ARTICLE

FIFTY YEARS SINCE THE BRUSSELS CONFERENCE ON MARINE POLLUTION

MILTON D. OTTENSOSER, PH.D., J.D.*

* Milton D. Ottensoser (B.A., Yeshiva University; J.D., New York Law School; Ph.D. in Political Science/International Relations, CUNY Graduate Center) is a Miami Beach based New York attorney in private practice. I would like to thank my dissertation committee at the City University of New York (CUNY) Graduate Center—Professor Ming Xia (Chairman), Peter Liberman, and Peter Romaniuk, as well as Executive Officer Professor Alyson Cole. A special thank you to Professor Saul Levmore (University of Chicago Law School) for his comments on the dissertation draft. The staff members of New York University Environmental Law Journal, particularly Editors-in-Chief Alex St. Romain and Asha Brundage-Moore as well as Executive Editor Julia F. Kindlon, and Submissions Editor Alexandra Cohen were more than helpful—they simply were beyond amazing, and I am extremely grateful for their assistance and hard work. A special note of appreciation to my wife Susan Ottensoser, as well as to my children, U. Seth and Wendy Ottensoser, Daniel and Judith Ottensoser, and "the crew." Any comments may be addressed to me at mdo@mdolaw.net.

INTRODUCTION

Fifty years ago, on November 29, 1969, at the conclusion of a two-week conference in Brussels sponsored by the Intergovernmental Maritime Consultative Organization (IMCO),[1] a

[1] In 1982, IMCO was renamed the International Maritime Organization (IMO). For consistency, throughout this Article I will use only the acronym IMCO.

specialized United Nations agency, two conventions were signed.[2] The first treaty, the International Convention Relating to Intervention on the High Seas in Cases of Oil Pollution Casualties (public law treaty), dealt with the public international law issue of the right of a state to intervene on the seas against a ship registered in another state—typically an oil tanker—that was causing significant environmental damage to the coastal region of the impacted state.[3] The second treaty, the International Convention on Civil Liability for Oil Pollution Damage (civil liability treaty or private law treaty),[4] dealt with the financial liability of the offending shipowner to third parties for environmental damage, including cleanup costs and damages sustained by governments and non-state entities.[5] This article focuses on the civil liability treaty and its unique provisions that established liability against shipowners of up to $14 million per incident[6] and which further incorporated in its

[2] *See* Final Act of the International Legal Conference on Marine Pollution Damage, Nov. 28, 1969, 970 U.N.T.S. 264, 9 I.L.M. 20, 20–67 (see I.L.M. for the full text of both treaties); *see also* U.N. Conference on Trade and Development, *Liability and Compensation for Ship-Source Oil Pollution: An Overview of the Legal Framework for Oil Pollution Damage from Tankers*, UNCTAD/DTL/TLB/2011/4 (Jan. 31, 2012). The treaties have been discussed extensively in law review articles. *See, e.g*., Nicholas J. Healy, *The International Convention on Civil Liability for Oil Pollution Damage, 1969*, 1 J. MAR. L. & COM. 317 (1970); Dennis M. O'Connell, *Reflections on Brussels: IMCO and the 1969 Pollution Conventions*, 3 CORNELL INT'L L. J. 161 (1970). For a strictly legal approach to the treaty's provisions, see DAVID W. ABECASSIS, THE LAW AND PRACTICE RELATING TO OIL POLLUTION FROM SHIPS (1978). *See generally List of IMO Conventions*, INT'L MAR. ORG., http://www.imo.org/en/About/Conventions/ListOfConventions/Pages/Default.aspx (last visited Feb. 18, 2019) (includes additional information about both treaties).

[3] *See* Convention Relating to Intervention on the High Seas in Cases of Oil Pollution Casualties, Nov. 29, 1969, 26 U.S.T. 765, 970 U.N.T.S. 211 [hereinafter Public Law Treaty].

[4] For the sake of uniformity, I will use civil liability treaty throughout this Article.

[5] *See* International Convention on Civil Liability for Oil Pollution Damage, Nov. 29, 1969, 973 U.N.T.S. 3 [hereinafter Civil Liability Treaty].

[6] *See id.* art. 3, ¶ 2. The actual amount in the treaty was 210 million francs, which converts to approximately $14 million. The number $14 million as used in this article is a convenient shorthand for the approximate liability limit of the treaty. The available amount, as of the date of this article, is in the hundreds of millions of dollars, which is a significant improvement over the 1969 Civil Liability Treaty, but is still a paltry sum considering the damage estimates of the 2010 Deepwater Horizon oil rig blowout. *See* Ron Buosso, *BP Deepwater Horizon Costs Balloon to $65 Billion*, REUTERS (Jan. 16, 2018),

terms the onerous strict liability standard rather than the less stringent standard of negligence.[7] Accordingly, the civil liability treaty stands separate and apart from other environmental treaties, which, for the most part, center on technical matters or establish general goals to preserve environmental integrity, but do not contain enforceable sanctions defined in specific monetary terms.[8] The treaty agreed to at Brussels stands in sharp contrast to other proposed international environmental initiatives. The well-publicized Paris Climate Agreement for carbon reduction, for example, does not provide financial sanctions for failure to comply with the goals set forth in that proposed treaty.

The catalyst for the 1969 IMCO Conference and the two treaties was the 1967 Torrey Canyon episode, in which a massive oil tanker ran aground off the coast of the United Kingdom.[9] The resulting environmental catastrophe, combined with the absence of a uniform system of compensation for those impacted by the oil spill, led to demands for the international community to act.[10] Therefore, it is crucial to review the weaknesses in the international system that were exposed by the Torrey Canyon episode.

Accordingly, this Article focuses on the attempt by the international community to establish an international regime to deal effectively with the problem of marine oil spills.[11] As will be

https://www.reuters.com/article/us-bp-deepwaterhorizon/bp-deepwater-horizon-costs-balloon-to-65-billion-idUSKBN1F50NL.

[7] *See* Civil Liability Treaty, *supra* note 5, art. 3, ¶ 1 (stating that the shipowner "shall be liable for any pollution damage caused by oil which has escaped or been discharged from the ship as a result of the incident").

[8] *See, e.g.*, International Convention for the Prevention of Pollution from Ships, art. 4 ¶¶ 1, 4, Nov. 2, 1973, 1340 U.N.T.S. 61 (containing no sanctions for violations, and calling upon contracting states to establish their own sanctions for violations of the conventions' terms).

[9] See *infra* Part I for a fuller description of the Torrey Canyon Episode.

[10] As will be detailed below, in April 1967, approximately three weeks after the Torrey Canyon episode, the United Kingdom requested a session of the IMCO to discuss the legal ramifications of maritime oil spills.

[11] The term "international regime" as used in this article is based on its use in contemporary international relations theory. *See, e.g.*, Stephen H. Krasner, *Structural Causes and Regime Consequences: Regimes as Intervening Variables*, *in* INTERNATIONAL REGIMES 1, 2 (Stephen H. Krasner, ed., 1983) (defining international regimes as "sets of implicit or explicit principles, norms, rules, and decision-making procedures around which actors' expectations

demonstrated below, the effort to create this regime involved not only an international organization—in this case, the IMCO—and individual States, but, no less significantly, Non-State Actors, such as shipping interests, international insurers, and petroleum companies. Ultimately, this Article argues the final product produced in 1969 (the civil liability treaty) was an amalgam of the interests—legal, economic, and political—of these competing entities.

Accordingly, this Article attempts to reconstruct the process which led to the formulation of the international regime at Brussels. It begins with the Torrey Canyon disaster, and the resulting demand that the international community establish a system for compensation of victims of oil pollution damage. Thereafter, an analysis is made of the stakeholders in the process and their sectoral interests. This is followed by a description of what was decided at Brussels in 1969, combined with an analysis, based on concepts developed in the study of domestic interest groups, of how the competing interests of the stakeholders led to compromises which resulted in the establishment of this international regime, which has endured for fifty years. The Article concludes by describing the stresses on this regime from the Exxon Valdez and Deepwater Horizon disasters and the effect of those disasters on the Brussels regime and on multinational approaches to environmental treaty making.

converge in a given area of international relations"). The definition was further refined as follows:

> Regimes are deliberately constructed, partial international orders on either a regional or a global scale, which are intended to remove specific issue-areas of international politics from the sphere of self-help behaviour. By creating shared expectations about appropriate behaviour and by upgrading the level of transparency in the issue-area, regimes help states (and other actors) to cooperate with a view to reaping joint gains in the form of additional welfare or security.

Andreras Hasenclever et al., *Integrating Theories of International Regimes*, 26 REV. INT'L STUD. 3, 3 (2000). For a study which examines the Brussels Conference through the lens of regime theory, *see generally* Milton D. Ottensoser, Oil Pollution on the High Seas: The Establishment of an International Regime to Deal with Public International Law and Private Law Issues, and the Role of Non-State Actors in Their Resolution on Marine Pollution ("Brussels Conference") (2018) (unpublished Ph.D. dissertation, City University of New York) (on file with the City University of New York Graduate Center after Sept. 30, 2019).

I. THE TORREY CANYON EPISODE

On March 18, 1967, the Torrey Canyon, a supertanker of 120,890 deadweight tons, smashed onto the Seven Stones reef while traveling at full speed on a voyage from Kuwait to Milford Haven in Wales.[12] The Seven Stones reef is a series of submerged rocks in international waters off the southwest coast of England between the Scilly Islands and Land's End.[13] The accident ruptured the Torrey Canyon's tanks, and thousands of tons of oil escaped into the sea.[14] Salvage operations were abandoned when the ship broke into three pieces, thereby becoming the largest oil spill in history at the time.[15]

The shipwreck became an international news story. It received front page coverage in the *New York Times* on March 25, March 28, and March 29, 1967, including a dramatic front page picture of the burning ship being bombed by the Royal Air Force in a vain attempt to halt the environmental catastrophe.[16] Decades later, Richard Hobbie, the president of the Water Quality Insurance Syndicate in New York, speaking at a seminar in New York sponsored by the American Institute of Marine Underwriters, summed up the impact of the Torrey Canyon incident:

> The graphic pictures that came out of the Torrey Canyon incident with the Royal Air Force attempting to bomb the vessel, and the oil washing onto beaches are still with us today. . . . That event more than any other ushered in the modern era of pollution legislation and public awareness of the issue.[17]

---

[12] *See* CRISPIN GILL, TONY SOPER & FRANK BOOKER, THE WRECK OF THE TORREY CANYON 16–17 (1967); *see also Oil From Grounded Ship Swept By Wind Onto Cornwall Beach*, N.Y. TIMES, Mar. 25, 1967, at 1; Anthony Lewis, *Oil Slick Sweeps Shoes of Britain; Big Tanker Splits*, N.Y. TIMES, Mar. 28, 1967, at 1, 3; Wener Bamberger, *Risk of Oil Pollution in Seas is Baffling Problem*, N.Y. TIMES, Mar. 29, 1967, at 2.

[13] *See* GILL, SOPER & BOOKER, *supra* note 12.

[14] *See* Lewis, *supra* note 12.

[15] *See id; see also* GILL, SOPER & BOOKER, *supra* note 12, at 23.

[16] *See Oil From Grounded Ship Swept By Wind Onto Cornwall Beach*, *supra* note 12, at 1; Lewis, *supra* note 12, at 1; Anthony Lewis, *Wide Area of Ocean Aflame as British Burn Off Oil*, N.Y. TIMES, Mar. 29, 1967, at 1.

[17] Brian Christine, *Trends in Maritime Legislation*, 41 J. RISK MGMT. 59 (1994) (quoting a talk by Richard Hobbie, president of the Water Quality Insurance Syndicate of New York at an American Institute of Marine Underwriters seminar).

It should be noted that when it comes to media attention, not all oil spills are created equally. It has been argued by Lawrence I. Kiern that oil spills resulting from ships, by definition, garner far more publicity than land-based oil spills. He observed:

> While oil spills from vessels represented only about forty percent of the total amount discharged in recent years, they attracted disproportionate media scrutiny and public attention because they were more likely to be dramatic events in sensitive coastal waters affecting America's shorelines. For example, while the COSCO BUSCAN spilled only about 54,000 (gallons) of oil in San Francisco Bay, it captured extensive media attention, prompted congressional hearings, and resulted in criminal convictions for both the vessel-operating company and the pilot. By comparison, oil spills from non-vessel sources, which have typically been more localized, have attracted less national media attention. For example the discharge of over 800,000 gallons of crude oil into the Kalamazoo River in Michigan on July 26, 2010 garnered little national attention.[18]

The Torrey Canyon was not the only oil spill in the 1960s, but its impact transcended the physical damages it wrought.[19] Although environmentalism had not yet become an important issue in the popular mind—the first Earth Day in the United States was not to occur for over three years—the Torrey Canyon disaster served as a watershed incident in the development of an awareness of environmental degradation in general, and more specifically, of the problem of oil spills and the codification of sea law as applicable to environmental disasters.[20]

In retrospect, the Torrey Canyon episode was the first of numerous environmental disasters that received worldwide coverage.[21] The Torrey Canyon itself, however, was a nondescript oil tanker, one of thousands that traverse the oceans daily and are an

---

[18] Lawrence I. Kiern, *Liability, Compensation, and Financial Responsibility Under the Oil Pollution Act of 1990: A Review of the Second Decade*, 36 TUL. MAR. L.J. 1, 8–9 (2011).

[19] *See* E.D. Brown, *The Lessons of the Torrey Canyon*, 21 CURRENT LEGAL PROBS. 113 (1968); Albert E. Utton, *Protective Measures and the Torrey Canyon*, 9 B.C. L. REV. 613 (1968).

[20] On the impact of the Torrey Canyon, see Brown, *supra* note 19; Utton, *supra* note 19.

[21] *See generally*, Comment, *Oil Pollution of the Sea*, 10 HARV. INT'L L.J. 316 (1969).

integral part of the international petroleum industry.[22] It was constructed in the United States by the Newport News Shipbuilding and Dry Dock Company in 1959.[23] Originally, the ship had a deadweight tonnage of 65,920.[24] In 1965, the ship was enlarged, or jumboized, in Japan by the Sasebo Heavy Industries Co.[25] The vessel was cut in half and a new center section was added, increasing its deadweight to over 120,000 tons, thereby widening and lengthening her.[26] At the time of the accident, the ship was only fifty-seven feet shorter than the Queen Elizabeth, the iconic ocean liner, which at that time was the largest passenger vessel in the world.[27]

The facts of the Torrey Canyon's ownership and registration are indicative of the complexity of establishing liability in contemporary maritime litigation. Despite the fact that the ship had no physical connection whatsoever with Liberia, the Torrey Canyon was registered in Monrovia, Liberia, and flew that country's flag.[28] She was owned by the Barracuda Tanker Company of Bermuda, a wholly owned subsidiary of the Union Oil Company of California.[29] On her last voyage, she was on charter to British Petroleum Ltd., and carried a Greek crew and an Italian captain.[30] The crude oil cargo was loaded at Mena Al Ahmadi on the Persian Gulf.[31] Although the disaster occurred in international waters, the resulting

[22] *See* G.W. Keeton, *The Lessons of the Torrey Canyon*, 21 CURRENT LEGAL PROBS. 94, 95 (1968).

[23] *See id.*

[24] *See id.*

[25] *See id*.

[26] *See id*.

[27] This information on the Torrey Canyon was adapted from *The Wreck of the Torrey Canyon*. *See* GILL, SOPER & BOOKER, *supra* note 12, at 16–17. The Barracuda Tanker Corporation was what might be termed a "shell" a.k.a. "dummy" corporation, and consisted of a Bermuda mail drop. The Torrey Canyon (which was named after one of the Union Oil's first fields) was in reality associated with the Union Oil Co. Photographs of the vessel show the company's logo (a large "76") emblazoned on the bow. *See id.*

[28] *See* Keeton, *supra* note 22, at 95.

[29] *See id.*

[30] *See id.*

[31] *See id.*

oil spill damaged beaches and property in France and Britain, and negatively impacted the coastal fishing industry.[32]

The Liberian registry of the Torrey Canyon was not accidental.[33] By registering the ship in Liberia, the owners were able to create a favorable climate for the business of transporting large quantities of crude oil.[34] Traditionally, a ship is obliged to follow the law of its flag state; coastal and port states cannot usually impose their laws on a foreign vessel. The principle of flag state supremacy over port or coastal states gives ships of a state with less stringent maritime laws some competitive advantage over ships from states with stricter laws.[35] While ostensibly there should be a link between a ship and the flag it flies, the practicalities of business cause this rule to be more honored in the breach than in the observance.

The environmental consequences of the Torrey Canyon incident were monumental. Huge numbers of fish and seabirds were killed or injured.[36] Livelihoods of fishermen and resort owners were upended.[37] The cleanup cost for oil removal in the Channel Islands and Brittany was three million British pounds.[38] Beyond the specter of ecological disaster, important legal questions arose as thousands of tons of crude oil began polluting the seas and beaches: (1) Did the British Government have a legal right to destroy the vessel in order to protect its coast and territorial seas? (2) If the ship were to be destroyed as a result of British governmental action, were the British obligated to compensate the ship and cargo owners for loss of the vessel and cargo? (3) What were the obligations of the owners or charterers of the Torrey Canyon? If they were found liable, to whom were they liable, and for what amount? Where would the venue of the litigation be?

---

[32] *See id* at 96–97. Barracuda could have sued since it had reversionary interests in the Torrey Canyon upon expiration of a long-term charter to the Union Oil Company.

[33] *See id.* at 109.

[34] *See id.*

[35] *See* Muhammad Masaum Billah, *The Role of Insurance in Providing Adequate Compensation and in Reducing Pollution Incidents: The Case of the Intn'l Oil Pollution Liability Regime*, 29 PACE ENVTL. L. REV. 1, 4–27 (2011).

[36] *See* Comment, *supra* note 21, at 322.

[37] *See id.*

[38] *See* Keeton, *supra* note 22, at 110. *See also* Joseph C. Sweeney, *Oil Pollution of the Oceans*, 37 FORDHAM L. REV. 155, 158 (1968).

The answer to question one appeared to be "no." The prevailing doctrine of "freedom of the seas" was inconsistent with any purported right to intervene on the high seas against a vessel leaking quantities of oil into the sea, even if that leakage caused environmental damage.[39] While a theory of anticipatory self-defense might be utilized as a justification for such an action, this theory does not seem to be consistent with theories of international law.

In reference to questions two and three above, while these were highly technical questions involving domestic, as well as international law, it was evident, as shall be described below, that contemporary practice absolved the shipping interests from assuming total liability in such a situation.

More specifically, the answer to the second question seemed to be "no." British Defense Minister Denis Healey stated, "[w]e are not in a position to be able to set fire to the ship until they (the owners) give their agreement that this can be done."[40] John Nott, a Conservative MP noted, "[c]an anyone believe, if a British tanker had gone aground outside New York harbor, President Johnson would still have been negotiating with the British owners ten days later?"[41]

Finally, after high winds had caused the ship to break into several sections and most of the cargo of oil had been discharged,

---

[39] *See* Barney T. Levantino, *Protection of the High Seas from Operational Oil Pollution: A Proposal*, 6 FORDHAM INT'L L.J. 72, 74–75 (1982). The justification for anticipatory self-defense against an impending environmental catastrophe could be based on the Caroline Case, which occurred in 1837. Briefly, during an insurrection in Canada, British forces crossed into the territory of the United States and destroyed a ship, the Caroline, which was being used by the Canadian rebels. There were American casualties in this British assault into American territory. This, in turn, led to an exchange of notes between the American Secretary of State, Daniel Webster, and a member of the British Parliament, Lord Ashburn. The note sent by Webster to Ashburn on April 24, 1841, articulated the doctrine of anticipatory self-defense. Specifically, Webster wrote to Ashburn, "and it will be for Her Majesty's Government to show up what state of fact, and what rules of national law, the destruction of the 'Caroline' is to be defended. It will be for that Government to show a necessity for self-defense, instant, overwhelming, leaving no choice, no moment for deliberation." Letter from Daniel Webster, Sec'y of State, United States, to Lord Ashton (Apr. 24, 1841) (on file with the Yale Law School Library), https://avalon.law.yale.edu/19th_century/br-1842d.asp#ash1.

[40] RICHARD PETROW, IN THE WAKE OF THE TORREY CANYON 186 (1968).

[41] *Id*. at 105.

the British government elected to bomb the vessel.[42] The task was substantially more difficult than had been originally anticipated.[43] Ultimately, 161 thousand-pound bombs, eleven thousand gallons of kerosene, three thousand gallons of napalm, and sixteen rockets were utilized to destroy the wreck and the oil.[44]

Most troublesome was the question of liability for damages inflicted by the Torrey Canyon on the French and British coasts.[45] Great Britain was a signatory to the International Convention Relating to the Liability of Owners of Sea Going Ships.[46] Under the terms of this treaty, one thousand gold francs—about sixty-seven dollars—was available per net ton of ship for all liability claims provided that there was no loss of life.[47] If fatalities did occur, an additional 2,100 gold francs per net ton was to be made available to compensate for injury or death.[48] The Torrey Canyon had a net tonnage[49] of 48,437 tons.[50] The treaty required that the weight of the engine room be added to the figure, yielding a liability limit of about

[42] The bombardment of the Torrey Canyon was the subject of a large graphic photo on the frontpage of the *New York Times* on March 29, 1967. *See* Associated Press Cablephoto, *Jets Bomb Grounded Tanker Off Cornwall*, N.Y. TIMES, Mar. 29, 1967, at 1. The accompanying news story detailed some of the ordinance used in the destruction of the Torrey Canyon by the Royal Air Force. *See* Anthony Lewis, *supra* note 16, at 1.

[43] *See* Lewis, *supra* note 16, at 3.

[44] *See* GILL, SOPER & BOOKER, *supra* note 12, at 45.

[45] In the broadest sense, the Torrey Canyon disaster raised broad questions of jurisdiction, liability, and remedy. *See generally* N.D. Shutler, *Pollution of the Seas by Oil*, 7 HOUSTON L. REV. 415 (1970). At the time of the Torrey Canyon, international law did not provide a clear guide as to whom would be liable (e.g., the shipowner, the ship charterer, or both), to whom liability would accrue (governments exclusively, or governments and non-governmental entities, such as fisherman and resort owners), whether strict liability or negligence would be the standard for determining liability, and the limits (if any) for liability. These issues, as shall be seen, were part of the discussions at Brussels in 1969.

[46] *See* International Convention Relating to the Liability of Owners of Sea Going Ships, Oct. 10, 1957, 1412 U.N.T.S. 80.

[47] *See id.* art. 3.

[48] *See id.*

[49] Net tonnage is a figure which relates to the volume of a ship's cargo space, and is derived through a mathematical formula. It does not measure the actual weight of a ship's cargo.

[50] *See* REPUBLIC OF LIBERIA, REP. OF THE BOARD OF INVESTIGATION IN THE MATTER OF THE STRANDING OF THE S.S. TORREY CANYON ON MARCH 18, 1967, 6 I.L.M. 480 (May 2, 1967).

$4.2 million, far short of the British cleanup costs, let alone compensation for claims for damages incurred as a result of the shipwreck.[51] Further, because the United States had not ratified the 1957 Brussels Convention, and because Union Oil, a United States corporation, was a party to the controversy, United States law was also relevant.[52]

In 1967, the United States legislation that covered a contingency such as the Torrey Canyon was over a century old.[53] This legislation, which had been passed in 1851, at a time when the American shipping industry was becoming an important economic force in this country, provided for a limitation of liability for this industry. Specifically, in 1851, the United States Congress passed a law stipulating that, in the absence of personal injury or death, an owner's liability is limited to the value of the vessel and its cargo.[54] In *Norwich Co. v. Wright*,[55] the United States Supreme Court interpreted the law to mean the value of a ship after the disaster.[56] Since the only salvageable portion of the Torrey Canyon was one lifeboat, the owner's liability would be limited to fifty dollars.[57] Shortly after the disaster, Union Oil and the Barracuda Tanker Corporation filed a petition in the United States District Court for the Southern District of New York to limit their liability to fifty dollars.[58]

The French and British governments, fearing that the oil and shipping interests might evade financial responsibility for their portion of the damages, commenced an intricate series of actions.[59]

---

[51] *See* PETROW, *supra* note 40, at 189.

[52] The United States never became a party to the International Convention Relating to Limitation of the Liability of Owners of Seagoing Ships, which was replaced by the Convention on Limitation of Liability for Marine Claims, which entered into force on December 1, 1986.

[53] *See* Limitation of Liability Act of 1851, 46 U.S.C. §§ 30501-12 (2006).

[54] *See* Act of Mar. 3, 1851, 9 Stat. 635.

[55] *See* Norwich Co. v. Wright, 80 U.S. 104, 122 (1871).

[56] *See id*.

[57] The American courts also ruled that if the owner of the vessel received an insurance indemnification, this money would not have to be added to the post-disaster value of the ship. *See In re* Barracuda Tanker Corp, 281 F. Supp 228, 230, 232–33 (S.D.N.Y. 1968).

[58] *See id.*

[59] *See* Paul Burrows et al., *The Economics of Accidental Pollution by Tankers in Coastal Waters*, 3 J. PUB. ECON. 251, 259 (1974).

The Lake Palourde, a sister ship of the Torrey Canyon, was seized first by the British and thereafter by French authorities in Singapore and Rotterdam, respectively, and was not released until a surety bond was posted in each case, which partially covered cleanup costs.[60] Ultimately an out-of-court settlement was reached, and the owners and charterers indemnified the British and French governments with a total payment of $7 million, which likely did not cover half the costs of the cleanup, let alone losses sustained by fishermen, resort owners, and other coastal economic interests.[61]

II. PREPARATIONS FOR THE BRUSSELS CONFERENCE—INTERNATIONAL STAKEHOLDERS REGARDING OIL POLLUTION AT SEA

The Torrey Canyon disaster, which as indicated above, revealed flaws in the existing system of compensation for damage sustained as a result of oil spills, led to the possibility of change. Therefore, the relevant question is which entities would be involved in these changes. Accordingly, this Article now moves to an examination of the constellation of actors, both state and non-state, who in the late 1960s were the likely participants in this process.

A. The Intergovernmental Maritime Consultative Organization

The gaps in international law, which allowed neither for intervention against an offending ship, nor for realistic compensation for injured parties, that were evinced after the Torrey Canyon episode, prompted the British government, in April 1967, to request a special session of IMCO, which was established in 1948 at a conference convened at Geneva, Switzerland.[62] IMCO's purposes are defined in Article 1(a) of the Convention: "To provide machinery for co-operation among Governments in the field of governmental regulation and practices relating to technical matters of all kinds affecting shipping engaged in international trade, and to

60 *See id.* at 260.

61 *See* PETROW, *supra* note 40, at 189, 230.

62 For an overview of the events of April 1967, see Nicholas J. Healy, *The C.M.I. and IMCO Draft Conventions on Civil Liability for Oil Pollution*, 1 J. MAR. L. & COM. 93, 93–95 (1969).

encourage the general adoption of the highest practical standards in matters concerning maritime safety and efficiency of navigation." [63]

Essentially a backwater among United Nations Specialized Agencies, IMCO began on January 6, 1959 and currently has 174 members and three associate members.[64] Operating on a minuscule annual budget of only $1 million, IMCO had dealt exclusively with various technical matters in the maritime field and had aroused little general interest outside of the maritime community.[65] Within the maritime community, there was resistance to the very idea of an agency like IMCO as a central body because it was viewed as representing the injection of "political distractions" into an area perceived as technical.[66] Matters such as navigation, radio communications, methods of tonnage measurement, and protection of ships against fire hazards were the types of activities generally undertaken by IMCO.[67] Nonetheless, given its budgetary constraints, IMCO did not have a large staff, and it was questionable whether it was up to the tasks of establishing a full blown international legal regime to deal with the problems of intervention on the seas and of establishing terms of liability for maritime oil pollution after the Torrey Canyon disaster.[68] The reason for this outlook was because IMCO was dealing with a magnitude of problems that it previously had not encountered.[69] Accordingly, Non-State Actors such as the Comité Maritime International (CMI)[70] were available to become highly involved in the inevitable

63 Convention on the Intergovernmental Maritime Consultative Organization art. 1, Mar. 6, 1948, 289 U.N.T.S 1, 48 [hereinafter Convention on the IMCO].

64 *See Member States, IGOs and NGOs*, INT'L MAR. ORG., http://www.imo.org/en/About/Membership/Pages/Default.aspx (last visited Feb. 18, 2019).

65 The Annual Reports of Intergovernmental Maritime Consultative Organization lay out the relatively modest accomplishments of IMCO during its formative years. *See* R. MICHAEL M'GONIGLE & MARK W. ZACHER, POLLUTION, POLITICS AND INTERNATIONAL LAW—TANKERS AT SEA 40–41 (1979).

66 *See id.* at 40.

67 *See id.*

68 *See* Tony Munoz, *International Maritime Organization: Guardian of the Seas*, MARINE EXEC. (May 18, 2015), https://www.maritime-executive.com/magazine/international-maritime-organization (indicating that in 2015, IMCO had fewer than 300 employees).

69 *See* M'GONIGLE & ZACHER, *supra* note 65, at 47. IMCO did not have a Legal Committee until May 1967, and its Marine Environmental Protection Committee was not established until November 1973. *See id.* at 48.

70 *See infra* Section II.B for further discussion.

adoption of rules and regulations to be promulgated regarding oil spills on the seas.[71] At the time of the Torrey Canyon disaster, a number of Non-Governmental Organizations (NGOs) had been granted official consultative status, which tended to result in overrepresentation of international shipping interests to the exclusion of other interests, such as fishermen, environmentalists, and even petroleum interests.[72] By 2016, eighty-one NGOs had been granted consultative status by the IMCO.[73] They now constitute a diverse group whose interests range from environmentalism (Friends of the Earth International, Greenpeace International) to industry groups (International Bulk Terminals Association, International Association of Independent Tankers Owners).[74]

It should be emphasized that IMCO, like other Public International Organizations, then as well as now, is an integral part of an ongoing political-economic process.[75] It does not exist in a rarified world of ideas, where organizational, economic, political and even personal motives are irrelevant to its work and mission.[76] As Susan Strange noted:

> But it should be enough at least to pose the in-whose-interest question, in the hope that subsequent research may pursue it further. Note that this is a fundamentally different question than

---

[71] *See infra* Section II.C for further discussion of the historic role of the CMI in drafting maritime treaties.

[72] *See, e.g.*, Edon V. C. Greenberg, *IMCO: An Environmentalist's Perspective*, 8 CASE W.J. INT'L L. 131 (1976).

[73] *See Member States, IGOs and NGOs*, INT'L MAR. ORG., http://www.imo.org/en/About/Membership/Pages/Default.aspx (last visited July 16, 2019).

[74] *See Non-Governmental International Organizations Which Have Been Granted Consultative Status with IMO*, INT'L MAR. ORG., http://www.imo.org/en/About/Membership/Pages/NGOsInConsultativeStatus.aspx (last visited Feb. 18, 2019).

[75] The literature on the political-economic process as it impacts international organizations is vast. A representative sample would include THE INTERNATIONAL POLITICS OF THE ENVIRONMENT (Andrew Hurrell & Benedict Kingsbury eds., 1992); Bruno S. Frey, *The Public Choice View of International Public Economy*, 38 INT'L ECON. 199, 215 (1984); DANIEL BODANSKY, THE ART AND CRAFT OF INTERNATIONAL ENVIRONMENTAL LAW 117 (Harvard Univ. Press, 2010); GLOBAL ENVIRONMENTAL GOVERNANCE RECONSIDERED (Frank Biermann & Philipp Pattberg eds., 2012).

[76] *See generally* Robert W. Cox & Harold K. Jacobsen, *The Framework for Inquiry*, in THE ANATOMY OF INFLUENCE: DECISION MAKING IN INTERNATIONAL ORGANIZATION (Robert W. Cox & Harold K. Jacobsen eds., 1973) (detailing the decision-making process at the United Nations and its specialized agencies).

> the regime one that has dominated the literature of international organisation—and the eponymous journal, IO—for almost a quarter of a century. The regime question has been about when, and how, governments could be got to cooperate; about what generated regimes, and what caused them to change. Only occasionally, and often only as an afterthought, did the cui bono question crop up. A notable exception was an edited volume in the late 1960s, *The Anatomy of Influence*, comparing the decision-making processes in a half-dozen UN specialised agencies (Cox and Jacobson, 1973). They did at least ask the questions when and if these processes were influenced by 'private-regarding motivated'—in less polite language, by the self-serving interests of international officials. Otherwise, it has generally been an implicit assumption of regime research that any increase in international organisation is a triumph of idealism over realism, that more is always better, and that cooperation is ipso facto better than conflict—no matter what the purpose of the cooperation, and whatever the outcome of that cooperation. And the outspoken assumption, of course, is that international officials are selfless dedicated missionaries, with only the best interests of the world community at heart.[77]

Therefore, by viewing IMCO through the paradigm suggested by Susan Strange, the results of the 1969 Brussels Conference are far more understandable than if IMCO is seen as somehow detached from political-economic processes.

B. The Comité Maritime International

Decisions undertaken by IMCO on the development of technical and legal measures to mitigate the problem of oil spills affected three Non-State Actors that were part of the maritime industry—shipping interests, marine insurers, and petroleum companies. The European shipping interests then as well as now are organized in a nongovernmental organization called the Comité Maritime International (CMI).[78] Arguably, because the CMI is

[77] *See* SUSAN STRANGE, THE RETREAT OF THE STATE: THE DIFFUSION OF POWER IN THE WORLD ECONOMY 162 (1996). On the role of marine insurance, see, for example, Jan C. Bongaerts & Aline F. M. de Bièvre, *Insurance for Civil Liability for Marine Oil Pollution Damages*, 12 GENEVA PAPERS ON RISK & INS. 145 (1987).

[78] *See* Nigel. H Frawley, *A Brief History: The CMI and its Relationship with IMO, the IOPC Funds and Other UN Organizations*, COMITÉ MARITIME INTERNATIONAL, https://comitemaritime.org/wp-content/uploads/2018/06/A-brief-

older, and has over the years developed relationships with governmental decision-makers in the area of maritime law, it has been more important in drafting international treaties on marine matters than IMCO.[79] Based in Antwerp, it has served as an important agency in the development of international maritime law.[80]

In defining its purpose, the CMI Constitution explains:

> It is a non-governmental not-for-profit international organization established in Antwerp in 1897, the object of which is to contribute by all appropriate means and activities to the unification of maritime law in all its aspects. To this end it shall promote the establishment of national associations of maritime law and shall co-operate with other international organizations.[81]

Since the time of the CMI's founding, whenever the need for a new set of laws, treaties, or regulations affecting the shipping industry arose, the CMI provided expertise.[82] The CMI convened and drafted an appropriate convention, which was then transmitted to the Belgian government.[83] In turn, the Belgian government held an international conference for the purpose of obtaining approval from

History-Frawlye.pdf (last visited on Feb. 19, 2019); F.L. Wiswall, *A Brief History*, https://comitemaritime.org/wp-content/uploads/2018/06/a-brief-history-wiswall.pdf (last visited Feb. 19, 2019).

[79] CMI was founded in 1897. *See About Us*, COMITÉ MARITIME INTERNATIONAL, https://comitemaritime.org/about-us/ (last visited July 18, 2019). First, IMCO, based on its constitution is "consultative and advisory." *See* Convention on the IMCO, *supra* note 63, at 50. Conversely, it is not a legislative body. Further, Robert H. Neuman suggests a possible reason for the imbalance between IMCO and the CMI is that the CMI represents maritime states, which have large shipping and naval fleets, tend to be in the northern hemisphere, and are developed economically. These states are in contradistinction to coastal states, which have smaller fleets, and tend to be in the southern hemisphere and are less developed economically. *See* Robert H. Neuman, *Oil on Troubled Waters: The International Control of Marine Pollution*, 2 J. MAR. L. & COM. 349, 351 (1971).

[80] *See* Wiswall, *supra* note 78, for detailed descriptions of its role in the development of international maritime law.

[81] *See* COMITÉ MARITIME INTERNATIONAL, CONSTITUTION 1 (2017) https://comitemaritime.org/wp-content/uploads/2018/05/2017-Genoa-Constitution.pdf; *see also* HENRY REIFF, THE UNITED STATES AND THE TREATY LAW OF THE SEA 132 (1959)*; see also*, Allan I. Mendelsohn, *Marine Liability for Oil Pollution: Domestic and International Law*, 38 GEO. WASH. L. REV. 1, 28–29 (1969).

[82] M'GONIGLE & ZACHER, *supra* note 65, at 66–67.

[83] *See* Allan I. Mendelsohn, *The Public Interest and Private International Maritime Law*, 10 WM. & MARY L. REV. 783, 794–95 (1969).

those states that chose to participate.[84] Among the CMI conventions adopted by the international community are those dealing with matters such as collisions at sea, maritime mortgages and liens, arrests of ships, and salvage and assistance.[85]

The CMI historically has maintained close ties with governmental officials in various European shipping ministries.[86] This is particularly true in certain European countries such as Belgium and Switzerland.[87] The pattern of interaction closely resembles the client-patron relationship that has been studied and observed in many bureaucracies, where an agency and an interest group formulate policies that accrue to their mutual benefit.[88] Accordingly, it would be fair to assess that the CMI, both as an organization and also some prominent individuals associated with it, provides information and occasional political support to governmental officials.[89] In turn, the CMI is given crucial input in decision-making regarding marine affairs in the abovementioned

---

[84] *See id.* at 795.

[85] M'GONIGLE & ZACHER, *supra* note 65, at 66.

[86] *See id.*

[87] *See* M'GONIGLE & ZACHER, *supra* note 65, at 268–69.

> The national associations—CMI and the International Chamber of Shipping—include some of their countries' most eminent maritime experts, who carry great authority and legitimacy when making representations to their governments. . . . Moreover, by passing information about impending legislative actions of a state to various foreign associations, foreign governments more sympathetic to the welfare of the industry are encourage to exert pressure on the state in question.

Id. at 299. *See also* Mendelsohn, *supra* note 83, at 795 (discussing the close relationship between the CMI and Belgian government).

[88] The classic description of this phenomenon can be found in Samuel P. Huntington, *The Marasmus of the ICC: The Commission, the Railroads, and the Public Interest*, 61 YALE L. J. 467, 509 (1952). On the role of the C.M.I. in the formulation of maritime law see Mendelsohn, *supra* note 21, and Healy, *supra* note 62, at 93–105.

[89] *See* Interview with Senate Foreign Relations Committee Staff Member, Washington, D.C. (1972); Interview with Ambassador from Mediterranean Nation, New York, N.Y. (June 20, 1972); Interview with former U.S. Department of State negotiator, Washington, D.C. (June 14, 1972); Interview with Large International Petroleum Company Executive, New York, N.Y. (1974) [hereinafter, *Interviews*] (for this Article, names of interviewees are on file with author to preserve anonymity); *see generally* Huntington, *supra* note 88. On the role of the C.M.I. in the formulation of maritime law see Mendelsohn, *supra* note 81, and Healy, *supra* note 62, at 93–105.

States.[90] As this writer was told in an interview with a high official of a major international petroleum company, "[t]he CMI can virtually dictate to certain governments which rules and regulations it will and will not accept."[91]

The U.S. member association of the CMI is the Maritime Law Association, which is composed of lawyers who represent maritime interests.[92] "[The] CMI is dominated largely by British and Scandinavian interests, with Belgium directly behind and everyone else, including the United States, a very poor third."[93]

Further, the shipowners have a very close relationship with the insurance industry either through self-insurance via the Protection and Indemnity Clubs (P&I Clubs), or through the purchase of policies through marine insurers. Accordingly, high limits of liability, coupled with the strict liability standard from marine oil pollution damage, would prove financially disruptive to the shipping industry. Like the Maritime Law Association, their United States counterparts in the marine insurance field have also been uninfluential in policy formulation.[94]

C. Marine Insurance Interests

A second set of Non-State Actors who had input in the resolution of the issues raised by the Torrey Canyon disaster was the marine insurance interests. Clearly, in the event of a significant oil spill, the major costs of the disaster would ultimately be paid by the insurance industry through third party coverage.[95]

While maritime insurance underwriters are available in many parts of the world, the industry originated in the Renaissance Mediterranean, and in the modern era, it is centered in Great Britain.[96] Some historians trace modern marine insurance to the Lombards, who were thirteenth century Italian traders, but most

90 *See* Mendelsohn, *supra* note 83, at 794–95.

91 Interviews, *supra* note 89.

92 *See* Mendelsohn, *supra* note 83, at 794.

93 *See id.* at 796.

94 *See id.* at 809.

95 For a discussion of third-party marine insurance against oil pollution, see Elli Sperdokli, *Marine Insurance for Oil Pollution*, 49 TORT TRIAL & INS. PRAC. L. 611–43 (2014).

96 *See* W.R. Vance, *The Early History of Insurance Law*, 8 COLUM. L. REV. 11 (1908).

agree that the modern concept of insurance originated after 1691 at Lloyd's Coffee House (on Lombard Street) in London where shipowners used to distribute lists of cargos they needed insured.[97] Any interested party would sign his name under the item he would be willing to insure. Lloyds, despite its venerable age, is still a powerful insurer.[98]

> The modern Lloyd's, together with a number of specialist "London Market" insurance companies, still writes about 15% of all marine business, 27% of world aviation insurance and nearly 58% percent of all offshore energy business (including oil rigs and similar marine structures). Lloyd's is not an insurance company; rather it is a society of underwriters and a market place where risks are insured by around eighty syndicates of Underwriting Members ("Names") which are controlled in turn by managing agents or underwriting firms (51 at present). . . . Marine business (and nearly all other business) is brought to Lloyd's by 180 or so accredited Lloyd's brokers.[99]

The roots of the political-economic power of the insurance industry are described in the following terms by Virginia Haufler, one of a handful of political economists who have studied the impact of insurance on international affairs:

> The development and evolution of an international risks insurance regime over the course of the twentieth century depended on the initiative and authority of the private sector participants. The insurance underwriters in London and elsewhere made crucial decisions about what would be insured, how it would be insured, and by whom. The public authorities, concerned with national security and economic well-being, looked on the management of political risks as an important

---

[97] *See Corporate History*, LLOYD'S, www.lloyds.com/about-lloyds/history/corporate-history (last visited June 2, 2019) (discussing the corporate history of Lloyd's). *See also*, M'GONIGLE & ZACHER, *supra* note 65, at 374.

[98] *See* LLOYD'S, ANNUAL REPORT 2017, https://www.lloyds.com/~/media/files/lloyds/investor-relations/results/2017ar/ar2017_annual-report-2017.pdf (last visited Feb. 13, 2019) (indicating substantial size of Lloyd's). Today, the UK insurance industry is the largest in Europe and the fourth largest in the world. *See* ABI, UK INSURANCE AND LONG TERM SAVINGS KEY FACTS 2018 (Dec. 2018), https://www.abi.org.uk/data-and-resources/industry-data/uk-insurance-and-long-term-savings-key-facts/ (last visited Feb. 13, 2019).

[99] Stanley Mutenga & Christopher Parsons, *Marine Insurance*, *in* THE BLACKWELL COMPANION TO MARITIME ECONOMICS 453 (Wayne K. Talley ed., Wiley Blackwell 2011).

> factor facilitating foreign commerce but proved reluctant to become participants themselves; they eventually joined the regime as junior partners. The commercial underwriters and government agencies carefully separate their business from each other, viewing their operations as complementary and not competitive. Both adhered to standard industry norms in designing their insurance contract, and both believed that many international risks could not be insured.[100]

While it is clear that insurers cannot insure that which is uninsurable, this concept would lie at the core of the issues raised at Brussels and afterwards, and would strongly influence the international regime that was established to govern liability for marine oil spills.

In modern times, two types of maritime insurance have developed. The first form insures a quantifiable insurance risk such as the cost of the ship and is referred to as hull and machinery insurance.[101] It is issued by large insurers such as Lloyd's and is substantially similar to ordinary fire or hazard insurance issued to cover a building against destruction. The second form of insurance covers, among other losses, damage caused by a ship or its cargo, which, by definition, is not a quantifiable number that can be determined in advance.[102] This form of insurance is not issued by marine insurance companies.[103] Rather, it is issued by the shipowners themselves, who band together in P&I Clubs.[104] Accordingly, the costs of a disaster like the Torrey Canyon are ultimately paid for by the shipowners themselves.[105] Therefore, the stakes for the shipowners are enormous in a situation of massive

---

[100] *See* VIRGINIA HAUFLER, DANGEROUS COMMERCE: INSURANCE AND MANAGEMENT OF INTERNATIONAL RISK 125 (Cornell Univ. Press 1997).

[101] *See Marine Business Guidance*, LLOYD'S, https://www.lloyds.com/tools-and-systems/risk-locator/class-of-business-guidance/marine (last visited Feb. 23, 2019) ("Ship's hull insurance covers physical damage to a ship's hull and machinery.").

[102] This type of insurance exists because there is no way of predicting claims by a third party that may arise, which is in contradistinction to hull and machinery insurance, which has a predictable finite value. *See Marine*, LLOYD'S, https://www.lloyds.com/tools-and-systems/risk-locator/class-of-business-guidance/marine#Ship%E2%80%99s%20hull%20and%20ship%E2%80%99s%20liability (last visited July 18, 2019).

[103] *See* Sperdokli, *supra* note 95, at 613.

[104] *See id.*

[105] *See id.*

damage to third parties, including government cleanup costs caused by cargo carried on their vessels.[106] In a very real sense, the P&I Clubs are the alter egos of the shipowners, and any compensation paid by them is ultimately borne by the shipowners themselves.[107]

In 1969, the position of the British insurers was that high limits of liability, combined with a strict liability standard—as opposed to the traditional maritime concept of fault—would result in uninsurable liabilities, which implied that the system in place for the transoceanic transport of oil would simply break down.[108]

Further, the Torrey Canyon episode resulted in the payment by the American maritime insurance industry of almost twenty-five percent of its annual premium intake for coverage of the disaster.[109] In 1971, the American Hull Insurance syndicate reported that the percent of the income paid out to indemnify casualties was at a record high and indicated that new policies were required to meet contemporary challenges to the industry. These losses reinforced the belief that what was best for the industry was lower limits of liability and lower standards of liability, specifically, liability based on negligence, with carved out exceptions further diluting that standard, as opposed to the higher standard of strict liability.[110] In addition, shipowners were interested in the idea of an international fund that would obligate the cargo interests (i.e. oil) to participate in any compensation scheme.[111] This would distribute the costs to the entire oil transport industry and lessen their own financial burden.[112] Thus, the interests of the shipowners and their insurers were not congruent with those of the petroleum industry.[113]

106 *See id*.

107 *See id*.

108 *See generally* Comment, *supra* note 21.

109 *See* PETROW, *supra* note 40, at 201–03.

110 *See generally id.*

111 *See infra* Section V.C for a discussion on the implementation of an arrangement which resulted in a compensation scheme which included the oil industry.

112 *See infra* Section V.C.

113 See *infra* Section V.C for a discussion on the implementation of an arrangement which resulted in a compensation scheme which included the oil industry.

D. The Petroleum Interests

The power and size of the major international oil firms have been well documented,[114] but the relationship between the oil and shipping industries is complex.[115] As previously noted, however, a divergence of interests was manifested between these two industries at the 1969 Brussels conference over liability for oil spills.[116] The states where shipping interests were powerful argued that cargo interests, rather than vessel owners, should bear the responsibility for liability for damages.[117] While oil interests were not averse to some forms of compensation, this could be accomplished only if the shipowners and the P&I Club agreed to participate in offering some of the compensation to damaged parties.[118] Further, the terms of liability could neither be made unlimited, nor be based on strict liability, rather than on fault.[119]

Of the three major industries involved—shipping, insurance, and oil—the oil companies offered the least resistance to a compensation plan.[120] This was because their financial resources

---

[114] *See generally, e.g.*, Robert Engler, *The Politics of Oil*, 38 IND. L.J. 305 (1961); PETER R. ODELL, OIL AND WORLD POWER (1970); ANTHONY SAMPSON, THE SEVEN SISTERS: THE GREAT OIL COMPANIES & THE WORLD THEY SHAPED (1975); STEVE COLL, PRIVATE EMPIRE: EXXONMOBIL AND AMERICAN POWER (2012); *see also* M'GONIGLE & ZACHER, *supra* note 65, at 372 (detailing in a table the percent of a state's tanker tonnage owned by oil companies). It is interesting to note the staying power of the petroleum industry. Much of the literature on oil written in the 1970s stated explicitly or implicitly that the status quo could not endure for long. Yet, forty to fifty years later, the size and strength of the international oil industry have certainly not diminished and may have in fact increased. *See* Amory Lovins, *Energy Strategy: The Road Not Taken*, FOREIGN AFFAIRS (Oct. 1, 1976), https://www.foreignaffairs.com/articles/united-states/1976-10-01/energy-strategy-road-not-taken (predicting the decline of the oil industry).

[115] *See* M'GONIGLE & ZACHER, *supra* note 65, at 53.

[116] *See id.* at 261 (providing an overview of the dynamics of the competition among shipping, insurance, and oil interests); *see also infra* Section VI.C (discussing the issues that separated the shipping, insurance and oil industries were resolved at Brussels).

[117] *See* M'GONIGLE & ZACHER, *supra* note 65, at 261.

[118] *See id.*

[119] *See* Interview with Chief Maritime Counsel of major International Oil Producer, New York (1974). *See also* Interview with American Diplomat, Washington, D.C. (1972) (discussing the diplomat's participation in IMCO deliberations in 1967).

[120] *See* M'GONIGLE & ZACHER, *supra* note 65, at 270.

were far greater than those of the shippers or the insurers. It should be remembered that these events occurred in the late l960s, a time when the oil interests were far more independent and far less under the control of the states in which they drilled for oil than they are today. Unlike the shippers or insurers, the cargo interests were bearing the brunt of criticism for oil spills (which is still true today). By participating in a compensatory scheme, a more positive public image might be developed. Finally, by participating in the establishment of any international fund, the oil industry would have an effective voice in its founding and in its ensuing policies.[121]

E. Tanker Owners Voluntary Agreement Concerning Liability for Oil Pollution

Self-regulation is a tactic used by Non-State Actors in domestic systems whereby a group threatened by government regulation takes a position that, while regulation is needed in any particular situation, the regulation should come from within the industry rather than from within the government.[122] One of the purposes of this tactic is to cause a non-decision from the government—i.e. not to proceed with governmental regulation, and instead, let industry police itself.[123]

This tactic was used by the tanker owners and the petroleum companies shortly after the Torrey Canyon episode in the establishment of two industry entities: The Tanker Owners Voluntary Agreement Concerning Liability for Oil Pollution (TOVALOP) by the shipowners, and the Contract Regarding and Interim Supplement to Tanker Liability for Oil Pollution (CRISTAL) by the oil companies.[124]

TOVALOP was an agreement reached by owners of oil tankers whose ostensible purpose was to reimburse governments for

---

121 *See id*.

122 *See* GRANT MCCONNELL, PRIVATE POWER & AMERICAN DEMOCRACY 294-95 (Alfred A. Knopf ed., 1966); *see also* THOMAS T. HOLYOKE, INTEREST GROUPS AND LOBBYING: PURSUING POLITICAL INTERESTS IN AMERICA 47 (Westview Press 2014).

123 *See* HOLYOKE, *supra* note 122, at 47.

124 *See* Colin De La Rue, *TOVALOP and CRISTAL—A Purpose Fulfilled*, 1996 INT'L J. SHIPPING L. 285, 287–89 (1996) (providing an examination of the origins and an appraisal of the accomplishments of TOVALOP and CRISTAL).

cleanup costs that ensued after an oil spill.[125] It originated in London in January 1969, shortly after the Torrey Canyon episode, in a meeting of several corporate lawyers representing shipping entities affiliated with seven major oil companies—British Petroleum, ESSO, Gulf Oil, Mobil Oil, Shell, Standard Oil and TEXACO—who gathered to assess what international action might occur in the aftermath of the Torrey Canyon episode.[126] These seven oil companies were the leaders in world oil production and known informally as the "Seven Sisters."[127] Their specific intention was to avert entirely or delay any reaction, either unilateral or international, that these lawyers perceived would run counter to the interests of their clients in the shipping industry.[128] Consequently, a detailed agreement was reached among the parties on January 7, 1969.[129]

The TOVALOP Agreement provided for compensation to governments for cleanup costs.[130] According to IV(B) of the agreement, liability was based on fault, as opposed to strict liability, but with a reversed burden of proof.[131] Further, VI(C) of the agreement details that compensation would be limited to $10 million and would become available only after other sources of compensation had become exhausted.[132]

---

125 *See* Tanker Owners Voluntary Agreement Concerning Liability for Oil Pollution, Jan. 7, 1969, 8 I.L.M. 497 (1969) (providing the full TOVALOP agreement). *See also* David A. Barrett & Christine M. Warren, *History of Florida Oil Spill Litigation*, 5 FLA. ST. U. L. REV. 309, 341 (1977) (arguing that TOVALOP and CRISTAL were attempts by Non-State Actors to establish and control claims for compensation for oil pollution damage); Gordon L. Becker, *A Short Cruise on the Good Ships: TOVALOP and CRISTAL*, 5 J. MAR. L. & COM. 609 (1974) (arguing that TOVALOP and CRISTAL were responsible industry efforts to deal with the problem); Kamil A. Bekiashev & Vitali V. Serebriakov, *International Tanker Owners Pollution Federation, Ltd. (TOVALOP)*, *in* INTERNATIONAL MARINE ORGANIZATIONS 180 (K.A. Bekiashev et al. eds., 1981).

126 *See* De La Rue, *supra* note 124, at 287.

127 *See* Bekiashev & Serebriakov, *supra* note 125, at 180.

128 *See* De La Rue, *supra* note 124, at 287 ("They [the Seven Sisters] devised the idea of an industry scheme in which tanker owners undertook voluntary liability to pay compensation for oil pollution damage. The scheme was designed to have an impact on world opinion, and to relieve political pressure on national governments to introduce their own unilateral solutions.").

129 *See id.*

130 *See* Tanker Owners: Voluntary Agreement Concerning Liability for Oil Pollution, *supra* note 125, at 497–501.

131 *See id.* at 500.

132 *See id.*

Moreover, as the name clearly states, it was a voluntary Non-State organization, which did not possess the attribute of sovereignty.[133] Further, TOVALOP was not an international treaty, which, per Article VI of the United States Constitution, would not rise to the level of being "the supreme law of the land." Instead, it was a voluntary industry organization for compensation, which some saw as being designed to coopt international action.[134]

F. The Contract Regarding an Interim Supplement to Tanker Liability for Oil Pollution

CRISTAL was not financed by insurance companies. Rather, the participants, the major international oil companies, pledged to compensate affected parties on a pro rata basis.[135] The upper limit of CRISTAL compensation was established at $30 million.[136] This thirty million dollar maximum payout would be reduced by the Owner's or Bareboat Charterer's maximum liability for the pollution damage under TOVALOP[137] plus the amount of expenditures by the Owner or Bareboat Charterer was entitled to make for "Removal of Oil"—as defined in TOVALOP—and to receive reimbursement for as provided in TOVALOP,[138] plus the maximum liability of Owner or Bareboat Charterer with respect to such damage under applicable law, statutes, regulations or conventions,[139] plus the maximum amount to which such persons sustaining pollution damage were entitled from any other person or from the ship or from any vessel under applicable law, statute, regulations or conventions providing for compensation for all or part of said damage.[140] CRISTAL would pay the difference between

133 It should be borne in mind that TOVALOP was a purely non-governmental association of independent corporations. Accordingly, it was not required to follow the constraints of due process in the legal sense of the term. *See* Barrett & Warren, *supra* note 125, at 340–41.

134 *See id.*

135 *See* Oil Companies: Contract Regarding an Interim Supplement to Tanker Liability for Oil Pollution, Jan. 14, 1971, 10 I.L.M. 137, 141, 143 (1971). Thirty-eight oil companies signed CRISTAL in January 1971, and the agreement entered into force on April 1, 1971. *See id.* at 139.

136 *See id.* at 140.

137 *See id.*

138 *See id.*

139 *See id.*

140 *See id.*

that final figure and a maximum of $30 million.[141] Thus, unless a monumental oil spill disaster occurred, and the total cleanup costs exceeded $14 million, CRISTAL would not be activated.[142] The CRISTAL agreement among the oil companies was formally agreed to by its component members on January 14, 1971.[143]

After TOVALOP had been organized, the tanker owners established a non-governmental entity known as the International Tanker Owners Pollution Federation Ltd. (ITOPF) to provide assistance in the event of oil spills.[144] It recently celebrated its fiftieth anniversary.[145] Like TOVALOP, the ITOPF was not a governmental entity, and any technical assistance by it was essentially voluntary in nature with the Institute establishing all procedural and substantive rules and regulations.[146]

III. THE REGIME FORMATION PROCESS BEGINS—APRIL 1967[147]

Almost immediately after the Torrey Canyon episode, in April 1967, the British government sent an official communication to IMCO requesting an urgent meeting to discuss changes in international law regarding liability for pollution-caused oil spills and possibly other pollutants.[148] At the same time, the Bureau Permanent of the CMI voted to establish an International Torrey Canyon Subcommittee, which was charged with studying the disaster and making the appropriate recommendations as to any changes in international law regarding liability for marine oil pollution damage.[149] The Chairman of the Subcommittee was Lord Devlin who was the President of the British Maritime Law

141 *See id.*

142 This number reflects the amounts payable under 1969 civil liability treaty and TOVALOP. *See supra* Introduction.

143 CRISTAL was signed and dated January 14, 1971. *See* Contract Regarding an Interim Supplement to Tanker Liability for Oil Pollution, *supra* note 135, at 137.

144 *See Our History*, ITOPF, https://www.itopf.org/about-us/our-history/ (last visited Feb. 22, 2019) (providing information on its history and functions).

145 *See id.*

146 As a voluntary non-governmental organization, ITOPF operates under its own rules and procedures. *See id.*

147 *See* Sweeney, *supra* note 38, at 193. *See also*, Healy, *supra* note 62, at 93.

148 *See* Healy, *supra* note 62, at 93.

149 *See id.* at 92–93.

Association, which, like other Maritime Law Associations, was the official national affiliate of the CMI.[150] The Subcommittee selected from its membership a Working Group of nine, which included prominent members of the French, British, Italian, Dutch, Norwegian, and Swedish Maritime Law Associations, as well as the Manager of the German Shipowners' Association.[151]

The IMCO and CMI subcommittees worked separately in the formation of the emerging regime complex to deal with maritime oil pollution.[152] IMCO consisted of an organization that had diverse international membership, although it was highly inclined to promote shipping interests.[153] The CMI Subcommittee Working Group, on the other hand, consisted of maritime lawyers, whose clients were the shipowners and therefore clearly represented the shipping interests and their alter egos, the P&I Clubs.[154]

IMCO, through its Legal Committee, studied both the public international law question of intervention on the seas against an offending vessel (Legal Working Group I), as well as the private law issue of financial liability of the shipowners (Legal Working Group II).[155] The CMI dealt only with the private law issue and was not concerned with the issue of intervention on the seas.[156] It is important to note, however, that IMCO and the CMI did have an official channel of communication through the IMCO Legal Working Group II.[157]

It soon became clear that the most important private law issue was the standard of liability, which would be incorporated in any civil liability treaty.[158] Maritime law had traditionally used a negligence standard, which is far less rigorous than the strict liability

150 *See id.* at 94.

151 *See id.* at 95 & n.4.

152 *See id.*

153 *See Introduction to IMO*, INT'L MAR. ORG., http://www.imo.org/en/About/Pages/Default.aspx (last visited Feb. 22, 2019) (touting the shipping industry, but only within the framework of creating a level playing field "so that ship operators cannot address their financial issues by simply cutting corners and compromising on safety, security and environmental performance").

154 *See* M'GONIGLE & ZACHER, *supra* note 65, at 66 (explaining that the CMI "represent[s] the entire range of interests involved in shipping").

155 *See* Healy, *supra* note 62, at 94.

156 *See id.* at 93–94.

157 *See id.* at 95.

158 *See id.* at 94.

standard.[159] There were those in IMCO who wanted a strict liability standard, while the CMI, as an organization representing shipowners, was adamant that the traditional negligence standard would remain in effect.[160]

The second private law issue was who would be liable for oil pollution damage.[161] In the broadest sense, the question under consideration was one of economics—should liability be borne by the shipowners and their insurance companies, or should liability be borne by the petroleum companies who, at the end of the day, were profiting from a lucrative trade in oil, or some combination of shipowners, insurance companies, and oil companies?[162] This question was not resolved at the Brussels Conference, and still remains an open issue today.[163]

---

[159] The difference between strict liability and negligence is summed up in the following statement from William Prosser's classic work on torts:

> Until the close of the nineteenth century, the progress of the law was in the direction of limiting liability in tort of 'fault,' in the sense of a wrongful intent or a departure from a community standard of conduct. Modern law is developing a policy of imposing liability without regard to 'fault,' particularly in cases where the defendant's activity is an unusual one involving abnormal danger to others, even though it is carried on with all possible precautions. The basis of this policy is a social philosophy which places the burden of the more or less inevitable losses due to a complex civilization upon those best able to bear them, or to shift them to society at large.

WILLIAM L. PROSSER, HANDBOOK OF THE LAW OF TORTS 315 (2d ed. 1955). In international law, this principle of strict liability has been incorporated into Article 7 of the Outer Space Treaty. *See* Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space Including the Moon and Other Celestial Bodies art. VII, Jan. 27, 1967, 18 U.S.T. 2410, 610 U.N.T.S. 205 (providing that a state launching any object into space "is internationally liable for damage to another State Party to the Treaty or to its natural or juridical persons by such object"); *see also* Convention on International Liability for Damage Caused by Space Objects art. II, Mar. 29, 1972, 24 U.S.T. 2389, 961 U.N.T.S. 187 (providing that a State launching an object into outer space "shall be absolutely liable to pay compensation for damage caused by its space object on the surface of the Earth or to aircraft in flight").

[160] *See* Healy, *supra* note 62, at 94–95.

[161] *See id.*

[162] *See* Sperdokli, *supra* note 95, at 616 (making the novel argument that perhaps first party insurance rather than third party insurance is a way of resolving this issue).

[163] *See id.*

The CMI spent the period between the establishment of its Working Group in 1967 and the Brussels Conference attempting to develop a credible alternative to an anticipated IMCO regime based on strict liability, as well as high limits of liability.[164] The CMI met in Rome in October 1967, and requested that its members respond to a membership poll on the issues in order to establish a unified position.[165] Eighteen members responded to the poll, and the CMI held a meeting in Tokyo to establish its position from March 30 to April 4, 1968.[166] The meeting was chaired by Albert Lilar, President of the Belgian Maritime Law Association, who served as an official chair on behalf of IMCO at the Brussels Conference.[167] The net result of this meeting at Brussels was—not unexpectedly—the drafting of a proposed treaty based on a consensus to minimize the liability of shipowners.[168]

Several months later, in January 1969, IMCO considered the September 1968 CMI draft treaty.[169] While there was agreement on certain relatively minor issues, such as compulsory insurance for shipowners, the key issue of liability remained open.[170] In January 1969, the CMI met in Tokyo and in an effort to shift the terms of liability, the Irish and Swedish delegations proposed that the strict liability standard be applied to cargo owners rather than shipowners.[171] This proposal was rejected, and further, no consensus was reached on some of the terms of a draft treaty.[172] Following the Tokyo meeting, the CMI submitted its latest draft to IMCO, but the terms and limits of liability remained open issues to be resolved at Brussels.[173]

164 *See* Healy, *supra* note 62, at 94–98.
165 *See id.* at 94.
166 *See id.* at 95.
167 *See id.* at 95–96.
168 *See id.* at 95.
169 *See id.*
170 *See id.* at 97.
171 *See id.*
172 *See id.* at 97–98.
173 *See id.*

IV. THE IMCO MEETING OF MAY 1967

One of the key events in the preparation for the Brussels Conference was the special session of IMCO convened in London on May 4 and 5, 1967.[174] There existed a broad consensus that if another Torrey Canyon disaster were to be avoided, certain corrective steps would have to be taken.[175] Three categories of potential IMCO activities were considered.[176] The first dealt with technical and preventive measures to avoid repetition of a Torrey Canyon disaster.[177] Topics discussed included methods of training seamen, tanker construction technology, and establishment of sea lanes for tankers.[178] Next on the agenda was a discussion of remedial measures, such as how to alleviate the physical problems caused by oil pollution.[179] These functions were well within the usual scope of IMCO activities and could be best described by noting that, though desirable, they were nonetheless technical and generally non-controversial.[180] The third category of question, however, marked a notable departure from previous IMCO endeavors.[181] The agenda centered on legal issues rather than technical issues.[182] Among the items under consideration were: the legal rights of a coastal state to intervene on the high seas in the case of an oil tanker breakup that threatened its shores; the terms and extent of civil liability in accident situations; and the question of compulsory insurance for oil tankers.[183]

The legal questions, which previously would have been discussed at a CMI session, were now being considered by

174 *See* Lawrence Juda, *IMCO and the Regulation of Ocean Pollution from Ships*, 26 INT'L & COMP. L.Q. 558, 562 (1977) (providing a summary of the proceedings of the May 1967 IMCO meeting in London).

175 *See id.*

176 *See id.*

177 *See id.*

178 *See id.* at 563.

179 *See id.*

180 In 1967, the IMCO transformed from an agency dealing primarily with technical matters to an agency also dealing with legal issues. *See* Mendelsohn, *supra* note 83, at 811–12.

181 *See* Juda, *supra* note 174, at 564.

182 *See id.* at 563–64.

183 *See id.*

IMCO.[184] At least some of the motives for this new approach were suggested by a team of observers from the United States House of Representatives, who in their report to the House's Committee on Merchant Marine and Fisheries, noted three things. First, the CMI, as a non-governmental body does not have the official status to make authoritative determinations on behalf of member nations. An intergovernmental panel such as a new subcommittee of IMCO would be able to give the prompt and official attention required for the pressing legal problems. Second, the entire three-part program would best be handled and coordinated within one organization. Finally, a further reason in the mind of the delegates, not discussed by the council but learned in private conversations, was that the CMI is not highly regarded for its efficiency or dispatch in handling problems. Many delegates felt that assigning urgent and complicated legal questions to the CMI would not bring prompt results.[185]

The claim that CMI "did not have official status to make authoritative determinations on behalf of member nations" sounds somewhat disingenuous given the fact that for seventy years, this consideration had never stopped the international community from ratifying treaties that had been drafted by the CMI.[186]

This dismissal of the CMI being given a pivotal role in any forthcoming legal conference could have been motivated by the fact that IMCO was attempting to gain recognition—possibly enhance its image and obtain a larger budget—by drafting a convention on a matter guaranteed to win some publicity for itself.[187] Further, it is reasonable to assume that since CMI represented shipping interests, it was probably felt by many within IMCO, such as the non-maritime states, that a more "neutral" agency should participate in

[184] As previously noted, IMCO's function heretofore had been as a consultative organization, which dealt with technical matters. *See* Convention on the IMCO, *supra* note 63, at 50.

[185] *See* H.R. REP. NO. 628, at 9–10 (1967).

[186] *See* M'GONIGLE & ZACHER, *supra* note 65, at 66–67 (pointing out that the CMI had drafted many "private law" conventions). Until the Torrey Canyon disaster, IMCO didn't even have a legal committee. It was only at that time that IMCO entered the area of "private law," and "the relationship between the two bodies became a competitive one." *Id.*

[187] *See* Interview with U.S. State Department Official, Wash., D.C. (June 14, 1972); *see also* Interview with U.N. Ambassador from a Mediterranean Nation, N.Y.C., NY (June 20, 1972).

the forthcoming conventions.[188] Thus, it appeared as if there occurred a parting of the ways between, on the one hand, IMCO, a Public International Organization, and the CMI, a Non-State Actor that heretofore had drafted maritime treaties and conventions.[189] This divorce, however, was not destined to be permanent or even contemplated to be permanent, for it was emphasized at the London Conference that, "[t]he IMCO body could draw upon the experience and expertise of the CMI, on a consultative basis."[190] Thus no real separation between the shipping interests and IMCO was in the offing.[191] As was demonstrated repeatedly at the 1969 Brussels Conference, the term "consultative basis" was interpreted rather broadly by the CMI and by IMCO.[192]

V. THE COMPETING CMI AND IMCO TREATY DRAFTS—POST-LONDON 1969

As the Brussels Conference approached, the CMI and IMCO draft treaties still diverged in significant ways. The CMI draft stipulated that liability be based on the traditional maritime standard of fault (negligence) and not on the principle of strict liability.[193] The CMI worked closely with the P&I Clubs.[194] Since liability would be ultimately borne by the shipping companies (who self-insured through the P&I Clubs), the mutual interests of CMI and P&I Clubs dictated that liability be based on fault (i.e. negligence as opposed to strict liability) and be limited rather than open-ended.[195] The IMCO Working Committee split between those sympathetic to

188 *See* Mendelsohn, *supra* note 83, at 811–14.

189 *See supra* Section II.B.

190 *See* H.R. REP. NO. 628, at 9.

191 *See infra* Part VI (dealing with the role of CMI, especially its dominant figures at the Brussels Conference).

192 *See infra* Part VI.

193 *See* Healy, *supra* note 62, at 97–98.

194 The CMI represented the shipping interests, and the P&I Clubs were the self-insurance vehicles established by the shipowners. *See id.* at 94.

195 *See id.* at 95; *see also Protection & Indemnity Insurance—Overview and Coverage Concerns*, AMWINS GROUP, INC. (Sept. 20, 2016), https://www.amwins.com/insights/article/protection-indemnity-insurance-overview-and-coverage-concerns_9-16.

the CMI position and those opting for strict liability.[196] The strict liability clause of the IMCO Legal Working Group II committee draft made the vessel owner fully liable for damages, unless the oil spill was caused by "an act of war, hostilities, civil war, insurrection or a grave natural disaster of an exceptional character."[197] Because of the split in the IMCO Working Committee, the proposed IMCO draft treaty contained both versions (Alternative A and Alternative B), and it remained for the delegates to the Brussels Conference to make the final decision.[198]

Besides the major issue of liability based on fault versus strict liability, there were other significant differences between the CMI and the IMCO draft treaties. First, the CMI draft applied only to seagoing vessels carrying bulk quantities of oil.[199] The IMCO convention defined ship (except war ships and government vessels used for noncommercial service) as any seagoing vessel, and included in its provisions, damage caused by empty tankers.[200] Second, the CMI draft defined damage as "contamination"—the damage actually caused by oil.[201] The IMCO draft could be interpreted to include damage caused by fire and explosion, as well as by oil.[202] Third, the CMI draft provided a limit of one thousand francs or sixty-seven dollars per net ton if the owner was innocent of "actual fault or privity."[203] IMCO's decision was to allow the matter of a ceiling for financial liability be decided at Brussels.[204] Consequently, the treaty clause that stipulated the exact amount of liability was left blank.[205] The CMI and IMCO drafts also included discrepancies on other related matters, such as compulsory

196 *See* Healy, *supra* note 62, at 98–99. This dichotomy was reflected in the IMCO draft which contained an Alternative "A" based on fault, and an Alternative "B" based on strict liability. *See id.*

197 *Id.*

198 *See id.*

199 *See id.* at 98.

200 *See id.*

201 This narrow definition of damage could ultimately make a huge difference in the event of a catastrophic oil spill that included a fire or an explosion. *See id.*

202 *See id.*

203 *See id.* at 100.

204 *See id.* at 100 & n.33.

205 *See* ROBERT E. NEUMAN ET AL., REPORT OF THE UNITED STATES DELEGATION TO THE INTERNATIONAL LEGAL CONFERENCE ON MARINE POLLUTION DAMAGE 2 (1969) (submitted to the Secretary of State).

insurance and appropriate jurisdictions for adjudicating any claims.[206]

Differences between the CMI and IMCO drafts were not the only problem; there were also wide differences of opinion within the IMCO Working Group.[207] Several of these relevant issues could not be resolved in the pre-conference negotiations.[208] Among the major points of contention—adopted from the Report of the United States Delegation—were:

a) Which pollutants should be encompassed within the scope of the treaty. The United States' position was that all pollutants should be included. Others took the position that only pollution by oil should be regulated.[209]
b) The territorial scope of the proposed treaty. Some states wanted to include the territorial seas, as well as the high seas. Others opposed the inclusion of the territorial seas in the treaty, since the right of States to act within their territorial seas had been codified in international law and "application (of the treaty) in the territorial sea might subject coastal states to liabilities by arbitral tribunals on the basis of law other than that of the coastal state."[210]
c) The matter of strict liability vs. liability based on fault. The United States favored the strict liability position. Again, this position appeared to be consistent with the structure of the shipping and marine insurance industries, which were located largely outside of the United States.[211]
d) The limit on liability. This was a subject of vigorous debate. The proposed figures ranged from $67 to $450 per ton per vessel per incident. The United States "favored a limit which would be sufficient in most cases to compensate fully governments and coastal victims for pollution damage keeping in mind the amount of insurance available on the world market."[212]

206 *See id.*
207 *See id.*
208 *See id.*
209 *See id.*
210 *See id.*
211 *See id.*
212 *See id.*

e) Whether a vessel should be required to demonstrate through some form of insurance that it was able to compensate both government and victims. Again, the United States maintained that "such a provision [was] essential to insure compensation." [213]

The following table summarizes the salient provisions of the competing IMCO and CMI draft treaty provisions.

Table 1 - COMPETING IMCO & CMI DRAFT TREATY PROVISIONS

	IMCO	**CMI**
Strict Liability	Yes	No
Limits to Liability	Yes (higher)	Yes (lower)
Cargo Causing Damage	Only Bulk Oil	Other Cargoes
Liability for Damage	Only Caused by Oil	Broader – fire, etc.

VI. THE BRUSSELS CONFERENCE

A. The Organization of the Conference

The IMCO conference met in Brussels from November 10 to 29, 1969.[214] The attendees included forty-eight nations as participants, six nations as observers, three specialized agencies of the United Nations, and a handful of intergovernmental organizations and NGOs.[215] The majority of the participants were either shipping States or coastal States from the Western powers, or

[213] The difference between the competing draft treaties reflected the larger question of what constitutes a community of interest to produce an effective solution to a particular problem. Bruno S. Frey described some of the difficulties in the following way:

> The need for international conventions and rules is obvious in view of the pollution of the atmosphere and the overfishing and overexploitation of the oceans. The difficulty in reaching agreement on what these rules should be is equally well known. It is hard to obtain consensus because no country can be forced to accept rules.

Frey, *supra* note 75, at 205.

[214] *See* Final Act of the International Legal Conference on Marine Pollution Damage, *supra* note 2.

[215] *See id.*

from the Communist bloc.[216] Notably, there was little representation from developing States, with the notable exception of Liberia, where many seagoing ships were registered.[217]

The first item on the agenda was the election of a President and Vice President for the Conference.[218] Elected as President of the Conference was Dr. Albert Lilar, Chairman of the Belgian delegation.[219] Dr. Lilar was also the President of the CMI and, as indicated, a member of the Belgian delegation.[220]

The Conference was divided into three working committees.[221] The Committee on the Whole I studied the draft articles on the public law treaty, which served as the basis of the International Convention Relating to Intervention on the High Seas in Case of Oil Pollution Casualties.[222] Mr. George A. Maslov (USSR) served as chairman of this committee, with Mr. G. E. Nasamento de Silva (Brazil) and Mr. E. Lysgaard (Denmark) as vice chairmen.[223] The Committee on the Whole II studied the draft articles, which eventually were incorporated into the International Convention on Civil Liability for Oil Pollution Damage.[224] The chairman of this committee was Dr. Walter Müller, a prominent Swiss attorney, member of the Swiss delegation, and President of the Swiss Maritime Law Association.[225] Vice chairmen were Mr. C. Borchsenius of Norway and Mr. S. Matysik of Poland.[226] Finally, a Committee on the Whole or Final Clauses was established.[227] The

---

[216] *See* M'GONIGLE & ZACHER, *supra* note 65, at 160 (describing the geographic breakdown of the fifty-four states participating in the Brussels Conference as "twenty-two . . . Western developed states from Western Europe, North America, and Australasia, six . . . from Eastern Europe, twelve . . . from Africa, nine from Asia, and five from Latin America").

[217] *See id*.

[218] *See* Final Act of the International Legal Conference on Marine Pollution Damage, *supra* note 2, 970 U.N.T.S. at 265, 9 I.L.M. at 22.

[219] *See id.*

[220] *See id.*

[221] *See id.*

[222] *See id.*

[223] *See id.*

[224] *See id.*

[225] *See id.*

[226] *See id.*

[227] *See id.*

chairman was Mr. H. E. Shefer (Netherlands), and the Vice-Chairman was Mr. R. Economou (Romania).[228]

The significance of the appointments of Dr. Albert Lilar and Dr. Walter Müller to leadership roles at the Brussels Conference cannot be underestimated, and these two appointments are illustrative of the role of interest groups in general, and the concept of regulatory capture in particular.[229] The following figures illustrate the complicated triple—State delegate, Non-State Actor, and International Organization—connections of both Dr. Walter Müller, who headed the Committee on the Whole on Private Law Articles and of Dr. Albert Lilar, the President of the Conference. It is illustrative of the concept of regulatory capture at the international level.

228 *See id.*

229 Political scientists have extensively studied the interactions between governmental agencies (which in this case would include an international organization like IMCO), on the one hand, and interest groups on the other hand. In social science parlance, the clientele of an agency are "groups whose interests were strongly affected by an agency's activities—the groups, consequently, who provided the principal sources of political support and opposition." HERBERT A. SIMON ET AL., PUBLIC ADMINISTRATION 461 (New Brunswick: Transaction Publishers, 4th prtg. 2010). This concept was pioneered in DAVID TRUMAN, THE GOVERNMENTAL PROCESS (Albert A. Knopf ed., 1951). The phenomenon of regulatory capture occurs when an agency becomes dominated, and even captured, by the groups it ostensibly is seeking to regulate. At that point, the relationship become symbiotic, and the lines blur, if not totally disappear, between the regulators and the regulated. *See, e.g.*, DANIEL CARPENTER, PREVENTING REGULATORY CAPTURE (Daniel Carpenter & David A. Moss eds., 2013).

Figure 1

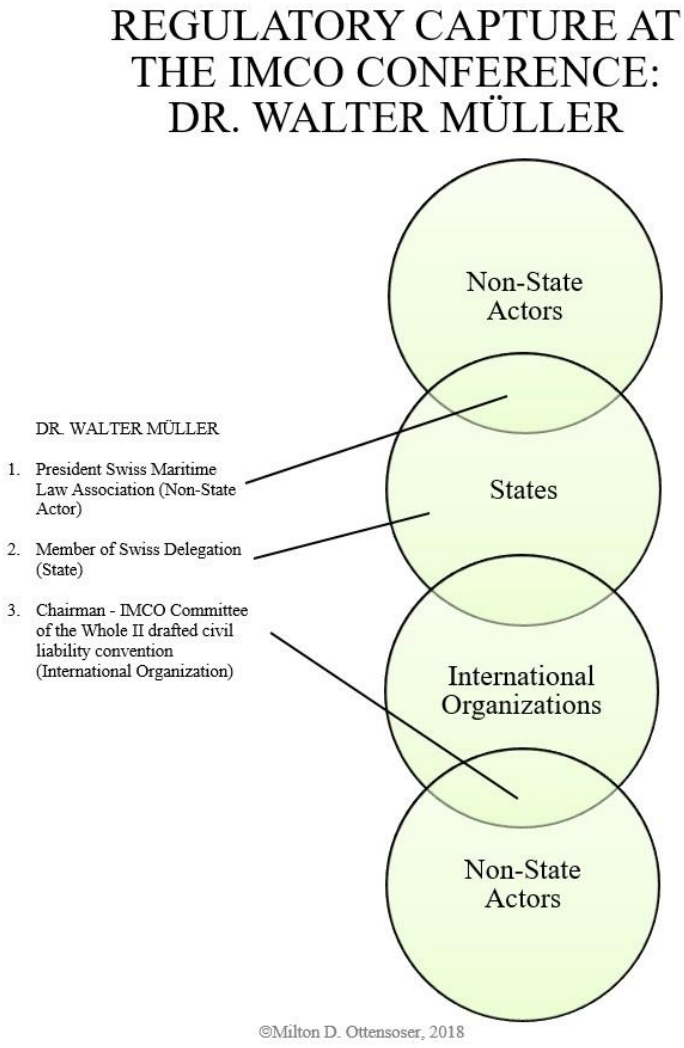
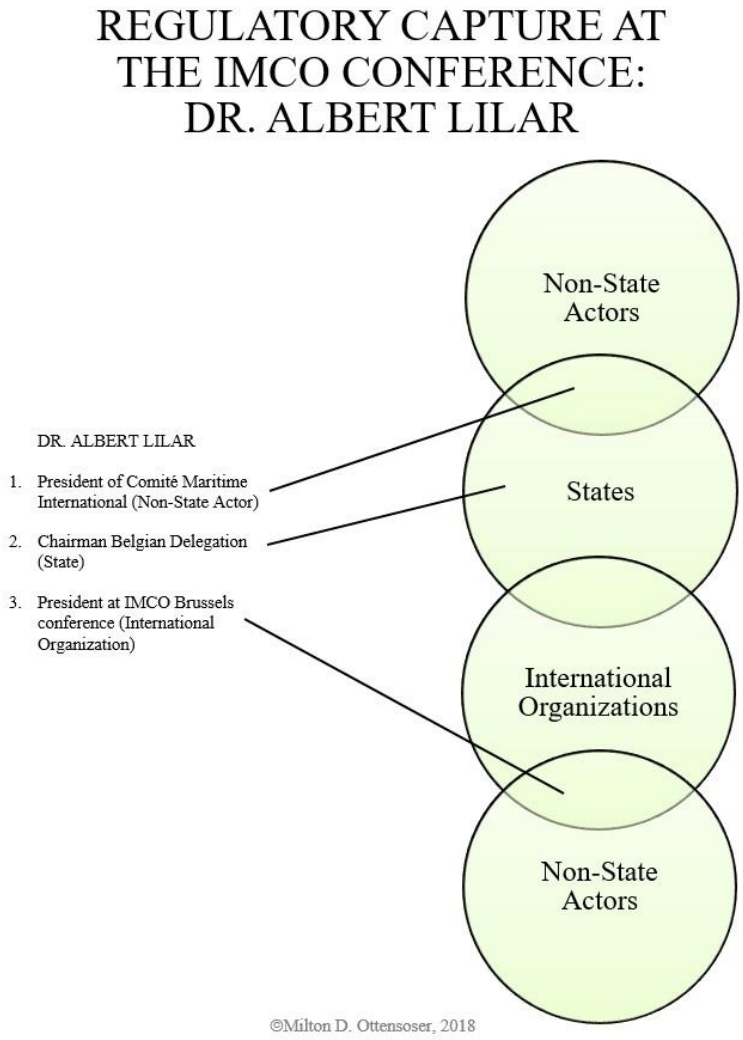

REGULATORY CAPTURE AT THE IMCO CONFERENCE: DR. WALTER MÜLLER
Non-State Actors
States
International Organizations
Non-State Actors
DR. WALTER MÜLLER
1. President Swiss Maritime Law Association (Non-State Actor)
2. Member of Swiss Delegation (State)
3. Chairman - IMCO Committee of the Whole II drafted civil liability convention (International Organization)
©Milton D. Ottensoser, 2018

Figure 2


REGULATORY CAPTURE AT THE IMCO CONFERENCE: DR. ALBERT LILAR
Non-State Actors
States
International Organizations
Non-State Actors
DR. ALBERT LILAR
1. President of Comité Maritime International (Non-State Actor)
2. Chairman Belgian Delegation (State)
3. President at IMCO Brussels conference (International Organization)
©Milton D. Ottensoser, 2018

As the Conference opened, it became clear that the national delegations were split on some of the most basic issues. Specifically, there were those at the Conference who opposed the approach of drafting two separate conventions.[230] Canada articulated these sentiments early in the Conference when its delegate, Mr. Jamieson, noted that, "[t]he Canadian government believed that there should be only a single convention—if necessary, in two parts: one part dealing with civil liability, the other with the right of intervention—so that the states would not be able to approve or reject one or other of the proposed conventions as it suited their interests."[231] In other words, the Canadian government took an approach requiring mutually acceptable cross-provisions for the private law and public law treaties.[232]

To reinforce its position, Canada offered an amendment to the public law convention that would have enabled States to disavow the financial obligations implicit within the convention vis-à-vis vessels of those states that did not accept the financial obligations in the private law convention.[233] Canada's position was that it was absurd to require a coastal state to pay for cleanup costs in relation to states that did not accept the corresponding financial obligation of the civil liability convention.[234] The amendment, which reflected an emerging environmentalist approach to the issue of pollution of transnational resources, was not ratified by the Conference.[235]

B. The International Convention Relating to Intervention on the High Seas in Cases of Oil Pollution Casualties

As previously indicated, two conventions were agreed to at Brussels. The first convention, formally known as the International Convention Relating to Intervention on the High Seas in Cases of

230 *See* International Legal Conference on Marine Pollution Damage, *Corrigendum submitted by Canada*, LEG/CONF/3/Corr. 3 (1969); *see also* M'GONIGLE & ZACHER, *supra* note 65, at 165.

231 *See* M'GONIGLE & ZACHER, *supra* note 65, at 165.

232 *See* International Legal Conference on Marine Pollution Damage, *Canadian Submission on the Draft Convention*, LEG/CONF/C.1/1 (1969); *see also* M'GONIGLE & ZACHER, *supra* note 65, at 165.

233 *See* M'GONIGLE & ZACHER, *supra* note 65, at 165.

234 *See Canadian Submission on the Draft Convention*, *supra* note 232.

235 At the end of the Brussels Conference, two conventions were agreed to, neither of which contained cross ratification clauses.

Oil Pollution Casualties, addressed the right of a state to protect itself against oil pollution damage by direct intervention against a ship discharging oil.[236] The public law treaty provides that:

> Parties to the present convention may take such measures on the high seas as may be necessary to prevent, mitigate or eliminate grave and imminent danger to their coastline or related interests from pollution of the seas by oil, following upon a marine casualty or acts related to such a casualty, which may reasonably be expected to result in major harmful consequences.[237]

Article II is, in essence, the sum and substance of this convention. It created a new right of a sovereign state to intervene unilaterally against a ship of another nationality that threatens environmental harm to the coastal state. Most of the rest of the convention is not much more than mere details. Two further relevant points should be noted:

a) The convention applies only to the high seas, not the territorial seas.[238]
b) Not only coastlines are protected, but also related interests, which are defined as "fisheries activities . . . tourist attractions . . . the health of the coastal population . . . and living marine resources and wildlife."[239]

This right to intervene against an offending vessel is tempered by the requirement that the intervening state must undertake consultations with other states affected by the casualty, particularly the flag state; consult with independent experts on the advisability of the impending action against the vessel; and notify any person (physical or corporate) in the coastal state whose interests could be affected by the decision.[240] Nonetheless, if the situation allows no time for consultation or notification, the threatened coastal State is authorized to act unilaterally.[241] Thus, a new right under public international law was created. Specifically, a state had the unilateral right to intervene proactively against a threat resulting from oil pollution to it or its interests.[242] Accordingly, this provision resolved

---

236 *See supra* Part I.

237 International Convention Relating to Intervention on the High Seas in Cases of Oil Pollution Casualties art. I, Nov. 28, 1969, 970 U.N.T.S. 212.

238 *See id.* art. I(1) (limiting measures by the coast state to "the high seas").

239 *Id.* art. II.

240 *See id.* art. III(a)–(c).

241 *See id.* art. III(d).

242 *See id.* art. I(1).

the uncertainty faced by the British government when confronted with a decision whether or not to destroy the Torrey Canyon.[243]

The public law treaty further provided that each State should "use its best endeavors to avoid any risk to human life, and to afford persons in distress any assistance of which they may stand in need, and in appropriate cases to facilitate the repatriation of ship's crews, and to have no obstacles thereto."[244] The Soviet Union had proposed an amendment which would have obligated the coastal states to repatriate the crew to the state of the ship's registry or their home port without delay, rather than just facilitate the repatriation.[245] The compromise term "to facilitate the repatriation" was ultimately incorporated into the treaty.[246]

The question of compensation by the coastal state to the owner of the ship that had been damaged or destroyed by the intervention process was resolved as follows. First, if any state takes measures in contravention of the provisions of the treaty and causes unnecessary damage, then compensation must be paid, "to the extent of the damage caused by measures which exceed those reasonably necessary to achieve the end mentioned in Article I."[247] Second, if there were to arise a dispute on the issue of compensation, then, in such event, a mechanism was provided in Article VIII for conciliation. If that failed, the Annex to the Convention provided for arbitration.[248]

The public law treaty, for a variety of reasons, provoked little controversy. By incorporating in its terms measures that evoked the nascent environmental spirit of the late 1960's, it dealt with the

---

243 The British government had no right under international law, as it existed in March 1967, to intervene against the Torrey Canyon. Article I newly established the right of direct intervention against a ship causing environmental harm through taking of such measures on the high seas

> as may be necessary to prevent, mitigate or eliminate grave and imminent danger to their coastline or related interests from pollution or threat of pollution of the sea by oil, following upon a marine casualty or acts related to such a casualty which may reasonably be expected to result in major harmful consequences.

Id.

244 Public Law Treaty, *supra* note 3, art. III(e).

245 *See* Neuman, *supra* note 79, at 9.

246 *See id*.

247 Public Law Treaty, *supra* note 3, art. VI.

248 *See id.* arts. VII–VIII.

problem that made front page headlines after the Torrey Canyon episode. First, it legitimized a practice that had been used to deal with the Torrey Canyon in 1967. Second, the treaty was "conservative," and rather limited in that:

a) It only dealt with oil, not all contaminants.
b) It provided for consultation with other powers and international experts.
c) It provided for compensation in cases of overreaction by the coastal state.[249]

Professor I. F. E. Goldie noted that there were those who suggested that the treaty be rejected because it reaffirms "creeping jurisdiction. . .that whenever a state enjoys exclusive offshore rights for some purposes, it tends to acquire further exclusive rights for other and perhaps all purposes, jeopardizing regional, international, and community interest in the freedom of the seas."[250] Goldie maintained that such fears are groundless and, "creeping jurisdiction can only occur by a failure of the international community's will."[251] Therefore, it is difficult to perceive how the public law convention could represent a threat to the international community.

C. The International Convention on Civil Liability for Oil Pollution Damage

The second convention agreed to at Brussels was the International Convention on Civil Liability for Oil Pollution, which, as indicated on the first page of this article, is known either as the private law treaty or civil liability treaty. The civil liability treaty was far more complicated and controversial than the public law treaty because of radically different views on the resolution of outstanding issues that were encompassed within the former draft text. Specifically, as was previously observed, there were significant divides over crucial issues such as whether the treaty should incorporate a strict liability or negligence standard, or whether or not it should include limits of liability.

The civil liability treaty, as signed, provided that the convention applied to oil pollution damage occurring on the

249 *See id.* arts. I, III, VI & VIII.

250 *Conventions and Amendment to Pollution of the Sea by Oil*: *Hearing Before the Subcomm. on Oceans & Int'l Env't of the S. Comm. on Foreign Relations*, 92nd Cong. 115–16 (1971) (statement of Professor L.F.E. Goldie).

251 *See id.*

territory or the territorial sea of a contracting State.[252] Since there was not a universally accepted standard as to the width of the territorial sea, a state that recognized a width of six miles had a greater coverage under the treaty than a State that recognized a three-mile limit.[253]

The civil liability treaty opens with a section in Article I that defines words and phrases used in the convention, followed by a provision in Article II that limits the remedies to pollution damage on the territory and territorial sea of a participating state.[254] Article III discusses the scope of liability, which was likely the most controversial issue discussed and decided upon at the conference.[255] It should be recalled that in the over two and a half years since the Torrey Canyon episode, no consensus had been reached by IMCO and the CMI on the resolution of this issue. The issue was simply who was liable for damages.[256] The terms of the civil liability treaty provide that the owner of the vessel—as opposed to the cargo owner—was made liable for any damages.[257] Clearly, this represented a victory for the international oil interests who had far deeper pockets than the shipping interests.[258]

The resolution of the liability issue occurred only after many days of debate and the addition of a provision to the treaty to

252 *See* Civil Liability Treaty, *supra* note 5, art. II.

253 The 1982 United National Convention on the Law of the Sea ("UNCLOS") attempted to correct this situation by establishing a twelve-mile limit on the territorial sea of a state (Part II - Territorial Sea and Contiguous Zone, Section 2, Limits of the Territorial Sea and Contiguous Zone).

254 *See* Civil Liability Treaty, *supra* note 5, art. II.

255 *See id.* art. III.

256 *See supra* Part II, discussing the positions of the CMI (shipping interests), marine insurance interests, and petroleum interests as stakeholders in the policy making process.

257 *See* Civil Liability Treaty, *supra* note 5, art. III (making "the owner of [the] ship at the time of [an] incident" liable for oil pollution damage). The owner is defined in Article II as

> [t]he person or persons registered as the owner of the ship or, in the absence of registration, the person or persons owning the ship. However, in the case of as ship owned by a state and operated by a company which in that state is registered as a ship's 'owner' shall mean such company.

Id. art. II.

258 *See supra* Sections II.B–D identifying the different positions of the CMI, the insurance interests, and petroleum interests on which of them should be primarily liable in the event of a marine oil pollution incident.

establish a fund to compensate victims.[259] The Canadian delegation, among others, had argued that since marine oil pollution was caused by the oil interests, as well as the shipping industry, both should share in the cleanup costs.[260] Consequently, Canada offered an amendment that would have made the shipping interests liable up to a certain amount, with the cargo owner (oil interests) paying the remainder.[261] Additionally, States which had strong shipping interests, such as Belgium, Greece, and Denmark, voted at the Conference in favor of making the cargo owner (oil companies) liable, rather than the shipowner.[262]

After lengthy discussion, an agreement was reached that provided that the shipowner would be held liable for oil pollution damage up to the amount of $134 per net ton of the ship, or, $14 million, whichever was less.[263] Further, strict liability, rather than negligence, was the standard used in the determination of the shipowner's liability.[264]

The effects of these seemingly onerous provisions were, however, diluted. First, an international compensation fund would be established to relieve shipowners from the burden of liability. Specifically, Sweden and Denmark offered a resolution that called upon IMCO to convene a conference by 1971 to establish such a fund. The fund would be based on two principles: "that victims would be fully compensated under a system of strict liability [and] that the fund should relieve, in principle, the shipowner of the additional final burden imposed by the convention."[265] Furthermore, a shipowner would be relieved of responsibility if the discharge "resulted from an act of war or hostilities," "was wholly caused by an act of omission done with intent to cause damage by a third party," or "was wholly caused by the negligence or other wrongful

259 These debates lasted for most of the almost three-week duration of the Brussels Conference. The discussions opened "with long speeches by a variety of delegations telling of the important shipping, coastal, and/or consumer interests they had to protect and introducing the best compensation scheme for these interests." M'GONIGLE & ZACHER, *supra* note 65, at 170.

260 *See* Healy, *supra* note 2, at 319.

261 *See* Neuman, *supra* note 79, at 12.

262 *See* M'GONIGLE & ZACHER, *supra* note 65, at 177.

263 *See* Civil Liability Treaty, *supra* note 5, art. 4.

264 *See id.* art. 3.

265 Healy, *supra* note 2, at 319.

acts of any government or other authority responsible for the maintenance of lights or other navigational aids in the exercise of that function."[266]

The ceiling for liability was global in that it incorporated all potential suits ranging from cleanup costs to damages to coastal installations.[267] No priority was granted to government cleanup costs over any other person's or other entity's cleanup costs or damages.[268] These limits of liability were enhanced by the commitment of TOVALOP and CRISTAL to provide additional coverage in the event that damages exceeded $14 million.[269] Needless to say, any payments by TOVALOP or CRISTAL would be made at their sole discretion, rather than by the independent authority having the power to compel payment.

Other salient provisions of the treaty dealt with the physical location of damages to an injured party.[270] Specifically, the treaty's liability provisions apply solely to damage in territorial waters, or the actual territory of a contracting State. Costs resulting from preventive measures taken by a coastal State are also covered.[271] Implicitly excluded, however, are damages that occur on the high seas, which would be highly relevant to coastal fishing interests, whose boats, equipment, and cargo were excluded from coverage by the terms of the treaty.[272]

Further, the treaty provided that each ship carrying over two thousand tons of oil was required to "maintain insurance or other financial security . . . in the sums fixed by applying the limits of

266 Civil Liability Treaty, *supra* note 5, art. 3.

267 *See* Civil Liability Treaty, *supra* note 5, art. 3, ¶ 6. (giving a broad definition of the term "pollution damage," which, in turn forms the basis of Article III, which establishes liability for a pollution incident.); *see also id.*, art. 3, ¶ 4 (explicitly limiting all remedies for pollution damage to the terms of the treaty, thereby establishing a global remedy and capping liability at 2,000 francs for each ton of the ship's tonnage).

268 *See id.*, art. 3 (defining the liability of a shipowner for pollution damage, and not differentiating between damages sustained by government versus those sustained by non-governmental entities).

269 *See supra* Sections II.E–F discussing the commitments of TOVALOP and CRISTAL to pay for oil pollution damage in amounts above those agreed to in a civil liability convention.

270 *See* Civil Liability Treaty, *supra* note 5, art. 2.

271 *See id.*

272 *See id.*

liability . . . to cover his liability for pollution damage under the convention."[273] This certificate specified the name of the vessel and its port of registration, the name and principal place of business of the owner, the type of security (e.g. surety bonds), name, and place of business of the insurer.[274]

Two significant exceptions were incorporated into the article outlining the role of the insurer or financial guarantor. In an instance where an insurer is being sued for damage, the defendant (insurer) "may, irrespective of the actual fault or privity of the owner, avail himself of the limits of liability, prescribed in Article V, paragraph 1."[275] The owner, however, cannot limit his liability in cases of "actual fault or privity."[276] In addition, the insurer was given the right to plead a defense "that the pollution damage resulted for the willful misconduct of the owner himself," and thereby not be liable for the damage.[277] These limitations on liability provided to the insurer are significant as they are indicative of the role played by the insurers at the Brussels conference.[278]

While the civil liability treaty established an orderly process for compensation of pollution victims, it nonetheless disappointed those who had anticipated an international convention that would provide substantial compensation for those entities and persons who were damaged by oil spills and their aftermath.[279] Even Robert H. Neuman, the Chairman of the American delegation to the Brussels meeting wrote, "the fact remains that the 1969 conventions are likely neither to reduce substantially the number of accidental oil spills or dramatically mitigate the damage resulting from them, nor will they fully compensate in all cases the coastal victims of such incidents."[280]

---

[273] *Id.* art. 7, ¶ 1.

[274] *See id.* art. 7, ¶ 2.

[275] *Id.* art. 7, ¶ 8.

[276] *Id.* art. 5, ¶ 2.

[277] *Id.* art. 7, ¶ 8.

[278] The role of marine insurers at the Brussels Conference is described above in Section VII.A.3.

[279] *See* M'GONIGLE & ZACHER, *supra* note 65, at 173–74 (describing some of the limitations of the treaty, such as a cap on liability (as opposed to unlimited liability), its applicability solely to tanker owners (as opposed to other types of ships), and its non-applicability to damage occurring on the high seas (as opposed to the territorial seas and State's territory)).

[280] Neuman, *supra* note 79, at 353.

While the first two goals mentioned by Neuman, the reduction on the number of oil spills and the mitigation of oil spill damage, were not directly under discussion at Brussels, the third goal, compensation of victims, was a primary topic of concern.[281] Consequently, the question must be raised as to why a seemingly inadequate system of compensation was established at Brussels. The answer lies in the interests of Non-State Actors, both national and transnational, who perceived an economic threat if certain terms and limits on liability were established at the Brussels Conference. The next step in this analysis is to examine the methods by which Non-State Actors were able to influence the terms of civil liability treaty.

VII. DECISION-MAKING AT BRUSSELS USING THE PARADIGM OF INTERNATIONAL REGIME FORMATION

The negotiations at Brussels that produced the civil liability treaty can probably be best understood by viewing them through the paradigm of international regime formation.

A. The Regime Formation Process

As previously noted, the regime formation process during the period beginning in April 1967 through November 1969 occurred in the context of a transnational system characterized by interactions among State and Non-State Actors and a public international organization.[282] The participants in this regime complex included the CMI and IMCO as competing power centers, as well as powerful insurance and oil interests.[283] All of these participants interacted in a bargaining process that culminated in the civil liability treaty, as well as the far less controversial public law treaty. A closer examination of the institutional framework in which Non-State Actors operated clarifies their specific roles in the competitive regime formation process.[284] It has been observed that "competition among the elemental institutions constitutes a core characteristic of

---

281 *See* O'Connell, *supra* note 2, at 165 (noting that the Brussels Conference, after all, was convened after the Torrey Canyon episode to deal with the inadequate available compensation under existing international law).

282 Healy, *supra* note 62, at 93.

283 *See supra* Part III.

284 For further discussion, *see infra* Section VII.A.1.

regime complex."[285] A closer examination of the institutional framework in which Non-State Actors operated sets forth their role in the competitive regime formation process in Brussels.

1. The Institutional Presence of the CMI and Other Non-State Actors at the Brussels Conference

The pivotal role of Non-State Actors at the Brussels conference can be observed by a reading of the records and the rules of the conference.[286] The larger States at the Brussels Conference had delegations comprised of delegates, alternates, and advisors.[287] The delegates and alternates were, in virtually all cases, individuals who held official governmental positions.[288] The advisors, however, represented, various segments of the industries that would be most affected by any resulting new treaties.[289] Thus, sprinkled throughout the ranks of certain delegations, were representatives of shipowner associations, maritime law associations, and the insurance industry.[290]

Allan I. Mendelsohn, a former United States Department of State negotiator who participated in several IMCO conferences, has been highly critical of the mingling of private interests in national delegations at IMCO meetings.[291] Mendelsohn has stated:

> The individual participants who appear at conferences on behalf of states are mostly drawn from shipowning and marine insurance interests. Though highly competent in their respective fields, these individuals are usually more prone to protect, and

[285] Thomas Gehring & Benjamin Faude, *The Dynamics of Regime Complexes: Microfoundations and System Effects*, 19 GLOBAL GOV. 119, 123 (2013).

[286] *See supra* Section VI.A, Figures 1 & 2. There exists no verbatim record of the Conference's proceedings. Instead, the records of the Conference consist of a synopsis of each of the addresses made.

[287] *See* M'GONIGLE & ZACHER, *supra* note 65, at 160.

[288] *See, e.g.*, *infra* Table 2.

[289] *See* O'Connell, *supra* note 2, at 166.

[290] *See id.* (noting that the American advisers were Ralph Casey, Vice President of the American Institute of Merchant Shipping, and James J. Higgins, President of the Maritime Law Association for the United States).

[291] Mendelsohn, *supra* note 83 at 283 (noting that Mr. Mendelsohn participated as a member of the United States Department of State delegation in every conference on international transportation matters from 1963 to 1969).

> experienced in protecting, their own parochial interests rather than the interests of the environment.[292]

While Canada, and to a lesser extent, the United States, represented "the interests of the environment" at Brussels, the shipping, petroleum, and insurance interests were probably far more effectively represented by delegates such as Dr. Walter Müller and Dr. Albert Lilar, who represented shipping interests on a professional level, served as members of their national delegations (Switzerland and Belgium respectively), and were part of the formal IMCO leadership that ran the Brussels Conference.[293]

The bias of certain key Brussels Conference delegations, such as the Belgian, Swiss, and Irish delegations toward the shipping and insurance industries and not to the potential victims of an oil spill again underlines a major premise of this article: in the bargaining process to create a transnational regime, there is competition, but not all actors are created equal.[294] Instead, the critical role of Non-State Actors (especially in the crucial area of terms of liability) and their methods of cooption can undermine the efficacy of the institutional machinery established to deal with the pollution of transnational resources.[295]

2. The American Delegation at Brussels: The Politics of Access

As previously observed, Non-State Actors such as the CMI were crucial in drafting the terms of the civil liability treaty.[296] Additionally, certain Non-State Actors were able to influence their host country's votes and position at Brussels (also referred to as advisory committees). The American delegation to the Brussels Conference provides a prototype of the latter type of influence.

This phenomenon of Non-State Actors impacting the decision-making process in government, has been studied extensively in

---

[292] Allan I. Mendelsohn, *Ocean Pollution and the 1972 United Nations Conference on the Environment*, 3 J. MAR. L. & COM. 385, 389 (1972).

[293] *See supra* Figures 1 & 2.

[294] *See* Mendelsohn, *supra* note 292, at 390 (noting, in writing about IMCO, the dominant position within the organization "of the established presence and power of nations with predominant shipping and insurance interests").

[295] Mendelsohn further observed that the participants in the IMCO conferences "are usually more prone to protect, and experienced in protecting, their own parochial interests rather than the interests of the environment." *Id*. at 389.

[296] *See supra* Part V.

domestic political systems. Writing on the roles played by interest groups, Harmon Zeigler noted on domestic systems:

> In those cases of almost total harmony of interest between the government organization and the interest group, the regulated clientele actually acquires a beachhead within the institutions of government. Groups enjoying this relationship have a distinct advantage over groups which face the obstacle of lack of access.[297]

Zeigler's observation manifests itself in the decision-making process in several different ways. Among the methods that an interest group can utilize to obtain access to bureaucratic decision-makers is by using organs of administrative pluralism (also referred to as advisory committees).[298]

The Shipping Coordinating Committee, an organ of administrative pluralism, played an outside role in the American delegation at Brussels. At the time of the Brussels Conference, the Shipping Coordinating Committee had thirty members.[299] The committee's members were drawn from the Departments of State and Transportation, and from the American shipping, oil, and insurance industries.[300] The Committee's purpose was to provide an input for the private interests which would be affected by a State Department decision on shipping matters.[301] A second purpose of the Shipping Coordinating Committee was to coordinate State Department policy on maritime policy with other involved governmental agencies, such as the United States Coast Guard.[302]

An examination of the Shipping Coordinating Committee's membership at the time of the 1969 Brussels Conference makes clear that access was provided only to representatives of the

---

297 HARMON ZEIGLER, INTEREST GROUPS IN AMERICAN SOCIETY 282 (1964).

298 Up to the 1970's, the use of these advisory committees in policy making by the federal government was quite common. During the Korean War, for example, 550 of these advisory committees were attached to the National Production Authority, an agency of the Department of Commerce. In 1972, the United State Congress passed the Federal Advisory Committee Act, 86 Stat. 770 (1972), which sharply curtailed and reduced the influence of these advisory committees. *See* GRANT MCCONNELL, PRIVATE POWER AND AMERICAN DEMOCRACY 264–65 (1966).

299 *See infra* Table 2.

300 *See id.*

301 *See id.*

302 Interview with former Brussels negotiator, Washington D.C. (1972).

maritime, insurance, and petroleum industries.[303] There was no access to the Shipping Coordinating Committee by representatives of environmental interests.[304]

At a hearing held before the United States Senate Committee on Foreign Relations in April 1973, Richard Frank, a spokesman for the Center for Law as Social Policy, a group representing environmental interest, charged that the lack of environmentalist membership on the Shipping Coordinating Committee resulted from a deliberate State Department policy "to inhibit the participation of certain elements of the public in the decision-making process."[305] Frank added that the economic bureaus of the State Department, which formulated international environmental policy, "have a constituency which is more oriented toward economic [sic] than the environment."[306]

Thus, decision-making in the State Department on the American stance at the Brussels Conference was not based on an amorphous concept known as "the public interest," but on the fact that representatives of key industry groups had direct access to members of the bureaucracy.[307] This again illustrates a major point of this article: in the making of policy to formulate a regime to regulate pollution, the role of Non-State Actors with a vested financial interest in the outcome can be crucial, and their resistance to the development of an effective international legal regime to regulate oil spills can override or countervail the desire of some States or environmental interests to establish such a regime.

---

303 *See infra* Table 2.

304 *See infra* Table 2 for the full roster of names.

305 *The Great Decisions Program of the Foreign Policy Association: Hearing Before the S. Comm. on Foreign Relations*, 93rd Cong. 96 (1974) (statement of Richard Frank, Center for Law and Social Policy).

306 *Id*.

307 *See* Mendelsohn, *supra* note 83, at 785–86 (noting the disparity of results for those who had access to decision-makers versus those who did not have access).

> Another example is the Miami or Cape Cod hotel owner. Assuming he even thinks about the problem of oil pollution, what lobbying groups can he put together to press his interests before the Senate or House Conference Committees? How often has he had, or even considered having a representative on the United States delegation—as the vessel owners always have—to the international conferences where these issues will be resolved?

Id.

When discussing the policy formulation process, it is difficult to define precisely which course of action is congruent with the public interest. It is not being suggested that the policy demands of the oil, marine, or insurance interests cannot coincide with "the public interest," nor that the demands of environmentalists, such as the Sierra Club, always represent "the public interest." Rather, what is being suggested is that a policy formulation process that does not give a multiplicity of competing interests access to the decision-makers cannot, by definition, be considered to be representative of the "public interest." Accordingly, it is suggested that if either the IMCO or the State Department had given access only to organized environmental groups, and not to the shipping interests, the resultant policy would likewise not have been considered as conforming to the "public interest." The Shipping Coordinating Committee, as constituted in August 1969 (three months prior to the Brussels Conference), consisted primarily of representatives of various governmental departments and agencies and representatives of the American oil and shipping industries. Conversely, there were no representatives from environmental or similar groups.

TABLE 2 - SHIPPING COORDINATING COMMITTEE

August 8, 1969

NAME	ORGANIZATION
Mr. Philip H. Trezise	Department of State - E
Mr. John Rhinelander	Department of State - L
Mr. John F. Buckle	Department of State - E/MA
Mr. Richard A. Frank	Department of State - L/E
Mr. M. C. Pfutz	American Petroleum Institute
Mr. A. H. McComb, Jr.	American Petroleum Institute
Mr. James J. Higgins	President, Maritime Law Association
Mr. Gordon W. Paulsen	Maritime Law Association
Mr. John Prokes	America Inst. of Merchant Shipping
Mr. Nicholas J. Healy	American Inst. of Merchant Shipping
Mr. James J. Reynolds	American Inst. of Merchant Shipping
Mr. Richard W. Palmer	Maritime Law Association
Mr. Robert P. Nash	Spec. Counsel – American Inst. of Merchant Shipping
Mr. Ralph E. Casey	Exec. Vice Pres. – American Inst. of Merchant Shipping
Mr. Carl J. Green	Department of Transportation TGC-10
Mr. Bernard H. Hyllestad	Department of Transportation TPI-50
Mr. Robert Henri Binder	Department of Transportation TPI-50
Mr. Edward S. Johnson	Federal Maritime Commission
Mr. F. D. Heyward	United States Coast Guard
Commander H. G. Lyons	United States Coast Guard
Mr. R. Y. Edwards	United States Coast Guard
Mr. C. G. Patrick Bursley	United States Coast Guard
Mr. C. J. Maguire	United States Coast Guard
Mr. C. E. Mc Dowell	American Institute of Merchant Underwriters
Adm. H. G. Shepherd	National Cargo Bureau
Mr. A S. Miller	F.C.F.N.
Mr. Earl W. Clark	Labor Management Maritime Committee
Mr. Paul J. McElligott	Regan and Mason
Mr. G. Marshall Bates	Captain, US Navy (Admiralty Navy JAC)
Mr. Ernest J. Corrado	House Merchant Marine and Fisheries Committee

In researching the lead up to the Brussels Conference as well as the Conference itself, I interviewed some of the key participants in the process, including a United States Senator and two of his staff members, negotiators for the United State Department of State, and the marine counsel for a "Seven Sisters" oil company. When two former State Department negotiators were asked about the role of the Shipping Coordinating Committee, both replied that before the United States participates in any international conference relating to maritime affairs, the members of the Shipping Coordinating Committee assemble to inform the Department of State of their positions.[308] When I observed that there were no groups representing the public interest on the Shipping Coordinating Committee, two different answers were offered.[309] One former negotiator replied, "We (the State Department) and other governmental units represent the public interest."[310] The other conceded that, in fact, the public interest was not represented at all, and the Shipping Coordinating Committee excluded public interest-oriented groups, such as environmentalists or those who are involved in what might be referred to as consumerism, and thus are opposed, for example, to oil or insurance industry policies.[311]

Another relevant aspect of the Shipping Coordinating Committee is the interchange of personnel (a so-called "revolving door") between its Non-State Actor members and the United States government.[312] This clearly enhances their role in the decision-making process. Three cases serve to illustrate this concept.

First, consider James J. Reynolds. Reynolds served as the president of the American Institute of Merchant Shipping since 1969.[313] From 1946 to 1951, he served on the National Labor Relations Board. In 1961, President Kennedy named him Assistant Secretary of Labor for Labor Management Relations. In that position, Reynolds served as the governmental official most directly concerned with maritime labor disputes. After the Nixon

[308] *See* Interview with former State Dep't negotiator, in Washington D.C. (1972), on file with author.
[309] *See id.*
[310] *Id.*
[311] *See id.*
[312] *See* Blanes I. Vidal et al., *Revolving Door Lobbyists*, 102 AM. ECON. REV. 3731 (2012).
[313] *See id.*

administration came to power, he became the congressional lobbyist for the American Institute of Merchant Shipping.

Second, consider Ralph E. Casey. From 1939 to 1955, Casey served with the General Accounting Office as an associate general counsel in charge of contracts, litigation and maritime activities (1948 to 1955). From 1955 to 1956, he was chief counsel to the House Merchant Marine and Fisheries Committee. After resigning that post in 1956, he became president of the American Merchant Marine Institute (AMMI) from 1956 to 1968. When the American Institute of Merchant Shipping succeeded the AMMI in 1969, he became that group's Executive Vice-President. In 1971, he became chief counsel to the House Merchant Marine and Fisheries Committee.

As a final example, consider Earl W. Clark. In 1969, Clark was involved in the maritime industry's Labor-Management Maritime Committee. From 1951 to 1954, he was a United States government deputy maritime administrator.[314]

Beyond the fact that the Shipping Coordinating Committee's membership was limited to government and maritime industry representatives, formal access was also not granted to interests affected by any potential oil spill disaster.[315] Thus, those whose livelihoods depend on the sea, such as fishers and resort and hotel operators, and those who would be adversely affected by a marine oil spill were not present when questions of the amount and extent of liability were raised. It is fairly certain that lobster fishers in Maine or hotel owners in Florida would have demanded greater amounts of compensation to be included in the treaty, as opposed to a representative of the American Petroleum Institute or the American Institute of Merchant Shipping.

---

[314] *See Key Men: They Switch Between Industry and Federal Posts*, CONG. Q. WKLY. REP., Mar. 19, 1971, at 624.

[315] As previously noted, Allan I. Mendelsohn wrote about the disparity of results for those who had access to decision-makers versus those who did not have access. *See generally* Mendelsohn, *supra* note 83. Further, a perusal of the Shipping Coordinating Committee's roster makes it clear that none of its members came from industries such as commercial fisheries and hotel and resort owners.

3. The Regime is Formed: The Brussels Conference's Decision on the Issue of Liability

Probably the most significant decision made at the 1969 Brussels Conference was related to the terms of liability. As previously observed, the delegates from Canada, Ireland, and Belgium, as well as from Greece, Liberia, and Scandinavia, among others, diverged on whether shipowners or cargo owners would be financially responsible for oil pollution damage and on the terms of liability.[316]

The final decision on the terms and extent of liability resulted from rounds of negotiations involving the P&I Clubs, who were the major insurers of European and American owned tankers, and the Belgian, British, Irish, and Scandinavian delegations.[317] The P&I Clubs interacted directly with the British delegation and insisted that liability be based on the traditional maritime standard of negligence—in contradistinction to strict liability—and that a low ceiling be imposed on the maximum amount of compensation that a shipowner be required to pay for any single oil spill incident.[318] At various stages of the conference, different maximum liability figures were suggested by the P&I Clubs, but they never exceeded $10 million per incident.[319] The P&I Clubs argued that the adoption of strict liability and unlimited liability standards would make it economically unfeasible to provide insurance for oil tankers.[320]

In sharp contrast, the Canadian delegation, which represented a State with a coastal and environmentalist orientation, argued that the economic loss resulting from an oil spill should be borne entirely from those who profited from the carriage of oil.[321] The Canadians maintained that establishing negligence rather than strict liability as the criteria for recovery of damages, or to impose a ceiling on the

316 *See* discussion *supra* Section VI.C.

317 *See* Neuman, *supra* note 79.

318 *See id*.

319 Throughout the negotiation process, the CMI (representing the shipping interests and their alter egos, the P&I Clubs), had insisted that liability be limited to $67 dollars, per ton, ($7 million per incident), which was half of the figure ultimately agreed to. *See* O'Connell, *supra* note 2, at 179. During the Conference itself, this number was raised to $10 million per incident.

320 *See id.*

321 *See* Neuman, *supra* note 79, at 12.

compensation that a victim of an oil spill could receive, would inevitably shift part of the cleanup and reconstruction burdens from the polluter to its victim.[322]

At Brussels, a compromise was reached on the problem of the terms of liability.[323] It was agreed that the draft convention would be based on the principle of strict liability, and a $134 per ton or $14 million limit (whichever figure was less) would be imposed on the shipowner for an oil spill disaster.[324] It was also agreed that the cargo owners—petroleum companies—would be responsible financially for claims in excess of $14 million.[325] The exact terms of liability of the cargo owners, which were not incorporated into the terms of the treaty, were to be defined in a supplemental IMCO convention.[326]

After the terms of the compromise had been offered, the deal was completed, but only after the following consultation with Non-State Actors occurred:

> Lord Devlin . . . after checking with the insurance people in London, stated that those limits could be insured (on the London market) so long as the provisions on direct action against the person providing financial responsibility contained an exception allowing the insurer a defense on the ground of willful misconduct of the vessel owner.[327]

In my interview with a member of the U.S. delegation at the Brussels conference, I asked whether a treaty could have been concluded without the express agreement of the London insurers.[328] The delegate replied that in the absence of concurrence by the insurers, a treaty would not have been possible.[329] He added that the P&I Clubs would not have agreed to a draft treaty that they

322 *See id*.

323 *See* Healy, *supra* note 2, at 319.

324 *See id.; see also* Neuman, *supra* note 79, at 353 (reviewing of the terms of liability and criticisms of the terms contained in the civil liability treaty).

325 *See* discussion *supra* Section II.F. In 1971, IMCO agreed to a Supplemental Fund Convention, which covered oil spill incidents where damage exceeded the $14 million-cap provided for in the civil liability treaty. *See* sources cited *infra* note 409.

326 *See* Neuman, *supra* note 79, at 14.

327 *Id*. at 15.

328 *See* Interview with a member of the U.S. delegation in Brussels (on file with author).

329 *See id*.

considered incompatible with their economic interests.[330] I then asked whether this method of drafting a treaty represented a dilution of a basic principle of tort law.[331] Should compensation not be based on the victim's loss rather than on the tortfeasor's ability to pay?[332] The diplomat replied that ideally the needs of the victim should be given a priority over the polluter's financial condition.[333] However, the realities of the situation dictated that the insurers had to remain economically viable in order to continue their insurance activities, and one could not expect them to bear too heavy of a burden of the losses resulting from oil spills.[334]

The finding that the process of regime formation at Brussels was finalized after the London insurance companies confirmed that the conference's negotiated and agreed upon monetary amount was acceptable to them, raises significant issues about the regime formation process. Specifically, if the key decision at the Brussels Conference was made by a Non-State Actor, this raises significant questions in international relations theory about States having a monopoly in the decision-making process. At the outset, it is important to reiterate the obvious, the entire regime formation process, commencing in April 1967, was based on the fact that the shipowners' insurance companies would compensate third-parties for damages sustained by them.[335] The salient question was what level of losses could be insured by the insurance companies? No one had expectations that insurance companies would insure unrealistic levels of loss.[336]

On the other hand, from a regime formation perspective, it is startling that this crucial decision was, in effect, made by Non-State Actors rather than by the States themselves. If the most significant decision at a conference convened by a public international organization with the participation of forty-eight sovereign States was indeed made by Non-State Actors, this then raises significant

330 *See id*.
331 *See id*.
332 *See id*.
333 *See id*.
334 *See id*.
335 *See* Sperdokli, *supra* note 95 (discussing the issue of third-party insurance for marine oil spills).
336 *See id.*

issues about the formation of international regimes, as well as on the concept of regulatory capture, especially on environmental issues.

Further, the establishment of TOVALOP and CRISTAL adds another dimension to the role of Non-State Actors being involved in the decision-making process at Brussels.[337] TOVALOP and CRISTAL can be analyzed by through the concept of non-decision, which "is a means by which demands for change in the existing allocation of benefits and privileges in the community can be killed before they gain access to the relevant decision-making arena."[338]

The creation of TOVALOP and CRISTAL by the tanker and oil industries was based on this principle of non-decision. Specifically, these two industries, which were Non-State Actors, used the creation of these entities as a method of deflecting—if not actually killing—a demand for international machinery to deal with the oil spill problem, or alternatively, establishing an independent international regime in which the industries, which were the subject of regulation, would determine the terms and extent of their own liability.[339] Specifically, these two industries hoped that their compensation schemes would deter or delay IMCO or any State from drafting or enacting a treaty or a statute regulating the liability of one responsible for an accidental oil spill.[340]

In addition, the shipowners and oil companies reasoned that even if TOVALOP and CRISTAL did not forestall international action on an oil spill program, these two plans might form the framework upon which any alternative state-sponsored draft treaty would be based.[341]

---

337 *See* discussion *supra* Sections II.E–F.

338 MCCONNELL, *supra* note 122.

339 Even the most favorable analyses of TOVALOP and CRISTAL essentially conceded this point. *See* De La Rue, *supra* note 124, at 287.

> The scheme was designed to have an impact on world opinion, and to relieve political pressure on national governments to introduce their own unilateral solutions. It was intended to play a part in shaping the pattern of the proposed new international laws, to improve the prospects for their adoption worldwide, and to secure the advantages of a uniform system.

Id.

340 *See id.*

341 Interview with senior marine counsel of an international petroleum company, New York (Spring 1972); *accord* Barrett & Warren, *supra* note 125. *But see* Becker, *supra* note 125.

TOVALOP and CRISTAL were ultimately based upon the principle of self-regulation, a perspective that is predicated upon an assumption that business should be free of governmental restraint and police its own actions.[342] Accordingly, in the case of CRISTAL, a victim of oil pollution damage would seek to recover compensation by applying to an entity that provided payment for damage based on rules formulated, adjudicated, and enforced by the very industry causing the problem in the first place, rather than by a regime established by governments.[343] A similar situation would prevail when a government would attempt to recover its cleanup costs from TOVALOP.[344] In either case, recovery would depend upon the shipper's or petroleum company's interpretation of its own contract.[345] Clearly, insofar as the oil companies and tanker owners were concerned, a self-regulation scheme was far more satisfactory than one imposed by governments acting alone or in concert.[346]

VIII. MARINE OIL SPILLS: POST BRUSSELS CONFERENCE DEVELOPMENTS

After the Brussels Conference concluded on November 29, 1969, the participating States that had a ratification process, with the exception of Canada, began the procedure. At the Brussels Conference, Canada had voiced opposition to certain portions of the treaties and was the only State present that voted against the civil

342 *See* MCCONNELL, *supra* note 122, at 246.
343 *See supra* Section II.E.
344 *See supra* Section II.E.
345 *See supra* Section II.E.
346 *See supra* Section II.F.

liability treaty.[347] Instead Canada opted for a unilateral approach to protect its coastal regions.[348]

A. The U.S. Refusal to Participate in the Brussels Regime

The U.S. reaction was somewhat more muted than that of Canada, but it too reflects dissatisfaction with the outcome of the Brussels Conference.[349] On April 3, 1970, the United States Congress, after a three-year effort, adopted the Water Quality Improvement Act of 1970 (WQIA).[350] The legislation embodied features that either paralleled or surpassed some of the features of the civil liability treaty. Particularly significant was the law's section providing that in the event of an oil spill—unless a shipowner could successfully claim that the discharge occurred solely because of an act of God, an act of war, negligence on the part of the American government, or an act or omission of a third party—the owner's liability for the cost of the removal of the oil of the government would be the lesser of either $100 per gross ton or the sum of $14 million.[351] While ostensibly this provision deviates only slightly from the civil liability treaty's provision on the amount of liability ($134 per gross ton or $14 million), the WQIA's limits applied only to governmental cleanup costs, while the civil liability treaty's limits encompassed both governmental costs and private

[347] *See* Allan I. Mendelsohn, *Ocean Pollution and the 1972 United Nations Conference on the Environment*, 3 J. MAR. L. & COM. 385, 389–390 (1972). Writing about the Canadian refusal to sign the civil liability treaty, Mendelsohn observed,

> Had I controlled the 1969 vote at the 1969 [Brussels] Conference, I would have joined Canada and not permitted that great environmental trail-blazing neighbor of ours to have been the sole vote opposing adoption of the final draft. I am sure, however, that Canada not only does not regret its singular position there, but, indeed, properly finds pride in the knowledge that, though very much alone, it was entirely right.

Id.

[348] *See* Canadian Legislation on Arctic Pollution And Territorial Sea And Fishing Zones, C - 202, 2d Sess., 28th Parliament, 18-19 Elizabeth II c. 47 (1970), *reprinted in* 9 I.L.M. 543 (1970); s*ee also* Louis Henkin, *Arctic Anti-Pollution: Does Canada Make—Or Break—International Law?*, 65 AM. J. INT'L L. 131, 132 (1971).

[349] As will be seen in this section of this article, the United States Senate ultimately did not ratify the civil liability convention.

[350] *See* Water Quality Improvement Act, Pub. L. No. 91-224, 84 Stat. 91 (1970).

[351] *See id.* § 11(f)(1).

claims.[352] Under WQIA, private entities, individuals, and individual American states were free to pursue their own damage claims.[353]

In contrast to the provisions of the WQIA, the civil liability treaty did not grant any priority to the government-incurred cleanup costs over those of private interests.[354] Accordingly, in the event of a massive oil spill from a vessel of more than forty thousand gross registered tons, the amount of money that the United States government could recover would be far greater under the WQIA than under the civil liability treaty.[355] Conversely, since Non-State interests would share the settlement with the government based on the civil liability treaty's provisions, these interests would forfeit any further claims—if the damage exceeded the amount allocated to them—based on existing common, statutory, or admiralty law. Robert Neuman, the U.S. negotiator, when queried on this point, replied, "That is the price they have to pay for receiving a remedy."[356]

Another difference between the civil liability treaty and WQIA is jurisdictional coverage. The WQIA provides for liability for damages sustained within the U.S. contiguous zone, as well as the territory of a particular State or on the territorial sea adjacent to a

[352] There is no language in the civil liability treaty which delineates governmental costs and private claims. Having said that, it appears that Article I, sections (6) and (7), which define "pollution damage" and "preventive measures" respectively, when combined with the shipowner's liability provision (Article III), makes it obvious that all damages as well as preventive and remedial measures are encompassed by these provisions. *See* Civil Liability Treaty, *supra* note 5, art. I(6)–(7).

[353] The liability provisions of the Federal Water Quality Improvement Act of 1970 dealt exclusively with the liability of a shipowner to the federal government. *See* Water Quality Improvement Act, Pub. L. No. 91-224, 84 Stat. 91 (1970), § 11(f)(1)-(3). States were free to bring their own actions to recover costs sustained by them as a result of an oil spill, and this right of recovery was upheld by the United States Supreme Court in *Askew v. American Waterways Operators, Inc.*, 411 U.S. 325 (1973). Further, nothing in the law precluded non-governmental entities who had sustained damage as a result of a marine oil spill from bringing an action in a state court. The Civil Liability Treaty, by the terms does not differentiate between governmental claims and private claims, in Article III (4), and sharply limits the total amount available for damages in Article III (4).

[354] *See* discussion *supra* Section VI.C.

[355] *See* Letter from David Abshire, Assistant Sec'y of State for Cong. Relations, to Senator Edmund S. Muskie (May 14, 1971).

[356] *IMCO Civil Liabilities Conventions: Hearing Before the Subcomm. on Air & Water Pollution*, 91st Cong. 10 (1970).

State, while the civil liability treaty omitted the contiguous zone.[357] Instead, it refers only to damages occurring on the territory of a particular State, thereby making the civil liability treaty less comprehensive in coverage than the WQIA.[358]

Hearings were held before the Subcommittee on Air and Water Pollution of the Senate's Public Works Committee in July of 1970 and before the Subcommittee on Oceans and Environment of the Senate's Foreign Relations Committee in May of 1971 to examine the treaty's provisions and their relationship to the WQIA.[359]

The hearings disclosed that U.S. oil and maritime interests preferred the terms of the civil liability treaty over the terms of the WQIA. Among those who testified in favor of the civil liability treaty's ratification were James J. Reynolds, President of the American Institute of Merchant Shipping, and Herbert A. Steyn, Jr. of the American Petroleum Institute.[360] Each was accompanied to the hearings by a representative of a major international petroleum producer.[361] Their arguments did not center on the civil liability treaty's generally less onerous liability provisions.[362] Instead, emphasis was placed on the uniformity of procedure that would arise upon the civil liability treaty's ratification.[363] This was deemed far more acceptable than each individual State adopting unilateral measures to deal with the problem.[364]

The strategy of these interests was, in the words of Herbert Simon, Donald Smithburg, and Victor Thompson to "accept

---

357 Section 11(a)(9) of the Federal Water Quality of Act of 1970 refers to liability accruing in a contiguous zone, which, by definition, extends beyond the territorial seas.

358 *See supra* text accompanying notes 268, 311.

359 *IMCO Civil Liabilities Conventions: Hearings Before the S. Subcomm. on Air & Water Pollution of the S. Comm. on Public Works*, 91st Cong. 19–33, 34–47 (1970).

360 *See id*.

361 *See IMCO Civil Liabilities Convention: Hearing Before the S. Subcomm. on Air & Water Pollution of the S. Comm. on Public Works*, 91st Cong. 10 (1970); *The International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage: Hearing Before the S. Subcomm. on Oceans & Envtl. Affairs*, 92nd Cong. 62–107 (1973).

362 *See IMCO Civil Liabilities Convention: Hearing Before the Subcomm. on Air & Water Pollution*, 91st Cong. 10 (1970).

363 *See id.*

364 *See id.*

regulation, even though somewhat adverse to its short run interests as a means of anticipating and heading off potential political forces that would otherwise impose more severe and less palatable regulations upon the group."[365] In sharp contrast, the representatives of environmental organizations, such as the Natural Resources Defense Council and the Sierra Club, advocated rejection of the civil liability treaty.[366] Noting some of the inadequate aspects of the treaty such as the cap on liability, the priority of payment of claims, the scope of liability provisions, and the fact that both federal and state laws were more comprehensive, the spokesman for the Sierra Club urged rejection of the treaty unless it were to be linked with a supplementary fund treaty.[367]

The most vehement arguments against the treaty were presented by Allan I. Mendelsohn, a former State Department negotiator in the area of marine and air law.[368] Noting all the previously described weaknesses of the treaty, and contrasting these inadequacies with both international treaties on aviation (which are based on strict liability provisions) and the WQIA, he insisted that the treaty be ratified only upon negotiation of the $30 million supplementary treaty.[369] He maintained that if the Senate were to reject the liability treaty, "it would give us the bargaining power to go into that conference and to use the strength of our government to effect a treaty with a limit that adequately protects the American public."[370]

The Senate Foreign Relations Committee accepted the arguments of the environmentalists and Mendelsohn. On August 5, 1971, the committee reported the Liability Convention to the Senate floor and recommended that advice and consent to ratification be

365 HERBERT A. SIMON, DONALD SMITHSBURG & VICTOR P. THOMPSON, PUBLIC ADMINISTRATION 462–63 (1950).

366 *The Great Decisions Program of the Foreign Policy Association: Hearing Before the S. Comm. on Foreign Relations*, 93rd Cong. 93–98 (1974) (statement of Richard Frank, Center for Law and Social Policy).

367 *See id.*

368 *See IMCO Civil Liabilities Conventions: Hearings Before the S. Subcomm. on Air & Water Pollution of the S. Comm. on Pub. Works*, 91st Cong. 39 (1970).

369 *See id.* at 40–48.

370 *Id.* at 44.

given only after the Senate could act on the supplementary fund treaty.[371]

B. The Establishment of the IMCO International Compensation Fund in 1971

In 1971, as part of the regime strengthening process, the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage (IMCO Fund) was established.[372] The establishment of a fund to provide for additional compensation above the limits agreed to at Brussels was a prerequisite by certain States to approve the civil liability treaty.[373] Further, there was widespread agreement as to the necessity for an additional source of compensation above the limits established in the Civil Liability Treaty.[374]

Accordingly, IMCO held a conference in Brussels in 1971 to establish a source of compensation for oil spill damages above and beyond that provided by the civil liability treaty.[375] Canada again

---

[371] *See* Lance D. Wood, *Toward Compatible International and Domestic Regimes of Civil Liability for Oil Pollution of Navigable Waters*, 7 J. MAR. L. & COM. 1, 14 (1975) (citing Exec. Rep. No. 92-9, 92d Cong., 1st Sess., p. 507 (Aug. 5, 1971)) ("Eventually the Committee recommended to the full Senate that advice and consent to ratification be given, but that the Senate should delay final action until it could simultaneously approve a supplementary convention to augment compensation to damaged parties."); *see also* Lance D. Wood, *A Progress Report on the International Convention on Civil Liability for Oil Pollution Damage and its Supplementary Fund Convention*, 5 E.L.R. 50103, 50105 (1971) (same).

[372] It should be recalled that as part of the negotiation process at Brussels in November 1969, it was agreed that a supplemental fund convention would be established within two years. On December 18, 1971, at an IMCO conference, the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage was agreed to, and it entered into force on October 16, 1978. *See generally* Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, 11 I.L.M. 284 (1972) [hereinafter Fund Convention]; *see also International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage (FUND)*, INT'L MAR. ORG., http://www.imo.org/en/About/Conventions/ListOfConventions/Pages/International-Convention-on-the-Establishment-of-an-International-Fund-for-Compensation-for-Oil-Pollution-Damage-(FUND).aspx (last visited July 22, 2019).

[373] *See* M'GONIGLE & ZACHER, *supra* note 65, at 183 ("That the [Supplemental] fund should provide compensation additional to that given by the Civil Liability was not disputed.").

[374] *See* Healy, *supra* note 2, at 322.

[375] *See* Fund Convention, *supra* note 372.

acted as the self-appointed guardian of environmental interests and demanded absolute liability for pollution damage caused by oil spills.[376] The other States involved at Brussels 1971 were essentially split on which domestic interests were paramount—their shipping industries or the role of petroleum in the domestic society.[377] Japan, Greece, Denmark, Liberia, and Norway, together with the USSR and France, sought to protect their domestic shipping companies from liability. Conversely, those States heavily dependent on foreign oil with a relatively weak shipping component, like Germany and the Netherlands, sought to shield the oil industry from any extreme compensation positions.[378]

Ultimately, an agreement was reached on the terms of a compensation fund which provided that a sum of up to $30 million would be made available from oil companies for payment of damages for an incident resulting in oil pollution damage.[379] Nonetheless, the thirty-million-dollar figure would be reduced by any amounts paid under the terms of the civil liability treaty.[380]

---

[376] The term "absolute liability" as used in this context refers to the accruing of liability for damage sustained without virtually any exceptions whatsoever. *See Absolute Liability*, BALLANTINE'S LAW DICTIONARY (3d. ed. 2010) ("*Liability* for an injury resulting to another where no account is taken of the standard of care exercised . . . .").

[377] *See* ALAN KHEE-JIN TAN, VESSEL-SOURCE MARINE POLLUTION: THE LAW AND POLITICS OF INTERNATIONAL REGULATION 302 (James Crawford & John S. Bell et al. eds., Cambridge Univ. Press, 2006) ("The familiar divide between coastal and maritime interests had now been compounded by intra-industry disagreements between shipowners and oil companies.").

[378] *See id*. at 308 ("[T]he major shipowning states, including Norway, Greece, Liberia, Denmark and Japan, together with the USSR and France, backed the shipowners strongly . . . net oil importers such as the Netherlands and Germany were persuaded . . . that their oil interests were paramount.").

[379] *See id.* at 302.

> The maximum limit of the [International Oil Pollution Compensation Fund] was established by the 1971 Conference at a level of 450 million francs per incident *(amounting then to about $35 million)* . . . . The . . . Fund's resources would be constituted by oil receivers contracting states paying contributions in proportion to the amounts that they received by sea. Contributions would be payable only by receivers who in any calendar year received contributing oil exceeding 1000 tonnes.

Id. (emphasis added).

[380] Clearly, based on the terms of the 1971 convention, the sole purpose of IMCO was to *supplement* compensation available under the civil liability convention. Conversely, any compensation received under the terms of the civil

Therefore, the compensation scheme agreed to in 1971 provided that the P&I Clubs and/or other insurers would pay up to $14 million while any excess (up to $21 million) would be paid by the oil companies.[381] Since the International Compensation Fund would not go into effect until the ratification process was completed, TOVALOP and CRISTAL would, in the interim, pay the excess damages based on the terms incorporated into their agreements.

C. The Exxon Valdez Disaster—1989

Through the post-1969 period, the United States, through its constitutional processes that required ratification by a two-thirds vote of the United States Senate, ratified neither the Brussels civil liability treaty nor the Supplemental Fund Convention.[382] The U.S. position was that despite the seemingly impressive numbers that were attached to the treaty and fund, the amount of compensation

liability would be *deducted* from the amount available under IMCO. *See* Fund Convention, *supra* note 372, art. 2 § 1(a) (noting that an aim of the convention is "to provide compensation for pollution damage to the extent that the protection afforded by the Liability Convention is inadequate").

381 *See* TAN, *supra* note 377, at 302 (noting the $35 million limit on liability); *see also* Healy, *supra* note 2, at 321 (stating that under the CLC, "[w]here the incident does not fall within one of the exceptions, the owner is liable for oil pollution claims up to a limit of 2,000 'Poincare' francs ($134.40) per ton of the vessel's adjusted net tonnage, or 210,000,000 'Poincare' francs *($14,112,000)*, whichever is the lesser amount") (emphasis added) (internal citations omitted). The convention provided that contribution would be made by persons who receive "contributing oil" in ports and other facilities in member States. *See* Fund Convention, *supra* note 372, art. 10 § 1, 1(a) (discussing who must make contributions); *see also id*. art. 1 § 2 (referring to CLC for the definition of "person"); International Convention on Civil Liability for Oil Pollution Damage art. 1 § 2, Nov. 29, 1969, 16 I.L.M. 617 [hereinafter CLC] (defining "person" to be "any individual or partnership or any public or private body, whether corporate or not, including a State or any of its constituent subdivisions").

382 *See* S. REP. NO. 93-98 § 2 (1972) (noting that the CLC was not ratified due to concerns about liability limits). The hearings on the ratification of the 1969 and 1971 IMCO conventions reflected the growing strength of the environmental movement in the United States. *See also* RONALD B. MITCHELL, INTERNATIONAL OIL POLLUTION AT SEA: ENVIRONMENTAL POLICY AND TREATY COMPLIANCE 90 (1994) (noting how growing environmentalism in the United States during the 1960's was leading to its seeking stronger international ocean pollution controls).

available would be totally inadequate in the event of a Torrey Canyon-type disaster.[383]

On March 24, 1989, the Exxon Valdez, whose voyage had begun in Alaska and whose destination was California, ran aground on Bligh Reef in Valdez.[384] While the subsequent oil spill was relatively small (it did not even make the list of the thirty-five largest oil spills in history), the Exxon Valdez incident in many ways paralleled the impact of the Torrey Canyon over twenty years previously.[385] The damage, cleanup costs, and media attention were massive, and the existing international regimes were incapable of properly compensating all impacted parties.[386]

---

[383] *See* Alan I. Mendelsohn, *Ocean Environment and the 1972 United Nations Conference on the Environment*, 3 J. MAR. L. & COM. 393 (1972). The defeat of both treaties in the United States Senate can be partly attributed to the decline of the merchant marine industry in the United States, as more and more shipping companies took advantage of "flag of convenience" registration, with the consequence of many ships being registered in Liberia, Honduras, and Micronesia. *See* Rodney Carlisle, *Second Registers: Maritime Nations Respond to Flags of Convenience, 1984-1998*, 19 N. MARINER 319, 320–21 (2009) (suggesting that the United States had national defense and potentially economic concerns with flags of convenience registries and noting that Honduras and Liberia were early countries featuring open registries).

[384] *See* Philip Shabecoff, *Largest U.S. Tanker Spill Spews 270,000 Barrels of Oil Off Alaska*, N.Y. TIMES, Mar. 25, 1989, at A1. Exxon Valdez coverage appeared on the front-page of the *New York Times* for the next twelve days, and periodically thereafter. *See* Richard Mauer, *Alaska Aide Assails Oil Industry for 'Inadequate' Response to Spill*, N.Y. TIMES, Mar. 26, 1989, at A1; Richard Mauer, *Unlicensed Mate Was in Charge of Ship That Hit Reef, Exxon Says*, N.Y. TIMES, Mar. 27, 1989, at A1; Timothy Egan, *High Winds Hamper Oil Spill Cleanup Off Alaska*, N.Y. TIMES, Mar. 28, 1989, at A1; Timothy Egan, *Fisherman and State Take Charge of Efforts to Control Alaska Spill*, N.Y. TIMES, Mar. 29, 1989, at A1; Timothy Egan, *Exxon Concedes It Can't Contain Most of Oil Spill*, N.Y. TIMES, Mar. 30, 1989, at A1; Philip Shabecoff, *Captain of Tanker Had Been Drinking, Blood Tests Show*, N.Y. TIMES, Mar. 31, 1989, at A1; Timothy Egan, *Alaska's Stain: Delicate Balance Undone*, N.Y. TIMES, Apr. 1, 1989, at A1; Keith Schneider, *Under Oil's Powerful Spell, Alaska Was Off Guard*, N.Y. TIMES, Apr. 2, 1989, at A1; E.J. Dionne Jr., *Big Oil Spill Leaves Its Mark On Politics of Environment*, N.Y. TIMES, Apr. 3, 1989, at A1; Malcolm W. Browne, *Alaska Bans Herring Fishing in Oil-Fueled Sound*, N.Y. TIMES, Apr. 4, 1989, at A1; *Coast Guard Changes Its Account on Oil Spill*, N.Y. TIMES, Apr. 5, 1989, at A1, A24; Keith Schneider, *Ship May Have Been on Autopilot*, N.Y. TIMES, Apr. 6, 1989, at A1.

[385] *See* John R. Herrald et al., *The EXXON Valdez: An Assessment of Crisis Prevention and Management Systems*, 20 INTERFACES, Sept.–Oct. 1990, at 14–15.

[386] *See id.* at 15–16.

The optics of the disaster were staggering. Television crews swarmed to the site, and Americans witnessed the damage caused by approximately eleven million gallons of spilled oil.[387] As thick black sludge washed onto the formerly pristine coast, wildlife activists scurried around heaping piles of animal carcasses in an effort to rescue marine mammals and sea birds.[388] Even those individuals who previously had not considered themselves part of the now well-organized environmental movement were outraged by the daily images.[389]

The cleanup costs were staggering.[390] Bearing in mind that the original limits at Brussels in 1969 were $14 million, and that the TOVALOP-CRISTAL combination provided for a total of $30 million, the total cost for the Exxon Valdez was estimated to be between $5.3 billion and $6 billion![391] None of the existing regimes could even come close to providing proper clean up and fair compensation to victims. Accordingly, in 1990, Congress acted unanimously and passed the Oil Pollution Act of 1990 (OPA),[392] which was signed into law by President George H.W. Bush.[393]

---

387 *See* Sam H. Verhovek, *Across 10 Years, Exxon Valdez Casts a Shadow*, N.Y. TIMES, Mar. 6, 1999, at A1 (stating that "at least 10.8 million gallons of North Slope crude" was spilled in the accident).

388 *See id.* (describing the response from neighboring communities and environmental activists in the aftermath of the spill).

389 *See* Jeffrey D. Morgan, *The Oil Pollution Act of 1990*, 6 FORDHAM L. REV. 1, 4 (2011).

390 *See* Harrald, *supra* note 385, at 14 ("Clean-up costs have exceeded $2 billion . . . .").

391 Including cleanup costs, penalties, and settlements. *See* TAN, *supra* note 377, at 302 (noting the $35 million limit after the Fund Convention); *see also* Brandon T. Morris, *Oil, Money, and the Environment: Punitive Damages Under Due Process, Preemption, and Maritime Law in the Wake of the EXXON VALDEZ Litigation*, 33 TULANE MAR. L.J. 165, 170 (2008) ("All told, Exxon spent $2.1 billion to clean up the disaster.").

392 *See* Oil Pollution Act (OPA) of 1990, 33 U.S.C. §§ 2701–62 (2012).

393 The OPA was passed by the United States Congress on August 4, 1990 and signed into law by President George H.W. Bush on August 18, 1990. *See* Thomas J. Wagner, *The Oil Pollution Act of 1990: An Analysis*, 21 J. MAR. L. & COM. 569 (1990) ("On August 18, 1990, President Bush signed into law the Oil Pollution Act of 1990, after the measure had been unanimously approved by both the House and the Senate."); Morgan, *supra* note 389, at 4 n.18 (citing 136 CONG. REC. S11,547 (daily ed. Aug. 2, 1990), and 136 CONG. REC. H6,949 (daily ed. Aug. 3, 1990)) (indicating that both the House and Senate had passed the Oil Pollution Act by August 3, 1990).

D. Damage as Defined Under the Oil Pollution Act of 1990

The OPA has an incredibly broad, all-encompassing definition of the terms of removal costs and liability.[394] Specifically, the statute provided that the "responsible party" would be responsible for "all removal costs."[395] It is noteworthy that, unlike the Brussels regime, liability for removal was unlimited without any caps whatsoever.[396] This broad liability provision reflected the strength of the environmental movement in the United States.[397]

E. Liability as Defined Under the Oil Pollution Act of 1990

Further, the specific damages for which compensation was due from the party found liable includes:

> (A) . . . Damages for injury to, destruction of, loss of, or loss of use of natural resources . . . (B) . . . Damages for injury to, or economic losses resulting from destruction of, real or personal property, which shall be recovered by a claimant who owns or leases that property . . . (C) . . . Damages for loss of subsistence use of natural resources, which shall be recoverable by any claimant who so uses natural resources that have been injured, destroyed, or lost . . . (D) . . . Damages equal to the net losses of taxes, royalties, rents, fees, or net profit shares due to the injury, destruction, or loss of real property, or natural resources . . .

---

394 *See* OPA, 33 U.S.C. § 2701(31) ("[R]emoval costs means the costs of removal that are incurred after a discharge of oil has occurred or, in any case in which there is a substantial threat of a discharge of oil, the costs to prevent, minimize, or mitigate oil pollution from such an incident.") (internal quotations omitted); *see also id.* § 2701(17) ("[L]iable or liability shall be construed to be the standard of liability which obtains under section 311 of the Federal Water Pollution Control Act (33 U.S.C. § 1321).") (internal quotations omitted).

395 *See id.* § 2702(a), (b)(1)(A)–(B) (laying out that the responsible party is liable for both removal costs and damages).

396 The 1969 Civil Liability Convention was capped per its terms at $14 million. *See* CLC, *supra* note 381, art. 5 § 1 (stating how liability limits are established); Healy, *supra* note 2, at 321 (noting the $14,112,000 cap). The Oil Pollution Act of 1990 contained some caps, but there was an overall escape clause in which, by way of example, gross negligence could be alleged, and under this and other circumstances, no liability cap would apply. *See* 33 U.S.C. § 2704(a), (c)(1)(A) (establishing defenses to liability, however noting that no defenses apply where the incident was proximately caused by gross negligence or willful misconduct). *See* Mendelsohn, *supra* note 292, at 386.

397 *See* Morgan, *supra* note 389, at 4 ("The nation gasped, and Congress responded in a rare show of unanimity, enacting the final draft of OPA without a single dissenting vote . . . .").

> (E) . . . Damages equal to the loss of profits or impairment of earning capacity due to the injury, destruction, or loss of real property, personal property, or natural resources . . . (F) . . . Damages for net costs of providing increased or additional public services during or after removal activities, including protection from fire safety or health hazards caused by a discharge of oil.[398]

OPA incorporates the strict liability standard into its terms, has porous damage caps, and does not preempt U.S. states from undertaking independent action against the responsible party.[399] One of the very few exceptions for damage caps, however, was granted to offshore drilling platforms, which proved to be critical in the 2010 Deepwater Horizon catastrophe.[400]

Further, the categories of damages that can be recovered are beyond anything contemplated by the Brussels regime and its progeny.[401] By way of example, the government can recover taxes that are not paid because of the destruction of facilities that provided all types of governmental revenue, and the subsequent loss of the revenue stream.[402] Further, lost profits are recoverable, as are

---

398 OPA, 33 U.S.C. § 2702(b)(2).

399 *See id.* § 2701(17) (defining liability based on the standards established by the Federal Water Pollution Control Act) (citing *id.* § 1321). Further, while a detailed analysis of the Oil Pollution Act of 1990 is beyond the scope of this article, it should be pointed out that pursuant to this statute, the "responsible party" (the language of OPA is broad enough to include defendants who are lessees or easement holders, as well as shipowners) was made liable for "costs of removal that are incurred after a discharge of oil has occurred" as well as for a variety of damages for injury, destruction of property, lost tax revenue, lost profits, and was further liable for actions brought by individual states. *Id.* § 2701(31). Additionally, the statute did not preclude action brought by plaintiffs in a state court. *See id.* § 2701(32).

400 The OPA provides that for an offshore facility other than a deep-water port, the responsible party shall be liable for "all removal costs plus $75,000,000." *Id.* § 2704(a)(3). As will be seen in this Article, the liability cap was dwarfed by the damages that resulted from the Deepwater Horizon oil platform blowout. *See* Eli Sperdokli, *supra* note 95, at 643 ("It is noteworthy that BP voluntarily waived its right to the OPA liability cap when it could have least argued that it was entitled to limit its liability to a maximum of $75 Million.").

401 *See* OPA, 33 U.S.C. § 2702(b)(2) (noting categories of damages not found in the Brussels regime); *cf.* discussion of decision-making at Brussels, *supra* Part VI.

402 *See* OPA, 33 U.S.C. § 2702(b)(2)(D).

increased expenses for public services, such as hazmat crews and other emergency services.[403]

In short, OPA is everything that Brussels and its progeny are not—a system of compensation in which the defendant faces open-ended liability for its errors or omissions. There are no escape clauses, and enforcement, in contradistinction to the international regime, is backed up by the full power of the United States Department of Justice and individual state equivalents.

F. Sources of Revenue for Compensation of Damages Under the Oil Pollution Act

The most important innovation of the OPA was the abandonment of the formula for compensation. This formula had been the guiding principle of the civil liability treaty and the 1971 compensation fund. It was also used in the 1992 treaty and its compensation fund. Specifically, the regime established at Brussels incorporated a compensation scheme whose first tier was payment of damage by marine insurers—P&I Clubs and marine insurance companies—and whose second tier was payment of damages by contributions from international oil companies.[404] This was the essence of the compromise reached at Brussels.[405] In sharp contrast, neither private insurers nor any compensation fund that was controlled by Non-State Actors (i.e., the large international petroleum companies) played any roles in the OPA compensation scheme.[406] Instead, the United States government used its massive taxing power to establish a $1 billion Oil Spill Liability Trust Fund (the Trust Fund), which was funded by a five cents per barrel tax collected from the oil industry on all oil produced or imported into the United States,[407] as well as from transfer from existing trust

403 *See id.* § 2702(b)(2)(E)–(F).

404 *See* Neuman, *supra* note 79.

405 The mechanics of the compromise process are discussed *supra* Section VI.A.3.

406 *See* OPA, 33 U.S.C. §§ 2701–62. *See also*, U.S. DEP'T OF HOMELAND SEC., U.S. COAST GUARD, REPORT ON IMPLEMENTATION OF THE OIL POLLUTION ACT OF 1990, at 5–6 (2004) (explaining how the Oil Spill Liability Trust Fund provides an alternative means of compensation).

407 *See* U.S. DEP'T OF HOMELAND SEC., *supra* note 406 (noting that the fund is made up of $1 billion and that its primary source of funding is "a 5 [cent] per barrel tax, collected from the oil industry on petroleum produced in or imported to the United States").

funds, such as the Trans-Alaska Pipeline Liability Fund, interest on the principal of the Trust Fund derived from United States Treasury instruments, and recovery from those held responsible for oil spills.[408] Accordingly, it was clear that the cargo owners—the petroleum companies—would be the parties ultimately responsible under the OPA to pay damage claims arising from massive oil spills.[409] The net result of Exxon Valdez and the OPA was that the United States abandoned the multilateral treaty approach in favor of the unilateral OPA.[410]

As a side note, although the litigation by the United States government against Exxon for damage caused by the Exxon Valdez was settled in 1991, the settlement permitted the federal government to reopen litigation in the event of "unknown damages."[411] This is precisely what occurred and the administration of George W. Bush pursued these claims.[412] It was only in 2015 that the final claims were dropped by the federal government, and all litigations were deemed terminated or settled.[413]

G. The 1992 Conventions

The ten-year period after the Supplemental Fund Convention went into effect was relatively quiet in terms of the issue of oil spills on the seas, and the legal regime established at Brussels—including the Supplemental Fund Convention, TOVALOP and CRISTAL—and the WQIA, passed by the United States Congress, seemed

408 *See id*. at 6–7 (noting three other sources of funding: transfers from existing pollution funds, interest on the fund's principal, and cost recoveries from responsible parties).

409 *See* OPA, 33 U.S.C. § 2712; *see also* 26 U.S.C. § 4611(a)(1)–(2), (b)(1)(A) (2012).

410 It is important to emphasize that the United States ratified neither the 1969 civil liability treaty, nor the 1971 International Compensation Fund, nor the 1992 Conventions. Rather, it has relied on domestic legislation, especially the Oil Pollution Act of 1990, to deal with the oil spill issue. *See generally* OPA, 33 U.S.C. §§ 2701–62.

411 Agreement and Consent Decree, United States v. Alaska, No. A91-083 CIV (D. Alaska Sept. 30, 1991).

412 *See* Rachel Waldholz, *Hearing Ends 26 Years of Litigation over Exxon Valdez Oil Spill*, ALASKA PUB. MEDIA, (Oct. 15, 2015) https://www.alaskapublic.org/2015/10/15/hearing-ends-26-years-of-litigation-over-exxon-valdez-oil-spill/ (covering the final settlement of all litigation).

413 *See id.*

adequate to handle the problem.[414] In 1989, however, after the Exxon Valdez catastrophe, it became clear that the limits of liability contained in the civil liability treaty and the Supplemental Fund Convention were set at unrealistically low levels.[415]

Accordingly, in 1992, both the civil liability treaty and the Supplemental Fund Convention were significantly revised, which resulting in an increase in the levels of compensation.[416] The 1969 civil liability treaty and the fund were renamed as the 1992 Civil Law Convention and the 1992 Fund Convention, and they entered into force on May 30, 1996 (the 1992 Conventions).[417] The 1992 Conventions, amended in 2003, raised the amount of available compensation to the sum of $292 million, a significant increase from the 1969/1971 levels.[418] For large oil tankers (140,000 units of tonnage), it was provided that their liability would be $127.3 million with the balance paid by the fund based on contributions from the large oil companies.[419]

While the total available amount for compensation represented a significant increase from the 1969 civil liability treaty—although when inflation is factored in the calculation, it is far less expensive than it initially appears—the 1992 Conventions also narrowed the

414 *See Major Oil Spills in the Gulf and Other U.S. Waters*, CTR. FOR BIOLOGICAL DIVERSITY, https://www.biologicaldiversity.org/programs/public_lands/energy/dirty_energy_development/oil_and_gas/gulf_oil_spill/oil-spill_timeline.html (last visited Mar. 1, 2019) (demonstrating that during this ten-year period, there were no spectacular oil spills that attracted media attention on the scale of the Torrey Canyon).

415 *See* Vernon Valentine Palmer, *The Great Spill in the Gulf . . . and a Sea of Pure Economic Loss: Reflections on the Boundaries of Civil Liability*, 116 PENN ST. L. REV. 105, 109 (2011) (describing the differential between the limits of liability and actual clean-up costs for marine oil spills).

416 *See* Protocol of 1992 to Amend the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, Nov. 27, 1992, 1953 U.N.T.S. 330.

417 *See id.*

418 *See* Civil Liability Treaty, *supra* note 5, art. 5, ¶ 9 (indicating that actual amounts available are based on the SDR (Special Drawing Right), a figure which is based on five currencies); *see also* INT'L PETROLEUM INDUS. ENVTL. CONSERVATION ASS'N, OIL SPILL COMPENSATION (2007). The $292 million figure is based on a conversion to dollars from SDRs and therefore fluctuates over time.

419 *See* INT'L PETROLEUM INDUSTRY ENVTL. CONSERVATION ASS'N, OIL SPILL COMPENSATION (2007).

definition of pollution damage from the 1969 civil liability treaty.[420] Specifically, the 1992 Convention limited the operative definition of "pollution damage" by adding a new provision which "provided that compensation for impairment of the environment other than loss of profit from such impairment shall be limited to costs of reasonable measures of reinstatement actually undertaken or to be undertaken."[421] The 1992 Conventions rendered TOVALOP and CRISTAL redundant because it was perceived there was no need for two sources of compensation from the same entities. Consequently, both entities disbanded in 1997.[422]

Finally, in 2005, an additional level of compensation was established by means of a Supplementary Fund.[423] This raised the total available amount for an oil spill disaster to $1.064 billion.[424] This amount includes available compensation under the 1992 Conventions as amended, and the additional liability under the 2005 Convention is paid by the international oil companies.[425] This clearly represented a marked increase over the amounts available under the 1969 civil liability treaty and the 1971 Fund Convention, but was far less than the amount paid out to claimants after the Exxon Valdez disaster.[426]

Ratification of the 1992 Civil Liability Convention and the 1992 Fund Convention have been widespread. As of July 20, 2019, 115 States are parties to both Conventions, thirty-two States are parties to the Supplemental Fund Protocol, and twenty-three States

420 *See* Protocol of 1992 to Amend the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, *supra* note 416, art. 4.

421 *See id.*

422 David Knott, *Hole Appears in Tanker Spill Cover*, OIL & GAS J., Mar. 17, 1997, at 30 (describing the dissolution of TOVALOP and CRISTAL); *see also* Susan Bloodworth, *Death on the High Seas: The Demise of TOVALOP and CRISTAL*,13 J. LAND USE & ENVTL. L. 443, 444 (1998).

423 INT'L PETROLEUM INDUS. ENVTL. CONSERVATION ASS'N & INT'L TANKER OWNERS POLLUTION FED'N LTD., OIL SPILL COMPENSATION 2 (2007)

424 *See id.*

425 *See The Funds*, IOPC FUNDS, https://www.iopcfunds.org/about-us/structure/ (last visited Aug. 9, 2019) ("The levies are paid by entities which receive oil after sea transport, and normally not by States.").

426 *See* Morris, *supra* note 389, at 173.

are parties to the 1992 Civil Liability Convention, but not to the 1992 Fund Convention.[427]

IX. THE DEEPWATER HORIZON DISASTER

In 2010, twenty-one years after the Exxon Valdez disaster, the Deepwater Horizon environmental catastrophe occurred. The Deepwater Horizon was a drilling rig owned by Transocean, the largest owner of drilling equipment in the world, and leased to BP, which was using it to drill for oil at the Macondo Field in the Gulf of Mexico in the United States Exclusive Economic Zone.[428] On April 20, 2010, an explosion on the rig caused a blowout, which resulted in four million barrels of oil leaking into the Gulf of Mexico.[429] Eleven lives were lost.[430] The economic repercussions were enormous: destruction of livelihoods for fishermen, resort owners, and those in the tourist industry on the Gulf Coast, as well as the havoc wreaked on the environment.[431]

Drilling rigs were not covered by the Brussels regime, which was limited to ships.[432] Further, the OPA had a $75 million cap on liability for damages caused by oil rigs.[433] It was clear that damages would total in the billions of dollars, but there was no compensatory scheme in place besides ordinary lawsuits, which, in turn, would

427 *See* INT'L OIL POLLUTION COMP. FUNDS, THE INTERNATIONAL REGIME FOR COMPENSATION FOR OIL POLLUTION DAMAGE 9–10 (2018).

428 *See* NAT'L COMM'N ON THE BP DEEPWATER OIL SPILL & OFFSHORE DRILLING, DEEP WATER: THE GULF OIL DISASTER AND THE FUTURE OF OFFSHORE DRILLING 2 (2011)*; see also* Ronen Perry, *The Deepwater Horizon Oil Spill and the Lessons of Civil Liability*, 86 WASH. L. REV. 2 (2011).

429 *See* Perry, *supra* note 428, at 2–3.

430 *See id*.

431 *See id.*

432 *See* Civil Liability Treaty, *supra* note 5, art. 1 (noting that by definition, the treaty only covers ships, not offshore drilling platforms); *see also*, Protocol of 1992 to Amend the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, *supra* note 416, art. 1.

433 *See Deepwater Horizon Liability: Hearing before the S. Subcomm. on Energy & Nat. Resources*, 111th Cong. 1–2 (2010) (opening statements of Sen. Jeff Bingaman, Chairman, Subcomm. on Energy and Nat. Resources and Sen. Lisa Murkowski, Ranking Member, Subcomm. on Energy and Nat. Resources).

take many years, if not decades, to wend their way through the U.S. judicial system.[434]

The United States government acted with its full power, and compelled BP to waive the $75 million cap.[435] As a result of U.S. governmental pressure, BP put $20 billion in escrow as security for pending liability claims.[436] Nonetheless, Deepwater Horizon demonstrated the inadequacies of all existing compensation schemes, whether established by an international regime or by unilateral State action, and the distance yet to travel to establish an effective regime.

CONCLUSION

The United States, based on a growing environmental awareness, refused to ratify the 1969 civil liability treaty.[437] Moreover, in the case of the United States, the traumatic Exxon Valdez environmental catastrophe made it clear that the existing—or even a somewhat improved upon—international regime begun in Brussels in 1969, with its financial model based upon insurers and contributions from oil companies, was inadequate. This perception led to a total abandonment of the idea of participation in an international regime, and thereby cemented this country's decision to proceed unilaterally.[438] Under this unilateral approach, liability was almost unlimited, and taxation of oil would provide the source

434 *See* Wadholz, *supra* note 412.

435 *See* Tom Hals, *BP tells court it waives cap on spill liability*, REUTERS (Oct. 19, 2010), https://www.reuters.com/article/us-oil-spill-bp-liability/bp-tells-court-it-waives-cap-on-spill-liability-idUSTRE69I3C420101019. The American governmental pressure on BP was intense. On June 16, 2010, a little more than two months after the Deepwater Horizon oil platform blowout, BP agreed to put $20 billion in escrow, and suspend its dividend payments for the rest of the year. *See The Role of BP in the Deepwater Horizon Explosion and Oil Spill: Hearing Before the H. Subcomm. on Oversight and Investigations, H. Comm. on Energy & Commerce*, 111th Cong. 8 (2010) (Statement of Sen. Henry A. Waxman, Chairman, H. Comm. on Energy and Commerce).

436 *See* Hals *supra* note 435.

437 *See* U.N. CONFERENCE ON TRADE & DEV., *Liability and Compensation for Ship-Source Oil Pollution: An Overview of the Legal Framework for Oil Pollution Damage from Tankers*, Table 4, U.N. Doc. UNCTAD/DTL/TLB/2011/4 (2012), https://unctad.org/en/PublicationsLibrary/dtltlb20114_en.pdf.

438 *See* discussion, *supra* Section VII.A.

of compensation to injured parties rather than insurance and oil industry contributions.[439]

This U.S. unilateral approach did not significantly weaken the Brussels regime. In fact, per the chronology of events described in this article, the 1992 Protocol to Amend the International Convention of Civil Liability and the 1992 Fund Convention cover approximately 97.7 percent of the gross tonnage of the world's merchant shipping.[440] Nonetheless, the unilateral American approach certainly negatively impacted the international regime that was established in 1969 in Brussels.[441]

On the eve of the fiftieth anniversary of the Brussels conference, it is indisputable that the civil law convention and its 1971 and 1992 progeny have achieved widespread acceptance.[442] As previously noted, as of 2018, approximately 97.7 percent of the world's gross shipping tonnage is now a party to these agreements.[443] While a cynic might point out that this extraordinarily high percentage is heavily weighted in favor of shipping states such as Micronesia, Panama and Liberia, the fact remains that Brussels is the most successful transnational environmental achievement to date.[444] Its provisions mandating significant compensation to victims of oil pollution damage separate it from virtually all other environmental initiatives which, as a general rule, deal with either technical matters, or establish general unenforceable goals to save the biosphere. The fact, as shown in this article, that the civil liability treaty resulted from a complex relationship among IMCO, States, and Non-State Actors, whose interactions were at least partly grounded in regulatory capture, does

439 *See* U.S. DEP'T OF HOMELAND SEC., U.S. COAST GUARD, *supra* note 406.

440 *See* INTERNATIONAL OIL POLLUTION COMPENSATION FUNDS, THE INT'L REGIME FOR COMPENSATION FOR OIL POLLUTION DAMAGE 9–10 (2018) (listing ratifying states).

441 *See* Palmer, *supra* note 415, at 411 (indicating that the absence of the world's largest economic power from the treaties collectively weakened the multinational approach to compensation for oil pollution damage).

442 *See* INT'L OIL POLLUTION COMP. FUNDS, *supra* note 440, at 9–10 (listing ratifying states).

443 *See id.*

444 The fact that 137 States have signed a series of treaties, making significant compensation mandatory in cases of oil spill damage, arguably makes these treaties the most significant environmental international agreements to date. *See, e.g.*, THE STATESMAN'S YEAR-BOOK 27 (Brian Hunter ed., 130th ed. 1993).

not diminish from that which was accomplished at Brussels in November 1969.

While the United States raised the bar on enforcement and sanctions substantially above anything agreed to at Brussels when it opted for unilateral action by passage of the Oil Pollution Act of 1990, the civil liability treaty serves as a shining example of what can be achieved to preserve the environment through international cooperation.