Reflections on Brussels: IMCO and the 1969 Pollution Conventions

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"It is the top of the ninth inning. Man, always a threat at the plate, has been hitting Nature hard. It is important to remember, however, that NATURE BATS LAST."†

In the world of the sea, impulsiveness is left to nature; man gives longer thought to his actions.*

Which of these characterizations ultimately proves accurate has, in recent years, become more than an academic question. The dramatic rise in the number of maritime or offshore incidents resulting in oil spillage has prompted widespread concern over the future of the living resources of the seas and over secondary effects on the greater environment. Optimism regarding the deliberateness of mankind in resolving such problems is a sentiment apropos of the adoption at Brussels, under the auspices of the Inter-Governmental Maritime Consultative Organization (IMCO), of two new conventions dealing with pollution of the seas by oil. Whether these and other measures will be adequate and timely enough to stay the predictions of the "doomsday" ecologists is yet to be seen.

†Anonymous — quoted by Dr. Paul Ehrlich in Eco-Catastrophe!, RAMPARTS, Sept. 1969, 24, at 28.
*Jean Roullier, Secretary-General, the Inter-Governmental Maritime Consultative Organization, Foreword to 8 N. SINGH, INTERNATIONAL CONVENTIONS OF MERCHANT SHIPPING at vi (British Shipping Laws 1963) [hereinafter cited as SHIPPING CONVENTIONS].
I. BACKGROUND — THE ROLE OF IMCO

No discussion of international efforts to domesticate the pollution problem could properly omit reference to the contributions made by IMCO in its brief history. The Organization of sixty-nine member states is a product of more than half a century of international efforts to facilitate cooperation in maritime matters. Forces seeking to institutionalize such cooperation coalesced at the United Nations Maritime Conference in 1948 which convened to "consider the establishment of an inter-governmental maritime organization." Thirty-two nations participated and produced the "Convention on the Inter-Governmental Maritime Consultative Organization" which came into force in 1958.

The purposes of IMCO were directed largely to problems of removal of discrimination in shipping and other restrictive practices. However, the Organization was also to:

provide machinery for co-operation among Governments in the field of governmental regulation and practices relating to technical matters of all kinds affecting shipping . . . [and]

[to provide for the consideration by the Organization of any matters concerning shipping that may be referred to it by . . . the United Nations.]

Although the purposes of IMCO are broad, its functions are "consultative and advisory" — it is neither a legislative body as such nor a regulatory agency. Despite general support for the consultative purposes, there has been resistance to IMCO activity beyond technical matters. For example, a number of states have adhered to the Convention with reservations relating to the provisions condemning restrictive practices. IMCO policy


3. Id. at 7.


5. IMCO Convention, 1 (a), (d).

6. Id., art. 2.

7. 13 N. SINGH & R. COLINVAUX, SHIPOWNERS 129 (British Shipping Laws 1967).
has apparently been more liberal than that of other agencies in accepting memberships subject to reservations.\(^8\) The diversity of interests among maritime states explains this phenomenon at least in part. Similarly, ship-owning states, oil-producing states, cargo-owning states, and "home-lands of the free" providing flags of convenience can be expected to view new oil pollution measures with differing degrees of enthusiasm.\(^9\) These conflicts have yielded a prediction that "there appears to be little future for IMCO save in the technical field."\(^10\) However, it must be remembered that the Organization is an advisory and consultative body and that its objectives are not present absolutes but goals to guide efforts.\(^11\) Its expertise and continuity tend to facilitate the resolution of problems more effectively than would ad hoc bodies or meetings.\(^12\) However, despite its importance, IMCO is the smallest of the United Nations specialized agencies and has a very limited budget.\(^13\)

IMCO activities in the pollution field must be viewed against the backdrop of earlier efforts. The most significant of these was the agreement at London in 1954 on the International Convention on the Pollution of the Sea by Oil.\(^14\) After its formation in 1958, IMCO assumed responsibility from the United Kingdom for study, supervision, and proposals

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9. IMCO's first "constitutional crisis" involved such flags of convenience. The Maritime Safety Committee, a major organ of IMCO was to consist of representatives, \textit{inter alia}, of the "eight largest ship-owning nations." States with large registered fleets argued that membership was to be based on tonnage registered by the state. This claim was upheld by the International Court of Justice. Advisory Opinion of 8 June 1960, [1960] I.C.J. Rep. 150. The opinions of the parties provide good coverage of the "flag of convenience" problem. I.C.J. Pleadings, Constitution of the Maritime Safety Committee of the Inter-Governmental Maritime Consultative Organization (Advisory Opinion, supra) (1960); see COLOMBOS 442-43.
10. 13 N. SINGH & R. COLINVAUX, supra note 7, at 130.
11. Id. at 364.
12. COLOMBOS 442.
for revision of the Convention. The 1954 Convention essentially forbids dumping or spillage of oil or oily mixtures from ships registered by Parties within 50 miles of any shore. The 1962 amendments expand the classes of ships covered and broaden the prohibited zones to as much as 150 miles in heavily traveled sea lanes. The 1962 agreement provides for inspection of oil record books which theoretically record all spillages permitted by the Convention (e.g., to save life at sea, mixtures sufficiently diluted with sea water, etc.). However, inspections may be conducted only in a port of one of the Contracting Parties. Enforcement of all provisions remains with the state of flag. It is important to note that the prohibited zones are not "contiguous zones" in the sense of affording a basis for coastal state police power over offending vessels within them.

14A. SHIPPING CONVENTIONS 1157-58.

15. "This is a nice round lawyer's figure which might be extended further or revised to reflect some facts of nature." The New Republic, April 22, 1967, at 5. For a discussion and similar criticism of the 1954 Convention and 1962 amendments, see E. du Pontavice, La Pollution des Mers par les Hydrocarbures 92-101 (1968).

[Dans l'état actuel de nos connaissances des courants marins, ... rien ne permet de dire que les eaux polluées ne vont pas être conduites par les courants, à la côte.

Id. at 99.

16. Several of the Contracting Parties have enacted legislation implementing the terms of the treaty:


France: The French enacted legislation establishing a zone of surveillance and imposing fines and penalties for violations, du Pontavice, supra note 15, at 101-06.

17. The state of flag theoretically offers a responsible party for enforcement of "community policies" for control of pollution. It may, by agreement, be made responsible for promulgation and enforcement of regulations. McDOUGAL & BURKE 1089. This is the theory upon which the 1954 Convention proceeds.

However, a state which has no greater nexus with a vessel than that of a "licensing office" or mailbox may be a dubious vehicle for vigorous prosecution of community interests. Comment, Oil Pollution of the Sea, 10 HARV. INT'L L.J. 316, 331 (1969). Movement toward a "genuine link" concept of nationality of ships may provide more responsible state governance of ships carrying pollutants, Convention on the High Seas done April 29, 1958, [1962] 2 U.S.T. 2312, T.I.A.S. No. 5200, 450 U.N.T.S. 82, (effective September 30, 1962) art. 5.

18. Whether such authority existed was a matter of some confusion in the 1967 water pollution hearings. Water Pollution — 1967, 11, 12, 19 (jurisdiction over foreign-flag vessels outside U.S. territorial waters), 206 (possibility of imposition of liability under U.S. laws within the zones), 207 (conclusion that jurisdiction of U.S. was confined to the three-mile limit). A report of government lawyers preparing for an IMCO session in 1967 found no authority for such jurisdiction beyond territorial waters except, e.g., admiralty and criminal jurisdiction over U.S. nationals, certain customs authority, and rights to the continental shelf. Id. at 207.
Therefore, the Convention does not justify the kind of state action which prompted the 1969 Brussels Conference.

II. THE WORK OF THE 1969 CONFERENCE

GENERAL

The catalysts which generated one of the central issues before the Conference were the wreck of the oil tanker, Torrey Canyon, which resulted in damage to public and private interests in Britain and France, and the bombing of the wreck by the British to set it afire.¹⁹ To resolve the ambiguity surrounding its rights against the vessel under international law,²⁰ Great Britain once again invoked international consultative machinery to devise new anti-pollution measures.²¹ In response, IMCO announced that it would take under study the issues of coastal state protective measures and vessel liability with a view to drafting a new treaty to deal with the oil problem.²²

IMCO, which had done continuing work in the field through its Subcommittee on Oil Pollution,²³ referred the matter to its newly created

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¹⁹. The sequence of events has been thoroughly rehearsed elsewhere: Nanda, The “Torrey Canyon” Disaster: Some Legal Aspects, 44 Denver L.J. 400 (1967); Sweeney, Oil Pollution of the Oceans, 87 Fordham L. Rev. 155, 157-58 (1968); Utton, Protective Measures and the “Torrey Canyon,” 9 B.C. Ind. & Com. L. Rev. 613, 613-17 (1968); Note, Continental Shelf Oil Disasters: Challenge To International Pollution Control, 55 Cornell L. Rev. 113, 117-18 (1969).


²¹. The United Kingdom called a special meeting of IMCO to discuss the dilemma confronting a state when a ship sinks outside territorial waters but harms national interests. WATER CONTROL NEWS, April 17, 1967, at 9.

²². Issues other than state action were coverage of chemical pollutants and cooperation with the International Labor Organization (I.L.O.) to improve the seamanship of tanker officers. N.Y. Times, Oct. 15, 1968, at 80, col. 3. Later the controversial proposal to permit the sinking of a polluting wreck on the high seas was announced in conjunction with a special assembly called for November 1969. N.Y. Times, Nov. 29, 1968, at 91, col. 3; Conference Report 2. At the time, it was also suggested that the coastal state be able to enact regulations to “prevent, mitigate, or eliminate” pollution of its shores. Ratification of the proposed conventions was expected to require about three years. N.Y. Times, Dec. 1, 1968, §5, at 15, col. 1.

²³. A U.S. study suggests the dominant international aspect of oil pollution:

First, accidental or deliberate spills which threaten American coasts may occur outside the United States territorial waters. Despite this fact, the United States
Legal Committee which, with assistance from the Comité Maritime International (C.M.I.),\textsuperscript{24} drafted two proposed treaties.\textsuperscript{25} The Final Act\textsuperscript{26} of the International Legal Conference on Marine Pollution Damage which met in Brussels, from 10-29 November 1969, opened two conventions for signature and accession: "The International Convention Relating to Intervention on the High Seas in Cases of Oil Pollution Casualties" [the "Public Law Convention"]\textsuperscript{27} and "The International Convention on Civil Liability for Oil Pollution Damage" [the "Civil Liability Convention"].\textsuperscript{28}

A. THE PUBLIC LAW CONVENTION

1. Content

The preamble to the Public Law Convention states that the Contracting Parties are conscious of the pollution threat to sea and coast-
line and are "[convinced] that under these circumstances measures of an exceptional character to protect such interests might be necessary on the high seas and that these measures do not affect the principle of freedom of the seas."29 Article I, the heart of the Convention, is the Conference's formulation of this principle of self-protection. Paragraph 1 of Article I provides:

Parties to the present Convention may take such measures on the high seas as may be necessary to prevent, mitigate or eliminate grave and imminent danger to their coastline or related interests from pollution or threat of pollution of the sea by oil, following upon a maritime casualty or acts related to such a casualty, which may reasonably be expected to result in major harmful consequences.

In accordance with the principle of sovereign immunity, no such actions may be taken against warships or ships owned or operated by a state in non-commercial service.

Significantly, the Convention is limited in its application to incidents involving a "ship." The term encompasses its usual meaning of a "seagoing vessel" as well as "any floating craft." However, the latter definition is qualified so as to exclude oil rigs conducting drilling operations on the continental shelf, an area of increasing concern for pollution incidents.30

that the shipping industry remained "vehemently opposed" to the State Department's position on strict liability for pollution damage. Id.

28. Id., Attachment 2, at 45.
29. Preamble, Public Law Convention.
30. It does not include — an installation or device engaged in the exploration and exploitation of the resources of the sea-bed and the ocean floor and the subsoil thereof.

Id., art. II, para. 2 (b).

It has been suggested that IMCO consider the international aspects of pollution from coastal state operations on the continental shelf. Note, supra note 19, 126-28. The Organization's abstinence from this endeavor at Brussels may be a consequence of "constitutional" limitations. The IMCO Convention provides for IMCO activity in the field of shipping. See note 4 supra. Pollution problems were not the impetus for the formation of IMCO despite the Organization's preeminent role in this field.

However, the threat to national and international interests posed by continental shelf disasters persists. REPORT TO THE PRESIDENT 9. An oil platform in the Gulf of Mexico caught fire and blazed out of control in late February 1969; killing the fire only allowed more oil to spew unburned into the Gulf. TIME, March 23, 1970, at 41; N.Y. Times, March 11, 1970, at 26, col. 1; id., March 14, 1970, at 62, cols. 7, 8. Since 1954, 25 blowouts have occurred on the shelf, of which 17 leaked gas only. Two resulted in serious pollution incidents (e.g. Santa Barbara) and nine resulted in serious blowouts accounting for 9 fires and 29 deaths. EXECUTIVE OFFICE OF THE PRESIDENT, OFFSHORE MINERAL RESOURCES, A CHALLENGE AND AN OPPORTUNITY 3 (1969) [emphasis added]. It is projected that if development continues to expand at the current rate and the frequency of accidents remains constant, "we can expect to have a major pollution incident every year." Id. The magnitude of such relatively unpublicized statistics bodes ill for a solution when one considers the half-life of public concern over the most dramatic of incidents.

However, serious conceptual problems may confound an attempt to characterize an oil rig as a "vessel" in order to obtain controls under some rubric of regulation of
The right of the coastal state to act is qualified by procedural hurdles and possible sanctions for improper conduct. Article III requires that a state acting under Article I must, “before taking any measures,” [emphasis added] consult with other states affected by the casualty, “particularly . . . the flag State.” It is also required to give notice of proposed measures to other interested parties. Provision is made for consultation with independent experts whose names are to be compiled by IMCO (under Article IV, para. 1). Nevertheless, the right of an aggrieved nation to act in a bona fide crisis is unrestricted by these procedures:

In cases of extreme urgency requiring measures to be taken immediately, the coastal State may take measures rendered necessary by the urgency of the situation, without prior notification or consultation or without continuing consultations already begun . . . .

“shipping.” Nevertheless, in Gianfala v. Texas Co., 350 U.S. 879 (1955), the United States Supreme Court upheld a jury verdict awarding damages for injuries sustained by a member of a drilling crew on an offshore rig, in effect treating him as a Jones Act “seaman.” The Court of Appeals had ruled in Texas Co. v. Gianfala, 22 F.2d. 382 (5th Cir. 1955) that treatment of complainant as a member of a crew of a vessel merely because the jury said he was, was improper. The court relied on evidence that “the vessel was not in navigation, nor was [plaintiff] aboard it in aid of navigation.” Id. at 387. The court intimated that its reasoning might not have been applicable had the injury occurred while the platform was being moved under power into drilling position. Arriving at the “drilling rig v. vessel” determination on the basis of whether the platform is anchored and affixed to the seabed rather than in motion recalls the property law chestnut that a fixture is “realty with a chattel past and the fear of a chattel future.” J. CASNER & W. LEACH, PROPERTY 469, n. 1 (1951). The Supreme Court’s ruling in the case may have turned merely on respect for the jury determination in a Jones Act case. See discussion and cases cited, H. BAER, ADMIRALTY LAW OF THE SUPREME COURT 180-91 (2d. ed. 1969). The likelihood of this cools the temptation to import the case into the area of maritime liability for offshore oil operations. A more serious problem is that, although the platform occasions the pollution in the typical continental shelf case, it is not the source of it in the same sense that a tanker is.

But see unpublished customs decision, ruling that the arrival of mobile oil rigs from Europe at points outside the U.S. three-mile limit but above the submerged oil lands did not constitute imports on the theory that:

mobile offshore drilling platforms even “during the period when they are secured to or submerged onto the seabed . . . .” are vessels within the meaning of that term as defined [in the customs regulations.] B. BITTKER & L. EBBS, UNITED STATES TAXATION OF FOREIGN INCOME AND FOREIGN PERSONS 201 (1968).

The United States has called upon the U.N. to adopt curbs on pollution and disturbances of biological, physical, and chemical balances in the regime of the deep ocean floor. 59 DEPT STATE BULL 554, 556 (1968). If the problem of pollution from the continental shelf and deep seabed is undertaken under U.N. auspices, the agency assigned to the task should take heed of the vast accumulation of expertise in pollution of the seas which presently resides uniquely in IMCO.

31. Public Law Convention, art. III (a), (b).
32. The experts are to be paid for services rendered by the state utilizing those services. Public Law Convention, art. IV, para. 2.
33. Id., art. III (d).
It may be expected that liberal use will be made of this "escape clause" feature. Even under this procedure, the state must notify interested states, avoid risk of human life, and abstain from interference with repatriation of the crew.34

The self-restraint promoted by these measures is further fostered by the standard by which the protective measures are to be judged:

Measures taken by the coastal State in accordance with Article I shall be proportionate to the damage actual or threatened to it.35

The measures taken are not to exceed what is reasonably necessary to protect the interests defined in Article I.36 Overreaction to a pollution crisis exposes the actor to sanctions:

Any Contracting Party which has taken measures in contravention of the provisions of this Convention causing damage to others shall be obliged to pay compensation.37

Nothing in the Convention is to deny other available remedies or to prejudice any "otherwise applicable right, duty, privilege or immunity."38

Controversies are to be settled through procedures of negotiation between the parties, conciliation, and ultimately, arbitration.39

2. The Convention and Pre-existing International Law

As might be expected, authorities differ concerning the extent to which the Public Law Convention represents a real change in pre-existing law. One observes that:

[W]hile acceptance of [the Convention] will not notably advance the rights of governments in pollution disaster situations, it will at least codify the existing state of international law on the subject.40

However, it must be recalled that, traditionally, establishment and enforcement of anti-pollution measures have been vested in the state of the

34. Id., art. III (e).
35. Id., art. V.
36. The criteria of proportional response are:
   (a) the extent and probability of imminent damage if those measures are not taken; and
   (b) the likelihood of those measures being effective; and
   (c) the extent of the damage which may be caused by such measures.

Id.

The concepts of "necessity" and "proportionality" are limitations on the exercise of the right of self-defense. M. McDougal & F. Feliciano, LAW AND MINIMUM WORLD PUBLIC ORDER 242-43 (1961); Utton, supra note 19, 623-25.

37. Public Law Convention, art. VI. In the Corfu Channel case, despite Albanian violation of international law in failing to warn of the existence of a minefield which harmed British vessels, British employment of a minesweeping operation accompanied by a naval demonstration was a non-innocent penetration of Albanian territorial waters and an illegal display of force under international law. Corfu Channel Case, [1949] I.C.J. Rep 4.
38. Public Law Convention, art. VII.
40. Mendelsohn, supra note 25, at 28.
ship's flag. The "equally strong claim" by the coastal state to exercise concurrent jurisdiction has, nevertheless, gained support.\textsuperscript{41} Regardless of whether Article I represents a major intrusion on established law of the sea or merely a restatement of it,\textsuperscript{42} the consultation procedures and sanctions for improper action are new developments.

In analyzing the effect of the Convention, customary and conventional international law precedents will be examined to determine whether they afford a basis for coastal state legislative and enforcement jurisdiction on the high seas to combat pollution.

The chief difficulty with permitting such extensions of coastal state authority is the potential impingement on freedom of the high seas. The high seas are defined by the 1958 High Seas Convention\textsuperscript{43} as all parts of the sea not included in territorial or internal waters. The exercise of freedoms of the high seas, which include navigation, fishing, laying of cable and pipelines, and flight over these seas, is not without qualification.\textsuperscript{44} Article 10 imposes an obligation on every state to take measures to comply with international standards, particularly with regard to safety and seaworthiness of ships.\textsuperscript{45}

Outside the Convention:

the international community has long since evolved rudimentary rules to ensure that the High Seas do not become a "legal vacuum", an area of lawlessness beyond the jurisdiction of civilized states.\textsuperscript{46} These rules include the right of states to exercise certain defensive prerogatives on the high seas and may be analyzed in terms of three divisions

\begin{itemize}
\item\textsuperscript{41} Nanda, supra note 19, at 406.
\item\textsuperscript{42} Some states have insisted that international action is necessary before a state may be authorized to take such a move. However, this cannot be the position of the British government and it seems inconceivable that any coastal state would concede that such new treaty would be \textit{de lege ferenda} rather than \textit{de lege lata}.
\item Sweeney, supra note 19, at 202-03.
\item Following the extraordinary IMCO session in 1967 after the Torrey Canyon incident, the U.S. Congressional delegation to the meeting advocated legislation empowering the President to take emergency action to forestall damage to U.S. shores in the event of a tanker casualty. \textsc{Water Control News}, Sept. 25, 1967, at 1. Implicit in the proposal is the suggestion that such action would not violate international norms. In a later report it was urged that the United States seek "[i]nternational concurrence with the \textit{U.S. view} that nations threatened by spills on the high seas can take immediate protective measures . . . ." \textsc{Report to the President}, at 25 [emphasis added].
\item Convention on the High Seas, supra note 18, art. 1.
\item These freedoms, and others which are recognized by the general principles of international law, 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. Id., art. 2.
\item Id., art. 10.
\item D. Bowett, \textit{The Law of the Sea} 44 (1967) [hereinafter cited as \textit{Law of the Sea}]. Restriction of freedom of the seas to ships flying a national flag is an example. Id. & n.1. The universal jurisdiction over the crime of piracy is another. Id. at 44; McDougal & Burke 806-23; Oppenheim 608-17.
\end{itemize}
of the sea: the territorial sea, the contiguous zone, and the remaining high seas. It has often been asserted that the right of a state to take action in its territorial waters to promulgate and enforce anti-pollution legislation is well-established. Two theories are advanced for this proposition. One argues that the territorial sea is an integral part of the state's sovereignty. The other theory differentiates the territorial sea from the land mass in that coastal state rights are qualified by the right of innocent passage. The 1958 Convention on the Territorial Sea and the Contiguous Zone adopts the sovereignty approach, but the rights and duties incident to innocent passage are carefully delineated.

Present state claims to territorial waters lack uniformity partly due to the failure of the 1958 Conference to establish a precise limit. Thus, the twelve mile contiguous zone specified by the Convention is a more important area for resolving state claims to apply authority.

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47. Sweeney, supra note 19, at 201.
48. It could perhaps be argued that the coastal State exercises absolute sovereignty over its marginal sea on the plea that the latter forms a part of its own territory. However, this sovereignty is always subject to the right of innocent passage, hence the view that the qualified sovereignty of the coastal State is based on a right of jurisdiction rather than anything else.
50. Supra note 18.
51. Article 1 states that the "sovereignty" of a state extends to a belt of sea adjacent to its coasts but does not define the width of that belt. Articles 3-13 establish with great precision the reference points to be used in the drawing of baselines from which the as yet internationally undefined width of the sea is to be measured.
52. Claims differ for selected purposes: territorial sea, continental shelf, customs, security, criminal jurisdiction, fishing, etc. See tables, Shipping Conventions 1152-57.
53. See generally Utton, supra note 19 at 618-22. The Torrey Canyon fell within the contiguous zone defined by the Convention (see Text at note 61, infra). Utton, supra at 619.

Prof. McDougal suggests that the territorial sea concept is superfluous — not even a three-mile limit is sound. It is irrelevant militarily, has little relation to the habits of fish, and serves only a "very petty minimum order" for customs, immigration, and health. A very flexible contiguous zone should be favored over the arbitrary limits of internal, territorial, and contiguous waters. The suggestion was made at the 1958 Conference that such zones were unnecessary in view of the broader right of self-defense. However, Prof. McDougal suggests that the concept of self-defense with its requirements of necessity and proportionality is inferior to a contiguous zone concept which demands only reasonableness. McDougal, International Law and the Law of the Sea, in The Law of the Sea 3, at 20-21 (L. Alexander ed. 1967).

Opposition to the contiguous zone in which only certain territorial rights may be exercised claims that it would complicate the restrictions on the high seas already created by claims to a territorial sea by "superimposing" on the distinction between
the coastal state may exercise the control necessary to:

(a) Prevent infringement of its customs, fiscal, immigration, or sanitary regulations within its territory or territorial sea;

(b) Punish infringement of the above regulations committed within its territory or territorial sea.\(^{64}\)

The rationale for the zone is that a state must be capable of exercising an "occasional exclusive competence" in order to protect its territorial sea and land mass.\(^{55}\) This occasional exercise of authority is to be strictly construed with a view to preservation of general uses of the sea by other parties. "[E]vidence of a consensus" that a state may so act is supplied by the number and variety of national legislative enactments in this area which are reciprocally honored by other states.\(^{56}\) The statutes typically involve customs, revenue, sanitary and police regulations, and national security.\(^{57}\) However, the failure of a number of maritime states to ratify the 1958 Convention on the Contiguous Zone may lend importance to resolution of the self-protection issue in the 1969 Convention.\(^{58}\)

Any extension of coastal state rights beyond the territorial sea involves a balancing of its interests against those of the rest of the international community; thus the range of activity which the coastal state may regulate in the contiguous zone is broader than the sanctions which it may impose.\(^{59}\) The contiguous zone concept expressed in Article 24 has been aplicable to "waters which are essentially the same," allegedly a "dangerous and difficult" concept. Colombos 110-11. The flaw in the argument is that its rationale is equally supportive of the McDougal position as its own. Simplicity might also be attained by essentially abolishing the "rigid" lines separating the three zones in favor of an "easement" of coastal state jurisdiction for certain purposes. Defining such rights functionally rather than by area would better accord with reality than geographical line-drawing.


55. It must be recognized, however, that there are certain exclusive interests, common to all states, which may require exercise of unilateral protective measures in the contiguous areas beyond the territorial sea. McDougal & Burke 578. The practice of mutually honoring such claims has prevailed since "early times." Id.


57. Harvard Research, Territorial Waters 333-34 (1929); McDougal & Burke 614-16.

58. Sweeney, supra note 19, at 207.

59. See Dean, The Geneva Conference on the Law of the Sea; What Was Accomplished, 52 Am. J. Int'l L. 607, 624 (1958). It was probably the intent of the framers of the 1958 Convention that the competence of the coastal state would be limited to such "minor measures" as surveillance, inquiry, and search. McDougal & Burke 628.

The United States would have preferred a stronger position giving the coastal state the power to punish activities within the contiguous zone which had deleterious effects in the territory or territorial sea, even though the offending vessel had never entered the territorial sea.

Dean, supra, at 624.
criticized for its "rigid conceptualism" in favor of a more flexible zone. The counterargument is based on the alleged necessity of preventing an ever-wider contiguous zone from being effectively incorporated into the territorial sea. A preferable view emphasizes the utility of the zone as a buffer area where a state may act to guard selected interests without the all-encompassing extension of authority involved in a wider territorial belt. This view is more consonant with the "free seas" principle.

3. Jurisdiction On the High Seas

Whatever the degree of consensus on littoral state authority in a contiguous zone, there is greater uneasiness about the application of measures outside the zone. Nevertheless, there is support for such actions in the objective territorial theory by which a state acquires jurisdiction over acts outside its territory which have their effects within it. Another way of describing this is "protective jurisdiction" over a threat to its territory:

In certain circumstances the state cannot await the arrival of a danger to its security within its own territorial jurisdiction but must take measures to prevent that danger from materializing while still outside its territorial jurisdiction. The protective theory is analogous to self-defense. The great principle of territorial integrity is vulnerable before the exercise of such a fundamental right. Certainly the "freedom of the seas" concept is of no greater dignity and may be temporarily abridged in pursuit of self-protection.

There is also a basis in customary law for "assumed jurisdiction" beyond the acknowledged bases of territoriality and nationality. State

60. It was the United States which proposed the present "rigid" conception. MCDougal & BURKE 628, n. 204, at 628-29. Yet "[w]e are not living with such a limit; we couldn't live with it! I don't know of any major state which could live with it." MCDougal, supra note 53, at 20.

61. One who snaps at the minnow of a limited, occasional, exclusive authority in a contiguous zone must, apparently, perforce swallow the whale of a comprehensive, continuing, exclusive competence in such zone. MCDougal & BURKE 629.

62. As a matter of fact, there is no impairment of [the freedom of the seas] . . ., since instead of extending the zone of territorial waters for all purposes, thus narrowing the high seas, it leaves the high seas area undiminished though the littoral state may exercise certain special rights in the waters outside of, but adjacent to, the marginal sea. HARVARD RESEARCH, TERRITORIAL WATERS 251 (1929).

63. W. BISHOP, INTERNATIONAL LAW 464-65 (2d ed. 1962); the Cutting incident, id. 459-61.

64. D. BOWETT, SELF-DEFENSE IN INTERNATIONAL LAW 66 (1958) [hereinafter cited as BOWETT].


practice affords a number of such examples which would buttress a claim to enforce anti-pollution measures at sea. The universal jurisdiction over piracy jure gentium has already been noted. Although, in time of peace, there is no right of visit and search on the high seas — merchant vessels must not be so molested — there is a right of approach by warships to determine whether a ship flies a flag and its nationality.

4. The Doctrine of "Abuse of Rights"

A more generic theory is that use of the high seas is subject to the doctrine of "abuse of rights." A recent example of such an abuse is the establishment of "pirate" radio stations aboard vessels or on platforms outside the territorial seas of European nations for purposes of broadcasting to audiences within those states without complying with their

67. Note 46 supra.
68. COLOMBO S 310-11.
69. Id. at 311.
70. LAW OF THE SEA 44, 45 (abuse of rights by oil pollution), 46-50 (pollution generally); OPPENHEIM 345-47.

There is general recognition of the idea that a state may not exercise "rights" in an arbitrary manner so as to injure another state out of proportion to its own advantage. OPPENHEIM 345. Since the maxim sic utere tuo ut alienum non laedas applies to states as well as individuals (Id. at 346), no state may alter the condition of its own territory to injure another state. Id. 290-91. "Abuse of rights" is a fundamental principle of civilized states which the I.C.J. may apply under art. 38 of the Statute of the Court, although the precise limits of the doctrine are uncertain. Id. at 346-47.

"A State is bound to prevent such use of its territory as, having regard to the circumstances, is unduly injurious to the inhabitants of the neighboring state ...." Id. at 291 [citing Trail Smelter Arbitral Tribunal, 33 AM. J. INT'L. L. 182 (1939), the leading international air pollution case]. Canada-U.S. efforts to control cross-border pollution are an example of bilateral international cooperation in the field. Jordan, Recent Developments in International Environmental Pollution Control, 15 McGIN L. J. 279 (1969). As to other such efforts, see Livingston, Pollution Control: An International Perspective, 10 SCIENTIST AND CITIZEN 172, 178-79 (1968).

Another example of international liability for permitting a usage of national territory to harm the interests of another state is the Corfu Channel case. The I.C.J. held Albania responsible under international law for failure to warn of an automatic minefield emplaced in its territorial waters which severely damaged two British warships. [1949] I.C.J. REP. 4, at 22; COLOMBO S 133-34; OPPENHEIM 291.

The general concept of the sea as a res communis read together with the Trail Smelter decision suggests an international law of nuisance. Reiff et al., A Symposium on the Geneva Conventions and the Need for Future Modifications, in THE LAW OF THE SEA, at 266-67 (L. Alexander ed. 1967); L. HYDEMAN & W. BERNAN, INTERNATIONAL CONTROL OF NUCLEAR MARITIME ACTIVITIES 276-86 (1960), [hereinafter cited as HYDEMAN & BERNAN.] Although international decisions and treaties which oblige states to act "with a decent respect for the ecologic opinions of mankind" have emerged piecemeal, international law may have a leading role to play, as in other fields, in fostering recognition of freedom from pollution as a basic human right. Livingston, supra, at 177.

In support of a proposed 1972 U.N. Conference on the environment, the U.S. delegate noted the universality of the problem:

Mammalian pollution crosses every boundary, riding the wind and rain, the rivers and ocean currents, the bodies of migrating fish and birds.

59 DEP'T STATE BULL. at 709 (1968).
licensing and other laws. State interests threatened by the practice included stability of licensing requirements, copyright protection, and international obligations regarding telecommunications.\footnote{Law of the Sea 52-53; Colombos 126-27.}

Measures employed to combat this broadcast "piracy" provide precedents for extensions of state jurisdiction to the high seas. One method was to extend beyond territorial waters the application of laws which would otherwise be applicable to the stations were they are on national territory. An expansion of the existing continental shelf jurisdiction enabled states to regulate fixed platforms. However, in the case of vessels, there was the possibility of opposition from the state of flag (often a flag of convenience).\footnote{Law of the Sea 53, n. 3. A treaty is now in force which requires Contracting Parties to restrain such piracy by its nationals or by non-nationals on its ships or aircraft. European Agreement for the Prevention of "Pirate" Broadcasts, art. 3, 59 Am. J. Int'l L. 715 (1965), 4 Int'l Leg. Mat'ls 116 (1965).} In one case, Britain went so far as to seize one of the Thames platforms, an act dubbed "double piracy" by some, and a precursor of her assault on the Torrey Canyon.\footnote{Bowett, at 78.}

5. The Fisheries Analogy

The issue of the protection of national interests on the high seas has arisen sharply in the context of control of living resources. There have been claims to extended jurisdiction or even an exclusive right of exploitation of fisheries on the high seas for:

[i]t is conceivable that an economic interest of this nature may be far more vital and essential for a state's existence than its interest in the inviolability of a portion of its territory. The question arises whether, under the right of self-defense, a claim to jurisdiction and control over fisheries on the High Seas may be maintained.\footnote{Id.}

The distinctions between this exercise of authority and territorial jurisdiction are so substantial that generally there is no acceptable basis for prescribing authority for conservation of high seas fisheries.\footnote{Pell, Preface to THE LAW OF THE SEA at vii (L. Alexander ed. 1967)}. However, if these common resources were to be seriously abused to the detriment of vital interests of a state, the jurisdictional base of self-protection might well be invoked.

The United States advanced the theory of protection of vital interests in high seas fishing in the \textit{Bering Sea Arbitration} of 1893. Russia, which

\begin{quote}
Le droit de pêche appartient à tous les peuples. Nulle puissance ne saurait se réserver d'une manière absolue et vis-à-vis de tous les États le monopole de la pêche dans aucune partie de la haute mer, ... aucune État ne peut édicter des règlements de pêche applicables aux sujets d'autres États.
\end{quote}

\textit{1 Fauchile, Traité de Droit International} 50 (1922) [quoted in Id.].
had preceded the United States in title to Alaska, had claimed exclusive sealing and fishing rights in the Sea, but after strong United States and British protests the claim was renounced. The United States regulated the pelagic seal fisheries through a series of laws in the late-nineteenth century. Although basing part of its claim on a right of self-defense applicable on the high seas, the United States also emphasized its "property" interest in the seals which based themselves on United States shores and its succession to the very Russian interests which it had earlier sought to restrict. The Arbitration resulted in the freedom of the seas principle winning out over the United States claims. It has been intimated that the decision may have turned on a finding that the United States interests were "not of a sufficiently vital nature to support a plea of self-defense..." However, the United States emphasis on property interest in the seals, based on their animus revertendi to the Alaskan shore, may have been the fatal defect.

The 1958 Convention on Fishing and Conservation of the Living Resources of the Sea has given effect to the concept that a coastal state may exercise nondiscriminatory regulatory control over foreign fishing vessels for conservation purposes. Article 7 permits the application of coastal state conservation measures "appropriate to any stock of fish or other marine resources in any area of the high seas adjacent to its territorial sea" where international agreement has not been reached. Machinery for resolving disputes arising out of such action is provided in Articles 9-11.

The criteria by which the reasonableness of measures taken are to be judged include a "need for urgent application," a basis for the measures in "appropriate scientific findings," and non-discrimination "in form or in fact" against foreign fishermen. These criteria possess great relevance to nuclear maritime activities "or to any other type of contiguous control." Similar standards could be incorporated in a permitted extension of coastal state jurisdiction within the 1954 zones of prohibition (as discussed in the 1967 Senate hearings). This would be an appropriate basis of agreement lacking an international enforcement body. Although states which apply pollution legislation beyond three miles generally restrict themselves to territorial waters as they define them, at least one authority asserts that states may promulgate regulations for the waters beyond if they can establish "a direct causal connection between discharges within

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76. Bowett 78-80; Colombo 61; Hydeman & Berman 200-02; Oppenheim 499-500.
77. Bowett 80.
78. Hydeman & Berman, at 202, 208 n. 289.
80. Hydeman & Berman 208.
81. Note 18 supra.
a particular area of those seas and damages sustained within adjacent territorial limits."82

Enforcement provisions of fisheries conventions are a matter of interest in drawing an analogy to pollution control. In several, the parties have established reciprocal rights of arrest of offenders by patrol boats of any party.83 An example is the Convention on Conduct of Fishing Operations in the North Atlantic (done at London in 1967) which provides for a system of mutual inspection whereby enforcement officers of contracting parties may observe and report on the activities of vessels of any of the parties. Ships may be boarded if necessary and the authority may be exercised "[o]utside national fishery limits."84 The Convention also forbids dumping into the sea of any article or substance which would interfere with fishing or damage fish, fishing gear, or vessels. Commenting on the no-dumping provision in a message submitted to the President, the Secretary of State wrote:

With the question of pollution of the sea becoming more and more significant, this first step since the Convention for the Prevention of Pollution of the Sea by Oil adds to the international cooperative approach that is presently underway to cope with this problem area.85 The first step alluded to is an important one. It is a precedent that can expand the role of national and international environmental control authority into the pollution field as it has been developing in the fisheries context.

6. The Impact of the Convention — An Evaluation

While the Public Law Convention may contribute a measure of certainty and orderliness to efforts to cope with a pollution disaster, steps which might be taken prospectively by states in a Torrey Canyon situation seem reasonably well-grounded in current customary international law. The Convention inspired little controversy and the permitted coastal state authority was carefully hedged with restrictions. The dispute-resolution procedures may be an important contribution. However, as has been stated, the Convention does not grapple with the problem of pollution from sources other than a "maritime casualty," an area of considerable ambiguity.

Evidence that the coastal state's rights are not significantly expanded may be gleaned from the Resolution on International Co-operation Concerning Pollutants Other than Oil.86 That resolution recommended a

82. HYDE, INTERNATIONAL LAW 757-58 (2d. ed. 1945) [quoted in HYDEMAN & BERMAN at 199].
83. LAW OF THE SEA, at 32.
85. Id. [emphasis added].
86. 9 INT'L LEG. MAT'LS 65 (1970).
subsequent convention to deal with the problem. In the interim, however, the limitation of the Public Law Convention to oil “is not intended to abridge any right of a coastal State to protect itself against pollution by any other agent.” This dictum by the Brussels conferees suggests, at least implicitly, that such rights exist outside the Convention.

B. THE CIVIL LIABILITY CONVENTION

1. Content

The purpose of the Convention is to establish “uniform international rules and procedures” for determining questions of liability and compensation. Definitions differ somewhat from the Public Law Convention to reflect the distinct utilities of the second convention — for instance, “ship” includes any “sea-going vessel and any seaborne craft actually carrying oil in bulk as cargo.” The Convention applies to “pollution damage” in the territory or territorial sea of a Contracting Party. Except where specifically exempted, the owner of a polluting vessel “shall be liable for any pollution damage caused by oil which has escaped or been discharged from the ship as a result of the incident.” Liability is without regard to fault; however, it is “strict” rather than “absolute” in that the owner may be absolved by the intervention of certain extraordinary causes. Claims are to be channeled through procedures prescribed by the Convention. Claims other than these may not be brought. However, the owner is not denied an action outside the

87. Id.
88. An argument may be made on the model of the interpretation of art. 51 of the United Nations Charter which states that it is not lege ferenda with respect to the right of self-defense. Although the Charter is much more explicit in that it refers to the “inherent” right of self-defense, there is nonetheless a parallel. U.N. CHARTER art. 51.
89. Civil Liability Convention, art. I, para. 1.
90. “Pollution damage” includes loss outside the ship resulting from the escape of oil and includes preventive measures and “loss or damage caused by preventive measures.” Id., art. I, para. 6. This would include pollution by detergents used to disperse the oil.
91. Id., art. III. “Incident” means “any occurrence, or series of occurrences having the same origin, which causes pollution damage.” Id., art. I, para. 8.
92. No liability attaches if the damage resulted from an “act of war . . . or a natural phenomenon of an exceptional, inevitable, and irresistible character,” an intentional act or omission of a third party, or negligence or other wrongful act of an authority responsible for aids to navigation. Id., art. III, para. 2.

The U.S. was successful in opposing inclusion of third-party negligence as an exception. CONFERENCE REPORT 14.
Convention against third parties. Liability is joint and several for the escape of oil from two or more ships, as in a collision.93

A central feature of the Convention is the limitation of liability:

The owner of a ship shall be entitled to limit his liability under this Convention in respect of any one incident to an aggregate amount of [$135] for each ton of the ship’s tonnage. However, this aggregate amount shall not in any event exceed [$14 million].94

The limitation applies to strict liability and may not be availed of “[i]f the incident occurred as a result of the actual fault or privity of the owner . . . .”95 The owner may have the benefit of the limitation by constituting a fund or an equivalent guaranty in the courts of a Contracting State up to the applicable liability limit.96 Preventive measures, cleanup efforts, and out-of-court compensation by the owner entitle him to subrogation rights against the fund. Third parties (e.g. governments, insurance companies) may likewise be subrogated to the rights of claimants whom they have paid.97

Under Article VI, no person may levy on other assets of the owner and courts of Contracting States are to release property which has been arrested or otherwise held as security for such a claim unless the claimant did not have access to the fund. Owners of ships registered in the Contracting States which carry more than 2000 tons of oil as bulk cargo must maintain insurance or other financial security in an amount determined by applying the Convention’s liability limits to the tonnage of the ship. A certificate attesting that such financial responsibility has been provided is to be issued by the state of registration after a determination of compliance.98

Under the terms of Article VII, a claim for pollution damage may be

93. Id., art. IV.
94. Id., art. V, para. 1. The C.M.I. draft proposed a limitation of $67 per ton, half of that finally agreed on. The higher figure resulted from a tradeoff of higher limits sought by the U.S. delegation for the British delegation's proposals for the exceptions to absolute liability outlined in art. III, para. 2. Lord Devlin of the British delegation, after a canvass of London insurance houses, notified the drafting committee that the amounts were insurable so long as the insurers were permitted to plead certain defenses of the owner. Anglo-American “lobbying” for the compromise led to its adoption. Conference Report 14-16.

The tonnage for limitation purposes is net tonnage plus engine room space. For ships not measurable by normal rules, tonnage is to be deemed 40% of the weight in tons of oil which the ship can carry. Id., art. 5, para. 10. In other words, the liability limitation for each ton of potentially damaging oil cargo is actually only $54 in such a case. See comparative table of dead weight tonnage (cargo capacity) and gross registered tonnage for selected vessels in Mendelsohn, supra note 25, at 10 n. 34, at 10-11.
95. Civil Liability Convention, art. V, para. 2.
96. Claimants are to participate in the fund pro rata. Id., art. V, para. 4.
97. Reasonable preventive measures voluntarily undertaken by the owner are compensable as claims against the fund. Id., art. V, para. 8.
98. Id., art. VII, para. 2 and the Annex to the Convention specify the contents of the certificate.
lodged directly against the insurer who may then constitute the limited liability fund. He may avail himself of the insured’s defenses against the claim and may plead that the damage resulted from the willful misconduct of the owner; however, he may neither invoke the bankruptcy or winding up of the owner, nor defenses which he might have invoked against the owner. The defendant-insurer is provided with a right of compulsory joinder of the owner. Insurance coverage maintained to make the showing of financial responsibility must be entirely reserved for the satisfaction of pollution claims.99

Claims may be pressed in the courts of any Contracting Party in whose territory or territorial waters damage has occurred or preventive measures have been taken. Each state is to enable its courts to entertain such suits. Once a fund is constituted, the courts of the state to which it has been entrusted are deemed “exclusively competent” with regard to disbursement among claimants.100 A final judgment is enforceable in the courts of the other Contracting Parties and is not to be reopened except on a showing of fraud or denial of notice for an opportunity to be heard.101

The Convention imposes several stringent responsibilities on the Contracting States to further ensure compliance with the Convention. A signatory is not to permit a ship to trade under its flag unless it carries a certificate of financial responsibility. More importantly, each Contracting State is to ensure that, under its national legislation, financial security up to the specified limits “is in force in respect of any ship, wherever registered, entering or leaving a port in its territory, or arriving at or leaving an offshore terminal in its territorial sea,” if the ship is of a type covered by the Convention.102 Although the Convention excepts warships and government ships on non-commercial service under Article XI, para. 1, it makes state-owned commercial ships subject to suit under Article XI, para 2; sovereign immunity of the state-owner is waived. Although such ships are not required to carry the insurance certificate, they are required to carry a certificate of state ownership, which is an affidavit of that state’s financial responsibility as a self-insurer up to the limits contemplated by the Convention.103

2. Limitation of Liability

The limitation of liability proposals put forth at Brussels were controversial. They ranged from overall limits as high as $30,000,000 to a retention of the status quo.104 Due to the importance of insurance in

100. Id., art. IX.
101. Id., art. X.
102. Id., art. VII, para. 11.
103. Id., art. VII, para. 12.
104. CONFERENCE REPORT 13-16, see Sweeney, supra note 19, at 205.
underwriting maritime liability, it has been the limitation of liability rather than the standard of care, which has been of greatest concern to shipowners.

Modern proposals for liability limits urged by shipowners are usually based on the limits incorporated in the International Convention Relating to the Limitation of Liability of Owners of Seagoing Ships done at Brussels in 1957.\textsuperscript{105} The Convention provides that a shipowner may limit his liability to $67 per ton for property damage and $207 per ton for personal claims.\textsuperscript{106}

The $67 per ton limitation has been frequently advanced by shipping interests in reference to currently pending U.S. oil pollution legislation and in discussions leading up to the 1969 Brussels Conference. Although one House bill in the 90th Congress embraced the $67 amount, current congressional proposals have ranged from $100 to $450 per gross registered ton with overall limits from $10 to $15 million.\textsuperscript{107} Grounds of opposition to the higher limits were that:

1. The limitation of liability provisions of the bills are tantamount to no limitation at all.

2. The costs of insurance in view of the exorbitant maximum exposure would be an unbearable burden on the merchant marine.\textsuperscript{108}

In 1967, a representative of companies owning more than half of the privately-owned vessels in the United States merchant fleet, testified to the rationality of a liability limitation. All maritime nations, it was said, maintained such limitations, and the economic burdens of a United States standard which recognized no limitation or an excessively high limitation would hasten the already rather drastic decline of the United States merchant fleet vis-a-vis those of other nations.\textsuperscript{109} It was added that the "paramount objective" of maintenance of uniformity in enacting maritime legislation would be served by United States accession to the 1957 Convention.\textsuperscript{110}

\textsuperscript{105} Shipping Conventions 1058.

\textsuperscript{106} 1957 Brussels Convention, arts. 1, 3 in Shipping Conventions 1059-60. Distribution is to be made in proportion to claims established. Id., art. 3, para. 2.

\textsuperscript{107} S.7 and S. 544, 91st Cong. 1st Sess. (1969); H.R. 4148, 91st Cong. 1st Sess. (1969). See discussion of bills before the 91st Congress in Mendelsohn, supra note 25, at 9-10. Senate and House conferees agreed upon a compromise measure applying the Senate-passed standard of strict liability and its overall liability limitation of $14 million but adjusted the limits per ton downward to the House-passed $100. N.Y. Times, March 4, 1970, at 1, col. 1 & at 26, col. 3 (city ed.). The bill passed the House without a dissenting vote and was sent to the President. N.Y. Times, March 26, 1970, at 21, col. 4. (city ed.). The discrepancy between the $100 per gross registered ton limitation and the $135 figure adopted at Brussels apparently did not figure in consideration of the measure.

\textsuperscript{108} Statement of the representative of the Maritime Law Association, Water Pollution — 1969, at 123.

\textsuperscript{109} In 1950, there were 1,206 ships in the U.S. merchant fleet as opposed to 905 in 1969. "By comparison, Norway has over 1,600 ships." Id. at 124.

\textsuperscript{110} Id. at 125.
Shippers contended that the higher limits of liability — $450 per ton and $15 million overall — were unrealistic in that "not in one's wildest imagination" could damage actually reach $15 million. Evidence that the respective limits were excessive consisted largely of records of amounts of oil spilled in earlier incidents and cleanup costs.\(^{111}\)

Despite these claims, the Federal Water Pollution Control Agency, supplied the Senate with data which would comport with a higher limitations:

> [W]e are discussing the upper limit of liability which a vessel owner might incur in the event of a catastrophic spill of oil. Obviously, this upper limit, if it is to be meaningful, must be set high enough to cover the cost of the cleanup in all but the most extreme cases.\(^{112}\)

The Commission's study indicated that, in major incidents such as the Torrey Canyon and the Ocean Eagle as well as in several less catastrophic spills, the cleanup cost approximated $1.00 per gallon of oil which actually escaped at sea. For Torrey Canyon and Ocean Eagle, the figures were $.70 and $1.00 respectively. Costs for other accidents have ranged from $1.00 to $5.00 per gallon. Relating the average ratio of cargo capacity to gross registered tonnage, it was illustrated that $450 per gross registered ton would provide $1.00 per gallon for the costs of cleanup efforts for tankers of relatively standard design.\(^{113}\)

3. The Insurability Problem

The heart of the shipowners' objection did not seem to be that the extremes of liability could not be overreached in any event, but that such an occurrence would be highly unusual. Notwithstanding the rarity of such an occurrence, no prudent owner could afford to eschew extensive insurance coverage even in the absence of international or domestic compulsion. Insurance for the higher amounts is allegedly flatly unavailable and lesser limits, if in excess of the 1957 Convention limitations, would mean prohibitive increases in premiums reducing severely the already strained profit margins of the small operators.\(^{114}\)

In a letter to the Chairman of the Senate Public Works Committee, 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 each accident each vessel, whichever amount proves to be the lesser.

\(^{111}\) Id. at 115-19.

\(^{112}\) Id. at 116.

\(^{113}\) Id.

(2) If the doctrine of absolute liability were enforced, the probable maximum world market would be in the area of $67 per gross registered ton or $5,000,000 each accident 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 on such vessels.

British underwriters insuring the bulk of the world's shipping tonnage told the committee that the proposed legislation would lead to "uninsurable liabilities and possibly chaos in shipping." At least one British fleet owner advised that his ships would be effectively prohibited by the legislation from calling at United States ports. A memorandum of the Tanker Committee of the International Chamber of Shipping concluded that underwriters will not insure where there is unlimited liability for negligence, where non-fault liabilities are "unrealistic," and there is an "unqualified right of direct action against the insurer." 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 a direct action brought against the insurer. The views of the London insurers are critical in that their houses provide vital backup for American firms. The industry practice of redistributing risk among additional companies, known as "reinsurance," requires an evaluation of the entire world capacity for risk bearing.

The insurance brokers market survey indicated that the largest coverage available was for the "$100 a ton or $10 million, whichever is less" formula. Even this would result in a substantial increase in the premium increment of the cost of doing business, already 15 per cent of carriers' operating costs. The representative of the United States fleet of unsubsidized merchant vessels claimed that they would be "decimated" by the proposal.

4. Means of Financing Cleanup Costs and Compensation

In a possible move to head off congressional and international convergence on high liability limits, the major oil tanker owners developed...
a private voluntary insurance scheme to compensate governments for cleanup efforts and to encourage owners and operators to take remedial measures. Known initially as the Tankers Owners Voluntary Agreement Concerning Liability for Oil Pollution or TOVALOP (now the International Tanker Owners Pollution Federation), the agreement provided for reimbursement by a Bermuda-based indemnity association of costs to an injured country up to $100 per ton or $10 million (whichever is less). Insurability of these amounts would belie the shippers earlier representations about market capacity but for the fact that TOVALOP indemnity was to be based on fault whereas some earlier estimates were based on strict liability. TOVALOP's adherence to a fault standard is its major weakness. Nevertheless, IMCO's sounding of the London market prior to confirmation of the final figures in the Civil Liability Convention of $135 per ton and $14 million overall suggests that some insurability fears were chimerical. Adherence to the $67 per ton figure seems to have little to support it except coincidence with the 1957 Convention. However, the drafters of the Brussels convention might take a different view in the light of subsequent marine disasters which have gone beyond the experience at that time.

The marine insurance system may, in fact, be based on archaic concepts. The purpose of marine insurance heretofore 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. For example, the Torrey Canyon carried hull insurance of $16 million — however, this amount was of no benefit to the shoreowners who suffered economic loss. Viewed in this light, the statements of the shipping industry that the current insurance system will not bear the cost of the extremely high liabilities created by oil spills may be accurate. However, it will not suffice to leave it at that. If the maritime industry is to continue to expand

122. N.Y. Times, supra note 114.
124. N.Y. Times, March 25, 1967, at 1, col. 7. The owners of the Torrey Canyon settled suits for cleanup costs by Britain and France for $7.2 million shortly before the Brussels meeting. N.Y. Times, Nov. 29, 1969, at 66, col. 1. Claims against the vessel were said to have been in excess of $16 million. Sweeney, supra note 19, at 163 n. 43. Liability based on a $67/dead weight ton figure considered by an IMCO subcommittee would have been $9,450,000. Id. It was said at the conclusion of the 1969 conference that liability for the Torrey Canyon would have been more than double the private settlement under the Civil Liability Convention. N.Y. Times, Nov. 29, 1969, at 66, col. 1. This appears to be an erroneous estimate, possibly based on a computation using the vessel's deadweight tonnage of 120,890 d.w.t. (Sweeney, supra, at 158). On the basis of a gross tonnage of 61,000 (Sweeney, supra, at 157), the liability would be only $8,235,000 under the Convention. See note 94 supra.
its technology to encompass new methods of transport which pose a threat to the environment, new means must be devised to insure losses. This problem was confronted and more satisfactorily dealt with in the airline industry where potential per accident liability may well outstrip any that has yet occurred at sea.\textsuperscript{125}

One proposal for reforming the insurance system was to provide reduced premiums for tankers sailing sealanes where the risk of pollution was limited.\textsuperscript{128} Ships would have an incentive to sail the safe, low-liability routes involving low premiums. Once established, the system would serve as an incentive to companies to reduce premium costs by investment in research and development to reduce the probability of casualties and the seriousness of the effects.\textsuperscript{127} If economic incentives failed, mandatory sealanes with increased liability for noncompliance might be established under a supervisory agency.\textsuperscript{128}

The new tanker technology should pay its own way. Since the potential damage which a tanker may cause increases markedly once it exceeds a critical size, it would be just to reallocate the benefit of the resulting low cost of oil to those who suffer pollution losses. The economies of scale realizable through use of large tankships should redound in part to these parties through the use of expanded liability insurance coverage with a premium pool large enough to cover any estimated damage.\textsuperscript{129} If this open-ended liability proved too onerous for private firms to underwrite, some form of government reinsurance might be provided.

Imaginative research must be devoted to development of equitable premium devices that will provide a large enough pool to underwrite losses without crippling the smaller operator whose contribution to pollution may be marginal. Perhaps other forms of insurance—automobile or health—would suggest schemes for accomplishing this. Provisions for deductible amounts for operators who use small vessels or structural design limiting damage, rebates for a good “health” history of vessel or

\textsuperscript{125} See Mendelsohn, supra note 25, at 15-18. See also the extensive liability provisions of the Convention on Liability of Operators of Nuclear Ships, 57 Am. J. Int’l L. 268 (1963); Colonos 355-57.

\textsuperscript{126} It was suggested that a private, governmental, or international agency develop a “liability profile” of tankship routes 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 cargoes. Route plans would have to be submitted which would provide adequate distances from coasts to minimize pollution. This proposal accords with other suggestions of international agreement on mandatory sealanes for supertankers and is a logical extension of the negative requirements of the 1954 prohibited zones. Liability premiums would be based on the degree of adherence to routes which involved least jeopardy to coastal interests. Water Pollution — 1967, at 250-55.

\textsuperscript{127} Id., at 252-53.

\textsuperscript{128} Id., at 255.

\textsuperscript{129} Id., at 251.
captain, and sliding-scale premiums for jumbo vessels are possibilities. The incremental cost of insurance should increase with size. This would meet the argument that the independents would be driven from the oceans. The large oil companies which formed TOVALOP not only account for the largest percentage of overall tanker tonnage but have a heavy investment in the “supertankers” which are most likely to test the upper margins of any liability system. Certainly increased transportation costs must figure in their business planning. Yet these companies are in business to profit from the production, refinement, and sale of oil, not its transportation; it is less onerous to impose greater standards of financial responsibility on them than on the independents. Further, such a move would encourage some efforts currently being made in the direction of improved tanker design and safety, or, in the alternative, impose outside limits on continually burgeoning tanker sizes if, in fact, safety and cleanup technology cannot keep step.

III. CONCLUSION

Although the patient efforts of IMCO from the Torrey Canyon to Brussels have borne fruit, the 1969 Conference has left much to be done. For instance, the failure to include non-oil substances is a disappointment; the delay inherent in separate action on the matter may prove costly. An organic reorganization in IMCO would be necessary to enable it to deal with non-maritime sources of pollution such as seabed exploitation, noxious substances carried by river effluents, and dumping of wastes at sea. A new United Nations agency which could deal with pollution generically would be preferable to clouding the heretofore exclusively maritime functions of IMCO.

Within the world of pollution from ships, IMCO should endorse stricter standards and take on greater authority. It would be visionary,

130. N.Y. Times, Nov. 7, 1969, at 93, col. 1; Mendelsohn, supra note 25, at 27 n. 88.
131. The U.S. warned that adoption of the Public Law Convention might be followed shortly by a disaster involving a “noxious chemical solvent.” N.Y. Times, Nov. 15, 1969, at 93, col. 2. The more cautious approach taken at Brussels leaves the world “one convention behind each maritime disaster.” Mendelsohn, supra note 25, at 30. The drafting committee felt that it lacked the “technical competence” to compile a list of substances. CONFERENCE REPORT at 7. Yet the IMCO has dealt exhaustively with the problem vis-a-vis cargo. IMCO, INTERNATIONAL MARITIME DANGEROUS GOODS CODE (1965) (covering inflammable liquids and solids, corrosives, poisons, etc.).
however, to suggest that the Organization be immediately changed from a non-coercive consultative body to an International Coast Guard with enforcement power. Short of this, there is a broader role for IMCO to play, perhaps as an objective fact-finding or investigatory body. For example, why not draw the services of the “experts” as provided in Articles III (c) and IV of the Public Law Convention directly from full-time personnel of IMCO? IMCO, with its expertise, could then recommend coastal state action.

An altered IMCO structure could be of use in supporting coastal state anti-pollution measures without directly involving a U.N. agency in policing violations. In the absence of international enforcement, extension of coastal state authority to contiguous zones, perhaps as broad as the 1954 prohibited zones, would be an interim step. IMCO scientific and technical observers on U.N. or national ships or aircraft would lend objectivity to the determination of a violation, and thus mitigate the impact of unilateral coastal state jurisdiction in so broad an area.

The International Fund proposal slated for further study by IMCO offers great promise as a backup for private insurance coverage. Ideally, the Fund could be used to compensate claimants even if the source of pollution were unknown; however, this would require near-universal adherence to the system to prevent exploitation by non-members.

This raises the problem of state responsibility for pollution by vessels of its registry. A state may eschew participation in international agreements or adhere to them with important reservations, may be lax in enforcement of treaty provisions, or, in the absence of a treaty commitment, may permit safety and other standards that fall below accepted international norms. We have seen that a state is responsible for injury to another state by its nationals even though the offenders are not instrumentalities of the state. State passivity, where there is a duty to act, is also liability-creating conduct.

134. The agency could participate in research and development of methods of detection and perhaps supply detection experts to states on an ad hoc basis. See N.Y. Times, May 28, 1969, at 15, col. 3 (“fingerprinting” tankers with chemicals which enable spilled oil to be traced); id., Nov. 6, 1969, at 47, col. 3 (British Mail Lines indicted for violation of 1954 Convention after an expert determined from aerial photographs that the oil mixture exceeded permissible limits).

135. There are several possibilities for financing such a fund: a pool of insurance premiums (text at note 129 supra), a charge on the carriage of oil by sea (Mendelsohn, supra note 25, at 27), and a levy on extraction of oil from the seabed (Note, supra note 19, at 128). The State of Maine has enacted a levy on import and export of oil through its deepwater ports to be used to finance pollution control. Time, Feb. 16, 1970, at 52.

136. Trail Smelter arbitration, supra note 70.

137. Corfu Channel case, id.
unity of ship with state notwithstanding the decline of the "floating island" concept.\textsuperscript{138} In view of the "genuine link" idea embodied in the High Seas Convention, perhaps it is time for a reversal or modification of the 1960 International Court of Justice opinion in the Maritime Safety Committee case\textsuperscript{139} which upheld the concept that a state's voice in international maritime matters was to be determined by the tonnage of ships of its registry.\textsuperscript{140} Although to date flag-state authority has not fostered "jurisdictional anarchy,"\textsuperscript{141} the success of international pollution control agreements should not be hostage to the adherence by a few key "flag of convenience" states. The nations which have the greatest stake in pollution control are those whose nationals own or operate vessels and those which are most exposed to pollution. They must lead international energies toward a solution.

\begin{itemize}
\item \textsuperscript{138} The S.S. "Lotus" 1935 P.C.I.J. ser. A, No. 10, Colombos 286-88, 304-06.
\item There may be a reverse-\textit{Lotus} argument — a state which sends out a ship under its flag which it has sought to immunize from the international legal order would be as responsible for resulting harm as if the wrong had been occasioned by a deleterious use of national territory.
\item \textsuperscript{139} Note 9 supra.
\item \textsuperscript{140} Traditional adherence to flag-state hegemony in this sphere is a rather perverse "one-ship-one-vote" philosophy. The "Panlibhon" (Panama, Liberia, Honduras; 13 N. SINGH & R. COLLIVAX; supra note 7, at 7) states are thus vested with authority that outweighs legitimate interest.
\item \textsuperscript{141} Comment, supra note 17, at 331.
\end{itemize}