it would be impossible to integrate dry cargo ships into the 1971 Fund Convention, frustrating the attempt to make this Convention the logical and necessary consequence of the C.L.C.

What must not be forgotten is that it is the oil industry which, in fact, pays for the fund. And that it does that not because it considers (or is obliged to consider!) the oil as inherently dangerous (in se), but only because it has a definite interest in the tanker shipping industry which transports its oil. There is no sound reason why it should be called ultimately to pay more for damages provoked by the shipping industry that simply uses oil as propellant.

The only way out of this problem is for the governments of contracting states themselves to finance the operation of the 1971 Fund Convention with respect to dry cargo ships, relieving the oil industry of a burden that it can certainly afford to pay but that, on the other hand, does not belong to it.[164]

Unfortunately it is highly unlikely that this idea will be taken into consideration by I.M.C.O. in the near future. The view unanimously expressed at the 1969 Conference that "for practical and theoretical reasons, no burden should be imposed on States" is still so deeply rooted[165] that no such solution can be expected to be developed.

5.3 The Position of Slop Oil

A delicate question of interpretation is raised by the text of the C.L.C. being doubtful whether the Convention covers slop oil which causes pollution damage. It is true that ambiguity is sometimes necessary to agreement and that "the institutional structure to which international legal text writing is confided is such that these problems are inevitable".[166] The I.M.C.O. Legal Committee[167] felt nonetheless that the problem of slop oil was worth reconsideration in view of a possible amendment of the definition of "oil". This would have removed the existing doubt clearing the field from a possible controversy.

Unfortunately at the 33rd Session of the Legal Committee, the

Working Group charged with this problem disappointed those who expected a similar amendment. The recommendation was that no change be made to the existing definition with respect to slop oil because "the existing text has been widely interpreted as including mixtures in the ordinary, as opposed to scientific, sense of this word. If a reference to mixtures is included, this could have an unwanted limiting effect on the scope of the existing Convention."[168]

The validity of this explanation rests almost exclusively on the fact that this "wide interpretation" is consistently maintained. Once again the delicate balance of drafting technique seems to have prevailed over the consolidation of a widely accepted interpretation that would leave no room for doubt.

5.4 Extension to Non-Persistent Oil

It has been seen in Chapter 3.1.2.4 that the draftsmen included in the Convention the forms of oil that are the greatest threat to the sea and shorelines because they are the more difficult to remove. On the problem of extending the C.L.C. to cover non-persistent oil there has been and still is much debate.

On one side, there are several authors whose position is synthesized by Black[169] who writes that "the definition (of oil) is so specific that it excludes possibly serious hazard to the environment". He adds that "the omission merits consideration,

because they too present problems with regard to ocean contamination. Gasoline and kerosene do not fall within the category for which liability is provided." On the other side are the oil industries and insurance industries who insist on the fact that non-persistent oils do not represent an environmental problem. By definition these oils do not leave a harmful residue and "a detailed examination by the oil industry in conjunction with the P & I Clubs failed to discover any cases of damage by non-persistent oil except for a few in-harbor incidents, all of which were covered by national legislation".[170]

Although the correctness of this latter view seems difficult to contest, the Legal Committee during the 32nd Session extensively discussed the possibility of extending the Convention to non-persistent oil. It must be acknowledged that on a theoretical level such an extension might well be justified. However, what should not be forgotten is that any amendment to the Convention must be "workable" in practice.

The inescapable conclusion is that together with technical and procedural difficulties[171] there would certainly be a considerable increase in insurance premiums. In consideration of the "low probability risk" involved[172] it was decided to maintain the status quo of the Convention.

The Legal Committee was split on the issue and it is quite probable that no change will be made in the near future.[173]

5.5 Extension to Fire and Explosion

No controversy arose for the rejection of such an extension during the 32nd Session.[174]

As the Committee pointed out "C.L.C. is a Convention designed to protect the environment by providing compensation for damage by contamination which encourages prompt and effective clean-up. Extension to fire and explosion would take the Convention into an entirely new field, namely the compensation of property damage and personal injury unrelated to environmental dangers. If oil should spill from a vessel which for some reason has exploded or caught fire, pollution damage caused by the oil will already be covered by C.L.C. as it now stands. To extend the Convention in this way is therefore inappropriate."

It is submitted that the reasons expounded by the legal Committee are so cogent and well-founded that this subject must be understood as definitely solved.

5.6 Extension of the Scope of the Convention as Delineated in Article II

The draftsmen of the C.L.C. could have eliminated the "legal quagmire"[175] represented by the fact that each nation sets the extent of its territorial sea and that therefore the result would be a lack of worldwide uniformity if they established their own definition of territorial sea. It has already been

seen that "because the various nations were unwilling to concede any territorial limit different from their own, such a solution was unfeasible".[176] However, in the last ten years a new concept in international law has been concretized in what is now known as Exclusive Economic Zone (E.E.Z.).[177] This concept would encompass what has been called a "pollution zone" in Chapter 3.1 because states should have jurisdiction within their E.E.Z. with regard to the preservation of the marine environment and this would include pollution control.

The Legal Committee at the 32nd Section took into consideration the possibility of extending the scope of the Convention as far as territorial jurisdiction is concerned,[178] but in order to avoid a new statement on the question, it was thought preferable to wait for the outcome of the Law of the Sea Conference.[179]

5.7 Extension of Pre-Spill Preventive Measures

It was seen above in Chapter 3.1 that for Article III of the C.L.C. to come into play, oil must actually "escape" from the ship as a result of the incident. Consequently the cost of preventive measures is not recoverable by a shipowner or a government "in a situation where there is merely a threat of oil spillage".[180]

It is submitted that there is no reason for the maintenance of the anomaly represented by the fact that the shipowner is given an incentive to prevent or minimize pollution damage by

virtue of the provision stated in Article V(8) but only after the spill has taken place. It has been argued that the "price" for such an extension is the need of a corresponding extension in Article III to allow plaintiffs to recover. This would be easily achieved by changing the definition of "preventive measures" in Article 1(7).

It has been hypothesised that this could easily lead to the shipowner paying for the cost of a coastal state's gross over-reaction to a grounding off its shore and that one cannot tell what is reasonable in the way of preventive action when there is no actual oil spillage. This concern does not seem to be fully justified. If we give to the word "reasonable" the meaning that is normally attached to it, to wit "agreeable to reason, not irrational, or absurd; not going beyond the limit assigned by reason, not extravagant or excessive",[181] it is difficult to see why a court should find it particularly difficult to state whether or not the intervention was "reasonable". Experts or professional witnesses[182] can, no doubt, provide the court with all the necessary elements to decide whether the measures taken were reasonable or not. The Legal Committee did not feel that the problem was of such importance to deserve discussion during the 32nd Session and the topic has not been inserted in the agenda of the 33rd Session nor in any session since.

5.8 Institution of Sea Lanes

It has already been seen how the view and the position of the insurance industry is crucial in the context of any kind of compensatory scheme.

It may well be true that the marine insurance system is based on archaic concepts. In fact, the purpose of marine insurance until the early 70's has been to protect ship and cargo owners against financial loss due to destruction of hull and cargo and to indemnify personal injury claims, not to protect third parties damaged by the cargo or escaping fuel. However, to work against the marine insurance business rather than with it, is indisputably a sucidial tactic.

We have also seen that even if limited, the liabilities, especially in major oil spills, can be objectively enormous. The cost of the compulsory insurance has been and still is a sour point and it has undoubtedly delayed and limited the number of ratifications. Equitable premium devices which will provide a large enough pool to underwrite losses without crippling the smaller operations whose contribution to pollution may be marginal, must be developed.

The author suggests that one proposal to reduce the premium cost could be to fix it according to the degree of danger (in terms of risk of pollution) that tankers encounter by sailing routes. By providing

an incentive to tankers to sail sea lanes where the risk of pollution is limited a two-fold goal can be achieved. In the first place the premiums would be lowered and secondly the probability of collisions or other incidents would necessarily decrease.

It is evident that safe, low-liability routes involve low premiums. If the establishment of this system proves to be difficult in terms of voluntary compliance, mandatory sealanes (with increased liability for non-compliance) might be established under the supervision of a private governmental or international agency. I.M.C.O. itself might be the appropriate agency to undertake such a task. A "liability profile" of tankership routes should be developed through a scientific and economic survey of the world's coastlines and make a specific valuation of the potential contamination damage which could result from accidents involving ships carrying dangerous cargo.[183] Route plans would have to be submitted which would provide adequate distances from coasts to minimize pollution. This proposal, first discussed fourteen years ago before a sub-committee of the U.S. Senate Public Works Commission,[184] is in accordance with other suggestions of international agreements on mandatory sea lanes for super tankers and is a logical extension of the negative requirements of the 1954 Geneva Convention on the High Sea.[185]

5.9 Miscellaneous Proposals Discussed by the IMCO Legal Committee

The Legal Committee of IMCO has made some interesting proposals in its 40th and 44th sessions of 1979-80.[186] A number of the suggestions were made to attempt to solve the problems caused by the Amoco Cadiz disaster.[187] Even if some of them are without direct bearing on the CLC or Fund Convention they are nontheless briefly discussed in this chapter.

All the delegations agreed that that there should be a system for reporting incidents to give coastal states timely information in particular with respect to maritime casualties prior to as well as in actual emergencies.[188] The Committee considered that it was essential to have a single and uniform system for this purpose. It was suggested that a ship suffering casualty should be required to give notification thereof if it occurred within a fixed distance from the coastline. Concern was expressed that the obligation to promptly answer all request from a coastal state might unduly burden the master and crew of a vessel in distress[189] and it was proposed that an obligation to reply as quickly as possible to requests for information might be more appropriate.

The importance of prompt notification of a casualty is of paramount importance. A costal state should have knowledge of circumstances which might give rise to the need for

intervention before it could decide on the need to undertake measures of self-protection. A timely and effective intervention might easily prevent the amount of damage from exceeding of the limits set forth by the CLC and the Fund Convention.

The topic of salvage, as a legal question arising from the Amoco Cadiz incident, was discussed in the context of both public law and private law. The former aspect of the matter included salvage operations under the control of the coastal state and the remuneration of the salvor in respect of them, while the latter aspect was concerned with the incentive and reward for salvage and matters associated with the 1910 Brussels Convention for the Unification of Certain Rules of Law relating to Assistance and Salvage at Sea, as well as the form of the private contract of salvage.[190]

It was seen in Chapter 3 that the CLC, the Fund Convention, TOVALOP and CRISTAL have failed to deal with the question of salvor's liability for oil pollution damage and, therefore, it is left to states to regulate this subject. This has often led to unsatisfactory results. As remarked by the representative of the International Salvage Union, representing the salvage industry, remarked the extension of powers of the coastal state to intervene in the salvage operation should be accompanied by renumeration of the salvor, as well as

provisions to relieve the salvor of liability for acts which he was compelled to undertake. It would benefit the salvor if new provisions of international law should compel a ship to accept salvage and assistance, but it could be a disincentive to the individual salvor if salvage operations could be pre-empted by the coastal state.

One of the delegations produced the following proposal,[191] in the opinion of the author the most advanced and effective attempt to deal with the topic of salvage in a satisfactory and comprehensive manner:

(a) Any salvage vessel proceeding to salve or assist a ship in distress would be obliged to inform the coastal State of its intentions and allow that State to decide what measures it might take. The coastal State would then inform the interested parties involved, including the ship in distress, the salvor and the flag State, of its intention to intervene. If a salvage contract had not been negotiated, the coastal State's intervention - commencing immediately upon the announcement of intention to intervene - would render this contract unnecessary; but if a coastal State took charge of a salvage operation (by issuing detailed instructions), the contract would be nullified and the salvor would be remunerated on an equitable basis. If necessary the coastal State would be reimbursed for part or all of the costs of salvage and in situations where the coastal State was in charge there would be no application of the rule "No Cure - No Pay". The proper elements of equitable remuneration would, however, be worked out in greater precision and embodied in an international instrument and decided upon by the courts in the case of salvage awards determined judicially.

(b) A number of provisions would have to be considered, either in terms of uniform law or by the courts in individual instances, with regard to the remuneration of salvors, the recovery of costs of activities directed by the coastal State, the reimbursement for preventive measures and other financial questions.

(c) Under this proposed system, the liabilities of the shipowner and salvor to the coastal State and vice-versa would be governed by appropriate international conventions and resolved either judicially or through arbitration and conciliation procedures provided in such conventions.

(d) With regard to the question whether the effectiveness of salvage operations and the incentives to undertake them would be impaired by the proposed system, it was explained that remuneration on an equitable basis and without the requirement for successful outcome of the salvage would provide both reward and incentive for salvage operations, rather than impairing them.

Not surprisingly there were a number of criticisms and comments on the proposal outlined above and the Committee reached no conclusion on that subject.[192]

Further suggestions were a revision of the geographic scope of the Liability and Fund Conventions; the inclusion of non-persistent oils in the definition of "oil"; the extension of the scope of application to pollution arising from the discharge of oil from the bunker of unladen tankers. These questions, raised in previous sessions, were not actually discussed.[193]

In the 44th Session of the Legal Committee, the Committee was presented with a "study on some legal issues which may arise from the increase of the limits of liability and compensation in the 1969 C.L.C. and the 1971 Fund Convention".[194]

The Legal Committee recognized that the question of limits was twofold: one, whether the existing distribution of limitation amounts between the shipowner and the Fund was satisfactory and, two, the question of the desirability of increasing the overall limits. This second point is of prime importance. It was this limit of liability which was one of the main reasons why both Canada and the United States - two of the most important proponents of environmental interests - would not ratify the Convention at its inception. The adequacy of the limits

of liability of small vessels was also discussed, as was the capacity of the insurance market to provide cover. A majority of the delegations were of the opinion that a review of the limits of liability in the two Conventions was necessary in the light of the developments that had occurred since the Conventions had been adopted. Some delegations felt that the determination of new limits were issues of a political rather than a legal nature and, as such, not appropriate for decisions by the Legal Committee. Other delegations, however, pointed out that while the ultimate decision on any new limits and any other amendments would rest with a diplomatic conference, it was necessary for the Legal Committee to prepare the appropriate tests for consideration by the conference, all the more so since any alteration of the limits of liability might well result in legally complex divergencies of rights and obligations for states depending on whether or not they had accepted the amendments.[195]

The study examines the effects of increase of limits of the C.L.C. on parties and non-parties and the effect of a revised C.L.C. on the Fund Convention. The issues are complex and manifold. Formal aspects such as the amendment procedure, problems concerning entry into force, must be dealt with as well as substantive aspects such as entitlement to limit liability, and compulsory insurance. A problem with the entitlement to limit liability would occur where one victim

of oil pollution damages has ratified the amendment, the other has not. This in turn would have an effect on the level of insurance to be taken out under Art. VII of the C.L.C. A state party to the amended convention might claim that it is entitled to request a level of insurance or financial security higher than the one imposed on the shipowner under the unamended Convention, while the shipowner might claim he only need satisfy the requirement under the unamended Convention. To avoid such a potential conflict it might be wise to include a provision that revised insurance requirements will not apply to ships registered in a state party to the original 1969 C.L.C.

If the entry into force of the revision were postponed until accepted by all existing parties to the original Convention, the above problems would be greatly minimized. However, the entry into force of the amendments might then take an unacceptably long time. To change only the C.L.C., leaving the Fund Convention unaltered would be the least complicated solution. This would raise the limits of compensation for states which are parties only to the C.L.C. but would leave the same limit for states which are parties to both conventions. A more complex solution would be to amend both conventions. A single new convention would be the easiest but most radical way of acheiving this

goal. However, since many states are parties to the C.L.C. but not members of the Fund a single instrument combining and amending the two conventions is likely to have much more limited application, a clear disadvantage.

The other alternative would be the adoption of two new instruments, each modifying one of the existing conventions. This would allow states greater flexibility in determining the instruments to which they wished to become parties. But this would, on the other hand, probably result in a more complex pattern of different regimes applicable on the one hand among different groups of Contracting States inter se and on the other hand among groups of Contracting States and non-Contracting States.[196]

As can be seen from these IMCO Legal Committee sessions, the Committee is playing an important role in closely monitoring the effectiveness of the conventions in particular situations. It is intent on improving these conventions not only by amending them to widen their application,[197] to clarify and remove any lacunas of the original drafts but also to keep abreast with a continually changing, developing world scene, with larger tankers and persistent inflation being but two examples.

6. TOVALOP AND CRISTAL

TOVALOP and CRISTAL[198] can be said to be the direct result of the Torrey Canyon disaster. Victims were in need of compensation; tanker owners of insurance for voluntary clean-up costs. The international agreements were too slow in coming into force, more drastic measures were called for.

6.1 TOVALOP

TOVALOP was founded by seven major oil companies[199] and came into effect on October 6, 1969. At that time 50% of all existing tankers were parties to it (excluding government-owned tonnage and the tonnage of tankers under 3,000 grt.), as measured by gross registered tonnage. Two years later this figure had risen to over 80% and at the present time owners of almost 99% of the world's tanker tonnage are parties to this voluntary agreement.[200]

TOVALOP was amended on June 1, 1978 to accomodate the coming into force of the C.L.C. in 1975. It was decided as stated in the Preamble, that although that Convention overlapped with TOVALOP in many areas, remedying many of the deficiencies in those areas,[201] TOVALOP should continue because, as it will be seen later in this chapter, there will still areas to which the C.L.C. did not apply and, therefore, which TOVALOP wished to continue to protect.

The key provision apportioning liability is Article IV:

> (A) Subject to the terms and conditions of this Agreement, the Participating Owner of a Tanker involved in an Incident agrees to assume liability for Pollution Damage caused by Oil which has escaped or which has been discharged from the Tanker, and the cost of Threat Removal Measures taken as a result of the Incident.

Each party to the Agreement will compensate victims of pollution damage as a result of a discharge of oil from a tanker. The Agreement applies to both owners and bareboat charterers by deeming them owners: I.(c) It applies also both to tankers in ballast as well as laden vessels: Article (1)(a).

Prior to the amendment of June 1, 1978 the owner's liability was one of negligence with a reversed burden of proof. Now it is one of strict liability. The limit of liability for all claims arising out of any one incident is $160 per limitation ton or $16.8 million, 202 whichever is less. Pollution damage is defined in Article I(h) as:

> Loss or damage caused outside the Tanker by contamination resulting from the escape or discharge of Oil from the Tanker, wherever such escape or discharge may occur, provided that the loss or damage is caused on the territory, including the territorial sea, of any State and includes the cost of Preventive Measures, wherever taken, and further loss or damage caused by Preventive Measures but excludes any loss or damage which is remote or speculative, or which does not result directly from such escape or discharge.

Preventive measures are defined by Article I(i) as "reasonable measures taken by any person after an incident

has occurred to prevent or minimize Pollution Damage".

TOVALOP compensates persons for the cost of reasonable measures taken after an incident has occurred which creates a grave and imminent danger of discharge of oil from a tanker, which, if it occurred would create a serious danger of pollution damage, whether or not a discharge in fact subsequently occurs: Articles IV, I(k) and (l). This is an important provision of TOVALOP and one that the C.L.C. does not have, for it encourages preventive action before any oil spill occurs.

Although liability is strict, there are exceptions: where pollution damage is covered by Article III (2) of the C.L.C. or if the damage occurs in any area that is a potential source of liability for a shipowner under the C.L.C.; where the incident results from an act of God, an act of war or similar circumstances; where the incident was wholly caused by an act or omission by a third person done with intent to cause damage; where the Government or similar authority was negligent in their duty to maintain lights and other navigational aids: Article IV (B). Furthermore, a party shall be exonerated wholly or partially from liability where the negligence of the person who suffered the pollution damage or took threat removal measures wholly or partially caused that damage or the necessity of taking these measures:

Article IV (B) (c).

Article IV provides that parties shall do their best to take appropriate preventive and threat removal measures. Such action will not be considered as an admission of liability. The costs of such measures may be treated as claims against the owners maximum liability.

A party to TOVALOP agrees to have the Agreement apply to all his tankers. He is obliged to "establish and maintain his financial capability to fulfill": Article II(B) Parties usually register their ships with a mutual insurance association, the International Tanker Association Ltd. (ITIA) or a Protection and Indemnity Clubs (P & I Club). It is significant that the payments come from the owner's insurance, not The International Tanker Owners Pollution Federation Limited (the "Federation")[203] which administers it. The parties are liable to each other. A plaintiff must look to an owner for compensation, not to the Federation.

The Federation is a company formed under English law: Article I (o) Each party to TOVALOP is also a party to the Federation and must abide by its rules: Article II. TOVALOP will continue in effect until at least June 1, 1981 but may be terminated after that in certain specified circumstances; individual parties may withdraw from TOVALOP on June 1, 1981 or subsequently upon six months' prior written notice: Article III.

TOVALOP came into effect in 1969 just two years after the Torrey Canyon disaster. It provided speedy, efficient compensation for victims of any oil pollution damage with few exceptions. It was good publicity for the oil companies who bear the most brunt for oil pollution disasters.

C.L.C. on the other hand came into force only in 1975, a full eight years after the Torrey Canyon incident.

TOVALOP being comparable to C.L.C., it is important to examine the differences between the two. TOVALOP is a voluntary agreement between tankers. It applies only to those tankers that are parties to it: it is thus said to be "vessel specific". C.L.C., on the other hand, is "territory specific": it applies to damage caused within the territory of a contracting state.

A most important difference is TOVALOP's coverage of measures taken by owner or victim before as well as after an oil spill. C.L.C. provides no compensation for such expenses. Nor can these expenses be included in any limitation fund established because an oil spill actually did occur. Further, under C.L.C. an owner may only limit his liability when not guilty of fault or privity. Insurance arrangements permit parties to TOVALOP to limit their liability in all cases. TOVALOP covers a spill from a tanker in ballast and,

also unlike C.L.C., covers the bareboat charterer by deeming him an owner.

Overall, therefore, TOVALOP when applicable is a better protection than is C.L.C. As Professor Abecassis writes:

> "The attractiveness to a state, particularly one with an exposed coast but a small fleet, of not becoming a party to C.L.C. (so that TOVALOP will continue to cover incidents off its shores) must be admitted. This is regrettable because it could mean that the global application of C.L.C. will be delayed. The irony would be that the delay would be caused by the existence, not necessarily of a lack of environmental concern by states, but of an industry-run alternative which is better than C.L.C." [204]

Although this is a valid statement at the present time, it is probable that in the near future, TOVALOP which comfortably coexists with C.L.C. will be taken over by C.L.C. [205] and cease to have a raison d'etre.

6.2 CRISTAL

The Contract Regarding an Interim Supplement to Tanker Liability for Oil Pollution is a voluntary agreement between various oil companies and the Oil Companies Institute for Marine Pollution Compensation Limited, which administers the organization,[206] to provide compensation over and above that provided for by TOVALOP or under law, as well as to indemnify tanker owners and bareboat charterers for some of their liability for oil pollution damage. CRISTAL came into

effect on April 1, 1971 as a predecessor to and complement of the Fund Convention. At that time oil companies receiving over 70% of the world's crude and fuel oil were parties. Now that figure has risen to 92%.[207]

CRISTAL will compensate any person who suffers pollution damage or who takes preventive measures: Clause IV(A)(1). In 1973 CRISTAL was amended to include costs for threat removal measures: Clause IV(A)(2). It will be noted that compensation is only available from CRISTAL where it cannot be obtained fully elsewhere: TOVALOP, the Fund Convention, other law.

In 1972 CRISTAL was amended to include compensation to a shipowner for a portion of his liability for pollution damage and threat removal measures and for liability under the C.L.C. and TOVALOP:[208] Clause IV(A)(3), (G). The P & I Clubs thereupon obliged themselves to promote the undertaking of effective and immediate measures by their members. This change was brought about to eliminate the unsatisfactory situation of more compensation being available from CRISTAL when lower clean-up costs were incurred by the shipowner, since more damage compensated by CRISTAL was then caused. The cost of a clean-up was borne by the shipowner, thereby reducing the liability of CRISTAL's fund.[209]

There are certain conditions precedent to the application

of CRISTAL. The oil involved must be owned by a party to CRISTAL: Clause IV (B)(1). However, the definition of ownership has been considerably extended by including parties who have transferred title to a non-party or who are carrying the cargo of a non-party provided that the party so elects prior to the incident Clauses V (ii), (iii). CRISTAL also applies even though title has not yet passed to a party, where there was a contract for such a transfer: Clause V (iv). The tanker must be owned or bareboat chartered to TOVALOP: Clause IV (B)(2). The tanker must be carrying oil in bulk as cargo though it need not be that oil that is spilled: Clauses I (A) and (F). The tanker must be sea-going but not necessarily on a sea at the time of an incident (the Great Lakes would be sufficient): Clause 1(A).

As TOVALOP and CRISTAL go hand-in-hand the definitions of "pollution damage", "preventive measures" and "threat removal" are indentical as set forth above.

Clause IV (E) provides that the Institute shall compensate a victim of pollution damage only "to the extent that such Person has been unable, after having taken all reasonable steps to pursue the remedies available to him, to obtain full compensation ...". The same rule applies to preventive measures and to threat removal measures: Clauses IV (E) and (F).

The Institute will partially indemnify the tanker owner or bareboat charterer as mentioned above. However, indemnity will only be provided where liability exceeds U.S. $120 per ton of the limitation tonnage of the tanker or U.S. $10 million, whichever is less, but does not exceed U.S. $160 per ton of the limitation tonnage of the tanker or U.S. $16.8 million, whichever is less. Where the owner is not guilty of causative wilful misconduct or privy to unworthiness, CRISTAL will compensate for liability exceeding this maximum limit: Clause IV (H). The ultimate ceiling, available per incident from all sources, is set at U.S. $72 million if the Institute considers it advisable: Clause IV (I).

CRISTAL will not indemnify "an owner whose recklessness or willful misconduct caused the Incident": Clause IV (G)(b). It is unfortunate that the term "recklessness" was used: it is unknown in maritime law or both civil and common law and countries, thus, it is difficult to see exactly how it will be interpreted.

The exceptions to liability under TOVALOP are likewise applicable to compensation under CRISTAL: Clause IV (C). CRISTAL does not apply where the Fund Convention is applicable (just as TOVALOP does not apply where C.L.C is applicable). CRISTAL has a similar winding-up mechanism

as TOVALOP: Clause III.

Compensation is paid for by parties contributing to a "fund": Clause VII. Originally the fund was set up by an initial call on all parties: Clause VII (B). When depleted, periodic calls are made to parties: Clause VII (C). Contribution is based on the quantities of crude and fuel oil carried by sea that are received by the parties ("Crude/Fuel Oil Receipts"): Article VII (C).

The crude oil and fuel oil receipts used are those from the calendar year preceding that for which the contribution is required: Clauses VII (B) and (C). Upon the winding-up of the Institute left-over funds shall be distributed to parties: Clause VII (D).

When CRISTAL was initiated in 1971 it was seen as a temporary stop-gap measure, to be gradually wound down upon the coming into force of the Fund Convention. In actual fact, CRISTAL is still playing an important role. There are still several states not yet parties to the Convention. Although the Fund will apply to incidents caused by acts of God and intentional acts or omissions of third parties such as terrorism, to which CRISTAL does not, it does not unlike Fund, compensate pure threat situations - an important advantage. Further, without bureaucracy or litigation CRISTAL provides for prompt results. However, the Assembly of the Fund

has taken a big step forward by raising its limit to approximately U,S, $54 million effective on April 20, 1979[212 (A)] (previously the limit as CRISTAL's U.S. $36 million). This step was no doubt taken on the realization that a very serious incident could exceed that previous limit. This change represents an important advantage over CRISTAL. It is to be hoped that CRISTAL will follow its example.[212 (B)]

By itself, TOVALOP was an inadequate remedy. However, the coming into force of CRISTAL much improved the situation: the limitation on compensation was raised to $30 million per incident pollution damage and private claims were covered as well as governmental cleanup expenses. It is only unfortunate that the scope of coverage is limited to "direct" provable damage (excluding "ecological" damage) and many of the exceptions of the C.L.C. have been retained.

TOVALOP and CRISTAL have been two most important developments in the prevention of marine oil pollution. They were speedier and have covered a broader sphere than their legal counterparts the C.L.C. and the Fund Convention. Until those attain a virtual monopoly, TOVALOP and CRISTAL will still have important roles to play. Eventually, however, they will cease to perform their functions.

The recent Amoco Cadiz disaster is a good example to demonstrate the potential applicability of TOVALOP and

and CRISTAL. Firstly, France being a member of the C.L.C., cannot claim from TOVALOP as the two are mutually exclusive. Secondly, France can only claim under CRISTAL insofar as it has not been fully compensated to a limit of $36 million - under other law, the C.L.C. or the Fund Convention. Thus, it is most unlikely that CRISTAL will ever be called upon to compensate France: as it now stands France is suing in the United States for over $300 million. Even if she does not succeed here or recovers less than $36 million, she must still claim under the C.L.C. and the Fund Convention before proceeding to CRISTAL. The owner of the Amoco Cadiz can claim indemnity under CRISTAL unless it is shown that his recklessnes or willful misconduct caused the incident.

7. STATE LIABILITY AND THE 3RD UNITED NATIONS CONFERENCE ON THE LAW OF THE SEA

The subject of state liability for oil pollution damages has been dealt with only indirectly in the C.L.C. This topic, however, deserves some consideration for several reasons: firstly, some of the doctrinal writers[213] (although a clear minority) seem to support a theory of strict liability of states for environmental damages, which, if brought to its logical conclusion might mean that the state of registry of the shipowner be held ultimately responsible for the pollution damages caused by its nationals; secondly, the 3rd United Nations Conference on the Law of Sea is in the process of "codifying" after years of debate a principle concerning state liability and responsibility in the context of "protection and preservation of the marine environment". It is felt that, because of its future implications and developments the analysis of this principle is warranted in the context of this research.

7.1 The Problem of State Liability

The C.L.C. excludes the possibility of making the State directly responsible for oil pollution damages. The Convention does not apply "to warships or other ships owned or operated

by a State and used, for the time being, only on Government non-commercial service."[214] As to the damage caused by state commercial ships, the Convention permits the subjection of each state to suit for such damage, but this provision is evidently of no great importance since, in all cases, when a ship owned by a state is operated by an independent state company, the company for the purposes of the Convention shall mean "the owner of a ship".[215]

7.1.1. The Principle

The general principle concerning responsibility in international law can be broadly stated by saying that every subject of international law is responsible for an internationally wrongful act, and that "it is a principle of international law, and even a general conception of law, that any breach of an engagement involves an obligation to make reparation".[216] Responsibility is the necessary corollary of a right. All rights of an international character involve international responsibility.[217]

It is well settled that a subject of international law can become responsible by either committing or omitting an action. Responsibility can be directly that of a state or

an international organization (e.g. when one of their organs acts) and the injury can be suffered directly (e.g. when a treaty obligation from one state to another is violated). Both may also be vicarious (e.g. when a national acts for whom the state is responsible, or when a national is injured abroad).[218]

However, apart from these last mentioned exceptions, the general view is that "the state...is...not responsible for acts of individuals, except when it has failed in its duties of prevention and punishment of restraint and redress".[219] This classical theory has been recently reiterated by Professor Sørensen who said that in the modern view the basis of State responsibility for acts of private individuals is not complicity with the perpetrator but solely failure of the State to perform its international duty of preventing the unlawful act, or, failing that, to arrest the offender and bring him to justice. The author asserts furthermore that:

> "There is no reason to speak of state complicity or of 'vicarious' or 'indirect' responsibility since the state is internationally responsible not for the acts of any private individual, but for its own omission, for the lack of 'due diligence' of its organs. The delinquency of private individuals is no longer taken as a basis of state responsibility but as merely the occasion for calling into operation certain duties for the state."[220]

A similar view is expressed by Ago:

> "Le fait illicite est I'omission de l'organe, non I'action du particulier, et toute opinion differente resulte de la confusion entre ce qui n'est et ne

> peut etre qu'une lesion materielle d'un interet etranger, lesion qui peut etre accomplie par le particulier, et la lesion d'un droit subjectif international etranger, le droit a exiger de l'Etat national du particulier une activite preventive et repressive pour la protection de certains interets, lesion qui exige une conduite d'omission des organes de l'Etat."[221]

The fait illicite of the State, in the context of marine pollution, would, therefore, consist in the failure by the State to supervise "individual activities" to make certain that these "activities" do not cause marine pollution.

We may say that "sans conduite illicite d'un organe de l'Etat, pas d'imputation a l'Etat, pas de faite illicite international, et pas de responsabilité".

7.1.2. The Exception

Some of the authorities[222] support the theory that vicarious liability of the State may arise under certain circumstances as the consequence of actions or omissions imputable to subordinate agents of the State or private individuals, either its own subjects or foreigners. Among the several circumstances which may engender vicarious responsibility is that incurred when "an injurious act is committed which causes actual damage, not necessarily material however, to another State or to the persons or property of citizens of another state".[223] The limits of this exception, for the purposes of this chapter, are tremendous. In fact, according to Professor Eagleton and almost all the doctrine, the theory

of vicarious liability must be considered together with "the theory of territorial control upon which the responsibility of the State is founded".[224] The author points out that:

> "the State cannot be regarded as an absolute guarantor of the proper conduct of all persons within the bounds. Before its responsibility may be engaged, it is necessary to show an illegality of its own; and this involves simply the question of what duties are laid upon the state with regard to individuals within its boundaries by positive international law."[225]

7.1.3. International State Liability

It is certainly accurate to state that the question of civil liability for pollution and compensation to victims is one of internal law and is settled through procedure before national courts. The State whose national he is or the flag state of the vessel is not liable to pay compensation under general international law.[226] As a general rule it is left for the victim to pursue his claim for damage by the means of an ordinary civil suit before the tribunals of some country or other, against the private tortfeasor as such.

Professor Ballenegger summarizes very well the state of the facts when he says that:

> "Tout d'abord, les Etats se refusent à endosser une responsabilité objective, alors que bon nombre d'entre eux l'ont introduite par des dispositions de droit interne dans les rapports entre leurs ressortissants. Rien ne laisse présager que les Etats acceptent à leur tour cette charge dans un proche avenir, sauf

lorsque, dans certains secteurs, leur activité peut être assimilée à celle des entreprises privées; mais alors ils ne relèvant plus du droit international public. Une responsabilité pour acte illicite seulement n'offre aucune action aux victimes lorsque l'incident dommageable est dû à un élément extérieur, un risque dont la survenance n'est pas imputable à l'Etat."[227]

7.1.4. A Theory of State Liability for Oil Pollution Damages

In the Middle Ages the State was regarded as a collectivity whose members were individually or collectively responsible for an act of any one member.

This concept of "collective responsibility" or "group solidarity" was such that "the bond of nationality alone was sufficient to impute to the State responsibility for the act of an individual member, wherever committed".[228] This theory lasted until Grotius influenced partly by Roman and partly by natural law[229] critically rejected it in his famous book "De Jure Belli et Pacis".[230] He examined the reasons why a state may become responsible for the acts of private individuals and arrived at the conclusion that:

> "A state may only become responsible by complicity in the crime of the individual, through patientia or through receptus. The state which becomes aware that an individual intends to commit a crime against another state or one of its nationals, and does not prevent it (patientia), or the state which extends protection to the offender by refusing to extradite

> or punish him (receptus), becomes an accomplice in his crime, establishes a link of solidarity, a tacit approval of the act: from such relationship, the responsibility of the state is born." [231]

It has been seen that even only from a conceptual viewpoint, one of the major problems to overcome when trying to establish state liability is that of territorial control. It is evident that when ships sailing on far seas are involved, the problem seems almost insurmountable. Professor Sørensen[232] says, in fact, that the responsibility for acts of private individuals applies to acts against other states performed in territory over which a state exercises jurisdiction or control, and extends to the conduct of any individual in the territory, whatever his nationality or reasons for his presence. The duty of 'due diligence' in preventing, investigating and/or punishing such acts is the counterpart of the exclusive exercise by each state, the police and judicial function in its own territory.

The foundation of this responsiblity lies, therefore, in the exclusive control which a state exerts over its territory. It has been suggested that one way to avoid this problem would be to resort to the old concept of a ship as a "floating island". Unsatisfactory as this may be, it would at least provide a "legal fiction" not totally deprived of a logical function.

An even more unorthodox view gained some momentum in

the early 70's i.e. that the State of registry of the ship causing pollution damage should be a party in the liability allocating process on the basis of the "indirect benefit" it (or its nationals) receives by the activity of its tankers. The weakness of this theory, not only from a legal point of view but also from a practical point of view, is evident: the ship may be owned, say, by a Liberian company, bareboat chartered to a Bermudan company, managed by an English company, time chartered to a Greek company and voyage chartered to an American company. Her cargo may have been sold during the voyage by the American company to a Japanese one. The officers may be English and the crew, Indian. The international nature of the shipping business is such that to hold "responsible" the state of registry of the ship on the base of a vague - to say the least - "indirect benefit" the state supposedly receives through the activity of tankers sailing under its flag, seems to be without a solid legal and economical foundation.

The latest development on state responsibility for oil pollution damages may be found in the report of the International Law Commission (ILC) on the work of its 32nd session.[233]

The International Law Commission in its draft articles on state responsibility discusses the question of state responsibility for internationally wrongful acts. According to Article 3 there is an internationally wrongful act of a

State when: (a) conduct consisting of an action or omission is attributable to the State under international law and (b) that conduct constitutes a breach of an international obligation of the State. It could be held that a breach of the State's duty of prevention and control with regard to oil carrying-vessels is an omission of an international obligation.[234] It could therefore be held responsible for any oil pollution damages which are a direct result of this breach. However, according to article 11 the State is not responsible for acts of private individuals per se.[235] Thus, it would not be responsible for damages directly caused by those individuals.

The ILC also discussed the question of "international liability for injurious consequences arising out of acts not prohibited by international law". The Commission felt that it was premature to adopt any articles before a further general discussion of the nature and scope of the Commission's task with regard to this topic. Two different (and to a certain extent difficult to reconcile) views emerge, however, from what should be considered a preliminary discussion: it was noted that there were activities involving a great risk of accidents (or a normal risk of large scale accidents) such as the transport of petroleum by super-tankers. It was observed that States had concluded agreements to deal with such eventualities and would no doubt conclude further agreement as required.

Another view emerged to the effect that "ships carrying oil and other pollutants" because of the ultra-hazardous nature of the activity entailed State liability for injurious consequences arising out of acts not prohibited by international law: "the liability (is) absolute or strict and (is) without the need to prove fault.

It will be most interesting to see whether this advanced view will find its way into the draft articles.

7.1.5 Conclusion

The formula "State responsibility for acts of private individuals" is a misleading and confusing one with regard to the concept of fault: The problem is whether the State should be held vicariously responsible for pollution damages inflicted to other States (or their nationals) by its nationals - i.e. whether the State is really responsible for "acts of private individuals" - or whether, on the contrary, the State should be held accountable exclusively for its own conduct - i.e. a violation of its duty of prevention and/or repression. In this second instance the State is clearly not responsible for "acts of private individuals".

The first theory has been supported in recent times by a few authors[236] who saw in a much quoted passage of the Smelter case ("....Canada is responsible in international law for the conduct of the Smelter") a confirmation of their theory i.e. that a state may be responsible without proof of non-fulfilment of its duty of prevention.[237] This conclusion does not seem to be justified by the Smelter decision because Canada had acknowledged before the arbitral award its responsibility for non-fulfilment of its duty of prevention.

At the present time it might still be maintained that, "all the authorities on international law are a unit as regards the principle that an injury done by one of the subjects of a nation is not to be considered as done by the nation itself."[239]

7.2 The 3rd United Nations Conference on the Law of the Sea

As can be seen from the reading of a recent draft[240] the 3rd United Nations Conference on the Law of the Sea (LOS III) an umbrella treaty. It establishes a framework of general obligations for future international negotiations. It sets forth general procedural rules on who has jurisdiction to do what, where and how. Specific, detailed regulations in specialized areas are left for other treaties. More important, the LOS conference is not an environmental forum. Its purpose is to resolve conflicting interests related to navigation and resource uses of the ocean. Economic, military and political factors are given top priority, environmental questions, unfortunately, may get lost in the shuffle.

7.2.1. General Obligations

In Part XII, "Protection and Preservation of the Marine Environment", states have a general obligation "to protect and preserve the marine environment": Article 192. Further, states shall "take all necessary measures...to prevent, reduce and control pollution of the marine environment from any source...": Article 194. These general principles are a necessary foundation for a treaty of this nature but in fact have little practical effect, especially in light of

Article 193 proclaiming the states "sovereign right to exploit their natural resources".

To foster a spirit of teamwork, Section 2 provides for cooperation on a global or regional basis, Section 3 for scientific and technical assistance to developing states. Again, fine sentiments of goodwill but virtually ineffectual.

7.2.2. Responsibility and Liability

The work that was done in this area produced more interesting results. Article 195 codified the duty in the Trail Smelter case "not to transfer, directly or indirectly, damage or hazards from one area to another or transform one type of pollution into another". Of necessity the concept was extended to prevent pollution spreading not only to other national territories but to the ocean - the common territory - as well. State responsibility for damage to the ocean commons is important in giving an impetus to other general obligations and to establishing a basis for assignment of liability in case of damage.

The Sub-Committee III on the Seabed and Committee III of the Conference, extensively analysed the problem of liability for damage caused to the marine environment. The result is the production of draft articles expressing principles of liability that depart considerably from those

on which the existing international agreements are based. The draft articles of Australia envisage that "if activities under the jurisdiction or control of one state cause damage to areas under the jurisdiction of another State... the first mentioned State (is) internationally liable to the second State and shall pay compensation accordingly".[241] Norway's working paper contains the same principle but adds that "the first-mentioned state shall, in accordance with the principles of international law, be internationally liable."[242]

The most remarkable feature of both drafts is the introduction of the concept of state liability. This represents a reversal of trend in international agreements where general rules concerning liability for pollution damage were not applied to the state, by accepting the immunity of warships and other state owned ships on non-commercial service. Here, both drafts deal with "international responsibility of the State", and the draft of Norway also deals with "responsibility" in accordance with the principles of international law.

As has been seen above, this means that responsibility may be incurred only for activities carried out by the state itself, its bodies and officials. As far as private persons are concerned, the two working papers simply refer to the more traditional view that the state shall be internationally liable for damage caused by the activities of its nationals

only when there is an omission of the state contradicting its responsibility to protect the marine environment from pollution.

The Canadian draft articles[243] of 1973 indisputably represented the most advanced and comprehensive attempt to make the State liable for damage caused "in the areas or the areas under jurisdiction of any State including the environment of that State". In principle, the State is responsible only when such damage may be "attributed" directly to the State. In other cases, when nationals of the States cause damage, the State must "provide recourse with a view to ensuring equitable compensation for the victim of marine pollution".

The real novelty in the Canadian position lies in the fact that the State of the victim, when local remedies do not satisfy his legitimate claim, has a "right of action" directly against the State which has jurisdiction over the persons responsible for the damage. General civil liability of "private persons" for pollution damage under certain conditions can develop into that of the State exercising jurisdiction over these persons, and civil law relations respecting such damages can be substituted for those of international law.

The Draft provides for a settlement of the claim if agreement is unachievable, by submitting the dispute to

arbitration or to a court in accordance with a procedure fixed by the parties themselves or by a third party designated by them. The International Court of Justice might be an ideal forum to adjudicate a dispute projected on an international level.[244]

It is clear that the Canadian draft articles established a principle that differs considerably both from other drafts and from the "principles of international law".

The Canadian proposal, although not accepted by the Committee was not entirely forgotten. In 1978 an informal proposal was drawn up by Arab countries with the same concepts.[245] It is indeed regrettable that the Canadian approach has not been followed by the international community.

Article 235 is a disappointing result:

> 1. States are responsible for the fulfilment of their international obligations concerning the protection and preservation of the marine environment. They shall be liable in accordance with international law.
>
> 2. States shall ensure that recourse is available in accordance with their legal systems for prompt and adequate compensation or other relief in respect of damage caused by pollution of the marine environment by natural or juridical persons under their jurisdiction.
>
> 3. With the objective of assuring prompt and adequate compensation in respect of all damage caused by pollution of the marine environment, States shall co-operate in the implementation of existing international law and the further development of international law relating to responsibility

> and liability for the assessment of and compensation for damage and the settlement of related disputes, as well as, where appropriate, development of criteria and procedures for payment of adequate compensation such as compulsory insurance or compensation funds.

It is clear that even if this confirms a positive trend in international law and international co-operation for the fight against pollution this article in itself is far from representing a turning point in the theory of state liability.

In this context, Article 235 simply repeats the admonition of Article 194 that states are responsible for preventing damage from activities under their jurisdiction or control to areas (including the marine environment) under the jurisdiction of other states, adding that, in accordance with principles of international law, states are liable to other states for such damage. The "activities" of concern may thus originate on land or anywhere at sea, including flag ships and sea bed installations, and the state is responsible whether the enterprise is public or private. It is otherwise left to international law to specify the nature and extent of liability.

Further provisions on liability to areas under national jurisdiction from ship-based pollution may be found in Part II. As part of the quid pro quo noted above, if a ship in innocent passage does not comply with the laws and regulations on navigation, it is liable for any damage to the coastal state, including its evironment. Any noncompliance from a warship in

innocent passage, including straits, with any laws and regulations of the coastal state, Text articles, or international law causing any damage to the coastal state and its environment puts international responsibility on the flag state (Article 31 of Part II). This otherwise remarkable development must be qualified, however, by the doctrine of Sovereign Immunity, which exempts military ships from falling under the jurisdiction of foreign states.[246] Article 236 states that "the provision this Convention regarding the protection and preservation of the marine environment do not apply to any warship, (---) used (---) only on government non commercial service. However, each State shall ensure (---) that such vessel (---) act in a manner consistent so far as it is reasonable and practicable, with the Convention".

It is clear that this article is as meaningful as a flag state wishes to make it, since the unilateral decision of the state guides the extent to which its naval ship will follow "appropriate" pollution rules. From an environmental stand point, such exemption is unjustifiable.

Coastal states are not entirely helpless, however. Traditional doctrine is expressed in Article 30, whereby a coastal state may request a warship not in compliance with its laws and in disregard of requests for compliance to leave its territorial sea by a safe and expeditious route.

Beyond this, warships out to be brought under the requirement of full compliance with pollution standards, just like any other ship, but in deference to reality, their exemption from foreign enforcement action may continue. The provision on non-warships is unnecessarily limited to violations of navigation rules nor is it clear whether the laws comprehended may be national and/or international - the broader formulation used for warships should be followed here as well. For its part, if in applying its laws, a coastal state acts contrary to provisions of the Text and loss or damage results to a ship in innocent passage, that state must compensate the ship owners. A significant development is found in Part III of the Convention dealing with "straits used for international navigation". Ships in transit must comply with generally accepted international regulations, procedures and practices for the prevention, reduction and control of pollution from ships. Furthermore, the flag state of a ship entitled to sovereign immunity which acts in a manner contrary to the laws and regulations relating to transit passage through straits (or other provisions of Part III) shall bear international responsibility nor any less on damage which results to states bordering straits. Liability for damage from ships transiting the economic zone to coastal state interests in the zone, territorial sea, or coastline would

be covered by the general principle of Article 235.

For areas beyond national jurisdiction, Article 235, drawing on Principle 22 of the Stockhold Declaration, holds states responsible for activities under their jurisdiction or control that cause damage to the marine environment of such areas, but nothing further is said about state liability for such damage. Instead, states are mandated to cooperate, when necessary, in developing criteria and procedures for protecting the marine environment, including determination of liability, assessment of damage, payment of compensation, and settlement of related disputes. However, states and international organizations are both responsible and liable for damage caused by activities in the sea bed area which they undertake or authorized, although a defense in any proceeding may be based on a claim that damage is the result of an act or omission of, as the case may be, the Authority or a contractor. There is no restriction on the location of such damage by activities originating in the sea bed area.

Except for the sea bed rules, the provisions on liability in Part XII are essentially holding actions, marking no advances in this subject. It it important that states be held responsible for damage they, or entities registered in them, cause to the high seas, but the nature of liability entailed is left under a vague injunction for states to work

out whenever they see fit. While the Text cannot carry detailed rules on this complicated subject, any more than on pollution control regulations, it could list general principles for states to spell in ensuing negotiations.

Such principles could include the following: most basically, the absolute liability of states, together with the owners or operators of enterprises and ships registered with them, for damage caused anywhere in the ocean from hazardous activities originating anywhere on land or sea, such liability to comprehend not only damage costs, but costs of pollution removal and of restoration of the viability of the impacted environment; the absence of a monetary ceiling on potential compensation, or if necessary, determination of a ceiling on the basis of maximum feasible damage from the activities covered; the obligation of states to ensure access to their courts by claimants; the right of initiation of or intervention in proceedings before a court by other states, competent international organizations, and private groups, even if not directly injured by the damage at hand and even if no damage to state territory has occurred, acting in the name of the international community; the right of states to impose higher than international standards or supplementary rules for liability regarding marine environments under their jurisdiction, and flag ships and installations registered with them; and the establishment of international compensation fund(s) as already contemplated for oil pollution

damage, particularly regarding harm which cannot be traced to individual sources or which is borne by the international community as a whole, such funds to be based on allocations from users and exploiters of ocean space and resources.

Because of the nature of LOS i.e. an umbrella treaty that establishes a framework of general obligations and sets forth general procedural rules on who has juris-diction to do what, where and how, it is difficult to asses at this time the direct impact that it will have on the C.L.C. and other pollution conventions, which deal with specific problems providing obligatory solutions to them. At present there seems little if any direct impact on the C.L.C. The LOS III only deals in a very minor way with oil pollution. Thus, the impact is more indirect: the growing sensitivity of the international community to marine pollution.

8. CONCLUSION

The international community was spurred into action by the Torrey Canyon disaster of 1967. Emphasis was placed on finding solutions in the areas of liability and compensation. Although their efforts were long in coming into effect (June 19, 1975 for the C.L.C. and October 16, 1978 for the Fund Convention) the results have been largely meritorious. A uniform international legal regime was created. Immediately this provides for an important procedural advantage: only one set of regulations must be followed, all claims are settled in one jurisdiction and all contracting parties will be bound by that judgment. The result is easy access to the shipowners on the high seas, who are made liable. A national scheme could never have thrown a net so wide without complicated procedural problems. Thus, the very fact of an international agreement dealing comprehensively with the important questions of liability and compensation is an achievement in itself that warrants a widespread ratification of the C.L.C. and the Fund Convention.

With regard to the substantive provisions of the conventions, the introduction of strict liability for the C.L.C. and the more nearly absolute liability for the Fund Convention represents an important development in international law. And the more so since they have not been watered down by a profusion of exceptions. The same can be said about the compulsory insurance scheme.

The C.L.C. provides substantial benefits to governments. Most important is the simplification of jurisdictional and procedural matters as mentioned earlier. They are granted access to the Fund Convention. Ships registered in states party to the C.L.C. may be issued with certificates which must be recognized by the other contracting states.

If the C.L.C. were more widely ratified, shipowners would derive greater benefits from it. It will be unlikely that a shipowner will have to establish more than one limitation fund in incidents where more than one state has been polluted (a problem which arose in the Amoco Cadiz incident). The C.L.C., as any system of law, would provide certainty for a shipowner as to his rights and liabilities. This is in sharp contrast to unilateral national action. Ships must be free to call at ports throughout the world if international trade is to flourish efficiently. It is impossible for a ship to operate efficiently and profitably if it has to comply with numerous different regulations as to design, equipment and operational procedures. A shipowner could never be certain whether he had complied with all the regulations and it is not unlikely that some would be conflicting. The cost of attempting to do so would be prohibitive. The problems of forum shopping and double jeopardy would be minimized. At the moment, if the state where the damage is suffered prescribes a shipowners' limit

of $10 million for a particular ship, and the state where the shipowner is resident prescribes a limit of $16.8 million, the motive for forum shopping by any plaintiff is obvious. If the shipowner is sued in both states by different plaintiffs, his limit could in fact become $26.8 million. States would be prevented from enacting unreasonable and draconian measures unilaterally.

The Fund provides for an inexhaustible fund. It guarantees compensation for an unlimited number of oil spills. Furthermore, cargo-owners are only required to contribute after the event. This prevents millions of dollars lying in a dormant fund. Few schemes have this flexibility. It is important, too, that the Fund increases its limit to 900 million francs. It is necessary for the Fund to be able to cover such large spills as the Amoco Cadiz even though in fact the majority of claims come from numerous small spills from small ships.

The Fund Convention is made the more effective with its provisions regarding non-contracting parties. Those states must have insurance; the "conditions" are to apply to a shipowner seeking indeminification whether or not the flag state is a party to the convention which is the basis of the condition; states party to the convention may benefit from it whether or not the flag state of the polluting ship is a party.

However , there are also major weaknesses in both conventions. The basic premise on which schemes of protection for the marine environment have been built has not been changed: it is still freedom of the seas; states are not liable for the actions of their nationals. Just one year after the Fund Convention, this attitude, at least, was modified: at the Stockholm Conference in 1972, it was resolved that states would be responsible for actions taken under their "jurisdiction or control" and must take measures to prevent pollution damage in "areas beyond the limits of national jurisdiction."[247] It is regrettable that those principles have not been incorporated into the 1969 and 1971 conventions. Their scope are thereby limited to pollution damage in the territory or territorial seas.

It is unfortunate that other factors limit further the scope of these conventions. Claimants must identify the source of the polluting oil: there is no compensation for damage from unidentified oil slicks which result from normal tanker activities. This was a compromise in order to win the support of the oil industry and those states sympathetic with it. The conventions apply only to "persistent" oils (C.L.C. Art. I(5)) and only when there is actually oil being carried in bulk as cargo (C.L.C. Art. I(1)).

The burden of proof is too onerous for innocent victims. It is difficult enough at times to identify the source of the

spill but it is virtually impossible to prove the extent and causes of oil pollution damage. The solution might be the creation of an independent organization to be in charge of investigating these aspects of a spill.

The Fund Convention should be more strict in laying down its conditions for indemnification. It is good that ships have to comply with other conventions before being eligible for indemnification but it should not have to prove the fault of the owner as well as the master where there is non-compliance (Fund Convention, Art. 5(3)). In fact, however, the Fund really indemnifies the shipowner's insurer: the shipowner himself, therefore, will have little incentive to comply with the conditions for indemnification.

From a purely technical point of view, the Fund Convention can be criticized for poor draftsmanship. This is apparent particularly in Arts. 4(1), 4(4) and 4(5) determining the amounts of compensation: the omission of amounts paid for pollution damage in the territorial sea and the awkward phrase "proportion between" of Art. 4(5).

There is also a lack of any reasonable amendment procedure which has proved to be a great hindrance for IMCO. A full-scale diplomatic conference is necessary to alter the conventions. This is unnecessary and inefficient.

In summary, however, the advantages outweighs the disadvantages. The true test, of course, is the effectiveness

of the conventions in practice, the ability of the contracting parties to make amendments where appropriate in order to cover unforeseen situations and remedy its defects. Most important, though, for the effectiveness of these conventions is world-wide ratification.

Two notable abstentions from the conventions are the United States and Canada both of whom have long coastlines and are environmentalists. It is interesting, therefore, to see their views on the matter. In its 1978 Report the U.S. Senate Commerce Committee concluded that:

> "because of the inadequacies of (the 1969 and 1971) proposed treaties the Committee believes they should not be approved unless substantially altered. In the meantime domestic legislation should fill the gap."[248]

At least two authors feel that "unless there is a radical change in the way the international community views the matter of compensation for oil pollution damage, it is hard to envision a successful leadership role for the United States in future treaty writing efforts to unify the international law governing oil pollution liability."[249]

As is well known the United States was and is particularly unhappy with the C.L.C. limit of $134 per gross ton subject to a $14 million ceiling. Its view on this was reiterated in the 40th Session of the IMCO Legal Committee in 1979. The U.S. was of the opinion, a view which Canada shared, that the conventions would be more widely accepted if in both the respective limitation amounts were increased.[250] In fact

almost all American commentators favored ratification of both conventions.[251] At present the U.S. limit of liability is U.S. $150 per gross ton or a minimum of U.S. $250,000 with no ceiling. It should be noted that the Federal Water Pollution Control Act[252] provides for strict liability only for "federal cleanup costs".[253] Apart from this liability, a shipowner may become responsible under state law.

The near tragedy of the Argo Merchant resulted in the proposed "Superfund." That legislation would increase shipowner's liability to U.S. $300 per gross ton with a total limit of U.S. $30 million. This is double the C.L.C. fund thus making even less likely, unfortunately, that the U.S. will ratify the conventions.[254] This is indeed a regretable result because it jeopardizes the existence and the workability of a uniform intergovernamental legal regime of civil liability for oil pollution damages. Despite many criticisms the C.L.C. and Fund Convention had widespread support for their implementation and even those most opposed to them could not but recognize that the two conventions represent an important and valuable first step. Furthermore, it should not be forgotten that the conventions provide for adequate compensation in the overwhelming majority of oil spills and that only a tiny minority, i.e. Amoco Cadiz, would remain insufficiently covered.

In such instances national legislation providing additional compensation, when limits of funds under the two Conventions

are reached and, thus, that supplements rather than is incompatible with the C.L.C. and Fund Convention would provide a satisfactory answer, certainly more in line with the international breadth of the problem of liability and compensation for oil pollution damage.

Canada took a hardline almost extremist position at the conference. She advocated unlimited liability imposed jointly on ship- and cargo-owners. She in fact cast the only negative vote against the Convention. This damaged Canada's relations with other IMCO members and resulted in less input into the work on the Fund Convention. However, there was at least one supporter for Canada's firm stance: Allan Mendelsohn, legal counsel in the Department of State prior to the conference wrote: "Had I controlled the United States vote at the 1969 Conference, I would have joined Canada and not permitted that great environmental-trail-blazing neighbor of ours to have been the sole vote opposing adoption of the final draft".[255]

Now, however, Canada is taking steps which will enable her to ratify the Conventions. A Press Release of February 17, 1981 indicates that the Parliament will be asked to amend Part 20 of the Canada Shipping Act so as to enable such ratification.[256] Further, the Maritime Pollution Claims

Fund (MPCF) would be changed so as to provide additional compensation when limits of funds under the two international pollution liability and compensation treaties have been reached. The fund would also be available for claims not covered by the international treaties, such as oil spills from ships other than tankers. 257 Another important change, and one that the C.L.C. should adopt, is the reversal of burden of proof for unidentified "mystery spills". In future, the administrator would have to prove that the spill did not originate from a ship. 258

TOVALOP and CRISTAL have provided excellent stop-gap measures in apportioning liability and compensation for oil pollution damage. They are speedy, efficient and for the most part cover a wider range of potential situations than do the C.L.C. Although originally meant to be only temporary, they have been such a success, and the international conventions so slow in becoming truly effective, that their winding-up has been postponed. It is hoped that they will continue playing their important role until international agreement has made them obsolete. The Fund Convention has already surpassed CRISTAL by raising its limit to 675 million francs. It is hoped that CRISTAL will likewise raise its limits for it may be some time before the conventions have been ratified by enough states for TOVALOP and CRISTAL to be pushed out of business. Until then may industry be congratulated for its commendable achievements.

CHAPTER 1 - FOOTNOTES

1. Declaration of the U.N. Conference on the Human Environment Stockholm 1972 I (6).

2. Kiselev, The Freedom of Navigation and the Problem of Pollution of the Marine Environment, (1976) 6 Ga. J. Int'L & Comp. L. 93, 94.

3. This concept does not find general recognition and application even at the Third Conference on the law of the Sea: A/CONF. 62/WP. 10/Rev. 3.

4. See E. Cowan, Oil and Water: The Torrey Canyon Disaster, New York, 1968 and G.W. Keeton, The Lesson of the Torrey Canyon, (1968) Current Legal Problems p. 96 et esq.; For the Amoco-Cadiz accident see infra, note 34.

5. On the recent developments of this problem see L.L. Herman, (1978) 24 McGill L.J. See also Boczek, Flags of Convenience (1962), Goldie, Recognition and Dual Nationality. A problem of Flags of Convenience (1963) 39 Brit. Yb. Int'l L. 220 and Report by the UNCTAD Secretariat, U.N. Doc. TD/B/C.4/168.

6. Such as establishing standards of ship design, construction, equipment, training for the crew; traffic regulation; industry's load-on-top system. Problems lie with agreeing to the standards, enforcing them and imposing liability for damages caused by failing to adhere to them: Fleischer, Pollution from Seaborne Sources, New York, 1978; Livingston, Marine Pollution Articles in the Law of the Sea Single Informal Negotiating Text (1976), p. 12; McGomigle & Zacher, Pollution, Politics and International Law: Tankers at Sea (1979) p. 146; D.A. Fitch, Unilateral Action Versus Universal Evolution of Safety and Environmental Protection Standards in Maritime Shipping of Hazardous Cargoes (1979) 20 Harv. Intl. L.J. p. 138 et seq.

7. This latter form of pollution is outside the scope of this thesis. See for instance the Nuclear Test case (1973) I.C.J. Rep. 112.

8. In fact, these purposes are explicitly set out in the preambles to the two Conventions.

9. C.L.C Art. I(1).

10. See the Journal of Commerce, December 9, 1969, p. 1. Col. 4, quoting Messrs. John C. J. Shearer and Peter N. Miller, representatives of the London Group of ship-owner's Protection and Indemnity Associations, which insure approximately 70% of the world's ocean tonnage against various types of liability, including liability for oil pollution.

11. October 10, 1957. This Convention has not been registered with the United Nations and does not appear in the U.N. Treaty Series. (1966) R.O.L.F. 1517.

12. As far as the new 1976 Convention on the Limitation of Liability for Maritime Claims, its Article 3(b) provides that the rules of this Convention shall not apply to claims for oil pollution damage within the meaning of the C.L.C. or any amendment or Protocol thereto which is in force.

13. This problem will be extensively dealt with in Chapter II.

CHAPTER 2 - FOOTNOTES

14. Definition adopted by the Inter-governmental Oceanographic Commission (based on a definition originally prepared by a SCOR/ACMRR/Working Group) and accepted by the Joint IMCO/FAO/UNESCO/WMO/WHO/IAEA/ UN Group of Experts on the Scientific Aspects of Marine Pollution (GESAMP). See doc. A/7750, Part I, 3, Nov. 10, 1969, and GESAMP I/II, para. 12. See also principle 7 of the Declaration of the United Nations Conference on the Human Environment.

15. M. Hardy (1973)"Definition and Forms of Marine Pollution", in New Direction in the Law of the Sea Vol. III, p. 73. G. Timagenis, International Control of Marine Pollution (1980).

16. Marine Environment Quality, U.S. National Research Council, 1971; Man's Impact on the Global Environment, Report of the Study of Critical Environmental Problems, Massachusetts Institute of Technology, 1979; "Tankers and Ecology," Transportation, Vol. 79, 1979.

17. Ibid., "Tankers and Ecology".

18. Livingston, Marine Pollution Articles in the Law of the Sea Single Informal Negotiating Text (1976) p.3 et seq. Fleischer, "Pollution from Seaborne Sources", in New Directions in the Law of the Sea, Vol. III (1973), p. 79 et seq. J. Hargrove, "Environment and Third Conference on Los" in Who Protects the Ocean? (1975).

19. See Anand, "Tyranny" of the Freedom-of-the-Seas Doctrine, 12 Int. Studies 416 (1973); Brown, Clean Seas versus Freedom of Navigation?, 2 Marit. Studies Mgmt. 69 (1974); Brown and Couper," Future Shipping and Transport Technology and its Impact on the Law of the Sea", in Christi et al (eds.), Law of the Sea: Caracas and Beyond , 271; Dinstein, Oil Pollution by Ships and Freedom of the High Seas, 3 J. Mar. L & Comm. 363 (1972); Fleischer,"Pollution from Seaborne Sources", in New Directions in the Law of the Sea , Vol. III,(1973) 78 at 79; Lapidoth, Freedom of Navigation and the New Law of the Sea, 10 Israel L.R. 456(1975); McCoy, Oil Spill and Pollution Control: the Conflict between States and Maritime Law, 40 Geo Wash. L. Rev. 97(1971); Teclaff, International Law and the Protection of the Oceans from Pollution, 40 Fordham L. Rev. 529(1972); Emanuelli, La pollution maritime et la notion de passage inoffensif, 1973 Canadian YBIL, 13.

20. See the latest Draft Convention on the Law of the Sea A/CONF. 62/W.P. 10/Rev. 3; See also J. Hargrove, op. cit. pp. 212-213.

21. U.N.R.I.A.A., Vol. III, p. 1905.

22. [1949] I.C.J. Rep 22; For a more detailed discussion of the Corfu Channel and Trail Smelter case see Chapter 7.1.

23. M'Gomigle and Zacher, Supra, note 6, p.152; Goldie, Principles of Responsibility in International Law. (1970) 9 Colum. J. Transnat'l L.283,306; Fleischer, supra note 18, p.80 et seq., Livingston, supra,note 6, p.5;Schneider, World Public Order of the Environment (1979) p.164.

24. Supra, note 21.

25. Supra, note 22.

26. Ibid.

27. Hardy, supra, note 15, p. 73 et seq.

28. Bill c-202, 91LM(1970).

29. The U.S. Coast Guard reported that of the ships proposing to carry bulk hazardous cargoes of "chlorine, methane, ammonia, phenol, acrylonitrile, liquid oxygen, liquid hyrodgen, and many other such products with grave toxic and/or explosive characteristics...nearly all [were] of other than U.S. registry. "U.S. Coast Guard, U.S. Dep't of Transportation," liquefied Natural Gas: Views and Practices, Policy and Safety," at I-3 (No.CG478, 1976). Hazardous cargoes are likely to be carried by vessels registered with flags of convenience states; in 1975, 13.5% of the LNG tonnage was registered Liberian and 7%, Panamanian P. Swan, Legal Aspects of the Ocean Carriage and Receipt of Liquefied Natural Gas (1977).

30. This main rule is in Article III:
"Subject to the provisions of Articles IV and V:
(a) the discharge from a ship to which the present Convention applies, other than a tanker, of oil or oily mixture shall be prohibited except when the following conditions are all satisfied:

(i) the ship is proceeding en route,
(ii) the instantaneous rate of discharge of oil does not exceed 60 litres per mile.
(iii) the oil content of the discharge is less than 100 parts per 1,000,000 parts of the mixture.
(iv) the discharge is made as far as practicable from land,

(b) the discharge from a tanker to which the present Convention applies of oil or oily mixture shall be prohibited except when the following conditions are all satisfied.
(i) the tanker is proceeding en route,
(ii) the instantaneous rate of discharge of oil content does not exceed 60 litres per mile,
(iii) the total quantity of oil discharged on a ballast voyage does not exceed 1/15,000 of the total cargo-carrying capacity,
(iv) the tanker is more than 50 miles from the nearest land;

(c) the provisions of sub-paragraph (v) of this Article shall not apply to:
(i) the discharge of ballast 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; or
(ii) the discharge of oil or oily mixture from machinery space bilges, which shall be governed by the provisions of sub-paragraph (a) of this Article."

31. Supra, note 2.

32. The 1972 Olso Convention for the Prevention of Marine Pollution by Dumping from Ships and Aircraft, 11 1LM 262(1972); The 1972 London Convention on the Prevention of Marine Pollution by Dumping of Wastes and other Matter, 11 1LM 1294(1972).

33. The 1967 Convention on Conduct of Fishing Operations in the North Atlantic.

34. The 1974 Convention for the Prevention of Marine Pollution from Land-based Sources (Paris Convention on Land-based Marine Pollution), Paris; the 1974 Convention on the Protection of the Marine Environment

of the Baltic Sea Area (Helsinki Convention), Helsinki; the 1976 Convention for the Protection of the Mediterranean Sea against Pollution (Barcelona Convention), Barcelona; the 1978 Kuwait Regional Convention for Cooperation on the Protection of the Marine Environment from Pollution (The Kuwait Convention), Kuwait.

35. Timagenis, Supra, note 15, pp. 114-115. See also Fitzmaurice, Some Results of The Geneva Conference on the Law of the Sea, 81/CLQ/72 (1959), p.110 et seq., and Oda, The Concept of the Contiguous Zone, 11 ICLQ p.131(1962).

36. An example of unilateral action in this respect can be found in the measures taken by France following the Amoco Cadiz accident. The "Amoco Cadiz", a large tanker, grounded off the coast of Brittany during the night of March 16/17, 1978, and extensive damage was caused to many miles of coast and marine life from the oil which leaked. Martray, Les lecons de la Castrophe de l'Amoco Cadiz, 4 Environmental Policy and Law 172(1978). Immediately after the accident the French Government took drastic measures on the national level and initiated an effort at the international level for the establishment of new rules for the prevention and control of marine pollution. At the national level Decree No.78-421 of March 24, 1978 was issued relating to measures to deal with accidental marine pollution (French "Journal Officiel" of 3.26.1978 pp. 1338-1339; 82 RGDIP 744 (1978); IMCO doc. MSC XXXVIII/2L/Add.1 Annex). Under this decree, upon entering French territorial waters the master of any ship carrying oil must give notice by radio to the French Maritime Prefect of the date and time of entry, the position, route and speed of the ship, and the nature of her cargo(Article 1). In addition, the master of any ship carrying oil and sailing within 50 nautical miles of the French coast must report to the appropriate French authority any accident within the meaning of the Brussels Convention of 1969 on Civil Liability (Article 2). Finally, any ship standing by for assistance to any ship must report the position of the ship in difficulty (Article 3). On the same day (3.24.78), a Circular was issued by the Prime Minister of France relating to the movement in French territorial waters of ships carrying Oil (French Journal Officel of 3.26.78, p. 1339; 82 RGDIP 745 (1978); IMCO doc. XXXVIII/21/Add. 1 Annex) by which all Maritime Prefects were ordered to issue in each maritime region instruments strictly

regulating the movement in French territorial waters of tankers carrying oil, including a prohibition for these ships to approach French coasts to a distance of less than 7 nautical miles except in international routing systems of for the purpose of entry into ports.
These unilateral measures could be said to partly, at least, contrary to existing international law as hampering innocent passage and the freedom of navigation. For a discussion of the problem of "port-state" jurisdiction especially in the contest of the 1973 Convention for the Prevention of Pollution from Ships and its 1978 Protocol, see Timagenis, supra, note 15, p. 510 et seq.

CHAPTER 3 - FOOTNOTES CONT'D

37.(A) Originally an ad hoc Legal Committee, it has since be-become a permanent organ of IMCO. In 1973 the IMCO Assembly created a Marine Environment Protection Committee ("MEPC") to coordinate and administer IMCO activities on pollution. In 1975 the Assembly moved to make prevention and control of marine pollution from ships one of the basic purposes of IMCO and to make the MEPC a permanent organ empowered to consider any matter within the scope of IMCO concerned with prevention of ship-based pollution.

37.(B)* The CLC is amended so far as the Unit of Account is concerned by the "Protocol to the International Convention on Civil Liability for Oil Pollution Damage, 1969" adopted in 1976 (IMCO Sales No. 1977.05).

38. Black, Civil Liability for Oil Pollution, (1973) 10 Houston L. Rev. 394, p. 399.

39. The extent of the territorial limit varies from the three miles of the United States to Peru's two hundred miles.

40. U.N. Conf. on the Law of the Sea, A/CONF.13/39 (1958). 2d U.N. Conf. on the Law of the Sea, A/CONF.19/8 (1960).

41. Supra, note 38, p. 399.

42. United States Department of State Press Release No.121 (April 15, 1970).

43. Supra, note 38, p. 400.

44. Ibid., p. 400.

45. C.L.C., Art. II.

46. Supra, note 38, p. 400.

47. Hearings on Conventions and Amendments Relating to the Pollution of the Sea by Oil Before the Sub-Committee on Oceans and International Environment of the Senate Committee on Foreign Relations, 92d Cong., 1st Sess. 102 (1971), 10 (hereinafter cited as Hearings on Oil Pollution of the Sea).

48. Assistant Secretary for Congressional Relations of the U.S. Department of State.

49. Supra, note 47, p. 20.

50. For a discussion as to what "damage" should cover see Wood, An Integrated International and Domestic Approach to Civil Liability for Vessel-Source Pollution, (1975) J. Mar. L. & Comm. p. 29-37.

51. Swan, International and National Approaches to Oil Pollution Responsibility: An Emerging Regime for a Global Problem, (1971) 50 Ore. L. Rev. 506, 524 et seq.

52. The phrase "loss or damage" is referred to here.

53. Abecassis, The Law and Practice Relating to Oil Pollution from Ships, (1978), 186 gives the example of detergent sprayed on the high seas on a slick which is being blown out to sea, and with no grounds for thinking that the slick will turn towards the shore. In this case the costs would be irrecoverable because a shipowner would be able to argue that he should not have to pay for clean-up costs when the sea would have broken down the slick on its own.

54. C.L.C., Art. I(8).

55. C.L.C., Art. I(6).

56. Abecassis, supra, note 41, 186, illustrates the situation with the following example: a ship that has been stranded but where no oil has spilled. The cost of sending out boats with detergent spraying capabilities and of laying booms and of other such measures will be irrecoverable.

57. Done Nov. 29, 1969, reprinted in (1970) 64 Am. J. Int'l L. 471.

58. Supra, note 53, 187.

59. Supra, note 53, 173.

60. This problem will be dealt with extensively in Chapter 5.

61. Supra, note 53, 174.

62. Ibid.

63. See below Chapter 5.

64. Supra, note 53, 174.

65. Cole, Marine Pollution, (1969) 4 Oceanology International 69 makes the suggestion to regard the term marine pollution as covering all human activities which may change the environment and so affect the marine fauna and flora, fisheries, public health or amenities. Professor Manner, Water Pollution in International Law (1972) formulates the following extensive definition: "Pollution in general terms, refers to those changes in water which are produced indirectly at least, by human agency, that is artificially."

These two definitions where the element of "change" seem to be the key factor can be contrasted with the authoritative and widely invoked definition adopted by the Inter-governmental Oceanographic Commission, where the element of "harm" seems to be the most relevant.

66. Supra, note 53, 175.

67. Doud, Compensation for Oil Pollution Damage: Further Comment on the Civil Liability and Compensation Fund Convention, (1973) 4 J. Mar. L.& Comm. 525, 533.

68. Supra, note 53, 175.

69. For a more detailed discussion of this issue see Chapter 5.

70. Supra, note 53, p. 176.

71. Except as provided in paragraphs 2 and 3 of Art. III.

72. Art. III(1).

73. The Treaty establishes a burden of proof under which plaintiff cannot rely merely on circumstantial evidence, but must point to a specific event from which the pollution damage arose.

74. C.L.C. Art. I(4).

75. Supra, note 26, 402.

76. Brierley, The Law of Nations, 6th ed. (1963), 310-311.

77. Supra, note 53, 177.

78. Ibid.

79. Ibid.

80. Gilmore & Black, The Law of Admiralty, (1957), 170.

81. Benedict, Law of American Admiralty, (6th ed. rev. and enlarged by Knauth 1940) 594.

82. Supra, note 80, 171.

83. Ibid.

84. The U.K. and the U.S.S.R. and Germany are among those who supported this solution.

85. Doc. LEG/CONF/4 Add. 1 (1969).

The documents of the Conference referred to in this thesis as reproduced by Inter-Governmental Maritime Consultative Organization, Official Record of the International Legal Conference on Marine Pollution Damage (1973) are identified by reference to the bodies for which they were produced. Plenary documents carry the symbol LEG/CONF/..., Committee of the Whole I documents are identified by LEG/CONF/C.1. Whole II documents bear the symbol LEG/CONF/C.2...

Two other Committees, one to deal with the question of Final Clauses and the other a Drafting Committee of the Conference, were established. The documents of these bear the symbols LEG/CONF/C.3 and LEG/CONF/C.4 respectively.

86. The second part of Art.III(4) reads:

"...no claim for pollution damage under this Convention or otherwise may be made against the servant or agents".

87. See for instance the U.S. Water Quality Improvement Act, (1970) 33 U.S.C. para. 1161(a) & (b), as amended, Oct. 18, 1972.

88. Supra, note 53, p. 177.

89. This is the solution adopted in the U.K. See Merchant Shipping (Oil Pollution) Act 1971, 41 Halsbury's Statutes of England (3rd ed.) 1945.

90. C.L.C. Art. I(1); TOVALOP below, Chapter 4.

91. C.L.C. Art. III.

92. See below, Chapter 4.

93. Dubais, The Liability of a Salvor's Responsibility for Oil Pollution Damage, (1977) 8 J. Mar. L. & Comm. 325, pp. 331-2.

94. Ibid., p. 336.

95. Under para. 2 and 3 of Art. 1, States or State Companies registered as operators fall under the definition of "owner".

96. LEG/CONF/WP.19, OR 76 (1969).

97. See among others, O'Connell, International Law, 2nd ed. (1970) Ch. 27; Abecassis, note 53., p. 180.

98. Supra, note 53, p. 186.

99. Ibid., p. 181.

100. Ibid., p. 194.

101. See In re Oil Spill by "Amoco Cadiz", 471 F. Supp. 473(1979) and 491 F.Supp 161(1979).

102. Ibid., p. 475.

103. Supra, Note 51, p. 539.

104. Ibid., p. 537.

He continues by saying that....

> "In view of the narrowness of the defences and the high likelihood that ordinary vessel records would pick up any casuality incident, it appears that the prejudice to the owner in the vast majority of cases would be limited to the lack of opportunity to arrange for his surveyor to directly evaluate the damage. There is a longstanding maritime tradition of prompt notice and joint surveys, but shoreside claimants would probably not be aware of this. To maximize chances of extra judicial settlement, such claimants would be well advised to give the earliest possible notice of claim."

105. Doc. LEG/CONF/4, 35-37 (1969).

106. It is interesting to note that the United States' diplomatic delegation took a position contrary to that of the U.S. Maritime Law Association at the C.M.I. (Comité Maritime International) meeting and contrary to that of American underwriters.

107. Supra, note 51, p. 521.

108. LEG/CONF/C.3/WP.1/Rev.1 (1969).

109. McGovern also felt that if the liability was imposed on the ship, many anomalies would arise. The question of limitation would be a major problem as would jurisdiction since liability for collision, pollution and personal injury might have to be dealt with by courts of different countries.

110. LEG/CONF/C.2/SR.5 (1969).

111. 1924 Brussels Convention, LNTS, Vol.120 (1931), 125.
1957 Brussels Convention, UKTS, No. 52 of 1968.

112. Supra, note 108.

113. For example when a bank or a holding company owns the ship but has completely removed itself from any operation, its control over the vessel would be so limited that there would be no connection between ownership and the pollution damage.

114. The objection that there was the risk of a victim being faced with the insolvency of the person liable, if liability were placed on the shipowner rather than on the shipper carried little weight because both could be small companies without large assets.

115. LEG/CONF/C.2/SR.8 (1969).

116. Letter from American Institute of Marine Underwriters to the Honorable Jennings Randolph, Chm'n, Sen. Comm. on Public Works, Aug. 18, 1969, 2.

117. New York Times, Sept. 15, 1969, 93, col.1.

118. LEG/CONF/4/Add.3 (1969).

119. LEG/CONF/C.2/WP.1"Rev.1 (1969).

120. Ibid.

121. Ibid.

122. Avins, Absolute Liability for Oil Spillage, (1970) 36 Brooklyn L. Rev. 367.

123. LEG/CONF/4/Add.4 (1969).

124. Among others see Righetti, Nuovissimo Digesto, "Trasporto di merci pericolose", Vol. 25, p. 609.

125. The position of the Indian delegation was particularly sensitive to the financial cost that the underdeveloped countries would have been required to pay without any real advantage going to them.

126. LEG/CONF/4/Add.3.

127. For example in the case of an air crash.

128. Sweeney, Oil Pollution of the Oceans, (1968) 37 Fordham L. Rev. 155, p. 198.

129. A liability with the exceptions provided for in Art.III.

130. L.R. 3 H.L. 330 (1868).

131. Baker, Tort, 2nd ed. (1976) 191.

132. Code Civil Art. 1384 (66e ed Petits Codes Dalloz 1967).

133. C.L.C. Art. III(2)(a).

134. Supra, note 38, p. 407.

135. C.L.C. Art. III(2)(a) in fine

136. Supra, note 53, p. 183.

137. 315 H. of L. Deb., Col. 23.

138. Forster, Civil Liability of Shipowners for Oil Pollution, (1973) J. Bus. L. 23, p. 25.

139. Supra, note 38, p. 419.

140. Supra, note 51, p. 183.

141. C.L.C. Art. III(2)(b).

142. Supra, note 51, p. 183.

143. Supra, note 38, p. 407.

144. Ibid.

145. Supra, note 53, p. 183.

146. Supra, note 53, p. 407.

147. C.L.C. Art. III(2)(c).

148. Supra, note 53, p. 184.

149. "If the owner proves that the pollution damage resulted wholly or partially either from an act or omission done with the intent to cause damage by the person who suffered the damage or from the negligence of that person, the owner may be exonerated wholly or partially from his liability to such persons."

150. Limitation of liability, usually is a protection for the shipowner from a ruinous damage for loss or injury caused by his vessel or employees. It has been the policy of sea-faring nations to support local shipping. Limitation of liability reflects an international intent to achieve such a policy. Roushdy, Marine Pollution and the Absolute Civil Liability of the Shipowner under the Laws of the United States and Egypt (1975) 10 J. Int'l Law & Econ. 117, p. 167; E. Selvig, The 1976 Limitation Convention and Oil Pollution Damage, (1979) Lloyd's Mar. and Com. L.Q. p. 21; Abecassis, supra, note 53, p. 141; Black, Supra, note 38, p. 408; Healy, The International Convention on Civil Liability for Oil Pollution Damage, 1969(1970) L.J. Mar. L. & Comm. 317, p.321.

151. As far as the Convention on the Limitation of Liability for Maritime Claims, 1976 is concerned, its Article 3(b) is worded in such a way as to avoid any conflict with the regime of the Civil Liability Convention. It was the wish of the 1976 Conference "that limitation of liability under the 1976 Convention should lead to the same result whether or not the Civil Liability Convention was applicable and whether or not limitation under the 1976 Convention was invoked in a State party to the Civil Liability Convention." This still leaves open the possibility that oil pollution damage not "within the meaning of" the Civil Liability Convention may be within the scope of the 1976 Convention LEG/XLIV/f, Annex p.11.

152. Supra note 53, p. 198

153. Supra, note 51, p. 531.

154. 11 1LM 284(1972); On this Convention the Unit of Account was revised by the "Protocol to the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, 1971" adopted in 1976 (IMCO Sales No. 1977.05); see Abecassis, supra, note 53, p. 220 and 411, Cusine, The International Oil Pollution Fund as Implemented in the United Kingdom; 9 J. Mar. L. & Comm. 495 (1978); Doud, Compensation for Oil Pollution Damage: Further Comment on Civil Liability and Compensation Fund Convention, 4 J.Mar.L.& Comm. 525(1973); Hunter, The Proposed International Compensation Fund for Oil Pollution Damage, 4 J.Mar.L. & Comm. 117 (1972); Lucchini, Le renforcement du dipositif conventionnel de lutte contre la pollution des mers, 101 Journal de Droit International 756(1974) at 780;

155. Supra, note 67, p. 534.

156. Supra, note 53, p. 224.

157. Ibid., p. 535.

158. On April 20, 197 The Second Session of the Assembly of the International Oil Pollution Compensation Fund, according to the powers conferred by article 4(6), decided to raise the limit of 450 million francs referred to in paragraph 4, sub-paragraph(a) and (b) of Article 4 of the International Convention on the Establishment of an International Fund for Oil Pollution Damage 1971, to 675 milli n francs, and further decided to request IMCO to consider the desirability of revising the CLC and the Fund Convention in the light of this decision especially looking into the adequacy of the limits laid down by the two Conventions, the feasibility of changing the limits in either or both of the Conventions, as well as the problems caused by the limits applicable under the CLC to small tankers, and the system of relieving the shipowner under Article 2, paragraph 1(b) of the

Fund Convention. (FUND/A.2/17). IMCO is currently considering the proposal of increasing the limit above 900 million francs: should this proposal go forward a full scale diplomatic conference would be necessary because the Assembly lacks the authority to increase the limit above 900 million francs. Private communication from Mr. Popp, Legal Department of Transport Canada, member of the Canadian delegation to IMCO.

159. Supra, note 53, p. 227.

160. Supra, note 67, p. 537.

161. Balleneger, La Pollution en droit international (1975), p. 112.

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162. Supra, note 53, p. 212.

163. Reports, LEG XXXII/10, para. 29 and Annex III (1976).

164. Supra, note 53, p. 211.

165. Private Communication from Dr. T. Busha, Deputy Director, Legal Division, IMCO.

166. Supra, note 51, p. 532.

167. 32nd Session, London, April and May 1977, LEG XXXII/10 para. 29 and Annex III (1976).

168. LEG XXXIII/5, Annex I (1976).

169. Supra, note 38, pp. 402-403.

170. LEG XXXII/9/I/Add. 1, Annex 1, p. 12 (1976).

171. To wit the similar amendment of the 1971 Fund Convention and the problem of administering the compulsory insurance scheme.

172. LEG XXXII/9/10/11 (1976).

173. Ibid.

174. LEG/XXXII/10/para. 26 (1976).

175. Supra, note 38, p. 400.

176. Ibid.

177. This new concept was proposed at the 3rd U.N. Conference on the Law of the Sea. U.N. Doc. A/CONF.62/WP.10/ Rev. 1 of April 28, 1979. See also Timagenis, Supra note 15, pp. 99, 211, 598 et seq.

178. Art. II C.L.C.

179. See Part V of the 3rd U.N. Conference on the Law of the Sea; revised informal composite negotiating Text for the 8th Session (July 28 - August 29, 1980), U.N. Doc A/ CONF. 62/WP. 10/Rev. 3 of September 22, 1980.

180. Supra, note 53, p. 214.

181. The Shorter Oxford English Dictionary, 3rd ed. (1965).

182. Mozley & Whitebey's Law Dictionary, 8th ed. (1970).

183. Oil for the purpose of this liability profile is considered to be dangerous even if one accepts the agrument that oil is not "per se" or "in se" dangerous.

184. Water Pollution-1967, pt. 1, Hearing on S.1591 and S.1604 before the Subcomm. on Air and Water Pollution of the U.S. Senate Public Works Comm., 90th Cong. 1st Sess., 16 et seq. (1967).

185. Convention on the High Sea, 1958, 450 UNTS, 88.

186. IMCO LEG XL/3/3 May 29, 1979 and XLIV/4, September 22, 1980.

187. Some of these suggestions concern topics outside the scope of this thesis such as the right of intervention by coastal states.

The right of intervention is the subject of the 1969 Convention relating to Intervention on the High Seas in Cases of Oil Pollution Damages and its 1978 Protocol (the Intervention Convention):

The main principle of the convention is found in Article I, which gives a coastal State the right to take such measures on the high seas as may be necessary to prevent, reduce or eliminate the danger of pollution to its coastline. The right which is conferred upon the coastal State by Article I is, however, strictly limited to extreme circumstances, in which the parties have found it necessary to provide for exceptional measures. There must be a "grave and imminent danger," which follows upon a "maritime casualty," and this "casualty" or acts related thereto must "reasonably be expected to result in major harmful consequences."

Article I does not specify the measures which may be taken against a foreign ship on the high seas. The measures range from the towing away of an abandoned ship from the zone where an oil spill can cause serious damage, to the use of bombs to destroy the oil by fire (which was indeed tried in the case of the Torrey Canyon, but with slight success). However, Article V lays down the principle that measures taken by the coastal State must be proportionate to the damage threatened to it. In the test of proportionality, account shall be taken both of the likelihood of the measures being effective and of the damage which they may cause to the ship or otherwise.

A coastal State which takes measures in contravention is obliged to pay compensation (cf. Article VI).

The convention does not apply to a ship which is within a State's territorial limits after the stranding or collision. This does not, of course, mean that no measures can be taken. Here the solution must be sought on the basis of three general principles of law; the sovereignty of the coastal State over its territorial waters, which, in principle, gives it the right to prescribe rules and to take measures, the right of innocent passage, and the principle of proportionality. The importance of the latter principle is borne out by the case of the I'm Alone. Here the U.S.A. was considered responsible for excessive measures in its

exercise of jurisdiction against a foreign vessel engaged in smuggling (which was sunk by the Coast Guard), even though the U.S.A. was competent to exercise jurisdiction. As to the more severe measures against a foreign ship, the rights of the coastal State in its territorial waters will, therefore, probably not be considerably greater than those which can be exercised on the high seas according to the convention. Other steps may be taken, e.g., the ordering of a ship which presents a special danger of oil pollution to proceed along a certain route, even if the conditions of the convention (such as the occurence of a "casualty") are not fulfilled.

The widening of the right of intervention has been recently discussed by The Legal Committee. It was suggested that measures of intervention might be taken by coastal states even in the absence of a "grave and imminent danger to their coastline or related interests". It was questioned whether intervention in the case of "danger" from pollution or threat of pollution would in substance be any different. Some delegations were of the view that the measures of intervention should not be restricted to those "proportional" to the danger, that requirement could be substituted with the test of "reasonableness". One delegation wanted to extend coastal state intervention to the Exclusive Economic Zone. Other delegations found this hard to justify and thought that enforcement of international standards should remain with the flag state in such areas (LEG XL/5).

As far as international law is concerned a coastal state's "right" under general international law to intervene when an accident occurs within that state's territorial seas has never been really open to question. Subject to the right of innocent passage and to the usual legal rules of reasonable conduct, the territorial sea is an area of full coastal states sovereignty. Although a state might be liable for tortious conduct or for interference with passage which "is not prejudicial to peace, good order, or security of the coastal state," (Geneva Convention on the Territorial Sea and Contiguous Zone (1958), art. 5(2)), it is otherwise free to act.

On the high seas, the issue is not nearly so clear. Under the rules of international law, a coastal state's right of intervention is subsidiary to the right of free, unimpeded usage by all. Article 2 of the High Seas Convention(1958) proclaims this basic freedom; "The high seas being open to all nations, no State may validly purport to subject any part of them to its sovereignty. Freedom of the high seas is exercised . . . by all States." This customary free use of the oceans has imposed a heavy burden on those interfering with it. Indeed, it may even be argued that coastal state intervention was permissible only to the extent that it was specifically allowed. No treaty provisions proclaim otherwise. Article 24 of the High Seas Convention does impose a duty on states to draft rules to prevent pollution of the seas, but such rules are stated to be subject to "existing treaty provisions" and they are directed toward discharge or construction standards and not to any self-proclaimed right of intervention. Moreover, the "existing treaty provisions" to which it refers, the 1954 Convention on the Prevention of Pollution of the Sea by Oil, themselves give exclusive control powers over ships on the high seas to the flag state.

In the absence of any treaty law supportive of a coastal state "right" of intervention, recourse would have to be made to customary international law. The principle of self-protection seems to provide coastal states with the major jurisdiction for intervention beyond territorial seas. With the ever-mounting threat posed by maritime activities to coastal interests, this principle has been increasingly supported as has the similar principle of "self-help".

See L. F. E. Goldie, "Principles of Responsibility in International Law," Hearings, Subcommittee on Air and Water Pollution of the United States Senate Committee on Public Works, 19st Congress, 2nd Session, July 21 and 22, 1970, p. 99. This position has been disputed. See, for example, E. D. Brown, The Lessons of the Torrey Canyon, Current Legal Problems, 1968. See also Dennis M. O'Connell, Reflections on Brussels, IMCO, and the 1969 Pollution Conventions, Cornell International Law Journal 3 (1970), p. 1. O'Connell supports Goldie in that he argues that a right of intervention is "reasonably well-grounded in current customary international law."; See also L. M. Hydeman and W. H. Berman, International Control of Nuclear Maritime Activities (Ann Arbor, Mich.: University of Michigan Law School, 1060), p. 216.

188. IMCO LEG XL/5, June 19, 1979, p. 3.

189. Ibid, p. 4.

190. Ibid., p. 7.

191. See LEG XL /2/1.

192. LEG XL/5 p. 10.

193. Ibid., p. 13.

194. IMCO LEG XLIV/4, September 22, 1980, Annex p. 1.

195. IMCO LEG XL/5 paragraph 57 and 58.

196. Ibid., pp. 30-31.

197. One example is to include certain noxious and hazardous substances in the C.L.C. In this regard it is interesting to note that consideration of a draft convention on liability and compensation in connection with the carriage of noxious and hazardous substances by sea was submitted to IMCO by the Oil Companies International Marine Forum (Leg XXXVIII/2/1). The author is of the opinion that the C.L.C. should remain an "oil convention", that the above mentioned draft should be the basis for a separate convention dealing with pollution damages caused by substances other than oil.

198. Respectively the "Tanker Owners Voluntary Agreement Concerning Liability for Oil Pollution," effective October 6, 1969, and the "Contract Regarding an Interim Supplement to Tanker Liability for Oil Pollution," effective April 1, 1971.

199. The signataries were: B. P. Tanker Company Ltd., Esso Transport Company Inc., Gulf Oil Corporation, Mobil Oil Corporation, Shell International Petroleum Company Ltd., Standard Oil Company of California and Texaco Inc. "Ten years of TOVALOP (published by ITOPF) (in 1979) p. 3.

200. Private communication from officials of the International Tanker Owners Pollution Federation Ltd. in January 1981.

201. The C.L.C. created an international legal regime for compensating victims for oil pollution damage: an important scheme not previously existing in traditional maritime law.

202. The limit has been raised since the first version of TOVALOP was reproduced in 1969 I.L.M. 497. The given figures appear in the current up-to-date version of TOVALOP.

203. The Federation is based in London, Staple Hall, Stonehouse Court, 87/90 Houndsditch.

204. Supra, note 51, p. 239.

205. See Ten Years of TOVALOP, published in 1979 by The International Tanker Owners Pollution Federation. See also Reichenbach, Legislative Developments Concerning Oil Pollution of the Seas (1980) (8)Int'l Bus. L. p. 9 et seq. and Abecassis, Marine Oil Pollution Laws: The View of Shell International Marine Limited (1980) (8)Int'l Bus. L. p. 3 et seq.

206. The Institute is based in Queen & Reid Streets, Hamilton 5, Bermuda.

207. Private communication from officials of the Institute on October 1980.

208. Becker, A Short Cruise on the Good Ships TOVALOP and CRISTAL (1974) 5 J. Mar. L. & Comm. 609, et seq. and supra, note 206.

209. Ibid., pp. 610 et seq.

210. The result of this is that a victim can recover compensation over and above that recoverable from a shipowner who is party to TOVALOP where the oil spilled was owned by an oil company party to CRISTAL.

211. From its coming into force until Jaunary 31, 1978, CRISTAL was notified of sixty-five incidents of which twelve resulted in payable claims averaging $401,000: Zacher & McGornigle, Pollution, Politics and International Law: Tankers at Sea (1979).

212 (A) FUND/82/17

212 (B) Abecassis, supra, note 206 p.8.

213. Goldie, supra, note 187 in fine, p. 1230 and Jenks, Liability for Ultra-hazardous activities, in Hague, Academy of International Law, Recueil des Cours, 1966, p.122.

214. C.L.C. Art. XI(1).

215. C.L.C. Art. III(3).

216. Corzow Factory (Indemnity) case, PCIJ Publication S.A., No. 17, p. 29.

217. Levi, Contemporary International Law: A Concise Introduction, (1979), p. 233.

218. Ibid., and see also C.S. Rhyne, International Law, (1971) p. 121.

219. Eagleton, The Responsibility of States in International Law, (1928), p. 93.

220. Sørensen, Manual of Public International Law (1968), p. 560.

221. Ago, Le delit international, Paris 1947 p. 435 et seq.

222. Von Schuschnigg, International Law (1959). See also Eagleton, supra note 219.

223. Ibid., p.237

224. Supra, note 219, p. 94.

225. Ibid., p. 77.

226. See Art. 24 Convention on the High Seas 1958, 450 UNTS 83. Of particular interest in this respect is Jenks, supra, note 213, p. 126 who states that "(W)hether extra-territorial damage caused by pollution is a ground of liability without proof of reckless or negligent conduct by the defendant State has been a matter of considerable controversy, revolving largely around the fundamental question how far international law recognizes

or should recognize liability arising from the objective risk created by ultra-hazardous activities. There is no incompatibility between the principle that conflicting uses must be accommodated and the principle of strict liability for the consequences of particular uses, whether these are regarded as legitimate or less legitimate in relation to other uses; the measure in which strict liability is accepted depends in the first instance on how far the principle of objective risk is regarded as being accepted, and having any general application, in international law; it may increasingly depend in the future on how far the principle is accepted in general or particular international agreements for the abatement of air or water pollution."

227. Balleneger, La Pollutionen Droit International, 1975, p. 232.

228. Supra, note 219, p. 76.

229. To wit that no one was responsible for acts of others unless there was fault on his part.

230. Grotius, De Jure Belli et Pacis, II, XVIII, 921; II, XXI, 1-4; II' XVII: XX-XXIII.

231. Sørensen, supra, note 220, p. 559.

232. Ibid., p. 561.

233. A/CN. 4/L. 326.

234. Fleischer, Pollution From Seaborne Source, in New Directions of the Law of the Sea Vol. III, p. 82.

235. Art. 11 Conduct of persons not acting on behalf of the State:
1. The conduct of a person or a group of persons not acting on behalf of the State shall not be considered as an act of the State under international law.
2. Paragraph 1 is without prejudice to the attribution to the State of any other conduct which is related to that of the persons or groups of persons referred to in that paragraph and which is to be considered as an act of the State by virtue of articles 5 to 10.

236. Goldie, International Principles of Responsibility for Pollution; (1970) Colum. J. Transnat'l L. 283, 306; Jenks, Liability for Ultra-hazardous activities, supra, note 226, p. 122, who stated that, "the Tribunal [in the Trail Smelter case] did not state, but clearly implied, that the liability arose from the nature of the operations of the smelter. It is, therefore, a true case of liability for ultra-hazardous activities without proof of fault or negligence. In a different perspective see Castel, International Law cheifly as interpreted and applied in Canada, Toronto 1965. See also Jan Schneider, World Public Order of the Environment, Toronto, 1979, p. 164 et seq.

237. Schneider in World Public Order of the Environment, 1979, p. 164, states that, "Others who have analysed these very few precedents [Trail Smelter, Corfu Channel, Lac Lanoux] in the field of international environmental law usually tend to agree with him [Goldie] that there is an evolving norm of strict liability for environmental injury modelled on the century-old rule adumbrated in the famous case of Rylands v. Fletcher." It is not however clear whether Schneider is implying that the "strict" liability of the State would extend to damages caused by oil pollution as result of i.e. negligence of a ship-owner in the normal course of its commercial activity and not of the state in exercising his duty of redress and control.

238. Supra, note 187.

239. "Chilean - United States Claims Commission, Lovett case", in Moore, International Arbitrations, Vol. III, 1898, p. 2991.

240. UN. Doc. A/CONF. 62/W.P. 10/Rev. 3 (1980).

241. Australia: Working Paper on Preservation of the Marine Environment, March 6, 1973, UN. Doc. A/AC 138/SC. III/b.27.

242. Norway: Working Paper-Draft Articles on the Protection of the Marine Environment Against Pollution, July 19, 1973, U.N. Doc. A/AC.138/SC. III/L.43.

243. Canada: Draft Articles for a Comprehensive Marine Pollution Convention, March 9, 1973, U.N. Doc. A/AC. 134/SC.III/L.28. See Article VII(1) and (2).

244. See also the Report on the I.L.C., Supp. No. 10 A/35/10 Art. 66.

245. U.N. Doc. A/C.3/Rep. 1.

246. The rationale for this traditional doctrine is the desire of naval officials not to hamper any operational mobility of their fleets that may be involved in adopting discharge regulations and not to open their fleets to possible harrassment by coastal states enforcing such regulations.

247. Stockholm Declaration on the Human Environment, Principles 21 and 22.

248. U.S. Senate, Commerce Committee Report, 1978 p. 4.

249. Mendelsohn & Fidell, (1979) 10 J of Mar. L.& p. 475 et seq.

250. IMCO LEG XL/3/1, March 6, 1979, p. 11.

251. Hearings, Subcommittee on Oceans and International Environment, Committee on Foreign Relations, United States Senate, 93rd Congress, 1st Session, April 17 and 18, 1973.

252. As amended by the Clean Water Act of 1977, 33 U.S.C. 1251, et seq.

253. Federal clean-up costs are only the expenses incurred by the U.S. Government for clearing and cleaning a polluted area. The Trans-Alaska Pipeline Authorization Act (the "TAPS" Act) that was adopted by the U.S. Congress in November, 1973. As for vessel owners, the Act extends only to "oil that has been transported through the trans-Alaska pipeline" and on vessels operating "between the terminal facilities of the pipeline and ports under the jurisdiction of the United States". However, the Act holds the vessel owner "strictly liable without regard to fault ... for all damages, including clean up costs, by any person or entity, public or private, including residents of Canada, as a result of discharges of oil" from vessels. (Pub. L. No. 93-153, 87 Stat. 584).

254. The legislation as it is proposed now would actually be incompatible with ratification (See H.R. 6803, 95th Congress, 1st Session).

CHAPTER 8 - FOOTNOTES

255. Ocean Environment and The 1972 United Nations Conference on the Environment (1972) 3 J. Mar. L & C, p. 389.

256. Minister Transport Canada, Press Release No. 18/81, February 17, 1981.

257. Ibid.

258. Ibid.

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