

**CIRCULATING COPY**  
**Sea Grant Depository**

Sea Grant Technical Bulletin #13

Contiguous Zones for Pollution Control:  
An Appraisal Under International Law

Norman A. Wulf

**PELL MARINE SCIENCE LIBRARY**  
**University of Rhode Island**  
**Narragansett Bay Campus**

University of Miami Sea Grant Program  
Miami, Florida 1971

(NSF Sea Grant - GH 100)

The research presented in this bulletin was submitted as a thesis in partial fulfillment of the requirements for the degree of LL.M. (Master of Laws) in Ocean Law.

Copyright© 1971 by University of Miami  
All rights reserved

Library of Congress Catalog Card Number: 75-153402

Information Services  
Sea Grant Institutional Program  
University of Miami  
10 Rickenbacker Causeway  
Miami, Florida 33149

## PREFACE

The Sea Grant Colleges Program was created by Congress in 1966 to stimulate research, instruction, and extension of knowledge of marine resources of the United States. In 1969 the Sea Grant Program was established at the University of Miami.

The outstanding success of the Land Grant Colleges Program, which in 100 years has brought the United States to its current superior position in agricultural production, was the basis for the Sea Grant concept. This concept has three objectives: to promote excellence in education and training, research, and information service in the University's disciplines that relate to the sea. The successful accomplishment of these objectives will result in material contributions to marine oriented industries and will, in addition, protect and preserve the environment for the enjoyment of all people.

With these objectives, this series of Sea Grant Technical Bulletins is intended to convey useful research information to the marine communities interested in resource development.

While the responsibility for administration of the Sea Grant Program rests with the Department of Commerce, the responsibility for financing the program is shared by federal, industrial and University of Miami contributions. This study, Contiguous Zones for Pollution Control: An Appraisal Under International Law, was made possible by Sea Grant support for the Ocean Law Program.

## TABLE OF CONTENTS

INTRODUCTION . . . . .	1
I. THE PROCESS OF INTERACTION . . . . .	4
A. <u>Transportation Interests</u> . . . . .	4
B. <u>Coastal Interests</u> . . . . .	14
1. Effects of Oil Pollution . . . . .	15
2. Variables Determining the Extent of Impact . . . . .	18
3. Prevention and Remedial Measures . . . . .	21
4. Effects of Oil Pollution Upon the Social Process. . . . .	27
5. Oil Pollution in the Arctic. . . . .	30
II. CLAIMS . . . . .	34
A. <u>The United States Claim to a 12         Mile Contiguous Zone for Pollution         Control.</u> . . . . .	34
1. Legislative Background . . . . .	34
2. Competence Claimed by the United States. . . . .	38
a. prevention	
b. compensation	
B. <u>The Canadian Claim to a 100 Mile         Contiguous Zone for Pollution         Control in Arctic Waters</u> . . . . .	48
1. Legislative Background . . . . .	48
a. introduction of legislative proposals	
b. international response to the proposals	
c. debates on the legislation	
d. committee hearings and enactment	

2. The Competence Claimed by Canada. . . . .	74
a. prevention	
b. compensation	
III. DECISION PROCESS . . . . .	82
A. <u>Organized Arena</u> . . . . .	82
B. <u>Unorganized Arena</u> . . . . .	87
IV. CLARIFICATION OF GOALS . . . . .	90
V. TRENDS IN DECISION . . . . .	95
A. <u>Non-Casualty Discharges</u> . . . . .	97
B. <u>Casualty Discharges</u> . . . . .	110
C. <u>Compensation</u> . . . . .	116
D. <u>Evaluation of Existing Regime</u> . . . . .	120
VI. CLAIMS TO EXCLUSIVE COMPETENCE IN THE HIGH SEAS CONTIGUOUS TO THE TERRITORIAL SEA. . . . .	126
A. <u>Development of the Contiguous Zone Concept</u> . . . . .	126
B. <u>Sanitary Regulations and Oil Pollution</u> . . . . .	133
1. Deliberations of the Inter- national Law Commission. . . . .	133
a. the contiguous zone	
b. innocent passage	
c. oil pollution	
d. the intent of the International Law Commission	
2. Geneva Conference on the Law of the Sea . . . . .	146
a. preparatory materials	
b. meetings of the first committee	
c. meetings of the second committee	
d. plenary meetings	
e. the intent of the Geneva Conference	

C. <u>Appraisal</u> . . . . .	155
1. Competence to Apply Authority in the Contiguous Zone. . . . .	155
2. Breadth of the Zone . . . . .	158
3. Interests Which May be Protected . . . . .	159
VII. CONTIGUOUS ZONES FOR POLLUTION CONTROL. . .	164
A. <u>Claims to Deter Non-Casualty Discharges</u> . . . . .	166
B. <u>Claims to Prevent or Minimize Damage after a Non-Casualty Discharge</u> . . . . .	170
C. <u>Claims to Prevent Threatened Pollution or to Abate Further Pollution from a Maritime Casualty</u> . . . . .	171
1. Right of Intervention . . . . .	171
2. Require Other Ships to Render Assistance. . . . .	174
3. Require Vessels to Carry on Board Remedial Equipment. . . . .	175
D. <u>Claims to Prevent the Occurrence of Maritime Casualties</u> . . . . .	177
1. Construction Standards. . . . .	178
2. Manning and Navigational Requirements. . . . .	179
3. Denial of Access to Areas Deemed Unsafe . . . . .	180
E. <u>Claims to Obtain Compensation for Pollution Damage</u> . . . . .	181
CONCLUSION. . . . .	188

CONTIGUOUS ZONES FOR POLLUTION CONTROL  
AN APPRAISAL UNDER INTERNATIONAL LAW

This decade perhaps will be known as the age of the environment. Pressures created by demands for environmental protection will result in changes of the established legal order. One area which will be affected by these pressures is the international conduit of trade--the sea. To the extent that use of the sea poses a threat to the coastal environment, coastal states will seek to control or limit such use.

Pollution of the sea by oil from ships poses a threat to the coastal environment. The United States and Canada have responded to this threat by claims of authority in the high seas off their coasts.<sup>1</sup> Two examples, therefore, presently exist where coastal

---

<sup>1</sup>Under the Water Quality Improvement Act of 1970, the United States claims authority over some activities of foreign flag vessels in a nine-mile zone of the high seas contiguous to her territorial sea. Pub. L. No. 91-224, 91st Cong., 2nd Sess. (April 3, 1970). Contiguous zone is defined in the Act as the "entire zone established or to be established by the United States under article 24 of the Convention on the Territorial Sea and the Contiguous Zone." *Id.* at § 11 (a) (9). Article 24 limits the breadth of the contiguous zone to a distance not greater than "twelve miles from the base-line from which the breadth of the territorial sea is

states alleging as a purpose the protection of the coastal environment have claimed to establish in the high seas special zones of limited competence, contiguous zones, for pollution control. With these examples before them, other states may seek to establish similar zones in the high seas for the avowed purpose of protecting the environment. As such zones would establish coastal state competence in areas formerly within the competence of the international community, they pose a fundamental challenge to the long established public order of the oceans.

In order to evaluate properly the lawfulness of pollution prevention contiguous zones, such as those established by the United States and Canada, it is necessary to examine the processes by which the oceans are used and the pollution risks such uses pose.

---

measured." U.S. T.I.A.S. 1606, 1612 (1964).

Canada, under the Arctic Waters Pollution Prevention Act, claims authority over foreign vessels in waters north of sixty degrees north latitude in a zone which extends "seaward from the nearest Canadian land a distance of one-hundred nautical miles" subject to a line of equidistance when the distance between the Canadian islands and Greenland is less than one-hundred nautical miles. Bill C-202, § 3 (1), 28th Parliament, 2nd Sess. (June 26, 1970). The Bill, as originally introduced, is set forth in 9 Int'l Legal Materials 543 (1970). As enacted, the Act contains a minor amendment which gives private claims priority over governmental claims for compensation from a polluting vessel. See note 186, infra.



Furthermore, examination of the process of claims by which interests are asserted and the process of authoritative decision by which interests are honored and protected must be undertaken before evaluating the reasonableness and, therefore, the acceptability of such claims to the international community.<sup>2</sup>

---

<sup>2</sup>This process of policy-related inquiry is based on the framework developed by Professor Myres S. McDougal of the Yale Law School as set forth in M. S. McDougal and W. T. Burke, The Public Order of the Oceans (1962) [hereinafter cited as McDougal and Burke].

## I. THE PROCESS OF INTERACTION

The process of interaction can best be illustrated by dividing the interests of states into two general categories, transportation and coastal. It is recognized that all states share, to a greater or lesser degree, benefits from the transport of oil by sea and that states with coastal interests bear some risk of pollution damage from these transportation activities. Even though coastal states benefit from the promotion of both interests, for purposes of convenient exposition the two interests will be discussed separately.

### A. Transportation Interests

Modern society consumes enormous quantities of oil in its quest for achievement of its varied goals. The extent of consumption is reflected in the world production of oil which is estimated to be 1800 million metric tons per year with a projected annual increase of four per cent.<sup>3</sup> Consumption does not necessarily

---

<sup>3</sup> Marine Science Affairs—Selecting Priority Programs, Annual Report of the President to the Congress on Marine Resources and Engineering Development, together with the Report of the National Council on Marine Resources

occur where oil is produced. Table 1 sets forth the approximate geographical disparity between production and consumption as it existed in 1967.<sup>4</sup>

TABLE 1  
WORLD PRODUCTION AND CONSUMPTION OF OIL IN 1967  
BY MAJOR GEOGRAPHICAL AREAS

Geographical Area	Production	Consumption
United States . . . . .	25%	35%
Other North America . . . . .	3%	5%
Latin America . . . . .	13%	5%
Europe . . . . .	2%	28%
U.S.S.R . . . . .	18%	12%
Africa . . . . .	9%	2%
Middle East . . . . .	28%	2%
Far East . . . . .	2%	11%

The disparities between consumption and production must be met by transportation of oil. This transportation, plus that resulting from movement of oil within the above geographical areas, results in some sixty per cent of the annual world production of oil, or some 1,000 million metric tons, being conveyed by sea.<sup>5</sup> The sea is chosen as the mode of transport because it is the cheapest

---

and Engineering Developments 21 (1970) [hereinafter cited as 1970 Marine Science Affairs].

<sup>4</sup>Percentages are based on information set forth in Report of the Panel of Marine Resources, 3 Panel Reports of the Commission on Marine Sciences, Engineering and Resources VII-193, VII-195 (1969).

<sup>5</sup>1970 Marine Science Affairs 21.

and most efficient method, as evidenced by the fact that about ninety per cent of the foreign trade of the United States, fifty-six billion dollars annually, is transported by the sea.<sup>6</sup> The tanker fleets which move these vast quantities of oil over the sea obviously select the most efficient routes, usually those which require the least time to transit. By using the shortest routes oil companies which own or time charter tankers maximize returns on their investment, increase their competitive position with others also using the most economic route and are able to provide their product to the consumer at less cost. Independent tanker owners on voyage charter are similarly motivated to use the routes which involve the least time to transit, maximizing their return and insuring their competitive position. These efficient routes may bring the tankers in close proximity to coastal states.

Also affecting the transport of oil by sea are the economics and physical realities of economy of scale. The management and operation of the movement of large loads is more efficient than smaller ones. And the physical principle that the total energy required

---

<sup>6</sup>Marine Science Affairs—A Year of Broadened Participation, The 3rd Report of the President to the Congress on Marine Resources and Engineering Development 113 (1969) [hereinafter cited as 1969 Marine Science Affairs].

to carry a ton of cargo at a given speed decreases as a vessel's cargo capacity increases, thus reducing costs per ton-mile is an important factor.<sup>7</sup> The increased petroleum requirements plus the decreased costs per ton-mile has spurred a tremendous growth in the cargo-carrying capacity of tankers. The World War II T-2 tanker of 16,640 dead weight tons (dwt)<sup>8</sup> by 1965 had been replaced as the average size tanker in the world fleet increased to 27,000 dwt.<sup>9</sup> Early in 1967 Gulf Oil announced a plan to operate six 312,000 dwt tankers. This announcement was followed in June 1967 by the report that three Japanese shipbuilders planned facilities capable of constructing a ship of 500,000 dwt. The major

---

<sup>7</sup> Report of the Panel on Industry and Private Investment, 2 Panel Reports of the Commission on Marine Science, Engineering and Resources V-46 (1969). The economics involved are graphically illustrated in E. Cowan, Oil and Water The Torrey Canyon Disaster 10 (1968) [hereinafter cited as Cowan] where it is established that use of a tanker of 117,000 tons rather than 67,000 would result in savings of thirty-five cents a barrel on oil delivered from the Persian Gulf to Los Angeles—a savings of almost a penny a gallon.

<sup>8</sup> Dead weight ton identifies a ship's carrying capacity including internal prominences, at salt water, summer load line immersion. Actual cargo capacity is somewhat less. For example, a 50,000 dwt tanker can carry about 47,000 tons of crude petroleum.

<sup>9</sup> Report of the Panel on Management and Development of the Coastal Zone, 1 Panel Reports of the Commission on Marine Science Engineering and Resources III-66 (1969).

route for oil from the Middle East to western Europe was the Suez Canal. When the six-day Arab-Israeli conflict in June, 1967, closed the Suez Canal for the second time in a decade, oil supplies for western Europe had to be transported around Africa. By autumn of 1967, orders had been placed for thirty super tankers all larger than the biggest tanker then afloat, the 206,000 dwt Idemitsu Maru to make these extended voyages.<sup>10</sup> In May, 1970, there were in service seventy-five tankers in the 200,000 dwt and over class.<sup>11</sup> It is estimated that by May 1973, super tankers larger than 200,000 dwt will comprise one-half of the total tonnage capacity.<sup>12</sup> Although designs have been made for ships up to 1,000,000 dwt, it is felt that geographic limitations, for example, the average draft for European ports is sixty-two feet, will set a practical limit on super tankers somewhere less than the million ton figure.<sup>13</sup> With the growth in tanker size also came a growth in the size of cargo holds aboard the tankers with center and wing tanks growing from a length of forty feet to more than eighty feet on the super

---

<sup>10</sup>Cowan 224.    <sup>11</sup>Petroleum Press Service 168 (May 1970).

<sup>12</sup>1969 Marine Science Affairs 20.

<sup>13</sup>Oil Spillage Study Literature Search and Critical Evaluation for Selection of Promising Techniques to Control and Prevent Damage, A Report to the U. S. Coast Guard by Battelle-Northwest, Battelle Memorial Institute 3-6 to 3-7 (1967) [hereinafter cited as Battelle-Northwest].

tankers.<sup>14</sup> Maneuverability of these large tankers is limited. The 312,000 dwt tanker, the Universe Ireland, requires three miles to stop with both propellers full astern.<sup>15</sup>

From oil tanker operations, oil can be released onto the waters of the sea by operational discharges or by spills resulting from maritime casualties which cause breaches in the integrity of the ship.<sup>16</sup> The operational discharge results from the deballasting and cleaning of tanks.

A ballasting problem occurs because once a tanker has discharged its oil, it thereafter rides very high in the water exposing portions of her rudder and propellers.<sup>17</sup> The extensive freeboard thus presented makes

---

<sup>14</sup> Id. at 3-9

<sup>15</sup> J. O. Ludwigson, "Oil Pollution at Sea" in Oil Pollution: Problems and Policies (S. E. Degler ed. 1969).

<sup>16</sup> The discussion which follows is drawn in large part from a paper entitled "International Regulation of Oil Pollution" prepared by Professor T. A. Clingan and R. Springer for the International Law Panel of the President's Commission on Marine Science, Engineering and Resources [hereinafter cited as Clingan & Springer]. Substantial portions of this paper are embodied in the Report of the International Law Panel, 3 Panel Reports of the Commission on Marine Science, Engineering and Resources VIII-84 to VIII-90 (1969) and in T. A. Clingan, "Oil Pollution: No Solution?" 95 U.S. Naval Inst. Proc. 64-75 (May 1969).

<sup>17</sup> Cowan 114.

the tanker susceptible to strong winds and difficult to maneuver. To lower the tanker in the water to a level where it is more stable and amenable to navigational control, sea water is pumped into tanks of the ships. Due to the expense of separate tanks for this sea water ballast, the cargo tanks in which the oil had been carried is often used. Oil residues remaining in these uncleaned cargo tanks combine with the ballast water to form a waste oil emulsion. Naturally, this oily water must be disposed of prior to the tanker taking on a new cargo. Cleaning the tanks before taking on ballast water does not remedy the problem. Tanks normally are cleaned by use of high pressure heated water which, like sea water ballast, then forms an oily emulsion and also presents a disposal problem. If all tanks to be used for ballast were cleaned prior to departure from ports, approximately thirty hours would be added to the turn-around time necessitating an additional four hundred tankers in the world fleet.<sup>18</sup> Tanks must be cleaned, however, before taking on an entirely different grade of oil or prior to entering a shipyard for repairs. Vessels other than tankers have similar problems of disposing of oily water resulting from cleaning and

---

<sup>18</sup>J. Moss, Character and Control of Sea Pollution by Oil, American Petroleum Institute 45-47 (1963).



deballasting, but the problem is of far less magnitude. Oil adhering to tank surfaces and lying in shallow puddles in tanks has been estimated to average about three-tenths of one per cent of the cargo carried. Based on this estimate, it was computed that in the year 1963, about 449,000 metric tons of crude oil were lost.<sup>19</sup>

Various methods have been developed to reduce oil pollution resulting from the oily mixture created by ballasting and cleaning operations. Oily-water separators have been developed but they have not been uniformly successful in separating the more than one thousand different types of crude oil from water.<sup>20</sup> Waste oil receiving facilities on shore do not exist in adequate numbers or size to cope with the volume. Efforts are continuing to overcome this deficiency.<sup>21</sup> The "load-on-top" system has reduced the amount of oil discharged by collecting all cleaning water and the uppermost layer

---

<sup>19</sup>Clingan & Springer Annex A. From this estimate should be subtracted "persistent oils recovered aboard and discharged ashore." Ibid.

<sup>20</sup>Research and Development for a Shipboard Oil and Water Separation System, A Report for the Maritime Administration by the Permutit Co. 1-2 (1963). Furthermore, the ship operator has difficulty determining the oil content of discharges from separators except by visual observation of the discharge or of the ship's wake. Turbulent seas and darkness render this primitive technique useless. Ibid.

<sup>21</sup>For an excellent discussion of complexities involved, see Clingan & Springer 8-17.

of ballast water in one tank aboard the tanker. After a period of relative calm, and preferably with the aid of some heat, much of the oil will separate out of the water and float to the surface. The bottom layer of water is discharged and the next cargo of oil is loaded on top of the remaining oil and water.<sup>22</sup> Construction changes have also reduced the amount of oil adhering to tank surfaces. These changes include the use of welded seams rather than rivets, and coating the inside surface of tanks with various smooth substances. Furthermore, the increase in the size of tanks on the newer tankers decreases the ratio of tank surface to tank volume and results in a proportionate reduction in the amount of oil retained.<sup>23</sup> These larger tanks, however, can result in the release of greater quantities of oil if the integrity of that tank is breached.

Inherent in the operation of a seagoing vessel is the risk of serious damage to the vessel by collision, grounding or foundering. Table 2 sets forth the statistical data for fiscal year 1968 concerning maritime casualties for all commercial vessels.<sup>24</sup>

---

<sup>22</sup>Id. at Annex A.

<sup>23</sup>Id. at 13-14.

<sup>24</sup>Source: 1969 Marine Science Affairs 24.

TABLE 2  
MARITIME CASUALTIES OF ALL COMMERCIAL VESSELS  
IN 1968

Vessel Casualty	Collision	Grounding	Heavy Weather
Number of casualties	409	525	164
Number of vessels involved	742	656	175
Vessels totally lost	10	39	29

Not included are three super tankers--the 206,700 dwt Marpessa, the 208,560 dwt Mactra and the 222,000 Kong Haakon VII--which suffered explosions in the second half of December, 1969. In all cases the explosions occurred while the empty tanks were being cleaned. After the explosion on the Marpessa, it caught fire and subsequently sank off the coast of West Africa on December 15, 1969.<sup>25</sup> Repair of the Mactra is expected to cost \$15.6 million, which is more than the ship originally cost.<sup>26</sup>

From the operation of oil tankers, therefore, a certain amount of the oil transported is released into the sea. The estimate of the total amount of oil thus placed in or upon the oceans of the world is one-tenth of one per cent of the total transported by sea, or about one million metric tons per year.<sup>27</sup>

<sup>25</sup>1 Marine Pollution Bull. 20 (Feb. 1970).

<sup>26</sup>Petroleum Press Service 1968 (May 1970).

<sup>27</sup>1970 Marine Science Affairs 21. Also see testi-

### B. Coastal Interests

Assuming that no oil leaked or spilled from oil tankers and presented no risk of ever doing so, the interests of the coastal state in the activities of an oil tanker on the adjacent high seas would be virtually non-existent. Coastal resort operators and tourists would find the horizon altered by the presence of the tanker but at most it would add a note of interest to the ocean's barren magnificence. Fishermen attempting to obtain their catch might find the tanker's passage an inconvenience, but they would not be significantly affected. Boatowners, beach front property owners, governmental officials, conservationists, and the population at large would be disinterested in the activities of an oil tanker as it transited the coastline on the high seas. If the coastal state or its citizens were exporters or importers of oil, or tanker owners, obviously it would have greater interest. In short, the coastal state would be passive and relatively indifferent to the passage of oil tankers if all the oil contained within it remained therein.

It has been established, however, that some oil

---

mony of M. Blumer of the Woods Hole Oceanographic Institute, Hearings on S. 7 and S. 554 Before the Sub-comm. on Air and Water Pollution of the Senate Public Works Committee, 91st Cong., 1st Sess., at 1486 (1969).

does escape from oil tankers into the marine environment. The effects of this oil, as well as those variables which determine its extent, must be examined to identify the interests of the coastal state. In addition to the physical effects, oil pollution also affects the social process. The outcome of the social process is that governments must react to prevent pollution damage from occurring and to remedy that damage which has occurred. After a study of the preventive and remedial measures which can be taken after oil has been released, the difficulties encountered by the coastal state in obtaining compensation for these measures and for actual damage will be examined. Since most oil pollution information is based upon experiences in temperate waters, oil pollution in the Arctic is discussed separately.

### 1. Effects of Oil Pollution

Deposits of oil on land can be offensive to both the eye and the nose hampering the use and enjoyment of shoreline property. It has been estimated that major oil pollution of beaches in the Long Island or Los Angeles area could create losses of revenue from recreational spending of approximately \$30 million and \$51 million respectively.<sup>28</sup> Although the experience of the

---

<sup>28</sup>Oil Pollution, A Report to the President, A

tourist industry after the Ocean Eagle split in two in San Juan Harbor indicates that this figure may be somewhat inflated,<sup>29</sup> it is nonetheless true that many revenue producing tourists will remain away from beaches when significant oil pollution is present. Owners of boats, piers or other coastline property will suffer, at a minimum, a cosmetic blemish on their property interests. Research has not reached a final conclusion concerning the effects of oil pollution on marine fauna and flora but the generally accepted opinion is that pollution by crude oil is not significantly harmful to these living organisms.<sup>30</sup> Oil pollution is of little direct consequence to fishermen other than dirtying gear and the

---

Special Study by the Secretary of Interior and the Secretary of Transportation 4 (1968).

<sup>29</sup>M. J. Cerame-Vivas, "The Wreck of the Ocean Eagle," 15 Sea Frontiers 224 (1969).

<sup>30</sup>"Pollution by the Torrey Canyon was found to have little biological effect apart from the tragic destruction of sea-birds." 'Torrey Canyon' Pollution and Marine Life: A Report by the Plymouth Laboratory of the Marine Biological Association of the United Kingdom 174 (J. E. Smith ed. 1968) [hereinafter cited as Plymouth Report]. Writing about the effects of the Ocean Eagle pollution, J. B. Pearce and L. Ogren stated: "Our conclusion is that . . . crude oil itself was not highly toxic to marine life indigenous to Puerto Rico." Marine Pollution Bull. No. 16, at 5 (Oct. 1969). And see the testimony of P. DeFalco of the U. S. Federal Water Quality Administration regarding the Santa Barbara spill:

Data from the chemical and biological studies to date have indicated minimal acute effects have been experienced thus far by sea life. Planktonic, intertidal plants and invertebrate

shells of some mollusks. The fishing industry may suffer a significant indirect effect as consumers curtail purchases of fish thought to have been taken from waters polluted by oil.<sup>31</sup> Oil pollution does have a direct biological effect on seabirds which come into contact with the oil. Their plumage becomes matted and water-logged resulting in the probable drowning of many birds. Those seabirds which do not drown, rapidly lose body heat, are unable to catch their prey and quickly become emaciated.<sup>32</sup> For those birds which reach the shore, the success rate of man's rehabilitation is less than five per cent.<sup>33</sup> The editors of the Marine Pollution Bulletin concluded that "except for seabirds, crude

animals have maintained their abundance and variety; no fish kills have been observed as yet and the kelp beds are reasonably healthy.

Hearings on S. 7 and S. 554 Before the Subcomm. on Air and Water Pollution of the Senate Comm. on Public Works, 91st Cong., 1st Sess., at 808 (1969) [hereinafter cited as 1969 Senate Hearings]. The long-term effects of oil pollution have not been extensively studied and may be significantly harmful. Testimony of M. Blumer, 1969 Senate Hearings 1488.

<sup>31</sup>On the Friday following the pollution of Brittany by the oil from the Torrey Canyon, retail fish sales in Paris tumbled as much as forty per cent. Cowan 169.

<sup>32</sup>Plymouth Report 14.

<sup>33</sup>Marine Pollution Bull. 23 (Feb. 1970). A major difficulty is that birds ingest quantities of oil while attempting to preen themselves causing severe gastrointestinal problems. Battelle-Northwest at 6-46. Of the

oil pollution is more of a nuisance, than a danger."<sup>34</sup>

## 2. Variables Determining the Extent of Impact

The effect of any oil spill upon a coastal state is subject to many variables. If the amount of oil is discharged at a rate of ten gallons per hour per square mile or less, it will not be visible.<sup>35</sup> Wave action can emulsify a thin film of oil. Discharge which creates a film of not more than fifty gallons of oil per square

---

7,849 birds known to have been treated by the British after the Torrey Canyon incident, less than one per cent were sufficiently recovered to be returned to the sea. Marine Pollution Bull. No. 18, at 22-23 (Dec. 1969).

<sup>34</sup>1 Marine Pollution Bull. 17 (Feb. 1970). The editors previously had said:

It is now clear that at least in temperate waters (the Arctic may well be different) the only direct casualties are seabirds . . . some of which are particularly vulnerable to oil slicks and cannot easily recover from heavy additional mortality. Commercial fisheries may be damaged indirectly by contamination of the catch either by fouling fishing gear or for the bivalve molluscs, by the contamination of shells or the ingestion of fine oil globules by the animals. Coastal amenities are damaged and there may be repercussions on the tourist industry although there is little evidence that significant harm has been done so far. Ibid.

<sup>35</sup>Battelle-Northwest at 4-10. The 1969 amendments to The Convention for the Prevention of Pollution of the Sea by Oil excepts from the general prohibition discharges whose instantaneous rates do not exceed sixty liters (3.785 liters per gallon) per mile and which meet other criteria. 9 Int'l Legal Materials 1, 3 (1970). The



mile will not persist more than five hours on agitated surfaces.<sup>36</sup> Similarly, rain falling upon a slick can break the surface tension of the oil thus enhancing emulsification.<sup>37</sup> Oil when discharged onto water will spread rapidly.<sup>38</sup> Movement of this resulting oil slick is primarily dependent upon wind direction and velocity.<sup>39</sup> A slick will travel at a speed of three to three and one-half per cent of the wind velocity, generally drifting twenty to forty-five degrees to the right of the wind in the northern hemisphere (to the left in the southern).<sup>40</sup>

Oil spread thinly upon water will lose about twenty-five to fifty per cent of its total volume by evaporation within the first few days.<sup>41</sup> Further

---

effects of discharges below that level have been shown in practical experiments to be negligible. Senate Ex. G, 91st Cong., 2nd Sess., at 6 (1970).

<sup>36</sup>Battelle-Northwest at 4-10

<sup>37</sup>The Miami Herald, Feb. 18, 1970 at 14-A.

<sup>38</sup>One-thousand tons will spread into a circle about one-third of a square mile in ninety minutes, and will cover about one square mile in about ten hours. Battelle-Northwest at 4-9.

<sup>39</sup>Other factors include the sea state, surface currents, latitude and temperature. Battelle-Northwest at 4-6.

<sup>40</sup>Plymouth Report 160; Battelle-Northwest at 4-7.

<sup>41</sup>Plymouth Report 11. On March 28 and 30, 1967, the Torrey Canyon hulk released about 50,000 tons of

reduction in the volume of virtually all oil results from microbial oxidation. The most rapid oxidation occurs at temperatures ranging from fifteen to thirty-five degrees Centigrade, although some oxidation will occur at temperatures as low as zero degrees Centigrade.<sup>42</sup> The growth of this oil oxidizing bacteria is believed to be beneficial because such bacteria are eaten by numerous protozoan species.<sup>43</sup> The rate of this biological degradation of oil can be enhanced by spreading sewage, organic acids or esters on the oil slick.<sup>44</sup> If the oil remains at sea for three months or more, the process of evaporation and bacterial oxidation theoretically should reduce the slick to an asphaltic residue representing perhaps fifteen per cent of the original amount.<sup>45</sup> Although the evidence is not conclusive, it is believed

---

crude oil which entered the English Channel and remained at sea for about six weeks before washing ashore on the French coast. About 25,000 tons are estimated to have evaporated. Id. at 168.

<sup>42</sup>Battelle-Northwest 4-44.

<sup>43</sup>Id. at 6-25; Marine Pollution Bull. No. 15, at 3 (Sept. 1969).

<sup>44</sup>"Navy Studies Oil Pollution Problems," 4 Environmental Science 4 (April 13, 1970); Battelle-Northwest 4-45.

<sup>45</sup>Plymouth Report 11. When the S. S. Keo split in heavy seas about 120 miles southeast of Nantucket Island, Massachusetts, on November 5, 1969, about 210,000 tons of fuel oil were released. No action was taken against the slick which after six days broke up into small clumps. No pecuniary or lasting environmental damage apparently

that these lumps of asphaltic residue are harmful to some surface feeding fish and that these lumps travel vast distances at sea.<sup>46</sup>

The type of crude oil or refined petroleum product which is released on the water is another variable to which all the foregoing are subject. Although the biological damage resulting from the spill of most crudes is minimal, intense local damage can result from release of some refined products.<sup>47</sup>

### 3. Prevention and Remedial Measures

If the movement of an oil slick is likely to be toward a coastal state and if the pollution occurs, or there is an imminent threat of its occurrence, at a point where natural processes will be inadequate, preventive or remedial measures may be desirable to prevent or minimize damage to the coastal environment.

If pollution can be controlled at its source, cleanup and restoration need not be undertaken.<sup>48</sup> There-

---

resulted. Marine Pollution Bull. No. 18, at 22-23 (Dec. 1969). And see accounts of the Hamilton Trader collision in Marine Pollution Bull. No. 13 (July 1969).

<sup>46</sup>National Fisherman 4 (Aug. 1970).

<sup>47</sup>1 Marine Pollution Bull. 17 (Feb. 1970). A barge carrying diesel fuel which sank in Buzzards Bay, Massachusetts in the summer of 1969 is reported to have caused serious damage to marine fauna and flora in the area. Ibid.

<sup>48</sup>Control of the source is the first phase in the

fore, to prevent pollution or further pollution, the U. S. Coast Guard has devised a system where oil on a stricken ship can be pumped off of the ship and into inflatable bladders.<sup>49</sup> Similarly, when the Arrow went aground, broke in two, and sank in Chedabucto Bay, Nova Scotia on February 4, 1970, Canadian officials minimized the damage by pumping the oil out before it was released into the water.<sup>50</sup> Attempting to burn oil while it is still on board a ship requires first opening the tanks so there will be sufficient oxygen to support combustion. If oil is thereby released into the sea, there is little chance of successfully igniting the oil.<sup>51</sup> Burning of an oil

---

National Oil and Hazardous Materials Pollution Contingency Plan § 402.1, 35 Fed. Reg. 8508, 8511 (June 2, 1970).

<sup>49</sup>Marine Pollution Bull. 20 (No. 2 Feb. 1970).

<sup>50</sup>The Globe and Mail (Toronto) April 7, 1970 at 35. The Arrow was not equipped with valves to which pump hoses could be attached so they had to be welded on by divers. The director of cleanup operations plans to recommend to the Canadian government that valves for hose attachments be fitted to any tanker that comes near Canada. The Manhattan prior to starting her 1970 voyage to Baffin Bay was fitted with such valves. Ibid. Another technique under study is the addition of gelling substances into tankers which are leaking. Marine Pollution Bull. No. 17 at 20 (Nov. 1969).

A Canadian court has ruled that bad navigation by the master caused the grounding. The Miami Herald, July 26, 1970 at 30-A.

<sup>51</sup>The lighter more volatile fractions evaporate quickly and the remaining fractions emulsify somewhat with seawater. Clingan & Springer 47. Bombing by the British of the Torrey Canyon wreck cost \$560,000 and only insured the uncontrolled release of all her cargo. Cowan 107.

slick is not considered a desirable or useful technique.

If the oil has already escaped or cannot be controlled at its source, containment of the slick is the desired next step. Booms constructed to encircle the oil and contain it within workable confines must be massive to withstand the normal waves and currents which occur along most coasts—if the sea is rough, no boom exists which effectively can contain the oil.<sup>52</sup> Booming therefore, has very little practical application except in harbors or other tranquil waters. Even where booming is successful in containing a spill, the oil still must be removed from the surface of the water. Various mechanical devices exist for removing the oil from the surface of the water, but almost all are limited in their effectiveness to relatively calm waters.<sup>53</sup> The most

---

<sup>52</sup>Battelle-Northwest at 4-51. Booms designed to prevent the oil from entering specific bodies of water have met with reasonable success in moderately calm waters. Marine Pollution Bull. No. 65, at 2 (Sep. 1969). Bubble curtains, created by blowing compressed air through a weighted polyurethane pipe which has holes in it, have been used to keep any spillage contained within a slip where a ship is berthed. Id. at 4-52.

<sup>53</sup>Skimmers have rollers covered with absorbent material which is rolled along the surface and absorbs the oil. The oil-soaked roller is squeezed on board the boat and the oil is collected in a tank as the now dry portion of the roller continues to proceed for another pass at the water's surface. 4 Environmental Science Intelligence 4 (Oct. 27, 1969). The skimmer's major limitation is that the sea must be relatively calm. Skimmers are widely used to clean oil from harbors. A new device undergoing experimentation collects the oil by use of

frequently used technique to deal with an oil slick is the spreading of absorbents upon it--straw is the oldest, cheapest and most effective absorbent.<sup>54</sup> Once the oil has been absorbed by the straw, it can be skimmed off the surface or removed from the beach after it has washed ashore.<sup>55</sup> Disposal of the oil-soaked straw, however, presents a different sort of pollution problem. The French in dealing with oil released by the Torrey Canyon dumped finely divided chalk and sawdust on the oil to sink it.<sup>56</sup> Although there was some fear that the sunken oil would contaminate fishing grounds and foul fishing gear, such fears do not appear to have been realized.<sup>57</sup>

---

rapidly turning propellers revolving in a plane parallel to the surface of the slick and a few feet below. The oil is attracted into the vortex formed by the propellers where it can then be pumped out. 4 Air and Water News No. 17, at 5-6 (1970).

<sup>54</sup>4 Environmental Technology and Economics 3 (Jan. 31, 1970).

<sup>55</sup>Battelle-Northwest at 4-15.

<sup>56</sup>Plymouth Report 168.

<sup>57</sup>Marine Pollution Bull. No. 15 at 1 (Sep. 1969). When the French tanker Gironde suffered collision damage off the coast of Brittany in August, 1969, releasing about 1,000 tons of fuel oil, about seventy-five per cent of the oil was sunk by use of chalk and sawdust. Marine Pollution Bull. No. 16 at 16 (Oct. 1969). An oil spill at Bridgeport, Connecticut in June, 1970 was dealt with partly by use of an absorbent sinking material composed primarily of corn cob and clay. The Hartford Times, June 16, 1970 at 1-A. The United States' National Oil and Hazardous Materials Pollution Contingency Plan allows use of sinking agents only in waters exceeding 100 meters in

The least preferred treatment of an oil slick is the use of chemical emulsifying agents.<sup>58</sup> The detergents have the effect of dispersing the oil by altering its surface tension. Detergents do not destroy the oil; instead they merely spread it thinner and make it more susceptible to emulsion.<sup>59</sup> Although considered highly toxic, the vast quantities of detergents, one-half million gallons, used at sea to treat the Torrey Canyon slick was not noticeably injurious to marine life except in the extreme surface areas where some of the phytoplankton was affected.<sup>60</sup> Use of detergents was deemed essential to preserve coastal amenities which had priority over all other interests during the Torrey Canyon incident.<sup>61</sup> This detergent-treated oil creates very real problems when it washes ashore. The treated oil penetrates deeper

---

depth and where currents are not predominantly onshore. 35 Fed. Reg. 8508, 8511 Annex X, § 2004 (June 2, 1970).

<sup>58</sup>Battelle-Northwest at 4-29

<sup>59</sup>Plymouth Report 14.

<sup>60</sup>Plymouth Report 174. This finding was surprising in view of the fact that concentrations of the detergent used of five to ten milligrams per liter will cause mortality in fish, while noticeable pathological changes will occur if the concentration reaches two to three milligrams per liter. Battelle-Northwest at 6-10.

<sup>61</sup>Plymouth Report 178. Section 2006 of The U. S. National Contingency Plan forbids the use of detergents in waters less than 100 feet and in waters containing commercially valuable fish. 35 Fed. Reg. 8508, 8511 (1970).

into the sand than untreated oil. Also the detergent reduces the surface tension of the water which fills the interstitial spaces making the sand soggy and similar to quicksand.<sup>62</sup>

Use of detergents to remove Torrey Canyon oil from sandy beaches had a devastating effect on aquatic life, destroying marine fauna and flora which would have been able to survive oil only.<sup>63</sup> Although less toxic detergents have been developed, it is the concensus that it is far better to physically remove the oil from the beaches than to attempt to wash it away with detergents.<sup>64</sup>

---

<sup>62</sup>Battelle-Northwest at 5-1; Plymouth Report 75.

<sup>63</sup>Marine Pollution Bull. No. 15 (Sep. 1969). During the Torrey Canyon incident 1.8 million gallons of detergents were used on land. Cowan 162. One observer noted that littoral life

was relatively unaffected by the oil, even on grossly contaminated beaches. There was some damage to sea anemones but most mulluscs were apparently unaffected and it was not uncommon to see limpets and winkles browsing and crawling on oil contaminated surfaces. When the enormous quantities of detergents were dispersed along the shore, however, the scene changed dramatically. . . . Molluscs, crustacea, rock-pool fish, worms, sea anemones, seaweed and other littoral fauna and flora were decimated.

L. R. Benyon, "The Torrey Canyon Incident", Marine Pollution Bull. No. 15, at 6 (Sep. 1969).

<sup>64</sup>Section 2006 of the U. S. National Contingency Plan forbids the use of detergents on any coastline. 35 Fed. Reg. 8508, 8511 (1970). "Only when physical removal is impossible should detergents be used and then sparingly." Plymouth Report 180. And see Battelle-Northwest at 5-1 and 5-2.



Similarly, rocky shores should not be treated with detergents to remove the oil. Browsing gastropods such as limpets and top-shells remove and ingest the oil without ill effects to themselves.<sup>65</sup> Wave and sand abrasion, as well as evaporation and consumption by gastropods have been known to remove all oil from tidal rocks in three to four months.<sup>66</sup> Weathering will act on oil in those areas above the tidal area and eventually the asphaltic residue should peel off.<sup>67</sup>

#### 4. Effects of Oil Pollution Upon the Social Process

Oil pollution has a dramatic impact on the coastal state. The mass media dramatizes its impact with stories of ugly black oil oozing onto clear sandy beaches<sup>68</sup> and with pictures of pathetic seabirds coated in their black death mantle of oil.<sup>69</sup> A concerned citizenry generates demands that the oil be cleaned up, but this can be an

---

<sup>65</sup>Plymouth Report 73.

<sup>66</sup>Id. at 73-74.

<sup>67</sup>J. B. Pearce and L. Ogren, "Sinking of the 'Ocean Eagle' in San Juan Harbor," Marine Pollution Bull. No. 16 at 3-5 (Oct. 1969).

<sup>68</sup>A headline appearing in a major newspaper following a small scale discharge in Tampa, Florida stated "Black Plague of Oil Hits Gulf Beaches." The Miami Herald, Feb. 17, 1970, at 18-A.

<sup>69</sup>See e.g. The Miami Herald, Feb. 15, 1970, at 1-A; Feb. 16, 1970, at 18-A.

expensive proposition.<sup>70</sup> Resort owners, fishermen and property owners demand compensation for the losses they have suffered.<sup>71</sup> The British and French claims for damages and cleanup costs resulting from the Torrey Canyon incident were \$8.4 million and \$7.68 million, respectively.<sup>72</sup> Obtaining compensation from the owner of the polluting vessel, however, can be very difficult. Even though damage occurs within the territory or territorial sea of a coastal state, if the spill occurred on the high seas the coastal state will encounter difficulties prescribing its liability laws to a polluting vessel which flies a foreign flag. Further, effective application of prescribed liability laws of the coastal state may be impossible if the only asset owned by the polluter is the ship now at the bottom of the sea, or if the foreign owner has no assets in the coastal state to which

---

<sup>70</sup>The costs of detergents used by the British after the Torrey Canyon spill alone cost \$1.44 million. Cowan 147.

<sup>71</sup>The loss of seabirds is not compensable. Many seabirds have high reproductive capacities which readily replace the increased mortalities resulting from oil pollution. Variables affecting the severity of harm to bird populations include the type of oil spilled, the type of birds and the season. Battelle-Northwest at 6-46.

<sup>72</sup>Id. at 195, 203. Following the spill in Tampa, a Florida official filed suit asking for more than \$250 million in damages "for likely harm to the tourist industry and the costs of advertising to counteract oil spill publicity." The Miami Herald, March 14, 1970 at 21-A.

the laws prescribed by the coastal state can be applied.

Britain and France were fortunate that the Bermuda corporation which owned the Torrey Canyon also owned two other tankers worth \$17 million each. Although neither vessel put into British or French territory, precluding the application of their liability prescriptions, both countries were able to utilize the laws of foreign states to levy a claim against the owners. Five months after the Torrey Canyon ran aground, one of its sister ships put into Singapore where British officials arrested the vessel, demanded and obtained the posting of \$8.4 million as security.<sup>73</sup> Over a year after the grounding, French officials arrested the sister ship of the Torrey Canyon in Rotterdam and received security of \$7.68 million.<sup>74</sup> While proceedings were pending under the laws of the Netherlands and Singapore, negotiations between the owners and officials of Britain and France were conducted. These negotiations led to a settlement, announced on November 11, 1969, whereby the governments of both countries received \$3.6 million.<sup>75</sup> It is doubtful that negotiations

---

<sup>73</sup>Cowan 193-196. Belatedly the French decided also to arrest the ship and pursued the vessel as it was leaving Singapore harbor. They were unsuccessful in reaching the vessel before it left Singapore's territorial sea. Id. at 196.

<sup>74</sup>Id. at 202-03

<sup>75</sup>9 Int'l Legal Materials 633-35 (1970). Under the

would have achieved even this level of success if the Torrey Canyon had been the only ship owned by the Bermuda corporation.

## 5. Oil Pollution in the Arctic

The dearth of information available about oil pollution in the Arctic precludes definitive statements, but some analogies can be drawn from the Arrow spill and the sinking of a barge in Lancaster Sound. The Arrow grounding released about sixteen thousand tons of bunker oil into waters of Chedabucto Bay, Nova Scotia, between February 4 and 8, 1970.<sup>76</sup> Attempts to transfer the two thousand tons of bunker oil which remained in the Arrow to another ship were frustrated by the extreme cold which caused the oil to congeal.<sup>77</sup> Steam heat was finally pumped into the tanks to make the oil less viscous.<sup>78</sup> Vast quantities of the spilled bunker oil disappeared through evaporation and emulsion.<sup>79</sup> Apparently, as the

---

British Merchant Shipping Act, a ship the size of the Torrey Canyon would have been able to limit its total liability to about \$4.2 million. Id. at 633.

<sup>76</sup>Marine Pollution Bull. 34-35 (March 1970).

<sup>77</sup>Ibid.

<sup>78</sup>Proceedings of the Canadian House of Commons Committee on Indian Affairs and Northern Development No. 16, at 21 (May 5, 1970) [hereinafter cited as H. C. Comm. on N. Devel.].

<sup>79</sup>H. C. Comm. on N. Devel. No. 16, at 14 (May 5, 1970).

result of wave action on the cold oil slick, irregularly shaped particles of oil broke off and often sank.<sup>80</sup> The mechanical device used for removing the oil from the water consisted of a conveyor belt with toweling attached which swept oil up from the water's surface and into a barge.<sup>81</sup> Damage to marine fauna and flora as a result of this spill was considered minor although several hundred seabirds died.<sup>82</sup> Studies are continuing to determine the biological effects of this spill with particular attention devoted to oil frozen onto ice and frozen oily mixtures.<sup>83</sup> Less than two weeks after the grounding, normal fishing resumed and most of the coastline had been cleared of oil by natural processes although some rocks remained stained.<sup>84</sup> In August, 1969, a barge owned by

---

<sup>80</sup><sup>1</sup> Marine Pollution Bull. 5 (March 1970).

<sup>81</sup>The Globe and Mail (Toronto) April 7, 1970, at 35.

<sup>82</sup>"[T]he only danger at all to the marine environment at Chedabucto Bay has been in the inter-tidal zone where marine life such as clams require breathing holes." Mr. G. W. Stead, Assistant Deputy Minister, Canadian Department of Transport, H. C. Comm. on N. Devel. No. 15, at 21 (Apr. 30, 1970). "Extensive collections of plankton have been made and no evidence of dead or dying organisms has been obtained." <sup>1</sup> Marine Pollution Bull. 35 (March 1970). "The facts are the effects on marine life are not all in yet but data collected so far does not suggest major ecological damage." Dr. P. D. McTaggart-Cowan, executive secretary of the National Science Council of Canada in The Globe and Mail (Toronto), April 17, 1970, at 35.

<sup>83</sup><sup>1</sup> Marine Pollution Bull. 35 (March 1970).

<sup>84</sup>Ibid.

Pan Arctic Oils Limited which was carrying diesel oil sank in Lancaster Sound. Subsequent investigation failed to locate the barge, the oil or any adverse effects.<sup>85</sup>

Applying knowledge gained from these two incidents, a representative of the Canadian Department of Transport speculated upon the effects of an oil spill in Arctic waters. Oil leaking beneath ice, he said, would adhere to the bottom of the ice and would not necessarily affect the ecology of the water below.<sup>86</sup> "Furthermore, in much of the Arctic the ice dissipates in the summer and the cleanup process would take place under very similar circumstances in the summer in the Arctic to what took place in the winter in Chedabucto Bay."<sup>87</sup> If the oil is spilled on the ice, unlikely since the damage would probably be done to the vast submerged hulls, the cold temperatures would limit its flow. Some evaporation, but little oxidation, would occur leaving a gelatinous mass which would have to be removed physically.<sup>88</sup>

The interests of an Arctic state would be similar

---

<sup>85</sup>H. C. Comm. on N. Devel. No. 16, at 14 (May 5, 1970).

<sup>86</sup>Statement of G. W. Stead, Assistant Deputy Minister, Department of Transport, H. C. Comm. on N. Devel. No. 15, at 21 (April 30, 1970).

<sup>87</sup>Id. at 20.

<sup>88</sup>Ibid. The spokesman from the Department of Transport said:

I think the concern of the government is

to those of other coastal states. Coastal amenities, especially as they affect tourism, would not be a significant interest; however, it would be a consideration in those isolated areas where human population exists. Based on preliminary evidence, damage to marine fauna and flora does not appear to be any greater in the Arctic than elsewhere. Seabirds in the Arctic would suffer from an oil spill perhaps even more than in other areas.<sup>89</sup>

---

that this process of natural recuperation would be exceedingly slow in the Arctic; therefore the man-made part of the clean-up operation perhaps has to be more vigorous and more complete.

H. C. Comm. on N. Devel. No. 16, at 14 (May 5, 1970).

<sup>89</sup>At a recent symposium on oil pollution, two officials of the Canadian Wildlife Service spoke of the implications of an oil spill in the Arctic:

In the Arctic the very low temperatures are likely to reduce substantially the rate of natural degradation of oil and consequently birds such as the King Eider which congregate in large numbers on open waters for moulting are at particular risk. In common with the rest of the Arctic flora and fauna, they are long-lived and have an exceptionally low reproductive rate, so that additional mortality from oil pollution would have catastrophic effects on bird populations. Immediate legislation is needed before irreparable damage is done and in this instance government action must run ahead of biological knowledge.

A. Macpherson and H. Boyd in "Report on the Symposium on Oil Pollution of the Sea. Burlington, Vermont, August 20, 1969," Marine Pollution Bull. No. 16, at 21 (1969).

## II. CLAIMS

### A. The United States Claim to a 12 Mile Contiguous Zone for Pollution Control

#### 1. Legislative Background

On May 26, 1967, while memories of the Torrey Canyon incident were still vivid, the President of the United States directed the Secretary of Interior and the Secretary of Transportation to prepare a report examining how the United States could best deal with the problem of oil pollution. This report, released in March, 1968, recommended inter alia, that the United States extend enforcement of its oil pollution regulations to the Contiguous Zone established by Article 24 of the Convention on the Territorial Sea and Contiguous Zone.<sup>90</sup> The authority relied on for such an extension was the provision in Article 24 which allows the coastal state

---

<sup>90</sup>Oil Pollution: A Report to the President, A Special Study by the Secretary of the Interior and the Secretary of Transportation (1968), reprinted in Oil Pollution: Problems and Policies 62, 101 (S. E. Degler, ed. 1969).



to exercise the control necessary to prevent infringement of its "sanitary regulations within its territory or territorial sea."<sup>91</sup> The President, forwarding the report to Congress on March 8, 1968 called upon Congress to "make the discharge of oil unlawful if it occurs from a . . . ship operating within twelve miles from the shore."<sup>92</sup> Legislation embodying the President's proposal was not enacted prior to adjournment of the Ninetieth Congress.<sup>93</sup>

---

<sup>91</sup>Ibid.

<sup>92</sup>"To Renew a Nation"—A Message from the President of the United States, H.R. Doc. No. 273, 90th Cong., 2nd Sess.; 114 Cong. Rec. 5987 (March 8, 1968). On October 11, 1967, S. 2525 was introduced by Senator Muskie which also would have made it unlawful to discharge any material into the contiguous zone which might pollute or contribute to the pollution of the waters of the territory or territorial sea of the United States. 113 Cong. Rec. 28542 (1967). A letter from the Secretary of Interior to the Vice President which accompanied this legislative proposal stated:

From the standpoint of vessels engaged in international voyages, this legislation represents a national approach that would not be inconsistent with our international legal obligations. We would recognize and encourage, however, multilateral action by interested maritime nations as another acceptable approach to the problem of controlling pollution from vessels engaged in such voyages.

113 Cong. Rec. 28545 (1967).

<sup>93</sup>In December, 1967, S. 2760 was passed by the U. S. Senate but its provisions were limited to the territorial sea. 113 Cong. Rec. 36130 (1967).

The impetus carried over to the Ninety-first Congress. In January 1969, S. 7, S. 554, and H.R. 4148 were introduced.<sup>94</sup> After passage by the respective Houses, H.R. 4148 and S. 7 were referred to a conference committee which on March 24, 1970 reported out the proposal which was to become the Water Quality Act of 1970.<sup>95</sup> The conference proposal was enacted subsequently and signed by the President on April 3, 1970.<sup>96</sup>

The authority relied upon by the Senate for the exercise of competence by the United States within a zone of high seas contiguous to its territorial sea is set forth in its Report on the bill:

The authority under which the United States may regulate, with regard to pollution by oil, the conduct of foreign vessels beyond the territorial sea and impose sanctions for violation of such regulations is contained in article 24 of the Convention on

---

<sup>94</sup>The bills were referred to the Public Works Committee of the respective houses. H.R. 4148 was reported favorably by the House Public Works Committee on March 25, 1969, H.R. Rep. No. 91-127, 91st Cong., 1st Sess. (1969), and passed by the House on April 16, 1969. The Subcommittee on Air and Water Pollution of the Senate Committee on Public Works on August 7, 1969 reported S. 7 in lieu of S. 554. S. Rep. No. 91-351, 91st Cong., 1st Sess. (1969). S. 7 passed the Senate on October 8, 1969.

<sup>95</sup>H.R. Rep. No. 91-940 (1970).

<sup>96</sup>Public Law 91-224, 91st Cong., 2nd Sess. For a detailed account of this Act's legislative background, see A. I. Mendelsohn, "Maritime Liability for Oil Pollution—Domestic and International Law," 38 Geo. Wash. L. Rev. 1 (1969).

the Territorial Sea and Contiguous Zone. Article 24 (1)(a) allows the coastal State "in a zone of the high seas contiguous to its territorial seas" to exercise the control necessary to "prevent infringement of its . . . sanitary regulations within its territory or territorial sea."<sup>97</sup>

Although the House Report does not contain any citation of authority for the exercise of competence in the contiguous zone, the Committee did have before it a memorandum from the Office of the Legal Adviser of the Department of State. This memorandum states: "It is the opinion of the Department of State that the provisions of H.R. 4148 establishing regulations and imposing sanctions for violations within the contiguous zone are justified under the language of Article 24 and are therefore consistent with the Convention."<sup>98</sup>

The U. S. Water Quality Improvement Act of 1970 contains comprehensive provisions dealing with oil pollution

---

<sup>97</sup> S. Rep. No. 91-351, 91st Cong., 1st Sess. at 66 (1969).

<sup>98</sup> Memorandum from Louis P. Georgantas, Office of the Legal Adviser, Department of State to Honorable George H. Fallon, Chairman, Public Works Committee, House of Representatives, dated March 14, 1969. The memorandum cites the position previously taken by the Department of State before the Senate Foreign Relations Committee during hearings on ratification of the Convention on the Territorial Sea and the Contiguous Zone. The view was expressed during the hearings that article 24 confirmed the U. S. practice of exercising customs jurisdiction in a zone beyond the territorial sea and extended such jurisdiction to fiscal, immigration and sanitary matters as well. Hearings before the Senate Foreign Relations Committee, 86th Cong., 2nd Sess., 82, 93 (Jan. 20, 1960).

from sources other than ships.<sup>99</sup> However, discussion of the Act will be limited primarily to those provisions applicable to ships within a zone of high seas contiguous to the territorial sea.

## 2. The Competence Claimed by the United States

The portion of the Water Quality Improvement Act of 1970 dealing with the control of pollution by oil is section eleven. It contains a policy declaration that there should be no discharges of oil<sup>100</sup> into or upon the navigable waters of the United States, adjoining shorelines, or into the waters of the contiguous zone. Contiguous zone is defined for purposes of section eleven to mean "the entire zone established or to be established by the United States under article 24 of the Convention on the Territorial Sea and the Contiguous Zone." The contiguous zone established by article 24 is specifically limited to a distance not greater than "twelve miles from the baseline from which the breadth of the territorial

---

<sup>99</sup>Specifically mentioned are discharges from on-shore facilities and offshore facilities. Offshore facilities are limited to those within navigable waters of the United States. *Id.* at § 11(a)(11). Offshore facilities located outside U. S. navigable waters are subject to regulations, 34 *Fed. Reg.* 13544 (1969), issued pursuant to the Outer Continental Shelf Lands Act of 1953. 43 U.S.C. 1331-1343.

<sup>100</sup>Discharge includes "any spilling, leaking, pumping, pouring, emitting, emptying or dumping." 92-224, § 11(a) (2) (April 3, 1970).

sea is measured."<sup>101</sup> Therefore, the breadth of the zone in which the United States claims competence to exercise pollution control is limited to an area of high seas extending nine miles beyond its three mile territorial sea.

a. prevention

Within this nine mile zone of high seas, the discharge of oil is prohibited except "where permitted by article IV of the International Convention for the Prevention of Pollution of the Sea by Oil, 1954 as amended"<sup>102</sup> and where the discharge has been determined by the President not to be harmful.<sup>103</sup> Regulations proposed to

<sup>101</sup>U.S. T.I.A.S. 5639; 15 U.S.T. 1606, 1612 (1964). Prior to enactment of this legislation, the United States announced a willingness to negotiate an international treaty fixing the limitation of the territorial sea at twelve miles and providing for freedom of transit through international straits. U. S. Department of State Press Release No. 49, (Feb. 18, 1970) reproduced in 9 Int'l Legal Materials 434 (1970).

<sup>102</sup>327 U.N.T.S. 3,8 (1959). Article 4 of the 1954 Convention excepts (1) discharges for the purpose of securing the safety of the ship or cargo or saving life at sea; (2) discharges resulting from damage to the ship or unavoidable leakage; and (3) discharges of solid sediments and residues of fuel oil and lubricating oil resulting from purification or clarification. Ibid. Under the 1969 proposed amendments to this Convention, those excepted discharges listed in (3) would be deleted. Senate Ex. G 31, 91st Cong., 2nd Sess. (1970).

<sup>103</sup>The President in determining whether a discharge into the waters of the contiguous zone is harmful may consider "only those discharges which threaten fishery

implement this provision make the determination that all discharges of oil are harmful which violate water quality standards applicable to navigable waters of the United States or which "cause a visible film, sheen or discoloration of the water."<sup>104</sup> A sanction, a civil penalty of

---

resources of the contiguous zone or threaten to pollute or contribute to the pollution of the territory or territorial sea of the United States." Pub. L. No. 91-224, § 11(b)(3) (Apr. 3, 1970). The State Department previously had concluded that

should Congress find that the discharge of oil . . . in substantial quantities into or upon the contiguous zone in all cases constitutes a threat to pollute the territory or territorial sea of the United States, the United States would have the authority under the terms of the Convention to apply [sanctions] in all instances of discharge into or upon the contiguous zone.

Memorandum from Louis P. Georgantas, Office of the Legal Adviser, Department of State to Honorable George H. Fallon, Chairman, Public Works Committee, House of Representatives, March 14, 1969.

For determining the harmfulness of discharges into the navigable waters of the United States, the President must consider whether a discharge will be harmful to the "public health or welfare of the United States, including, but not limited to fish, shellfish, wildlife, and public or private property, shorelines and beaches . . ." Pub. L. No. 91-224, § 11(b)(3) (Apr. 3, 1970).

<sup>104</sup>35 Fed. Reg. 11908. The proposed regulations provide that harmful discharges do not include discharges resulting from a properly functioning vessel engine, an act of a third party, an act of God or discharges when necessary to save human life or limb. 35 Fed. Reg. 11908-09. The proposed regulations were issued by the Secretary of the Interior pursuant to the authority delegated in Executive Order 11548 of July 20, 1970. 35 Fed. Reg. 11677-79.

not more than \$10,000, is imposed only for those unlawful discharges which are knowingly made. If the offending vessel puts into a United States port, clearance may be withheld until surety satisfactory to meet the civil penalty has been filed.<sup>105</sup> In addition, the Coast Guard is authorized, except as to public vessels, to board and inspect any vessel upon the waters of the contiguous zone and to arrest any person who unlawfully discharges oil.<sup>106</sup> Essentially, by claiming competence to prescribe what is an unlawful discharge and to apply a sanction, the United States seeks to deter non-casualty discharges which may cause harm.<sup>107</sup>

Further, the Act imposes a duty upon all who discharge in violation of its provisions to notify governmental officials. Failure to notify subjects the violator to a \$10,000 fine and imprisonment for not more than one year.<sup>108</sup> The Coast Guard may board any vessel

---

<sup>105</sup> Commercial vessels bound for a foreign port are required to obtain clearance from the Secretary of Treasury prior to departing. 46 U.S.C. 91.

<sup>106</sup> Pub. L. No. 91-224, § 11(m) (Apr. 3, 1970). Public vessel is defined as any vessel owned or bare boat chartered and operated by the United States or by a foreign nation, except when such vessel is engaged in commerce. Id. at § 11(a)(4).

<sup>107</sup> H.R. Rep. No. 91-940, 91st Cong., 2nd Sess. 38 (1970).

<sup>108</sup> The notification required cannot be used against the person providing it in any criminal prosecution

and arrest any person who violates this provision. This claimed competence to require notification would provide the United States with the opportunity to take timely action to prevent or minimize pollution damage after a discharge has occurred.<sup>109</sup>

The Act in a subsection devoted to facilitating removal of discharged oil provides general authorization to the President to issue regulations

establishing procedures, methods, and requirements for equipment to prevent discharges of oil from vessels and from onshore facilities and offshore facilities, and . . . governing the inspection of vessels carrying cargoes of oil and the inspection of such cargoes in order to reduce the likelihood of discharges of oil from such vessels in violation of this section.<sup>110</sup>

This highly ambiguous subsection can be subject to many interpretations. Certainly, with respect to offshore and onshore facilities various equipment can be required which will prevent discharges of oil. Discharges of oil

---

except for perjury or giving a false statement. Pub. L. No. 91-224, § 11(b)(4) (Apr. 3, 1970).

<sup>109</sup>H.R. Rep. No. 91-940, 91st Cong., 2nd Sess. 34 (1970); H.R. Rep. No. 91-127, 91st Cong., 1st Sess. 2 (1969).

<sup>110</sup>Pub. L. No. 91-224 § 11(j)(1) (Apr. 3, 1970). This subsection also provides authority for the President to issue regulations establishing methods and procedures for removal of discharged oil and establishing criteria for the development and implementation of local and regional oil removal contingency plans.



from a vessel, however, can be prevented by numerous means: (a) preventing maritime casualties from occurring; (b) setting construction standards which reduce the likelihood of the release of oil; and (c) by requiring certain equipment to be carried on board which can be used in the event of necessity to prevent oil from being released and to clean up that oil which has been discharged. Although the issue is not free from doubt, it appears that only those preventive measures included within (c) were intended.<sup>111</sup> The authority to inspect oil tankers and their cargoes to prevent non-casualty discharges<sup>112</sup> does not carry with it enforcement provisions. The subsection immediately following does, however,

---

<sup>111</sup>The House Conference Report states

This language is in very general terms, and it is the understanding of all of the conferees that under this authority the President would be authorized by regulation to require vessels and facilities to carry on board or otherwise have available materials and equipment determined necessary to prevent and clean up oil discharges.

In view of the fact that the words "clean up" are not mentioned in this subsection, one could speculate that the authority meant to be conferred was to prevent damages from discharges of oil.

<sup>112</sup>Discharges which violate the Act, it will be recalled, do not include those discharges permitted by Article IV of the 1954 Oil Pollution Convention. Supra note 102 and accompanying text. Discharges resulting from a maritime casualty, i.e. damage to a ship, are not, therefore discharges in violation of the Act.

provide for a civil penalty not to exceed \$5,000 for any vessel which fails to carry on board equipment to prevent discharges of oil. Therefore, it would appear that the effectiveness of the inspection provision is limited to insuring that the vessel carry the prescribed equipment. The competence claimed by the United States is to prevent or minimize damage after a discharge occurs by requiring vessels within the contiguous zone to carry certain equipment.

After a maritime casualty has occurred, the United States claims competence to intervene to prevent threatened pollution or to abate further pollution.<sup>113</sup> This claimed right of intervention is limited to maritime casualties which occur within the territorial sea.

#### b. compensation

Whenever oil is discharged into the waters of the contiguous zone, the Act authorizes the President to remove such oil unless he determines that the owner of the vessel will remove it properly. If the United States removes this oil, the U. S. claims the competence to prescribe and apply its local liability laws to obtain

---

<sup>113</sup>The right is limited to casualties which create a substantial threat of a pollution hazard because of discharge or imminent discharge of large quantities of oil. The right of intervention includes the power to remove or destroy any casualty which poses such a substantial threat. Pub. L. No. 91-224, § 11(d) (Apr. 3, 1970).

compensation for removal costs. The Act provides that the owner of a vessel which unlawfully discharges oil in the contiguous zone shall be liable to the United States' Government for removal costs in an amount not to exceed \$100 per gross ton of the vessel or \$14,000,000, whichever is less. There is no liability to the United States for removal costs where the owner can prove that the discharge was caused solely by an act of God, an act of war, negligence on the part of the U. S., or by the act or omission of a third party. There is no limitation on liability where the U. S. can show that the discharge resulted from willful negligence or misconduct within the privity or knowledge of the owner. These removal costs shall constitute a maritime lien on the polluting vessel which may be recovered in an action in rem. The Act invests the federal district courts of the United States with jurisdiction for actions brought under this section. Any warrant or process issued by these federal courts may be executed within the contiguous zone by the Coast Guard. In addition to in rem proceedings, the United States also may bring an in personam action against the owner or operator of the vessel.<sup>114</sup>

If the polluting vessel is not available for attachment and if the owner is not subject to its juris-

---

<sup>114</sup>Pub. L. No. 91-224, § 11(f)(1) (Apr. 3, 1970).

diction, the United States would not be able to apply its liability laws. In order to insure effective application of its liability laws, the United States requires that any vessel over three hundred tons using U. S. navigable waters "for any purpose" must establish and maintain evidence of financial responsibility sufficient to meet the maximum liability for removal costs to which it could be subjected.<sup>115</sup> Although various methods may be used to establish evidence of financial responsibility, the assets or the person providing such assurance must be subject to the jurisdiction of U. S. courts.<sup>116</sup> After

---

<sup>115</sup>Pub. L. No. 91-224, § 11(p)(1) (Apr. 3, 1970). If the same owner, owns more than one vessel he need only establish financial responsibility sufficient to meet the maximum liability to which the largest vessel could be subjected. Ibid.

<sup>116</sup>Financial responsibility may be established by evidence of insurance, surety bonds, qualification as a self-insurer or other satisfactory evidence. Any bond filed shall be issued by a bonding company authorized to do business in the United States. Pub. L. No. 91-224, § 11(p)(1) (Apr. 3, 1970). The Federal Maritime Commission was delegated responsibility for implementing the financial responsibility provisions. Letter of the President to the Chairman of the Federal Maritime Commission dated June 2, 1970, 35 Fed. Reg. 8631 (1970), superseded by Executive Order 11548, 35 Fed. Reg. 11677 (1970). Regulations proposed by the Maritime Commission would require each insurer, surety and guarantor to designate in writing a person in the United States as legal agent for service of process. In any instance where the designated person cannot be served, the Secretary, Federal Maritime Commission, will be deemed the irrevocable agent for service of process. Proposed section 542.4(d), 35 Fed. Reg. 11188, 11189 (1970). A self-insurer must maintain sufficient assets within the United States to meet its maximum liability. Proposed section 542.5(3), 35 Fed. Reg. 11187, 89 (1970).

April 3, 1971, no vessel over three hundred gross tons will be allowed to use the navigable waters of the United States for any purpose unless a certificate has been issued evidencing that financial responsibility has been established.<sup>117</sup> Therefore, before any vessel puts into a United States port or traverses its territorial sea, it must have established financial responsibility within the United States. The fund established would be subject to U. S. claims for costs of removing oil discharged by the vessel at any time in the contiguous zone. Naturally, if a vessel had never used the navigable waters of the United States, there would be no fund against which the U. S. could claim.

These provisions establishing liability of vessels and requiring financial responsibility are limited to removal costs incurred by the United States and in no way affect or modify the obligations of the owner of the

---

<sup>117</sup>The Act specifies that the requirement of financial responsibility shall be effective one year after the effective date of section eleven. Pub. L. No. 91-224, § 11(p)(2) (Apr. 3, 1970). Proposed section 542.3 states that vessels will be prohibited from the navigable waters of the U. S. if they do not have a certificate. 35 Fed. Reg. 11187, 11188 (1970).

The proposed regulations are substantially similar to regulations issued by the Maritime Commission to insure that passenger ships have financial responsibility to meet liability for nonperformance of transportation and for death or injury to passengers. 32 C.F.R. § 540. Note however, that those provisions apply only to vessels "embarking passengers at United States ports." 46 U.S.C. 817d.

vessel to any person for damage to public or private property.<sup>118</sup>

B. The Canadian Claim to a 100 Mile  
Contiguous Zone for Pollution  
Control in Arctic Waters

1. Legislative Background

Thorough discussion of the Arctic Waters Pollution Prevention bill is required to explore both its intricacies and its diverse objectives. An act to extend the Canadian territorial sea from three to twelve miles was introduced on the same date as the Arctic Waters bill. The relationship between these bills and the response of other nations to these proposals will be examined.

a. introduction of legislative proposals

As the Torrey Canyon oil spill spurred the U. S. claim, the Canadian claim was stimulated in great part by the voyage of the Manhattan. The discovery of huge oil deposits at Prudhoe Bay led to speculation whether that oil could be delivered economically to eastern United States and Europe by the shortest route--the Northwest Passage. To find out, Humble Oil and Refining

---

Pub. L. No. 91-224, § 11(o)(1) (Apr. 3, 1970). For a comprehensive examination of the legal remedies available for property damage resulting from oil pollution, see Sweeney, "Oil Pollution of the Oceans," 37 Fordham L. Rev. 155, 164-181 (1968).

Company reinforced the 115,000 ton tanker, the Manhattan, and announced plans for the tanker to pass east to west through the Northwest Passage and return.<sup>119</sup> Announcement of the intended voyage created grave anxieties among some Canadian officials. On June 19, 1969, a member of Prime Minister Trudeau's Liberal Party, on the floor of the House of Commons, requested that the Government

draw baselines headland to headland to include the entire archipelago and declare all waters within those baselines to be Canadian waters. . . . in the Arctic there are one or two places in which the baseline might have to reach an extent of 100 miles to pass from point to point.<sup>120</sup>

Two reasons were outlined why such a claim of sovereignty over the Arctic archipelago was necessary. He pointed out that while no one presently challenged Canada's claims to the islands in the North American Arctic, Canada's claims to these islands would be weakened seriously if other countries effectively occupied them.<sup>121</sup>

---

<sup>119</sup><sup>113</sup> House of Commons Debates 10424, 10425 (June 19, 1969) [hereinafter cited as H. C. Deb.]. This publication is often referred to as the "Hansard" after the Hansard family whose firm originally published verbatim reports of parliamentary debates in Great Britain.

<sup>120</sup>Id. at 10424-25.

<sup>121</sup>Professor Head, now serving as special adviser to Prime Minister Trudeau, stated in 1963 that Canada's claims to the Arctic region rested upon discovery, exercise of jurisdiction, settlement, and exclusion of foreign states. He further stated,

As the years pass and as the occupation becomes more effective, always in the absence of a foreign claim, the title assumes

For example, if the U. S. chose to put in a navigational aid system by installing it on unoccupied islands throughout the Passage route, Canada's claims to those islands and the continental shelf of those islands would be jeopardized. Bearing in mind the Torrey Canyon spill and the Santa Barbara incident, the danger that oil pollution posed to the Arctic ecology was advanced as the other reason why a claim of sovereignty was necessary.<sup>122</sup> No immediate response was made to this request.

However, at the opening of the second session of the Twenty-Eighth Parliament in October, 1969, the Government stated that the resources in the Arctic archipelago would soon be developed and that such development constituted a grave danger to plant and animal life in the Arctic. The Government would, therefore, introduce legislation setting out the measures necessary to prevent pollution in the Arctic Seas.<sup>123</sup> Prime Minister

---

those characteristics of continuity and peaceful lack of disturbance required to be present in a valid territorial claim. . . . It is suggested that time and circumstance both favour Canada in the Arctic.

I. L. Head, "Canadian Claims to Territorial Sovereignty in the Arctic Regions," 9 McGill L. J. 200 (1963).

<sup>122</sup><sup>113</sup> H. C. Deb. 10426-27 (1969).

<sup>123</sup><sup>114</sup> H. C. Deb. 1, 3 (1969). These views were expressed in the Speech from the Throne delivered by the Governor General of Canada who acts as the Queen's representative. This speech is prepared by the Government



Trudeau in the debate following rejected denial of passage to all foreign vessels through Arctic waters, but rather stated that Canada will propose "a use of the Arctic waters which will be designed for environmental preservation."<sup>124</sup>

The Prime Minister reviewed Canadian activities in the Arctic and stated: "In all these activities, and in others, ranging from geographical exploration to the distribution of family allowance cheques, Arctic North America has, for 450 years, progressively become the Canadian Arctic."<sup>125</sup> Although he viewed a challenge to Canadian sovereignty as inconceivable, the Prime Minister pledged his government's policies in the Arctic would reflect Canada's interest in preservation of the ecological balance, economic development of the north, the security of Canada and "in our stature and reputation in the world community."<sup>126</sup> Some members of the House of Commons

---

and serves as a review of national affairs and an indication of the measures the Government intends to introduce in the new session. E. R. Hopkins, How Parliament Works: An Examination of the Functioning of the Parliament of Canada 31-32 (1966).

<sup>124</sup>114 H. C. Deb. 34, 39 (1969).

<sup>125</sup>Id. at 40. Professor Head had reached a similar conclusion in 1963: "From the first voyages of discovery in the fifteenth century, to the distribution of Family Allowance cheques in the twentieth century, Arctic North America has, for 450 years, progressively become the Canadian Arctic." Supra note 121, at 226.

<sup>126</sup>114 H. C. Deb. 40 (1969).

nonetheless feared losing "sovereignty and ownership of those Arctic waters" and the rich mineral resources in that area.<sup>127</sup>

From November 10-29, 1969, Canada participated in the International Legal Conference on Marine Pollution Damage at Brussels. Two conventions were produced at this conference.<sup>128</sup> Canada voted against one convention and abstained from voting on the other; she signed neither.<sup>129</sup> Her objections to the conventions were primarily on the following grounds: that they failed to accord the coastal states competence to prevent maritime casualties from occurring; that they failed to insure complete compensation for all pollution damage and clean up costs; and that no compensation was provided for damages inflicted beyond the territorial sea.<sup>130</sup>

---

<sup>127</sup>As evidence of the questioning of Canada's rights to these waters, a member stated: "The fact remains that a few weeks ago the Manhattan sailed through those waters with instructions from Washington not to fly the Canadian flag." Id. at 43, 49. The continuing debate highlighted the danger of oil pollution and the necessity for a declaration of sovereignty. 114 H. C. Deb. 189-193 (1969).

<sup>128</sup>The Conventions are discussed in detail, infra notes 274-86 and accompanying text.

<sup>129</sup>114 H. C. Deb. 5951 (1970)

<sup>130</sup>See the statements and proposals made by the Canadian delegation at the Brussels Conference, in particular I.M.C.O. Doc. LEG/CONF. 4/SR. 2 and SR. 5; LEG/CONF. 4/Add. 3. And see statements of Minister of Transport before the House of Commons. 114 H. C. Deb. 2696 (1970).

On December 16, 1969, the Standing Committee on Indian Affairs and Northern Development issued a report which contained its conclusions and recommendations regarding "Arctic Sovereignty".<sup>131</sup> The Committee concluded that effective pollution control for Arctic waters would be possible only with the exercise of Canadian control over those waters. An international waterway, the Committee said, did not exist through the "Canadian Arctic Archipelago" nor did the Committee feel that the Canadian Arctic was analogous to the Pacific archipelagoes where international trade routes had existed for centuries. The waters of the Canadian Arctic archipelago lie over the continental shelf plus the Arctic islands are geological extensions of the Canadian mainland and the North American land mass.<sup>132</sup> The waters lying between the islands of the Arctic archipelago "have been, and are, subject to Canadian Sovereignty historically, geographically and geologically" the Committee concluded. Innocent passage for ships of all nations through these waters was compatible with Canadian interests, the Committee found, but deemed any passage which poses a threat

---

<sup>131</sup>H. C. Comm. on N. Devel. No. 1 (1969).

<sup>132</sup>And see Professor Head's description of the Canadian Arctic "archipelago:" "The archipelago forms a natural extension of the continent and shares with it a common continental shelf. It does not lie astride any shipping routes." I. L. Head supra note 121, at 218.

of pollution not innocent. The Committee recommended that the Government "indicate to the world, without delay, that vessels, surface and submarine, passing through Canada's Arctic Archipelago are and shall be subject to the sovereign control and regulation of Canada."<sup>133</sup> The members of the Committee unanimously agreed to these conclusions and recommendations.<sup>134</sup>

On January 19, 1970, the vice-chairman of the Committee acting on his own behalf moved that the House of Commons concur in the report of the Committee.<sup>135</sup> After the procedural propriety of such a motion was debated extensively, the Speaker of the House of Commons in a precedent setting ruling, ruled such a motion proper.<sup>136</sup> Extensive debate on the motion took place on January 22, 1970. Under the procedural rules of the Commons if the motion was not voted on that day, it thereafter could be called up only by the Government.<sup>137</sup> Discussion on the motion, with several prolonged Government speeches, continued until the usual hour of adjournment without a vote.<sup>138</sup>

---

<sup>133</sup>H. C. Comm. on N. Devel. at 5-7.

<sup>134</sup>114 H. C. Deb. 2695 (1970).

<sup>135</sup>114 H. C. Deb. 2513 (1970).

<sup>136</sup>Id. at 2513-2523. <sup>137</sup>Id. at 2694.

<sup>138</sup>Id. at 2727.

Near unanimity of support for a claim over the Arctic, however, was exhibited during the debate. The Leader of the Opposition agreed with the Committee and recommended drawing baselines around the whole Arctic archipelago. Passage through waters contained within those baselines, he said, should be contingent upon Canadian approval. Such qualified passage, he said, is justifiable because: (1) there is no customary international trade route through the Northwest Passage; (2) Canadian "security interests" demand protection of the resources of the area from pollution; (3) navigation through the area will demand a great deal of expensive aids which may necessitate levying a charge against vessels using the passage; and (4) the Northwest Passage possesses many of the features of an internal waterway.<sup>139</sup> Members of Mr. Trudeau's Party, while not calling for the drawing of baselines around the islands, did feel that an assertion of sovereignty was necessary to protect the Arctic ecology. Some cited as precedent the U. S. Water Quality Improvement Act of 1970 which at that time was in a conference committee.<sup>140</sup> Inherent in the debate was the fear by some members that lacking a claim of

---

<sup>139</sup>Id. at 2701, 2705. And see the comments of Mr. Yewchuk 2681-2685; Mr. Nesbitt 2715-2718.

<sup>140</sup>Id. at 2685, 2690.

sovereignty over the Arctic archipelago, its wealth in resources might be lost to others.<sup>141</sup> Participating in the debate, the Secretary of State for External Affairs stated there was "no fundamental difference between the views of the government and of the committee as to extent of Canada's sovereignty in the Arctic region." How best to reinforce that sovereignty and to use that authority for pollution control is a difficult problem, he said, where "timing is of the essence."<sup>142</sup> One lone voice was heard on January 22, 1970 in the debate of the House of Commons which indicated that a further claim of sovereignty was not necessary and probably not desirable.

I believe in the sovereignty of this

---

<sup>141</sup>The Chairman of the Northern Affairs Committee stated that the committee members believed that the "nature of the Manhattan's voyage, with no formal request for permission for its passage having been addressed to the Canadian government . . . presented a challenge to Canadian sovereignty." Id. at 2718. Another member of the Commons construed this as a challenge to Canada's sovereignty over the vast resources of the Arctic. Id. at 2692, 93, 94, 96. Yet another member suggested that a mere assertion of sovereignty was not enough. This member pointed out that the United States had moved into Oregon, parts of California and New Mexico "and because of the right of occupancy it became a part of the United States." Id. at 2720, 2721. This member suggested, therefore, that in addition to a claim of sovereignty, the Canadian Government should take several steps to establish a Canadian presence in the area. Id. at 2722.

<sup>142</sup>Id. at 2712, 2713.

country. We have established our sovereignty on the islands. We have established sovereignty on the polar shelf. We also control the only Northwest Passage there is, between Banks Island and Victoria Island through the Prince of Whales Strait . . . which [is in] Canadian Territory . . .

As Canadians we control the Northwest Passage. It is ours. We can say which ships can pass through it. We can set the standards . . . we can control possible pollution and preserve the ecology of the region, compatible with the principles we have set down.<sup>143</sup>

The motion for the Commons to concur in the Committee Report, not having been voted upon prior to adjournment, was thereafter effectively buried.

Events occurred rapidly after the inconclusive debate of January 22, 1970. On February 4, 1970, the Liberian tanker Arrow went aground in Chedabucto Bay, Nova Scotia and split in two four days later releasing 16,000 tons of Venezuelan tanker fuel oil.<sup>144</sup> In March, President Nixon reduced the oil import quota from Canada prompting the Wall Street Journal to speculate that the Trudeau government would retaliate by closing the Northwest Passage.<sup>145</sup> Throughout March, high level meetings between Canadian and U. S. officials took place to

---

<sup>143</sup>Id. at 2724.

<sup>144</sup><sup>1</sup> Marine Pollution Bull. 34-35 (March 1970).

<sup>145</sup>The Wall Street Journal, March 20, 1970 at 1, cl. 5.

discuss contemplated measures in the Arctic. Canadian newspapers on April 2, 1970, carried an item noting that Humble Oil and Refining Company had awarded a contract to design, not build, icebreaking tankers.<sup>147</sup> The Water Quality Improvement Act of 1970 was signed into law by President Nixon on April 3, 1970. On the same date, the Manhattan departed Newport News, Virginia, for her second test voyage in the Arctic.<sup>148</sup> Canadian newspapers on April 8, 1970, reported that Humble Oil had stated that a decision would be made by the end of 1970 on whether to proceed with construction of the icebreaker tankers for use in the Northwest Passage.<sup>149</sup> To paraphrase the statement of the Secretary of State for External Affairs, the time was right to act.<sup>150</sup>

On April 8, 1970, the Prime Minister announced to

---

<sup>146</sup>114 H. C. Deb. 5952-53 (1970). On March 17, 1970, President Nixon telephoned Prime Minister Trudeau to express interest in the pending proposal and offered to send a high level delegation to Ottawa. Id. at 5953.

<sup>147</sup>The Globe and Mail (Toronto) April 2, 1970, at 38.

<sup>148</sup>The Globe and Mail (Toronto) April 4, 1970, at B3.

<sup>149</sup>A Humble Oil official was quoted as saying that the Arctic shipping route once established will be more than a carrier of oil, it will be a full fledged trade route for international use "with domestic implications for the United States comparable to the impact transcontinental railways had on its economy." The Globe and Mail (Toronto), April 8, 1970, at B-5.

<sup>150</sup>Supra note 142 and accompanying text.



the House of Commons that Canada on the previous day had submitted a new reservation to its acceptance of the compulsory jurisdiction of the International Court of Justice which was intended to guard against possible litigation of two bills to be introduced dealing with protection of Canada's marine environment and the living resources of the sea.<sup>151</sup> Thereafter the Minister of Indian Affairs and Northern Development moved for leave to introduce C-202, a bill to prevent pollution of the Arctic waters, which motion was agreed to, and the bill read the first time.<sup>152</sup> Immediately thereafter, C-203, extending the territorial sea to twelve miles and providing authority for establishment of fishing zones, was introduced, read the first time and ordered to be printed.<sup>153</sup> Later, the Prime Minister stated to the press that C-202, the Arctic Waters Pollution Prevention Act, "is not an assertion of sovereignty. It is an exercise of our desire to protect the Arctic from the threat of pollution."<sup>154</sup>

---

<sup>151</sup>114 H. C. Deb. 5623 (1970). Prime Minister Trudeau stated "There is an urgent need for the development of international law establishing that coastal states are entitled, on the basis of fundamental principles of self-defense, to protect their marine environment and the living resources of the sea adjacent to their coasts." Id. at 5624. The text of the reservation is set forth in 9 Int'l Legal Materials 598 (1970).

<sup>152</sup>Id. at 5626. <sup>153</sup>Ibid.

<sup>154</sup>The Globe and Mail (Toronto) April 9, 1970, at 1.

In support of the exercise of limited jurisdiction beyond the territorial sea the Prime Minister cited the U. S. and Canadian requirement that aircraft approaching their coasts must identify themselves.<sup>155</sup>

b. international response to the proposals

The reaction of the U. S. State Department came the following day in a four paragraph statement which stated inter alia:

The United States does not recognize any exercise of coastal jurisdiction over our vessels on the high seas and thus does not recognize the right of any state unilaterally to establish a territorial sea of more than three miles or exercise of more limited jurisdiction in any area beyond 12 miles.<sup>156</sup>

Subsequently the U. S. Department of State issued a statement on the Canadian legislation.<sup>157</sup> That statement declared that "the United States can neither accept or acquiesce" in the unilateral extension of jurisdiction on the high seas. The statement pointed out that if the Canadian legislation were not opposed by the U. S., it would be taken as precedent for the unilateral extension of jurisdiction over the high seas by other nations

---

<sup>155</sup>Ibid.

<sup>156</sup>The Globe and Mail (Toronto) April 10, 1970, at 1.

<sup>157</sup>Department of State Press Release No. 121, April 15, 1970, set forth in 9 Int'l Legal Materials 605 (1970).

resulting in merchant shipping being severely restricted and naval mobility seriously jeopardized. "We believe," the statement continued, "the Arctic beyond national jurisdiction should be subject to internationally agreed rules protecting its assets, both living and non-living." To that end, the U. S. called for an international conference "designed to establish rules for the Arctic beyond national jurisdiction by international agreement."<sup>158</sup> The Canadian Secretary of State on April 15, stated that there was nothing in the U. S. note which would lead Canada to withdraw or amend the proposed legislation.<sup>159</sup> Britain and, to a lesser extent, France also opposed the Canadian Arctic Waters proposal.<sup>160</sup>

On April 16 the Canadian reply to the U. S. protest was delivered to the United States Government.<sup>161</sup> In that reply the Canadian Government pointed to the various contiguous zones established by the United States since 1790, and stated "Canada reserves to itself the same rights as the USA has asserted to determine for itself

---

<sup>158</sup>Ibid.

<sup>159</sup>The Globe and Mail (Toronto) April 16, 1970, at 4.

<sup>160</sup>The Gazette (Montreal) May 29, 1970, at 2.

<sup>161</sup>A summary of this reply is set forth in 9 Int'l Legal Materials 607 (1970) and in the Appendix to the House of Commons Debates on April 17, 1970, 114 H. C. Deb. 6027-30 (1970).

how best to protect its vital interests, including in particular its national security." The Canadian Government took the position that "a danger to the environment of a state constitutes a threat to its security." The Arctic Water bill is, therefore, a lawful extension of jurisdiction to meet a particular danger.

Freedom of the seas is an irrelevant doctrine, the Canadian reply stated, in areas having unique characteristics like the Arctic, "where there is an intimate relationship between the sea, the ice and the land, and when the permanent defilement of the environment could occur and result in the destruction of whole species." Further, the note said, the Northwest Passage is not an international strait neither "by customary usage nor has it been defined as such by conventional international law."<sup>162</sup> Regarding the U. S. proposal for an international Arctic conference, Canada responded that in their view there was no area in the Arctic beyond national jurisdiction. Naturally, she would not participate in a conference to discuss matters falling wholly within Canadian jurisdiction.

---

<sup>162</sup>Professor Pharand of the University of Ottawa states that the Northwest Passage is a "legal strait" in that it connects parts of the high seas, regardless of whether presently used for international navigation or not." D. Pharand, "The Water of Canadian Arctic Islands," 3 Ottawa L. Rev. 414, 430 (1969). And see The Corfu Channel Case, [1949] I.C.J. 28.

## c. debates on the legislation

On April 16, 1970, the Minister of Indian Affairs and Northern Development moved the Arctic Waters bill be read a second time and referred to committee.<sup>163</sup> The Minister spoke at length about the serious dangers of pollution in the Arctic and stated that this legislation would encourage commercial shipping and the orderly development of the area, pointing out that the legislation not only applied to ships passing through the Northwest Passage but to all development on the islands and on the continental shelf which might pollute the Arctic waters.<sup>164</sup>

The Leader of the Opposition denounced the Arctic Waters bill and the companion twelve mile territorial sea legislation on the ground that they reduced, rather than expanded, Canada's claim to sovereignty over the area. He stated that a twelve mile territorial sea would not include all the water between the Arctic Islands or between the Arctic Islands and the mainland resulting by

---

<sup>163</sup>114 H. C. Deb. 5937 (1970). On this motion, the principle of the bill, though not its specific provisions, is fully debatable. Once the motion for second reading is carried, the principle of the bill has been approved by the House and subsequent discussion is limited to the specific provisions of the bill. E. R. Hopkins, How Parliament Works: An Examination of the Functioning of the Parliament of Canada 45-46 (1966).

<sup>164</sup>114 H. C. Deb. 5938 (1970).

implication in the abandonment of sovereignty over these waters which traditionally were deemed Canadian. And he reiterated the view that baselines connecting the islands would have been a better way to deal with the problem but, nonetheless, his party supported the Arctic Waters bill in principle.<sup>165</sup> The spokesman for the New Democratic Party also criticized the Government for failure to make an outright claim to sovereignty over the Arctic archipelago, but indicated the party would give unreserved support to the legislation.<sup>166</sup>

The Secretary of State entered the debate stating that the fundamental objectives of the Arctic Waters bill were the economic development of the Arctic and preservation of its environment. He then proceeded to answer the criticism of the Opposition Leader. "Canada," he said, "has always regarded the waters between the islands of the Arctic archipelago as being Canadian waters." The present Government maintains that position, the Secretary said, and there is no abandonment of these claims in the legislation put forward.

This exercise of jurisdiction for the purpose of pollution control can in no way be construed to be inconsistent with a claim of sovereignty over the islands of the waters between the islands or otherwise. Similarly, the exercise of sovereignty over an area of

---

<sup>165</sup>Id. at 5941-5943.      <sup>166</sup>Id. at 5943-5948.

the sea extending 12 miles from the shore in accordance with the provisions of . . . [C-203] . . . cannot be said to be inconsistent with a claim of sovereignty beyond 12 miles.<sup>167</sup>

To support his position that these claims did not weaken Canadian claims to sovereignty, the Secretary cited the decision of the Permanent Court of Arbitration in the 1910 North Atlantic Coast Fisheries Case.<sup>168</sup> His view of the decision was that a state may, without prejudice to its claim of sovereignty over the whole of a particular area of the sea, exercise only so much of its sovereign power over such part of that area as may be necessary for immediate purposes. The Secretary then reviewed international efforts to deal with oil pollution and viewed them as somewhat ineffectual.<sup>169</sup> In response to a question of whether the Government intended to draw a twelve mile sea around each island or to draw a line enclosing all the islands, the Secretary responded "Since obviously we claim these to be Canadian internal waters we would not draw such lines."<sup>170</sup>

One member pointed out that with a twelve mile territorial sea, the territorial waters of Canada would extend completely across two sections of the Northwest Passage—the Barrow Strait and Prince of Wales Strait.

---

<sup>167</sup>Id. at 5949. <sup>168</sup>11 U.N.R.I.A.A. 167.

<sup>169</sup>114 H. C. Deb. at 5925 (1970). <sup>170</sup>Id. at 5953.

With Canada's definition of innocent passage as not including passage by a vessel which threatens to pollute, the Canadians could control tanker traffic through the Passage. Nonetheless, in a curious bit of logic this member viewed the Arctic Waters bill as essential to protect the Arctic ecology.<sup>171</sup> Subsequently during discussion of C-203 extending the territorial sea to twelve miles, the Secretary of State for External Affairs reiterated Canada's position that she had sovereignty over the islands and waters of the Canadian Arctic and sovereign rights in the northern continental shelf. Barrow Strait and Prince of Wales Strait, the Secretary pointed out, were less than twenty-four miles at some points and, therefore, "are subject to complete Canadian sovereignty." Canada, he said, would not accept any right of innocent passage if that right is defined as precluding the right of the coastal state to control pollution in such waters.<sup>172</sup> The Secretary reaffirmed that "there is no interest on the part of the Canadian government in the exercise of chauvinism."<sup>173</sup>

The morning newspapers on April 22, 1970 carried front page headlines proclaiming "U. S. bill signed before Canada's on 12-mile limit."<sup>174</sup> The article

---

<sup>171</sup>Id. at 5965-67.    <sup>172</sup>114 H. C. Deb. 6015 (1970).

<sup>173</sup>Ibid.

<sup>174</sup>The Globe and Mail (Toronto), April 22, 1970, at 1.



accompanying the headline discussed the signing of the Water Quality Improvement Act of 1970 on April 3—five days before the Canadian legislation was introduced. With this news before them, the Commons met to vote on the motion that the Arctic Waters bill be read a second time and referred to committee. Of the 264 members of the Commons, 198 members voted in favor of the legislation. No votes were recorded against the bill.<sup>175</sup> Debate then resumed on the bill to extend the territorial sea with two speakers pointing out that with a twelve mile territorial sea, Barrow Strait and Prince of Wales Strait would be territorial waters which "if all else fails, creates a gate across the Northwest Passage."<sup>176</sup> The motion was agreed to, the bill extending the

---

<sup>175</sup>114 H. C. Deb. 6170-72.

<sup>176</sup>Id. at 6189 (Mr. St. Pierre) and 6190 (Mr. Anderson). Mr. St. Pierre stated:

The country remains faced with a test on this matter in which we find the two major powers, the United States and, according to my understanding the USSR, in agreement. It is the position of the United States that the waters of archipelagos lying between oceans should be subject to high seas passage. It is my understanding that Russia, which has some concern about the right of Turkey to close its canals to military traffic in times of war, is supporting the American government in this position. Needless to say, this must be vigorously resisted by the Canadian government. We cannot accept a high seas passage through the Arctic archipelago.

Id. at 6189.

territorial sea was read the second time and referred to committee.<sup>177</sup>

d. committee hearings and enactment

Because the Arctic Waters bill and the territorial seas bill were introduced at the same time and were considered related by the Government, the committee hearings on both bills will be examined.

On April 29, 1970, Mr. Beesley, Head of the Legal Division, Department of External Affairs appeared before the External Affairs Committee to testify regarding the territorial sea bill. Mr. Beesley was unable to spell out with precision what the status of the Arctic water was now or after passage of the Arctic Waters bill. The waters could be considered internal waters or "historic territorial waters." No straight baselines, he stated, had ever been drawn around the archipelago so the status remained somewhat in doubt; however, with a twelve mile territorial sea Canada has "unassailable sovereignty" over two of the gateways to the Northwest Passage where the width of the Passage is less than twenty-four miles.<sup>178</sup>

---

<sup>177</sup>Id. at 6191.

<sup>178</sup>Proceedings of the House of Commons Standing Committee on External Affairs and National Defence No. 25, at 18 (Apr. 29, 1970) [hereinafter cited as H. C. Comm. on External Affairs]. Mr. Beesley stated he knew of no government statement indicating that they intended

He stated that Prince of Wales is already subject to Canadian control with a three mile territorial sea. With a twelve mile territorial sea McClure Strait might not be covered but Barrow Strait, the only route to or from McClure, would be within Canadian "sovereignty."<sup>179</sup> Traffic through Barrow Strait and Prince of Wales Strait would be subject to the Canadian definition of innocent passage. That definition he then stated: "It is the Canadian position that any passage threatening the environment of a coastal state cannot be considered innocent since it represents a threat to the coastal state's security."<sup>180</sup> No guaranteed right of passage exists through the Northwest Passage because it is not an international strait either by customary development of the law or by conventional law. "There has been no passage, no usage, which would have developed the body of water as an international strait" under customary

---

to draw straight baselines connecting the islands of the Arctic. *Id.* at 37. However, a map drawn by the government for the committee with the one hundred mile pollution control line represented must have been somewhat similar to straight baselines since certain committee members were confused as to the pollution line's meaning. *Id.* at 35-37. And see H. C. Comm. on N. Devel. No. 15, at 49-50 (April 30, 1970).

<sup>179</sup>H. C. Comm. on External Affairs No. 25, at 21 (April 29, 1970).

<sup>180</sup>H. C. Comm. on External Affairs No. 25, at 11 (April 29, 1970).

law.<sup>181</sup> Conventional law, Mr. Beesley said, talks about joining two bodies of the high seas. The Beaufort Sea or the Arctic Ocean only by a stretch of the imagination can be considered high seas since they are covered with ice most of the year. "The end result," Mr. Beesley said, "is that the 12-mile territorial sea gives us an additional kind of control in the Northwest Passage whether one considers all of the waters of the Arctic archipelago to be Canadian or not."<sup>182</sup>

Hearings of the Committee on Indian Affairs and Northern Development raised questions as to why one-hundred miles was selected. A representative of the Department on Northern Development gave the following explanation.

. . . it seemed that 100 miles was a practical distance within which it would be necessary to know what shipping would be moving, since any accident within that area might be difficult to handle from the point of view of the damage it could do to the coastline. Beyond that region, the thought is that there would be sufficient warning for at least adequate remedial measures to be taken.<sup>183</sup>

A representative from the Department of Transport suggested that the distance of one hundred miles was drawn from the 1954 Oil Pollution Convention which prohibits

---

<sup>181</sup>Id. at 19.    <sup>182</sup>Id. at 20.

<sup>183</sup>H. C. Comm. on N. Devel. No. 15, at 14 (April 30, 1970).

discharges "up to 100 miles from the coast."<sup>184</sup>

No scientists were called to testify before the Northern Development Committee about the ecological effects of an oil spill in the Arctic. A spokesman from the Department of Northern Development, however, did state what could be affected by an oil spill:

Perhaps of primary importance to the continent as a whole would be the nesting grounds of some of the ducks and geese in that area. This is certainly a very significant resource for the whole of North America. Of secondary, but none the less considerable importance to the people who live in the North, would be the wild life resources of the sea, the seal, the walrus and the Arctic char . . . There are still a large number of people living off these resources in the territories.<sup>185</sup>

On May 14, an amendment to the Arctic Waters bill was offered and adopted which would give the individual who suffered actual loss or damage priority over governmental claims for cleanup costs.<sup>186</sup> The Arctic Waters bill was thereafter reported favorably to the House of Commons with one amendment on May 22, 1970.<sup>187</sup> On June

---

<sup>184</sup>Id. at 17. Annex A of the Convention for the Prevention of Pollution of the Sea by Oil, 1954, lists the prohibited zones. At the 1962 Conference, the prohibited zones for Canada's eastern and western coasts were established at one hundred miles.

<sup>185</sup>H. C. Comm. on N. Devel. No. 16, at 12 (May 5, 1970).

<sup>186</sup>H. C. Comm. on N. Devel. No. 19, at 16 (May 14, 1970).

<sup>187</sup>Votes and Proceedings of the House of Commons of Canada No. 128, at 844-45 (May 22, 1970).

5, 1970, the Act received a favorable vote for its third and final reading in the House of Commons.

The Act which would establish the twelve mile territorial sea and authorize the drawing of fishing zones was not amended in committee, although two amendments were offered. The first amendment offered, but not adopted, would have established Canadian fishing zones in all waters above Canada's continental shelf.<sup>188</sup> The second proposed amendment, on the theory that if one hundred miles was good in the Arctic it was also good in the Atlantic and Pacific, would have established one hundred mile pollution control zones in the waters of the Atlantic and Pacific Oceans adjacent to Canada.<sup>189</sup> The United States prediction that the Arctic Waters one hundred mile zone could serve as precedent for similar claims elsewhere obviously was coming true, even in the country sponsoring the legislation. Mr. Beesley of the Department of External Affairs in commenting on the offered amendment noted that the one hundred mile zone was premised on the "delicacy of the ecological balance in the North" and the fact that most of the water was ice-covered. "A number of considerations lay behind the

---

<sup>188</sup>H. C. Comm. on External Affairs No. 30, at 8, 46 (May 19, 1970).

<sup>189</sup>Id. at 16.

decision to go as far as 100 miles from shore."<sup>190</sup> This proposed amendment was also defeated.<sup>191</sup>

The Committee on External Affairs and National Defence reported Bill C-203 extending the territorial sea to twelve miles and authorizing the establishment of fishing zones to the House of Commons with no amendments on May 20, 1970.<sup>192</sup> The amendment seeking to establish fishing zones above the continental shelf and seeking to establish one hundred mile pollution control zones in the Atlantic and Pacific waters adjacent to Canada subsequently were offered as private amendments.<sup>193</sup> Neither amendment was adopted.

The Senate of Canada is composed of 102 Senators appointed for life by the Governor General based on the advice of the Prime Minister. The body, less political than the House of Commons, was not intended to compete with the Commons but rather to take a "sober second look."<sup>194</sup> The Arctic Waters bill received its sober second look on June 9, 1970 when it was read the first

---

<sup>190</sup>Id. at 42.    <sup>191</sup>Id. at 47.

<sup>192</sup>Votes and Proceedings of the House of Commons of Canada No. 126, at 825 (May 20, 1970).

<sup>193</sup>Routine Proceedings and Orders of the Day of the Canadian House of Commons No. 130, at xi (May 26, 1970).

<sup>194</sup>E. R. Hopkins, How Parliament Works: An Examination of the Functioning of the Parliament of Canada 20-22 (1966).

time.<sup>195</sup> After limited debate, the bill received its second reading by the Senate on June 16, 1970.<sup>196</sup> Without referral to committee, the Senate gave the Arctic Waters bill its third and final reading on June 17, 1970.<sup>197</sup> The Arctic Water Pollution Prevention Act became law on June 26, 1970 when the Governor General gave Royal Assent.<sup>198</sup>

## 2. The Competence Claimed by Canada

The preamble to the Arctic Waters Pollution Prevention Act recites the potentially great international and domestic significance of the exploitation and transportation of Arctic resources. It asserts that the Canadian Parliament has an obligation to ensure that Canadian arctic resources are exploited and the arctic waters are navigated "only in a manner that takes cognizance of Canada's responsibility for the welfare of the Eskimo and other inhabitants of the Canadian arctic and the preservation of the peculiar ecological balance that now exists in the water, ice and land areas of the

---

<sup>195</sup>118 Debates of the Senate 1175 (1970).

<sup>196</sup>Id. at 1242.    <sup>197</sup>Id. at 1249.

<sup>198</sup>Royal Assent is invariably given by the Governor General to bills which have passed both the Senate and the House of Commons. E. R. Hopkins, How Parliament Works: An Examination of the Functioning of the Parliament of Canada 19 (1966).



Canadian arctic."<sup>199</sup>

Arctic waters are defined as those waters "adjacent to the mainland and islands of the Canadian arctic within the area enclosed by the sixtieth parallel of north latitude, the one hundred and forty-first meridian of longitude and a line measured seaward from the nearest Canadian land a distance of one hundred nautical miles." In those areas where the distance between Canadian arctic islands and Greenland is less than one hundred miles there shall be substituted a "line of equidistance." Insofar as the Act applies to exploring for, developing or exploiting natural resources in submarine areas, arctic waters include waters adjacent to those in the area described above where such adjacent waters, frozen or liquid, overlie "submarine areas that Her Majesty in right of Canada has the right to dispose of or exploit." Although the Act contains extensive provisions dealing with virtually all explorative or extractive activities, examination will be limited to those provisions applicable to ships within the one hundred mile zone of arctic waters.

---

<sup>199</sup>An interesting analogy can be drawn between this language and that used in the Norwegian Decree of 1935 which was the subject of controversy in *The Fisheries Case (United Kingdom v. Norway)*, [1951] I.C.J. 125, 127-28, 133.

## a. prevention

The Act provides that no person shall deposit or permit the deposit of wastes in the one hundred mile zone except as may be provided by regulations issued by the Governor in Council.<sup>200</sup> Waste includes any substance which would degrade or alter the arctic waters to an extent detrimental to their use by man or by any animal, fish or plant that is useful to man. Any ship which deposits waste in violation of the Act is subject to a maximum fine of one hundred thousand dollars. The Act authorizes prosecution of the ship for any prohibited deposit. Proof that the master or any person on board the ship committed the act or neglect that constitutes the offense is sufficient to establish that the ship has committed the offense. If there are reasonable grounds to suspect that a ship has violated the Act, the ship and its cargo may be seized anywhere in Arctic waters if the Governor in Council consents. If the seized ship is convicted, the court may, in addition to any other penalty, order the ship and its cargo to be forfeited. The court may, with the consent of the Governor in Council,

---

<sup>200</sup>The Council consists of the Prime Minister and his cabinet. Their decision when regulations are issued by the Governor in Council must be approved by the Governor General, as representative of the Queen. That approval invariably is given. E. R. Hopkins, How Parliament Works: An Examination of the Functioning of the Parliament of Canada 19 (1966).

release the ship if satisfactory security is posted. By asserting a competence to impose a criminal sanction for all deposits of oil, Canada seeks to deter non-casualty discharges.

A duty is imposed by the Act upon the master of a ship to report the discharge of any waste or a condition of distress that may cause any deposit of waste. Failure to make the required report is a criminal offense which carries a maximum penalty of twenty-five thousand dollars. By claiming the competence to require vessels to report discharges or threatened discharges, Canada seeks the opportunity to take timely action to prevent or minimize pollution damage after a discharge has occurred.

Within the one hundred mile zone, the Governor in Council may remove or destroy any distressed vessel or maritime casualty which he has reasonable cause to believe is depositing or is likely to deposit waste. If the vessel or the cargo is removed, either may be sold to meet the expenses incurred. The objective of this claimed competence is to prevent threatened pollution or to abate further pollution from a maritime casualty.

The same general objective is sought to be achieved by the claimed competence to order any ship to take part in cleaning up waste or in any action to control or contain waste where a substantial deposit has occurred or is

threatened. Any ship that fails to comply with this order is guilty of an offense and is subject to a fine not exceeding twenty-five thousand dollars and to seizure and forfeiture.

The claimed competence to require all vessels to carry certain equipment to remedy any deposit seeks to prevent or minimize pollution damage after a discharge has occurred. Failure to carry prescribed equipment subjects the ship to a twenty-five thousand dollar fine and to seizure and forfeiture. Authority is provided to board and inspect any vessel to determine whether it complies with this requirement.

The most comprehensive claims are those authorized by the Act within shipping safety control zones. The Act empowers the Governor in Council to establish safety zones anywhere within the one hundred mile limit.<sup>201</sup> He has the authority to prohibit all vessels from navigating within these shipping safety control zones unless they

---

<sup>201</sup>A representative of the Department of Transport during committee hearings on the Act explained the need for flexibility. If there was an area within the one hundred mile limit where shipping traffic is anticipated, a zone would be established and standards suitable for ice conditions within that zone would be issued. Since ice conditions are more severe in the western arctic, it would be unwise to throttle development of the eastern arctic because of the application of standards appropriate only to the severe conditions in the west. H. C. Comm. on N. Devel. No. 15, at 51-53 (Apr. 30, 1970).

comply with comprehensive construction, navigation and manning standards.<sup>202</sup> In addition, the Governor in Council may require the aid of a pilot or an ice navigator or the assistance of an icebreaker for all who wish to navigate within a safety zone. Further, all navigation may be prohibited during certain portions of the year or when certain ice conditions exist. Any ship that fails to comply with any of these requirements is guilty of an offense and subject to a fine not to exceed twenty-five thousand dollars. The ship may also be subject to seizure and forfeiture. To determine whether the ship complies with construction, manning and navigational standards, authorization is given to board and inspect any ship that is within shipping safety control zones. The purpose of these claimed competences is essentially

---

<sup>202</sup>The areas in which standards can be established are listed seriatim: hull and fuel tank construction; use of double hulls and compartmentalization; construction of machinery and equipment, electronic navigational aids, telecommunications equipment and the manner and frequency of maintenance thereof; construction of propelling power and appliances and fittings for steering and stabilizing; manning of the ship including the number and qualifications of navigating and look-out personnel; quantity of cargo and its stowage; freeboard to be allowed and the marking of load lines; quantities of water, fuel and other supplies to be carried; and the charts and other documents relating to navigation in the arctic waters. The Act authorizes the Governor in Council to exempt vessels owned or operated by a sovereign power from these standards. They would be subject to all other requirements. H. C. Comm. on N. Devel. No. 17, at 5, 11 (May 7, 1970).

to prevent the occurrence of maritime casualties.

b. compensation

Canada claims the competence to prescribe and apply its local liability laws to obtain compensation for removal costs<sup>203</sup> incurred by the Government and for all actual loss or damage incurred by other persons. The owner of the ship and the owner of the cargo are jointly and severally liable for removal costs and damages.<sup>204</sup> The liability is absolute, not dependent upon proof of fault or negligence, except that no person is liable for costs or damages incurred by another person whose conduct caused any deposit of waste. The Governor in Council may issue regulations establishing a limit on the amount of liability to which the owner of a ship or cargo may be subject.

To insure effective application of its liability laws, Canada requires that the owner of any ship that proposes to navigate within any shipping safety control

---

<sup>203</sup>Removal costs include the expense of all actions taken to remedy any condition that results from a deposit of waste as well as those taken to mitigate damage that results or may reasonably be expected to result from the deposit of waste. Bill C-202, § 6(2).

<sup>204</sup>A cargo owner will have no liability if he can establish that his cargo and any other cargo of the same nature that is carried by that ship were deposited by that ship in arctic waters it would not be a violation of the Act. Bill C-202, § 7(3).

zones, and the owner of cargo on any such ship, must provide evidence of financial responsibility. The evidence may be in the form of insurance, an indemnity bond, or in any other form satisfactory to the Governor in Council. Further, it must be in such a form that a person with a claim may recover directly from the proceeds. Thus anyone damaged need only establish that a particular ship caused the damage. The Canadian courts would have available the evidence of financial responsibility for distribution to damaged parties who obtain a judgment.<sup>205</sup> The failure of any shipowner or cargo owner to provide evidence of financial responsibility is an offense punishable by a maximum fine of twenty-five thousand dollars. A ship and its cargo may be seized if reasonable cause exists to believe that the owners have failed to provide evidence of financial responsibility and if the Governor in Council consents. If convicted, the court may, in addition to any other penalty imposed, order the ship or its cargo forfeited. The Court, with the consent of the Governor in Council, may release the ship or cargo upon the posting of satisfactory bond.

---

<sup>205</sup>H. C. Comm. on N. Devel. No. 19, at 14-15 (May 14, 1970).

### III. DECISION PROCESS

The claims advanced by coastal states to exercise pollution control in and beyond the territorial sea conflict with the claims by transportation interests of a right to unencumbered navigation on the high seas and to innocent passage in the territorial seas of non-flag states. Decision-makers who could accommodate these conflicting interests exist and operate within both the organized and unorganized arenas. The former includes various intergovernmental organizations, international conferences and international courts or tribunals. The unorganized arena embraces not only state-to-state interaction but interaction between states and individuals.<sup>206</sup>

#### A. Organized Arenas

The Intergovernmental Maritime Consultative Organization (IMCO)<sup>207</sup> is perhaps the most obvious intergovernmental organization to serve as a decision-maker

---

<sup>206</sup>For a detailed exposition of the process of decision, see McDougal and Burke 36-51.

<sup>207</sup>The IMCO Convention was concluded in 1948. U. N. Maritime Conference, Final Act and Related Documents 29 (1948). Its functioning, however, was delayed until 1958 when sufficient ratification was achieved to bring the Convention into force. 1958 Yearbook of the United Nations 501 (1959).



for these claims. IMCO's function is to provide machinery for cooperation among Governments in regulations affecting international shipping and to encourage the adoption of the "highest practicable standards in matters concerning maritime safety and efficiency of navigation."<sup>208</sup> Within the organization, the pivotal agency is the Maritime Safety Committee which makes recommendations to the IMCO Assembly through the IMCO Council. Membership of the Maritime Safety Committee is weighted by the requirement that eight of its fourteen members must be the largest shipowning nations.<sup>209</sup> Since its inception, IMCO has been involved intimately in the problem of oil pollution.<sup>210</sup> The most recent endeavor of IMCO was to sponsor the International Legal Conference on Marine Pollution Damage held in Brussels from November 10-29, 1969. The conference resulted in a convention relating to intervention on the high seas by the coastal state and a

---

<sup>208</sup>U. N. Maritime Conference, Final Act and Related Documents Art. I, at 29 (1948).

<sup>209</sup>Id. at Art. 28, p. 36.

<sup>210</sup>Article 21 of the Convention for the Prevention of Pollution of the Sea by Oil, 1954 designated IMCO as the responsible agency but provided that the United Kingdom would exercise appropriate authority until the IMCO Convention came into force. 327 U.N.T.S. 3, 13 (1958). At its first meeting in 1959, the IMCO Assembly accepted the responsibilities under the 1954 Convention and also undertook the oil pollution functions formerly lodged with the United Nations' Economic and Social Council. 4 M. M. Whiteman, Digest of Int'l Law 698 (1965).

convention establishing liability for oil pollution.<sup>211</sup> Both conventions were signed by the United States and have been submitted by the President to the Senate for its advice and consent to ratification.<sup>212</sup> To the extent that provisions in these conventions conflict with provisions in the Water Quality Improvement Act of 1970, the Act's provisions would be superseded if the Senate consents to ratification.<sup>213</sup>

Canada voted against one convention, abstained from voting on the other and refused to sign either. The belief has been voiced by Canadian officials that the primary concern of IMCO is to protect transportation interests, not the coastal state.<sup>214</sup> To the extent that other nations have similar beliefs, IMCO's role will be

---

<sup>211</sup>These two conventions are discussed in detail infra notes 274-86 and accompanying text.

<sup>212</sup>Senate Ex. G, 91st Cong., 2nd Sess. at 1 (1970).

<sup>213</sup>U. S. Const. Art. VI. Because of possible inconsistencies, the Senate Subcommittee on Air and Water Pollution has requested the Foreign Relations Committee to refer the request for ratification to it for additional hearings. The New York Times, May 21, 1970 at 1, 71. The subcommittee has held hearings on the conventions which were attended by the head of the U. S. delegation at the Brussels Conference. Environment Reporter (Current Developments) 303 (1970).

<sup>214</sup>See e.g. the comments by Prime Minister Trudeau on the proposed legislation, 9 Int'l Legal Materials 600, 603 (1970); and the remarks of Minister Jamieson, Department of Transport, 114 H. C. Deb. 2696 (1970).

circumscribed severely. The most immediate challenge to IMCO's supremacy in the area of marine pollution is the forthcoming Conference on the Human Environment to be held in Stockholm in 1972.<sup>215</sup> The Food and Agriculture Organization will sponsor a technical conference on the effects of marine pollution on living resources and fishing at Rome in December, 1970.<sup>216</sup> The technical conference and the subsequent Human Environment Conference could result in international resolution of the conflicting claims of coastal interests and transportation interests.<sup>217</sup> The issue also may be resolved at the forthcoming Conference on the Law of the Sea.<sup>218</sup> With respect to the Canadian claim, a regional conference has been proposed by the United States to establish environmental protection rules for the arctic beyond national

---

<sup>215</sup>General Assembly Resolution 2398 (XXIII) of 3 December 1968.

<sup>216</sup>Marine Pollution Bull. No. 17, at 28-32 (Nov. 1969).

<sup>217</sup>Note that General Assembly Resolution 2566 of December 13, 1969 requests the Secretary-General to seek the views of member states on the feasibility and desirability of an international treaty on the subject of marine pollution. This resolution is set forth in 1970 Marine Science Affairs 235-37.

<sup>218</sup>The Secretary-General is currently ascertaining the views of member states on the desirability of convening a conference to review the four conventions on the law of the sea. General Assembly Resolution 2574A (XXIV) of 15 December 1969, set forth in 1970 Marine Science Affairs 231-32.

jurisdiction. Canada has rejected the proposal in so far as it may embrace territory or waters claimed by Canada, but indicated a willingness to participate in a conference dealing with matters of an international character.<sup>219</sup>

It appears highly doubtful that the conflicting claims will be accommodated by the International Court of Justice or by an arbitral tribunal especially with respect to the Canadian claim. On April 7, 1970, Canada filed a reservation to its acceptance of the compulsory jurisdiction of the International Court of Justice excepting inter alia disputes concerning jurisdiction claimed by Canada "in respect of the prevention or control of pollution or contamination of the marine environment in marine areas adjacent to the coast of Canada."<sup>220</sup> Similarly, Canada's announced fear that if it submitted the Arctic

---

<sup>219</sup>The U. S. proposal, Dept. of State Press Release No. 121 of April 15, 1970, and the Canadian response of April 16, 1970 are set forth in 9 Int'l Legal Materials 605, 607 (1970). Professor Pharand of the University of Ottawa has proposed a solution which calls for the establishment of two belts of territorial waters. One would enclose the islands south of the Northwest Passage with the mainland and the other would enclose the islands north of the Passage with Ellesmere Island. Such a delimitation, he suggests, would protect Canadian territorial interests by giving sovereignty over all the islands within each group of islands but respects the principle of freedom of navigation in favor of the international community by retaining a strip of high seas. D. Pharand, "The Waters of the Canadian Arctic Islands," 3 Ottawa L. Rev. 414, 430 (1969).

<sup>220</sup>For the full text see, 9 Int'l Legal Materials 598 (1970).

Waters Pollution Prevention Act to the International Court it would lose, renders it improbable that she would submit her claims to any international tribunal.<sup>221</sup>

#### B. Unorganized Arenas

As with most significant questions about the use of the oceans, resolution of the conflicting claims of coastal and transportation interests probably will be decided by the officials of nation-states. Significant

---

<sup>221</sup>Prime Minister Trudeau is quoted in the Canadian press as follows:

What is involved . . . is the very grave risk that the World Court would find itself obligated to find that coastal states cannot take steps to prevent pollution. Such a legalistic decision would set back immeasurably the development of law in this area.

The Globe and Mail (Toronto) April 16, 1970, at 5. While urging that Canada was stimulating the creation of new international law for the protection of the environment, the Prime Minister in the same speech rejected the idea that freedom of navigation applied in this unique area.

Canada has been told that this pollution legislation is unacceptable because it is allegedly inconsistent with long-standing principles of freedom of navigation. Those who say this evidently regard the climactic conditions of the high Arctic as somehow similar to those close to the equator. This parallel we reject. . . . I suggest it is a disservice to the development of international law to argue that important principles should be applied in circumstances which are clearly inappropriate. Ibid.

state-to-state interaction is already taking place regarding the Canadian claim. Similar interaction has not occurred as a result of the United States claim, although the actual exercise of the claimed competence may lead to such interaction.

Interaction between states and individuals may result in non-authoritative decisions. For example, Canada presently has de facto control of the Northwest Passage because of her essential icebreakers and, to a lesser degree, because of her knowledge of the problems associated with navigation in the area. In response to Canadian requests, the owners of the Manhattan in return for the services of these icebreakers have agreed to make certain structural modifications, to post a six million dollar bond for pollution damage and to furnish Canada with research data obtained from the voyage.<sup>222</sup> To the extent that other owners also need the assistance of Canadian icebreakers, further acquiescence to Canadian requests is likely. In the area of compensation, owners of the Torrey Canyon in negotiations with British and French officials agreed to provide compensation. Similarly,

---

<sup>222</sup>H. C. Comm. on N. Devel. No. 15, at 20 (April 30, 1970); No. 17, at 19 (May 7, 1970); No. 16, at 24 (May 5, 1970). The challenge to this de facto control posed by plans of the United States Coast Guard to construct "the most powerful icebreaking fleet in the world" played a role in the House of Commons debates on the Arctic Waters bill. 114 H. C. Deb. 5973 (1970).

many tanker owners have entered into a voluntary agreement concerning liability for oil pollution (TOVALOP) whereby they have agreed to pay compensation for governmental expenses incurred in preventing and cleaning up pollution of a coastline.<sup>223</sup> These non-authoritative decisions by the private sector interacting with states may result in effective decisions.

---

<sup>223</sup>As of November 1969, fifty-five per cent of the gross registered tonnage of the world's privately owned tanker fleet had enrolled. Limitation on liability is established at \$100 per gross ton or \$10 million, whichever is less. Marine Pollution Bull. No. 17, at 17-18 (Nov. 1969).

#### IV. CLARIFICATION OF GOALS

Before evaluating the specific competences claimed for pollution control in contiguous high seas zones it is necessary to clarify the goals sought to be achieved. The goal of the international community in use of the oceans perhaps is typified by the currently popular phrase "for the benefit of mankind."<sup>224</sup> This concept is embodied in the phrase "freedom of seas" which includes "freedom of navigation" as set forth in article two of the Convention on the High Seas.<sup>225</sup> Although this Convention is of recent date, the concept of free access and use can be traced to the early seventeenth century.<sup>226</sup> This history teaches that the oceans are sufficiently immense to accommodate all who wish to navigate peacefully upon them and that the interests of too many nations are involved to allow any one nation to assert an exclusive claim to the ocean's vast reaches. Approximately seventy-one per cent of the Earth's surface, therefore, is dedicated to inclusive use for the benefit of mankind.

---

<sup>224</sup>See e.g. U. N. General Assembly Resolution 2574D (XXIV) of December 15, 1969.

<sup>225</sup>450 U.N.T.S. 82, 84 (1963).

<sup>226</sup>For an excellent history, see C. J. Colombos, International Law of the Sea 47-67 (6th ed. 1967).



Mankind benefits from the use of the oceans as an avenue of commercial and cultural interchange and as a means of maintaining minimum public order.

Cultural interchange has been facilitated by use of the oceans to transport human beings and their culture to the far reaches of the world. Modern air transport has rendered ocean transport as a means of cultural interchange far less meaningful. However, to the extent that freedom of overflight is dependent upon freedom of navigation, this benefit still derives from freedom of navigation.

The ability of naval forces to navigate upon the world's oceans enhances the protection of legitimate interests of nation-states. The freedom of navies to navigate serves not only to protect ocean commerce but also by facilitating naval mobility it serves to inhibit actions which could be disruptive of the world public order.<sup>227</sup> In addition to inhibiting disruption generally, naval mobility is also essential to collective and self-defense. The interests of a major power, like the United States, in maintaining freedom of navigation was summarized recently as follows: "Freedom of the seas must be maintained to protect the United States from

---

<sup>227</sup>See generally A. T. Mahan, The Interest of America in Sea Power, Present and Future (1897).

attack, to sustain our allies, to project our military power by sea when necessary, and to protect ocean commerce."<sup>228</sup>

Mankind's greatest benefit derives from the commercial exchange facilitated by the inclusive use of the oceans for transport. The inclusive nature of this activity is established by the fact that in 1968 fifty-nine states had significant merchant vessels participating in ocean transport.<sup>229</sup> Registry of vessels, however, is not necessarily indicative of the importance of ocean transport to a particular state. For example, in 1968 the United States and Canada ranked third and thirteenth respectively in merchant tonnage registered, but ranked second and seventh in total commercial commodities transported by sea.<sup>230</sup> Even though many nations do not own any ocean-going vessels, it is submitted that all nations, coastal and non-coastal, derive significant benefit from the efficient transport of commercial commodities by sea.<sup>231</sup> It is expected that this ocean

---

<sup>228</sup>1970 Marine Science Affairs 167.

<sup>229</sup>United Nations, 1968 Statistical Yearbook 418-419 (1969).

<sup>230</sup>Id. at 418-19, 421-30. Liberia, the ranking nation in tonnage registered, ranked twenty-fifth in exports transported by sea and eighty-fourth in imports. Ibid.

<sup>231</sup>See "Vessels entered and cleared and goods loaded

transport will double every twenty years for the foreseeable future.<sup>232</sup>

Although the vast reaches of the oceans do not admit of any special interest by a particular state, it is clear that sea areas adjacent to a coastal state reflect a relatively greater concentration of interests in the coastal state than any other state.<sup>233</sup> All coastal states have a common interest in asserting control in adjacent areas of the seas to protect their territorial integrity and to reap reward from any unique proximity they may have to the sea's living and mineral resources.<sup>234</sup> However, all states, whether coastal or not, have an interest in the fullest possible access to inclusive use of oceans for navigation. Therefore, it is in the interest of all states to accommodate conflicting uses by providing

---

and unloaded in external trade," United Nations, 1968 Statistical Yearbook 421-30 (1969). Almost one hundred per cent of international world trade in bulk raw materials is transported by sea, while air transported cargoes constitute less than three per cent of the value of all international commerce. E. P. Holmes, "Freedom of the Seas," 22 Naval War College Review 4, 6 (June 1970).

<sup>232</sup>Ibid.

<sup>233</sup>McDougal and Burke 51-52. The discussion which follows is drawn from their concise elaboration of "the common interest in an economic balance of exclusive and inclusive use." Id. at 51-56.

<sup>234</sup>Acknowledgment of the interests of coastal states in the adjacent sea can be found in the concepts of the territorial sea, exclusive fishing zones, continental shelf, and contiguous zones for fiscal, customs, sanitation and immigration purposes.

adequate protection of exclusive coastal interests while insuring the greatest access to inclusive use. This requires the restriction of exclusive claims by coastal states to the minimum reasonably necessary to protect their common interests. The factors relevant to reasonableness include: (a) the relationship between the claimed authority and the interests sought to be protected; (b) the nature and significance of the inclusive uses affected; and (c) the possibility of alternative methods of securing the coastal interest.<sup>235</sup>

All coastal states, it is submitted, have a common interest in protecting their well-being from the harmful effects of oil discharged at sea and in obtaining compensation for damages caused by pollution. The harm to coastal amenities with possible adverse economic consequences and the disruption of the social process may justify the exercise of some exclusive competence by coastal states. Accordingly, the goal postulated is to accord to coastal states only that degree of exclusive competence which is reasonable and necessary to prevent harm and to insure compensation. If alternatives to exclusive competence exist which will meet the interests of coastal states, those alternatives are preferred.

---

<sup>235</sup>McDougal and Burke 579-80, 583.

## V. TRENDS IN DECISION

Regarding the conflict between exclusive interests of the coastal states and the inclusive interests of the international community, accommodation has been achieved by according to the coastal states an exclusive competence within a narrow belt of seas adjacent to their coasts known as territorial seas.<sup>236</sup> The inclusive interests of the community are protected within these narrow belts by reserving to other states a right of innocent passage both in the territorial seas generally and through international straits where the inclusive interests are greatest.<sup>237</sup> Waters beyond the territorial seas, the high seas, are reserved for the use of the international community. Generally speaking, vessels on the high seas

---

<sup>236</sup>Grotius stated that his principle of freedom of the sea applied only to the "sea properly speaking," not to bays, straits or to the sea adjacent to the shore. Grotius, Freedom of the Seas 37 (Magoffin transl. 1916). Article one of the Convention on the High Seas and the Contiguous Zone uses traditional labels and states that the sovereignty of a State extends to a belt of sea adjacent to its coast. 516 U.N.T.S. 205 (1964).

<sup>237</sup>Convention on the Territorial Seas and the Contiguous Zone arts. 14, 16(4), 516 U.N.T.S. 205 (1964). And see McDougal and Burke 174-304. The recently announced policy of the United States on the law of the sea calls for "freedom of transit" through international straits. 9 Int'l Legal Materials 434, 438 (1970).

are subject to the exclusive competence of the flag state.<sup>238</sup>

This general pattern has been followed in dealing with oil pollution. Within the territorial sea, oil pollution has been treated as a problem of domestic concern and the legitimate subject of coastal state jurisdiction while pollution of the high seas has been deemed a matter of international concern and beyond the jurisdiction of any coastal state. Previous discussion has established that most oil pollution occurs as a result of operational discharges or as a result of a breach of the integrity of a ship. This distinction between casualty and non-casualty discharges has been observed in both domestic and international regulation of oil pollution. In the discussion which follows, the existing regime for prevention of casualty and non-casualty discharges will be examined. The proposed convention for compensating coastal states for oil pollution damage is discussed separately. An evaluation of the entire oil pollution regime will then be made to determine its adequacy in meeting the interests of coastal states.

---

<sup>238</sup>Convention on the High Seas arts. 2, 16, 450 U.N.T.S. 82 (1963). Exception is made for the exercise of competence by non-flag states in case of piracy, slave trade, flag-changing and hot pursuit. *Id.* at arts. 19, 22, 23. And see discussion of the contiguous zone, infra.

### A. Non-Casualty Discharges

The problem of oil pollution became a major concern in the 1920's as use of oil for fuel increased. In 1922, Great Britain sought protection of its territorial sea and harbors by enacting the Oil in Navigable Waters Act which made it an offense for a vessel "to discharge or allow the escape of oil into navigable waters except when due to the vessel being in a collision or to damage or accident and provided all reasonable means were taken by the master to prevent the escape of oil."<sup>239</sup> The United States followed Great Britain's example and enacted the Oil Pollution Act, 1924 which made the discharge of any oil into the coastal navigable water unlawful "except in case of emergency imperiling life or property, or unavoidable accident, collision, or stranding" or where

---

<sup>239</sup>12 & 13 Geo. 5, c. 39 (1922). Previously, the United States in 1886 had enacted legislation prohibiting the dumping of any ballast in New York Harbor. 24 Stat. 329 superseded by Act of June 29, 1888, 25 Stat. 207; 33 U.S.C. 441. In 1889, the United States enacted the Refuse Act which prohibited the dumping of any refuse into the navigable waters of the United States. 30 Stat. 1152; 33 U.S.C. 407. This Act subsequently was interpreted as to apply to oil discharged from ships. *United States v. Standard Oil*, 384 U.S. 224 (1966); *The La Merced*, 84 F. 2d 444 (9th Cir. 1936).

In 1913, South Australia and the Union of South Africa by regulation prohibited the discharge of oil into any harbor. C. J. Colombos, The International Law of the Sea 431 (6th ed. 1967).

otherwise permitted.<sup>240</sup>

By 1954, at least nine other states had laws or regulations prohibiting the discharge of oil into their territorial sea.<sup>241</sup> The effectiveness of these provisions in deterring discharges of oil into the territorial sea is dependent upon detection of the polluter and the application of a sufficient sanction. However, discharges of oil on the high seas often polluted the territorial sea of the coastal state. This problem was recognized as early as 1922 when the United States' Congress by joint resolution noted the damage done by the dumping of oil refuse on the high seas and requested the President to call a conference of maritime nations to consider the adoption of effective measures to prevent pollution

---

<sup>240</sup>43 Stat. 604; 33 U.S.C. 433.

<sup>241</sup>Brazil. United Nations Legislative Series, Laws and Regulations on the Regime of the Territorial Seas 80, U. N. Doc. No. ST/LEG/SER. B/6 (1957) [hereinafter cited as U.N.L.S., Territorial Seas]. China (Nationalist). U.N.L.S., Territorial Seas III. Columbia. 2 1952 Yearbook of the International Law Commission 29 [hereinafter cited as ILC Yearbook]. Cuba. United Nations Legislative Series, Laws and Regulations on the Regime of the High Seas 65, U. N. Doc. No. ST/LEG/SER. B/1 (1951) [hereinafter cited as U.N.L.S., High Seas]. Israel. U.N.L.S., Territorial Seas 154. Japan. U.N.L.S., Territorial Seas 155. New Zealand. U.N.L.S., Territorial Seas 214. Portugal. Pollution of the Sea by Oil 205, U. N. Doc. No. ST/ECA/41 (1956). Spain. U. N. Conference on the Law of the Seas Information Submitted by Governments Regarding Laws, Decrees and Regulations for the Prevention of Pollution of the Seas 52, U. N. Doc. No. A/Conf. 13/24 (1957).



of navigable waters.<sup>242</sup>

As a result of this Congressional action, an Inter-governmental Conference of Major Maritime Nations met in Washington in 1926. The Conference noted that a marked diminution of oil pollution had occurred after attention had been called to the problem. The Conference concluded that areas should be established around maritime countries in which no oil should be discharged. Each country was to establish its own area which was not to exceed fifty miles, although exception could be made allowing up to one hundred and fifty miles.<sup>243</sup> Representatives of thirteen governments signed the final draft, but none adopted the convention.<sup>244</sup> The International Shipping Conference (composed of private shipowners' organizations of the principle maritime countries) also met in 1926 and voluntarily entered into "gentleman's agreements" to refrain from discharging oily waters within fifty miles from any coast.

The problem of oil pollution was dealt with at the 1930 Hague Conference but only with respect to discharges within the territorial sea. A provisional draft was approved by the Second Committee which required foreign

---

<sup>242</sup> 42 Stat. 821 (1922).

<sup>243</sup> J. W. Mann, "The Problem of Sea Water Pollution," 29 Dept. of State Bull. 775, 776 (1953).

<sup>244</sup> M. M. Whiteman, Digest of Int'l Law 696 (1965).

vessels exercising the right of innocent passage to comply with the coastal state's pollution regulations.<sup>245</sup> After the unsuccessful Hague Conference, the League of Nations in 1935 decided to convene an international conference but it was not held because Germany, Italy and Japan refused to attend.<sup>246</sup> The advent of World War II precluded further efforts at international action.

Great Britain, at the same time the problem of oil pollution was being studied by the Economic and Social Council of the United Nations, undertook a study which resulted in recommendations substantially similar to those reached by the 1926 Washington Conference and by the League of Nations.<sup>247</sup> After consultations with the Secretary-General, Great Britain issued invitations to an international conference on oil pollution to be held in London on April 26, 1954. Thirty-two nations including Canada and the United States attended this conference that

---

<sup>245</sup>Acts of the Conference for the Codification of International Law, Minutes of the Second Committee, Territorial Waters art. 6, at 7, League of Nations Pub. No. C.351(b).M. 145(b).1930.V.

<sup>246</sup>J. W. Mann, supra note 243, at 777. The proposed treaty to be considered at the conference was based on the 1926 Washington Conference proposals. League of Nations, Communications and Transit Organization, Pollution of the Sea by Oil Doc. No. A.20.1935.VIII.

<sup>247</sup>H. C. Shephard and J. W. Mann, "Reducing the Menace of Oil Pollution," 31 Dept. of State Bull. 311, 312 (1954).

resulted in The Convention for the Prevention of Pollution of the Sea by Oil, 1954; however, only twenty nations were signatories to the Convention.<sup>248</sup> The United States, which had previously indicated that it did not believe international action was necessary,<sup>249</sup> did not sign the Convention because of the "shortness of time for preparation and difficulties of reconciling conflicting domestic views."<sup>250</sup> Canada, however, was a signatory and in 1956 enacted legislation to implement the Convention.<sup>251</sup> The Convention entered into force on July 26, 1958, twelve months after the date on which ten governments became parties to the Convention.<sup>252</sup> The

---

<sup>248</sup>327 U.N.T.S. 322-25 (1959).

<sup>249</sup>U. N. Doc. No. E/CN.2/100 (1950); U. N. Doc. No. E/CN.2/134 (1952).

<sup>250</sup>Hearings of the Senate Foreign Relations Committee on Ex. C. 86th Cong., 2nd Sess., at 2 (1960). The chairman of the U. S. delegation at the Conference announced that American ships voluntarily would observe the zones in which the Convention prohibited the discharge of oil. Id. at 9.

<sup>251</sup>4 & 5 Eliz. 2, ch. 34 (1956). Included within this enactment was a provision providing authority for the Governor in Council to issue regulations designed to prevent oil pollution of Canadian waters by ships. Id. at 212-13. This provision was repealed subsequently and a broader authorization was given to prevent pollution of Canadian waters by oil, chemicals or other substances from ships. 17 & 18 Eliz. 2, c.53, § 23 (1969).

<sup>252</sup>327 U.N.T.S. 3 n. 1 (1959).

United States subsequently overcame its domestic difficulties and ratified the Convention and it came into force for the United States on December 8, 1961.<sup>253</sup> In April, 1962, amendments to the 1954 Convention were adopted by the contracting governments and entered into force in May and June, 1967.<sup>254</sup>

In general, the Convention, as amended, prohibits the discharge or escape of oil or oily mixtures from a

---

<sup>253</sup>12 U.S.T. 4900; U.S. T.I.A.S. 4900. On February 15, 1960, the Convention was transmitted to the U. S. Senate for its advice and consent. Hearings before the Senate Foreign Relations Committee on Ex. C, 86th Cong., 2nd Sess. at 1 (1960). At that time, Belgium, Canada, Denmark, Finland, France, Germany, Ireland, Mexico, the Netherlands, Norway, Sweden and the United Kingdom had formally adopted the Convention without reservations. Id. at 5. On May 16, 1961, the U. S. Senate gave its advice and consent to ratification of the 1954 Convention subject to an understanding, two reservations and five recommendations. 107 Cong. Rec. 7416-7417 (daily ed. May 15, 1961). The understanding was that offenses in U. S. territorial waters will continue to be punishable under U. S. laws regardless of the ship's registry.

To implement provisions of the Convention, the U. S. Congress enacted the "Oil Pollution Act, 1961." Pub. L. No. 87-167, of Aug. 30, 1961, 75 Stat. 402-407; 33 U.S.C. §§ 1001-1015. This Act specifies that nothing therein modifies or amends the Oil Pollution Act of 1924. 75 Stat. 407; 33 U.S.C. § 1014. On December 8, 1961, the 1954 Convention entered into force and the Oil Pollution Act, 1961, also became effective on that date.

<sup>254</sup>9 Int'l Legal Materials 1 (Jan. 1970). The Oil Pollution Act of 1961 was amended in 1966 to conform with the 1962 amendments to the 1954 Convention. Pub. L. No. 89-551 of Sept. 1, 1966; 80 Stat. 372; 33 U.S.C. §§ 1001-1015.

ship within any prohibited area.<sup>255</sup> The prohibited zones generally extend fifty miles from the coasts of all countries with certain specified exceptions, some extending as far as one hundred miles from the baseline from which the territorial sea is measured. The zone on both the Atlantic and Pacific coasts of Canada extends one hundred miles from her territorial sea baseline. The prohibition of discharges within these zones does not apply to those made for the purpose of securing the safety of the ship or cargo or to discharges resulting from damage to the ship if all reasonable precautions are taken after the occurrence of the damage to prevent or minimize the escape.<sup>256</sup> Therefore, oil released as a result of a maritime casualty would not be a violation of this Convention.

Every ship to which the Convention applies is required to maintain an oil record book in which the discharge of any oil must be recorded. Further, the ship operator is required to record actions which could result in the spillage of oil or oily mixtures, such as

---

<sup>255</sup>Oil is defined to include crude oil, fuel oil, heavy diesel oil and lubricating oil. An oily mixture is a mixture which contains one hundred parts or more of oil in one million parts of the mixture.

<sup>256</sup>Also excepted are discharges of solid sediments and residues of fuel oil and lubricating oil resulting from purification or clarification. Amendments adopted in 1969 by the IMCO Assembly would delete this exception. Senate Ex. G., 91st Cong., 2nd Sess. 31 (1970).

deballasting and cleaning. State parties may board any ship to which the Convention applies while that ship is within one of its ports in order to inspect the oil record book.

The owner or master of any ship which violates the Convention shall be punished under the laws of the Contracting Government to which the ship belongs. Any party to the Convention may furnish evidence of a violation to another party whose ship has contravened the Convention. If satisfied that sufficient evidence is available to warrant prosecution under its law, the state of the violator shall institute proceedings. Thus, if a ship registered in Canada discharges oil into a prohibited high seas zone off the coast of the United States, only Canada may take action against the ship for that offense. The penalties imposed by a flag state for a discharge in violation of the Convention shall not be less than the penalties imposed by that state for discharges within its territorial sea.

The Convention reserves to the coastal state the competence to deal with discharges in that part of the prohibited zone constituting the territorial sea by stating that nothing in the Convention shall derogate from the powers of any state party "to take measures within its jurisdiction in respect of any matter to

which the Convention relates."<sup>257</sup> The right of a coastal state to punish foreign ships for discharges in its territorial sea was confirmed in the 1958 Geneva Convention on the Territorial Sea and the Contiguous Zone which requires foreign vessels exercising the right of innocent passage to comply "with the laws and regulations enacted by the coastal state in conformity with these articles and other rules of international law."<sup>258</sup> The International Law Commission in their commentary to this section listed "the protection of the waters of the coastal State against pollution of any kind caused by ships" as an example of the regulations with which a foreign vessel must comply.<sup>259</sup> Clearly, a coastal state may prohibit the discharge of oil by a foreign ship within its territorial sea.

As of May, 1970, forty countries, including the major maritime countries were parties to the Convention.<sup>260</sup> Despite widespread acceptance of the Convention, difficulties in the enforcement of its provisions has rendered the Convention less than effective. For

---

<sup>257</sup>The ratification of the Convention by the United States was subject to an understanding that "offenses in U. S. territorial waters will continue to be punishable under U. S. laws regardless of the ship's registry." 107 Cong. Rec. 7416-17 (daily ed. May 15, 1961).

<sup>258</sup>Article 17, 516 U.N.T.S. 205 (1964).

<sup>259</sup>2 ILC Yearbook 273-74 (1956).

<sup>260</sup>Senate Ex. G, 91st Cong., 2nd Sess. 7 (1970).

example, the vastness of the prohibited zone and its use for transit by many ships makes detection and proof of violations a serious problem. Unless the offending vessel is caught in the act of violating the Convention, it is very difficult to determine and assign responsibility for an observed slick. Further, most discharges of oil occur under cover of darkness rendering detection virtually impossible.<sup>261</sup> As an example of the problem detection poses, one need look only to the fact that the first prosecution of a British ship for violating Great Britain's 1955 legislation implementing the 1954 Convention occurred in August, 1969.<sup>262</sup>

Even if a violator is detected, successful prosecution poses an almost insurmountable hurdle. Because of the Convention's definition of prohibited oily mixtures, the prosecution must prove that the discharge contained one hundred parts or more of oil in one million parts of the mixture. Actual photographs of ships dumping oily wastes have not constituted sufficient evidence. A bottle of the liquid with other supporting evidence has been required.<sup>263</sup> Further diminishing the Convention's

---

<sup>261</sup>Clingan & Springer 24-25.

<sup>262</sup>Marine Pollution Bull. No. 14, at 22 (1969).

<sup>263</sup>Report of International Panel, III Panel Reports of the Commission on Marine Science, Engineering and Resources VIII-87 (1969).



effectiveness is the lack of uniform sanctions. Enforcement of violations under the Convention is by the flag state. If that state does not prescribe effective penalties in its legislation and apply them, a vessel under its flag, although cited for discharging oil in a prohibited zone, would not be penalized.

In May 1967, the IMCO Council instituted a complete review of the 1954 Convention. This review resulted in nine recommended amendments to the Convention which were adopted by the IMCO Assembly on October 21, 1969.<sup>264</sup> The principal change resulting from these proposed amendments is the total prohibition of oil discharge subject to certain exceptions. The discharge from a ship (other than tankers) of oil or oily mixtures is prohibited except when all the following conditions are met: (1) the ship is proceeding en route; (2) the instantaneous rate of discharge of oil content does not exceed sixty liters per mile; (3) the oil content of the discharge is less than one hundred parts per one million parts of the mixture; and (4) the discharge is made as far as practicable from land. As to tankers, the first two provisions are the same but the third provision limits the total discharge of oil on a ballast voyage to 1/15,000

---

<sup>264</sup>Letter submitting two conventions and amendments relating to pollution of the sea by oil from the Secretary of State to President, May 7, 1970 in Senate Ex. G, 91st Cong., 2nd Sess. at 5 (1970).

of the total cargo-carrying capacity and the fourth provision requires that the tanker be more than fifty miles from the nearest land. However, there is no prohibition of 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 waters on a clear day, would produce no visible traces of oil on the surface of the water."<sup>265</sup> These amendments, on May 20, 1970, were transmitted by the President of the United States to the Senate for its advice and consent.<sup>266</sup>

As to ships other than tankers, these amendments could facilitate prosecution if sixty liters per mile never results in a visible sheen. However, if such a discharge is visible, it will be as difficult to prove

---

<sup>265</sup>Id. at 31. The new Article III and the other eight amendments are also set forth in 9 Int'l Legal Materials 1-19 (1970). The 1969 Brussels Conventions on intervention on the high seas and liability for oil pollution damage also are located in this publication. Id. at 25, 45.

<sup>266</sup>Senate Ex. G, 91st Cong., 2nd Sess. at 1 (1970). On the same date these amendments were transmitted to the Senate, the President announced that since these amendments may not go into effect for some time he was instructing U. S. authorities to bring the provisions of these amendments into effect with respect to American vessels as soon as implementing legislation further amending the Oil Pollution Act of 1961 was adopted. The President also announced that there would be an increase in off-shore surveillance in the areas of highest spill potential. H. R. Doc. No. 91-340, 91st Cong., 2nd Sess. (1970).

that a discharge did exceed sixty liters per mile as it is to prove that a discharge contained one hundred parts or more of oil per one million parts of the mixture. Prosecution of tankers should be facilitated since any visible discharge of oil within fifty miles of a coast is prohibited. The amendments will not solve the problems of detecting the unlawful discharge or assigning responsibilities for an observed slick. Nor will the amendments insure uniform application of sanctions.

Within its territorial sea, a coastal state may apply uniform sanctions against vessels of all countries. Similarly, it may set its own standards as to what discharges are prohibited. For example, the 1924 oil pollution act of the United States prohibited virtually all discharges with certain limited exceptions.<sup>267</sup> Prior to its amendment in 1966, this legislation served as a basis of prosecution in over one hundred cases a year.<sup>268</sup> The 1966 amendments defined the word "discharge" to mean any "grossly negligent or willful spilling" of oil which rendered the Act virtually unenforceable.<sup>269</sup>

---

<sup>267</sup>Supra note 240 and accompanying text.

<sup>268</sup>Comment, "Oil Pollution of the Sea," 10 Harv. Int'l L. J. 316, 339 (1969).

<sup>269</sup>80 Stat. 1247; 33 U.S.C. 432(3). The 1966 amendments, however, did introduce a new section requiring anyone who discharged oil into the navigable waters of the United States to remove it. Upon failure of the

The 1924 Act, as amended, was repealed by the Water Quality Improvement Act of 1970 and all discharges of oil with very narrow exceptions now are prohibited within the U. S. territorial sea.<sup>270</sup> Difficulties of prosecution which may exist for discharges within the territorial sea are those created by the laws of the coastal state. As with discharges on the high seas, the major impediment to effective pollution prevention in the territorial seas is detection. Lacking detection, a potential polluter will not be deterred by the laws of either the coastal state or the flag state.

#### B. Casualty Discharges

Discharges resulting from damage to a ship came under intensive study after the spectacular Torrey Canyon incident. Canada in 1969 and the United States in 1970 enacted legislation authorizing immediate governmental intervention when a maritime casualty in the territorial sea poses a pollution hazard to its territory by actual or threatened discharge of large quantities of

---

polluter to remove the oil, governmental officials were authorized to remove the oil with the discharger liable for the costs. This liability would constitute a maritime lien against the vessel enforceable by a libel in rem.

<sup>270</sup>Pub. L. No. 91-224 § 11(b)(2), § 108 (Apr. 3, 1970).

oil.<sup>271</sup> This right to intervene encompasses not only the right to remove the ship or its cargo but also the right to destroy either. In view of the unsatisfactory results achieved by the British in their attempts to prevent pollution by bombing the Torrey Canyon thus insuring the release of all the oil, it would appear that destruction of a stricken vessel would be advisable only in the rarest of circumstances.

The Torrey Canyon incident also raised a question whether the right of a coastal state to intervene after a maritime casualty should be limited to the territorial sea as massive spills on the high seas may significantly affect the territorial sea and territory of the coastal state. The Torrey Canyon went aground ten miles from the nearest territory of Great Britain, outside of Britain's three mile territorial sea.<sup>272</sup> Oil released by the stranded vessel not only affected the Cornish coast fifteen miles away, but also the French coast of Brittany over one hundred and ten miles from the scene.<sup>273</sup>

---

<sup>271</sup>17 & 18 Eliz. 2, c. 53, § 24 (1969); Pub. L. No. 91-224, § 11(d) (Apr. 3, 1970).

<sup>272</sup>The Times (London), March 29, 1967, at 1, col. 1, quoted in A. E. Utton, "Protective Measures and the 'Torrey Canyon,'" 9 B. C. Ind. & Com. L. Rev. 613, 619 n. 41 (1968).

<sup>273</sup>Cowan 162. Some Torrey Canyon oil traveled as far as two hundred and twenty-five miles before polluting the beaches at Normandy. J. C. Sweeney, Oil Pollution of the Oceans, 37 Fordham L. Rev. 155, 158 (1968).

Following the Torrey Canyon incident, IMCO undertook a substantial study of the problems posed by a massive spill. The IMCO Legal Committee drafted a convention dealing with the right of the coastal state to intervene on the high seas when a tanker accident threatened that state. On November 28, 1968, the IMCO Assembly adopted a resolution authorizing the Secretary General to convene an international conference "for the purpose of adopting a convention or conventions on the subject of pollution damage arising from maritime casualties."<sup>274</sup> Pursuant to this resolution, the International Legal Conference on Marine Pollution Damage convened in Brussels on November 10, 1969 with fifty-four countries represented. This conference resulted in the International Convention Relating to Intervention on the High Seas in Cases of Oil Pollution Casualties, hereinafter referred to as the Intervention Convention,<sup>275</sup> which was signed by eighteen countries.<sup>276</sup> The United States signed the Con-

---

<sup>274</sup>Report of the U. S. Delegation to the International Legal Conference on Marine Pollution Damage, Brussels, Belgium, Nov. 10-29, 1969 in Senate Ex. G., 91st Cong., 2nd Sess. at 36-37 (1970).

<sup>275</sup>This Conference also produced the International Convention on Civil Liability for Oil Pollution Damage. Both Conventions are set forth in 64 Am. J. Int'l L. 471 and 481 (1970) and in 9 Int'l Legal Materials 25 and 45 (1970).

<sup>276</sup>Belgium, Cameroon, Republic of China, West Germany, France, Ghana, Guatamala, Iceland, Italy, Ivory Coast,

vention and has taken steps toward ratification.<sup>277</sup> Canada, which had abstained from the voting, did not sign.

The Intervention Convention provides that, following a maritime casualty, a state 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 the threat of pollution of the sea by oil. A maritime casualty is defined as a collision of ships, stranding or other incident of navigation or other occurrence resulting in material damage or imminent threat of material damage to a ship or cargo. Related interests which may be protected in addition to the coastline include (1) maritime coastal, port or estuarine activities, including fishing, which constitute an essential means of livelihood of the persons concerned; (2) tourist attractions of the area concerned; and (3) the health of the population and the well-being of the area concerned, including conservation of living marine resources and of

---

Malagasy Republic, Monaco, Poland, Portugal, Switzerland, United Kingdom, United States and Yugoslavia signed both the Intervention and Liability Conventions. Indonesia signed only the Liability Convention and Korea signed only the Intervention Convention. 9 Int'l Legal Materials 20-21 (1970).

<sup>277</sup>On May 20, 1970, the Convention was submitted to the Senate for its advice and consent to ratification. Senate Ex. G, 91st Cong., 2nd Sess. at 1 (1970).

wildlife.<sup>278</sup> The right to intervene against a maritime casualty on the high seas does not extend to any warship or government ships on non-commercial service.

Prior to taking any action, a coastal state must consult with interested states, especially the flag state. Furthermore, the coastal state should notify any person, physical or corporate, which can reasonably be expected to be affected by those measures. However, in cases of extreme emergency, the coastal state may take action rendered necessary by the situation without prior notification or consultation.

Any measures taken by the coastal state must be proportionate to the damage, actual or threatened. To determine whether the measures are proportionate to the damage, account will be taken of (1) the extent and probability of imminent damage if those measures are not taken; (2) the likelihood of those measures being effective; and (3) the extent of damage which may be caused by such measures. A coastal state taking actions in contravention of the Convention causing damage to others shall pay compensation to the extent of the damage caused by measures which exceed those reasonably necessary. In the event of disagreement as to whether compensation is due or as to the amount thereof, the dispute shall be

---

<sup>278</sup>Art. II (4).



submitted to conciliation or, if necessary, to arbitration upon the request of any interested party. The failure of a claimant to exhaust remedies under the domestic law of an intervening coastal state shall not entitle that state to refuse conciliation and arbitration.

Canada took the view that a coastal state should not be required to undertake the potential financial liability for disproportionate measures in relation to states which were not prepared to accept the corresponding financial obligations imposed by the liability convention. Canada proposed, therefore, that there be one convention, in two parts if necessary. The Canadian proposal was rejected by a vote of ten for, twenty-four against. The United States voted against the proposal.<sup>279</sup>

A coastal state, therefore, could prevent threatened pollution or abate further pollution from a maritime casualty by intervening in its territorial sea or, after this Convention enters into force, on the high seas. The view has been expressed that the Intervention Convention codifies existing international law.<sup>280</sup> Under

---

<sup>279</sup>Report of the U. S. Delegation, Senate Ex. G, 91st Cong., 2nd Sess. at 42 (1970).

<sup>280</sup>A. I. Mendelsohn, "Maritime Liability for Oil Pollution--Domestic and International Law". 38 Geo. Wash. L. Rev. 1, 28 (1969).

this view, the right already exists for a threatened coastal state to intervene against a stricken foreign ship on the high seas.

### C. Compensation

The difficulties a coastal state may encounter in attempting to obtain compensation for pollution damage caused by discharges on the high seas or in the territorial sea have been discussed previously.<sup>281</sup> The IMCO study initiated after the Torrey Canyon incident considered, in addition to intervention, the liability of a polluting vessel for damage caused. The resulting International Convention on Civil Liability for Oil Pollution Damage, hereafter referred to as the Liability Convention, was signed by eighteen states at the 1969 Brussels Conference.<sup>282</sup> Canada, which cast the only vote against the proposed convention, did not sign it. The United States, which was a signatory, has initiated steps leading to ratification.<sup>283</sup>

---

<sup>281</sup>Supra notes 71-75 and accompanying text.

<sup>282</sup>Supra note 276.

<sup>283</sup>On May 20, 1970 the Liability Convention and that relating to intervention were submitted by the President to the U. S. Senate for its advice and consent. Senate Ex. G, 91st Cong., 2nd Sess. at 1 (1970). Because of conflicts between the Liability Convention and the Water Quality Improvement Act, hearings have been conducted on the Convention by the Senate Public Works Subcommittee

The Convention deals only with the liability of ships carrying oil in bulk as cargo (tankers). It provides that the owner of a tanker, other than a warship or non-commercial public vessel, is liable for any pollution damage caused by oil which has escaped or been discharged from the ship except where the owner can prove the damage (1) resulted from an act of war or act of God; (2) was wholly caused by the act or omission done with intent to cause damage by a third party; or (3) was wholly caused by the negligent or wrongful act of any Government or other authority responsible for the maintenance of navigational aids in the exercise of that function. Liability for pollution damage includes the costs of preventive measures and further damage caused by preventive measures. Unlike the U. S. provision, liability extends to private claims and to claims by states. The application of the Convention is limited to pollution damage caused on the territory of a coastal state including the territorial sea.<sup>284</sup>

---

on Air and Water Pollution. Senator Muskie, the subcommittee chairman stated that U. S. refusal to ratify could result in a better convention. Mr. Neuman, assistant legal adviser for the Department of State who served as Chairman of the U. S. delegation to the Brussels Conference, rejoined stating that the result of such refusal might be no convention at all. B.N.A. Environment Reporter, Current Developments 303 (1970).

<sup>284</sup>Art. II. Therefore, the expense of removing oil from ice in arctic high seas areas would not be within the liability created by this Convention.

A tanker owner is entitled to limit his liability for any one incident to an aggregate amount of one hundred and thirty-four dollars for each ton of the ship's tonnage, not to exceed fourteen million dollars, except when the incident occurred as the result of the actual fault or privity of the owner. To avail himself of the benefit of this limitation, the tanker owner must constitute a fund for the total amount of his liability with the authorities of the state in which pollution damage to the territory or territorial sea has occurred. If the fund has been properly constituted, no person claiming pollution damage is entitled to levy against any other assets of the owner in respect to the claim, and authorities of the coastal state must order the release of any ship or property of the owner which has been arrested or any security which has been deposited. No claim for compensation for pollution damage against the owner is allowed except in accordance with the Convention.

To insure that the owner of a vessel subject to the Convention has adequate assets to meet his potential liability, the Convention requires the owner of a ship carrying more than two thousand tons of oil in bulk as cargo to maintain insurance or other financial security in an amount equal to the limit of his liability. To enforce the required financial responsibility no

state shall permit any ship under its flag which is required to maintain financial liability to trade unless a certificate has been issued by the state attesting that the requisite financial responsibility has been established. Further, each state must ensure that all ships wherever registered, carrying over two thousand tons of oil in bulk as cargo, are insured or covered by other security before allowing them to enter or leave either a port in its territory or an offshore terminal in its territorial sea. Any claim for pollution damage may be brought directly against the person providing financial security for the owner's liability. The person providing financial responsibility is entitled to constitute a fund under the same conditions and with the same effects as if constituted by the owner.

To meet objections by some delegations that cargo owners should bear some of the risk and that fourteen million dollars might not be sufficient to provide full and adequate compensation for pollution damage, a proposal was made at the Brussels Conference that an international fund be established to compensate victims for any damage suffered beyond the limits of the ship's liability. The fund would be constituted by a levy on the carriage of oil up to a fixed amount (thirty million dollars was suggested) with contributions based on the

number of tons of oil carried by sea. Liability would be limited to the amount of the fund. If an incident occurred depleting the fund, an additional levy would be imposed to bring it back up to the full amount. Due to the shortage of time, many of the delegations agreed to accept liability on the ship with limitations on liability if the other delegations would adopt a resolution directing IMCO to study the international fund idea and to convene, not later than 1971, a conference for the consideration and adoption of such a scheme.<sup>285</sup> Such a resolution was adopted and it set forth two principles to be considered in elaborating the fund scheme:

- (1) Victims should be fully and adequately compensated under a system based upon the principles of strict liability.
- (2) The fund should in principle relieve the shipowner of the additional financial burden imposed by the Convention.<sup>286</sup>

#### D. Evaluation of the Existing Regime

Within their territorial sea, coastal states have exercised competence to prevent pollution damage from

---

<sup>285</sup>Report of the Delegation, Senate Ex. G, 91st Cong., 2nd Sess. 36, 44-46.

<sup>286</sup>Id. at 45. The American Petroleum Institute has indicated its support of the fund concept if the fund responds only after all remedies from the Liability Convention, regional funds and from the Tanker Owners Voluntary Agreement Concerning Liability for Oil Pollution (TOVALOP) have been exhausted. Letter from B. H. Lord, Jr., Director of Division of Transport, American Petroleum Institute of June 26, 1970.

occurring by prohibiting the discharge of oil. The effectiveness of the prohibition in deterring non-casualty discharges is dependent upon detection of the polluter and the imposition by the coastal state of sanctions sufficient to deter future discharges. The Convention for the Prevention of Pollution of the Sea by Oil, 1954, as amended, provides a zone fifty miles from the coastal state in which most discharges are prohibited. The difficulties of proof created by the discharges presently excepted from the prohibition will be ameliorated somewhat by the 1969 amendments which prohibit all visible discharges by tankers within fifty miles of a coast. Detection of a polluting vessel lies with the coastal state while enforcement of sanctions lies with the flag state. To the extent that flag states do not, or are unable to, punish the violator effectively, the protection of the coastal state provided by this Convention is diminished. Detection of the routine spill in these vast zones, as in the territorial sea, remains the greatest obstacle to effective prevention of oil pollution damage to coastal interests.

The 1954 Convention does not deal with the prevention of damage caused by casualty discharges or with liability for pollution damage. The 1969 Brussels Conventions encompass liability for pollution damage and

prevention of pollution damages from casualty discharges. The Intervention Convention allows the coastal state to take preventive measures on the high seas following a maritime casualty to reduce the danger of pollution damage to coastal interests. But the Convention does not allow the coastal state to take measures prior to the occurrence of a maritime casualty. The coastal state, therefore, is not allowed under this Convention to take measures on the high seas contiguous to its coast to prevent a maritime casualty from occurring.

The Liability Convention clearly establishes that the owner of a vessel carrying oil in bulk as cargo is liable for all damages to the territory or territorial sea of a coastal state caused by a discharge of oil no matter where the discharge occurs. The liability is strict with the burden upon the owner to establish that the pollution resulted from one of the three very limited exceptions. The liability of the ship extends not only to the actual damage caused by the oil itself but also to the costs of preventing or minimizing pollution damage and to damages those preventive measures may cause. For vessels carrying less than two thousand tons of oil in bulk as cargo, the Convention does not insure that assets will be available to the coastal state. However, if the flag state is a party to the convention,



liability of the vessel for the damage is established and if the owner has other assets, there is an inducement for the owner to constitute a fund in the coastal state to avail himself of the right to limit liability. For vessels carrying more than two thousand tons of oil in bulk, the Convention requires that the vessel owner maintain insurance or other evidence of financial responsibility up to the limits of the vessel's liability. The coastal state may sue the insurer or other person providing financial responsibility directly. Thus, there would be assurance that assets would be available to the coastal state once responsibility for pollution damage has been determined. It is possible that massive spills could result in damage in excess of fourteen million dollars or one hundred and thirty-four dollars per ton but establishment of an additional thirty million dollars in an international fund probably would provide funds sufficient to meet any foreseeable damage to a coastal state.

Although the primary thrust of the Liability Convention is not preventive in nature, it is clear that this should be an indirect result. First, the clarification of liability for oil pollution damage ought to provide an additional incentive for tanker owners to avoid the intentional discharge of oil and to exercise

even greater care in navigation. Further, the requirement of insurance or other financial responsibility also should result in a reduction of pollution. To the extent that premiums are dependent upon past intentional discharges or the present pollution safety of the vessel, the requirement of insurance should induce tanker owners to reduce the risk of casualty or non-casualty discharges of oil.

In summary, if all major maritime nations were parties to the 1954 Convention and to the two 1969 Conventions significant protection of the interests of most coastal states would result. The 1954 Convention with the 1962 and 1969 amendments if vigorously enforced by all parties, would deter many non-casualty discharges of oil. As to casualty discharges, the Intervention Convention would allow the coastal state to intervene against a foreign vessel on the high seas to prevent threatened pollution or abate further pollution from a maritime casualty. The Liability Convention insures that the coastal state will be compensated for pollution damage by establishing the vessel's liability for damages and by requiring financial responsibility to meet that liability. The compulsory insurance requirements of the Liability Convention could lead to the prevention of maritime casualties as owners take significant steps to

reduce the risk of oil discharges in order to obtain a lower premium. Forty nations are parties to the 1954 Convention; only seventeen are signatories to the 1969 Conventions. Of the forty nations party to the 1954 Convention, not all enforce its provisions with equal vigor. The 1969 Conventions have not entered into force and may never obtain the support necessary to enter into force (or they may find very wide acceptance and enter into force at an early date). Significant interests of the coastal state, therefore, may not be met by the existing regime.

VI. CLAIMS TO EXCLUSIVE COMPETENCE  
IN THE HIGH SEAS CONTIGUOUS  
TO THE TERRITORIAL SEA

Previously, the conflict between exclusive interests and inclusive use was described noting that accommodation had been achieved by according the coastal state exclusive competence in the territorial sea. Coastal states, however, have claimed and exercised exclusive competence in zones of high seas contiguous to their territorial sea. The development of the contiguous zone concept through its embodiment at Geneva in the Convention on the Territorial Sea and the Contiguous Zone is examined in this section. An attempt will then be made to determine whether pollution control is included within the Geneva formulation.

A. Development of the Contiguous Zone Concept

As early as 1736, Great Britain claimed the right in waters nine miles beyond its three-mile territorial sea to seize and prosecute any ship which landed goods without payment of duty.<sup>287</sup> In the period from 1802 to

---

<sup>287</sup>9 Geo. 2, c. 35 (1736). Cited and discussed in W. E. Masterson, Jurisdiction in Marginal Seas with Special Reference to Smuggling 26 (1929) [hereinafter cited as Masterson.].

1825, the claim of competence was extended over certain vessels hovering within three hundred miles of the British coast.<sup>288</sup> With the decline of smuggling, British claims beyond the territorial sea were reduced and by 1876 legislative authorization was limited to six miles of contiguous high seas.<sup>289</sup>

In 1790, the United States, although claiming a three mile territorial sea, required foreign vessels within twelve miles of its coast to have a cargo manifest available for inspection by a U. S. official.<sup>290</sup> Subsequently, the U. S. Supreme Court in 1804 was called upon to consider the exercise of competence by a coastal state beyond its territorial sea. In Church v. Hubbart the Court had to decide whether the seizure of an American

---

<sup>288</sup>45 Geo. 2, c. 121 (1805). The Act was limited to vessels belonging in whole or in part to His Majesty's subjects, or where one-half of the persons on board were such subjects. Masterson 77. Since British law precluded registry of any vessel owned in part by a foreigner, the Act was applicable to foreign flag vessels. Id. at 61.

<sup>289</sup>39 & 40 Vict. c. 36, discussed in Masterson 151-152. Professor Jessup concluded that abandonment of hovering acts was "apparently upon the theory that they were not consistent with international law." P. C. Jessup, The Law of Territorial Waters and Maritime Jurisdiction 91 (1927). The better view, however, seems to be that "jurisdiction and control to enforce protective laws should only be extended beyond territorial waters where necessary and should be withdrawn once the necessity for extension ceases to exist." L. M. Hydemann and W. H. Berman, International Control of Nuclear Maritime Activities 195 (1960).

<sup>290</sup>Act of Aug. 4, 1970, c. 35, 1 Stat. 145.

vessel four or five leagues from the Brazilian coast was "a loss arising from illicit trade." If it were such a loss, the insurer of the vessel would not be liable for its loss. The insured contended that the conduct that precipitated the seizure could not be a violation of Portuguese law because it occurred so far from shore. The seizure, the insured contended, was unlawful and not within the exception of the insurance policy. Chief Justice Marshall, stating that a coastal state could exercise power to secure itself from injury beyond the limits of its territory, added:

Any attempt to violate the laws made to protect this right [to monopolize colonial trade] is an injury to itself, which it may prevent, and it has the right to use the means necessary for its prevention. These means do not appear to be limited within any certain marked boundaries, which remain the same, at all times and in all situations. If they are such as unnecessarily to vex and harass foreign lawful commerce, foreign nations will resist their exercise. If they are such as reasonable and necessary to secure their laws from violation, they will be submitted to.<sup>291</sup>

The Chief Justice concluded that a coastal state's authority was not limited to its territorial sea by citing the U. S. twelve-mile revenue rule as a "declaration that in the opinion of the American government, no such principle as that contended for [limiting competence to the

---

<sup>291</sup>6 Cranch (2 U.S.) 187, 234 (1804).

territorial sea] has a real existence."<sup>292</sup>

Exercise of authority beyond the territorial seas by the U. S. expanded with the advent of Prohibition. Importation of intoxicating liquors into the United States was prohibited, and to enforce this exclusion the U. S. felt required to exercise authority against foreign vessels on the high seas contiguous to the territorial sea.<sup>293</sup> The exercise against foreign ships seeking to bring liquor into the United States by seizure beyond the territorial sea provoked protests by the flag states.<sup>294</sup> Although the United States rejected these protests, it nonetheless entered into negotiations which resulted in a series of treaties which accorded to the U. S. the right to board vessels outside the limits of the territorial sea if reasonable cause existed for believing the vessel was committing or attempting to commit a violation of the prohibition against importation of alcoholic beverages.<sup>295</sup>

International activity in the late 1920's crystallized expert opinion concerning the exercise of competence

---

<sup>292</sup>Id. at 235.

<sup>293</sup>P. C. Jessup, The Law of Territorial Waters and Maritime Jurisdiction 211-352 (1927).

<sup>294</sup>Id. at 245-47.

<sup>295</sup>Id. at 289-90. And see Convention between United Kingdom and United States for Prevention of Smuggling of Intoxicating Liquors, 43 Stat. 1761 (1921).

for limited purposes beyond the territorial sea. The Harvard Research in International Law in 1929 proposed:

Article 20. The navigation of the high sea is free to all states. On the high sea adjacent to the marginal sea, however, a state may take such measures as may be necessary for the enforcement within its territory or territorial waters of its customs, navigation, sanitary or police laws or regulations or for its immediate protection.<sup>296</sup>

The commentary to this proposed article acknowledges that this proposal modifies the general principle of freedom of navigation on the high sea but views the modification as entirely reasonable "in view of the fact that it represents the long established practice of many states."<sup>297</sup> The Basis of Discussion for the Hague Codification Conference of 1930 proposed a more restrictive authority beyond the territorial sea:

On the high seas adjacent to its territorial waters, the coastal State may exercise the control necessary to prevent, within its territory or territorial waters, the infringement of its customs or sanitary regulations or interference with its security by foreign ships. Such control may not be exercised more than twelve miles from the coast.<sup>298</sup>

Although the 1930 Codification Conference was unable to reach agreement, "the contiguous zone concept appeared

---

<sup>296</sup>Research in International Law, Harvard Law School, Nationality, Responsibility of States, Territorial Waters 333-34 (1929).

<sup>297</sup>Id. at 334.

<sup>298</sup>Conference for the Codification of International



to a majority to be desirable for meeting particular needs."<sup>299</sup>

In 1935, the United States enacted the Anti-Smuggling Act which authorized the establishment of customs enforcement zones extending sixty-two miles from the coast.<sup>300</sup> Only five seizures of foreign ships appear to have occurred under this Act, two within ports and two within twelve miles. However, one British ship was seized thirty-six miles from the coast.<sup>301</sup>

By 1950 when the International Law Commission began its consideration of the contiguous zone, a proposal authorizing a coastal state to exercise "specific administrative powers beyond the territorial sea" evoked no opposition.<sup>302</sup> The International Law Commission in the commentary to their 1956 proposals stated "International

---

Law, Basis of Discussion 34, League of Nations Pub. No. C.74.M.39.1929.V.

<sup>299</sup>McDougal and Burke 601. And see the conclusions of P. C. Jessup, supra note 293, at 459; and Masterson 380-84.

<sup>300</sup>49 Stat. 517, 19 U.S.C. 1701. During hearings on this legislation an excellent review of hovering legislation was presented. Yntema, "Validity of Hovering Legislation in International Law" in Hearings before the House Committee on Ways and Means on H. R. 5496, 74th Cong., 1st Sess. 82 (1935). And see Jessup, "The Anti-Smuggling Act of 1935," 31 Am. J. Int'l L. 101 (1937).

<sup>301</sup>L. M. Hydeman and W. H. Berman, International Control of Nuclear Maritime Activities 192-93 (1960).

<sup>302</sup>I ILC Yearbook 204-05 (1950).

law accords States the right to exercise preventive or protective control for certain purposes over a belt of the high seas contiguous to their territorial sea."<sup>303</sup> The Commission, therefore, put forward a proposal creating a twelve-mile contiguous zone for the protection of the coastal States' fiscal, customs and sanitation interests.<sup>304</sup> The conferees meeting at Geneva during the 1958 Law of the Sea Conference adopted the International Law Commission's proposed draft. Article 24 of the Convention on the Territorial Sea and the Contiguous Zone states:

1. In a zone of the high seas contiguous to its territorial sea, 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.
2. The contiguous zone may not extend beyond twelve miles from the baseline from which the breadth of the territorial sea is measured.<sup>305</sup>

---

<sup>303</sup>II ILC Yearbook 294 (1956).

<sup>304</sup>Article 66. Ibid.

<sup>305</sup>U. N. Conference on the Law of the Sea, Plenary Meetings 135 (1958). For a more comprehensive examination of the exercise of competence by coastal states beyond the territorial sea, see Dickinson, "Jurisdiction at the Maritime Frontier," 40 Harv. L. Rev. 1 (1926); P. C. Jessup, The Law of Territorial Waters and Maritime Jurisdiction (1927); Masterson; McDougal and Burke 585-606.

## B. Sanitary Regulations and Oil Pollution

The United States claim of competence to control pollution in a zone of high seas extending nine miles beyond its territorial sea is predicated upon the authority under Article 24 of a coastal state to prevent infringement of its sanitary regulations.<sup>306</sup> An examination of the deliberations of the International Law Commission and of the discussions at Geneva should reveal whether the drafters of Article 24 intended sanitary regulations to include control of oil pollution.

### 1. Deliberations of the International Law Commission

#### a. the contiguous zone

At the 1950 session of the International Law Commission, Mr. Amado, of Brazil, submitted a statement of principle: "A sovereign State may exercise specific administrative powers beyond the limits of its territorial waters in order to protect its fiscal and customs interests . . ."<sup>307</sup> Judge Hudson requested that Mr. Amado agree to insert the word "sanitary" into the text: "within that zone a sovereign State had also the right to protect its sanitary interests. A number of American

---

<sup>306</sup>Supra notes 90-99 and accompanying text.

<sup>307</sup>Principle No. 5, I ILC Yearbook 204 (1950).

States set great store by that principle . . . "308

Without further definition, it was agreed that coastal states also could protect sanitary interests beyond the limits of their territorial seas.

The fact that immediately prior to the discussion of Mr. Amado's proposal the Commission declined to examine the general problem of marine pollution suggests that "sanitary interests" did not include pollution.<sup>309</sup> This view is buttressed by the fact that the Commission in their report to the General Assembly listed fiscal, customs and health as the interests which could be protected in the contiguous zone.<sup>310</sup>

Prior to the third session of the International Law Commission, a compilation of laws and regulations of various states relating to the high seas was published by the United Nations.<sup>311</sup> This compilation discloses that two states purported to exercise some measure of control over marine pollution beyond their territorial

---

<sup>308</sup>Id. at 204-05.

<sup>309</sup>Examination of the question of marine pollution was refused because: 1) it was being considered by other United Nation bodies and; 2) since there was no "international legislation" dealing with marine pollution there was consequently "nothing to codify." I ILC Yearbook 204 (1950). And see discussion, infra notes 333-37.

<sup>310</sup>II ILC Yearbook 364 (1950).

<sup>311</sup>United Nations Legislative Series, Laws and Regulations on the Regime of the High Seas, Volume I, U. N. Doc. No. ST/LEG/SER. B/I (1951) [hereinafter cited as UNLS, High Seas].

waters. Cuba prohibited the discharge from ships of oil or "waste matter of any kind . . . at a distance less than five miles from the coast."<sup>312</sup> In 1936 when this provision was adopted, Cuba claimed a six-mile territorial sea, but from 1942 to the date the compilation was published she claimed only a three-mile territorial sea.<sup>313</sup> Japan, in 1949, promulgated a port regulation which provided that no person should discharge refuse within ten thousand meters (approximately six miles) from the boundaries of a port.<sup>314</sup> Japan claimed a three-mile territorial sea.

In 1951, Egypt, with a six-mile territorial sea, established a zone of an additional six miles for the enforcement of statutes and regulations relating to "security, navigation, revenue and health."<sup>315</sup> Whether Egyptian health regulations included control over pollution of the sea is not indicated in the compilation.

With this information available, the third session

---

<sup>312</sup>Id. at 65.      <sup>313</sup>Id. at 66.

<sup>314</sup>Ibid. Subsequently, Japan informed the United Nations that this provision did not apply to foreign flag vessels more than three miles from her coast. United Nations Legislative Series, Supplement to Laws and Regulations on the Regime of the High Seas (Volumes I and II) and Laws Concerning the Nationality of Ships 26 n. 3, U. N. Doc. No. ST/LEG/SER. B/8 (1959) [hereinafter cited as UNLS, High Seas Supp.].

<sup>315</sup>UNLS, High Seas 307.

of the Commission again considered contiguous zones. Special Rapporteur Francois led off the discussion by summarizing that states claimed power to exercise "customs and sanitary control in the contiguous zone;" that these claims had been admitted by the 1930 Hague Codification Conference; and that they had been accepted in principle by the Commission the previous year.<sup>316</sup> Francois thereafter pointed out that very few states actually had issued sanitary regulations.<sup>317</sup> Although there was extensive discussion concerning the breadth of the contiguous zone, no further light was shed upon the meaning the Commission ascribed to the word "sanitation." The article proposed by this 1952 meeting of the Commission stated: "On the high seas adjacent to its territorial waters, a coastal state may exercise the control necessary to prevent the infringement, within its territory or territorial waters, of its customs, fiscal and sanitary regulations."<sup>318</sup> The commentary to this proposed article is revealing of the Commission's intent regarding the definition of "sanitary interests." Paragraph three of the commentary says "the Commission believes that in view of the connection between customs and sanitary regulations, the contiguous zone of 12 miles should be

---

<sup>316</sup>I ILC Yearbook 324 (1951).    <sup>317</sup>Ibid.

<sup>318</sup>II ILC Yearbook 417 (1951).

recognized for purposes of sanitary control as well."<sup>319</sup>  
 A connection between customs and pollution is far more  
 tenuous than the connection between customs and sanitary  
 regulations designed to prevent the introduction of  
 disease into a country. Subsequent meetings of the Inter-  
 national Law Commission prior to 1956 fail to provide  
 additional insight into the meaning of sanitary as used  
 in the article on the contiguous zone.

At the 1956 session of the Commission, a discussion  
 occurred between three of its members which reinforces  
 the view that the Commission intended sanitary regulations  
 to mean regulations designed to prevent the importation  
 of disease.

Mr. ZOUREK . . . . In his opinion the Com-  
 mission, at its second session, had been  
 correct in maintaining that a "State might  
 exercise such control as was required for  
 the application of its fiscal, customs and  
 health laws, over a zone of high seas  
 extending for such a limited distance be-  
 yond its territorial waters as was neces-  
 sary for such application . . . ."

Mr. AMADO . . . . It was equitable that a  
 coastal State should exercise control in  
 the contiguous zone in order to protect  
 certain specific interests; he had in mind,  
 in particular, sanitary regulations and  
 the prevention of the introduction of  
 disease into Brazil with its vast coastline  
 . . .

Mr. HSU, endorsing Mr. Amado's view, said

---

<sup>319</sup>Ibid.

that the risks of disease through immigration could perfectly well be covered by sanitary regulations.<sup>320</sup>

The statement of Mr. Hsu states the justification for deleting immigration from the Commission's 1956 draft. Nothing in the discussion indicates that sanitary regulations were meant to encompass anything more than the prevention of the introduction of disease into a country. The 1956 final draft provides that in "a zone of the high seas contiguous to its territorial sea, the coastal State may exercise the control necessary to (a) prevent the infringement of its customs, fiscal or sanitary regulations within its territory or territorial sea . . ."<sup>321</sup> The commentary to this final draft is similar to the 1952 draft and states that although "the number of States which claim rights over the contiguous zone for the purpose of applying sanitary rights is fairly small, the Commission considers that, in view of the connexion between customs and sanitary regulations, such rights should also be recognized for sanitary regulations."<sup>322</sup> Nothing in the International Law Commission's discussions of the contiguous zone indicates that the Commission intended sanitary regulations to include regulations against oil pollution. Marine pollution,

---

<sup>320</sup>I ILC Yearbook 76 (1956).

<sup>321</sup>II ILC Yearbook 294 (1956). <sup>322</sup>Ibid.



however, was discussed by the Commission in their deliberations on innocent passage and in their examination of the right of the coastal state to protect the living resources against oil pollution in the waters adjacent to its coast. Therefore, before reaching a final conclusion as to whether the Commission intended the contiguous zone to protect against oil pollution, these two areas of the Commission's deliberations must be examined.

b. innocent passage

Regarding innocent passage through the territorial sea, the draft article produced by the 1954 session of the Commission stated in proposed article 17 that passage is not innocent if a ship makes use of the territorial sea "for the purpose of committing any act prejudicial to the security or public policy of that State or to such other of its interests as the territorial sea is intended to protect."<sup>323</sup> The original draft of this article had stated "fiscal interests" in addition to security and public policy.<sup>324</sup> Professor Scelle suggested that it would be better to state "sanitary and fiscal interests." Mr. Liang, Secretary to the Commission, pointed out that the report of the Second Committee

---

<sup>323</sup>II ILC Yearbook 158 (1954).

<sup>324</sup>I ILC Yearbook 105 (1954).

of the 1930 Codification Conference suggested that "fiscal interests" included such matters as public health regulations.<sup>325</sup> Concluding that no listing of interests would be exhaustive, the Commission resolved the issue by deleting the word "fiscal" and adopting the draft set forth above. The commentary to this article defined "such other interests" as including "inter alia, questions relating to immigration, customs and health as well as the interests enumerated in draft article 21."<sup>326</sup>

Professor Lauterpacht, in discussing the text of this commentary said that it should include "fiscal, public health, sanitation, immigration and customs matters."<sup>327</sup> Ensuing discussion did not elaborate a distinction between public health and sanitation matters rendering it impossible to determine whether Professor Lauterpacht's usage was merely a redundancy or a listing of two distinct interests. It is doubtful that Mr. Lauterpacht meant to draw a distinction extending sanitation to include pollution control. Article 21, to which the commentary he was considering refers, specifically states that foreign vessels exercising the right of passage shall comply with coastal state regulations which have as their purpose "(b) The protection of the waters of the coastal State

---

<sup>325</sup>Ibid.      <sup>326</sup>II ILC Yearbook 190 (1954).

<sup>327</sup>I ILC Yearbook 190 (1954).

against pollution of any kind caused by vessels."<sup>328</sup> Since this article is specifically incorporated into the commentary of article 17, there seems little likelihood that Professor Lauterpacht intended sanitation in his listing of interests to include an interest already set forth in article 21.

In 1956, the draft article defining innocent passage had been renumbered as article 15 and stated in part that passage was not innocent if acts committed during passage were "prejudicial to the security of the coastal State or contrary to the present rules or to the other rules of international law."<sup>329</sup> The commentary to this draft text stated, as had the 1954 commentary, that the general clause covers "inter alia, questions relating to customs and health as well as those interests enunciated in article 18."<sup>330</sup> Article 18 was substantially modified

---

<sup>328</sup>II ILC Yearbook 159 (1954).

<sup>329</sup>II ILC Yearbook 272 (1956).

<sup>330</sup>Ibid. That this article 15 was meant to include those interests which a coastal State could control in the contiguous zone is indicated by the statement of Mr. Pal.

The analogy of the article on the contiguous zone, which had specifically referred to the exercise by the coastal State of the control necessary to prevent and punish the infringement, within the territorial sea of its customs, fiscal and sanitary regulations, was a useful guide . . .

I ILC Yearbook 200 (1956).

at the 1956 session of the Commission. It stated:  
 "Foreign ships exercising the right of passage shall comply with the laws and regulations enacted by the coastal State in conformity with the present rules and other rules of international law and, in particular, with the laws and regulations relating to transport and navigation."<sup>331</sup> The commentary to this article gives examples of laws and regulations with which a foreign ship must comply when exercising the right of passage. These examples, not meant to be exhaustive, include "the protection of the waters of the coastal State against pollution of any kind caused by ships . . . and . . . observance of rules relating to security, customs and health regulations."<sup>332</sup> The Commission's deliberations on innocent passage, therefore, support the view espoused earlier that "sanitary regulations" which could be enforced in the contiguous zone were not intended to include pollution control. Regulations against marine pollution caused by ships, however, could be enforced in the territorial sea.

#### c. oil pollution

Examination of the Commission's deliberations on the general problem of oil pollution does not lead to a contrary conclusion. At the 1951 session, a proposal was

---

<sup>331</sup> II ILC Yearbook 273 (1956). <sup>332</sup>Id. at 273-74.

placed before the Commission which authorized a coastal state in a two hundred mile wide zone contiguous to its territorial sea to exercise the restrictions "necessary to prevent the pollution of those waters by fuel oil."<sup>333</sup> After this proposal had been defeated by a tie vote, the Commission adopted a draft article which deleted the two hundred mile zone and all reference to oil pollution. The commentary to this draft article, however, did discuss the problem of pollution.

The pollution of the waters of the high seas presents special problems, not only with regard to the conservation of the resources of the sea but also with regard to the protection of other interests. The Commission noted that the Economic and Social Council has taken an initiative in this matter.<sup>334</sup>

The UNESCO initiative referred to was discontinued after England initiated action which led to the Convention for the Prevention of Pollution of the Sea by Oil, 1954.<sup>335</sup> As we have seen, this Convention prohibits the discharge of oil or oily mixtures by vessels within certain prohibited zones, generally fifty miles from a coast.

The International Law Commission when it submitted its final draft articles in 1956 made specific reference

---

<sup>333</sup>I ILC Yearbook 308 (1951).

<sup>334</sup>II ILC Yearbook 143 (1951). And see discussion, supra note 247.

<sup>335</sup>4 M. M. Whiteman, Digest of International Law 696-700 (1965).

to this Convention. The Commission proposal, designed to protect the high seas against oil pollution, places the burden on every state to "draw up regulations to prevent pollution of the seas by the discharge of oil from ships or pipelines or resulting from the exploitation of the seabed and its sub-soil, taking account existing treaty provisions on the subject."<sup>336</sup> The commentary to this article sets forth in detail the Commission's view of the problem and its solution.

Water pollution by oil raises serious problems: danger to the life of certain marine species, fish and birds; pollution of ports and beaches; fire risks. Almost all maritime States have laid down regulations to prevent the pollution of their internal waters and their territorial sea by oils discharged from ships. But these regulations are clearly inadequate. Petroleum products discharged on the high seas may be washed towards the coasts by currents and wind. All States should therefore enact regulations to be observed, even on the high seas, by ships sailing under their flags, and the observance of these regulations should be controlled. It is obvious that only an international solution of the problem can be effective. A conference held in London for the purpose drafted the International Convention for the Prevention of Pollution of the Sea by Oil, 1954. This Convention has not yet come into force.<sup>337</sup>

This commentary sets forth the Commission's belief that unilateral state action would be inadequate to deal with the problem oil pollution creates. In view of the

---

<sup>336</sup>II ILC Yearbook 285 (1956).    <sup>337</sup>Id. at 285-86.

Commission's knowledge of the fifty mile prohibited zones established in the 1954 Convention, the twelve mile contiguous zone authorized by the draft article on the contiguous zone would not meet the Commission's view of the threat that oil pollution presented.

d. the intent of the International  
Law Commission

Examination of the proceedings of the Commission leads to the following conclusion: When the International Law Commission authorized a coastal state to exercise in the contiguous zone the control necessary to prevent infringement of its sanitary regulations, the Commission intended sanitary regulations to include only those regulations necessary to prevent the introduction of disease into the coastal state—the Commission did not intend "sanitary regulations" to include regulations against oil pollution. The Commission, however, did provide protection in their draft articles of the territorial and high seas against marine pollution. In the territorial sea, a foreign ship exercising passage was to observe rules protecting the waters of the coastal state against pollution of any kind caused by ships. Beyond the territorial sea, states were to draw regulations against oil pollution to be observed by all ships sailing under their flag taking into account "existing

treaty provisions."

## 2. Geneva Conference on the Law of the Sea

Having concluded that the International Law Commission did not intend sanitary regulations to include regulations against oil pollution, the more important, and more difficult, task remains of attempting to determine the intent of the conferees at Geneva. Prior to examining the official records of the Conference, the preparatory material which was prepared after the Commission submitted its final draft in 1956, must be examined.

### a. preparatory materials

In 1957, the Secretariat published a compilation of laws and regulations of various states dealing with the territorial sea.<sup>338</sup> This compilation includes the laws of Poland and the Dominican Republic which purport to establish contiguous zones. The Polish law, dated 1948, allows officials to arrest in the contiguous zone and escort to a specified port, any ship which commits a breach of "health regulations."<sup>339</sup> The Dominican Republic contiguous zone was established in 1952 to

---

<sup>338</sup>United Nations Legislative Series, Laws and Regulations on the Regime of the Territorial Seas, U. N. Doc. No. ST/LEG/SER. B/6 (1957) [hereinafter cited as UNLS, Territorial Seas].

<sup>339</sup>Id. at 237.



prevent "contravention of Dominican legislation relating to public health . . ." <sup>340</sup> Whether these regulations extend to pollution control is not answered by the compilation. The compilation further clarifies the Japanese regulation banning discharge of refuse three miles beyond her territorial sea by stating that it was not applicable to foreign vessels. <sup>341</sup> The compilation also lists the laws of five states including the United States which prohibited the discharge of oil or refuse in ports or territorial waters. <sup>342</sup>

Other preparatory materials include a mimeographed supplement to the compilation of laws and regulations dealing with the high seas. <sup>343</sup> This supplement lists a Saudi Arabian law, dated February 16, 1958, which purported to establish a six mile contiguous zone, outside of her twelve mile territorial sea, for assuring compliance "with the laws of the Kingdom relating to security,

---

<sup>340</sup>Id. at 12.

<sup>341</sup>UNLS, Territorial Seas 175. This explanation was also noted in UNLS, High Seas Supp. 26 n. 3.

<sup>342</sup>Supra note 241. Also listed is 1919 law of the Union of South Africa which dealt with an unusual type of pollution:

No person shall bury at sea the dead body of any person within a distance of three nautical miles from the low water line on any part of the coast of the Union.

<sup>343</sup>A/Conf. 13/27. In 1959, this mimeographed supplement was published as UNLS, High Seas Supp. Id. at iii.

navigation, fiscal and sanitary matters."<sup>344</sup>

When the conferees assembled at Geneva they therefore had available to them the compilations on the territorial seas, the high seas and the supplement to the high seas compilation. These compilations contained information demonstrating that only Cuba purported to exercise control to prevent discharge of oil in a zone beyond its territorial sea. The Dominican Republic, Egypt and Poland had a similar zone in which they exercised control to enforce "health" regulations. Saudi Arabia was the only nation having a zone listed beyond its territorial sea in which it enforced "sanitary" regulations.

Also available to the conferees was a synoptical table prepared by the Secretariat which listed the breadths of the territorial sea and adjacent zones claimed by members of the United Nations.<sup>345</sup> Although this synoptical table is not available readily, a revision of that

---

<sup>344</sup>Id. at 29-30.

<sup>345</sup>A/Conf. 13/C. 1/L.11. A note prepared by the Secretary-General prior to the Second Conference on the Law of the Sea states:

During the first United Nations Conference on the Law of the Sea, the Secretariat prepared, at the request of the First Committee and in consultation with the delegations, a synoptical table concerning the breadth and juridical status of the territorial sea and adjacent zones of the States represented at the Conference.

Second UN Conference on the Law of the Sea, Official Records 157 (1960).

table which was used at the Second Law of the Sea Conference has been published. This second table is "based upon" the original synoptical table and incorporates changes subsequent to the first conference.<sup>346</sup> It will be assumed that the second table is similar in all relevant respects to the original, with only minor changes not affecting the organization of the original synoptical table.

The original table is important because it lists the special purposes states sought to protect in and beyond their territorial seas. Among the interests listed are customs and sanitary regulations. Under the heading "sanitary regulations," Columbia and Cuba are listed as having sanitary regulations dealing with "pollution of the sea." In addition, the sanitary regulation heading lists Portugal and the United States as having sanitary regulations concerning "pollution by oil." It is unclear from the note of the Secretary-General preceding this table whether the Secretariat on its own initiative placed these four pollution laws under the sanitary regulations heading or if the four nations concerned requested the Secretariat to place these laws under that heading. In any event, this table is the only indication found in any of the preparatory materials which indicates

---

<sup>346</sup>Ibid.

sanitary regulations include regulations against pollution.

As to Columbia and Cuba, the table makes clear that the area in which they enforce their pollution regulations extends beyond their territorial sea. This table, therefore, lists two countries with contiguous zones and labels their pollution control regulations in these zones as "sanitary regulations."

b. meetings of the first committee

The First Committee's deliberations on the territorial sea and the contiguous zone contain no answer as to whether oil pollution regulations were intended to be within the meaning of sanitary regulations. The discussions are unenlightening except to the extent one may wish to draw inferences from the use of "health regulations" interchangeably with "sanitary regulations."<sup>347</sup>

The First Committee, however, did have before it one document which might indicate that sanitation included pollution. During their discussions, a memorandum of the World Health Organization was brought to the attention of the First Committee.<sup>348</sup> This memorandum,

---

<sup>347</sup>E.g., III UN Conference on the Law of the Sea, First Committee (Territorial Sea and Contiguous Zone) 13, 33 (1958).

<sup>348</sup>Id. at 105.

in part, states:

Under [the contiguous zone article]  
 . . . a coastal State would be entitled  
 [in the contiguous zone] to . . . cer-  
 tain rights regarding the enforcement  
 of sanitary regulations . . .  
 In light of the limitations of the sani-  
 tary measures which may be applied by  
 States to shipping, the World Health  
 Organization understands [the contiguous  
 zone article] as not implying the right  
 of States to extend existing permissible  
 sanitary measures, in particular with  
 respect to transit traffic. Moreover,  
 since medical inspection of ships and  
 any consequent sanitary measures such  
 as disinfecting and deratting can only  
 be carried out effectively in ports  
 equipped for the purpose, the World  
 Health Organization believes the need  
 for careful consideration should be  
 given the actual need for the special  
 provision envisaged in [the contiguous  
 zone article] insofar as sanitary  
 measures are concerned.<sup>349</sup>

Unfortunately, the official records of the First Com-  
 mittee contain no discussion of this World Health Organ-  
 ization resolution. Had the records shown that the Com-  
 mittee agreed with the resolution and nonetheless re-  
 tained "sanitary regulations" in the contiguous zone  
 article, this would establish that the Committee intended  
 the term to mean more than disease control.

The First Committee adopted the Commission's 1956  
 draft including "sanitary regulations" with no clarifying

---

<sup>349</sup>This document, Doc. A/Conf. 13/36, is set forth  
 in the Annex, I U.N. Conference on the Law of the Sea,  
Preparatory Documents 339 (1958).

discussion. The only alteration the First Committee made of the 1956 draft was to include immigration in the listing of interests which a coastal state could protect in the contiguous zone.<sup>350</sup>

The First Committee's discussions concerning innocent passage provide even less insight and do not merit examination.

#### c. meetings of the second committee

The discussions of the Second Committee, while not directly concerned with the definition of "sanitary regulations," support the conclusion drawn from examination of the International Law Commission's deliberations on oil pollution in the high seas.

In the Second Committee, the United States sponsored a resolution to delete the Commission's proposal calling upon all states to draw up regulations for the prevention of oil discharges by ships flying their flag. In lieu of the Commission's language, the United States proposed that the conferees adopt a resolution recommending "that States render all possible assistance to the interested international organizations and that, pending the outcome of the studies of the respective organizations, States promote national programmes designed to

---

<sup>350</sup>III UN Conference on the Law of the Sea, First Committee (Territorial Sea and Contiguous Zone) 182 (1958).

minimize the possibility of pollution of the sea by oil."<sup>351</sup> A proposal by the United Kingdom also called for deletion of the draft article on oil pollution and adoption of a resolution expressing the belief that the objectives of the deleted article "will be achieved by States participating in the International Convention of 12 May 1954."<sup>352</sup> After discussion of these two proposals both were withdrawn and the Commission text was adopted with minor modification.<sup>353</sup>

The Second Committee, therefore, believed that all states had an obligation to prevent oil pollution of the high seas by enacting regulations for ships flying their flag. That portion of the high seas contiguous to the territorial sea was to be controlled by this general article, not by the contiguous zone article.

#### d. plenary meetings

The records of the plenary meetings are unenlightening as to the scope of sanitary regulations. The primary debate regarding the contiguous zone dealt with its

---

<sup>351</sup>Doc. A/Conf. 13/C. 2/L. 106 in IV UN Conference on the Law of the Sea, Second Committee (High Seas: General Regime) 145 (1958).

<sup>352</sup>Doc. A/Conf. 13/C. 2/L. 96/Rev. 1. Id. at 142.

<sup>353</sup>Id. at 92. An amendment was adopted inserting "and exploration" between "exploitation" and "of the seabed." Ibid.

breadth and the question of whether fishing could be regulated within the zone. The conferees concluded that fishing should not be included and adopted as the final text the proposal put forward by the International Law Commission as adopted by the First Committee.<sup>354</sup>

e. the intent of the Geneva Conference

A positive statement as to whether the conferees at Geneva intended to include within sanitary regulations, regulations against marine pollution cannot be made with absolute assurance.

The synoptical table and the resolution of the World Health Organization provide some support for the position that pollution control is included within sanitary regulations. However, the bulk of the discussions leading to Geneva and at Geneva give substantial doubt that the "sanitary regulations" referred to in article 24 of the Convention of the Territorial Sea and the Contiguous Zone include regulations against pollution of the sea.<sup>355</sup>

---

<sup>354</sup>II UN Conference on the Law of the Sea, Plenary Meetings 40 (1958).

<sup>355</sup>The International Panel of the Commission on Marine Science, Engineering and Resources concluded that it was "questionable" whether sanitary regulations included regulations against marine pollution. Report of the International Panel, III Panel Reports of the Commission on Marine Science, Engineering and Resources VIII-87 (1969). And see The Restatement of the Foreign Relations



The scheme devised by the International Law Commission for dealing with oil pollution was adopted at Geneva. Coastal states can exercise competence over foreign ships to prevent oil pollution only when the vessels are within the territorial sea. On the high seas, each state is to regulate ships flying its flag to prevent oil pollution. The contiguous zone was limited to preventing infringement of the coastal state's fiscal, customs and immigration regulations as well as its sanitary regulations dealing with the control of disease.

### C. Appraisal

Even though pollution control may not have been contemplated in the formulation of the contiguous zone article of the Geneva Convention, the protection of coastal interests from pollution damage by the exercise of competence in a contiguous zone may yet be permissible. Therefore, the ability of the contiguous zone as formulated at Geneva to meet realistically perceived coastal interests must be examined.

#### 1. Competence to Apply Authority in the Contiguous Zone

---

Law of the United States which would recognize the authority of the coastal state in the contiguous zone to prevent "the entry of persons or goods into its territory." American Law Institute Restatement of the Foreign Relations Law of the United States § 21 (1962).

Article 24, it will be recalled, provides that a coastal state may exercise the control necessary to prevent infringement of its various regulations within its territory or territorial sea and to punish infringement of those regulations committed within its territory or territorial sea. Since a discharge of oil in the adjacent high seas could enter, or pose a threat of entering, the territorial sea, such discharges would infringe pollution prevention laws of the coastal state.<sup>356</sup> The problem created by the Geneva formulation, however, relates to the authority of the coastal state to punish infringements by foreign vessels within the contiguous zone.

The head of the American delegation at the 1958 Conference concluded that while a state may prohibit certain activities within the contiguous zone "it seems dubious from the language of subsection (b) of Article 24 Par. 1 that the coastal state can punish infractions of such rules."<sup>357</sup> While this interpretation of the language

---

<sup>356</sup>Recall that the U. S. legislation authorized the President to prohibit those discharges which threaten "fishing resources or threaten to pollute or contribute to the pollution of the territory or territorial sea of the United States." Supra note 103. The United States claims exclusive fishing rights in a nine mile zone contiguous to its territorial sea. 80 Stat. 908; 16 U.S.C. 1092.

<sup>357</sup>Dean, "The Geneva Conference on the Law of the Sea: What was Accomplished," 52 Am. J. Int'l L. 607, 624 (1958). Sir Gerald Fitzmaurice of the English

of article 24 may be a correct literal interpretation, it is quite clear that historically states did apply authority beyond their territorial seas.<sup>358</sup>

The U. S. Department of State during hearings on ratification of the Convention of the Territorial Sea and the Contiguous Zone, took the position that article 24 confirmed the U. S. practice of arresting and imposing criminal sanctions for violations of its customs laws in the zone beyond the territorial sea.<sup>359</sup> Professors McDougal and Burke have concluded:

In the absence of a demonstration of the disappearance of factors which have caused states for some decades to assert, and reciprocally honor, claims to an occasional, exclusive competence to authority beyond the territorial sea, it would appear most doubtful that many states will in fact act upon an agreement that their competence is limited to the exercise of a protective jurisdiction which does not include enforcement of coastal laws.<sup>360</sup>

It seems reasonable to assume, therefore, that states

---

delegation took a different perspective and found that "in the territorial sea the foreigner is bound voluntarily to submit, whereas in the contiguous zone he is bound to do so only if compelled." Fitzmaurice, "The Law and Procedure of the International Court of Justice, 1951-54: Points of Substantive Law-I," 31 Brit. Yb. Int'l L. 371, 380 (1954). For a critical evaluation of these views, see McDougal and Burke 630.

<sup>358</sup>Supra notes 287-301 and accompanying text.

<sup>359</sup>Hearings on Conventions on the Law of the Sea before the Senate Committee on Foreign Relations, 86th Cong., 2nd Sess. 82, 93 (1960).

<sup>360</sup>McDougal and Burke 607.

will continue actively to enforce laws in contiguous zones to protect significant coastal interests.

## 2. Breadth of the Zone

The Geneva formulation has been criticized for its projection of a single permissible width of twelve miles. Professors McDougal and Burke deem it "improbable" that states will abandon important claims asserted beyond the twelve mile limit.<sup>361</sup> Previous commentators had urged that flexibility is necessary and that an attempt to set a precise limit of so many miles was "impracticable,"<sup>362</sup> "futile" and "illogical."<sup>363</sup> The Harvard Research in International Law in commentary to their proposed article stated:

It would seem to serve no useful purpose to attempt to state what is adjacent in terms of miles as the powers described in this article are not dependent upon sovereignty over the locus and are not limited to a geographical area which can be thus defined. The distance from shore at which these powers may be exercised is determined not by mileage but by the necessity of the littoral state and by the connection between the interests of its territory and the acts performed on the high sea.<sup>364</sup>

---

<sup>361</sup>Ibid.

<sup>362</sup>P. C. Jessup, The Law of Territorial Waters and Maritime Jurisdiction 460 (1927).

<sup>363</sup>Brown, "Protective Jurisdiction," 34 Am. J. Int'l. L. 112, 114 (1940).

<sup>364</sup>Research in International Law, Harvard Law School,

Chief Justice Marshall in the oft-cited case of Church v. Hubbart also recognized that the extent of high seas in which the coastal state can exercise competence for certain purposes must be flexible:

These means [to protect coastal interests] do not appear to be limited within any certain marked boundaries, which remain the same at all times and in all situations . . . .  
 In different seas, and on different coasts, a wider or more contracted range, in which to exercise the vigilance of the government, will be assented to. Thus in the Channel, where a very great part of the commerce to and from all the north of Europe, passes through a very narrow sea, the seizure of vessels on suspicion of attempting an illicit trade, must necessarily be restricted to very narrow limits; but on the coast of South America, seldom frequented by vessels but for the purpose of illicit trade, the vigilance of the government may be extended somewhat further; and foreign nations submit to such regulations as are reasonable in themselves, and are really necessary to secure that monopoly of colonial commerce, which is claimed by all nations holding distant possessions.<sup>365</sup>

It would seem, therefore, that there may be distances other than twelve miles which may be reasonable and necessary to protect legitimate coastal interests.

### 3. Interests Which May be Protected

Commentators have criticized the drafters of article 24 for its rigid formulation which does not provide the

---

Nationality, Responsibility of States, Territorial Waters  
 334 (1929).

<sup>365</sup>U. S. (2 Cranch), 87, 234-36 (1804).

flexibility needed to meet state interests:

With the developing technology and expanding enlightenment, new uses of the oceans, portending also new benefits and harms unique to particular states bordering on the oceans, appear certain to emerge. It can scarcely be regarded as an appropriate clarification of the common interests of states to project a formulation of the purposes for which they may exercise a reasonable exclusive competence which both omits important contemporary shared interest and forecloses the protection of new, emerging interests whatever their importance or urgency.<sup>366</sup>

This rigidity is surprising in light of the previously published views of several important commentators.

Professor Gidel in a document prepared in 1950 for the International Law Commission stated there were numerous other interests besides customs and fiscal which could be protected in the contiguous zone. He deemed it "neither possible nor desirable" to attempt a complete listing.<sup>367</sup> Gidel's view is similar to that espoused in the commentary to the contiguous zone article proposed in 1929 by the Harvard Research in International Law.<sup>368</sup> Similarly, the Committee of Experts of the League of Nations

---

<sup>366</sup>McDougal and Burke 607.

<sup>367</sup>U. N. Secretariat, Memorandum on the Regime of the High Seas 28-29, UN Doc. No. A/CN.4/32 (1950).

<sup>368</sup>That commentary states that it is "neither possible nor desirable" to list the interests which could be protected in the contiguous zone. Research in International Law, Harvard Law School, Nationality, Responsibility of States, Territorial Waters 335 (1929). The text of the article, proposed by the Harvard Research lists "customs, navigation, sanitary or police laws or

provided needed flexibility in their draft proposal by allowing states to exercise "administrative rights" beyond their zone of sovereignty on the grounds "either of custom or vital necessity."<sup>369</sup> Despite these precedents which clearly favored a flexible contiguous zone, article 24 was propounded in all its rigidity by the International Law Commission and adopted by the conferees at Geneva.

The rigidity of this article led Professors McDougal and Burke in 1962 to view "any prediction that states will be able to live, and secure their common interests, within such limitations . . . as most precarious."<sup>370</sup> Just how precarious was demonstrated as state after state unilaterally claimed zones contiguous to their territorial sea in which they sought to establish exclusive rights to fishery resources. By 1966, twenty-two nations had established nine mile fishing zones.<sup>371</sup> These contiguous zone claims, designed to protect wealth,<sup>372</sup>

---

regulations, or for its immediate protection." The commentary, however, points out that this proposal merely indicates the general fields in which international practice has demonstrated national necessities. *Id.* at 333-35.

<sup>369</sup>Publications of the League of Nations, V. Legal Questions, 1926 v. 10, 49 (1926). And see Church v. Hubbard, supra note 365 and accompanying text.

<sup>370</sup>McDougal and Burke 607.

<sup>371</sup>House Report 2086, 89th Cong., 2nd Sess. 2 U. S. Code Cong. and Admin. News 3282, 3287 (1966).

<sup>372</sup>McDougal and Burke 605.

prompted the United States to claim a zone of nine miles contiguous to its territorial sea in which exclusive fishing rights were asserted.<sup>373</sup> In view of the now widespread acceptance of such claims<sup>374</sup> these zones have been accepted as reasonable by the international community.

The protection of fishery resources in the contiguous zone is not one of the interests listed in article 24. In fact, the International Law Commission and the conferees at Geneva in 1958 and in 1960 specifically discussed

---

<sup>373</sup>Public Law 89-658; 80 Stat. 908. Since the Act stipulates that the baseline for the nine mile zone is to be the outer edge of the territorial sea, the United States may increase its exclusive fishing zone merely by delimiting a broader territorial sea. The United States has announced a willingness to agree at an international conference to a twelve mile territorial sea. The Miami Herald, March 30, 1970, at 19-A. If such an action were taken by the United States, an exclusive fishing zone, therefore, would be established automatically extending twenty-one miles from the coast. A similar result would not occur under the Water Quality Improvement Act of 1970 since the definition of the contiguous zone is based on article 24 of the Convention on the Territorial Sea and the Contiguous Zone. Pub. L. No. 91-224 § 11(a)(9) (Apr. 3, 1970). That article specifically limits the breadth of the contiguous zone to a distance not greater than "twelve miles from the baseline from which the breadth of the territorial sea is measured." U. S. T.I.A.S. 5639; 15 U.S.T. 1606, 1612 (1964).

The U. S. State Department views on this legislation are summarized in H. R. Rep. No. 2086, 89th Cong., 2nd Sess. 2 U. S. Code Cong. and Admin. News 3282, 3283 (1966).

<sup>374</sup>At the beginning of 1970, twenty-three states with territorial seas less than twelve miles claimed exclusive fishing rights out to twelve miles; forty-four claimed territorial waters out to twelve miles; and eight claimed a two hundred mile band of territorial sea. 1970 Marine Science Affairs 281-284. Uruguay and Brazil



and rejected inclusion of fishery resource protection.<sup>375</sup> Nonetheless, through a pattern of mutual claim and reciprocal tolerance, a consensus has developed that such zones are permissible. Reasonableness is the criteria which the international community used in evaluating this claim. It is submitted that reasonableness, not strict interpretation of the intent of the International Law Commission and the Geneva Conference, is the criteria by which future claims to competence in waters contiguous to the territorial sea will be evaluated.<sup>376</sup>

---

recently joined the two hundred mile states. 8 Int'l Legal Materials 1067 (1969); N. Y. Times, March 26, 1970.

<sup>375</sup>International Law Commission Report, UN General Assembly, Official Records, 11th Session, Supplement No. 9, at 40, UN Doc. No. A/3159 (1956). For an extensive examination of the Geneva discussions, see McDougal and Burke 529-48.

<sup>376</sup>Professor Jessup in his examination of claimed competence to enforce customs laws beyond the territorial sea stated: "There seems, however, to be sufficient evidence of acquiescence in reasonable claims to warrant the assertion that a customary rule of international law has grown up under which such acts may be held legal if they meet the test of reasonableness." P. C. Jessup, The Law of Territorial Waters and Maritime Jurisdiction 95 (1927).

Professors McDougal and Burke formulate a similar criteria:

The major problem in specific strategy posed by claims to exclusive authority in contiguous zones is, thus, to permit the necessary extensions of coastal interests and, simultaneously, to promote and to protect the widest possible range of inclusive uses and interests, free of coastal interference. Accommodation of the resulting conflicts

## VII. CONTIGUOUS ZONES FOR POLLUTION CONTROL

In the view of some commentators, control of oil pollution is an interest which a coastal state may seek to advance by the exercise of some competence in a zone of high seas contiguous to its territorial sea. Hyde, writing in 1945, found that "a state whose domain is adjacent to the polluted area is not prevented by the laws of nations from exercising a preventive jurisdiction on the high seas if it is capable of establishing a direct causal connection between discharges within a particular area of those seas and damages within its adjacent territorial limits."<sup>377</sup> Professors McDougal and Burke reach a similar conclusion but properly limit the competence of a coastal state to those measures which can be made effective.

Since the impact of pollution is usually upon coastal residents, the coastal state has an understandable interest in preventing the discharge of oil and oily substances in

---

between inclusive and exclusive interests has been achieved historically by application of a standard of reasonableness . . .

McDougal and Burke 579.

<sup>377</sup>1 C. C. Hyde, International Law, Chiefly as Interpreted and Applied by the United States 757 (2nd. ed. 1945).

such a way that harmful pollution results. If it were practicable for the coastal state to enact and enforce prohibitory regulations applicable in adjacent seas, there would seem to be sufficient justification for considering this permissible under general community policy. To the extent, therefore, that a coastal state could exercise sufficient effective control it would be appropriate to permit it to prohibit the discharge of oil that would, or could reasonably be thought to, damage marine life and property in the vicinity.<sup>378</sup>

The interests of a coastal state in protecting itself from pollution damage and in obtaining compensation if damage should occur are common interests of all coastal states. Those interests may justify the exercise of some competence by coastal states in adjacent areas of the high seas.

From the previous discussion of the effects of oil pollution, the U. S. and Canadian claims, and the trends in decision, it is possible to extrapolate a list of the possible claims a coastal state could assert. Such a listing would include those claims set forth in the major headings which follow. Under each heading the competence claimed is evaluated in terms of the goals previously stated. Since it would be impossible to evaluate properly the extent of any zone without knowledge of the competence sought to be exercised, the breadth of the zone will be evaluated under each specific claim.

---

<sup>378</sup>McDougal and Burke 849.

A. Claims to Deter Non-Casualty Discharges

Non-casualty discharges can be deterred by the application of sanctions of sufficient severity to render it undesirable to discharge oil intentionally or knowingly and to induce more careful handling of ship's equipment. Effective deterrence of non-casualty discharges naturally would result in reduced pollution damage to the coastal state. Under the existing regime, the coastal state in the territorial sea may prescribe what discharges are prohibited and apply sanctions for discharges which violate that standard. Beyond the territorial sea, the international community through the 1954 Convention prescribes the standard and reserves the application of sanctions to the flag state. The competence sought to be exercised by a coastal state under this claim could include not only the right to apply the sanction for violation of a standard, but also the right to prescribe that standard.

The standards prescribed by the present 1954 Convention are unenforceable in practice since proof must be adduced that the discharge included more than one hundred parts of oil for every million parts of mixture. The 1969 amendments, however, will facilitate proof of wrongful discharges from tankers within fifty miles of land by prescribing a standard based not on content but

on visibility. This standard can be enforced effectively and would protect the coastal state from known harmful consequences. Therefore, if the 1969 amendments enter into force a satisfactory alternative to coastal state prescription of a standard would exist at least as to tankers. The coastal state, however, may desire to set its own standards which can be enforced effectively with respect to non-tankers since the international standards, even after the 1969 amendments, may present great difficulties of proof.

No matter who prescribes the standard in high seas zones, difficulties will remain if enforcement is left to the flag state. If that state does not prescribe and apply effective penalties, a vessel under its flag will not be deterred from future discharges. The alternative is to allow the coastal state to apply the sanction for violations of the international standard. This alternative would not create a burden on inclusive use if the sanction imposed is not disproportionate since the foreign vessel is already under a requirement to meet this standard. Similarly, the prescription of a standard by the coastal state applicable to vessels other than tankers which are registered in states party to the 1954 Convention would not create any significant burden on inclusive use. The only standard which can be enforced effectively is one based on the visibility of the discharge. That

standard would be applicable to tankers if the 1969 amendments come into force. For non-tankers, the 1969 amendments prohibit discharges which exceed an instantaneous rate of sixty liters per mile or which contain one hundred parts of oil per one million parts of mixture. If the 1969 amendments do not enter into force, the latter standard would be applicable to tankers and non-tankers. Both of these standards, however, approach the visibility criteria. The imposition by the coastal state of an additional limitation on discharges up to the visibility criteria would not constitute a significant burden.

Prescription of a standard and application of a sanction by a coastal state to the vessels of flag states which are not signatories to the 1954 Convention would be justified on the grounds set forth previously. However, the burden on these particular vessels would be greater since presently their discharges are limited only when within the territorial sea of a coastal state. In view of the forty maritime states which are signatories to the 1954 Convention, the overall burden on inclusive use by this exercise of competence would not be great. The ability of signatories to function effectively even though subject to the Convention's restrictions indicates that the effect on the remaining inclusive users would not be unduly burdensome even though those restrictions are imposed unilaterally by the coastal state. Therefore,

it would appear that the claimed competence by a coastal state to prescribe standards and apply sanctions applicable to all ships to deter non-casualty discharges would be reasonable.

Deterrence requires that violators be detected. This requirement places a limit on the breadth of the zone in which this competence could be exercised. A further limitation is imposed by the required relationship between the claimed authority and the interests sought to be protected. If a discharge would not be harmful to the interests of the coastal state, it would have no justification for an exercise of competence. Experience has shown that it is difficult to detect all discharges in a three mile territorial sea. With a twelve mile territorial sea now claimed by forty-five states, the difficulties of detection are compounded. Before a coastal state's exercise of competence beyond a twelve mile territorial sea can be considered justified, it must be established that the breadth of its territorial sea is inadequate to protect coastal interests and that the coastal state can effectively enforce its pollution laws, that is, detect violators, within the area it already has subject to its competence. It is submitted that neither thus far has been established by states claiming twelve mile territorial seas. With respect to those states whose territorial sea is less than twelve miles, the

same requirements must be met before a claim to competence beyond their territorial sea would be justifiable. Until it has been established that a coastal state can effectively enforce its prescriptions and that a greater breadth is needed to protect coastal interests, the claim to deter non-casualty discharges by the imposition of sanctions should be limited to twelve miles.

B. Claims to Prevent or Minimize  
Damage after a Non-Casualty Discharge

By requiring vessels to give notice of discharges of oil, the coastal state would be allowed to take timely action to prevent or minimize damages to coastal interests. The burden which this claimed competence would impose upon inclusive use would be slight. The only alternative which would achieve the objective of timely notice would be a multilateral treaty imposing an obligation to report and providing for the application of sanctions for those vessels which fail to report. If the competence to apply the sanction were vested in the flag state, difficulties similar to those discussed under claims to deter non-casualty discharges would result. Therefore, the claimed competence to require a report of a discharge and to apply a sanction for failure to meet that obligation appears to be reasonable.

Since the master of a vessel would be reluctant to



report a discharge if he thereafter would be penalized for that discharge, the sanction for failure to report must be greater than that imposed for discharging. Even if that sanction is greater, a master might be willing to risk that greater sanction and not report the discharge if he believed that the discharge would not be detected. Therefore, the breadth of the zone in which this claimed competence could be exercised should be limited to that area in which the coastal state can detect discharges. For the reasons discussed under claims to deter non-casualty discharges, the claimed competence to require report of discharges presently should be limited to a breadth of twelve miles from the coast.

C. Claims to Prevent Threatened Pollution  
or to Abate Further Pollution  
from a Maritime Casualty

1. Right of Intervention

This claimed competence would allow the coastal state to take actions on the high seas against a maritime casualty which poses a threat of harm to coastal interests because of an actual or imminent discharge of oil. These actions would include removal or destruction of oil within the ship or removal or destruction of the ship itself. Because of the difficulties in burning crude oil, destruction of the cargo would be inappropriate

in most cases. Destruction of the ship similarly would be limited since this normally only insures the release of the remaining oil. Therefore, the competence claimed would be limited in the majority of cases to removal of the cargo from the distressed vessel or removal of the vessel. Such removal of the cargo would insure no further release of oil and no further damage or threat to coastal interests. There would be no burden on inclusive use if the action taken by the coastal state against a maritime casualty is limited to that which is reasonable and necessary to protect coastal interests. If the action taken is disproportionate to the threat presented, compensation for damages caused by those disproportionate measures would be appropriate. The fear that the decision-maker, who subsequent to the event is called upon to decide the appropriateness of the coastal state response, will perceive the situation far differently in calm reflection than the coastal state did, is not realistic if that decision-maker is a potential claimant. The promise of reciprocity will temper his judgment. Therefore, this claimed competence to intervene following a maritime casualty would appear to meet the requirement of reasonableness.

To establish a zone of fixed breadth would be unwise and probably unnecessary. Oil from the Torrey Canyon

traveled a distance of one hundred and ten to two hundred and twenty-five miles before impacting on French beaches. With all the variables which determine the impact of a spill on a coastal state, an inflexible standard would not meet the interests of the coastal state. Further, a right to intervene should not be dependent upon a claim to a specified zone but rather upon the realistically perceived threat a maritime casualty presents to the coastal states no matter where the casualty occurs.

The Intervention Convention would allow coastal state intervention anywhere on the high seas following a maritime casualty subject only to the qualification that the release or the threatened release of oil "may reasonably be expected to result in major harmful consequences." Of course, a coastal state should not be able to intervene if no harm, or inconsequential minor harm, to coastal interests can reasonably be expected to result. "Major harmful consequences" perhaps is an unfortunate term, however, if that expression means only that the harm must be more than inconsequential minor harm it would provide protection for coastal interests. The requirement of a proportionate response and compensation for disproportionate acts would provide protection of transportation interests. Although a coastal state would have the same rights if it did not accede to the Convention, the benefit of a formalized procedure for settling disputes might render

accession more desirable than relying on a unilateral claim to take necessary measures on the high seas to prevent threatened pollution or abate further pollution from a maritime casualty.

## 2. Require Other Ships to Render Assistance

The coastal state by claiming the competence to require other ships to render assistance after a maritime casualty has occurred would seek to utilize the facilities of these vessels to prevent damage to its coastal interest. The primary use of these other vessels would be to store oil removed from the stricken vessel thereby saving the coastal state the expense of providing those facilities. The justification which a coastal state would advance is that timely action is essential to prevent or minimize the discharge of oil from a maritime casualty and, in those areas where facilities of the coastal state are not available readily, use of empty tanks of other ships will reduce damage to the coastal state. However, exercise of this competence could impose a serious burden on inclusive users. Diversion of a ship from its destination could result not only in loss of revenue to the tanker owner but also could seriously disrupt activities dependent upon the vessel maintaining its schedule. For example, if the efficient operation of a refinery is dependent on a continuous supply of crude oil, diversion

of a tanker may interrupt that continuous flow. Indeed, the entire public order of the oceans would be jeopardized if a coastal state could reach out onto the high seas and sequester the use of any vessel which could be helpful. The severe burden the exercise of this competence would place upon inclusive use leads to rejection of this claim as unreasonable.

The alternative available to the coastal state is to have available its own facilities for storage of removed oil, for example, inflatable plastic bags or similar devices. Additionally, the coastal state could seek multilateral agreement which would allow the sequestration of vessels of flag states party to the agreement under certain specified conditions and which would provide compensation to the vessel owner for losses suffered thereby.

### 3. Require Vessels to Carry on Board Remedial Equipment

By this claimed competence, a coastal state would require vessels on the high seas to carry on board equipment to remedy a casualty discharge. Such equipment could vary from chemicals which would sink, absorb or emulsify the oil to mechanical equipment which could be used to remove the oil from the water's surface. A timely response to a pollution threat could be made

reducing or eliminating damage to coastal interests. Adequate protection would necessitate imposition of these requirements upon all vessels in any area where a maritime casualty could threaten coastal interests. To insure compliance, the coastal state would have to inspect all vessels within that area. If a vessel did not comply, the coastal state would have to impose a sanction, a fine or denial of access to make the requirement effective.

A heavy burden upon inclusive use would result if coastal states unilaterally exercised this competence. A plethora of equipment to meet the varying requirements of different coastal states could result in displacement of cargo as the principle commodity carried. Efficient transport would be impeded as coastal states stop and inspect vessels to insure compliance. The burden thus imposed upon inclusive use dictates the conclusion that this claim must be rejected as unreasonable.

Any requirements as to remedial equipment to be carried on board obviously would have to be determined by multilateral agreement to insure uniformity. The failure to achieve multilateral agreement on remedial equipment would not deprive the coastal state completely of the protection this claim would provide since an alternative exists which would advance substantially the coastal state's interests. That alternative, more fully set forth in section E. below, would be the claim to prescribe

liability for pollution damage and the claim to require financial responsibility to insure that assets are available to meet that liability. The clarification of the liability of a vessel owner for pollution damage would provide an incentive for the vessel owner to carry equipment on board which would minimize pollution damage. Additional incentive would be provided by the reduction in the cost of insurance, needed to meet financial responsibility requirements, which would result if the vessel owners carried remedial equipment on board thereby reducing the risk or extent of harm to the coastal state. This alternative would not require the coastal state to stop and inspect but would require the cooperation of private insurers.

D. Claims to Prevent  
the Occurrence of Maritime Casualties

If a coastal state can prevent or perhaps reduce the occurrence of maritime casualties, the threat to coastal interests would be decreased. The coastal state could seek to prevent maritime casualties by setting construction standards, by imposing standards as to the internal operations of the ship (including manning and navigational requirements) and by denying access to areas deemed dangerous.

## 1. Construction Standards

Construction standards could encompass any facet which conceivably could lead to the occurrence of a maritime casualty. For example, a coastal state might seek to require a vessel to have two separate boiler systems so that if one malfunctioned the other would be available to prevent foundering or it might seek to require twin propellers in order to increase the backing capability of a vessel if it became involved in a collision situation. Similarly, the coastal state might require reinforced or double hulls to prevent discharges if a casualty should occur or it might set standards for tank sizes in order to reduce the amount of oil released if the integrity of the ship is breached. To insure complete protection, the coastal state would have to impose these standards on vessels in any area where the release of its cargo could threaten coastal interests. These areas would vary depending upon the size of the vessel and upon the factors which determine the effects of a discharge upon the coastal state, e.g. wind direction and velocity, currents, type of crude oil, temperature, etc. Within those areas, the coastal state would have to inspect all vessels to insure compliance with its standards. If the coastal state limited its sanctions to a fine, the threat to the coastal state would not be reduced.

---



Therefore, a coastal state would have to deny access to those areas where its standards apply. The burden upon inclusive use if only one coastal state exercised such a competence would be onerous. If several or all coastal states exercised a similar competence, each setting their own standards, inclusive use would be impossible. The claim by a coastal state to exercise competence by setting construction standards for all vessels which may threaten their coastal interests, therefore, must be considered unreasonable.

Prevention of maritime casualties by imposition of construction standards requires an international approach. If multilateral agreement cannot be achieved, the marine insurance industry could induce safer construction by reducing the premium for pollution liability insurance for vessels which are less likely to cause pollution damage.

## 2. Manning and Navigational Requirements

Claims to prescribe manning requirements would include the number of personnel and their qualifications since a vessel adequately manned with qualified personnel is less likely to become a maritime casualty. The coastal state would not accept necessarily the number of personnel required by the flag state but rather would make its own determination of the number required for safe navigation. A coastal state also would look behind certificates of

qualification issued by the flag state to insure that personnel meet its standards of qualification. Similarly, claims to require certain navigational equipment and to set standards for its care and operation could reduce the risks of maritime casualties. The burdens that these claims would place on inclusive use would be similar to those imposed by claims to prescribe construction standards. Accordingly, claims to prevent the occurrence of maritime casualties by the imposition of manning and navigational requirements are considered unreasonable.

The standards required to meet the worthwhile goal of preventing maritime casualties must be achieved by multilateral agreement or through other agencies which are international in scope and have the effective power to induce achievement of these standards.

### 3. Denial of Access to Areas Deemed Unsafe

If the coastal state can preclude navigation in areas of the high seas that it deems unsafe, the risk of pollution damage as the result of maritime casualties, as perceived by the coastal state, would be reduced. However, if the vessel of another flag state wishes to navigate through that area, there is an obvious disagreement as to how dangerous that area is. The claimed competence to prevent the occurrence of maritime casualties by denying access to unsafe areas, therefore, includes the

right to determine the criteria by which the safety of an area will be adjudged. The burden on inclusive competence is obvious and necessitates a finding that this claim also is unreasonable.

Prevention of maritime casualties is a goal of both transportation and coastal interests. Although no panacea exists, advancement toward this goal could be achieved if transportation interests could improve the safety of their operations while retaining or improving their competitive position. This would require the imposition of a similar financial burden upon all tankers which would be reduced for a vessel as its safety increased. This possibility is explored more fully below.

#### E. Claims to Obtain Compensation for Pollution Damage

As we have seen, a discharge of oil can harm the coastal state by damaging the property interests of private individuals, by imposing a financial burden on the citizenry at large for the expenses incurred by governments in taking measures to prevent or remedy pollution damage and by further damage resulting from such corrective measures. By claiming the competence to prescribe liability for vessels which cause damage by pollution, the coastal state seeks to obtain compensation for all these pollution damages. The burden such prescription

places upon inclusive use need not be great since the shipowner may distribute it to cargo owners by increased rates. Cargo owners may pass this burden on to the ultimate beneficiaries of the activities which create the harm, the consumers. Therefore, a claim by the quiescent coastal state to prescribe liability for vessels whose discharges cause pollution damage would appear reasonable.

Effective application of the coastal state's prescribed liability, however, may be impossible if the polluting vessel now lies valueless at the bottom of the sea and if the foreign owner has no assets in the coastal state against which liability prescriptions can be applied. By requiring a vessel which may cause pollution damage to establish financial responsibility within the coastal state, assets of the owner of a polluting vessel would be subject to the competence of the coastal state. This financial responsibility could be established by maintaining actual assets in the coastal state or by obtaining insurance from an insurer who submits to the competence of the coastal state. If a number of coastal states advanced the claim to require evidence of financial responsibility, the vessel owner obviously would not maintain actual assets in each state. Instead, the vessel owner would obtain insurance for the maximum limit of his liability from an insurer subject to the competence of the many coastal claimants. The cost of premiums, like

actual expenses for damages, can be distributed by the vessel owners to the consumer. Since a coastal state would have a record of all vessels which had established financial responsibility, a determination of whether a vessel complied could be made without stopping and inspecting. Therefore, the burden on inclusive use would not be onerous and the claim by the coastal state to require the establishment of financial responsibility would not appear to be unreasonable.

Previous discussion has established that extensive pollution damage can result from maritime casualties which occur at distances far from the coast. Multilateral agreement establishing the liability of a vessel which causes pollution damage and imposing the requirement that the vessel owners establish financial responsibility, therefore, would appear a preferable alternative to the exercise of competence by the coastal state in these vast areas. The coastal state would be relieved of the necessity of patrolling these areas to insure that all tankers therein had established financial responsibility and tanker owners would be relieved of the difficulties of obtaining insurance to meet the varying limits of liability set by coastal states. The Liability Convention would result in substantial achievement of most of the objectives of a coastal state. Adjustment upwards of the present limits on a vessel's liability or establish-

ment of the international fund to meet liability in excess of the Convention limits should satisfy the needs of coastal states which believe present limits are inadequate. However, the Liability Convention may not enter into force if eight states, five of whom must have not less than one million gross tons of tanker tonnage, do not accept its provisions. Even if the Convention does enter into force, financial responsibility to meet pollution liability would not be available to coastal states for those vessels flying the flag of states not party to it. In either case, the goal of coastal states to obtain compensation for pollution damage would be frustrated.

Some coastal states could still meet their goals without claiming competence to require vessels on the adjacent high seas to establish financial responsibility. If the coastal state were fortunate enough to be situated in an area where most shipping traffic was bound for its ports, it could require all vessels, as a condition of entry, to establish evidence of financial responsibility. Many coastal states, however, are not so situated but are located near major routes taken by foreign ships on their way to foreign ports. To achieve their objective, these states must exercise the competence to require all vessels which threaten pollution damage to establish financial responsibility. If the major trading states previously

had conditioned the entry of vessels into their ports upon the establishment of financial responsibility, the coastal states which are not major traders need only exercise that degree of competence necessary to make it desirable for vessel owners to submit the established responsibility to the competence of these states. Denial of access, therefore, would not be appropriate, but the application of a sanction severe enough to induce such submission would be. Obviously, it would be preferable for the flag state of all tankers to accede to the Liability Convention as it now exists or as it subsequently may be altered.

No matter how instituted, a regime which establishes the liability of a vessel which causes pollution damage and makes that liability actual by requiring that financial responsibility be established in the coastal state should produce benefits other than just compensation. Lacking this regime, vessel owners have only to contemplate whether a discharge on the high seas violates the 1954 Convention and, if it does, the amount of penalty which may be imposed by their registry state if the discharge is detected. Economic considerations, although not public responsibility, might dictate in those circumstances that deballasting or other non-casualty discharges occur where most convenient for the vessel. A different result, however, may occur where the owner knows that if the discharge is

detected he is liable for all pollution damages caused by the discharge and that assets are available to the coastal state to satisfy that liability. If those assets are established through maintenance of insurance issued by a marine insurer or a club of shipowners, it is likely that a chronic polluter will suffer an economic penalty through increased premiums. Therefore, the requirement of maintaining financial responsibility would provide an economic incentive to avoid non-casualty discharges (or to avoid detection). Claims to obtain compensation for pollution damage would lead to deterrence of non-casualty discharges.

Similarly, clarified liability and required financial responsibility could provide an opportunity to make substantial progress toward prevention of maritime casualties. If all coastal states required establishment of financial responsibility as a condition of entry or if the 1969 Liability Convention is applicable, a vessel owner must obtain some form of insurance. To the extent that the insurer, whether a marine insurer or a club of shipowners, rewards vessel safety by a reduced premium, economic incentive exists for a shipowner to increase the safety of his vessels. If all must maintain insurance, an individual shipowner could increase the safety of his vessel operations without jeopardizing his competitive position if he is rewarded for his efforts by a decrease



in the cost of his insurance. In view of the maximum liability to which a vessel could be exposed, it is conceivable that the premium differential could be significant enough that a vessel owner who increases the safety of his operations would enhance his competitive position. Therefore, an economic incentive would exist for a vessel owner to conform to high construction, manning and navigation standards and to utilize safe navigation routes. Further, by carrying equipment on board which could be used to remedy a discharge, the vessel owner would reduce or eliminate pollution damage and, therefore, his liability. This increased pollution safety of the vessel and resultant decrease in potential liability should be rewarded by a reduction in the cost of maintaining financial responsibility.

If the marine insurance industry fails to perform this role satisfactorily or if tanker owners devise their own insurance scheme which does not reward safety with lower premiums, other alternatives would have to be considered. One alternative might be to reduce a vessel's maximum liability under the Convention as its safety increases. This would require establishment of international standards and international inspection. To insure the availability of sufficient funds to compensate coastal states who are damaged by oil pollution, the liability of the international fund, constituted by levies on cargo, would have to be increased.

## CONCLUSION

Although the lawfulness of U. S. and Canadian claims has not been appraised specifically, the significant features of each have been examined. From this examination, it is obvious that both contain some common features which commend themselves to other states. Navigation through a passage often covered with ice which has narrow entrance points through which limited passage presently is contemplated are unique features of the Canadian claim which may justify the exercise of some broader competence in deterring non-casualty discharges and minimizing damage after a discharge occurs. However, the Canadian claim to prevent the occurrence of maritime casualties cannot be justified by any claim of peculiar geographical or navigational conditions. It is too soon to determine whether the international community will accept this casualty prevention claim by Canada on other grounds.

Consideration of contiguous zones for pollution control has been limited to control of pollution caused by the release of oil into the sea. Since oil pollution, perhaps unlike other forms of marine pollution, appears to cause localized, temporary damage to coastal areas, the coastal state has an identifiable interest in asserting

competence to prevent such pollution. Other types of marine pollution may cause general harm to the marine ecology making it difficult to segregate the interests of a particular state from the interests of all states. The destruction of seabirds by oil pollution is a general harm to the marine ecology which requires international cooperation, not individual assertions of competence. The steps taken to reduce the pollution threat to coastal interests will also decrease pollution danger to seabirds. Additional steps to reduce the danger should be taken by the community of states after thorough consideration of all interests. No state should be allowed to unilaterally exercise competence in areas where international interests are paramount by proclaiming itself as the self-appointed protector of the marine environment for the international community.