9-2018

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 Prior to and at the 1969 International Legal Conference on Marine Pollution Damage (“Brussels Conference”)

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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 PRIOR TO AND AT THE 1969 INTERNATIONAL LEGAL CONFERENCE ON MARINE POLLUTION DAMAGE (“BRUSSELS CONFERENCE”)

A DISSERTATION SUBMITTED TO THE GRADUATE CENTER OF THE CITY UNIVERSITY OF NEW YORK

DEPARTMENT OF POLITICAL SCIENCE

BY

MILTON D. OTTENOSER

2018
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by Milton D. Ottensoser

This manuscript has been read and accepted for the Graduate Faculty in Political Science in satisfaction of the dissertation requirement for the degree of Doctor of Philosophy

2018

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Peter Romaniuk

THE CITY UNIVERSITY OF NEW YORK
ABSTRACT

Oil Pollution on the High Seas: The Establishment of an International Regime to Seal with Public International Law and Private Law Issues, and the Role of Non-State Actors in Their Resolution at the 1969 International Legal Conference on Marine Pollution (“Brussels Conference”)

by

Milton D. Ottensoser

Advisor: Professor Ming Xia

On March 18, 1967, the Torrey Canyon, an oil tanker flying the flag of Liberia and carrying thirty million gallons of crude oil, smashed onto rocks off the coast of the United Kingdom. The oil spill metastasized into an environmental catastrophe, and this event became the first major environmental disaster of the electronic media age. As a direct result of the Torrey Canyon catastrophe, two treaties were signed in November 1969, at a conference in Brussels sponsored by the Intergovernmental Maritime Consultative Organization (IMCO), a United Nations Specialized Agency. The first treaty (the public law treaty) dealt with the right of a State to intervene on the high seas in the event of potential damage from an oil spill, while the second treaty (the private law treaty) dealt with the issue of financial liability of the owner (or charterer) of a ship to those damaged by an oil spill.

The second treaty was and remains unique in that the participants agreed to a legally enforceable compensation scheme in an amount of up to fourteen million dollars per incident (subsequently raised over the years to several hundred million dollars) to damaged parties. Moreover, the Brussels system of legal liability and mandatory compensation, despite the growth of the environmental movement in the second half century after the Torrey Canyon incident, has
not been replicated by other proposals or treaties (e.g., the Paris Climate Accords). Therefore, the central question for analysis is to explain and trace the factors that produced the treaty and its compensation scheme, and further, to explain the relevance of these processes to regime theory and regime formation.

Accordingly, this dissertation examines the intense bargaining among States, IMCO, and Non-State Actors in the establishment of the international regime at Brussels. Particular emphasis is placed on the roles of the Non-State Actors, primarily shipping interests, international insurance companies, and oil companies, in attempting to safeguard their sectoral interests during the regime formation process. Further, individuals who held leadership positions in some of these Non-State Actors also had professional relationships that overlapped with their roles as members of State delegations and their official roles within IMCO. These interactions are examined through concepts in interest group theory as developed by political scientists, especially clientism, regulatory capture and non-decisions.

The bargaining process itself is analyzed through the neoliberal approach to regime formation, which emphasizes negotiations and bargaining among the parties. This is in contradistinction to a realist approach, which would center on a solution being imposed by the strongest party. This approach also differs from the cognitivist approach, which would emphasize that the participants were using a knowledge-based strategy, such as working to develop a solution to marine pollution based on a common belief that the environmental integrity of the oceans represents the highest good.

The dissertation further examines the impact on regime resilience of exogenous events, such as the Exxon Valdez oil spill in 1989, which, for all practical purposes, resulted in the United States abandoning the multinational approach created at Brussels in favor of unilateral
domestic legislation, the Oil Pollution Act of 1990. The American unilateral approach, the Brussels structure, and the alternate independent entities established by Non-State Actors (the Tanker Owners Voluntary Agreement Concerning Liability for Oil Pollution representing shipping interests, and the Contract Regarding an Interim Supplement to Tanker Liability for Oil Pollution representing oil interests) all combined to form a regime complex with multiple power centers.

Finally, on a broader theoretical basis, this study relies on a critical case study. While the utility of critical case studies has been debated for decades among social scientists, its usefulness as a tool in analyzing the regime complex first established a half century ago at Brussels is crucial to understanding why and how this regime developed.
ACKNOWLEDGMENTS

This project probably set the world’s record for the longest interval between commencement of the program and dissertation defense. I am therefore deeply grateful to Professor Alyson Cole, executive officer of the political science department, who in October 2016, received an updated draft of my dissertation out of nowhere, and immediately got back to me and invited me to reapply to the program. This project simply would not have been possible without her taking a chance on me and readmitting me after a very lengthy absence.

I thought, that after many years as an attorney, I knew how to write. Professor Ming Xia, my advisor, proved me (somewhat) wrong, and enhanced my writing and analytical skills (in only sixteen months) in innumerable ways. I cannot begin to thank him for taking me on as a graduate student, guiding my thinking process, and leading me to a successful dissertation defense. Similarly, Professor Peter Liberman and Professor Peter Romaniuk influenced me to strive for excellence, pressed the delete button on ambiguity and fuzzy thinking, and substituted a step by step logical analysis on research issues. Thank you for your input.

My wife Susan, whom I have known since she was sixteen, has been part of my life’s journey through college, graduate school, law school, the New York State bar examination (fortunately, only one time), and graduate school (a second time), plus two children, seven grandchildren, and an assortment of ups and downs that life offers. A renowned geriatric social worker, a wife, mother, grandmother, caregiver of her parents of beloved memory (to name but a few roles), she has been my rock for over fifty years. “Re’eh chaim im isha asher ahavta” – “Enjoy life with the woman whom you love” – Kohelet 9-9/Ecclesiastes 9-9.

And of course, “the crew,” who have enriched my life in so many uncountable ways: my
children, Uri and Wendy, and Daniel and Judith; and my grandchildren, Elyssa, Haley, Elliott, Jack, Izzie, Alex, and Nate – thank you, thank you and thank you.

Special thanks to Professor (and longtime Dean) Saul Levmore of the University of Chicago Law School, who not only encouraged me in this project but took time out to comment on the drafts of my dissertation. Thank you also to Professor Edmond Phelps of Columbia University, who has been part of my professional and intellectual life for almost twenty years. Alan I. Mendelsohn, Esq. served as my “intellectual godfather” on this journey. His insights on the role of Non-State Actors in private law issues, provided the requisite framework for this project.

A special shout out to Lea Schlesinger, who has been my super paralegal (almost an adopted family member) for over twenty years, and assisted me in the finer points of word processing, as well as my graphic artist, Nitzy Dror Tamir, who did the art work for the dissertation. Finally, Sydney Beveridge masterfully assisted me in removing the glitches and typos from the final product. Thank you also to Etta Barmann for her technical assistance.

This dissertation is dedicated to the memory of my late parents, Max and Ruth Ottensoser, who were able to escape the Nazi murderers in 1939, and build a new life for themselves, and establish a family in the United States, and my late parents-in-law, Rabbi Jacob and Edith Cohen, who over many decades, guided and influenced me in innumerable ways. Yehi zichram baruch – May our memories of them be a blessing.
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1971
Establishment of the Contract Regarding an Interim Supplement to Tanker Liability for Oil Pollution (CRISTAL), an oil industry organization to provide compensation to victims of oil pollution damage (January)

1989
Exxon Valdez oil tanker disaster off the Alaskan coast (March 24)

1990
United States Congress enacts the Oil Pollution Act of 1990, which de facto marks the American withdrawal from international efforts to establish standards of liability for damages arising from oil spills on the ocean

1992
IMCO Conference approves the 1992 Protocol to Amend the International Convention on Civil Liability and the 1992 Fund Convention, which supersede the private law treaty and the 1971 Fund Convention

1997
TOVALOP and CRISTAL are dissolved

2010
Deepwater Horizon oil rig disaster (April 10)

2015
Settlement of final litigations arising from the Exxon Valdez disaster

2018
As of March 20, 2018, the 1969 International Convention Relating to Intervention on the High Seas in Case of Oil Pollution Casualties has been ratified by 89 States, representing approximately 75.20 percent of the gross tonnage of the world’s merchant shipping, while the 1992 Protocol to Amend the International Convention on Civil Liability and the 1992 Fund Convention have been ratified by 137 contracting States, representing approximately 97.69 percent of the gross tonnage of the world’s merchant shipping. The 1992 Protocol and Fund Convention have not been ratified by the United States, which is insignificant in terms of the actual number of ships flying the American flag, but because of the American dominant position in the world economy, as well as its strict domestic legislation that impacts oil pollution in the oceans up to 200 miles from the American coast, this non-ratification represents a major omission from the international regime established in 1969 at Brussels.
Chapter 1: Introduction

I. The Scope of the Inquiry

This dissertation centers on the establishment of an international regime in 1969 to deal with the problem of oil spills resulting from oil tanker crashes on the seas. A crash (in common parlance “an accident”) differs from deballasting, a routine maritime maneuver, which is defined as the deliberate discharge of oily water from a ship and is the subject of a different international regime. Accordingly, deballasting is discussed briefly in this dissertation only in the broader context of international environmental issues. The issue of maritime oil pollution resulting from ship crashes gained significant traction after the Torrey Canyon episode of March 18, 1967, in which a massive oil tanker smashed onto submerged rocks off the coast of the United Kingdom. The collision resulted in enormous environmental damage, and concomitantly became a worldwide news story.

This proposed international regime was formalized by the signing of two treaties in Brussels in November 1969 at a conference (“the Brussels Conference”) sponsored by the Inter-Governmental Maritime Consultative Organization (“IMCO”), a specialized agency of the United Nations. Each treaty dealt with a different aspect of the issue of maritime oil spills. The first treaty, the International Convention Relating to Intervention on the High Seas in Cases of Oil Pollution Casualties (“public law treaty” see Appendix 1) dealt with the Public International Law issue of the right of a State to intervene on the seas against a vessel registered in another State, which vessel (typically an oil tanker) was causing significant environmental damage to the seas, and to the coastal regions of the
impacted State. As will be demonstrated below, the right of intervention against an offending vessel overturned centuries of traditional Public International Law.

The second treaty, the International Convention on Civil Liability for Oil Pollution Damage (the “private law treaty” or the “civil law treaty” see Appendix 2), dealt with the financial liability of the offending ship owner/charterer/cargo owner to third parties for environmental damage, including cleanup costs and damages sustained by governments and non-State entities.

This dissertation's primary focus is on the private law treaty and its unique provisions, which established liability against a ship owner or charterer of up to fourteen million dollars per episode and which further incorporated the onerous strict liability standard rather than a lesser negligence standard. Accordingly, the private law treaty stands separate and apart from other environmental treaties, which for the most part center on technical matters or the establishment of voluntary goals by the signatories.

Therefore, the central question for analysis is to identify the factors that led to the formation of this international regime at Brussels in 1969.

A prerequisite to answering this question requires a definition and understanding of international regimes, which were defined by Stephen Krasner as “sets of implicit or explicit principles, norms, rules and decision-making procedures around which actors' expectations converge in a given area of international relations...Decision making procedures are prevailing practices for making and implementing collective choice.”
II. The Research Questions

As previously stated, the major research question is: which factors led to the formation in 1969 at Brussels of the international regime that addressed the twin issues of intervention on the high seas against ships spilling oil as a result of a crash, and the and financial liability of ships for damages resulting from these oil spills? Additionally, the related question is: of which factors and interests (e.g., bargaining resulting from the conflicting interests of coastal states versus maritime states versus the interests of powerful Non-State Actors) led to the incorporation of specific provisions of the public law and private law treaties? Among the possible answers are:

a. The emergence in the period 1941 to 1966 of norms of Public International Law based on a “polluter pays principle,” essentially opening up the possibility under international law of a victim of oil pollution obtaining compensation for injuries from the ship that caused the injury;

b. The emergence of environmentalism as an issue on the public agenda, particularly the issue of oil spills resulting from tanker crashes, which as will be demonstrated below, became part of the public agenda through an inordinate amount of media coverage;

c. The inadequate remedies for compensation to victims of oil pollution damage under existing domestic laws and institutions;

d. The interactions among States, IMCO, and Non-State Actors (insurance, shipping, and petroleum) who, in the case of Non-State Actors, were guided by market forces that led to inclusion in the private law treaty of terms based on
these market forces to the exclusion of other possible factors, such as an approach to the issue based on environmental integrity being the highest good, irrespective of the financial cost involved.

These interactions among States, Public International Organization, and Non-State Actors will demonstrate that the neoliberal approach on international regimes has much to offer in the analysis of the Brussels Conference, particularly as it shall be viewed through the paradigm of States, Public International Organization and Non-State Actors “as rational egoists who care for only their own (absolute) gain.” Conversely, it will be argued that despite an ostensible purpose of constructing a regime based on a common awareness of the environmental dangers posed by massive oil spills (an “only one earth” perspective), the cognitive approach is somewhat irrelevant because many of the participants at Brussels had other priorities, such as maintaining the status quo, which led to a dilution of treaty provisions dealing with liability of tankers for oil spills.

A concomitant question is, why was the regime established at Brussels not resilient or robust, and accordingly, why did it begin to disintegrate within twenty years? Why is the private law treaty as was amended sui generis, and has not been replicated or expanded by subsequent environmental treaties? Why did the United States not sign the private law treaty, and instead opt for a policy of unilateral action?

Among the variables to be explored to answer this question are:

a. The input of the Non-State Actors into the private law treaty reflected the parochial needs of Non-State Actors instead of broader environmental concerns, and therefore was not sustainable in the long term. More to the point, the weakness of the private law treaty's compensation scheme became apparent after the 1989 Exxon Valdez
catastrophe, which prompted the United States to take unilateral action, which bypassed Non-State Actors like insurance companies and relied on a tax on oil to establish a trust fund to be used to pay for oil cleanup costs;

b. The initial reluctance of coastal States such as Canada and Ireland to participate based on an initial perception that the regime was inadequate to compensate victims in the event of a major oil pollution disaster.

III. The Use of a Critical Case Study

The analysis of the proceedings of the Brussels Conference and the significance of its results utilizes the case study method, which is defined as “the detailed examination of an aspect of a historical episode to develop or test historical explanations that may be generalizable to other events.”

The threshold question is whether a single case, such as the Brussels Conference, can be used to develop an explanation of environmentalism, international regimes, or anything else. In their landmark book, *Designing Social Inquiry*, Gary King, Robert D. Keohane and Sidney Verba argue, essentially, that it is not possible. Picking up on Harry Eckstein's statement that a crucial case study based on “a single measure on any pertinent variable,” they argue that a crucial case is not reliable because of the existence of alternative explanations, errors in measurement, and simply because the world is not deterministic – there are always unknown, omitted variables. Based on this approach, one could readily argue that a study using the Brussels Conference has limited probative value.
There are two approaches to justifying the use of a critical case study. First, in practical terms, the private law treaty is sui generis. The incorporation into an international treaty of a “polluter pays” principle,15 requiring offenders to pay up to fourteen million dollars to the victims of marine pollution is not only unprecedented, but, as will be seen in Chapter IV, simply not replicated. None of the well known international environmental initiatives such as the United Nations Environmental Programme, the Stockholm Declaration, the Kyoto Protocol, and the Paris Agreement on Climate Change (to name but a few) contain enforcement provisions even remotely comparable to the private law treaty. Accordingly, the utility of using other cases in a discussion of the Brussels private law treaty is questionable.

Further, the criticisms of the utility of a critical case study in Designing Social Inquiry were addressed by, among others, Bent Flyvbjerg in “Five Misunderstandings About Case-Study Research,”16 which reviewed the King, Keohane, Verba arguments, and proceeded to highlight flaws in their approach, and accordingly justified the use of a critical case study.

Needless to say, a descriptive case study is not an end onto itself. Rather, a case study is combined with process tracing, which “is a set of procedures for formulating and testing explanations.”17 This allows the researcher “to made causal inferences about a single case or a small number of cases,”18 which, in turn enable one to engage in theory testing or theory development.19

All of the methodological issues raised in this introduction will be reviewed and amplified in Chapter III of this dissertation. Before addressing these methodological matters, however, the background of this study, including the emergence of the
environment as a policy issue, the development of international environmental law in the mid-twentieth century, and the actual dynamics of the Torrey Canyon catastrophe, will be reviewed and analyzed in Chapter II.

IV. Structure of the Dissertation

After this introductory chapter, the dissertation continues with a discussion of the policy issue of the environment in general, and a specific inquiry into the phenomenon of marine pollution with specific emphasis on oil pollution of the seas. Thereafter, since the Brussels Conference formulated two treaties that were based upon and actually expanded norms of international law, an analysis will be made of which provisions of international law were relevant to the creation of an international regime regulating oil pollution of the seas. Emphasis will be placed on the fact that during the twenty-five-year period immediately prior to the Torrey Canyon (1941 to 1966), principles of international law emerged that formed the legal basis of the two conventions signed at Brussels. The chapter concludes with the Torrey Canyon incident itself – what happened, why the event made such a major impact and what were the shortcomings of existing legal remedies that led to the approach culminating in the Brussels Conference.

Chapter III discusses the existing literature on the Torrey Canyon and the Brussels Conference, most of which is based upon interpretations of the legal implications of the private law treaty. Since the existing literature does not view the Brussels Conference through the paradigm of regime formation, there is a review of the literature of regime formation and the schools of thought on regimes (realism, neoliberalism, and
cognitivism). Further, there is a review of the literature on interest groups, especially as it relates to regulatory capture, and overlapping memberships between the public and private sectors, as well as a discussion of regime complexes, which are defined simply as “a collective of partially-overlapping and non-hierarchical regimes.”

This material is then integrated into an analysis of what the existing literature on the Brussels Conference lacks, which, as previously indicated, is legalistic and generally fails to analyze the Brussels Conference in regime formation terms.

Additionally, since the dissertation is based on a single critical case study, there is a review and analysis of the existing literature on case studies, as well as a discussion of why the critical case study is an appropriate vehicle to frame this dissertation.

Finally, since much of the material on the actual events at Brussels was obtained from a series of interviews with elite actors who had first hand or intimate knowledge of Brussels, there is a brief discussion of elite interviewing. (No other study of the Brussels Conference was found that was based on elite interviews of some of the participants.) These interviews were conducted in 1972 and the subjects included:

1. Claiborne Pell, United States Senator from Rhode Island, who sat on the United States Committee on Foreign Relations, and chaired its subcommittee dealing with maritime affairs;

2. Arvid Pardo, the United Nations Ambassador from Malta and known as “the father of the law of the sea;”

3. Peter Ghee, Chief Maritime Counsel, Mobil Oil;

4. Robert Neuman, United States Department of State, and head of the American delegation to the Brussels Conference, as well as three of his aides;
5. Allan I. Mendelsohn, Deputy Assistant Secretary of State (Transportation Affairs) of the United States Department of State.

Chapter IV is a study of the Brussels Conference as regime formation. The key questions include: who were the actors (State, Public International Organization, Non-State Actors – shipping, petroleum and insurance); what were the preferences of the actors; and which resources did they utilize in the bargaining process? In which way did the private law treaty reflect the preferences of the participants in the bargaining process; and which school of thought of regime formation (realism, neoliberalism, or cognitivism) best explains the process?

Additionally, with the Exxon Valdez episode in 1989 (the American counterpart to the Torrey Canyon), why did the United States decide to abandon entirely the multilateral regime established at Brussels, and instead acted unilaterally by passing the Oil Pollution Act of 1990? Concomitantly, why was the international regime that was centered on the private law treaty not resilient or robust enough to survive an Exxon Valdez environmental catastrophe? What does this demonstrate about regime formation?

The dissertation concludes with a final chapter which summarizes the findings of this study, and its importance to the field of international relations. As will be seen below, the contours of the international regime created at Brussels in 1969 were shaped by competing forces consisting of participating States, IMCO, and most importantly Non-State Actors, primarily shipping interests, marine insurers, and international oil companies. Moreover, an unforeseen event, the 1989 Exxon Valdez disaster, prompted the United States to abandon entirely the multilateral approach, and opt instead for unilateral action through the passage of the Oil Pollution Act of 1990.
ENDNOTES TO CHAPTER I

1 Deballasting is covered by the 1954 International Convention for the Prevention of Pollution of the Sea by Oil (OILPOL), which was amended in 1962 and 1969, and was succeeded in 1973 by the International Convention for the Prevention of Pollution by Ships (MARPOL). It should be emphasized that in contradistinction to the private law treaty signed at Brussels, neither OILPOL nor MARPOL contain sanctions for violation of the terms of either Convention. Rather, any penalties are left to the individual States. Ronald B. Mitchell’s scholarly work, *International Oil Pollution at Sea: Environmental Policy and Treaty Compliance* discusses compliance with the provisions of OILPOL and MARPOL.

2 See Chapter III for some of the details of the coverage of the Torrey Canyon as the first international environmental catastrophe media event.

3 The text of the International Convention Relating to Intervention on the High Seas in Cases of Oil Pollution Casualties is reproduced in the Appendix of this dissertation.

4 The text of the International Convention on Civil Liability for Oil Pollution Damage is reproduced in the Appendix of this dissertation.

5 This point was effectively made by Jessica F. Green in *Rethinking Private Authority: Agents and Entrepreneurs in Global Environmental Governance* (Princeton: Princeton University Press, 2014).


7 The neoliberal approach is described and discussed in Andreras Hasenclever, Peter Mayer, and Volker Rittberger, *Theories of International Regimes* (Cambridge: Cambridge University Press, 1997), 4.

8 Ibid.

9 See Chapter IV of this dissertation which discusses the conflicting interests among States, IMCO, and the Non-State Actors involved in decision-making at Brussels. As will be
demonstrated, Susan Strange’s approach to international organization (that it is not neutral or even “good”) is useful in understanding the positions of IMCO at the Brussels Conference.

10 Andreas Hasenclever, Peter Mayer, and Volker Rittberger, 2. “In contrast regime robustness (resilience) refers to the ‘staying power’ of international institutions in the face of exogenous challenges, and to the extent to which prior institutional choices constrain decisions and behavior in later period...”


13 Ibid., 209.

14 Ibid., 210-11.

15 The development of the “polluter pays” principle in international law emerges in the Trail Smelter Arbitration in 1941. See Chapter II for a discussion of the evolution of this principle.


Chapter 2: Evolution of Environmental Issues and Legal-Political Response

I. The Emergence of the Environment as a Policy Issue

In the late 1960s, much public attention in the United States, as well as in other industrialized and non-industrialized states, became focused on problems of the environment.¹ According to Oran Young, an early pioneer in the study of global environmental issues and related regime formation and governance issues in international politics, “international environmental problems sets” can be grouped into four clusters: international commons; shared natural resources; transboundary externalities; and linked issues.²

Overpopulation, climate change, pollution of air and the seas, inadequate methods of waste disposal, depletion of fish stock and renewable resources, biodiversity, and sustainable development became matters of concern to private citizens and Non-State Actors, as well as to governments of different countries and various levels. Whether or not the apocalyptic vision of a world suffocating under its wastes, which some early proponents of ecological reform believed would become reality unless drastic measures were promptly taken, represented an exaggerated view of the situation, it is clear that the question of environmental degradation has become an increasingly important component of political debate.³

The environmental challenges raised the issues of both cause and response. Although the challenge, its cause, and its response can all be global in scale, and therefore fall into the concern of political scientists, a subtle difference over emphasis does exist: causal explanations have attracted more biological and natural scientists, while responses and solutions offer opportunities to politicians and political scientists. The multiplicity of governmental environmental initiatives has been staggering. Take the United States as an example: “Since the first Earth Day in April
1970, federal, state and local governments have adopted dozens of major laws and hundreds of regulations to protect natural resources and foster sustainable approaches to economic development. New institutions, such as the United States Environmental Protection Agency (EPA), have been created, and governments have assumed a wide range of new responsibilities.”

Needless to say, the environmental movement was not born in 1970. Naturalist and conservationist John Muir founded the Sierra Club in 1892. In the United States during the early twentieth century, the conservation movement bore fruit in the establishment of a vast network of national parks. Further, almost a decade prior to the first Earth Day, Rachel Carson wrote the best-selling book *Silent Spring* (1962), which described in vivid detail the far-reaching consequences of the widespread use of chemicals, especially insecticides, on the environment. As Robert Gottlieb observed in *Where We Live, Play, and Work* (1993):

> Pollution issues are not just a recent concern; people have recognized, thought about, and struggled with these problems for more than a century in significant ways. A history that separates resource development and its regulation from the urban and industrial environment disguises a crucial link that connects both pollution and loss of wilderness.

Similarly, States in other parts of the globe have likewise added provisions to their constitutions, enacted legislation and established bureaucracies that deal with environmental matters. Thus, in the nineteenth century, the River Commissions for the Rhine and the Danube started to address environmental issues of rivers and waterways in Europe. Article 48A of the Constitution of India, which was enacted in 1976, provides that, “The State shall endeavour to protect and improve the environment.” China has undertaken numerous environmental initiatives including a broad statute from 1995 called the “Law of the People’s Republic of China on the Prevention
and Control of Atmospheric Pollution.” The Japanese government has a Ministry of the Environment to administer the Basic Environment Law of 1993, which provides a broad plan for control of environmental issues. Additionally, Article 11 of the Treaty on the Functioning of The European Union encompasses a requirement that “Environmental protection requirements must be integrated into the definition and implementation of the Union’s policies and activities, in particular with a view to promoting sustainable development.” Further, Articles 191 to 193 of this treaty amplify the general goals in environmental matters of the European Community.

In the area of international relations, there has been a proliferation over the past fifty years of treaties, conferences, and bilateral and multilateral arrangements concerned with environmental degradation. Starting in 1972 with the Conference on the Human Environment held in Stockholm, the United Nations has held a series of conferences that included the Conference on Environment and Development held in Rio de Janeiro in 1993, a General Assembly Special Session on the Environment in 1997, and the Climate Change Conferences held in Durban in 2011 and in Paris in 2015. In addition, the United Nations has created an agency, the United Nations Environment Programme, to act in environmental matters. Further, numerous regional and bilateral arrangements have been created to deal with environmental matters.9

Skirting the question of the origin of the environmental movement, the threshold issue is one of definition. The central issue is environmental degradation which is caused by a society’s economic and/or social behavior and is simply defined as, “any reduction in the environment’s contribution to economic well-being.”10 The degradation can be total, which is termed “exhaustion,” or partial, which is termed “depletion.”11 Conversely, if a society engages in economic and/or social behavior that results in the needs of the present generation being met
without compromising the ability of future generations to meet their own needs, such a society is engaging in sustainable behavior.\textsuperscript{12} Therefore, “a sustainable society does not use natural resources or produce wastes faster than they are regenerated or assimilated by the environment.”\textsuperscript{13}

Needless to say, there is a tension between development and sustainability. It is, by way of example, difficult to reconcile two provisions of \textit{The Rio Declaration on Environment and Development}. Specifically, Principle 2 provides:

States have, in accordance, with the Charter of the United Nations, and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental law, the sovereign right to exploit their own resources pursuant to their own environmental policies.\textsuperscript{14}

Simultaneously, Principle 4 provides that:

In order to achieve sustainable development, environmental protection shall constitute an integral part of the development and cannot be considered an isolation from it.”\textsuperscript{15}

The key point about these institutions and activities is, however, that there exists no central international entity regulating the environment. This stands in contrast to the World Trade Organization, which was established in 1995 and has 153 States as members, and not only facilitates trade among its members, but also monitors compliance. Because of the complexities of environmental issues, international environmental law has not focused on compliance and enforcement. Instead, the three major areas of activity center on the holding of international conferences that articulate general principles designed to guide states towards environmental protection, the drafting of treaties to deal with specific environmental problems with an aim of establishing technical guideline on dealing with the particular problem, and the creation of
voluntary self-regulatory regimes by Non-State Actors for environmental impact and risk assessment.\textsuperscript{16}

II. Sources of Marine Pollution

Since this dissertation centers on the establishment of a regime to deal with oil spills on the high seas, sources of ocean contamination should be briefly reviewed. Oceans, which occupy three fourths of the earth’s surface, are probably the key portion of the biosphere. Particularly vital is their role as a medium for the growth of fish, which provide significant amounts of protein and other nutrients for much of mankind. Fish, however, are the end result of a food chain process that originates at the level of phytoplankton, tiny organisms that serve as nutrients for more complicated forms of life. In the North Atlantic area, 1,000 pounds of phytoplankton produce:

- One hundred pounds of zooplankton or shellfish;
- Fifty pounds of anchovies and other small fish and ten pounds of small carnivores;
- One pound of carnivores harvested by man.\textsuperscript{17}

Phytoplankton, however, also has the ability to attract, absorb, and retain extraneous substances. Heavy metals such as aluminum, copper, and lead can be concentrated by the phytoplankton at levels up to one hundred thousand times the concentration in the surrounding environment.\textsuperscript{18} By destroying the phytoplankton, the rest of the food chain suffers commensurately. Besides the food factor, mankind benefits from the oceans in other ways. Oceans provide recreation for swimmers and surfers, livelihoods for fishermen and sailors on
merchant vessels, and most precipitation originates as evaporation and condensation of ocean waters. Many biologists maintain that life itself originated in the oceans.

Conversely, oceans have also served as humanity’s ultimate sewer. Because of a prevailing belief that oceans can accommodate a limitless flow of man’s wastes, enormous quantities of refuse, sewage sludge, industrial wastes, and dredging spoils are continuously being emptied into the seas. During the late 1960s and early 1970s, at the time of the Torrey Canyon episode, the Brussels Conference and the ocean protection regulation enacted by the United States and Canada, the environmental degradation of the oceans was horrific. A report prepared in 1970 by the Dillingham Environmental Corporation for the Bureau of Solid Waste Management estimated that the yearly amount of wastes discharged from the coastal regions of the United States totaled 48,210,710 tons.19 Impressive scientific evidence was being accumulated that indicated that oceans’ capacity to absorb wastes was not unlimited. On a more impressionistic basis, in 1970, Thor Heyerdahl, after crossing the Atlantic Ocean on the Ra, noted that oil globs and manmade debris virtually carpeted the ocean.20 In 1970, governmental officials and scientists publicized the existence of the New York Bight disposal area where sludge had accumulated for over forty years. The conditions were so severe that it was termed a dead sea and oxygen levels were not deemed sufficient to support various forms of aquatic life including shellfish.21 Other detrimental results of certain pollutants include mutant forms of fish and fish with cancerous growths.22

The problem of maritime pollution was summed up best by Barbara Ward and Rene Dubos. “Every ounce hitherto dumped or channeled into the sea, from the very morning of time until the modern age of general industrialization, has accumulated in one form or another inside
the same landlocked sea, the lowest section of our biosphere and the only one with no outlet for refuse.”

There exist at least three major categories and/or sources of ocean pollutants. The first two—chlorinated hydrocarbons and waste dumped from vessels—while significant, are not, however, relevant to this study. Oil pollution, however, is a significant ongoing problem and forms the core of this study. The most common ways in which oil enters the marine environment are:

- Naturally, via seepage and from the decay of marine and animal life.
- Off shore oil exploration.
- Deballasting by tankers.
- Tanker break-up.
- Loading accidents in port.
- Wastes from land-based petroleum use and refining being dumped into the seas.

While the exact quantity of oil discharged into the seas is unknown, it has been estimated that about one million metric tons of oil are spilled annually into the seas from oil transport, and the total from all of man’s activities is probably ten times that figure. The largest single source of oil in the sea probably comes from deballasting and other cleaning operations by tankers and other ships.

Yet, it should also be noted that oil seepage occurs in large quantities naturally. Oil was observed in the Santa Barbara Channel off California as early as 1793, years before oil was used in significant quantities. Nonetheless, with the increase in size and number of tankers, and the acceleration of the development of offshore petroleum exploration, it is these sources of pollution by oil that are becoming increasingly significant. Thus, in the late 1960s the average
tanker weighed 12 thousand to 13 thousand tons. By 1972, there were four tankers in operation of 325 thousand tons, and plans were being developed for 800 thousand-ton tankers. 28 If but one of these super tankers were to spill its cargo, the total pollution from tankers would increase by twenty-five percent. 29

When the Torrey Canyon became grounded off the English coast in 1967, thirty million gallons of oil were spilled. The 1969 Ocean Eagle disaster near Puerto Rico resulted in a spill of three million gallons. 30 In addition, with the increase in offshore oil drilling, more accidents became inevitable. The Santa Barbara disaster of January 1969, resulted in a spill estimated at one to three million gallons. 31 The 1989 Exxon Valdez grounding and the 2010 Deepwater Horizon oil rig explosion dwarfed the magnitude of these events. To sum up, at the time of the Torrey Canyon disaster, there occurred worldwide about ten thousand oil spills per year, two thirds of which occurred in port and harbor areas, and the short-range prospect was for proliferation of these discharges. 32

III. Environmental Degradation and International Law

If oil pollution of the seas is a significant international environmental issue, the point of departure in acting in concert to devise a solution is to determine whether Public International Law offers any agreed upon principles and guidelines upon which to craft an appropriate response. As it turns out, the years from 1941 to 1966 (immediately prior to the Torrey Canyon episode) marked a particularly fruitful time period in which Public International Law developed to meet the challenge of environmental degradation.
The threshold question, simply put, is whether the mere act of an oil tanker polluting the seas through discharges of oil contravenes any principle of international law. Further, if such a principle exists, is the ship- (or cargo-) owner financially liable to the entities or parties injured by the oil spill? While a response might simply be that it is just plain wrong for a State or Non-State Actor to degrade the biosphere, the answer is far more complex.

The more precise question is whether there exists a duty under the norms of Public International Law not to degrade the biosphere, and if so, what are the consequences of breaching this duty? Would such a breach of duty rise to the level of delictum iuris gentium, "wrong against the law of nations"? To clarify, it is a fundamental principle of western jurisprudence that liability accrues to a tortfeasor if a duty to others has been breached.33 Conversely, as general rule, no liability accrues in the absence of a breach of duty.34 The counterpart principle in Public International Law is State Responsibility. Article 3 of the Draft Articles on State Responsibility provides:

Article 3

Elements of an internationally wrongful act of a State

There is an intentionally wrongful act of a State when:

(a) conduct consisting of an act of omission is attributable to the state under international law; and (b) that conduct constitutes a breach of international obligation of the State.35

While rules and laws enjoining environmental damage by polluters in the domestic law context can be traced to antiquity,36 there historically have been no counterpart prohibiting pollution causing activities in Public International Law. The only exception is a generic principle that a State has a duty not to cause harm or permit activities from its territory that
cause harm to another State. (*Sic utere tuo ut alienum non laedas.*)\textsuperscript{37} It has been observed that the classical writers and commentators on Public International Law essentially had little, if anything, to say on pollution-causing activities.\textsuperscript{38} The paucity of international norms is best summed up as follows:

The classical references to pollution are few, and even then, in a context which makes them to appear to be little more than footnotes to rules on warfare. Neither Grotius nor any of the other classical writers appear to express any concern for the non-intentional pollution of the environment. Their frame of reference was purposeful pollution as a possible tactic of warfare, not pollution as the by-product of an industrial world.\textsuperscript{39}

During the twenty-five-year period from 1941 to 1966, however, this absence of Public International Law norms governing the pollution of transnational resources began to change when three significant contributions were made to the body of international law governing the pollution of transnational resources. The first resulted from a case of arbitration – the Trail Smelter Arbitration – between the United States and Canada (1941). The second was a multinational treaty – the International Convention for the Prevention of Pollution of the Sea by Oil (1954). The third resulted from the promulgation of the Helsinki Rules on the Uses of the Waters of International River by the International Law Association (1966). While each of these three, especially in its own time, may not have been viewed as groundbreaking, their combined effect was the establishment of a norm of Public International Law restricting the freedom of a State and of Non-State Actors to pollute transnational resources at will and with impunity.
A. The Trail Smelter Arbitration – March 11, 1941

The Trail Smelter Arbitration arose out of the following circumstances. The Consolidated Mining and Smelter Company owned a smelter located in Trail, British Columbia (at that time still called the Dominion of Canada). The smelter, which was used to process zinc, lead, and other metals, discharged fumes that caused damage to crops and forests in the State of Washington. To resolve the issue of liability and the extent of damages, it was decided, pursuant to a 1935 Special Agreement between the two counties, which established a three-person arbitration panel to resolve all issues.

Article III of the Agreement empowered the Tribunal to decide four questions:

1. Whether damage caused by the Trail Smelter to the State of Washington has occurred since the first day of January 1932, and, if so, what indemnity should be paid therefor?

2. In the event of the answer to the first part of the preceding Question being in the affirmative, whether the Trail Smelter should be required to refrain from causing damage in the State of Washington in the future, and, if so, to what extent?

3. In the light of the answer to the preceding Question, what measures or regime, if any, should be adopted or maintained by the Trail Smelter?

4. What indemnity or compensation, if any, should be paid on account of any decision or decisions rendered by the Tribunal pursuant to the next two preceding Questions?

The tribunal was authorized to answer the questions based on the law of the United States as well as international law and practice. Further, each country was authorized to use
scientists and technical experts to come to its conclusion, and, in fact, the Decision of Tribunal incorporated expert testimony based on the data amassed by the scientists and technical experts.\(^{42}\)

The uniqueness of the task given to the tribunal was expressed in its final decision when the Tribunal concluded, "No case of air pollution dealt with by an international tribunal has been brought to the attention of the Tribunal nor does the Tribunal know of any such case. The nearest analogy is that of water pollution. But, here, also, no decision of an international tribunal has been cited or has been found."\(^{43}\)

Since no precedent was available, the Tribunal used the reasoning of Professor Eagleton, who wrote in *Responsibility of States in International Law*, "A State owes at all times a duty to protect other States against injurious acts by individuals from within its jurisdiction." Further, the Tribunal incorporated decisions of the United States Supreme Court in cases like State of Missouri v. State of Illinois (200 U.S. 496,521), Kansas v. Colorado (185 U.S. 125), the State of New York v. the State of New Jersey (256 US. 296, 309), the State of Georgia v. Tennessee Copper Company and Ducktown Sulphur, Copper and Iron Company, Limited (206 U.S. 230), which dealt with diversion of rivers, pollution of New York Bay, and air pollution crossing from a one state to a second state.\(^{44}\)

Therefore, the Tribunal held that "under the principles of international law, as well as the law of the United States, no State has the right to use or permit the use of its territory in such a manner as to cause injury by fumes in or to the territory of another or the properties or persons therein, when the case of serious consequence and the injury is established by clear and convincing evidence."\(^{45}\)

Within this legal framework, the Tribunal answered the four questions as follows:
1. Sulfur dioxide from the Trail Smelter had drifted into Washington State. The scientific experts concluded that the sulfur dioxide impacted negatively on crop development and forests. The American standard for computation of damages was utilized by the Tribunal and was based on the reduction of the value of the land (diminished crops, and diminished lower rentals for properties). No damages, however, were awarded to the United States for violations of its sovereignty.  

2. Initially, no decision was made on Question 2, and its resolution by the Tribunal was deferred until October 1, 1940. Thereafter, the Tribunal decided that the damages due from Canada to the United States amounted to $78,000. Ultimately, after protracted negotiations between the United States and Canada, a government payment in the amount of $350,000 was made.  

3. The Arbitration Tribunal decided that permanent scientific instruments should be strategically placed in border areas so that meteorological and other conditions could be monitored, thereby ensuring compliance with the arbitration decision. Further, the instruments would be monitored by two technical consultants who had been appointed by their respective governments to assist the Tribunal experts in the fields of meteorology and agriculture.  

4. The Tribunal noted that the international regime established by it would prevent further damage in the future. Moreover, as to any damages which, nonetheless, could occur in the future, the Tribunal held, "an indemnity shall be paid for such damage, but only when and if the two Governments shall make arrangements for the disposition of all claims for indemnity under Article XI of the Convention."
While the Trail Smelter decision explicitly decided that a State would be financially liable for serious damages to another State, the decision was limited to the facts of that particular case, and there is no evidence that it was seen at the time as having any broader implication for the international system.50

Yet, while it can be easily argued that while the participants in the Trail Smelter Arbitration did not see the results as particularly groundbreaking,51 it is clear that the Arbitrators’ decision had long-term significance in the rise of an environmental awareness, which in turn would form the legal and intellectual basis of the development of international regimes in the forthcoming decades.52

Specifically, the principle that emerged from the Trail Smelter Arbitration, namely that the polluter is liable to his victims for harm caused by pollution activities (“polluter pays”) was loosely incorporated thirty-one years later into Principle 21 of the 1972 Stockholm Declaration on the Human Environment, which declared:

States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction.53

It has been pointed out that this language does not replicate the Trail Smelter Arbitration principle in that the Stockholm Declaration omits the qualifying adjective "serious" (serious damage) in terms of what constitutes a breach of Public International Law.54 Fifty-one years after the Trail Smelter Arbitration, at the Earth Summit in Rio de Janeiro (1992), the Rio
Declaration on Environment and Development was adopted, and while it did not use the adjective "serious," it clearly incorporated the principle of "polluter pays" as a principle of international environmental law. Specifically, Principle 16 of the Rio Declaration on Environment and Development states:

National authorities should endeavor to promote the internalization of environmental costs and the use of economic instruments taking into account the approach that the polluter should, in principle, bear the cost of pollution, with due regard to the public interest and without distorting international trade and investment.55

Finally, when the International Law Commission promulgated the Draft Articles on State Responsibility, the Trail Smelter Arbitration was mentioned several times in the Commentary as a precedent for the incorporation of the principle of State responsibility for transboundary environmental damages.56

B. The International Convention for the Prevention of Pollution of the Sea by Oil

On May 12, 1954, the International Convention for the Prevention of Pollution of the Sea by Oil was signed at a conference held in London.57 The Convention entered into force on July 26, 1958, and was modified by Amendments in 1962. These Amendments entered into force on May 18 and June 28, 1967.

The problem addressed by the Convention was the deliberate discharge of oil (a process known as deballasting) by ships in areas of the seas that were near coastal States but not part of the territorial seas.
Article III of the Convention addressed the issue of discharge of oil by ships in the following manner:58

a) the discharge from a ship to which the present Convention applies, other than a tanker, of oil or oily mixture shall be prohibited except when the following conditions are all satisfied:

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

b) the discharge from a tanker to which the present Convention applies of oil or oily mixture shall be prohibited except when the following conventions are all satisfied:

(i) the tanker is proceeding en route;
(ii) the instantaneous rate of discharge of oil content does not exceed 60 litres per mile;
(iii) the total quantity of oil discharged on a ballast voyage does not exceed 1/15,000 of the total cargo-carrying capacity;
(iv) the tanker is more than 50 miles from the nearest land

The Treaty established neither any criteria for liability, nor did it establish an international mechanism to punish offenders. It did not even incorporate the principle of "polluter pays" within its terms. Rather, it merely contained a provision that a violation of its provisions:
Shall be an offence punishable under the law of the relevant territory in respect of the ship in accordance with paragraph (1) of Article 11.\textsuperscript{59}

Appended to the Treaty were several Annexes that amplified its terms. Annex I set up the territorial locations where a discharge of oil would be a violation of the Terms of the Treaty. As a general rule, this area was within fifty miles off the coast of a contracting state. Further, the captain of each ship was required to keep a log of discharges of oil during each voyage. In addition, there was an Annex that contained specifications for the future construction of new ships and tankers so that oil discharges would be less likely in the future.

While the Treaty did not establish negligence (as opposed to strict liability) as the standard for liability, it did contain an important escape clause in Article IV which provides in part: b) the source of oil or oily mixture resulting from damage to a ship or unavoidable leakage, if all reasonable precautions have been taken after the occurrence of the damage or discovery of the leakage for the purpose or minimizing the escape.\textsuperscript{60}

In other words, no liability would accrue in a scenario where a significant oil discharge had occurred, which damaged extensively fishing or recreational facilities, as long as the owners of the ship or tanker could argue that they had used reasonable measures to contain the discharge of oil.

Another issue which the Convention dealt with was the all-important question of a ship’s nationality. The Convention provides "The present Convention shall apply to sea-going ships registered in any of the territories of a contracting government."\textsuperscript{61}

Needless to say, different governments have radically different standards to regulate shipping. Specifically, because of issues involving taxation (resulting in corporate inversions), labor standards (wages and hours) and safety standards, significant numbers of ships are
registered in countries that have a lax approach to these matters, which are generally termed "flags of convenience." The Marshall Islands, Honduras, Liberia, and Panama are among States that have lax standards. While the Geneva Convention on the High Seas provides that there should be a genuine link between a ship and the State of its registration, this provision is frequently ignored and certainly not enforced.

Further, it should be noted that the Convention is essentially impossible to police and enforce. A ship can deballast in a protected zone, and days or weeks may elapse before the resulting oil slick is detected, thereby allowing the offender to continue its voyage undetected.

While the Convention was somewhat strengthened by the 1962 and 1969 amendments, and further strengthened by a successor treaty, the International Convention for the Prevention of Pollution of Ships and its 1978 protocol (MARPOL), it is questionable nonetheless whether it has substantially alleviated the oil spill/discharge problem. Still, it should be viewed in the context of an era when comparatively few perceived that oil spills posed a significant problem, and even fewer believed that concerted international action was necessary to deal with the issue.

Accordingly, it would be fair to characterize the Convention as an affirmative statement that certain transnational resources are protected from pollution damage. Nonetheless, the fact that enforcement provisions were in the hands of individual states, the exception to liability and the significant exception contained in Article III (b) makes the Treaty a relatively modest step.

The 1954 treaty as it was subsequently amended, was the subject of a scholarly analysis by Professor Ronald B. Mitchell (International Oil Pollution at Sea), who described the amendments as effective multinational efforts to increase compliance, and, in general, improve the marine environment. He described compliance as, “an actor’s behavior that conforms to a treaty’s explicit rules.” What Mitchell glosses over, however, are the facts that the specific
“polluter pays” principle for damages (as promulgated in the Trail Smelter Arbitration), as well as sanctions for noncompliance, are omitted in the treaty and in its amendments. In other words, since there are no “explicit rules” providing for penalties and sanctions, there is no issue of noncompliance which, of course, is what differentiates the 1969 Brussels private law treaty from the 1954 convention, as well as from the 1996 London Protocol to the Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter. The latter treaty incorporated Article 15, which merely recommended that the parties to the treaty meet and work out issues of liability. It is therefore submitted that the question of whether there is or is not compliance with a treaty’s terms is secondary to the issue of why certain terms are incorporated in a treaty and others are omitted.

Therefore, the question arises as to why sanctions were omitted in the 1954 treaty as amended, in contradistinction to the 1969 private law treaty agreed to at Brussels, in which sanctions were incorporated. The solution to understanding the difference might lie in political-economic analysis such as overlaps in decisionmakers among participating states and in IMCO, and whether IMCO was or was not a genuinely neutral agency.

Finally, it is worth noting the notorious 1986 case of the Khian Sea, a ship which carried fourteen thousand tons of incinerated ash from Philadelphia, and traversed the seas for almost two years, searching for a place to dump its cargo. The ash was ultimately dumped on a beach in Haiti and in the Indian Ocean. Despite the existence of various conventions, no one was held legally accountable for any damages in this matter.

Approximately four years after the Oil Pollution Convention was signed, the 1958 Convention of the High Seas, which was perhaps the landmark treaty of that era governing the law of the sea, was agreed to in Geneva.65
Article 24 provides:

Every State shall draw up regulations to prevent pollution of the seas by the discharge of oil from ships or pipelines or resulting from the exploitation and exploration of the seabed and its subsoil, taking into account of existing treaty provisions on the subject.\(^66\)

Article 25 dealt with an agreement by the covenantsing parties, "to prevent pollution of the seas from the dumping of radio-active waste, taking into account any standards and regulations which may be formulated by the competent international organizations."\(^67\)

In addition, States pledged to "co-operate with the competent international organizations in taking measures for the prevention of pollution of the seas or air space above, resulting from any radio-active activities materials or other harmful agents."\(^68\)

In sum, the 1958 Convention on the High Seas, at best, contained precatory language requesting States to draft regulations to prevent oil pollution of the seas, and to take measures to prevent the discharge of radio-active materials. Conversely, the Convention contained no provisions forbidding pollution of the seas or sanctions for violating its provisions.\(^69\)

C. The Helsinki Rules on the Uses of the Waters of International Rivers

The International Law Association (ILA), which was founded in Brussels, Belgium, in 1873, is a private (non-governmental) group of international lawyers. Among its activities is the drafting of proposed rules of international law and conventions.\(^70\) Its objectives, as defined in its Constitution, are the "study, clarification and development of international law, both, public and private, and the furtherance of international understanding and respect for international law." It has consultative status as an international non-governmental organization with a number of the
United Nations specialized agencies. The ILA holds biennial Conferences where the ideas promulgated at its committees provide a forum for discussion. To date, seventy-five of these conferences have been held.\textsuperscript{71}

At its fifty-second conference held in Helsinki, Finland, in 1966, its Committee on the Uses of Water of International Rivers offered a draft set of rules, The Helsinki Rules on the Uses of the Waters of International Rivers. The Helsinki Rules covered the uses of international drainage basins. Article II defined an international drainage basin as a "geographical area extending over two or more States determined by the system of waters, including surface and underground waters, flowing into a common terminus."\textsuperscript{72}

Article III defined a basin state as, "a State, the territory of which includes a portion of an international drainage basin."\textsuperscript{73}

The governing principle of the Helsinki Rules was contained in the title of Chapter 2, "Equitable Utilization of the Waters of an International Drainage Basin." This principle was amplified in Article IV, which stated, "Each basin State is entitled, within its territory, to a reasonable and equitable share in the beneficial uses of the drainage basin."\textsuperscript{74}

Article V sets forth the criteria for determining the equitable share of an international drainage basin. Among these, Article X dealt with pollution and provided:

1. Consistent with the principle of equitable utilization of the waters of an international drainage basin, a State:

(a) Must prevent any new form of new water pollution or any increase in the degree of existing water pollution which would cause substantial injury in the territory of a co-basin State.
(b) Should take all reasonable measures to abate existing water pollution in an international drainage basin substantially caused in the territory.\textsuperscript{75}

2. The rule stated in paragraph 1 of this Article applies to water pollution originating:

(a) Within the territory of a state, or

(b) Outside the territory of the State’s conduct.

Article XI discussed compensation to the injured State:

1. In the case of a violation of the rule stated in paragraph 1 (a) of this chapter, the State responsible shall cease the wrongful conduct and compensate the injured co-basin State for the injury that has been caused to it;

2. In a case falling under the rule stated in paragraph I (b) of article X, if a State fails to take reasonable measures, it shall be required promptly to enter into negotiations with the injured State with a view towards reaching a settlement equitable under the circumstances.\textsuperscript{76}

Therefore, the Helsinki Rules incorporated the essence of the decision (“polluter pays”) in the Trail Smelter Arbitration – polluters are liable for damage caused to other States because of pollution-causing activities within its territorial boundaries.\textsuperscript{77}

Accordingly, by 1966, it was clear that there existed principles of international law governing the pollution of transnational resources. Specifically, responsibility under Public International Law attached to the State that permitted pollution-causing activities within its boundaries.

Nonetheless, it is also clear that the establishment of this principle of international law did not have any institutional mechanisms attached to it that have provided for administrative
sanctions to deter and/or punish the polluters of transnational resources. Rather, the principle of "polluter pays" required voluntary adherence to a set of abstract principles without any operating guidelines.

Specifically, while "polluter pays" became an accepted principle, it remains only an abstraction unless and until guiding principles were agreed upon and established. Among these principles are who is ultimately liable – the owner of a ship, the charterer of a ship, the owner of the cargo, or are they jointly and severally liable? Which standards should be used – negligence, gross negligence, willful acts, or strict liability? Who should be compensated – only States or private groups and individuals such as fishermen, beach property owners, or other private interests? Should there be limits to liability (such as found in the Warsaw Convention on liability to international airline passengers) or should liability be unlimited?

In the absence of answers to these questions, the principle of "polluter pays" remains an abstract notion, in effect, an empty shell. Moreover, it should be noted that the development of these principles established in the Trail Smelter Arbitration, etc. must be placed in their proper historical context. Specifically, they occurred alongside many treaties, both bilateral and multinational, which governed many aspects of transnational resources, such as the United Nations Convention on the Law of the Seas, the International Convention for the Safety of Life on the Sea, the Standards for Training Certification and Watchkeeping, the International Convention on Bills of Lading, the International Regulations for Preventing Collisions at Sea, and the International Aeronautical and Maritime Search and Rescue Convention. Additionally, regional arrangements, such as the Rhine River Convention and the Treaty on Lake Constance, were all products of the early to mid-twentieth century. Most of these agreements were at that time seen as far more significant than the Trail Smelter Arbitration or the 1954 International
Convention for the Prevention of Pollution of the Sea by Oil. (See Table II-1 for a summary and comparison of The Development of Principles of Public International Law Governing the Pollution of Transnational Resources.)

All of this changed forever on March 18, 1967, the day that the oil tanker, Torrey Canyon, smashed onto rocks off the coast of England, thereby causing a massive oil spill that led to an environmental catastrophe.
TABLE II-1

The Development of Principles of Public International Law Governing the Pollution of Transnational Resources

<table>
<thead>
<tr>
<th>Event/Convention / Agreement</th>
<th>State Duty Not To Pollute Biosphere</th>
<th>Incorporates Polluter Pays Principle</th>
</tr>
</thead>
<tbody>
<tr>
<td>Trail Smelter Arbitration (1941)</td>
<td>YES</td>
<td>YES</td>
</tr>
<tr>
<td>International Convention For The Prevention Of Pollution Of The Sea By Oil (1954)</td>
<td>YES</td>
<td>NO</td>
</tr>
<tr>
<td>The Helsinki Rules On The Uses Of Waters Of International Rivers (1966)</td>
<td>YES</td>
<td>YES</td>
</tr>
</tbody>
</table>
IV. 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 it was traveling at full speed on a voyage from Kuwait to Milford Haven in Wales. 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. The accident ruptured the Torrey Canyon’s tanks, and thousands of tons of oil escaped into the sea. Salvage operations were abandoned when the ship broke into three pieces, thereby becoming the largest shipwreck in history at the time.

While the Torrey Canyon was only one of several major oil spill disasters in the 1960s, its impact transcended the physical damages it wrought.\textsuperscript{78} 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 serves as a watershed incident in the development of an awareness of environmental degradation in general, and more specifically, in the problem of oil spills and the codification of sea law\textsuperscript{79} as applicable to environmental disasters.

The shipwreck became an international news story, with intensive coverage from print and electronic media. It received frontpage coverage in the \textit{New York Times} (March 25, March 28 and March 29, 1967), including a dramatic frontpage picture of the burning ship being bombed by the Royal Air Force in a vain attempt to halt the environmental catastrophe.\textsuperscript{80} 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 the beach 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.\textsuperscript{81}

It is revealing to note that as a general rule, oil spills from ships tended to be more highly publicized in the media than those emanating from other sources (with the 2010 Deepwater Horizon oil rig catastrophe being a notable exception).

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,

More recently, the July 6, 2011 discharge of approximately 42,000 (gallons) of crude oil from Exxon Mobil’s Silvertip pipeline into the Yellowstone River in Montana attracted only modest media attention. It appeared to be handled as a routine incident by both the responsible party and government officials.\textsuperscript{82}

In retrospect, the Torrey Canyon episode was the first of numerous environmental disasters that received worldwide coverage. The Torrey Canyon itself, however, was a
nondescript oil tanker, one of thousands that traverse the oceans daily and are an integral part of the international petroleum industry. It was constructed in the United States by the Newport News Shipbuilding and Dry Dock Company in 1959. Originally, the ship had a deadweight tonnage of 65,920. In 1965, the ship was enlarged, or jumboized, in Japan by the Sasebo Heavy Industries Co. 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. 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.83

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. She was owned by the Barracuda Tanker Company of Bermuda, a wholly owned subsidiary of the Union Oil Company of California. On her last voyage, she was on charter to British Petroleum Ltd., and carried a Greek crew and an Italian captain. The crude oil cargo was loaded at Mena Al Ahmadi on the Persian Gulf.

Although the disaster occurred in international waters, the resulting oil spill damaged beaches and property in France and Britain, as well as impacting negatively on the coastal fishing industry.84

The Liberian registry of the Torrey Canyon was not accidental. 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.

Traditionally, a ship is obligated to follow the law of its flag state; coastal and port states cannot 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.85

The environment consequences of the Torrey Canyon incident were monumental. Huge numbers of fish and seabirds were killed or injured. Livelihoods of fishermen and resort owners were upended. The cleanup cost for oil removal in the Channel Islands and Brittany was three million English Pounds. 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 owners of the ship and/or its cargo for loss of vessel and cargo?
3. What were the obligations of the owners and/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?

The answer to question number one appeared to be "no." At that time, no convention existed which permitted a State to intervene on the high seas against a vessel of another nationality in such a situation. While an "abatement theory" (the right, akin to self-defense, to intervene unilaterally to abate an imminent danger) might be utilized as a justification for such an action, this theory has generally not been accepted by international lawyers as a valid rationale for such actions.

In reference to questions two and three above, while these were highly technical questions involving domestic, as well as international law, it was evident 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. The initial British position was that if such drastic action were undertaken, the government could be sued by a Dutch salvage company, which had contracted for salvage rights by British Petroleum, for loss of the cargo, and by Union Oil and its subsidiary, the Barracuda Tanker Corporation, for loss of the vessel. British Defense Minister Denis Healey stated, "We 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." Instead, it afforded the Dutch salvagers several opportunities to refloat the vessel and also consulted with the owners. John Nott, a Conservative MP noted, "Can 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?"

Finally, after high winds had caused the ship to break into several sections and most of the cargo of oil had been discharged, the British government elected to bomb the vessel. The task was substantially more difficult than had been originally anticipated. 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.

Most troublesome was the question of liability for damages inflicted by the Torrey Canyon on the French and British coasts. Great Britain was a signatory to the International Convention Relating to the Liability of Owners of Sea Going Ships (Brussels, October 10, 1957). Under the terms of this treaty, 1,000 gold francs (about $67) was available per net ton of ship for all liability claims provided that there was no loss of life. If fatalities did actually occur, an additional 2,000 gold francs per net ton was to be made available to compensate for injury or death. The Torrey Canyon had a net tonnage of 48,427 tons. The treaty required that the weight
of the engine room be added to the figure, yielding a liability limit of about 4.2 million dollars, far short of the British cleanup costs, let alone compensation for claims for damages incurred as a result of the shipwreck. Further, because the United States had not ratified the 1957 Brussels Convention, and because an American corporation (Union Oil) was a party to the controversy, the role of American law was also relevant. In 1967, the American legislation that covered a contingency such as the Torrey Canyon was over a century old.

Specifically, in 1851, Congress passed a law stipulating that, in the absence of personal injury or death, an owner’s liability be limited to the value of the vessel. The American courts interpreted the law to mean the value of a ship after the disaster, Norwich Co v. Wright, 80 U.S. (13 Wall.) 104 (1871). Since the only salvageable portion of the Torrey Canyon was one lifeboat, the owner’s liability would be limited to fifty dollars. Shortly after the disaster, Union Oil and the Barracuda Tanker Corporation filed a petition in a United States District Court to limit their liability to fifty dollars.

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 legal maneuvers. The Lake Pelourde, 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. Ultimately an out-of-court settlement was reached, and the owners and charterers indemnified the British and French governments with a total payment of seven million dollars, which probably did not cover half the costs of the cleanup, let alone losses sustained by fishermen, resort owners and other coastal economic interests.
The environmental devastation caused by the Torrey Canyon demonstrated that a norm of Public International Law requiring a State to compensate another State was essentially meaningless in the face of an actual massive disaster. The need for the establishment of an international regime to confront the issue of oil spills on the seas was obvious, but two broad categories of issues had to be confronted and resolved prior to the establishment of such a regime.

The first issue was a Public International Law issue. Could a State raise a response to the next level and proactively intervene against an offending ship that is threatening or actually causing severe environmental harm under the doctrine of self-defense, as promulgated in the Caroline Case?94

The second issues were private law issues: Who was the responsible party to pay for damages – the ship owner, cargo owner, or another party? Who should be compensated for economic losses – governments, non-state interests, or both? Further, should there be a cap on compensation or should compensation be unlimited?

These issues were addressed at the 1969 Brussels Conference, which was ostensibly designed to create an international regime to deal with the legal aspects of marine oil spills. Prior to examining the substantive results of Brussels, however, methodological issues such as approaches to regime formation and disintegration, and the use of a critical case study should be reviewed. These concerns form the basis of Chapter III.
ENDNOTES TO CHAPTER II

1 As to the question of why the environment emerged as an issue in the late 1960s, see: E.F. Schumacher, *Small is Beautiful* (New York: Harper & Row Publishers, Inc., 1973), who suggests that “The explanation is not difficult to find. As with fossil fuels, we have indeed been living on nature for some time. It is only since the end of World War II, that we have succeeded in increasing this rate to alarming proportions. In other words, quite recently – so recently that most of us have hardly yet become conscious of it – there has been a unique quantum jump in industrial production (pages 16-17).


3 A classic early example of this concern was articulated by George F. Kennan, "To Prevent A World Wasteland: A Proposal," *Foreign Affairs* 48, no. 3 (1970): 401-13. See also from this period, Barbara Ward and René J Dubos, (New York: W.W. Norton, 1972), as well as Donella H. Meadows, Jørgen Randers and William W. Behrens III, *The Limits of Growth: A Report for the Club of Rome’s Project on the Predicament of Mankind* (New York: Universe Books, 1972), in which the authors predicted, based on a mathematical model, that “If the present growth rates in world population, industrialization, pollution, food production, and resource depletion continue unchanged, the limits to growth on this planet will be reached sometime within the next one hundred years. The most probable result will be a rather sudden and uncontrollable decline in both population and industrial capacity” (23). See also Report on the World Commission on Environment, United Nations General Assembly A/42/427, 1987, commonly known as the Bruntland Commission, which spoke in stark terms by warning, “There are environmental trends that threaten to radically alter the planet, that threaten the lives of many species on it, including the human species.” The Bruntland Commission’s remedy was to institutionalize and accelerate the process known as “sustainable development.”


By way of example, Jeannie L. Sowers, in a case study of environmental movements in Egypt, raised the fundamental question of what are the requisites for environmentalism to gain traction as an issue in a society. She observed that in Egypt, that three types of authorities (discursive, legal, and infrastructural) were necessary for success in regulating environmental degradation. See Jeannie L. Sowers, Environmental Politics in Egypt: Activists, Experts, and the State (London: Routledge Tayler & Francis Group, 2013).

The Constitution of India, Article 48A.


The number of bilateral environmental arrangements keeps growing exponentially. In March 2010 alone, by way of example only, four bilateral environmental agreements were signed which included an agreement between New Zealand and Hong Kong, China (environmental cooperation), Japan and the Republic of Kazakhstan (peaceful uses of nuclear energy), Norway and Sweden (management of salmon
and trout in Svinesund, Iddefjorden and Enningdal Rivers), and Federal Republic of Germany and Uganda (Lake Victoria).


11 Thomas Princen and Jack P. Manno argue essentially, however, that depletion and sustainability are not the issue. Rather, the solution to the environmental problem is to delegitimize the use of fossil fuels in the same way that slavery and smoking have been delegitimized. Their mantra in essence, is to leave fossil fuels in the ground. Thomas Princen and Jack P. Manno, The Problem: Ending the Fossil Fuel Era (Cambridge: The MIT Press, 2015). For a discussion of alternatives to fossil fuels, see Joanna I. Lewis, Green Innovation in China (New York: Columbia University Press, 2015), which describes in detail Chinese attempts to substitute wind power for coal.


13 Ibid. Thomas Princen, in The Logic of Sufficiency (Cambridge: The MIT Press, 2005), argues that a sustainable society can be achieved by making sufficiency, rather than efficiency, the dominant criteria. He maintains that this would obviously require changes in norms and organizing principles, but it is the only path forward. His argument against what he termed, “the comfortable term” of sustainable development can also be found in his earlier work. Thomas Princen, Michael Maniates, and Ken Conca, ed., Confronting Consumption Cambridge The MIT Press, 2002). See also the critique of sustainable development (judgments as to development can no longer be left to individualized producers and consumers who interact in markets, created and conditioned by national states), in Brendan Gleeson and Nicholas Low, Justice, Society, and Nature: An Exploration of Political Ecology (New York: Routledge, 1998).


18 Ibid.


21 Ibid., 14.

22 Ibid., 13.


24 These categories were devised by Oscar Schachter and Daniel Serwer in their article entitled, “Marine Pollution Problems and Remedies,” *American Journal of International Law* 65, no. 1 (1971): 84-113.

25 Ibid., 88.


27 Schachter and Serwer, op. cit., 88.

28 Ward and Dubos, op. cit., page 200. There are no definitive international plans to limit the maximum sizes for tankers.

29 Ibid.


31 Ibid.

The classic expression of the interplay between breach of duty and liability for negligence was articulated by Justice Cardozo in Helen Palsgraf v. The Long Island Railroad (Palsgraf v Long Is. R.R. Co (248 NY 339, 1928), where he wrote on behalf of the majority of the New York State Court of Appeals, "In every instance, before negligence can be predicated of a given act, back of the act must be sought and found a duty to the individual complaining, the observance of which would have averted or avoided the injury (page 340). Justice Andrews wrote in his dissent:

Everyone owes to the world at large the duty of refraining from those acts that may unreasonably threaten the safety of others. Such an act occurs. Not only is he wronged to whom harm might reasonably be expected to result, but he also who is in fact injured, even if he be outside what could generally be thought the danger zone. There need to be duty due the one complaining, but this is not a duty to a particular individual because as to him harm might be expected.


Palsgraf, op. cit., "The ideas of negligence and duty are strictly correlative."


See for example, the Code of Hammurabi, Number 53, "If anyone be too lazy to keep his dam in proper condition, and does not so keep it; if then the dam break and all the fields be flooded, then shall he, in whose dam the break occurred be sold for money, and the money shall replace the corn which he has caused to be ruined." See also Talmud Bavli, Mesechet Bava Batra (Artscroll Edition): 17-24, which
detail numerous restrictions on the placing of laundries, lime pits, tanneries and similar nuisances in close proximity to a neighboring property.

37 See, for example, "The Corfu Channel Case (Merits) Judgement of April 9, 1949," International Court of Justice (Leyden: A.W. Sijthoffs Publishing Company):

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


39 Ibid.


41 United Nations, Reports of International Arbitral Awards, op. cit., 1911.

42 Ibid., 1920.

43 Ibid., 1963.

44 Ibid., 1964.


46 Ibid., 1920.


48 Ibid., 1966.

49 Ibid., 1980.

50 Gunther Handl, "Territorial Sovereignty and the Problem of Transnational Pollution," American Journal of International Law 69, no. 1 (1975). For a withering criticism of the procedures used at the

51 Handl, op. cit.

52 See the incisive essay by Stephen C. McCaffrey, "Of Paradoxes, Precedents, and Progeny: The Trail Smelter Arbitration 65 Years Later" in *Transnational Harm in International Law: Lessons from the Trail Smelter Arbitration*, Rebecca Bratspies and Russell A. Miller (eds.), op. cit., 34. McCaffrey traces the progeny of the Trail Smelter Arbitration, and concludes with his experiences as a member of the Experts Group of the Bruntland Commission, "I can testify to the importance of the Trail Smelter Arbitration in the Group’s deliberations. Article 10 of the Expert Group Report provides that ‘States shall...prevent or abate any transboundary environmental interference or a significant risk thereof which causes substantial harm, i.e. harm which is not minor or insignificant,’" page 43.


54 McCaffrey, op. cit., 41.


56 The Rio Declaration on Environment and Development was produced at the 1992 United Nations Conference on Environment and Development.

57 International Convention for the Prevention of Pollution of the Sea by Oil. Actually, prior to World War II, there were two unsuccessful multilateral attempts to regulate oil spills on the high seas. On July 1, 1922, the United States Congress passed a Joint Resolution requesting the President to convene a conference of the major maritime States to discuss the problem of oil spills in navigable waters. In June, 1925, the Preliminary Conference on Oil Pollution of Navigable Waters met in Washington, D.C., and
proposed a treaty which would have banned oil discharged by vessels within fifty to one hundred miles from coastal regions. While the treaty was never adopted, it is doubtful that its adoption would have been successful in resolving any problems. One incisive observer noted, “oil patches move and to trace the culprit who discharged the oil, perhaps months ago and miles away, will be in most cases impossible.”

A second attempt was undertaken by the League of Nations in 1934. Great Britain initiated a discussion of the issue of oil pollution in July 1934 in the League of Nations; subsequently the Assembly of the League proposed that the Communication and Transit Organization of the League investigate the problem. A conference of Experts from Denmark, France, Italy, Japan, and the United Kingdom was held in Geneva in November 1934, and concluded that oil pollution of the seas, was, in fact, a significant problem. A second meeting of the Committee of Experts was held in October 1935, and a new draft convention, based largely on the 1926 Washington recommendations, was proposed. The League’s Advisory and Technical Committee favored holding a conference on the matter, and the League Council announced plans to convene a conference to consider the treaty. The conference was not held because Germany and Italy "…whose participation was considered necessary from a technical point of view, were not in a position to attend a conference convened under the auspices of the League of Nations." Finally, on account of the outbreak of World War II, the matter was not pursued further.

58 International Convention for the Prevention of the Sea by Oil, Article III.

59 Ibid., Article III (3).

60 Ibid., Article IV (b).

61 Ibid., Article II.


63 At the time of this writing, approximately forty percent of the world’s sea going fleet are registered in Liberia, Honduras, and the Marshall Islands. Conversely, despite the fact the United States is a major
industrial and transportation power, only about one percent of the world’s sea going fleet is registered in the United States.


65 Convention on the High Seas

66 Ibid., Article 24.

67 Ibid., Article 25.

68 Ibid.

69 The details of the United Nations Convention on the Law of the Sea (UNCLOS), which was agreed to in 1982 and came into effect in 1994, are beyond the scope of this dissertation. It should be noted that a lengthy Section 5 (International Rules and National Legislation to Prevent, Reduce, and Control Pollution of the Marine Environment) was added. Nonetheless, the thrust of this section is towards individual States and regions adopting laws and regulations to deal with marine pollution. Conversely, UNCLOS is silent as to an explicit statement that pollution activities are violative of Public International Law. (CF to the Trail Smelter Arbitration) Moreover, sanctions (“polluter pays”) are not mentioned. For a detailed account of the negotiation process of UNCLOS, see James K. Sebenius, *Negotiating the Law of the Sea: Lessons in the Art and Science of Reaching Agreement* (Cambridge: Harvard University Press, 1984).

70 Details about the activities and Constitution of the International Law Association are taken from its website found at www.ila.hq.org.

71 Ibid.

72 The Helsinki Rules on the Uses of the Waters of International Rivers, Article II.

73 Ibid, Article III.

74 Ibid, Article IV.

75 Ibid., Article X.

76 Article IX.
Ken Conca, in *Governing Water: Contentious Transnational Politics and Global Institution Building* (Cambridge: The MIT Press, 2005), writes about international drainage basins (among other types of water resources) and the relative paucity of effective agreements regarding their regulation, which he attributed to the existence of political conditions inhibiting their creation.

Other oil spills of the 1960s include (bbl = 42-gallon barrel):

- Argea Prima 07/17/62 28,000 bbl.
- R.C. Stone 09/07/67 143,000 bbl.
- Keo 11/05/69 210,000 bbl.

Because of larger oil tankers and more efficient methods of oil drilling, as well as the 1990 Gulf War, the size of oil spills grew significantly over the ensuing decades. By 2014, the largest oil spills included:

- The Sea Star Oil Spill (1972) 35.3 million gallons
- Amoco Cadiz (1978) 69 million gallons
- Atlantic Empress Oil Spill (1979) 90 million gallons
- Nowuz Oil Field Spill (1979) 80 million gallons
- Kolva River Oil Spill (1983) 88 million gallons
- Castillo de Bolivar Oil Spill (1983) 79 million gallons
- Odyssey Oil Spill (1988) 40.7 million gallons
- Persian Gulf War (1991) 380-520 million gallons
- ABT Summer Oil Spill (1991) 51-81 million gallons
- M/T Haven Tanker Oil Spill (1991) 45 million gallons
Deep Horizon Oil Spill (2010) 200 million gallons

Interestingly enough, the Exxon Valdez disaster in Alaska, while so widely publicized and subsequently litigated, does not even rank among the worst thirty-five oil spills of all time. It was a spill of 11 million gallons, which could have been far worse given the fact that the Exxon Valdez was carrying 55 million gallons of oil.

Probably the largest oil spill catastrophe of all time was the Deepwater Horizon offshore drilling platform, which was owned by British Petroleum (BP) and which on April 20, 2010, exploded and sank off the coast of Louisiana. By the time the oil spill was contained, an estimated 200 million gallons of crude oil were discharged into the Gulf of Mexico, thereby creating an ecological catastrophe. The extent of the disaster was manifested in a press release by BP on July 27, 2010, in which BP announced that it had taken a charge of $32.7 billion dollars, including direct costs of $2.9 billion, as well as an escrow of $29.3 billion for future costs.

83 This information on the Torrey Canyon was adapted from Crispin Gill, Tony Soper, and Frank Booker, The Wreck of the Torrey Canyon (Newton Abbot: David & Charles, 1967), 16-17.

The Barracuda Tanker Corporation was what might be termed a “shell” aka “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.

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.


Ibid., 105.

Gill, Booker, Soper, op. cit., page 45.

Petrow, op. cit., page 189.

9 Stat. 65

91 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.


Petrow, op. cit., 189, 230.

The concept of imminent danger was articulated in the Caroline Case which occurred in 1837. Briefly, during an insurrection in Canada, British forces crossed into the territory of the States and destroyed a vessel "The Caroline," which was being used by the Canadian rebels. There were American casualties in the British assault into American territory. This, in turn, led to an exchange of diplomatic notes between American Secretary of State Daniel Webster, and Lord Ashburton, a member of the British Parliament, who had negotiated with Webster to conclude the Webster-Ashburn Treaty, which resolved outstanding border issues between the United States and Canada.

The Note dated April 24, 1841, sent by Webster to Ashburn 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.

The Caroline Case and the Webster - Ashburton exchange of notes is found in "British American Diplomacy. The Caroline Case" New Haven: Yale Law School, Lillian Goldman Law Library.

This right of self-defense is incorporated in Article 51 of the Charter of the United Nations, but this portion of the Charter deals only with armed attacked, not an impending environmental crisis.
Chapter 3: Issues of Methodology

I. Previous Studies of the Brussels Conference

While the literature on the Torrey Canyon shipwreck itself is generally either journalistic or descriptive, much of the existing literature on the Brussels Conference and the treaties it produced consists of legal analysis of their provisions – i.e. what each treaty article provides and how the treaties mark advances in Public International Law.

Therefore, not surprisingly, much of the initial analysis of the issues of oil spills on the seas and of the Brussels Conference, especially in the years immediately after 1969, appeared in law reviews and similar publications. Among the representative examples of this approach are scholarly law review articles by Dennis M. O’Connell, Nicholas J. Healey, and Allan I. Mendelsohn, as well as a lengthy unattributed forty-four-page long Comment in the Harvard International Law Journal.

All were written by attorneys (with the possible exception of the Comment in the Harvard International Law Journal, which was probably written by law students) and, not surprisingly, primarily addressed the legal ramifications of the private law treaty. Conversely, there is very little in these pieces about interactions of Non-State Actors with IMCO and State participants at Brussels. By way of example, in Healy’s articles about Brussels, there is mention of the conference, the key participants who chaired the proceedings (Dr. Albert Lilar and Dr. Walter Muller), but there is no connection made to their professional affiliations as international lawyers representing shipping interests. These different roles raise issues of regulatory capture...
as well as regime complexes, and likewise will be examined in this dissertation.

Even in more recent years, much of the literature on the private law treaty tends to be legalistic in orientation and not framed in broader theoretical context.  

A partial exception to the legalistic approach in the analysis of the private law treaty is the literature about the Tanker Owners Voluntary Agreement concerning Liability in Oil Pollution (TOVALOP) and the contract regarding a supplement to Tanker Liability for Oil Pollution (“CRISTAL”), which were organizations established by shipowners and petroleum companies respectively, to provide compensation beyond that provided by the private law treaty to victims of oil spill damage. In the later years of TOVALOP’s and CRISTAL’s existences, numerous articles appeared that described not only the legal impact of these institutions, but also discussed in broad terms the interplay between shipping interests and international petroleum companies in the establishment and maintenance of the compensation scheme established by the private law treaty.

The question therefore arises as to what is missing in these previous studies of the private law treaty? And further, what can this dissertation add to the existing body of scholarly literature?

It is therefore argued that to date, there has been no study of the private law treaty and its effects in the broader methodological framework of international regimes. This inquiry will examine the results of Brussels in terms of regime formation. Further, the multiplicity of actors and their interactions in the Brussels process – States, IMCO, and Non-State Actors (shipping, oil, and insurance), will be analyzed through the paradigm of regime complexes. Moreover, the American refusal to participate in international regimes established by the private law treaty, and
the subsequent American election to proceed unilaterally by the enactment of the Oil Pollution Act of 1990 raise questions about the impact of exogenous events and their impact upon regime resilience and robustness.10

Finally, this dissertation contains materials, based on interviews with governmental officials who had both firsthand and secondhand knowledge as to what actually transpired at Brussels. To date, there apparently has been no study of Brussels based on the use of such interview data.

Accordingly, this dissertation, while incorporating a legal approach to understanding the content of the treaties under examination, seeks to move beyond a law review type analysis and instead place them in the realm of regime formation and regime complexes. In order to move in that direction, a brief review of the intellectual underpinnings of the study of international relations of the past seventy years follows.

II. Paradigms in the Study of International Relations

A. The State-Centric Model

Traditionally, the study of international relations has been oriented towards the nation state (“the State” or “State”), which has been the dominant entity in the international system since the Peace Treaty of Westphalia in 1648.11

In a very real sense, the study of international relations, as was undertaken in the middle and later years of the twentieth century, developed almost exclusively around the nation state, to
the almost total exclusion of all other actors in the international arena.

The state centric model was incorporated and expanded upon by many theorists of international relations in the mid- to late-twentieth century, and it formed the basis of the realist world view of the international system. Hans Morgenthau, in his classic work, *Politics Among Nations*, stressed the role of the nation state and the national interest in the international system with virtually no mention, let alone analysis, of the role of Non-State Actors except for Public International Organizations.12

Similarly, Raymond Aron,13 Stanley Hoffman,14 and Henry Kissinger (at least in his earlier writings) wrote about a system of world order which relied, “on a system of independent states refraining from interference in each other’s domestic affairs, and checking each other’s ambitions through a general equilibrium of power.”15

Nonetheless, there is virtually no rule in the realm of social science that is absolute without any exceptions whatsoever. Thus, even the most traditionalist theorist of international relations always allowed that there exist entities in international relations other than States. Among the obvious examples are Public International Organizations, as well as religious movements, the Vatican, international terrorism, state-run corporations, and the International Red Cross.

Further, while Public International Organizations have been accorded the standing of an international person,16 most realist studies of these entities during this time period were predicated upon an instrumental interpretation of any particular situation, and the Public International Organization being studied, was viewed as being composed of sovereign States that utilized the Public International Organization as an instrument to attain the State’s specific goals.
Thus, the prevalent view of Public International Organization reduced it to an arena in which the clashing agendas of States were carried out. As two critics to this realist approach noted:

Realists believe states would never cede to supranational institutions the strong enforcement capabilities necessary to overcome international anarchy. Consequently IOs (International Organizations) and similar institutions are of little interest; they merely reflect national interests and power and do not constrain the powerful states.

B. The Transnational Model of the International System

An alternative to the State-Centric model, which, as described herein, largely ignores the presence and roles of Non-State Actors, is the pluralist or the transnational model. The origin of the word transnational, as used in this context, is attributed to Phillip C. Jessup, who wrote his influential treatise, Transnational Law, in 1956, which was based on his belief that the State-Centric model was inadequate to define the international order. Similarly, in 1964, Professor Wolfgang Friedmann of Columbia University wrote and lectured extensively about the diversity of the actors in the international system. This pluralist view was further developed by, among others, Robert O. Keohane and Joseph S. Nye. Fundamental to their analysis is their view that the actors in the international system are not limited to States. Rather, they all argued that Non-State Actors such as for-profit corporations and religious organizations, to name but two, are an integral part of the international system. They termed the pluralist system a “transnational” system. Keohane and Nye maintained that Non-State Actors’ roles are not confined to operating through their State of domicile, or the location from where they transact their business, or
maintain their activities. Rather, they can and do act independently of their host States, and interact directly with Public International Organization, or other States, or other Non-Governmental Actors. 23

This model stands in sharp contrast to the State-Centric model. It should be noted, for the sake of clarity, that the Keohane-Nye model uses a specific terminology that identifies and describes the interaction of the components of the transnational system. Thus, the term Intergovernmental Organization refers to a Public International Organization while Society refers to a privately (Non-State) organized interest group. Of course, it goes without saying that the Non-State Actors have their own policy agendas, which may or may not be congruent with the abstract notions of “the people” or “the public interest.” (For a diagram illustrating the components and interactions in the Keohane-Nye model, refer to Figure III-1 on the next page.)

Probably the greatest deficiency in the Keohane transnational model is the underlying assumption of a sharply defined compartmentalization of its components. Even a cursory glance at their transnational model shows that on its face, its components are distinct: States, International Organizations, and Societies. Further, this assumption of compartmentalization is implicit in the writings of other political scientists. 24

This compartmentalization assumption apparently precludes the possibility that representatives of Non-State Actors may actually be embedded in the ranks of the ostensibly neutral state delegations and Public International Organizations. The validity of this assumption shall be tested in the analysis of the Brussels Conference.

A second flaw in the Nye-Keohane model results from the fact that its major actors (S1, G1, S2, G2) are not differentiated or ranked. Thus, from their model alone, one cannot ascertain
whether or not Keohane and Nye believe that Non-State Actors and International Organizations are inferior to, exceed, or are equal to States in power. Specific indicia of what constitutes power in the transnational system remain largely undiscussed.\textsuperscript{25}
A State-Centric Interaction Pattern

Transnational interactions and interstate politics

Figure III - 1
A third flaw in the Keohane-Nye model was pointed out by Din Eshanov, who observed, “...The authors did not provide a clear cut analytic framework which would explain exactly how Non-State Actors interact with states and other subjects of IL (International Law).”26 Further, Eshanov continued, “it is not clear from their propositions what concrete mechanisms are available to Non-State Actors through which they could exert influence on the dynamics of global affairs.”27

C. International Regimes

The simple transnational approach evolved into regime theory, which attempts to establish a theoretical, as well as a pragmatic, understanding of the cooperative interactions among States, International Organizations, and Non-State Actors. Keohane and Nye defined a regime as “sets of governing arrangements” whose components include “networks of rules, norms, and procedures that regularize behavior and control its effects.”28

In 1983, Stephen D. Krasner edited a volume on international regimes29 which he later described as, “...A term that was just coming into wider usage in the field of international relations, and which has some currency in international law.”30

In his seminal 1982 essay, Professor Krasner amplified this concept and defined an international regime as, “sets of implicit or explicit principles, norms, rules, and decision making procedures around which actors’ expectations converge in a given area of international relations. Decision making procedures are prevailing for making and implementing collective choice.”31
This definition of a regime was refined as follows:

Regimes are deliberately constructed, partial international orders on either a regional or 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 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.³²

Interestingly, in a fascinating self-reflective essay written eighteen years after his original theory was propounded, Professor Krasner modified significantly (if not actually walked back) his original definition and its underlying assumptions. Referring to his celebrated 1982 essay, he wrote, about his original definition of an international regime, (“principles, norms, rules and decision-making procedures around which actor expectations converge in a given issue-area”),

In fact this definition reflected what would now be termed a constructivist perspective which emphasizes the importance of intersubjective shared ideas or identities. Most of the writers in the volume would not have accepted the definition had they fully appreciated its implications. Realists, for instance, would have defined regimes as principles, norms, rules, and decision making procedures that reflect the preferences of the most powerful states in the international system, and liberals would have been happier with a definition that read something like principles, norms, rules and decision making procedures that contribute to the solution of market failure problems. But these distinctions were not as clear in 1981 as they are now.³³

Moreover, in a candid evaluation of the shortcomings of social scientists, Krasner
conceded that he had participated in a 1980s conference on regimes, and it was the lawyers, rather than the political scientists and the economists, who had clarity about the specific character and nature of international regimes.\(^{34}\)

1. **Regime Formation**

   Regime formation “is the process by which a regime comes about in an issue area where hitherto none has existed. It includes both the initiation of the regime, for example, through international negotiations ending up in an international agreement, and its implementation through norm- and rule guided action by the participating states.”\(^{35}\)

   The process of regime formation has been the subject of considerable discussion among international relations theorists for over three decades. Relevant issues include (but are not limited to) typologies of regime formation, the role of bargaining in regime formation, the actors who participate in regime formation, and regime complexes, which often are a product of regime formation. A brief discussion of regime formation issues relevant to this dissertation now follows.

   According to Oran Young, there are three tracks or channels through which regimes form.\(^{36}\)

   a. The contractian track in which actors interested in some sort of activity meet “for the explicit purpose of negotiating a ‘constitutional’ contract laying out a regime to govern the activities in question;”

   b. The evolutionary track, which is the result of social institutions “arising either from widespread practice over time, or as a consequence of dramatic unilateral actions that are
subsequently accepted by others on a *de facto* basis;”

c. The piecemeal track in which actors, “can reach agreements on one or more components of a regime without entering into a comprehensive social contract regarding the activity.”

Another approach to regime formation is the analysis of a phenomenon through the paradigm of “the assumptions that are made” about the underlying motivations of actors.\(^{37}\)

Accordingly, there exist three general schools of thought about the actors and their motivations in the establishment of international regimes.

The first is an outgrowth of realism. This approach is the logical outcome of the State-Centric theorists, previously described in this chapter, who view international regimes through the prism of power.

As such, according to this school of thought, international cooperation is most likely to occur when it is imposed by a dominant State or hegemon that has a dominant position over economic resources and the ability to impose its will over competing States.\(^{38}\)

In sharp contrast, the neoliberal approach emphasizes interests as opposed to power, and centers on a bargaining situation where each party seeks absolute gains but does not have the ability to impose its will on other members of an international regime. It is suggested at this point that the neoliberal approach is an appropriate model to analyze the dynamics of regime formation and will serve as part of the methodological framework of this study.

Cognitivism, the third school of thought, emphasizes the role of knowledge in the establishment of stable regimes. Hasenclever, Mayer, and Rittberger maintain that state identities and the objects that they pursue in foreign relations, “are shaped by normative and causal beliefs

68
that decision makers hold and that, consequently, changes in belief systems can trigger changes in policies.” Therefore, focus must be placed on “the distribution of knowledge.” Implicit in cognitivism is the assumption that decision-makers arrive at a consensus based on their shared values, which in the instant case would be a belief that oceans must be preserved from environmental degradation. The case study of the Brussels Conference analyzes the validity of these assumptions.

Another approach to a broad view of regime formation is to differentiate between reactionary regimes and anticipatory regimes. The former addresses an existing problem (e.g. marine oil spills), and each actor participates in attempts to negotiate a solution based on its perceived interest.

Accordingly, in a reactionary regime, any individual actor is satisfied if its needs are met. The downside of this regime is that, “the resulting institutions will be limited in its ability to address changing environmental conditions…” It can therefore be argued that reactionary regimes are by definition weak because decision-making will always remain with the individual state components who seek to maximize their own advantage at the expense of the regime’s interest.

In contrast, an anticipatory regime can be forward looking and flexible enough to meet changing conditions. “It prescribes the processes for resolving problems that have not been identified yet. Decision-making in such a regime focuses on achieving a common long-term goal for all the members, not on maximizing the benefits of individual members.”

To sum up, the international regime established at Brussels will be analyzed as a contractian regime (per Oran Young) in that the relevant actors gathered for the explicit purpose
of addressing a particular problem and establishing rules to deal with it. Further, the regime was reactionary (per Hagen) as opposed to anticipatory, resulting in a regime that might not be resilient to the challenges of exogenous events. Finally, the neoliberal approach (based on the dynamics of bargaining) will be the relevant paradigm. Conversely, the realist approach (based on a dominant power dictating to the wealth power) and cognitivist approach (shared values based on knowledge) will be tested to determine their relevance to the outcome of the Brussels Conference.

2. Regime Complexes

The introduction of the concept of regime complexes marked an advance in the analyses of regimes. Regime complexes result from, “the rising density of international institutions – making it increasingly difficult to isolate and ‘decompose’ individual organizations for study.”

Further, a regime complex is characterized as, “loosely coupled sets of specific arrangements.” An outgrowth of regime complexes is what has been termed “forum shopping” since there are multiple, overlapping institutions in any regime complex, actors can choose the venue where they hope to obtain the most favorable outcome. This allows States to, “bypass legal commitments which tend to undermine the goals of cooperation.”

The essence of a regime complex approach is that it broadens the analysis of regime formation from a relatively simple paradigm of interaction among States to a more detailed examination of all of the participants in the regime’s formation and ongoing activities. Thus, by way of example only, there are twelve different sets of components identified in Keohane and Victor’s model for the regime complex for climate change. They range from United Nations
legal regimes (UNFCCC), to bilateral initiatives, to financial market regulating agencies.

3. Role of Non-State Actors in Regime Complexes

If regime complexes consist of a variety of actors, both State as well as Non-State, the question arises as to the nature of the configuration in which these interactions occur.

First, as a general proposition, the role of ideas cannot be underestimated. As Thomas Risse-Kappen observed, the end of the Cold War cannot be analyzed separate and apart from the role of ideas, knowledge, values, and strategic concepts. He argued that the transmission of ideas from natural scientists, think tanks, scholars at academic institutions and public interest groups to their counterparts in the Soviet Union led to a mentality that was instrumental in ending the cold war.48

Second, the institutional presence, identity, and roles of Non-State Actors in a regime are crucial. In this dissertation, the core issue is to identify the Non-State Actors at Brussels, and the methods used by them to shape the contours of the regime. Chapter IV details six of the major Non-State Actors in the regime complex, as well as issues of overlapping identities among the State and Non-State Actors.

In recent years, the role of Non-State Actors in regime formation has been analyzed extensively. In Sell and Prakash’s study centering on a 1994 agreement on intellectual property (Trade-Related Intellectual Property or TRIPS) and the subsequent distribution of certain HIV/AIDS medications, they note the role of ideas in the bargaining process but ask the obvious question of whose ideas matter. Moreover, they observed that business interests and non-governmental organizations, despite obvious differences are, nonetheless, similar enough in that
they have instrumental goals and principled beliefs, and thus they can be studied together. Further, they observed that both business interests and nongovernmental organizations use interest group tactics such as agenda-setting and mobilization of public opinion.49

Similarly, Raustalia, and Victor’s study of plant genetic resources revealed a sophisticated system of actors, institutions, and other components interacting with each other.50

This approach was taken a step further by Elizabeth A. Bloodgood who actually advocated the use of domestic interest group activity to analyze Non-State Actors.51 Specifically, she observed that American interest groups have three mechanisms for influence: campaign contributions and electoral pressure; strategic information transmission or expertise; and grassroots representation and mobilization.52 Bloodgood found that these mechanisms were useful in constructing a State-Centric theory of the international system, while simultaneously not underestimating the importance of advocacy INGOs or overestimating the decline of the State.53

In short, the study of international regimes based on an approach that the networks of arrangements among different types of actors, in which there exist significant overlaps among the State and Non-State components, all operating in a market economy, is a relevant paradigm for analysis of these regimes.

4. The American Interest Group Analogy

If a regime complex incorporates a multiplicity of groups, both State and Non-State, and if business interests do in fact exhibit behavior substantially similar to that of non-governmental organizations per Sell and Prakash, and if domestic interest activity might provide a useful
paradigm per Bloodgood, then a brief discussion of some of the other observations about domestic interest group activity can be useful in analyzing the results of the Brussels Conference.

Specifically, students of American interest groups understood decades ago that the role of interest groups in the United States went far beyond the three mechanisms for influence suggested by Bloodgood. Among the most crucial mechanisms are strategies used by domestic interest groups that allow for participation in the decision-making process through the use of organs of administrative pluralism, clientism leading to regulatory capture, and self-regulation. A brief discussion of each of the strategies reveals the following.

i. The Existence and Roles of Organs of Administrative Pluralism

The term “organs of administrative pluralism” refers to entities established by a particular government to bring specific private (non-governmental) entities into the decision-making process. The importance of these entities is that they provide a platform by which interest groups are embedded into an official governmental institution. At the very least, this results in an interest group having an officially sanctioned link to governmental decision-makers.

A student of the administrative process noted the diversity of interest group/bureaucratic relationships in the following terms:

The influence exercised by groups on the administrative process can probably be considered on a continuum. On the one hand, there exist in many countries officially sanctioned institutions described sometimes as organs of administrative pluralism i.e. boards and committees which are merely supposed to provide expert advice to the administration especially in economic and social matters. On the other hand we find
situations where public and private ‘managers’, the civil servants, and the staff of interest groups are working so closely together that to speak of ‘pressures from the outside’ is no longer an adequate description. Here the administrative process may have been ‘colonized’ by the representatives of interest groups to an extent that the dividing line between state and society has all but disappeared.\textsuperscript{54}

The establishment of “organs of administrative pluralism” has been a fairly common phenomenon in industrialized nations. In the mid-nineteen-fifties, for example, over five thousand advisory committees, many of them having corporate representation, existed within the framework of the federal executive departments in the United States. During the Korean War, five hundred and fifty industry advisory committees were attached to the National Production Authority, an agency of the Department of Commerce.\textsuperscript{55}

In 1972, the United States Congress passed the Federal Advisory Committee Act,\textsuperscript{56} whose purpose was to reduce significantly the number of these entities, as well as to diversify the nongovernmental participants, in order to achieve a balance of opinions. Accordingly, their role in the policy-making process has probably diminished since that time. This statutory change, however, occurred three years after the Brussels Conference in 1969. As will be discussed below (Chapter IV), the Shipping Coordinating Committee, an organ of administrative pluralism attached to the United States Department of State, was particularly influential in formulating a policy position for the American delegation at the Brussels Conference.
ii. Clientism Leading to Regulatory Capture

The clientele of an agency are, “...those groups whose interests are strongly affected by an agency’s activities, and provided the principal sources of political support and opposition.”\textsuperscript{57} Clientism has been studied for decades as a phenomenon in domestic politics, but far less at the level of the international system. Among the conclusions drawn by political scientists studying domestic politics are that agencies often become dominated and are, in fact, captured by the groups that they are supposed to regulate. This phenomenon is known as regulatory capture. In the realm of international environmental regimes, there is some discussion of regulatory capture because of the existence of domestic entities, as well as multinational corporations, acting as stakeholders in the regime formation and ongoing regulation processes.\textsuperscript{58}

David G. Victor, Kal Raustiala and Eugene B. Skolnikoff however, conclude:

We expected to find that policy systems open to participation by target groups would be prone to regulatory capture leading to public policy decisions that mirror the interests of regulated target groups, not the public good. The studies confirm that while regulatory capture is a risk, the capturing influence of target groups has been offset through informed participation by countervailing groups.\textsuperscript{59}

Other studies of international regimes established to deal with environmental issues have failed to incorporate even the possibility of regulatory capture in their research or conclusions. Thus, in their collection of research studies titled \textit{The International Politics of the Environment, Actors, Interests, and Institutions}, Andrew Hurrell and Benedict Kingsbury et. al discuss environmental issues such as deforestation, marine dumping, ozone depletion, and climate change, to name but a few, and limit their analysis of the role of Non-State
Actors to international environmental groups.\textsuperscript{60}

Conversely, despite the word “actors” in the subtitle, there is no mention of the role played by multinational corporations in formulating the terms of any particular environmental agreement, which certainly represents a failure to view the formulation of an international regime through the prism of regulatory capture of veto groups.\textsuperscript{61} As will be demonstrated in Chapter IV, the key to understanding the private law treaty was the regulatory capture of IMCO by Non-State Actors.

Further, administrative agencies often actively seek support from interest groups, and the sources from which agency personnel are recruited have a direct bearing on policy outcomes.\textsuperscript{62} Perhaps the ultimate manifestation of clientism is the veto group: it, by definition, has the power to oppose successfully any change in the status quo that the group perceives to be a threat to its position.\textsuperscript{63} This definition differs from the approach of George Tsebelis, who writes extensively about “veto players,” which he defines as follows, “in order to change policies – or, as we will say henceforth, to change the (legislative) status quo – a certain number of collective actors have to agree to the proposed change. I call such actors veto players.” Tsebelis, however, limits his definition of veto players to constitutionally-mandated players (e.g. Congress or the President), or those created by the political system (e.g. political parties).\textsuperscript{64} As previously stated, however, the term veto group as used in this study is a nongovernmental entity (Non-State Actor), which has the ability to block change unless its demands are accepted by all players. The concept of clientism will be utilized to examine the relationship between the Intergovernmental Maritime Consultative Organization and the Comité’ Maritime Internationale, a Belgian-based organization of maritime lawyers, which historically has actually drafted treaties in the area of
international shipping.

The concept of clientism will also be used to analyze the composition of the American delegation to the Brussels conference. Clientism explains the presence of shipping, oil and insurance interests, and the absence of environmentalists; it also sheds light on the political clout of the fishing and coastal interests who would be directly involved in any lawsuit for damages arising from an oil spill. In addition, the role of the British marine insurers at the Brussels conference will be examined by the use of the veto group concept.

iii. Self-Regulation as a Manifestation of Non-Decisions

Another concept developed in the study of domestic groups is that of the non-decision. In *Power and Poverty*, Peter Bachrach and Morton S. Baratz discuss the decision-making process. Among their key theoretical concepts is what they termed the non-decision. They note:

A non-decision, as we define it, is a decision that results in suppression or thwarting of a latent or manifest challenge to the values or interests of the decision maker. To be more explicit, non-decision making is a means by which demands for change in the existing allocation of benefits and privileges in the community can be suffocated before they are even voiced; or kept covert; or killed before they gain access to the relevant decision-making arena; or failing all these things, maimed or destroyed in the decision-implementing stage of the policy process.65

Essentially, the term non-decision-making encompasses a variety of strategies that seek to prevent a certain set of options from reaching the public agenda.
Among the strategies of non-decision employed by business interests is self-regulation. As Grant McConnell noted:

The claim to autonomy is the typical demand in business. In its most traditional form – that government not interfere in business affairs that a policy of laissez faire should be followed – it is usually not seen as a business demand at all. Indeed, differing policies are often very simply condemned as “political”, although it should be fairly obvious that a policy of non-intervention is as political as any other.66

This has been a common tactic in the context of the American political system. It has been noted that:

Much of this self-policing and self-regulation is backed by state and federal law...and its voice carries tremendous influence regarding any changes to laws regarding the profession under its jurisdiction. Associations usually do this to head off governmental regulation and protect their profession’s independence. For example, physicians formed the American Medical Association in 1846 to prove that they were more than just blood-letters, but also to stay independent of both hospitals and government.67

Non-decision and autonomy serve as a conceptual framework to understand the strategy of oil tanker owners and petroleum companies in 1967 and 1968. Essentially, these two groups realized that with the growing consciousness of environmental degradation (which was partially sparked by Torrey Canyon – see Chapter IV below), some sort of international action was inevitable. Consequently, they reasoned that if they devised their own self-policing entities to deal with the oil spill problem, certain obvious benefits would accrue. Specifically, they correctly believed that the international community might either be deterred from undertaking any liability
compensation scheme in the first place, or procrastinate the implementation of any plan of action, or, at the very least, adopt a plan that would incorporate their own proposals as a basis of action. Therefore, beginning in 1967, the shipping and oil industries proposed the voluntary liability plans, TOVALOP and CRISTAL, either to head off or dilute proposed regulation of oil spills on the high seas by the international community.\textsuperscript{68}

By undertaking this course of action, the maritime and petroleum interests would, in effect, make these entities (TOVALP and CRISTAL) the arbiters of their own liability, and would have the further benefit of making themselves judge and jury \textit{vis-a-vis} any potential liability for harm caused by them.

D. The Use of a Case Study

1. Critical Case Study

The basis of this dissertation is a single case study on the Brussels Conference. Needless to say, the utility of a single case ("critical case," "single case," or "crucial case") as opposed to multiple cases, is subject to a significant debate among methodologists.

As indicated in Chapter I, Gary King, Robert D. Keohane, and Sidney Verba in \textit{Designing Social Inquiry} are highly skeptical about crucial case studies. "In general, we conclude, the single observation is not a useful technique for testing hypotheses or theories."\textsuperscript{69} Moreover, they vehemently disagree with Harry Eckstein, who in the 1970s had argued that a crucial case not only can be used for explanatory purposes, but can also score a clean knockout over a theory."\textsuperscript{70}
In sharp contrast to the *Designing Social Inquiry* argument, George and Bennett have a point-by-point critical analysis and rebuttal of *Designing Social Inquiry*, and come to very different conclusions on social research in general and case studies in particular. They maintain that, “Cases usually fall somewhere in between being most likely and least likely for particular theories and so pose tests for intermediate degrees of difficulty.”\(^71\)

The most articulate defense of the single case study was made by Bent Flyvbjerg who explicitly rejected the idea that, “One cannot generalize on the basis of an individual case; therefore the case study cannot contribute to scientific development.”\(^72\) After relating his own experience in finding “black swans” in a research project, he concluded that, “one can often generalize on the basis of a single case, and the case study may be central to scientific development via generalization as a supplement or alternative to other methods. But formal generalization is overvalued as a source of scientific development, whereas, the ‘force of example, is underestimated.”\(^73\) This dissertation proceeds on the assumption that in general, critical case studies can be very useful in the development of theories in political science research.

2. Process Tracing and Case Studies

Process tracing is defined as, “the systematic examination of diagnostic evidence selected and analyzed in light of research questions and hypothesis posed by the investigator.”\(^74\) It is “an analytical tool for drawing descriptive and causal inferences from diagnostic pieces of evidences often misunderstood as part of temporal sequence of events or phenomena.”\(^75\) Process tracing is a method to identify cause and effect by attempting, “to identify the intervening causal process –
the causal chain and the causal mechanism – between an independent variable (or variables) and the outcome of the dependent variable.76

Alternatively, causal process tracing is described as a way of, “formulating and testing explanations with case studies” Specifically, “if we are able to trace the processes, we will be able to identify the causal mechanism as it is operating in a particular.”77

A body of political science literature has developed on the theoretical aspects of process tracing. Moreover, there is scholarship that incorporates process tracing into actual case studies on international relations. Thus, by way of example, Nina Tannenwald used process tracing to determine why nuclear weapons have not been used since 1945.78 She posited the existence of a taboo against the use of nuclear weapons and deterrence theory as two possible causes of the non-use of nuclear weapons, and by the use of process tracing, eliminated deterrence and thereby confirmed that it was the nuclear taboo that was the better explanation.

Similarly, Kenneth Schultz in Democracy and Coercive Diplomacy79 uses process tracing to analyze the 1898 Fashoda Incident between Great Britain and France which resulted in the ascendancy of British interests and the concomitant decline of French interests in East Africa. It further represented the last time (except for the extraordinary situation in 1940 after the Nazi conquest of France) in which Great Britain and France actually threatened war against each other.

Schultz uses process tracing to determine which factors were relevant to the crisis’ outcome. Among the factors considered were domestic considerations, economic issues, and military strength to come to a conclusion on how the crisis between Great Britain and France was resolved.
In Chapter I, several factors were suggested, such as the development of norms of international law based on the “polluter pays” principle, the emergence of environmentalism as an issue on the public agenda, and the inadequate remedies for victim compensation, among others, as explaining the results of the Brussels Conference. Through process tracing, this dissertation attempts to determine which variables can be used to explain the outcome of the conference.

E. Methodological Issues as Applicable to the Case Study of the Brussels Conference

Based on the foregoing, this dissertation attempts to analyze the Brussels Conference and the regime it established as follows. First, it is not at its core a legal analysis of the treaties signed at Brussels, although it is probable that an understanding of the legal concepts incorporated in the private law treaty’s provisions, such as strict liability versus negligence, and limits of liability versus unlimited liability, are a sine qua non to understanding what was accomplished at Brussels.

Nonetheless, as indicated at the beginning of this chapter, law review articles have done a more than adequate job in detailing who is liable for marine oil spills and the extent of their liability under the treaties signed at Brussels.

Instead, this dissertation is a critical case study of the events from the Torrey Canyon disaster in March 1967, through the signing of the two treaties at Brussels on November 29, 1969.

More specifically, it is a crucial case study of the establishment of a reactionary international regime (as the term is used by Hugen – see endnote 40 to this chapter), and the
roles of diverse actors in its establishment. These actors include States, a Public International Organization (IMCO), and Non-State Actors, particularly shipping, oil and insurance interests. Further, the neoliberal approach, which emphasizes bargaining in contradistinction to realism or cognitivism, will be the paradigm by which the results will be evaluated. The uneven results of the bargaining process, by which certain actors achieved their goals and other did not, will be analyzed through the paradigm of interest group theory, where concepts such as clientism will be incorporated not only to describe the results of Brussels, but also to understand the broader implications for the study of international relations.

Accordingly, this dissertation proceeds on the assumption that, in general, crucial case studies can be very useful in the development of theories in political science, and in the case of the 1969 Brussels Conference in particular, it is an indispensable tool of analysis because of its unique feature in its imposition of significant sanctions for violations of the terms of the private law treaty.

Additionally, the United States’ refusal to participate in the regime established at Brussels and choice to opt instead for unilateral action through the passage of the Oil Pollution Act of 1990 will be analyzed as an example of the establishment of a regime complex with competing institutions and centers of powers.

Finally, the variables, such as the development of norms of Public International Law based on the “polluter pays” principle, the emergence of environmentalism, the inadequacy of compensation remedies for oil pollution damage, and the existence of market forces (compensation by insurance companies) to explain the formation of the international regime will
be analyzed by process tracing, in order to eliminate the causes that are irrelevant to what actually occurred at Brussels and afterwards.

I do not believe that this regime theory approach has been used to date in any other analysis of Brussels. Therefore, in order to demonstrate the validity of this methodological approach, the next step is to discover what actually occurred in the leadup to Brussels and at Brussels itself, which is the subject of the next chapter.
ENDNOTES TO CHAPTER III

1 Journalist accounts can be found on the frontpage of the New York Times, March 25, 28, and 29, 1967.


9 See Chapter IV.

10 See Chapter V.

While the Treaty of Westphalia is generally associated with the rise of the modern nation state, there is at least one dissenting view. Specifically, N. Wight wrote in Systems of States, (Leicester: Leicester University Press, 1977) that the modern nation state actually emerged in parts of Italy in the 1400s, and at Westphalia, the nation state came of age, as opposed to being created at that time (152).

The study of international law preceded the formal study of international relations. Accordingly, it would be safe to say that the analysis of international law relations historically centered on the study of customary international law that linked, “the customary practice of states coupled with the determination (by the practicing state) that such practice is being undertaken out of a sense of legal obligation.”


See, for example, John Stoessinger, *The United Nations and the Superpowers: China, Russia and America* (New York: Random House, 1977), which examines the United Nations as an institution, used (and possibly abused) by the Superpowers as an arena where national goals could be reached through a manipulation of the organization.


Ibid., xv-xvi.

Ibid., 1-22.


This perspective is not unique to Keohane and Nye. In general, there is a paucity of analysis in much of the literature as to what precisely constitutes non-state power.


Ibid.


34 Ibid.


37 Hasenclever, op. cit., 3.


39 Hasenclever, Mayer, and Rittberger, 136.


41 Ibid.

42 Ibid.


44 Keohane and Victor, 3.

45 Raustiala and Victor.

Keohane and Victor.


Raustiala and Victor, op. cit., 308.


Ibid., 90-100.

Ibid., 110.

Because the number and influence of these organs of administrative pluralism in the United States were curtailed as a result of 1972 legislation (see endnote 67), most of the scholarly literature on the topic goes back to the 1960s. The same notwithstanding, they were still highly relevant at the time of the Brussels Conference in 1969. For some of the literature, see, for example, Lyman White, *The Role of International NGOs in World Affairs* (New Brunswick: Rutgers University Press, 1951); Curtis Roosevelt, “The Politics of Development: A Role for Interest and Pressure Groups,” *International Associations*, no. 5 (1970): 283-89; Anne Thompson Feran, “Transnational Political Interest and The Global Environment,” *International Organization* 28 (Winter 1974): 31-55; Henry W. Ehrmann, “Comparative Study of Interest

55 Ibid.


57 See David Truman, *The Governmental Process* (New York: Alfred A. Knopf, 1951). Despite the passage of over sixty-five years since its publication, this volume still represents the foundation to the understanding of the role of interest groups in American political life.


61 Ibid., 310.


64 See George Tsebelis, *Veto Players: How Political Institutions Work* (New York: Russell Sage Foundation, 2002). However, the term “veto players” as used by Tsebelis is narrowly defined as political
institutions, and essentially refers to those institutions within government that can block change. This is not one and the same as a non-governmental actor having the power to block (politically not legally) a change in the status quo. Harmon Zeigler, *Interest Groups in American Society* (Englewood Cliffs, Prentice Hall, 1964), 280. On this same point, see Herbert A. Simon, Donald W. Smithburg and Victor A. Thompson, *Public Administration* (New York: Alfred A. Knopf, 1950), 384.


68 TOVALOP and CRISTAL are discussed in detail in Chapter IV.


73 Ibid., 238.


75 Ibid., 824.
George and Bennett, op. cit., 206. Bennett and Elman added the following to the utility of process tracing and case studies, “With process tracing, causation is established through uncovered traces of a hypothesized causal mechanism within the confines of one or a few cases.” Andrew Bennett and Colin Elman, “Case Study Methods in the International Relations Subfield,” *Comparative Political Studies* 40, no. 2 (February 2007): 170-195, 182.


Chapter 4: The Formation of a Regime – The Brussels Conference of November 1969

Chapter II concluded with a description of the Torrey Canyon episode and the resulting oil spill, which ultimately cost millions of dollars to clean up and further resulted in enormous financial damage to fishermen, boat owners, proprietors of resorts, and those whose livelihoods depended on the seas. Thereafter, preparations began for what ultimately evolved into the establishment of an international regime to deal with the problem of marine oil pollution, in particular the legal questions of intervention of the high seas against the ship leaking oil, and on the issue of compensation to be paid to the victims of oil spills for damages sustained by them.

At the outset, it is crucial to emphasize that the Brussels Conference was not contemplated as an academic discussion of environmental issues, nor was it likely that it would result in general technical guidelines on ship operation and safety. Rather, it would codify and effectuate a new body of international law that would mandate compensation in the millions of dollars to parties injured by marine oil spills.

Further, the regime would be based on the economics of the world oil trade, a highly profitable business, and accordingly, liability would accrue to shipowners and their insurers, cargo (oil) interests, or some combination thereof. The countervailing idea that since the benefits of the oil trade accrue to society as a whole (gasoline for transport, oil to fuel industry and thereby provide employment, and oil for heating purposes), and therefore society as a whole should bear some or all of the losses, did not seem likely to carry the day.¹

In order to obtain the full picture of the nature of the international regime established at Brussels, the participants (“stakeholders in the process”) should be identified along with their positions.
I. Preparations for the Brussels Conference – International Stakeholders Regarding Oil Pollution at Sea

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 the Intergovernmental Maritime Consultative Organization (IMCO), which has been known as the International Maritime Organization (IMO) since 1982. IMCO is a United Nations specialized agency that was established in 1948 at a conference convened at Geneva, Switzerland. Its purposes are defined in Article 1 (a) of the Convention:

To provide machinery for cooperation among Governments in the field of governmental regulation and practices relating to technical matters of all kinds affecting shipping engaged in international trade; to encourage and facilitate the general adoption of the highest practical standards in matters concerning maritime safety, efficiency and prevention and control of marine pollution from ships.\(^2\)

Essentially a backwater among United Nations Specialized Agencies, it began to function on January 6, 1959, and by 1967, it had fifty-nine members (by contrast, in 2018 it has one hundred fifty-three members, and three associate members). Operating on a minuscule annual budget of only one million dollars, IMCO had dealt exclusively with various technical matters in the maritime field and had aroused little general interest outside of the maritime community. Within the maritime community, there was resistance to the very idea of an agency like IMCO as a central body since it was viewed as representing the injection of “political distractions” into an
area perceived as technical. 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. Nonetheless, given its budgetary constraints, IMCO did not have
a large staff, and it was questionable whether it was up to the task at hand after the Torrey
Canyon disaster. Accordingly, Non-State Actors such as the Comité Maritime International
(CMI—see below) were available to become highly involved in the inevitable adoption of rules
and regulations to be promulgated regarding oil spills on the seas. At the time of the Torrey
Canyon disaster, a number of Non-Governmental Organizations had been granted official
consultative status, which tended to overrepresent international shipping interests.

Parenthetically, by 2016, sixty-eight Non-Governmental Organizations had been granted
consultative status by the IMO. They constitute a diverse group whose interests range from
environmentalism (Friends of the Earth International, Greenpeace International) to industry
groups (International Bulk Terminals Association, International Associations of Independent
Tankers Owners).

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. 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. 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 the regime one that has dominated the literature of international
organization – and its 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 as
an afterthought, did the *cui bono* question crop up. A notable exception was an edited volume in the late 1960’s *The Anatomy of Influence*, comparing the decision making processes in a half-dozen UN specialized 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.4

Similarly, John M. Bunzel’s observation about the international system in general, is likewise applicable to international organizations, “The present predominant set of shared values and worldviews – what we might call superstructure also remain a good deal less than global. Since we don’t yet *think* globally and systematically, it’s hardly surprising that we’re having trouble solving global problems.”5 At the time of the Brussels Conference, IMCO did have preferences and biases, it saw its mission as being consistent with the maritime industry’s goals, and was not inclined towards harming this industry to promote environmental interests.

B. The Comité Maritime International

By definition, decisions undertaken by IMCO on the development of technical and legal measures to mitigate the problem of oil spills would directly affect 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). The CMI has probably been far more important than IMCO in the drafting of international law on marine matters. Based in Antwerp, it has served as an important agency in the development of international maritime law.

The CMI’s Constitution defines its purpose:

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.⁶

Since the time of CMI’s founding, whenever the need for a new set of laws, treaties, or regulations affecting the shipping industry arose, the CMI provided expertise. The CMI convened and drafted an appropriate convention, which was then transmitted to the Belgian government. In turn, that government held an international conference for the purpose of obtaining approval from those states that chose to participate. Among the CMI conventions adopted by the international community have been those dealing with matters such as collisions at sea, maritime mortgages and liens, arrests of ships, and salvage and assistance.

The CMI historically has maintained close ties with governmental officials in various European shipping ministries. This is particularly true in Great Britain, Belgium, Norway, Sweden, and Denmark. The pattern of interaction closely resembles a 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.⁷ Accordingly, it would be fair to assess that
the CMI, both as an organization and also as some prominent individuals associated with it, provides information and occasional political support to governmental officials.\(^8\)

In turn, the CMI is given crucial input in decision-making regarding marine affairs in the abovementioned States. As I was told in an interview with a high official of a major international petroleum company, “The CMI can virtually dictate to certain governments which rules and regulations it will and will not accept.”\(^9\)

The American affiliate of the Comité Maritime International is the Maritime Law Association, which is composed of lawyers who represent the maritime industry. Like their American counterparts in the marine insurance field, the Maritime Law Association is relatively uninfluential in policy formulation in the international area. “CMI is dominated largely by British and Scandinavian interests with Belgium directly behind and everyone else, including the United States, a very poor third.”\(^10\)

Further, as shall be described in the next section, the shipowners have a very close relationship with the insurance industry either through self insurance via the Prevention and Indemnity 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.

C. Marine Insurance Interests

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. Susan Strange was perfectly on target when she wrote about the insurance industry:

The business of insurance plays a growing and important part in the world market
economy. Those who supply it are not seeking power over outcomes–but they exercise it nonetheless. And increasingly so. Yet it is hardly mentioned in texts on world politics; (emphasis by writer of this dissertation) and in economics the study of insurance is dominated by a few informed specialists, most of who are ideologically committed to the value judgments of economic liberalism, putting the pursuit of free trade and untrammeled competition above all other policy objectives.  

Professor Strange expanded on this thought when she wrote:

But it is still generally true that the most widely read academic journals in social science, whether in economics or politics, pay little or no attention to the political economy of the insurance business as it is conducted in the real world. This is surprising because structural forces in the market, in technology, in the authority of political regulators, in the nature and fortunes of the players, make this one of the most dynamic of the world system.  

Similarly, political economist Virginia Haufler wrote about reactions of political scientist colleagues when she discussed her proposed research dealing with insurance. The following excerpt is from the introduction to her book, Dangerous Commerce: Insurance and the Management of International Commerce, about risk management in the international system:

When I started this project, the reaction among my colleagues could not be called universally enthusiastic. Their concerns centered on whether the insurance industry made a suitable project for a political scientist to explore; some declared insurance dreadfully dull. Certainly few had bothered to explore this area previously. When I began my interviews, I discovered many insurers who honestly did not see any political significance
in what they did. The challenge to me was to demonstrate to readers in both the scholarly and business communities that the historical development of insurance reveals something broader about political-economic development and the changing relationship between the public and private sectors.\textsuperscript{13}

While maritime insurance underwriters are available in many parts of the world, the industry has historically been centered in Great Britain. Some historians trace modern marine insurance to the Lombards, who were thirteenth century Italian traders, but most 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. Any interested party would sign his name (from this practice came the term underwriter) under the item he would be willing to insure. Lloyds, despite its venerable age, is still a powerful insurer.

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% 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 marketplace 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.\textsuperscript{14}

The roots of the political-economic power of the insurance industry are described in the following terms:

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 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 not competitive. Both adhered to standard industry norms in designing their insurance contract, and both believed that many international risks could not be insured.\textsuperscript{15}

In modern times, two types of maritime insurance 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. It is issued by large marine insurance companies, who cover risks. 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. This form of insurance is not issued by marine insurance companies. Rather, it is issued by the shipowners themselves, who band together in what are termed Prevention and Indemnity Associations (“P&I Clubs”). Accordingly, the costs of a disaster like the Torrey Canyon are ultimately paid for by the shipowners themselves. Therefore, the stakes for the shipowners are enormous in a situation of massive damage to third parties, including government cleanup costs caused by cargo carried on their vessels. In a very real sense, the P&I Clubs are the alter egos of the shipowners, and any compensation paid by them are ultimately borne by the shipowners themselves.

Lloyd’s, the London-based insurer, is composed of over six thousand separate underwriters who join together to form several dozen syndicates. When a ship is to be insured for
a particular voyage, each of the brokers (through the syndicate) can purchase a portion of the
insured value of the vessel and/or its cargo (but generally not for damage caused by the cargo).
Often, these individual policies issued by insurance brokers represent a tiny portion of the ship’s
value. In the case of the Torrey Canyon, over four thousand brokers had insured the hull, and the
losses in many cases were as little as one thousand dollars. Although the Torrey Canyon’s hull
was insured at sixteen and a half million dollars (the greatest loss in maritime history), the loss of
the portion insured by the British underwriters was easily absorbed by the British insurers.\textsuperscript{16}

In 1969, British underwriters insured the bulk of the world’s shipping tonnage. Their
position 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.\textsuperscript{17}

The United States marine insurance industry at that time was smaller and far less
influential than its British counterpart. Nonetheless, the amount paid out by it for the Torrey
Canyon loss amounted to almost twenty-five percent of its total annual premium intake.\textsuperscript{18} 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.\textsuperscript{19} Therefore, it urged lower limits of liability and lower
standards of liability, specifically, liability based on negligence, with carved out exceptions
diluting that standard, as opposed to the higher standard of strict liability. 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. This would distribute the costs to the entire oil
transport industry and lessen their own financial burden. Thus, their interests did not necessarily
coincide with those of the insurers or oil industry.
D. The Petroleum Interests

The power and size of the major international oil firms have been well documented.\textsuperscript{20} The relationship between the oil and shipping industries is complex. Petroleum companies operate their own tankers, yet independently owned tankers have always been an important factor in the transoceanic transport of oil.\textsuperscript{21} The American Merchant Marine Institute (AMMI), which was the major merchant marine lobby in the United States until 1968 when it merged into a new association known as the American Institute of Merchant Shipping, listed in 1972 among its forty three members, eight oil companies including Standard Oil Company of California, Atlantic Refining Company, and the Sun Oil Company.\textsuperscript{22} As previously noted, however, a divergence of interests was manifested between these two industries at the 1969 Brussels conference over liability for oil spills. The States where shipping interests were powerful argued that cargo interests, rather than vessel owners, should bear the responsibility for liability for damages. 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. Further, the terms of liability could neither be made unlimited, nor based on strict liability, rather than on fault.\textsuperscript{23} Of the three involved major industries (shipping, insurance, and oil), the oil companies offered the least resistance to a compensation plan. The reasons for this attitude were:

a) Their financial resources were far greater than those of the shippers or the insurers. (It should be remembered that these events occurred in the late 1960s, 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.)

b) 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.

c) Finally, by participating in the establishment of any international fund, the oil industry would have an effective voice in its founding and in its ensuring policies.24

E. Tanker Owners Voluntary Agreement Concerning Liability for Oil Pollution

(TOVALOP)

As was discussed in Chapter III, 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. 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.

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.

TOVALOP was an agreement reached by owners of oil tankers whose ostensible purpose was to reimburse governments for cleanup costs that ensued after an oil spill.25 It originated in London in June 1967, 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. These seven oil companies were the leaders in world oil production and known informally as the “Seven Sisters.” 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. Consequently, after a series of meetings, TOVALOP was formally registered as a Bermuda based self-insurance corporation in December 1967.

The TOVALOP Agreement provided that the member Tanker Owners would undertake certain obligations in the event of an oil spill caused by one of its members. Specifically, if a Participating Owner’s oil tanker caused an oil spill through an error or omission, then, in such event, the Participating Owner would either remove the oil and/or reimburse the government which had cleaned up the spill for cost of removal up to certain limits – ten million dollars. This compensation would be made available only after all other means and avenues of compensation were exhausted.

In short, TOVALOP would provide payment if a Participating Owner acted negligently (as opposed to a strict liability standard), and only to reimburse governments for cleanup costs, (as opposed to third parties, e.g. property owners, fishermen, and persons similarly situated, for damage to person and property).

Moreover, as the name clearly states, it was a voluntary Non-State organization, and therefore was not subject to governmental oversight, review, appeal, or any of the procedural safeguards in place when a government is the decision-maker regarding the imposition of liability. Ultimately, it was sole judge and jury in the matter for governmental compensation for cleanup costs resulting from oil spills.
F. The Contract Regarding and Interim Supplement to Tanker Liability for Oil Pollution (CRISTAL)

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. The upper limit of CRISTAL compensation was established at thirty million dollars. The same, notwithstanding, CRISTAL would become activated in any particular situation only after other criteria had been met. First, the shipowner’s maximum liability under TOVALOP would have to be established. Added to this figure would be the expenditures incurred by the shipowner to clean up the oil. Finally, two other computations would be necessary: the maximum liability of the owner with respect to such damage under applicable law, statutes, regulations, and conventions; and the maximum amount to which persons sustaining pollution damage were entitled from any other person or other ship under existing law, statutes, regulations, and conventions for compensation for the damage. CRISTAL would pay the difference between that final figure and a maximum of thirty million dollars. Thus, unless a monumental oil spill disaster occurred, and the total cleanup costs exceeded fourteen million dollars, CRISTAL would not be activated. The CRISTAL agreement among the oil companies was formally agreed to by its component members on January 14, 1971.

After the details of CRISTAL had been worked out, an entity called the Oil Companies Institute for Marine Compensation Ltd (“the Institute”) was established by the oil companies. Unlike TOVALOP, which imposed liability on the shipowner, CRISTAL’s method was to impose liability on the cargo owner (oil companies) and claims would then be paid by the Institute.
Again, like TOVALOP, the Institute was not a governmental entity, and any payments by it were essentially voluntary in nature with the Institute establishing all procedural and substantive rules and regulations.

II. The Regime Formation Process Begins – April 1967

As previously noted in this chapter, shortly after the Torrey Canyon episode, the British government in April 1967, 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.

Almost simultaneously, 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. The Chairman of the Subcommittee was Lord Devlin who was the President of the British Maritime Law Association, which like other Maritime Law Associations was the official national affiliate of the CMI (see official CMI website for listing of all national Maritime Law Associations). 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.

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

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). The CMI dealt only with the private law issue and was not concerned with the issue of intervention on the seas. 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.

It soon became clear that most important private law issue was the standard of liability, which would be incorporated in any private law treaty. Maritime law had traditionally used a negligence standard, which is far less rigorous than the strict liability standard. The latter standard, in practical terms, meant that liability would accrue to the shipowner, whether or not the crew of the ship had acted negligently. There were many 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.

The second issue was who would be liable for oil pollution damage. 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? As will be seen below, this question was not resolved at the Brussels Conference, and in a very real sense still remains an open issue today.

The CMI spent the period between the establishment of its Working Group in 1967 and the Brussels Conference attempting to establish a credible alternative to an anticipated IMCO
regime based on strict liability, as well as high limits of liability.

Accordingly, 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.

Eighteen members responded to the poll, and in September 1968, the CMI held a meeting in Brussels to establish its position. The meeting was chaired by Albert Lilar, President of the Belgian Maritime Law Association, who, as will be seen in the discussion of the Brussels Conference, served as an official chair on behalf of IMCO. 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.

Several months later, in January 1969, IMCO met in London and considered the September 1968 CMI draft treaty, and while there was an agreement on certain relatively minor issues such as compulsory insurance for shipowners, the key issue of liability remained open.

Also 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. This proposal was rejected, and further, no consensus was reached on all of the terms of a draft treaty. 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.

III. The IMCO Meeting of May 1967

The special session of IMCO to discuss the problems raised by the Torrey Canyon episode convened in London on May 4 and 5, 1967. Because of the significant decisions made at this meeting, an in-depth analysis of the decisions will be discussed at this point. There existed a
broad consensus that if another Torrey Canyon disaster were to be avoided, certain corrective steps would have to be taken. Three categories of potential IMCO activities were considered. The first dealt with technical and preventive measures to avoid repetition of a Torrey Canyon disaster. Discussed were methods of training seamen, tanker construction technology, and establishment of sea lanes for tankers. Next on the agenda was a discussion of remedial measures, such as how to alleviate the physical problems caused by oil pollution. 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.

The third category of question, however, marked a notable departure from previous IMCO endeavors. For the first time at any IMCO meeting, proposals dealing with legal remedies were placed upon the agenda. Among the items under consideration were: the legal rights of a coastal state to intervene on the high seas in 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.

The legal questions, which previously would have been discussed exclusively at a CMI session, were now being considered by IMCO. 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 that:

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.

The second reason was that the entire three-part program would best be handled and
coordinated within one organization.

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.29

This last reason is problematical because the CMI over the past seventy years had dealt with precisely the type of situation, which it was now claimed the CMI did, “not have the official status to make authoritative determinations on behalf of member nations.”

Instead, one must examine the latter two reasons given by the report of the United States House of Representatives and the fact that IMCO was attempting to gain recognition (and possibly enhance its image and obtain a larger budget) by drafting a convention on a matter guaranteed to win some publicity for itself.30 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 the forthcoming conventions.

Thus, it appeared as if there occurred, a dichotomy 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. This divorce, however, was not destined to be permanent or even contemplated to be permanent, for it was emphasized at the London Conference that, “The IMCO body could draw upon the experience and expertise of the CMI, on a consultative basis.”31 Thus no real separation between the shipping interests and IMCO was in the offing. As was demonstrated repeatedly at the 1969 Brussels Conference, the term “consultative basis” was interpreted rather broadly by the CMI and by IMCO.
The Competing CMI and IMCO Treaty Drafts – Post-London 1969

As previously indicated, 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. Again, the CMI worked closely with the P&I Clubs and accordingly, since liability would be ultimately borne by the shipping companies (who self-insured through the P&I Clubs), their mutual interests dictated that liability be based on fault (i.e. negligence as opposed to strict liability) and, further, be limited rather than open-ended. The IMCO Working Committee split between those sympathetic to the CMI position and those opting for strict liability. The strict liability clause of the IMCO Working Committee 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.” 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.

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 to seagoing vessels carrying bulk quantities of oil. The IMCO convention defined ship (except war ships and government vessels used for noncommercial service) as any sea going vessel, and included in its provisions, damage caused by empty tankers.
Second, the CMI draft defined damage as “contamination” – the damage actually caused by oil.\textsuperscript{34} The IMCO draft could be interpreted to include damage caused by fire and explosion, as well as by oil.\textsuperscript{35}

Third, the CMI draft provided a limit of one thousand Franc Poincaré (sixty-seven dollars) per net ton if the owner was innocent of “actual fault or privity.” IMCO’s decision was to allow the matter of a ceiling for financial liability be decided at Brussels. Consequently, the treaty clause that stipulated the exact amount of liability was left blank.\textsuperscript{36}

While there existed other discrepancies between the two drafts on other related matters, such as compulsory insurance and appropriate jurisdictions for adjudicating any claims,\textsuperscript{37} there also were wide differences of opinion within the IMCO Working Group. Several of these relevant issues could not be resolved in the pre-conference negotiations. (Table IV-I: Competing IMCO and CMI Draft Treaty Provisions outlines these issues on the next page.) Among the major points of contention 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.

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.”\textsuperscript{38}

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.

d) The limit on liability. This was a subject of vigorous debate. The proposed figures ranged from sixty-seven dollars to four hundred and fifty dollars 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.”

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.”

<table>
<thead>
<tr>
<th></th>
<th>IMCO</th>
<th>CMI</th>
</tr>
</thead>
<tbody>
<tr>
<td>STRICT LIABILITY</td>
<td>Yes</td>
<td>No</td>
</tr>
<tr>
<td>LIMITS TO LIABILITY</td>
<td>Yes (higher)</td>
<td>Yes (lower)</td>
</tr>
<tr>
<td>CARGO CAUSING DAMAGE</td>
<td>Only Bulk Oil</td>
<td>Other Cargoes</td>
</tr>
<tr>
<td>LIABILITY FOR DAMAGE</td>
<td>Only Caused by Oil</td>
<td>Broader – fire, etc.</td>
</tr>
</tbody>
</table>
V. THE BRUSSELS CONFERENCE

A. The Organization of the Conference

The IMCO conference met in Brussels from November 10 to 29, 1969. The attendees included forty-eight nations as participants, six nations as observers, three specialized agencies of the United Nations, two intergovernmental organizations, and six non-governmental organizations. The majority of the participants were either shipping States or coastal States from the Western powers, or from the Communist bloc. Conversely, there was little representation from developing States, with the notable exception of Liberia, where so many seagoing ships were registered. (A full list of the participating nations and organizations, as well as the composition of the leadership, is presented in the following pages in Table IV-2 Participants at the Brussels Conference.)

The first item on the agenda was the election of a President and Vice President for the Conference. Elected as President of the Conference was Dr. Albert Lilar, Chairman of the Belgian delegation. Dr. Lilar was also the President of the CMI and, as indicated, a member of the Belgian delegation. From the perspective of interest group theory, especially on the broad issue of regulatory capture, this overlapping of public and private roles by the President of the Conference was highly significant.

The Conference was divided into three working committees. 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. Chairman of this committee was Mr. George A. Maslov (USSR) with Mr. G. E. Nasamento de Silva (Brazil) and Mr. E. Lysgaard (Denmark) as vice chairmen. 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. Chairman of this committee was Dr. Walter Muller, a prominent Swiss attorney, member of the Swiss delegation and President of the Swiss Maritime Law Association. Vice chairmen were Mr. C. Borchsenius of Norway and Mr. S. Matysik of Poland.

Finally, a committee on the Whole or Final Clauses was established. The chairman was Mr. H. E. Shefer (Netherlands), and the Vice-Chairman was Mr. R. Economou (Romania).

Again, one cannot underestimate the significance of the appointments of Dr. Albert Lilar and Dr. Walter Muller to leadership roles at the Brussels Conference. These two appointments are illustrative of the role of interest groups in general, and the concept of regulatory capture in particular. This phenomenon could exist only in an international system that is transnational and characterized by overlapping relationships among its State, Non-State Actors, and Public International Organization components. What is somewhat surprising is that those who have previously written about Brussels have failed to identify these dual roles and their significance to both interest group and international relations theory.44

There were those at the Conference who opposed the approach of drafting two separate conventions. Canada articulated these sentiments when early in the Conference its delegate, Mr. Jamieson, noted that, “The 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.”45 In other words, the Canadian government took an approach requiring mutually acceptable cross-provisions for the private law and public law treaties.

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-a-vis vessels of those States that did not accept the financial obligations in the private law
convention. 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 private
law convention. The amendment, which reflected an emerging environmentalist approach to the
issue of pollution of transnational resources, was rejected by the Conference.
III. Participation

As previously indicated, fifty-three countries were represented at the Conference, forty-seven by official delegations and six as observers. In addition, three Specialized Agencies of the United Nations, two intergovernmental organizations, and six non-governmental organizations were represented by observers at the invitation of the IMCO Assembly.

The following countries were represented by official delegations with the number of representatives from each indicated:

<table>
<thead>
<tr>
<th>Country</th>
<th>Number of Representatives</th>
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<tbody>
<tr>
<td>Australia</td>
<td>3</td>
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<tr>
<td>Belgium</td>
<td>14</td>
</tr>
<tr>
<td>Brazil</td>
<td>6</td>
</tr>
<tr>
<td>Bulgaria</td>
<td>3</td>
</tr>
<tr>
<td>Cameroon</td>
<td>1</td>
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<tr>
<td>Canada</td>
<td>9</td>
</tr>
<tr>
<td>China, Republic of</td>
<td>4</td>
</tr>
<tr>
<td>Denmark</td>
<td>7</td>
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<tr>
<td>Finland</td>
<td>4</td>
</tr>
<tr>
<td>France</td>
<td>9</td>
</tr>
<tr>
<td>Germany, Federal Republic of</td>
<td>8</td>
</tr>
<tr>
<td>Ghana</td>
<td>3</td>
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<tr>
<td>Greece</td>
<td>5</td>
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<tr>
<td>Guatemala</td>
<td>1</td>
</tr>
<tr>
<td>Iceland</td>
<td>2</td>
</tr>
<tr>
<td>India</td>
<td>4</td>
</tr>
<tr>
<td>Indonesia</td>
<td>8</td>
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<tr>
<td>Ireland</td>
<td>2</td>
</tr>
<tr>
<td>Israel</td>
<td>1</td>
</tr>
<tr>
<td>Italy</td>
<td>8</td>
</tr>
<tr>
<td>Ivory Coast</td>
<td>2</td>
</tr>
<tr>
<td>Japan</td>
<td>13</td>
</tr>
<tr>
<td>Korea, Republic of</td>
<td>4</td>
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<tr>
<td>Liberia</td>
<td>9</td>
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<tr>
<td>Libya</td>
<td>1</td>
</tr>
<tr>
<td>Malagasy Republic</td>
<td>5</td>
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<tr>
<td>Monaco</td>
<td>1</td>
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<tr>
<td>Netherlands</td>
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</tr>
<tr>
<td>New Zealand</td>
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<tr>
<td>Norway</td>
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<tr>
<td>Peru</td>
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<tr>
<td>Philippines</td>
<td>1</td>
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<tr>
<td>Poland</td>
<td>6</td>
</tr>
<tr>
<td>Portugal</td>
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<td>Romania</td>
<td>3</td>
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<tr>
<td>Singapore</td>
<td>1</td>
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<tr>
<td>Spain</td>
<td>9</td>
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<tr>
<td>Sweden</td>
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<tr>
<td>Switzerland</td>
<td>4</td>
</tr>
<tr>
<td>Syria</td>
<td>3</td>
</tr>
<tr>
<td>Thailand</td>
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</tr>
<tr>
<td>Ukrainian S.S.R.</td>
<td>2</td>
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<tr>
<td>U.S.S.R.</td>
<td>6</td>
</tr>
<tr>
<td>United Arab Republic</td>
<td>2</td>
</tr>
<tr>
<td>United States</td>
<td>8</td>
</tr>
<tr>
<td>Venezuela</td>
<td>3</td>
</tr>
<tr>
<td>Yugoslavia</td>
<td>4</td>
</tr>
</tbody>
</table>
The following countries attended as observers with the number of representatives from each indicated:

<table>
<thead>
<tr>
<th>Country</th>
<th>Number of Representatives</th>
</tr>
</thead>
<tbody>
<tr>
<td>Algeria</td>
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<td>Argentina</td>
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<tr>
<td>Hong Kong</td>
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<tr>
<td>South Africa</td>
<td>1</td>
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<tr>
<td>Sudan</td>
<td>1</td>
</tr>
<tr>
<td>Turkey</td>
<td>1</td>
</tr>
</tbody>
</table>

The following Specialized Agencies of the United Nations were represented as observers with the number of representatives from each indicated:

- International Labour Organization (1)
- Food and Agricultural Organization of the United Nations (2)
- International Atomic Energy Agency (2)

The following intergovernmental organizations attended as observers with the number of representatives from each indicated:

- Organization for Economic Cooperation and Development (1)
- International Institute for the Unification of Private Law (2)

The following non-governmental organizations attended as observers with the number of representatives from each indicated:

- Comité Maritime International (2)
- International Chamber of Shipping (1)
- International Chamber of Commerce (3)
- Permanent International Association of Navigation Congresses (1)
- International Law Association (3)
- International Confederation of Free Trade Unions (1)

IV. United States Delegation

The United States delegation consisted of:

Representatives:

Robert H. Neuman  
Assistant Legal Advisor  
Department of State  
Chairman of Delegation
Rear Admiral William L. Morrison United States Coast Guard
Department of Transportation
Alternate

Charles I. Bevans
Assistant Legal Adviser
Department of State

K. E. Biglane
Federal Water Pollution Control Administration
Department of Interior

W.J. Ford
Shipping Attache
U.S. Embassy, London

Louis P. Georgantas
Office of the Legal Adviser
Department of State

Advisers:

Ralph E. Casey, Vice President
American Institute of Merchant Shipping

James J. Higgins, President
Maritime Law Association of the United States

(Source: United State Department of State, Robert E. Neuman et. al., *Report of the United States Delegation to the International Legal Conference on Marine Pollution Damage*, p. 3-5.)
B. The International Convention Relating to Intervention on the High Seas in Cases of Oil Pollution Casualties (Public Law Treaty)

The public law treaty establishes the rights of a State to intervene on the high seas against a ship causing oil pollution by providing that:

Parties to the 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.46

Two further relevant points should be noted:

a) The convention applies only to the high seas, not the territorial seas.

b) Not only coastlines are protected, but related interests, which are defined as, “...fisheries activities...tourist attractions...the health of the coastal population...and living marine resources and wildlife.”47

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.48

Nonetheless, if the situation allows no time for consultation or notification, the threatened coastal State was authorized to act unilaterally.49

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. Accordingly, this provision resolved the uncertainty faced by the British government when confronted with a decision whether or not to destroy the Torrey Canyon.

The 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.” On the last point, the Soviet Union had proposed an amendment which would have obligated the coastal State to repatriate the crew to the State of the ship’s registry or their home port without delay. The compromise term “to facilitate the repatriation” was ultimately incorporated into the treaty.

Further, the financial liability issues resulting from a State’s intervention against an offending vessel were also 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.”

Second, Article VIII provides that if there is a dispute between the involved parties whether or not the measures taken, “were in contravention of the provisions of the proposed convention,” (and compensation must therefore be paid under the provisions of Article VI), then the parties can submit the dispute to conciliation or arbitration as provided in the annex of the convention.

Third, the annex to the convention details the procedures for conciliation and arbitration. The Soviet Union, the Soviet Bloc, and some of the Third World States opposed the principle of compulsory arbitration. The United States and Western Europe favored the idea.

Generally speaking, the public law treaty aroused little controversy. First, it legitimized a
practice that had been used previously (for example in the Torrey Canyon episode). The treaty, in a very real sense, only legitimized State action against privately-owned ships, which in any event was a course of action likely to have been undertaken by coastal States faced with an environmental catastrophe.

Second, it was perceived as a reasonable move to save the seas.

Third, 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.

In essence, the Caroline Case\textsuperscript{53} described in Chapter 2 serves as a relevant precedent or, at the very least, a rationale for this treaty. Action is sanctioned in situations where monumental disaster is inevitable. The State’s action can readily be justified on the grounds of defense; consequently, the treaty reiterates an accepted principle of customary international law.

Professor I. F. E. Goldie noted that there are 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.”\textsuperscript{54} Goldie maintained that such fears are groundless and, “creeping jurisdiction can only occur by a failure of the international community’s will.”\textsuperscript{55} It is difficult to perceive how the public law convention could represent a threat to the international community.

Additionally, the protective theory is analogous to self-defense. The great principle of territorial integrity is vulnerable before the experience of such a fundamental right. Certainly, “the freedom of the seas” concept is of no greater dignity and must be temporarily abridged in the pursuit of self-protection.\textsuperscript{56}
A second approach to rationalize the right of States to intervene on the high seas is based on the broad doctrine of “abuse of right” and its specific application in the Trail Smelter Arbitration.\textsuperscript{57} It should be pointed out that abuse of right is a doctrine of Public International Law, which may be applied by the International Court of Justice per Article 38 of the Statue of the Court. Both approaches have a common basis of affording an environmentally endangered State the opportunity of intervening against an offending vessel on the seas.

C. The International Convention on Civil Liability for Oil Pollution Damage (Private Law Treaty/Civil Law Treaty)

The private law treaty was far more complicated and controversial than was the public law treaty because of radically different views on the resolution of outstanding issues that were encompassed within the former draft text.\textsuperscript{58}

The private law treaty, as signed, provides that the convention applies to oil pollution damage occurring on the territory or the territorial sea of a contracting State.\textsuperscript{59} At that time, there did not exist a universally accepted standard as to the width of the territorial sea. Accordingly, 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.

Article III discusses the scope of liability, which was probably the most controversial issue discussed and decided upon at the conference. The issue was simply who was liable for damages. The terms of the private law treaty provide that the owner of the vessel (as opposed to the cargo owner) was made liable for any damages.\textsuperscript{60} Clearly, this represented a victory for the international oil interests who had far deeper pockets than the shipping interests.

The resolution of this issue occurred only after many days of debate and the addition of a
provision to the treaty to establish a fund to compensate victims. 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. 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.61

Similarly, the Irish delegation offered another amendment, which was supported by States that had strong shipping interests, such as Belgium, Greece, Liberia, and the Scandinavian countries. This amendment placed primary responsibility on the cargo owner. Further, the liability would have been absolute, rather than capped at a specific dollar or franc amount. This was modified by a savings clause, which provided that if the oil discharge occurred because of the vessel’s negligence, then, in such event, the cargo owner (oil interests) would have had a right of recovery over the shipowner.

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 one hundred thirty-four dollars per net ton of the ship, or fourteen million dollars whichever was less. Further, strict liability, rather than negligence, was the standard used in the determination of the ship owner’s liability.

The effects of these seemingly onerous provisions were, however, diluted as follows:

a. 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 ship owner of the additional final burden imposed by the convention.”

b. A ship owner 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;”

“was wholly caused by the negligence or other wrongful acts of any government or other authority responsible for the maintenance of lights or other navigational aides in the exercise of that function.”62

The ceiling for liability was global in that it incorporated all potential suits ranging from cleanup costs to damages to coastal installations. No priority was granted to government cleanup costs over any other person’s or other entity’s cleanup costs or damages. These limits of liability were enhanced by the commitment of TOVALOP and CRISTAL to provide additional coverage in the event that damages exceeded fourteen million dollars. 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. Specifically, as previously noted, the treaty’s liability provisions apply solely to damage in territorial waters, or the actual territory of a contracting State. Also covered are costs resulting from preventive measures taken by a coastal State.63 Excluded, however, by implication, 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.

Further, the treaty provided that each ship carrying over two thousand tons of oil must, “maintain insurance or other financial security...in the sums fixed by applying the limits of liability...to cover his liability for pollution damage under the convention.”64 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. surely bunds), name, and place of business of the insurer.\textsuperscript{65}

Two significant exceptions, however, 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.\textsuperscript{66} The owner, however, cannot limit his liability in cases of “actual fault or privity.”\textsuperscript{67}

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.\textsuperscript{68}

These limitations on liability provided to the insurer are highly significant. As will be demonstrated further, they are indicative of the role played by the insurers at the Brussels conference.

Further, on the matter of jurisdiction for litigation, the convention provides that if pollution damage has occurred in the territorial seas of two or more of the contracting States, or preventive measures have been taken in these areas, “...actions for compensation may only be brought in the courts of any such contracting state or states.”\textsuperscript{69} Thus the venue for litigation is in the court system of the State(s) damaged, irrespective of the State of origin of the ship’s owner or charterer.

Finally, other articles dealt with “boiler plate” issues of ratification and signature,\textsuperscript{70} denunciation,\textsuperscript{71} and the amendment process.\textsuperscript{72}

While the private law 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. 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.”

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, compensation of victims was a primary topic of concern. 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 then in this analysis is to examine the methods by which Non-State Actors were able to influence the terms of the Convention on Civil Liability (the private law treaty).

VI. Decision-Making at Brussels Using the Paradigm of Regime Formation

A. The Regime Formation Process

As demonstrated in this chapter, 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. The participants in this regime complex included the CMI and IMCO
as competing power centers, as well as powerful insurance and oil interests. All interacted in a bargaining process that culminated in the private law 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. It has been observed that, “competition among the elemental institutions constitutes a core characteristic of regime complex.” A closer examination of the institutional framework in which Non-State Actors operated clarifies 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. Most of the States who sent representatives to the meeting divided their delegations into three levels: the delegates; alternates; and advisors. While the delegates and alternates were, in virtually all cases, individuals who held official governmental positions, the advisors represented, to a certain extent, various segments of the industries that would be most affected by any resulting new treaties. Thus, sprinkled throughout the ranks of certain delegations were representatives of shipowner associations, maritime law associations, and the insurance industry. The Provisional Rules of the meeting provided that alternates or advisors could act as a representative if they were so designated by the head of the delegation. An examination of the records of the Committee of the Whole II (which drafted the Convention on Civil Liability for Oil Pollution) indicates that the Non-State Actors often availed themselves of the opportunity to inform publicly the Committee of their views on certain of the vital issues under discussion, not the least
of which was the controversy over whether or not to incorporate strict liability provisions into
the private law treaty.

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. Mendelsohn has stated:

The individual participants who appear at conferences on behalf of states are mostly
drawn from ship owning and marine insurance interests. Though highly competent in
their respective fields, these individuals are usually more prone to protect, and
experienced in protecting, their own parochial interests rather than the interests of the
environment.78

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 Muller and Dr. Albert Lilar, who as
previously indicated represented shipping interests on a professional level, but served as
members of their national delegations (Switzerland and Belgium respectively), and were part of
the formal IMCO leadership that ran the Brussels Conference.

The bias of certain key Brussels Conference delegations, such as Belgian, Swiss, and
Irish, towards the shipping and insurance industries and not to the potential victims of an oil spill
again underlines a major premise of this study: that in the bargaining process to create a
transnational regime, there is competition but not all actors are created equal.

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

As previously noted, Non-State Actors such as the CMI were crucial in drafting the terms of the private law treaty. In addition, 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.

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.  

As previously observed in Chapter III, among the methods that an interest group can utilize to obtain access to bureaucratic decision-makers is by the use of what are termed organs of administrative pluralism (also referred to as advisory committees). 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. The committee’s members were drawn from the Departments of State and Transportation, and from the shipping, oil, and insurance industries. The Committee’s purpose was to provide an input for the private interests who would be affected by a State Department decision on shipping matters. 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.\textsuperscript{80}

An examination of the Shipping Coordinating Committee’s membership at the time of the 1969 Brussels Conference makes it clear that access was provided only to representatives of the maritime, insurance, and petroleum industries. Conversely, there was no access to the Shipping Coordinating Committee by representatives of environmental interests.\textsuperscript{81} (For a detailed list of the committee’s membership, see Table IV-3 Shipping Coordinating Committee on p. 138.)

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.”\textsuperscript{82} 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.”\textsuperscript{83}

Democratic Rhode Island Senator Claiborne Pell, who had a strong environmentalist orientation, agreed with Frank’s evaluation of the State Department’s pro-industry orientation, and indicated that he would attempt to ensure that organized environmentalists would be granted access to the deliberations of the Shipping Coordinating Committee.\textsuperscript{84}

In my research, I conducted interviews in Washington, D.C., in March and June of 1972. The late Senator Claiborne Pell of Rhode Island provided background information, but this information was somewhat general in that he was an active member of the United States Senate, and obviously was not in a position to reveal matters that might be detrimental to his career. Another interviewee was Allan I. Mendelsohn, a former State Department negotiator currently in the private practice of law, as well as an adjunct professor at the Georgetown University Law
Center. He was the individual deploring the lack of public participation in the decision-making process. The other former negotiator wished to remain unidentified. It should be noted, however, that there was a feeling in certain business circles at the time of the Brussels meeting that the United States had adopted a position that was inconsistent with the best interest of the shipping and insurance industry and was over-concerned with ecology.85

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. This again illustrates a major point of this study: that 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.

When discussing the policy formulation process, it is, of course, difficult to define precisely which course of action is congruent with the public interest.86 It is not, of course, 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 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.”
### TABLE IV-3

**SHIPPING COORDINATING COMMITTEE**

August 8, 1969

<table>
<thead>
<tr>
<th>NAME</th>
<th>ORGANIZATION</th>
</tr>
</thead>
<tbody>
<tr>
<td>Mr. Philip H. Trezise</td>
<td>Department of State - E</td>
</tr>
<tr>
<td>Mr. John Rhinelander</td>
<td>Department of State - L</td>
</tr>
<tr>
<td>Mr. John F. Buckle</td>
<td>Department of State - E/MA</td>
</tr>
<tr>
<td>Mr. Richard A. Frank</td>
<td>Department of State - L/E</td>
</tr>
<tr>
<td>Mr. M. C. Pfutz</td>
<td>American Petroleum Institute</td>
</tr>
<tr>
<td>Mr. A. H. McComb, Jr.</td>
<td>American Petroleum Institute</td>
</tr>
<tr>
<td>Mr. James J. Higgins</td>
<td>President, Maritime Law Association</td>
</tr>
<tr>
<td>Mr. Gordon W. Paulsen</td>
<td>Maritime Law Association</td>
</tr>
<tr>
<td>Mr. John Prokes</td>
<td>America Inst. of Merchant Shipping</td>
</tr>
<tr>
<td>Mr. Nicholas J. Healy</td>
<td>American Inst. of Merchant Shipping</td>
</tr>
<tr>
<td>Mr. James J. Reynolds</td>
<td>American Inst. of Merchant Shipping</td>
</tr>
<tr>
<td>Mr. Richard W. Palmer</td>
<td>Maritime Law Association</td>
</tr>
<tr>
<td>Mr. Robert P. Nash</td>
<td>Spec. Counsel – American Inst. of Merchant Shipping</td>
</tr>
<tr>
<td>Mr. Ralph E. Casey</td>
<td>Exec. Vice Pres. – American Inst. of Merchant Shipping</td>
</tr>
<tr>
<td>Mr. Carl J. Green</td>
<td>Department of Transportation TGC-10</td>
</tr>
<tr>
<td>Mr. Bernard H. Hyllestad</td>
<td>Department of Transportation TPI-50</td>
</tr>
<tr>
<td>Mr. Robert Henri Binder</td>
<td>Department of Transportation TPI-50</td>
</tr>
<tr>
<td>Mr. Edward S. Johnson</td>
<td>Federal Maritime Commission</td>
</tr>
<tr>
<td>Mr. F. D. Heyward</td>
<td>United States Coast Guard</td>
</tr>
<tr>
<td>Commander H. G. Lyons</td>
<td>United States Coast Guard</td>
</tr>
<tr>
<td>Mr. R. Y. Edwards</td>
<td>United States Coast Guard</td>
</tr>
<tr>
<td>Mr. C. G. Patrick Bursley</td>
<td>United States Coast Guard</td>
</tr>
<tr>
<td>Mr. C. J. Maguire</td>
<td>United States Coast Guard</td>
</tr>
<tr>
<td>Mr. C. E. Mc Dowell</td>
<td>American Institute of Merchant Underwriters</td>
</tr>
<tr>
<td>Adm. H. G. Shepherd</td>
<td>National Cargo Bureau</td>
</tr>
<tr>
<td>Mr. A S. Miller</td>
<td>F.C.F.N.</td>
</tr>
<tr>
<td>Mr. Earl W. Clark</td>
<td>Labor Management Maritime Committee</td>
</tr>
<tr>
<td>Mr. Paul J. McEligott</td>
<td>Regan and Mason</td>
</tr>
<tr>
<td>Mr. G. Marshall Bates</td>
<td>Captain, US Navy (Admiralty Navy JAC)</td>
</tr>
<tr>
<td>Mr. Ernest J. Corrado</td>
<td>House Merchant Marine and Fisheries Committee</td>
</tr>
</tbody>
</table>
In my interview research in 1972, 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. When I observed that there were no groups representing the public interest on the Shipping Coordinating Committee, two different answers were offered. One former negotiator replied, “We (the State Department) and other governmental units represent the public interest.” 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.87

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. This clearly enhances their role in the decision-making process. Three cases serve to illustrate this concept:

a) James J. Reynolds: President of the American Institute of Merchant Shipping since 1969. 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, he served the government as the governmental official most directly concerned with maritime labor disputes. After the Nixon administration came to power, he became the congressional lobbyist for the American Institute of Merchant Shipping.

b) Ralph E. Casey: From 1939 to 1955 he 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 56, he was chief counsel to the House Merchant Marine and Fisheries Committee. Resigning that post in 1956, he became president of the American Merchant Marine Institute 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.

c) Earl W. Clark: In 1969, he was involved in the Maritime industry’s Labor-Management Maritime Committee. From 1951 to 1954, he was a former United States government deputy maritime administrator.88

Beyond the fact that the Shipping Coordinating Committee’s membership was limited to government and maritime industry representatives, formal access was not granted to interests affected by any potential oil spill disaster. Thus, those whose livelihoods depend on the sea, such as fishermen, 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 fishermen 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.

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

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.

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. 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. At various stages of the conference, different maximum liability figures were suggested by the P&I Clubs, but they never exceeded ten million dollars per incident. 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.

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. The Canadians maintained that to establish negligence rather than strict liability as the criteria for recovery of damages, or to impose a ceiling on the 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.

At Brussels, a compromise was reached on the problem of the terms of liability. It was agreed that the draft convention would be based on the principle of strict liability, and a one hundred thirty-four dollars per ton or fourteen million dollar limit (whichever figure was less) would be imposed on the shipowner for an oil spill disaster. It was also agreed in principle that the cargo owners (petroleum companies) would be responsible financially for claims in excess of fourteen million dollars. 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.\textsuperscript{93}

After the terms of the compromise had been offered, the following occurred:

Lord Devlin, (a member of the British delegation, but also professionally involved with the shipping interests, as well as being the person selected by IMCO to head the Brussels Conference, 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.\textsuperscript{94}

In my interview with a member of the American delegation at the Brussels conference, I asked whether a treaty could have been concluded without the express agreement of the London insurers. The delegate replied that in the absence of concurrence by the insurers, a treaty would not have been possible. He added that the P&I Clubs would not have agreed to a draft treaty that they considered incompatible with their economic interests.\textsuperscript{95} I then asked whether this method of drafting a treaty represented a dilution of a basic principle of tort law. Should compensation not be based on the victim’s loss rather than on the tortfeasor’s ability to pay?

The diplomat replied that ideally the needs of the victim should be given a priority over the polluter’s financial condition. 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.

The diplomat then added that since its creation, IMCO had maintained a close relationship with groups such as the P&I Clubs and the CMI. He indicated that the Secretariat of IMCO included several officials who had formerly served in their national maritime industry and were sympathetic to the positions of the shipowners and insurers.\textsuperscript{96}
When asked whether or not IMCO would act upon an environmental program that would run counter to the direct interests of the CMI and the P&I Clubs, the diplomat responded, “Probably not.”

In my research, I also interviewed maritime counsel of an international petroleum company, an American marine insurer, and a staff member of the Committee on Foreign Relations of the United States Senate. All agreed with the diplomat’s assessment of the CMI relationship with IMCO.

This finding that the process of regime formation at Brussels was finalized when the London insurance confirmed that the conference’s negotiated and agreed upon monetary amount was acceptable to them raises significant issues about the regime formation 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. The salient question was what level of losses could be insured by the insurance companies? No one had realistic expectations that insurance companies would insure unrealistic levels of loss.

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. This raises significant issues regarding the general role of Non-State Actors in international regimes, whether the realist and cognitivist schools of thought provide an accurate description of what occurred at Brussels, the nature of regime complexes that incorporate both State and Non-State Actors, and whether the American interest group analogy provides an adequate description of decision-making at Brussels.

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. TOVALOP
and CRISTAL can be analyzed by means of the concept of non-decision. As stated previously in Chapter III, a non-decision:

…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.\textsuperscript{99}

Somewhat similarly, TOVALOP and CRISTAL were indicative of the role played by Non-State Actors in the international environmental movement, which was described by Kyla Tienhaara, Amandine Orsini, and Robert Falkner as follows:

A final role that global corporations have recently assumed is that of regulator. Instead of simply passively accepting or trying to influence regulations by governments, global corporations are actively developing standards for themselves or cooperating with other private actors (e.g., NGOs) to do so…These private initiatives are not only relevant of how they affect corporate behavior with respect to the environment, but in terms of how they influence the way in which environmental issues are dealt with in more traditional state-led forms.\textsuperscript{100}

Needless to say, a Non-State Actor acting as a regulator is not one and the same as an entity which assesses damages, and then, through a self-insurance scheme, pays damages to certain impacted parties.

In the cases of TOVALOP and CRISTAL, the Non-State Actors (in this instance, the shipowners and oil companies) attempted to deflect a demand for the creation of international machinery to deal with the oil spill problem. Specifically, these two interests hoped that their compensation schemes would deter and/or delay IMCO or any State from drafting or enacting a treaty and/or a statute regulating the liability of one responsible for an accidental oil spill.

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.\textsuperscript{101}

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.\textsuperscript{102} 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. A similar situation would prevail when a government would attempt to recover its cleanup costs from TOVALOP. In either case, recovery would depend upon the shipper’s or petroleum company’s interpretation of its own contract. Clearly, in so far 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.

Accordingly, while the Conclusions chapter will address the issues raised herein, it seems clear that any analysis of regime formation must incorporate the possibility of the existence of regime complexes that include Non-State Actors who have a close relationship with States and Public International Organizations based on clientism, including regulatory capture and their roles as a veto group. Further, the bargaining among State and Non-State Actors provides evidence of the validity of the neoliberal approach, which emphasizes the element of bargaining among the constituent members of an international regime. Conversely, there is absolutely no evidence that a single State acted as a hegemon exerting undue influence over the outcome of the Brussels Conference. Moreover, what is perhaps even more striking is that there is no evidence that the cognitive school of thought guided decision-making at Brussels, but to the contrary, it was largely irrelevant in explaining what occurred at Brussels. Even more striking, despite the
growth of a body of international environmental law that incorporated the “polluter pays”
principle, there is no real evidence that this principle was a relevant factor in the drafting of the
private law treaty. To the contrary, there is no mention of it in the records of the proceedings, nor
did it ever come up in the interviews that I conducted with the participants in the Brussels
process.

Specifically, while the conference ostensibly dealt with environmentalism, the essence of
the deliberations was to arrive at the lowest possible figure of compensation to injured parties.

Finally, in the broadest sense, the observation of Raustiala and Victor about regime
complexes describes what occurred at Brussels: “In regime complexes by contrast, the array [of] rules already in force channel and constrain the content of the new elemental regimes…The
institutional slate is not clean. Ideas, interests, and expectations frequently are already aligned
around some set of existing rules and concepts…”103 In the case of the Brussels Conference, the
existing rules and concepts reflected the power of insurance, shipping, and oil interests, as well
as those States where the insurance and shipping interests were dominant.
ENDNOTES TO CHAPTER IV


5 Bruno S. Frey, International Political Economics (Oxford: Basil Blackwell Publisher Ltd, 1984). Speaking about bureaucracies of international organizations, he noted that there exists, “a growth of the international bureaucracy quite independent of the tasks to be performed, because all bureaucrats benefit from larger budgets and from a greater number of employees” (page 151). See also Arthur A. Stein, “Neoliberal Institutionalism,” in Oxford Handbook on International Relations, eds. Christian Reus-Smit and Duncan Snidal (New York: Oxford University Press, 2008), 202-21, where he provides insights into the linkages between international organizations, on the one hand, with international politics, economics and domestic politics on the other hand.

The approach of Strange, Cox, and Jacobson differs sharply from a more benevolent view of Public International Organization as articulated, by way of example only, by Kenneth Dahlberg, who almost forty years ago suggested, “…the need for strengthened international agencies to deal with the various global and strategic dimension of the environment.” Kenneth Dahlberg, Beyond the Green Revolution: The Ecology and Politics of Global Agricultural Development (New York: Plenum Press, 1979), 215.


This information was obtained by this writer in an interview with a member of the staff of the Senate Foreign Relations Committee, an Ambassador from a small Mediterranean power, a former negotiator for the United States Department of State, and an executive of a large international petroleum company. The first three interviews were held in 1972. The last interview was held in 1974.

Ibid.


Strange, op. cit., 122.

Ibid.


Haufler, op. cit., page 125.

For more information on Lloyd’s, see Leon Schulman, “Lloyd’s-After 284 Years, Young, Vibrant.”
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. For an example of a prediction of the decline of the oil industry, see Amory Lovins, “Energy Strategy: The Road Not Taken,” Foreign Affairs (October 1976): 76.

21 See, for example, the annual report of the Standard Oil Company of New Jersey, which in 1971 owned sixty-four tankers.


23 In my interview research, this point was made to the author by the chief marine counsel of a major international oil producer (who requested that his name not be revealed), and by an American diplomat who had participated in IMCO deliberations in 1967.

24 These points were also suggested by the two people cited in the previous footnote.

25 For the full TOVALOP agreement, see Tanker Owners Voluntary Agreement Concerning Liability for Oil Pollution (London: Burrup, Mathieson & Co. Ltd, undated). See also David A. Barrett and Christine M. Warren, “History of Florida Oil Spill Litigation,” Florida State University Law Review 5, no. 309,
who argue that TOVALOP and CRISTAL were attempts by Non-State Actors to establish and control claims for compensation for oil pollution damage. A different approach was suggested by Gordon L. Becker, “A Short Cruise on the Good Ships TOVALOP and CRISTAL.” *Journal of Maritime Law & Commerce* 5, no. 609, who argues that TOVALOP and CRISTAL were responsible industry efforts to deal with the problem. See also “International Tanker Owners Pollution Federation, Ltd.” in *International Maritime Organizations: Essays on Structure and Activities* (Netherlands: Springer), 1981.

26 Ibid., Article IV B.

27 Ibid.


30 This reason was suggested to the author by an American State Department official who had negotiated treaties, and by an ambassador to the U.N. from a small Mediterranean nation state. Both requested that their names not appear in this work.


32 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 19th 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 the others, even though it is carried out 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.


The concept of strict liability emerged in the 1868 British case of Rylands v. Fletcher. This doctrine has been accepted by several American jurisdictions, such as California, Ohio, Minnesota, and Oregon, and has been applied to liability for damages from wild animals, explosives, and airplanes. The concept of strict liability as applied to the problem of oil spills and tankers would mean that the tanker owner would be liable for damages caused by an oil spill even if he acted reasonably, and the oil spill nonetheless occurred in the absence of his negligence. In short, the concept of fault is irrelevant in a strict liability jurisdiction, and the only criteria is: Did “A” through engaging in a certain activity cause an injury or loss to “B”? Literally, nothing else matters when discussing the concept of strict liability.

By way of example only, New York State uses the fault standard in the computation of damages for “pain and suffering” resulting from automobile accidents, and the even lower standard of “no fault” for out of pocket expenses for medical care resulting from automobile accidents. In sharp contrast, New York State uses the strict liability standard for claims for damage to adjacent properties arising out of excavations for construction purposes. (Yenem Corp. v. 281 Holdings LLC, New York Appeals, 2012).

The strict liability standard has been described by the New York State Court of Appeals as, “the onerous burden of strict liability.” (Jaramillo v. Weyerhaeuser Company, 209 N.Y. Slip Opinion 02444, 209, WL 812965, 2009).

In international law, this principle of strict liability has been incorporated into Article 7 of the Outer Space Treaty,* which provides that a state launching any object into space, “shall be internationally liable for damage to another state party to the treaty or to its natural or juridical persons by such object.”
See also, the “United Nations: Convention on International Liability for Damage Caused by Space Objects.” American Journal of International Law 66, no. 3 (1972): 702–9, which provides 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.”


33 Healy, op. cit., 98.

34 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.

35 Healy, op. cit., 101.


37 Ibid.

38 Ibid.

39 Ibid.

40 These five problems are adopted from the Report of the United States Delegation.

41 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.” Bruno S. Frey, “The Public Choice View of International Political Economy,” International Organization 38, no. 1 (1984): 205.

42 See Table III-2.
43 Leg/Conf/SR.1, p. 6.

44 See for example, O’Connell and M’Gonigle and Zacher, who have made significant contributions to the understanding of the oil pollution problem.

45 Leg/Conf/3/Corr. 3

46 Article I

47 Article II

48 Article III a, b, c.

49 Article III d.

50 Article III e.

51 Neuman et. al, op. cit., 9.

52 Article VI.

53 See Chapter III, end note 44 for a discussion of the Caroline Case.

54 Memorandum by Professor L.F.E. Goldie submitted to hearings held before the United States Senate Committee on Foreign Relations, Subcommittee on Oceans and International Environment (Conventions and Amendment to Pollution of the Sea by Oil), Ninety-Second Congress, 2nd Session, May 20, 1971, p. 115-16.

55 Ibid., 116.

56 O’Connell, op. cit., 173.

57 O’Connell, op. cit., 174.

58 The Convention signed at Brussels and the Supplementary Compensation Fund are the subject of an incisive analysis by Michael Faure and Wang Hui, “The International Regimes for Compensation of Oil Pollution Damages: Are they Effective?” Review of European Comparative International and Environmental Law 12, no. 3 (November 2003): 242-53. Unlike most analyses of Brussels, they briefly discuss the P&I Clubs, as well as TOVALOP and CRISTAL. For a full law review analysis of Brussels, see O’Connell supra.
The owner is defined in Article II as, “The person or persons registered as the owner of the ship or, in the absence of registration, the person or persons owning the ship. However in the case of a ship owned by a state and operated by a company which in that state is registered as a ship’s ‘owner’ shall mean such company.”

—Neuman et. al., op. cit., 12.

—Article III 2 a, b, c.

—Article II.

—Article VII (1).

—Article VII (2).

—Article VII (8).

—Article V (2).

—Article VII (8).

—Article IX (1).

—Articles XII, XIII, XIV, XV.

—Article XVI.

—Article XVIII.


—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.

—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.
Provisional Rule II of the Conference.

Statement of Allan I. Mendelsohn before the Secretary of State’s Advisory Committee on the United Nations’ Conference on the Human Environment (1972) (mimeographed copy, no publisher).


This information was obtained from an interview with a former negotiator at Brussels from the United States Department of State, 1972.

See the roster of the Shipping Coordinating Committee in this Chapter.


Ibid., 96-97.

These written conducted interviews in Washington, D.C., in March and June of 1972. The late Senator Claiborne Pell of Rhode Island provided background information, but this information was somewhat general in that he was an active member of the United States Senate, and obviously was not in a position to reveal matters which might be detrimental to his career. Another interviewee was Allan I. Mendelsohn, a former State Department negotiator, currently in the private practice of law, as well as an adjunct professor at the Georgetown University Law Center. He was the individual deploring the lack of public participation in the decision-making process. The other former negotiator wished to remain unidentified. It should be noted, however, that there was a feeling in certain business circles at the time of the Brussels meeting that the United States had adopted a position that was inconsistent with the best interest of the shipping and insurance industry and was over-concerned with ecology. See “The Oil Spills at Brussels” (editorial), *Journal of Commerce*, November 17, 1969.


Zeigler, op. cit.
Interview with former State Department negotiator.


See Neuman, *Report of the American Delegation*, op. cit, as well as in-person interviews with members of the American delegation.

Ibid.

Neuman, op. cit., 12.

Ibid.

Ibid., 14.

Ibid., 15.

Interview with a member of the American delegation.

Ibid.

Ibid.

Ibid.

These interviews were held in 1972 and 1974.


This analysis is from a senior marine counsel of an international petroleum company. The interview was held in New York in the spring of 1972. See also Barrett and Warren, endnote twenty-six, who agree with this assessment. See also Becker, endnote twenty-six, who holds a contrary (albeit minority) view.

McConnell, op. cit., 246.

Chapter 5: The Private Law Treaty – The Expansion of the International Regime
and the Impact of Exogenous Events on its Resilience (1971 to 2011)

After the Brussels Conference concluded on November 29, 1969, each participating State, with the exception of Canada, began the ratification process based on its own constitutional procedure. Canada, which as noted in Chapter IV, had voiced opposition to certain portions of the treaties and was the only State present at Brussels that voted against the private law treaty.

I. The Canadian Refusal to Participate in the Brussels Regime

In April 1970, four months after the Brussels Conference, the Canadian government introduced bills in the House of Commons that sharply deviated from the principles that were incorporated into the civil law treaty. Briefly, the bills established pollution-free zones in Arctic waters from every point of coastal outreach one hundred miles from the Canadian coast above the sixtieth parallel. Within this zone, Canada asserted the right to control pollution, to regulate ship construction, to regulate navigation, to prohibit passage of shipping, and to impose financial penalties for failure to comply. Additionally, the law also established exclusive Canadian fishing rights beyond a twelve-mile limit in specific areas like the Bay of Fundy, and also designated a twelve-mile territorial sea. The United States State Department issued a sharply worded statement contending that, “International law provides no basis for these proposed unilateral extensions of jurisdiction on the high seas [by Canada], and the United States can neither accept
nor acquiesce in the assertion of such jurisdiction.”

Many observers commended the Canadian legislation and deplored the American response. To them, Canada was acting affirmatively to protect the Arctic from maritime pollution, while America was attempting to impede this effort because of “legal technicalities.”

The Canadian move was motivated by criteria that went beyond a mere concern for preservation of the Arctic environment. Canada was reacting to the fact that the law of the sea has generally been formulated to favor shipping interests, not coastal interests. As Columbia University School of Law Professor Louis Henkin noted:

The law of freedom of the seas has been a law of laissez faire favoring the shippers of the world. Shipping states are potential perpetrators of serious pollution threatening coastal states, but they have the votes to resist comprehensive regulation. Recent flurries of activity have produced neither cure nor effective control, and Canada, in particular, has been outvoted at several anti-pollution conferences.

In a sense, the Canadian move can be interpreted as a rebuff to the IMCO conference in which many of the key decision were shaped by the CMI, the P&I Clubs, other maritime (noncoastal) interests, and the shipping states to the detriment of the needs of coastal states who wanted to incorporate into the draft treaty provisions establishing absolute liability. In terms of the impact on the international law process by the Canadian action, Professor Henkin stated that, “surely today, the answer to inadequate law or inadequate process is not unilateral assertions enhancing national authority and national judging for oneself and others. Canada has struck a blow against pollution and for today’s crusade for the environment, but it is a blow also at international law and its law of lawmaking.”
II. The American Refusal to Participate in the Brussels Regime

The American reaction was somewhat more muted than that of Canada, but it too reflects dissatisfaction with the outcome of the Brussels Conference. On April 3, 1970, the United States Congress, after a three-year effort, adopted the Water Quality Improvement Act of 1970 (WQIA). The legislation embodied features that either paralleled or surpassed some of the features of the private law 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 of 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 one hundred dollars per gross ton or the sum of fourteen million dollars. While ostensibly this provision deviates only slightly from the private law treaty's provision on the amount of liability (one hundred thirty-four dollars per gross ton or fourteen million dollars), the WQIA's limits applied only to governmental cleanup costs, while the private law treaty's limits encompassed both governmental costs and private claims. Under WQIA, private entities, individuals, and individual American states were free to pursue their own damage claims.

In contrast to the provisions of the WQIA, the private law treaty did not grant any priority to the government-incurred cleanup costs over those of private interests. Therefore, in any single instance where the amount available under the cleanup costs would be less than the total damage, a pro rata distribution would be necessary. 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 private law treaty.  

Conversely, since Non-State interests would share with the government in the settlement based on the private law 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 American negotiator, when queried on this point, replied, “That is the price they have to pay for receiving a remedy.”

Another difference between the private law treaty and WQIA deals with the issue of jurisdictional coverage. The WQIA provides for liability for damages sustained within the American contiguous zone, as well as the territory of a particular State or on the territorial sea adjacent to a State, while the private law treaty omitted the contiguous zone. Instead it refers only to damages occurring on the territory of a particular State, thereby making the private law treaty less comprehensive in coverage than the WQIA.

In only one situation, however, would the provisions of the private law treaty be stricter than those of the WQIA. In the event that an oil spill occurred solely because of the actions of a third party (a small fishing boat collides with a tanker in a fog, and the fault lies solely with the smaller vessel), the tanker would not be liable under the WQIA, but would be liable under the private law treaty.

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. With the Supremacy Clause of the United
States Constitution as the operative principle, the Senators were reminded by the Deputy Attorney General that the private law treaty, “would therefore supersede all state and all preexisting federal laws which are inconsistent with it.”

The hearings disclosed that American oil and maritime interests preferred the terms of the private law treaty over the terms of the WQIA. Among those who testified in favor of the private law 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. Each was accompanied to the hearings by a representative of a major international petroleum producer. Their arguments did not center on the private law treaty's generally less onerous liability provisions. Instead, emphasis was placed on the uniformity of procedure that would arise upon the private law treaty's ratification. This was deemed far more acceptable than each individual State adopting unilateral measures to deal with the problem.

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

...accept 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.

In sharp contrast, the representatives of environmental organizations, such as the National Audubon Society and the Sierra Club, advocated rejection of the private law treaty. 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 latter group urged rejection of the treaty unless it were to
be linked with a supplementary fund treaty.\textsuperscript{15}

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.\textsuperscript{16} 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 thirty million dollar supplementary treaty.\textsuperscript{17} 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.”\textsuperscript{18}

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 given only after the Senate could act on the supplementary fund treaty.\textsuperscript{19}

III. The Establishment of the IMCO International Compensation Fund 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 (IMO Fund) was established in 1971. As noted in Chapter IV, 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 private law treaty. Further, it has even been suggested that in the absence of a commitment to establish an additional source of compensation to parties injured by oil spills,
the private law treaty would not have been approved at Brussels.\textsuperscript{20}

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 private law treaty. Canada again acted as the self-appointed guardian of environmental interests and demanded unlimited liability for pollution damage caused by oil spills. The other States involved at Brussels 1971 essentially split on which domestic interests were paramount – their shipping industries or the role of petroleum in the domestic society.\textsuperscript{21}

Therefore 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.\textsuperscript{22}

Ultimately agreement was reached on the terms of a compensation fund which provided that a sum of up to thirty-five million dollars would be made available from oil companies for payment of damages for an incident resulting in oil pollution damage. Nonetheless, the thirty-five-million-dollar figure would be reduced by any amounts paid under the terms of the private law treaty. Therefore, the compensation scheme agreed to in 1971 provided that the P&I Clubs and/or other insurers would pay up to fourteen million dollars while any excess (up to an additional payment of up to twenty-one million dollars) would be paid by the oil companies. 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.\textsuperscript{23} The private law treaty entered into force on

IV. 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 adequate to handle the problem.

In 1989, however, after the Exxon Valdez catastrophe (see V. below), it became clear that the limits of liability contained in the private law treaty and the Supplemental Fund Convention were set at unrealistically low levels.

Accordingly, in 1992, both the private law treaty and the Supplemental Fund Convention were significantly revised, which resulted in the levels of compensation being increased. Therefore, the 1969 private law 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”).

The 1992 Conventions (as subsequently amended in 2003) raised the amount of available compensation to the sum of $292 million, a significant increase from the 1969/1971 levels. For large oil tankers (one hundred forty thousand 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.

While the total available amount for compensation represented a significant increase
from the 1969 private law treaty (although when inflation is factored in the calculation, it is far less expansive than it initially appears), the 1992 conventions also narrowed the definition of pollution damage from the 1969 civil law treaty.

Specifically, the 1992 convention limits the operative definition of “pollution damage” by adding the following provision, which did not appear in the 1969 private law treaty, “…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.”

Clearly, the addition of this provision was a concession to the Non-State Actors (shipping, oil, and insurance) to limit their exposure in the event of a supersized disaster.

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.

Finally, in 2005, an additional level of compensation was established by means of a Supplementary Fund. This raised the total available amount for an oil spill disaster to $1.064 billion dollars. 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.

Ratification of the 1992 Civil Liability Convention and the 1992 Fund Convention have been widespread. As of March 20, 2018:

a. 137 States are parties to both Conventions;

b. 31 States are parties to the Supplemental Fund Protocol;
c. 31 States are parties to the 1992 Civil Liability Convention, but not to the 1992 Fund Convention.  

V. 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 private law treaty nor the Supplemental Fund Convention. The American position was that despite the seemingly impressive numbers that were attached to the treaty and fund, the amount of compensation available would be totally inadequate in the event of a Torrey Canyon-type disaster.

On March 24, 1989, the Exxon Valdez, whose voyage had begun in California and whose destination was the Trans-Alaska Pipeline terminal at Valdez, Alaska, ran aground on Bligh Reef in Valdez. 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. The damage, cleanup costs, and media attention were massive, and the existing international regimes would have been totally incapable of properly compensating all impacted parties.

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. 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. Even
those individuals who previously had not considered themselves part of the now well-organized environmental movement were outraged by the daily images.\textsuperscript{27}

The cleanup costs were stupendous. Bearing in mind that the original limits at Brussels in 1969 were fourteen million dollars, and that the TOVALOP-CRISTAL combination provided for a total of thirty million dollars, the total cleanup cost for the Exxon Valdez was estimated to be between $5.3 and $6 billion dollars!\textsuperscript{28} Further, it was estimated the total economic cost of the Exxon Valdez oil spill was $16.5 billion dollars!\textsuperscript{29} None of the existing regimes could even come close to providing proper clean up and fair compensation to victims.

Accordingly, in 1990, Congress acted unilaterally and passed the Oil Pollution Act of 1990 (OPA),\textsuperscript{30} which was signed into law by President George H.W. Bush.

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

OPA has an incredibly broad, all-encompassing definition of the terms of removal costs and liability. Specifically, the statute provided that the “responsible party” would be responsible for “\textbf{all removal costs}.”\textsuperscript{31} It is noteworthy that, unlike the Brussels regime, liability for removal was unlimited without any caps whatsoever. This broad liability provision reflected the strength of the environmental movement in the United States combined with the perception in the United States that the oil companies were greedy, super wealthy entities who could and should pay for the damages that they had caused.
B. 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 use of loss of natural resources.\(^{32}\)
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.\(^ {33}\)
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.\(^ {34}\)
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.\(^ {35}\)
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.\(^ {36}\)
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.\(^ {37}\)

The scope of liability for damage under OPA is breathtaking. Besides the use of the strict liability standard (which also is incorporated in Brussels and its progeny), OPA, with very few exceptions, contains no damage caps and, further, does not preempt any American state from undertaking independent action against the ship or the cargo owner. As will be seen below, however, one of the very few exceptions for damage caps was granted to offshore drilling platforms, which proved to be critical in the 2010 Deepwater Horizon catastrophe.
Further, the categories of damages that can be recovered are beyond anything contemplated by the Brussels regime and its progeny. 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. Further, lost profits are recoverable, as are increased expenses for public services, such as hazmat crews and other emergency services.

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 the individual state equivalents.

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

The most important innovation of OPA was the abandonment of the formula for compensation that had been the guiding principle of the private law treaty and the 1971 compensation fund and would continue to be 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. This was the essence of the compromise reached at Brussels. 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. Instead, the United States government used its massive taxing power to establish a one-billion-dollar 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,\(^3^8\) as well as from transfer from existing trust 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.\(^3^9\) Accordingly, it was clear that the cargo owners (the oil companies) would be the parties ultimately responsible under OPA to pay damage claims arising from massive oil spills. The net result of Exxon Valdez and OPA was that the United States abandoned the multilateral treaty approach in favor of the unilateral OPA.

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.” This is precisely what occurred and the administration of George W. Bush pursued these claims. It was only in 2015 that the final claims were dropped by the federal government, and all litigations were deemed terminated or settled.
VI. 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 was leased to British Petroleum (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. 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. Eleven lives were lost. Further, 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.

Drilling rigs were not covered by the Brussels regime, which was limited to ships. Further, OPA had a seventy-five million-dollar cap on liability for damages caused by oil rigs. 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 take many years if not decades, to wend their way through the American judicial system.

The United States government acted with its full power, and compelled BP to waive the seventy-five million-dollar-cap. Further, as a result of American governmental pressure, BP put twenty-nine billion dollars in escrow as security for pending liability claims.

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.
VII. Post-Brussels Conference: Stresses on the International Regime Summed Up

The post-Brussels activities by IMCO, including the establishment of the Supplemental Compensation Fund in 1971, the adoption of the 1992 Convention, and their subsequent modification, are demonstrative of the interactions inherent in the regime formation process. The question of compensation was initially resolved by shifting the burden of liability to the insurance interests – the P&I Clubs and the traditional marine insurers. While the insurers reluctantly abandoned the traditional maritime standard of negligence in favor of strict liability, they refused to raise the actual amount of compensation (fourteen million dollars) beyond what they deemed an insurable risk.

Accordingly, the oil interests became liable for compensation beyond the fourteen-million-dollar mark. They, however, did not give an open-ended commitment to compensate injured parties for any and all damages. Instead, initially through TOVALOP (backed up by CRISTAL), they essentially retained the power to control compensation on their own terms and conditions. Even with the introduction of the IMCO compensation funds in 1971 and 1992, there is no evidence that the oil interests gave an unconditional guarantee of compensation. To the contrary, the 1992 Treaty narrowed the definition of liability, and thereby further limited the oil exposure of the oil companies.

Further, the United States and Canada, based on a growing environmental awareness, refused to ratify the 1969 private law treaty. Moreover, in the case of the United States, the traumatic Exxon Valdez environmental catastrophe, an exogenous event, made it clear that the existing (or even a somewhat improved upon) international regime – with its financial model
based upon insurers, and contributions from oil companies – led to a total abandonment of the idea of participation in an international regime, and thereby cemented this country’s decision to proceed unilaterally. Under this unilateral approach, liability was unlimited, and taxation of oil would provide the source of compensation to injured parties rather than insurance and oil industry contributions.

This American unilateral approach did not significantly weaken the Brussels regime. In fact, per the chronology of events attached hereto, the 1992 Protocol to Amend the International Convention of Civil Liability and the 1992 Fund Convention cover approximately 97,698 of the gross tonnage of the world's merchant shipping. Nonetheless, the unilateral American approach was certainly impacted negatively on the international regime that was established in 1969 in Brussels.
ENDNOTES TO CHAPTER V


2 64 Department of State Bulletin 610 (1970).


5 Ibid., 135.

6 P.L. 91-224; 84 Stat. 91.

7 Title I Section 11 (f) (1).

8 This point was made in a letter (May 14, 1971) from David Abshire, Assistant Secretary of State for Congressional Relations to Senator Edmund S. Muskie, p. 3.


10 See Section 11 (b) (1) and 11 (b) (3) of the Act, and Article II of the Treaty.

Further, see the letter (April 15, 1971) from Richard Kleindienst, Deputy Attorney General to Senator Edmund Muskie, p. 8.

Further, see Mr. Neuman’s testimony before the Committee on Public Works (Hearings, op. cit.) July 21, 1970.

11 Article VI, 2: “...and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land.”


13 Hearings Before the Subcommittee on Oceans, op. cit., 19-33, 34-47.

15 Hearing before the Subcommittee on Oceans, op. cit., 62-107.

16 Mendelsohn’s testimony was given Before the Senate Committee on Public Works. Note 182 op. cit., 34-98.

17 Ibid., 40-48.

18 Ibid., 44.


26 “The International Regime for Compensation for Oil Pollution Damage,” March 2018, on website of IMCO.


29 Ibid.

30 33 U.S. C. 2701.

31 33 U.S.C. 2702 (b) (1) (A) and (B).

32 33 U.S.C. 2702 (b) (2) (A).

33 33 U.S. C. 2702 (b) (2) (B).

34 33 U.S.C. 2702 (b) (2) (C).

35 33 U.S.C. 2702 (b) (2) (D).

36 33 U.S.C. 2702 (b) (2) (E).

37 33 U.S.C. 2702 (b) (2) (F).


39 Ibid., 6-7.

40 On the BP Deepwater Horizon oil spill, there are contemporary journalistic accounts. A Presidential Commission was established to investigate the disaster, National Commission on the BP Deepwater Oil Spill and Offshore Drilling: Report to the President 2011, It is available at www.oilspillcommission.gov/site/default/documents. See also Ronen Perry, “The Deepwater Horizon Oil Spill and the Lessons of Civil Liability,” Washington Law Review 86, no. 1 (2011): 2.
Chapter 6: Conclusions

This study opened with a hypothesis on which factors led to the formation of an international regime to deal with marine oil spills at the 1969 Brussels Conference sponsored by the Intergovernmental Maritime Consultative Organization (IMCO). As emphasized in this dissertation, the Brussels Conference offers fertile ground for analysis because it went far beyond the usual agenda of such conferences. Specifically, it did not deal with garden variety research proposals, technical or safety issues, or recommendations for action. Rather, it set up a fully-fledged international legal regime that established both enforceable standards of liability and specific mandatory levels of compensation to those injured by marine oil spills.

Four possible explanations for the formation of this regime were offered:

I. The first explanation was the emergence, in the period 1941 to 1966, of norms of Public International Law based on the “polluter pays principle,” which essentially opened the possibility under international law of a victim of oil pollution obtaining compensation for injuries from the ship that caused the injury.

This explanation evidently does not provide an adequate basis for understanding why the regime was formed. While, as indicated in Chapter III, the Trail Smelter Arbitration and the Helsinki Rules both established the Public International Law rule of the illegality of the pollution of transnational resources, as well as the “polluter pays” principle, there was no mention of any of this in the 1969 private law treaty, the 1971 Fund Convention, or the 1992 Civil Law Convention. Further, there is no mention of these rules in the IMCO documents that were produced contemporaneously with the Brussels Conference.
Moreover, and possibly most significantly, there is no mention of the “polluter pays” rule in the 1972 Declaration of the United States Conference on the Human Environment, which is widely seen as the founding document of the international environmental movement. Specifically, while the document does call for the maintenance of environmental integrity in Principles 6 and Principle 7, the omission of this “polluter pays” rule raises fundamental issues of its importance in international environmental law.

Therefore, by tracing the “polluter pays” rule to determine what happened at the Brussels Conference and in its aftermath, one can conclude based on the existing evidence, that these rules, which developed during the period 1941 to 1966, were essentially irrelevant to the outcome of the Brussels Conference.

II. The second explanation is the emergence of environmentalism as an issue on the public agenda, particularly the issue of oil spills resulting from tanker crashes, which became part of the public agenda through an inordinate amount of media coverage.

There is little doubt that the Torrey Canyon episode was the first environmental disaster of the electronic media era. It received front package coverage (both in the electronic and print media) in the United States, as well as Europe. Adding to the media drama were images of the ship being bombed with napalm by the Royal Air Force in an attempt to burn off the leaking petroleum.

Moreover, as has been observed, a shipwreck leaking oil captures the public imagination far more effectively than an ordinary oil spill emanating from land-based oil tanks, even if the latter has greater environmental impact than the former (Kiern).
Further, it was during this period that the environmental movement began to gain traction in the United States, as well as other areas of the world. Therefore, during the hearings in the United States Senate on the ratification of the private law treaty, effective presentations against the treaty were made by traditional conservationist lobbyists, such as the Sierra Club and the National Audubon Society, as well as individuals such as Allan I. Mendelsohn, the former State Department negotiator.

Clearly, the Torrey Canyon episode, with its disastrous environmental impact, was a sufficient reason for the British government to request an urgent meeting of IMCO to address the major issues raised by the disaster within ten days of the conclusion of the incident. Needless to say, the long, two and a half year negotiation process, described in Chapter IV, which fundamentally centered on evasion of responsibility for compensation by the impacted parties, cannot be explained simply by the rise of a global environmental consciousness. Accordingly, this explanation is confirmed to the extent that the Torrey Canyon was a necessary part of the process, but is far from sufficient in explaining what occurred.

**III. The third explanation is** the inadequate remedies for compensation to victims of oil pollution damage under existing domestic laws and institutions.

There is no question that the domestic law in many States provided inadequate legal remedies to pay claims arising from significant oil pollution damage. As was seen in Chapter II, the owners of the Torrey Canyon filed a Petition in the United States District Court for the Southern District of New York to determine that the total liability of the owners totaled just fifty dollars.
Yet, in a very real sense, the issue of “inadequate compensation” is a very slippery, nebulous term to quantify. As has been observed, there are those who maintain that since society as a whole benefits from international transport of oil, the risk should be spread among society at large. Further, in a variation of this argument, the shipping industry maintained that since the oil industry was enormously profitable, it should bear the primary financial risks involved in the transport of oil, while the oil industry countered that it could not be held accountable for the acts of negligent ship captains and crews (Sperdokli).

Therefore, while both domestic and international law did not provide effective remedies to those impacted by oil spills, the real question was not only how much compensation would be available for injured parties, but who would be responsible for payment. Therefore, this explanation was a necessary part of the process, but is far from sufficient in explaining the results of the conference. This then brings this analysis to the most likely explanation in understanding what happened at Brussels.

**IV. The fourth explanation** is that the interactions among States, IMCO, and Non-State Actors (insurance, shipping, and petroleum) who, in the case of Non-State Actors, were guided by market forces that led to the inclusion in the private law treaty of terms based on these market forces to the exclusion of other possible factors, such as an approach to the issue based on environmental integrity being the highest good, irrespective of the financial costs involved.

To determine whether this explanation describes the outcome of the Brussels Conference, it is necessary to review briefly contemporary international relations theory, especially international regimes and regime complexes, and see how these paradigms explain what occurred at Brussels.
A. International Regimes

Chapter III describes the evolution of international relations theory from realism to a transnational system approach, and then to the study of international regimes and regime complexes. Clearly the series of events beginning at Brussels in 1969 and running for decades afterwards is consistent with the formation of a regime complex to deal with the issue of marine oil pollution. This regime formation process itself, both at Brussels and afterwards, can be described in the following terms:

1. The regime originated on the contraction track. The participants met with the specific intent of establishing a, “‘constitutional’ contract laying out a regime to govern the activity in question” (Young).

2. It was a reactionary (O’Hagan) that arose to deal with the specific problem – in this case marine oil pollution. Like other reactionary regimes, it does not have the staying power of an anticipatory regime, which has the flexibility to meet changing conditions.

3. The formation process in terms of the negotiations at Brussels is consistent with the neoliberal approach found in the writings of Keohane and Young. Specifically, the multiple actors (both State and Non-State) in the process are inconsistent with a realist approach, which would lead one to conclude that a dominant power (hegemon) was essentially dictating the terms of the treaties at Brussels. The United States opposed the process (the United States never ratified the private law treaty), and opted instead for unilateral action with the passage of the Water Quality Improvement Act (WQIA) in 1970 and the Oil Pollution Act (OPA) in 1990. The Brussels treaties have been ratified by States under whose flags sail more than ninety-seven percent of the world’s merchant...
shipping. It is clear that the United States did not and could not act as a hegemon and thereby derail the Brussels process.

It is manifest that the case at hand is marked by the opposite of the realist approach, and accordingly, it is posited that the neoliberal approach describes the events at Brussels. Specifically, the roles of multiple actors, both State and Non-State, such as the CMI, the national Maritime Law Associations, the petroleum companies, the P&I Clubs and international insurance companies, the United Kingdom, the United States, Canada, and IMCO to name but some, reflect a diverse negotiating universe at Brussels, which was an attempt to find an acceptable outcome that would have satisfied the needs of at least some of the participants.

Moreover, and somewhat surprisingly, there was no evidence that the cognitive school of thought was relevant to the outcome at Brussels. Specifically, given the fact that the Brussels Conference was ostensibly about forming a legal regime to deal with preservation of the marine environment, one would have thought that a knowledge-based approach, in which there were shared values on the preservation of the environment among key decision-makers, would have shaped the negotiations, as well as their outcome. Instead, the opposite scenario was dominant. The insurance and shipping interests had three major concerns: that the traditional maritime standard of fault (as opposed to strict liability) be incorporated into the private law treaty; that the limits of liability be set as low as possible; and that the cargo owners (i.e. the international petroleum companies), rather than negligent shipowners, bear most of the financial and legal responsibility for paying for oil pollution damage.

Conversely, based on a cognitive approach to international regimes, there is no evidence of a real discussion on what steps the major actors (Non-State and State) could undertake together to preserve the fragile marine environment. There was a marked absence of substantive
efforts to demonstrate in this study the major points of discussion centered on shifting the burden of liability from shipping interests to insurance interests, and then to petroleum interests.

If this is indeed the case, and if, further, an international regime is defined as “sets of implicit or explicit principles, norms, rules, and decision-making around which actors’ expectations converge in a given area of international” (Krasner), it is somewhat challenging to incorporate the outcome of the Brussels Conference into a framework that implies a commonality of interest among the participants. While, as was observed in Chapter IV, the American, Canadian, and Irish delegations did share some of these values, the countervailing value of market viability held by other States seemed to have carried the day.

B. Regime Complexes

1. The Private Law Treaty as the Initial Component of a Regime Complex

Regime theory was expanded to incorporate the concept of regime complexes that result from “the rising density of international institutions” (Raustiala and Victor). Further, because of the density of international institutions, “it is increasingly difficult to isolate and ‘decompose’ individual organizations for study” (Raustiala and Victor). The regime complex centering on compensation for marine oil pollution encompasses the private law treaty negotiated at Brussels in 1969, the separate 1970 Canadian legislative initiative, the 1970 WQIA and the 1990 OPA. The narrative of this study stresses the complicated interactions at Brussels among participating States, IMCO, and an array of Non-State Actors, such as the CMI, the P&I Clubs, insurance companies, the international petroleum companies, and special purpose entities such as
TOVALOP and CRISTAL, which formed the first regime in the regime complex. Figure VI-I illustrates their interactions at Brussels in 1969. As is self-evident, many Actors (State as well as Non-State) and a Public International Organization were involved in the negotiating process that produced the treaties at the end of the conference.

Further, because the international regime established at Brussels encountered only one institution (the private law treaty), forum shopping, which is a component of a regime complex, did not exist in 1969, and probably does not even exist today because the United States, which remains the only major non-participant in the Brussels regime, claims exclusive jurisdiction over a limited geographic area that abuts against the United States and its territories.

Further, the bargaining among the actors that produced the private law treaty at Brussels demonstrates another characteristic relevant to the study of regime complexes. An international regime is not a level playing field because, “The institutional slate is not clean. Ideas, interests, and expectations frequently are already aligned around some existing rules and concepts” (Raustiala and Victor). Thus, the Non-State Actors at Brussels entered the negotiations with firm ideas on whether negligence or strict liability would be the criteria that would form the basis of any future claim for damages.

Moreover, each Non-State Actor came into the conference with a preconceived notion of the market forces and business realities that shaped their negotiating stances. For the shipping companies and their alter egos in the insurance industry, their negotiating stance was shaped by their knowledge of what was, and what was not, insurable. For the petroleum industry, the issue was their bottom line and how it would be impacted if, pursuant to any treaty, they were being asked to become partners in liability with the negligent ship crews who were the root cause of the problem. Therefore, the oil industry initially refused to participate in any regime in which the
THE REGIME COMPLEX AT THE 1969 IMCO BRUSSEL CONFERENCE

The International Conventional relating to intervention on the high-seas in cases of oil pollution casualties

Public Law Treaty

IMCO

States

The International Convention on civil liability for oil pollution Damages

Private Law / Civil Law Treaty

IMCO

States

To represent Non-State interests

Non-State Actors

1. Insurance*

2. Shipping *

3. Petroleum

TOVALOP and CRISTAL were ostensibly established to supplement liability coverage under the Private Law Treaty

TOVALOP Tanker Owners

CRISTAL Petroleum Companies

* Overlapped with State Delegates and with IMCO
shipping and insurance companies were not parties of the first instance against whom a claim would be filed.

C. The Role of Non-State Actors in International Regimes and Complexes

A core issue of this study was to identify the role of interest groups at the Brussels Conference in particular, and in international regimes and complexes in general. Some of the existing literature stresses the American interest group analogy, which is perceived as centering on, “campaign contributions and electoral pressure, strategic information transmission of expertise and grassroots representation and mobilization” (Bloodgood).

There is no evidence that these three mechanisms were actually utilized at Brussels, although they were used in the context of the American political system at the time that the Oil Pollution Act of 1990 was being debated in Congress.

Instead, this study of the Brussels Conference has revealed, based on the domestic interest group analogy, that the dominant form of interaction between IMCO, Non-State Actors and national delegations in shaping the Conference’s outcome was clientism, which describes a symbiotic relationship between the regulators and the regulated.

1. Clientism

A prerequisite for the analysis based on clientism is an assumption that Public International Organizations do have a propensity for seeking support from those outside the agency – that in fact, Public International Organizations are not neutral, or even “benevolent” and in fact, these factors may detract from the organization’s stated mission (Strange, Cox and
Jacobson, and Frey, but see Dahlberg who argues for strengthened international agencies to deal with various strategic international agencies to confront environmental issues).

Therefore, IMCO, as described in Chapter IV, for many years prior to Brussels had a very close relationship with the CMI, and in fact, on occasion actually produced the draft treaties that formed the basis of treaties circulated and then approved at IMCO meetings. Further, in the period from 1967 to 1969, both the CMI and IMCO worked at parallel but also intersecting efforts to produce draft treaties on the issue of liability.

Moreover, the leadership of the Brussels Conference, which ostensibly was run by IMCO, a Public International Organization, but in practical terms, was run by the leaders of the CMI, who played triple roles as members of their State delegations, leaders of the IMCO conference, while simultaneously representatives of the shipping/insurance interests. Figure VI-2 and VI-3 illustrate the overlapping roles of Dr. Walter Muller and Albert Lilar at Brussels, two of the most influential leaders at the Brussels Conference.

Further, in the case of the United States delegation, clientism was manifested by the strategic placement of leaders of the American maritime industry into the ranks of those who officially represented the United States at the Brussels Conference. Moreover, an organ of administrative pluralism, the Shipping Coordinating Committee, was heavily involved in formulating the American position at Brussels. Conversely, there is no evidence that environmental groups played any role whatsoever in the United States preparation for the Brussels Conference, and there certainly were no representatives of any environmental group in any capacity (e.g. members of the delegation or advisors to the delegation) incorporated into the American delegation. Figure VI-4 illustrates the politics of access relevant to the American delegation of Brussels.
REGULATORY CAPTURE AT THE IMCO CONFERENCE: DR. WALTER MULLER

1. Member of Swiss Delegation (State)
2. President Swiss Maritime Law Association (Non-State Actor)
3. Chairman - IMCO Committee of the Whole II drafted civil liability convention (International Organization)
Figure VI - 3

REGULATORY CAPTURE AT THE IMCO CONFERENCE: DR. ALBERT LILAR

Non State Actors

States

International Organizations

Non State Actors

DR. ALBERT LILAR
4. Chairman Belgian Delegation (State)
5. President of Comite Maritime International (Non-State Actor)
6. President at IMCO Brussels conference (International Organization)
2. Regulatory Capture

The close relationships between IMCO and the CMI, and the overlapping identifications between IMCO, the CMI, industry representatives, and State delegations, led to the concomitant question of regulatory capture (i.e. the domination and even capture by interests) of the agency that ostensibly is tasked with the regulation of these very interests. This phenomenon has been studied extensively in the context of domestic systems, and there has been a very limited amount of research on this in international relations. Among the conclusions drawn about international environmental regimes is that regulatory capture is a possibility, but has been offset by the existence of countervailing groups (Victor, Rausytala, Skolnikoff). Further, many scholars do not even mention the possibility of regulatory capture in their work on international environmental regimes (Hurrell and Kingsbury). The evidence at Brussels clearly indicates that IMCO was captured by the shipping industry and its alter egos, the P&I Clubs and the international insurers. IMCO, in fact, identified with the insurance and shipping interests and vice versa to the extent that the actual dollar amounts of liability in the private law treaty could not have been incorporated in its terms unless and until the London insurers consented to this proposal. Accordingly, not only was there regulatory capture of IMCO, but the insurers actually acted as a veto group that effectively enabled them to set the terms of liability.
THE AMERICAN DELEGATION AT BRUSSELS: THE POLITICS OF ACCESS

RALPH CASEY
7. Advisor to American Delegation (State)
8. Vice President, American Institute of Merchant Shipping (Non-State Actor)
9. Shipping Coordinating Committee (Organ of Administrative Pluralism)

JAMES G. HIGGINS
1. Advisor to American Delegation (State)
2. President, Maritime Law Association (Non-State Actor)
3. Shipping Coordinating Committee (Organ of Administrative Pluralism)

NO ENVIRONMENTAL GROUP REPRESENTATIVES IN UNITED STATES DELEGATION

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3. Self-Regulation as a Manifestation of Non-Decisions

Another angle to analyze the events leading up to Brussels and afterwards is by approaching TOVALOP and CRISTAL through the paradigm of self-regulation and non-decision, which refers to the process by which an interest argues that the most efficient way to deal with an issue is to allow it to establish its own regulatory scheme and to police itself. By taking this approach, the interest seeks to coopt outside initiatives, and thereby deflect any regulatory regime imposed by an outside legal authority.

The role played by TOVALOP and CRISTAL, especially in the years from 1969 to 1976, in providing financial backup to the regime established by the private law treaty (1969) but prior to the coming into force of the 1971 International Fund Convention in 1976, allowed both of these entities to have an input into the payment of any compensation to impacted parties above and beyond the figure established at Brussels that insurers were required to pay. This self-regulation allowed the shipping and oil companies to police themselves during this time period, and, in a sense, act as a judge and jury in the determination of the amounts of compensation to be paid to the injured parties. In fact, it was only after the 1992 conventions were agreed to that TOVALOP and CRISTAL became totally redundant and obsolete, and consequently, TOVALOP and CRISTAL disbanded in 1997.

D. Insurance Companies as Non-State Actors

This study emphasizes the role of the P&I Clubs and insurance companies, such as Lloyd’s of London, in establishing the limits of liability at the Brussels Conference. More
specifically, the finalization of the terms of the private law treaty required the assent of the London insurers who, as previously indicated, acted as a veto group with the power to abort the proposed international regime unless their demands were acceded to by the assembled delegates at the Conference sponsored by IMCO, a Public International Organization.

It has been observed that despite the immense wealth and economic power in international insurance companies (the largest insurance companies have assets in excess of five-hundred billion dollars), there has been a reluctance to undertake scholarly research on their roles in the transnational system (Strange, Haufler). Even some of those who do write about the significance of the role played by insurance companies fail to follow up in a subsequent work about international environmental regimes (Haufler).

It is therefore concluded that the only way to understand fully the terms of the private law treaty is to integrate the role of insurance companies into the analysis.

V. The Use of a Critical Case Study

The final issue addressed in this chapter is the utility of a critical or crucial case study as a research model. Distilled to its essence, this study analyzes the results of the Brussels Conference in terms of regime formation, and with specific emphasis on the roles of Non-State Actors (shipping, oil, and insurance interests on its outcome). The stakes were immense – who was going to be financially liable in the event of an oil spill disaster. The outcome was analyzed by using theories developed in regime formation (as well as regime complexes), and the use of the domestic interest group analogy.
At a certain level, it can be argued that the uniqueness of the Brussels Conference lends itself to a critical case study if for no other reason than that the private law treaty stands separate and apart from any other environmental conferences prior to or since 1969. Most international environmental regimes lack any enforcement provisions (Green, Mitchell). The conferences and programs that are of headline-making quality (Kyoto and Paris) are essentially voluntary efforts to comply with certain guideline on the emissions of greenhouse gases.

In sharp contrast, Brussels and its progeny addressed the marine oil pollution issue by imposing liability of up to one billion dollars on offenders. Whether or not these remedies are adequate to deal with the issue is not the operative question. What is relevant is that no other treaty approaches (or possibly even exists) that replicates the Brussels model. Therefore, to compare the results of Brussels with other cases (environmental regimes) that deal primarily with technical issues and voluntary guidelines (Green) may be a useless exercise.

Moving beyond the factual uniqueness of the Brussels case, the question arises as to the epistemological value of a detailed study of the factors and actors that led to the drafting of the private law treaty. Within the paradigms of political science, there is a significant resistance to the use of a critical case study, and the compelling reasons against their use have been laid out with clarity in the *Designing Social Inquiry* (King, Keohane, and Verba).

Nonetheless, there are those who advocate the use of significant case studies (Campbell, Ragin, and Flyvberg). Among the reasons given is that, at the end of the day, there is no predictive theory in social science. Accordingly, in the absence of social science formulating context-independent theory, what else is left but context dependent knowledge? (Flyvberg).

Therefore, this study of the Brussels Conference and its aftermath incorporates research findings that either conflict with existing theory or are not accounted for in existing theory.
Specifically, regime theory beginning with Keohane and Nye in the 1970s through the more recent studies by Raustiala and Victor, Sell and Parkash, and Keohane and Victor were predicated on a view that the transnational system and its component regimes and regime complexes, consisted of distinct and separate entities – States, Public International Organizations and Non-State Actors – all of whom operated on independent tracks.

This study, however, concludes that in the case of Brussels, the power centers were not distinct, and, in fact, there was an overlap of key Non-State Actors (e.g. Lord Devlin, Dr. Albert Lilar, and Dr. Walter Muller among others) who were embedded in State delegations and in IMCO, and yet in their professional lives represented the insurance and shipping interests, which were the subject of regulation at Brussels. The existence of this phenomenon calls into question those studies that fail to note the existence and importance of this overlap, and by this omission conclude, among other things, that regulatory capture does not exist in international environmental regimes, and that Public International Organizations are neutral institutions who focus exclusively on their stated missions without any other considerations.

Further, by emphasizing the tactic of Non-State Actors who were operating at Brussels in substantially the same way as they act in domestic legislative systems (i.e. clientism and self-regulation non-decisions – TOVALOP and CRISTAL), this study moves the analysis of regime formation and regime complexes into previously unexplored territory. Specifically, Non-State Actors attempting to influence the outcome of a conference, such as the one held in Brussels in 1969, do more than merely mobilize opinion, motivate voters and get them to vote, and provide crucial information to the formal decision-making persons. Instead they attempt to influence directly the outcome of the regime formation process through the use of conventional interest group strategies used to lobby members of a domestic legislature. This process has been, for the
most part, largely ignored by researchers and theorists. Accordingly, if the existence of this phenomenon can be found in similar studies that might be conducted, this then might cause the recalibration of theories of regime formation.

VI. What Was Accomplished at Brussels

This dissertation emphasized theoretical and legal issues in the establishment of an international regime to provide compensation for those impacted by oil spills on the high seas. Among the issues discussed was regime formation in a transnational international system, the role of Non-State Actors in the process, and strategies used by Non-State Actors.

The unspoken issue is whether anything practical was accomplished by the complex process described in this study. The answer is that the regime did and continues to compensate victims of oil spill damage. Attached in the Appendix as item 3, is Annex I to the financial statement of the International Oil Pollution Compensation Fund of 1992 [the revised version of the 1969 Civil Liability Treaty and the 1971 Supplemental Fund] for the period ending on December 31, 2016.

A review of the Comments of the Directors indicates that sums in excess of one-hundred million British pounds have been paid as compensation to victims of oil spill damage since the inception of the 1992 Oil Pollution Compensation Fund. Additionally, significant compensation has been paid by the original 1969 treaty and 1971 Supplemental Fund, which are still applicable to those States that ratified the original 1969 and 1971 agreements but did not ratify the 1992 Compensation Fund.

These accomplishments, while impressive, are diminished, however, by two factors.
First, given the extent of damage measured in the billions of dollars in incidents like the Exxon Valdez and the Deepwater Horizon (both of which are discussed in Chapter 5), the level of compensation provided by the Brussels system of compensation is highly inadequate.

Second, the United States, the key player in the world economy, has opted not to join the Brussels regime and instead, through the passage of the Oil Pollution Act of 1990, has elected to take a unilateral approach to the issue.

While clearly, a half measure is preferable to inaction, the question that arises is whether an entirely different approach is feasible. This alternative approach is discussed in the next and final segment of this study.

VII. Looking Beyond

This dissertation stressed the intertwined roles of large international entities, such as IMCO, the CMI, the international oil companies, the multinational insurance companies, and States in the formulation of policy on the issue of liability for oil spills on the oceans.

In recent years, an alternate approach to the issue of the management of international resources to mitigate pollution has been suggested, which represents a radical break from the legal-institutional paradigm. Specifically, green international political economy (“green theory” or “the green approach”) essentially turns the legal-institutional model on its head, and then proceeds to move into uncharted territory. Green theory’s point of departure is the realization that despite all of the domestic and international activity in the realm of what might loosely be termed “pollution control” over the past half-century (i.e. the studies, research, legislation, treaties et. al.), there has been a “visible absence of substantive policy responses to handle these
issues, both in the United States and the rest of the world." Accordingly, it has been suggested that a new approach is required to deal with ecological issues:

A Green or ecological approach understands the international political economy as an open subsystem of the largely closed planetary ecosystem, with which human society is deeply intertwined and fundamentally dependent. Because of this view, the relative size of any political-economic subsystem within a larger ecosystem becomes a central analytic device for Green IPE, as do exchanges between various subsystems. It is an inherently social (or human ecological process).

Green theory’s intellectual progenitors include Leopold Kohr, an Austrian born economist whose 1957 book, The Breakdown of Nations, was a cri de coeur over the consequences of large States and mass industrialization.

In 1973, E.F. Schumacher made the following observation about organizations:

The higher level must not absorb the functions of the lower one, on the assumption that being higher, it will automatically be wiser and fulfill them more efficiently. Loyalty can grow only from the smaller units to the larger (and higher) ones, not the other way around – any loyalty is an essential element in the health of any organization. The Principal of Subsidiary Function implies that the burden of proof always lies on those who want to deprive a lower level of its function, and thereby of its freedom and responsibility in that respect; they have to prove that the lower level is incapable of fulfilling this function satisfactorily and that the higher level can do much better.

In a similar vein, Eric Helleiner, who has written extensively on international finance, is generally credited as being the first major scholar to identify a theory of Green International
Economy. He observed that the slogan that best describes green thinking is “think globally, act locally.” Here, act locally, “is meant to convey the idea that people should focus their energies primarily on improving the quality of life and solving problems within communities where they live,” and in general refers to a, “deep commitment to the decentralization of political-economic life and the strength and value of local communities.”

“Think globally” is somewhat more difficult to define, but refers to several phenomena such as a belief that global institutions, such as the G-7 and the European community, become more democratic and more responsive to the people of the world; the creation of “global civil society” groups that would promote the world economy to push for green goals; the creation of a world economy in which, “relatively autonomous local economies would exist within national economic spaces, which in turn would function fairly independently within broader regional and global economic structures;” and the elimination of “Koyaanisqaatsi,” a Hopi Indian word describing a life out of balance.

In terms of the practical application of Green theory to the issue of the pollution of transnational resources, it is clear that in recent years, the beginnings of the “think globally, act locally” approach have begun to emerge, which have been described as follows:

Consider the United Nations climate change negotiations in Paris (2015). As Oxford professor and activist Thomas Hale has explained, the Paris Agreement of last December represents a paradigm shift in international agreements, from a ‘regulatory’ model of enforceable legal obligations to a ‘catalytic and facilitative’ model that both spurs and has a wide range of actors meeting rolling schedules of increasing commitments. That model, in turn, can work only if state parties to an agreement formally include non-state and substate actors – or as they insisted on being called in Paris “non-Party stakeholders”.
According to a study released during the Paris negotiations, more than 7,000 cities from more than 99 countries and some 5,000 companies from 88 countries made climate commitments. The cities represent 11 percent of the world’s population and about 32 percent of the global gross domestic product, and the companies represented over $38 trillion in revenue.9

The reference to Non-Party Stakeholders reflects the increasing role given to these entities in the ongoing efforts to include non-conventional Non-State Actors in the international policymaking process in the area of environmental protection.

A Non-Party Stakeholder is defined in the United Nations Framework Convention on the Climate Change as:

Entities that are not Parties (national governments). Non-Party Stakeholders therefore include civil society, the private sector, financial institutions, cities and other sub-national authorities, local communities, and indigenous people.10

The increased participation by Non-Party Stakeholders in the various United Nations Specialized Agencies and other international entities is reflected, by way of example only, in the recent publication by the United Nations Framework Convention on Climate Change, which published a forty-seven page document that consisted of a list of the submissions Non-State Party Stakeholders in the area of the climate change. Each of these diverse entities (e.g. the Mountain Institute, Alliance for Global Water Adoption, and Gesellschaft für international Zusammenarbeit, to name but three of these Non-Party Stakeholders) had submitted a position paper reflecting its concerns to the United Nations.11
The Non-Party Stakeholders submissions are diverse and essentially reflect the interests of the submitting entity within the context of the recipient international organization’s mandate. By way of example, the Purdue University Department of Political Science in its submission to the United Nations Framework Convention on Climate Change made the following suggestion for a course of action that would:

- support knowledge-related capacity building within the UNFCCC process especially with regard to providing science-based learning opportunities for Parties in the form of materials/documents, in-session presentations or other, more creative formats and exercises (e.g. serious games).¹²

Accordingly, it is undeniable, that in the twenty-first century, the existence and role of Non-State Actors in the policymaking process in international environment matters is ascendant.¹³ What is not clear at this time, of course, is the actual ability of these Non-State Actors, be they Non-Party Stakeholders or other, to be relevant to the policymaking process. Nonetheless, it is possible that these new approaches represent a path forward in the regulation of ocean pollution and other transnational environmental issues.
ENDNOTES TO CHAPTER 6


3 Ibid., 324.


5 Eric Helleiner has written over one hundred journal articles. His seminal article on international political economy and the green movement is representative of his work and can be found in Paul and Amawi at pages 327 to 329.

6 Paul and Amawi, op. cit., 328.

7 Ibid., 329.

8 Ibid., 329-335.


12 Submission by the Department of Political Science, Purdue University to the United Nations Framework Convention on Climate Change.

13 To cite but one example, Benjamin Cashore, “Governing Through Markets: Forest Certification and the Emergence of Non State Authority” (New Haven: Yale University Press, 2004), describes the work of the Forest Stewardship Council an environmental group, and its role, by using market forces rather than state regulation to advance efforts to protect forests in different parts of the globe; something that would have been unthinkable at the time of the Brussels Conference in 1969.

See also on the issue of deforestation, David Humphreys, Logjam: Deforestation and the Crisis of Global Governance (Abington Oxon: Earthscan 2006), and Peter Dauvergne, Shadows in the Forest: Japan and the Politics of Timber in Southeast Asia (Cambridge, MIT Press, 1997).
Appendix 1:

1969 INTERNATIONAL CONVENTION RELATING TO INTERVENTION ON THE HIGH SEAS IN CASES OF OIL POLLUTION CASUALTIES

Adopted in Brussels, Belgium on 29 Nov 1969

The States Parties to the present Convention,

Conscious of the need to protect the interests of their peoples against the grave consequences of a maritime casualty resulting in danger of oil pollution of sea and coastlines,

Convinced that under these circumstances measures of an exceptional character to protect such interests might be necessary on the high seas and that these measures do not affect the principle of freedom of the high seas,

Have agreed as follows:

ARTICLE I

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

2. However, no measures shall be taken under the present Convention against any warship or other ship owned or operated by a State and used, for the time being, only on government non-commercial services.

ARTICLE II

For the purposes of the present Convention:

1. "maritime casualty" means a collision of ships, stranding or other incident of navigation, or other occurrence on board a ship or external to it resulting in material damage or imminent threat of material damage to a ship or cargo;

2. "ship" means:

(a) any sea-going vessel of any type whatsoever, and

(b) any floating craft, with the exception of an installation or device engaged in the
exploration and exploitation of the resources of the sea-bed and the ocean floor and the subsoil thereof,

3. "oil" means crude oil, fuel oil, diesel oil and lubricating oil;

4. "related interests" means the interests of a coastal State directly affected or threatened by the maritime casualty, such as:
   (a) maritime coastal, port or estuarine activities, including fisheries activities, constituting an essential means of livelihood of the persons concerned;
   (b) tourist attractions of the area concerned;
   (c) the health of the coastal population and the well-being of the area concerned, including conservation of living marine resources and of wildlife;

5. "Organization" means the Inter-Governmental Maritime Consultative Organization.

ARTICLE III

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

(a) before taking any measures, a coastal State shall proceed to consultations with other States affected by the maritime casualty, particularly with the flag State or States;

(b) the coastal State shall notify without delay the proposed measures to any persons physical or corporate known to the coastal State, or made known to it during the consultations, to have interests which can reasonably be expected to be affected by those measures. The coastal State shall take into account any views they may submit;

(c) before any measure is taken, the coastal State may proceed to a consultation with independent experts, whose names shall be chosen from a list maintained by the Organizations;

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

(e) a coastal State shall, before taking such measures and during their course, use its best endeavours 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 ships' crews, and to raise no obstacle thereto;
(f) measures which have been taken in application of Article I shall be notified without delay to the States and to the known physical or corporate persons concerned, as well as to the Secretary-General of the Organization.

ARTICLE IV

1. Under the supervision of the Organization, there shall be set up and maintained the list of experts contemplated by Article III of the present Convention, and the Organization shall make necessary and appropriate regulations in connexion therewith, including the determination of the required qualifications.

2. Nominations to the list may be made by Member States of the Organization and by Parties to this Convention. The experts shall be paid on the basis of services rendered by the States utilizing those services.

ARTICLE V

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

2. Such measures shall not go beyond what is reasonably necessary to achieve the end mentioned in Article I and shall cease as soon as that end has been achieved; they shall not unnecessarily interfere with the rights and interests of the flag State, third States and of any persons, physical or corporate, concerned.

3. In considering whether the measures are proportionate to the damage, account shall be taken of:

(a) the extent and probability of imminent damage if those measures are not taken; and

(b) the likelihood of those measures being effective; and

(c) the extent of the damage which may be caused by such measures.

ARTICLE VI

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

ARTICLE VII

Except as specifically provided, nothing in the present Convention shall prejudice any
otherwise applicable right, duty, privilege or immunity or deprive any of the Parties or any interested physical or corporate person of any remedy otherwise applicable.

ARTICLE VIII

1. Any controversy between the parties as to whether measures taken under Article I were in contravention of the present Convention, to whether compensation is obliged to be paid under Article VI, and to the amount of such compensation shall, if settlement by negotiation between the Parties involved or between the Party which took the measures and the physical or corporate claimants has not been possible, and if the Parties do not otherwise agree, be submitted upon request of any of the parties concerned to conciliation or, if conciliation does not succeed, to arbitration, as set out in the Annex to the present Convention.

2. The Party which took the measures shall not be entitled to refuse a request for conciliation or arbitration under provisions of the preceding paragraph solely on the grounds that any remedies under municipal law in its own courts have not been exhausted.

ARTICLE IX

1. The present Convention shall remain open for signature until 31 December 1970 and shall thereafter remain open for accession.

2. States Members of the United Nations or any of the Specialized Agencies or of the International Atomic Energy Agencies or Parties to the Statute of the International Court of Justice may become Parties to this Convention by:

(a) signature without reservation as to ratification, acceptance or approval;

(b) signature subject to ratification, acceptance or approval followed by ratification, acceptance or approval; or

(c) accession.

ARTICLE X

1. Ratification, acceptance, approval or accession shall be effected by the deposit of a formal instrument to that effect with the Secretary-General of the Organization.

2. Any instrument of ratification, acceptance, approval or accession deposited after the entry into force of an amendment to the present Convention with respect to all existing Parties or after the completion of all measures required for the entry into force of the amendment with respect to those Parties shall be deemed to apply to the Convention as modified by the amendment.
ARTICLE XI

1. The present Convention shall enter into force on the ninetieth day following the date on which Governments of fifteen States have either signed it without reservation as to ratification, acceptance or approval or have deposited instruments of ratification, acceptance, approval or accession with the Secretary-General of the Organization.

2. For each State which subsequently ratifies, accepts, approves or accedes to it the present Convention shall come into force on the ninetieth day after deposit by such State of the appropriate instrument.

ARTICLE XII

1. The present Convention may be denounced by any Party at any time after the date on which the Convention comes into force for that State.

2. Denunciation shall be affected by the deposit of an instrument with the Secretary-General of the Organization.

3. A denunciation shall take effect one year, or such longer period as may be specified in the instrument of denunciation, after its deposit with the Secretary-General of the Organization.

ARTICLE XIII

1. The United Nations where it is the administering authority for a territory, or any State Party to the present Convention responsible for the international relations of a territory, shall as soon as possible consult with the appropriate authorities of such territories or take such other measures as may be appropriate, in order to extend the present Convention to that territory and may at any time by notification in writing to the Secretary-General of the Organization declare that the present Convention shall extend to such territory.

2. The present Convention shall, from the date of receipt of the notification or from such other date as may be specified in the notification, extend to the territory named therein.

3. The United Nations, or any Party which has made a declaration under paragraph 1 of this Article may at any time after the date on which the Convention has been so extended to any territory declare by notification in writing to the Secretary-General of the Organization that the present Convention shall cease to extend to any such territory named in the notification.

4. The present Convention shall cease to extend to any territory mentioned in such notification one year, or such longer period as may be specified therein, after the date of
receipt of the notification by the Secretary-General of the Organization.

ARTICLE XIV

1. A Conference for the purpose of revising or amending the present Convention may be convened by the Organization.

2. The Organization shall convene a Conference of the States Parties to the present Convention for revising or amending the present Convention at the request of not less than one-third of the Parties.

ARTICLE XV

1. The present Convention shall be deposited with the Secretary-General of the Organization.

2. The Secretary-General of the Organization shall:

   (a) inform all States which have signed or acceded to the Convention of:

   (i) each new signature or deposit of instrument together with the date thereof;

   (ii) the deposit of any instrument of denunciation of this Convention together with the date of the deposit;

   (iii) the extension of the present Convention to any territory under paragraph 1 of Article XIII and of the termination of any such extension under the provisions of paragraph 4 of that Article stating in each case the date on which the present Convention has been or will cease to be so extended;

   (b) transmit certified true copies of the present Convention to all Signatory States and to all States which accede to the present Convention.

ARTICLE XVI

As soon as the present Convention comes into force, the text shall be transmitted by the Secretary-General of the Organization to the Secretariat of the United Nations for registration and publication in accordance with Article 102 of the Charter of the United Nations.

ARTICLE XVII

The present Convention is established in a single copy in the English and French languages, both texts being equally authentic. Official translations in the Russian and Spanish languages shall be prepared and deposited with the signed original.
In witness whereof the undersigned* being duly authorized by their respective Governments for that purpose have signed the present Convention.

Done at Brussels this twenty-ninth day of November 1969.

ANNEX

CHAPTER I. CONCILIATION

Article 1

Provided the Parties concerned do not decide otherwise, the procedure for conciliation shall be in accordance with the rules set out in this Chapter.

Article 2

1. A Conciliation Commission shall be established upon the request of one Party addressed to another in application of Article VIII of the Convention.

2. The request for conciliation submitted by a Party shall consist of a statement of the case together with any supporting documents.

3. If a procedure has been initiated between two Parties, any other Party the nationals or property of which have been affected by the same measures, or which is a coastal State having taken similar measures, may join in the conciliation procedure by giving written notice to the Parties which have originally initiated the procedure unless either of the latter Parties object to such joinder.

Article 3

1. The Conciliation Commission shall be composed of three members: one nominated by the coastal State which took the measures, one nominated by the State the nationals or property of which have been affected by those measures and a third, who shall preside over the Commission and shall be nominated by agreement between the two original members.

2. The Conciliators shall be selected from a list previously drawn up in accordance with the procedure set out in Article 4 below.

3. If within a period of 60 days from the date of receipt of the request for conciliation, the Party to which such request is made has not given notice to the other Party to the controversy of the nomination of the Conciliator for whose selection it is responsible, or if, within a period of 30 days from the date of nomination of the second of the members of the Commission to be designated by the Parties, the first two Conciliators have not
been able to designate by common agreement the Chairmen of the Commission, the Secretary-General of the Organization shall upon request of either Party and within a period of 30 days, proceed to the required nomination. The members of the Commission thus nominated shall be selected from the list prescribed in the preceding paragraph.

4. In no case shall the Chairman of the Commission be or have been a national of one of the original Parties to the procedure, whatever the method of his nomination.

Article 4

1. The list prescribed in Article 3 above shall consist of qualified persons designated by the Parties and shall be kept up to date by the Organization. Each Party may designate for inclusion on the list four persons, who shall not necessarily be its nationals. The nominations shall be for periods of six years each and shall be renewable.

2. In the case of the decease or resignation of a person whose name appears on the list, the Party which nominated such person shall be permitted to nominate a replacement for the remainder of the term of office.

Article 5

1. Provided the Parties do not agree otherwise, the Conciliation Commission shall establish its own procedures, which shall in all cases permit a fair hearing. As regards examination, the Commission, unless it unanimously decides otherwise, shall conform with the provisions of Chapter III of The Hague Convention for the Peaceful Settlement of International Disputes of 18 October 1907.

2. The Parties shall be represented before the Conciliation Commission by agents whose duty shall be to act as intermediaries between the Parties and the Commission. Each of the Parties may seek also the assistance of advisers and experts nominated by it for this purpose and may request the hearing of all persons whose evidence the Party considers useful.

3. The Commission shall have the right to request explanations from agents, advisers and experts of the Parties as well as from any persons whom, with the consent of their Governments, it may deem useful to call.

Article 6

Provided the Parties do not agree otherwise, decisions of the Conciliation Commission shall be taken by a majority vote and the Commission shall not pronounce on the substance of the controversy unless all its members are present.

Article 7
The Parties shall facilitate the work of the Conciliation Commission and in particular, in accordance with their legislation, and using all means at their disposal:

(a) provide the Commission with the necessary documents and information;

(b) enable the Commission to enter their territory, to hear witnesses or experts, and to visit the scene.

Article 8

The task of the Conciliation Commission will be to clarify the matters under dispute, to assemble for this purpose all relevant information by means of examination or other means, and to endeavour to reconcile the Parties. After examining the case, the Commission shall communicate to the Parties a recommendation which appears to the Commission to be appropriate to the matter and shall fix a period of not more than 90 days within which the Parties are called upon to state whether or not they accept the recommendation.

Article 9

The recommendation shall be accompanied by a statement of reasons. If the recommendation does not represent in whole or in part the unanimous opinion of the Commission, any Conciliator shall be entitled to deliver a separate opinion.

Article 10

A conciliation shall be deemed unsuccessful if, 90 days after the Parties have been notified of the recommendation, either Party shall not have notified the other Party of its acceptance of the recommendation. Conciliation shall likewise be deemed unsuccessful if the Commission shall not have been established within the period prescribed in the third paragraph of Article 3 above, or provided the Parties have not agreed otherwise, if the Commission shall not have issued its recommendation within one year from the date on which the Chairman of the Commission was nominated.

Article 11

1. Each member of the Commission shall receive remuneration for his work, such remuneration to be fixed by agreement between the Parties which shall each contribute an equal proportion.

2. Contributions for miscellaneous expenditure incurred by the work of the Commission shall be apportioned in the same manner.
Article 12

The parties to the controversy may at any time during the conciliation procedure decide in agreement to have recourse to a different procedure for settlement of disputes.

CHAPTER II. ARBITRATION

Article 13

1. Arbitration procedure, unless the Parties decide otherwise, shall be in accordance with the rules set out in this Chapter.

2. Where conciliation is unsuccessful, a request for arbitration may only be made within a period of 180 days following the failure of conciliation.

Article 14

The Arbitration Tribunal shall consist of three members: one Arbitrator nominated by the coastal State which took the measures, one Arbitrator nominated by the State the nationals or property of which have been affected by those measures, and another Arbitrator who shall be nominated by agreement between the two first-named, and shall act as its Chairman.

Article 15

1. If, at the end of a period of 60 days from the nomination of the second Arbitrator, the Chairman of the Tribunal shall not have been nominated, the Secretary-General of the Organization upon request of either Party shall within a further period of 60 days proceed to such nomination, selecting from a list of qualified persons previously drawn up in accordance with the provisions of Article 4 above. This list shall be separate from the list of experts prescribed in Article IV of the Convention and from the list of Conciliators prescribed in Article 4 of the present Annex; the name of the same person may, however, appear both on the list of Conciliators and on the list of Arbitrators. A person who has acted as Conciliator in a dispute may not, however, be chosen to act as Arbitrator in the same matter.

2. If, within a period of 60 days from the date of the receipt of the request, one of the Parties shall not have nominated the member of the Tribunal for whose designation it is responsible, the other Party may directly inform the Secretary-General of the Organization who shall nominate the Chairman of the Tribunal within a period of 60 days, selecting him from the list prescribed in paragraph 1 of the present Article.

3. The Chairman of the Tribunal shall, upon nomination, request the Party which has not provided an Arbitrator, to do so in the same manner and under the same conditions. If the Party does not make the required nomination, the Chairman of the Tribunal shall request the Secretary-General of the Organization to make the nomination in the form and conditions
prescribed in the preceding paragraph.

4. The Chairman of the Tribunal, if nominated under the provisions of the present Article, shall not be or have been a national of one of the parties concerned, except with the consent of the other Party or Parties.

5. In the case of the decease or default of an Arbitrator for whose nomination one of the Parties is responsible, the said Party shall nominate a replacement within a period of 60 days from the date of decease or default. Should the said Party not make the nomination, the arbitration shall proceed under the remaining Arbitrators. In the case of decease or default of the Chairman of the Tribunal, a replacement shall be nominated in accordance with the provisions of Article 14 above, or in the absence of agreement between the members of the Tribunal within a period of 60 days of the decease or default, according to the provisions of the present Article.

Article 16

If a procedure has been initiated between two Parties, any other Party, the nationals or property of which have been affected by the same measures or which is a coastal State having taken similar measures, may join in the arbitration procedure by giving written notice to the Parties which have originally initiated the procedure unless either of the latter Parties object to such joinder.

Article 17

Any arbitration Tribunal established under the provisions of the present Annex shall decide its own rules of procedure.

Article 18

1. Decisions of the Tribunal both as to its procedure and its place of meeting and as to any controversy laid before it, shall be taken by majority vote of its members; the absence or abstention of one of the members of the Tribunal for whose nomination the Parties were responsible shall not constitute an impediment to the Tribunal reaching a decision. In cases of equal voting, the Chairman shall cast the deciding vote.

2. The Parties shall facilitate the work of the Tribunal and in particular, in accordance with their legislation, and using all means at their disposal:

(a) provide the Tribunal with the necessary documents and information;

(b) enable the Tribunal to enter their territory, to hear witnesses or experts, and to visit the scene.

3. Absence or default of one Party shall not constitute an impediment to the
procedure.

Article 19

1. The award of the Tribunal shall be accompanied by a statement of reasons. It shall be final and without appeal. The Parties shall immediately comply with the award.

2. Any controversy which may arise between the Parties as regards interpretation and execution of the award may be submitted by either Party for judgment to the Tribunal which made the award, or, if it is not available, to mother Tribunal constituted for this purpose in the same manner as the original Tribunal.

THE STATES PARTIES TO THE PRESENT CONVENTION,

CONSCIOUS of the dangers of pollution posed by the worldwide maritime carriage of oil in bulk,

CONVINCED of the need to ensure that adequate compensation is available to persons who suffer damage caused by pollution resulting from the escape or discharge of oil from ships,

DESIRING to adopt uniform international rules and procedures for determining questions of liability and providing adequate compensation in such cases,

HAVE AGREED as follows:

Article I

For the purposes of this Convention:

1. "Ships" means any sea-going vessel and any seaborne craft of any type whatsoever, actually carrying oil in bulk as cargo.

2. "Person" means any individual or partnership or any public or private body, whether corporate or not, including a State or any of its constituent subdivisions.

3. "Owner" means the person or persons registered as the owner of the ship or, in the absence of registration, the person or persons owning the ship. However in the case of a ship owned by a State and operated by a company which in that State is registered as the ship's operator, "owner" shall mean such company.

4. "State of the ship's registry" means in relation to registered ships the State of registration of the ship, and in relation to unregistered ships the State whose flag the ship is flying.

5. "Oil" means any persistent oil such as crude oil, fuel oil, heavy diesel oil, lubricating oil and whale oil, whether carried on board a ship as cargo or in the bunkers of such a ship.
6. "Pollution damage" means loss or damage caused outside the ship carrying oil by contamination resulting from the escape or discharge of oil from the ship, wherever such escape or discharge may occur, and includes the costs of preventive measures and further loss or damage caused by preventive measures.

7. "Preventive measures" means any reasonable measures taken by any person after an incident has occurred to prevent or minimize pollution damage.

8. "Incident" means any occurrence, or series of occurrences having the same origin, which causes pollution damage.

9. "Organization" means the Inter-Governmental Maritime Consultative Organization.

Article II

This Convention shall apply exclusively to pollution damage caused on the territory including the territorial sea of a Contracting State and to preventive measures taken to prevent or minimize such damage.

Article III

1. Except as provided in paragraphs 2 and 3 of this Article, the owner of a ship at the time of an incident, or where the incident consists of a series of occurrences at the time of the first such occurrence, 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.

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

(a) resulted from an act of war, hostilities, civil war, insurrection or a natural phenomenon of an exceptional, inevitable and irresistible character, or

(b) was wholly caused by an act or omission done with intent to cause damage by a third party, or

(c) was wholly caused by the negligence or other wrongful act of any Government or other authority responsible for the maintenance of lights or other navigational aids in the exercise of that function.

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

4. No claim for compensation for pollution damage shall be made against the owner otherwise than in accordance with this Convention. No claim for pollution damage under this Convention or otherwise may be made against the servants or agents of the owner.
5. Nothing in this Convention shall prejudice any right of recourse of the owner against third parties.

Article IV

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

Article V

1. The owner of a ship shall be entitled to limit his liability under this Convention in respect of any one incident to an aggregate amount of 2,000 francs for each ton of the ship's tonnage. However, this aggregate amount shall not in any event exceed 210 million francs.

2. If the incident occurred as a result of the actual fault or privity of the owner, he shall not be entitled to avail himself of the limitation provided in paragraph 1 of this Article.

3. For the purpose of availing himself of the benefit of limitation provided for in paragraph 1 of this Article the owner shall constitute a fund for the total sum representing the limit of his liability with the Court or other competent authority of any one of the Contracting States in which action is brought under Article IX. The fund can be constituted either by depositing the sum or by producing a bank guarantee or other guarantee, acceptable under the legislation of the Contracting State where the fund is constituted, and considered to be adequate by the Court or another competent authority.

4. The fund shall be distributed among the claimants in proportion to the amounts of their established claims.

5. If before the fund is distributed the owner or any of his servants or agents or any person providing him insurance or other financial security has as a result of the incident in question, paid compensation for pollution damage, such person shall, up to the amount he has paid, acquire by subrogation the rights which the person so compensated would have enjoyed under this Convention.

6. The right of subrogation provided for in paragraph 5 of this Article may also be exercised by a person other than those mentioned therein in respect of any amount of compensation for pollution damage which he may have paid by only to the extent that such subrogation is permitted under the applicable national law.

7. Where the owner or any other person establishes that he may be compelled to pay at a later date in whole or in part any such amount of compensation, with regard to which such person would have enjoyed a right of subrogation under paragraphs 5 or 6 of this Article, had the compensation been paid before the fund was distributed, the Court or other competent authority of the State where the fund has been constituted may order that a sufficient sum shall be
provisionally set aside to enable such person at such later date to enforce his claim against the fund.

8. Claims in respect of expenses reasonably incurred or sacrifices reasonably made by the owner voluntarily to prevent or minimize pollution damage shall rank equally with other claims against the fund.

9. The franc mentioned in this Article shall be a unit consisting of sixty-five and a half milligrams of gold of millesimal fineness nine hundred. The amount mentioned in paragraph 1 of this Article shall be converted into the national currency of the State in which the fund is being constituted on the basis of the official value of that currency by reference to the unit defined above on the date of the constitution of the fund.

10. For the purpose of this Article the ship's tonnage shall be the net tonnage of the ship with the addition of the amount deducted from the gross tonnage on account of engine room space for the purpose of ascertaining the net tonnage. In the case of a ship which cannot be measured in accordance with the normal rules of tonnage measurement, the ship's tonnage shall be deemed to be 40 per cent of the weight in tons (of 2240 lbs) of oil which the ship is capable of carrying.

11. the insurer or other person providing financial security shall be entitled to constitute a fund in accordance with this Article on the same conditions and having the same effect as if it were constituted by the owner. Such a fund may be constituted even in the event of the actual fault or privity of the owner but its constitution shall in that case not prejudice the rights of any claimant against the owner.

Article VI

1. Where the owner, after an incident, has constituted a fund in accordance with Article V, and is entitled to limit his liability,

(a) no person having a claim for pollution damage arising out of that incident shall be entitled to exercise any right against any other assets of the owner in respect of such claim;

(b) the Court or other competent authority of any Contracting State shall order the release of any ship or other property belonging to the owner which has been arrested in respect of a claim for pollution damage arising out of that incident, and shall similarly release any bail or other security furnished to avoid such arrest.

2. The foregoing shall, however, only apply if the claimant has access to the Court administering the fund and the fund is actually available in respect of his claim.

Article VII

1. The owner of a ship registered in a Contracting State and carrying more than 2,000 tons of oil in bulk as cargo shall be required to maintain insurance or other financial security, such as the guarantee of a bank or a certificate delivered by an international compensation fund, in the sums
fixed by applying the limits of liability prescribed in Article V, paragraph 1 to cover his liability for pollution damage under this Convention.

2. A certificate attesting that insurance or other financial security is in force in accordance with the provisions of this Convention shall be issued to each ship. It shall be issued or certified by the appropriate authority of the State of the ship's registry after determining that the requirements of paragraph 1 of this Article have been complied with. The certificate shall be in the form of the annexed model and shall contain the following particulars:

(a) name of ship and port of registration;

(b) name and principal place of business of owner;

(c) type of security;

(d) name and principal place of business of insurer or other person giving security and, where appropriate, place of business where the insurance or security is established;

(e) period of validity of certificate which shall not be longer than the period of validity of the insurance or other security.

3. The certificate shall be in the official language or languages of the issuing State. If the language used is neither English nor French, the text shall include a translation into one of these languages.

4. The certificate shall be carried on board the ship and a copy shall be deposited with the authorities who keep the record of the ship's registry.

5. An insurance or other financial security shall not satisfy the requirements of this Article if it can cease, for reasons other than the expiry of the period of validity of the insurance or security specified in the certificate under paragraph 2 of this Article, before three months have elapsed from the date on which notice of its termination is given to the authorities referred to in paragraph 4 of this Article, unless the certificate has been surrendered to these authorities or a new certificate has been issued within the said period. The foregoing provision shall similarly apply to any modification which results in the insurance or security no longer satisfying the requirements of this Article.

6. The State of registry shall, subject to the provisions of this Article, determine the conditions of issue and validity of the certificate.

7. Certificates issued or certified under the authority of a Contracting State shall be accepted by other Contracting States for the purposes of this Convention and shall be regarded by other Contracting States as having the same force as certificates issued or certified by them. A Contracting State may at any time request consultation with the State of a ship's registry should it believe that the insurer or guarantor named in the certificate is not financially capable of meeting the obligations imposed by this Convention.
8. Any claim for compensation for pollution damage may be brought directly against the insurer or other person providing financial security for the owner's liability for pollution damage. In such case the defendant may, irrespective of the actual fault or privity of the owner, avail himself of the limits of liability prescribed in Article V, paragraph 1. He may further avail himself of the defences (other than the bankruptcy or winding up of the owner) which the owner himself would have been entitled to invoke. Furthermore, the defendant may avail himself of the defence that the pollution damage resulted from the wilful misconduct of the owner himself, but the defendant shall not avail himself of any other defence which he might have been entitled to invoke in proceedings brought by the owner against him. The defendant shall in any event have the right to require the owner to be joined in the proceedings.

9. Any sum provided by insurance or by other financial security maintained in accordance with paragraph 1 of this Article shall be available exclusively for the satisfaction of claims under this Convention.

10. A Contracting State shall not permit a ship under its flag to which this Article applies to trade unless a certificate has been issued under paragraph 2 or 12 of this Article.

11. Subject to the provisions of this Article, each Contracting State shall ensure, under its national legislation, that insurance or other security to the extent specified in paragraph 1 of this Article is in force in respect of any ship, wherever registered, entering or leaving a port in its territory, or arriving at or leaving an off-shore terminal in its territorial sea, if the ship actually carries more than 2,000 tons of oil in bulk as cargo.

12. If insurance or other financial security is not maintained in respect of a ship owned by a Contracting State, the provisions of this Article relating thereto shall not be applicable to such ship, but the ship shall carry a certificate issued by the appropriate authorities of the State of the ship's registry stating that the ship is owned by that State and that the ship's liability is covered within the limits prescribed by Article V, paragraph 1. Such a certificate shall follow as closely as practicable the model prescribed by paragraph 2 of this Article.

Article VIII

Rights of compensation under this Convention shall be extinguished unless an action is brought thereunder within three years from the date when the damage occurred. However, in no case shall an action be brought after six years from the date of the incident which caused the damage. Where this incident consists of a series of occurrences, the six years' period shall run from the date of the first such occurrence.

Article IX

1. Where an incident has caused pollution damage in the territory including the territorial sea of one or more Contracting States, or preventive measures have been taken to prevent or minimize pollution damage in such territory including the territorial sea, actions for compensation may only be brought in the Courts of any such Contracting State or States. Reasonable notice of any such action shall be given to the defendant.
2. Each Contracting State shall ensure that its Courts possess the necessary jurisdiction to entertain such actions for compensation.

3. After the fund has been constituted in accordance with Article V the Courts of the State in which the fund is constituted shall be exclusively competent to determine all matters relating to the apportionment and distribution of the fund.

Article X

1. Any judgment given by a Court with jurisdiction in accordance with Article IX which is enforceable in the State of origin where it is no longer subject to ordinary forms of review, shall be recognized in any Contracting State, except:

(a) where the judgment was obtained by fraud; or

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

2. A judgment recognized under paragraph 1 of this Article shall be enforceable in each Contracting State as soon as the formalities required in the State have been complied with. The formalities shall not permit the merits of the case to be re-opened.

Article XI

1. The provisions of this Convention shall not apply to warships or other ships owned or operated by a State and used, for the time being, only on government non-commercial service.

2. With respect to ships owned by a Contracting State and used for commercial purposes, each State shall be subject to suit in the jurisdictions set forth in Article IX and shall waive all defences based on its status as a sovereign State.

Article XII

This Convention shall supersede any International Conventions in force or open for signature, ratification or accession at the date on which the Convention is opened for signature, but only to the extent that such Conventions would be in conflict with it; however, nothing in this Article shall affect the obligations of Contracting States to non-Contracting States arising under such International Conventions.

Article XIII

1. The present Convention shall remain open for signature until 31 December 1970 and shall thereafter remain open for accession.
2. States Members of the United Nations or any of the Specialized Agencies or of the International Atomic Energy Agency or Parties to the Statute of the International Court of Justice may become Parties to this Convention by:

(a) signature without reservation as to ratification, acceptance or approval;

(b) signature subject to ratification, acceptance or approval followed by ratification, acceptance or approval; or

(c) accession

Article XIV

1. Ratification, acceptance, approval or accession shall be effected by the deposit of a formal instrument to that effect with the Secretary-General of the Organization.

2. Any instrument of ratification, acceptance, approval or accession deposited after the entry into force of an amendment to the present Convention with respect to all existing Contracting States, or after the completion of all measures required for the entry into force of the amendment with respect to those Contracting States shall be deemed to apply to the Convention as modified by the amendment.

Article XV

1. The present Convention shall enter into force on the ninetieth day following the date on which Governments of eight States including five States each with not less than 1,000,000 gross tons of tanker tonnage have either signed it without reservation as to ratification, acceptance or approval or have deposited instruments of ratification, acceptance approval or accession with the Secretary-General of the Organization.

2. For each State which subsequently ratifies, accepts, approves or accedes to it the present Convention shall come into force on the ninetieth day after deposit by such State of the appropriate instrument.

Article XVI

1. The present Convention may be denounced by any Contracting State at any time after the date on which the Convention comes into force for that State.

2. Denunciation shall be effected by the deposit of an instrument with the Secretary-General of the Organization.

3. A denunciation shall take effect one year, or such longer period as may be specified in the instrument of denunciation, after its deposit with the Secretary-General of the Organization.

Article XVII
1. The United Nations, where it is the administering authority for a territory, or any Contracting State responsible for the international relations of a territory, shall as soon as possible consult with the appropriate authorities of such territory or take such other measures as may be appropriate, in order to extend the present Convention to that territory and may at any time by notification in writing to the Secretary-General of the Organization declare that the present Convention shall extend to such territory.

2. The present Convention shall, from the date of receipt of the notification of from such other date as may be specified in the notification, extend to the territory named therein.

3. The United Nations, or any Contracting State which has made a declaration under paragraph 1 of this Article may at any time after the date on which the Convention has been so extended to any territory declare by notification in writing to the Secretary-General of the Organization that the present Convention shall cease to extend to any such territory named in the notification.

4. The present Convention shall cease to extend to any territory mentioned in such notification one year, or such longer period as may be specified therein, after the date of receipt of the notification by the Secretary-General of the Organization.

Article XVIII

1. A Conference for the purpose of revising or amending the present Convention may be convened by the Organization.

2. The Organization shall convene a Conference of the Contracting States for revising or amending the present Convention at the request of not less than one-third of the Contracting States.

Article XIX

1. The present Convention shall be deposited with the Secretary-General of the Organization.

2. The Secretary-General of the Organization shall:

(a) inform all States which have signed or acceded to the Convention of:

(i) each new signature or deposit of instrument together with the date thereof;

(ii) the deposit of any instrument of denunciation of this Convention together with the date of the deposit;

(iii) the extension of the present Convention to any territory under paragraph 1 of Article XVII and of the termination of any such extension under the provisions of paragraph 4 of that Article stating in each case the date on which the present Convention has been or will cease to be so extended;
(b) transmit certified true copies of the present Convention to all Signatory States and to all States which accede to the present Convention.

Article XX

As soon as the present Convention comes into force, the text shall be transmitted by the Secretary-General of the Organization to the Secretariat of the United Nations for registration and publication in accordance with Article 102 of the Charter of the United Nations.

Article XXI

The present Convention is established in a single copy in the English and French languages, both texts being equally authentic. Official translations in the Russian and Spanish languages shall be prepared and deposited with the signed original.

IN WITNESS WHEREOF the undersigned being duly authorized by their respective Governments for that purpose have signed the present Convention.

DONE at Brussels this twenty-ninth day of November 1969.

ANNEX

CERTIFICATE OF INSURANCE OR OTHER FINANCIAL SECURITY IN RESPECT OF CIVIL LIABILITY FOR OIL POLLUTION DAMAGE

Issued in accordance with the provisions of Article VII of the International Convention on Civil Liability for Oil Pollution Damage, 1969.

<table>
<thead>
<tr>
<th>Name of ship</th>
<th>Distinctive number or letters</th>
<th>Port of registry</th>
<th>Name and address of owner</th>
</tr>
</thead>
</table>

This is to certify that there is in force in respect of the above-named ship a policy of insurance or other financial security satisfying the requirements of Article VII of the International convention on civil Liability for Oil Pollution Damage, 1969.

Type of Security

Duration of Security

Name and Address of the Insurer(s) and/or Guarantor(s)
Name

Address

This certificate is valid until

Issued or certified by the Government of

(Full designation of the State)

At On

(Place) (Date)

Signature and Title of issuing or certifying official.

Explanatory Notes:

1. If desired, the designation of the State may include a reference to the competent public authority of the country where the certificate is issued.

2. If the total amount of security has been furnished by more than one source, the amount of each of them should be indicated.

3. If security is furnished in several forms, these should be enumerated.

4. The entry "Duration of Security" must stipulate the date on which such security takes effect. [Explanatory Notes appeared in original text.]

Source: The Admiralty and Maritime Law Guide at:
2016 FINANCIAL STATEMENTS AND AUDITOR’S REPORT AND OPINION

INTERNATIONAL OIL POLLUTION COMPENSATION FUND 1992 (1992 FUND)

Note by the Director

**Summary:**
As indicated in document IOPC/OCT17/5/6, the 1992 Fund Financial Statements and the Auditor’s Report and Opinion are set out.

**Action to be taken:**
1992 Fund Assembly
Approval of 2016 Financial Statements.

1

**Introduction**

1.1 In accordance with Article 29.2(f) of the 1992 Fund Convention, the Director has prepared the Financial Statements of the 1992 Fund for the financial year 2016. The Director has also prepared comments on the Financial Statements. These comments are at Annex I. Attached to that Annex is a summary of the External Auditor’s recommendations from the current and prior financial years and the actions taken on those recommendations.

1.2 In keeping with best practice the Director has included a Statement on Internal Control which provides positive confirmation of the internal control framework. The statement is at Annex II.

1.3 The Financial Statements of the 1992 Fund are audited by BDO LLP.


1.5 Under Financial Regulation 14.16 the External Auditor shall express an opinion on the Financial Statements on which it is reporting. This Opinion is at Annex IV.

1.6 Staff Regulation 26(b) provides that the Director shall establish and operate a Provident Fund to which both the 1992 Fund and staff members shall contribute on such terms and conditions as may be approved by the 1992 Fund Assembly. Under Staff Rule VIII.5(g), the auditing of the Provident Fund shall be carried out in conjunction with the annual audit of the accounts of the 1992 Fund.

1.7 The 2016 Financial Statements have been prepared in accordance with the International Public Sector Accounting Standards (IPSAS) as prescribed by Financial Regulation 12.1.
1.8 The certified Financial Statements for the financial period 1 January to 31 December 2016 are at Annex V and consist of the following:

Statement I  Statement of Financial Position at 31 December 2016
Statement II Statement of Financial Performance for the year ended 31 December 2016
Statement IV Statement of Cash Flow for the year ended 31 December 2016
Statement V Statement of Comparison of Budget and Actual Amounts for the year ended 31 December 2016

1.9 In addition to the Financial Statements submitted, such notes as may be necessary for a better understanding of the Financial Statements, including a statement of the significant accounting policies, are attached.

2  Action to be taken

1992 Fund Assembly

The 1992 Fund Assembly is invited to consider the External Auditor’s Report and Opinion and to approve the Financial Statements for the financial period 1 January to 31 December 2016.

***
ANNEX I

INTERNATIONAL OIL POLLUTION COMPENSATION FUND 1992

DIRECTOR'S COMMENTS ON THE
FINANCIAL STATEMENTS FOR THE FINANCIAL PERIOD
1 JANUARY TO 31 DECEMBER 2016

1 Introduction

1.1 The International Oil Pollution Compensation Funds (IOPC Funds) are intergovernmental organisations which provide compensation for oil pollution damage resulting from spills of persistent oil from tankers. The International Oil Pollution Compensation Fund 1992 (1992 Fund) which entered into force on 30 May 1996 was set up under the 1992 Fund Convention.

1.2 The maximum amount of compensation payable under the 1992 Conventions for any one incident is SDR 135 million\(^{1}\) in respect of incidents occurring before 1 November 2003 and SDR 203 million for incidents occurring after that date. These amounts, which as at 31 December 2016 corresponded to £147 million and £222 million respectively, include the sum which may be attributed to the shipowner or their insurer (Protection and Indemnity Club (P&I Club)).

1.3 At its February/March 2006 session, the 1992 Fund Assembly took note of a voluntary agreement, the Small Tanker Oil Pollution Indemnification Agreement (STOPIA) 2006, under which the shipowner/P&I Clubs would reimburse the 1992 Fund for part of the compensation payable by the Fund under the 1992 Fund Convention. The effect of STOPIA 2006 is that the maximum amount of compensation payable by owners of all ships of 29 548 gross tonnage or less is SDR 20 million. This voluntary agreement is applicable to the Solar 1 incident which occurred in 2006, Haekup Pacific incident in 2013, and the Trident Star incident in 2016.

1.4 The 1992 Fund has an Assembly composed of all Member States and an Executive Committee of 15 Member States elected by the Assembly. The Assembly is the supreme governing body of the organisation having, inter alia, the responsibility for financial matters. The main function of the Executive Committee is to approve settlement of claims for compensation when either the Director is not authorised to make settlements or when the Director seeks policy approval on specific aspects of a claim.

1.5 The 1992 Fund is financed by contributions paid by any person who has received in the relevant calendar year in excess of 150 000 tonnes of crude oil or heavy fuel oil (contributing oil) in ports or terminal installations in a Member State after carriage by sea. The levy of contributions is based on reports of oil receipts in respect of individual contributors, which are submitted to the Secretariat by governments of Member States.

1.6 As at 31 December 2016, 114 States were Members of the 1992 Fund (see Attachment I).

---

\(^{1}\) The SDR (Special Drawing Right), which is the unit of account used in the Conventions referred to in paragraph 1.2, is valued on the basis of a basket of key International currencies and serves as the unit of account of the International Monetary Fund and a number of other intergovernmental organisations.

IOPC/OCT17/5/6/1, Annex I, Page 1
2 Secretariat

2.1 The 1992 Fund has a Secretariat, based in London, headed by a Director. The 1992 Fund Secretariat also administers the International Oil Pollution Compensation Supplementary Fund (Supplementary Fund). As at 31 December 2016 the Secretariat had 34 established posts.

2.2 Key management personnel consist of the Director, Deputy Director/Head of the Finance and Administration Department, the Head of the External Relations and Conference Department, the Head of the Claims Department, and the Legal Counsel. Related party disclosures in line with IPSAS requirements are included in the notes to the Financial Statements.

2.3 The Director of the 1992 Fund is ex officio also the Director of the Supplementary Fund, and is assisted by a Management Team in the day-to-day running of the joint Secretariat.

2.4 The 1992 Fund uses external consultants to provide advice on legal and technical matters as well as on matters relating to management.

2.5 In connection with a number of major incidents, the Fund and the shipowner’s third party liability insurer have established joint local claims offices to facilitate the efficient handling of the great number of claims submitted and to assist claimants generally.

2.6 A local claims office was in operation in 2016 with respect to the Prestige incident which ensured smooth communication between the Fund and the claimants, technical experts, and lawyers with respect to the claims.

3 Audit Body

3.1 The governing bodies of the IOPC Funds have established a joint Audit Body for the Funds composed of seven members elected by the 1992 Fund Assembly: one named Chairman nominated by 1992 Fund Member States, five named individuals nominated by 1992 Fund Member States and one external expert with experience in audit matters nominated by the Chairman of the 1992 Fund Assembly.

3.2 In October 2014, the 1992 Fund Assembly elected a new Audit Body for a three-year term made up of the full complement of members.

3.3 The Audit Body normally meets three times a year. In 2016 it met in April, June, and December.

4 Investment Advisory Body

4.1 The governing bodies of the IOPC Funds have established a joint Investment Advisory Body (IAB), consisting of three experts with specialist knowledge in investment matters elected by the 1992 Fund Assembly to advise the Director in general terms on such matters.

4.2 The IAB normally meets four times a year. In 2016 it met in March, May, September, and November.

5 Financial risk management

5.1 The IOPC Funds’ risk register consists of two categories of risk, namely: operational risk and institutional risk. Under operational risk five areas of risk have been identified which are finance/contributions, governance/management, compensation, safety/security, and communications/publications. The sub-risks, the process and procedures for management of these risks have been mapped, assessed and documented. This exercise allows the IOPC Funds to
prioritise the key risks and to ensure that these risks have been adequately mitigated and managed. Annual reviews are conducted of the IOPC Funds’ risk register by the management and of the Key Risk Register by the Audit Body.

5.2 The 1992 Fund has established a framework of internal control as set out in the Statement on Internal Control (Annex II).

5.3 The 1992 Fund’s financial risk management policies focus on securing the Fund’s assets, maintaining sufficient liquid funds for the operation of the Fund, avoiding undue currency risks and obtaining a reasonable return. Financial risk is managed using the Internal Investment and Hedging Guidelines approved by the Director, which have been developed in accordance with advice from the IAB. Established policies cover areas of financial risk such as foreign exchange, interest rate and credit risk, the use of financial instruments, and the investing of excess liquid funds.

5.4 The 1992 Fund’s credit risk is spread widely and its investment policy limits the amount of credit exposure to any one counterparty and includes minimum credit quality guidelines.

6 Financial overview

6.1 2016 Financial Statements—Statement of Financial Position (Statement I)

Assets and liabilities

(a) The 1992 Fund’s cash assets at the end of the 2016 financial period, amounting to some £137 million, were held in pounds sterling (44%) and Euro (13%) in respect of the Prestige incident, Korean won (40%) in respect of the Hebei Spirit incident and Russian roubles (3%) in respect of the Volgoneft 139 incident.

(b) Outstanding contributions due to the 1992 Fund as at 31 December 2016 totalled some £1 million (some £243 000 net of provision of £762 000) representing 0.18% of the total amount levied of £546 million since inception.

(c) Provision in respect of contributions and accrued interest on contributions due from contributors of £932 683 (2015 Financial Statements—£952 846) has been made as set out below.

(i) In total a provision for £833 411 has been created for contributions and interest on contributions due from contributors in the Russian Federation.

Provision includes amounts due from two contributors in the Russian Federation where legal action had been commenced in 2011. The final judgments rendered by the Russian courts were not in the Fund’s favour except for partial recovery from one contributor. The provision for the balance has been retained together with interest on overdue contributions for 2016 as the Secretariat is awaiting a response from the authorities in the Russian Federation with respect to the outstanding amounts.

Provision has also been created for amounts involved in two further legal actions commenced in 2014 in the Russian Federation. One of the legal actions was to recover further contributions due from the contributor involved in the legal action commenced in 2011. The contributions and interest on the overdue contributions up to the date of commencement of legal action has been recovered.

In the second legal action based on the judgment full recovery of the contributions and interest up to commencement of legal action has been received in 2016. Further IOPC/OCT17/5/6/1, Annex I, Page 3
contributions not part of the legal action against this contributor has been received in early 2017.

(ii) Provision also includes £51 500 which is due in contributions from Petroplus companies that have gone into liquidation. Contributions are due from these contributors in the United Kingdom and France. Interim dividends have been received in 2016 of £3 820. An amount of £16 149 due from Petroplus in Switzerland was rejected by the liquidator on the grounds that the refinery in France was not the same entity as the holding company in Switzerland. Also included is contributions of £1 694 due from a contributor in Denmark and £46 078 in contributions and interest due from a contributor in Morocco both of whom have been declared bankrupt.

(d) Other receivables amounting to £489 100 includes amounts due for joint costs in relation to the Prestige and Hebei Spirit incidents from the respective P&I Clubs of £175 299, and taxes recoverable of £143 444 from the United Kingdom, French, and Spanish Governments. Miscellaneous receivables includes the overpayment to three private claimants of RUB 8 738 171 (£115 847). These claimants were paid full compensation in accordance with the decision of the Executive Committee in April 2013 based on the June 2012 Court decision. In a judgment delivered in November 2014, the Arbitration Court of Saint Petersburg and Leningrad Region decided that the ‘insurance gap’ should be allocated between all the claimants (private and government) on an equal basis. In order to recover the amounts overpaid to the three private claimants, the 1992 Fund had applied for the reversal of the execution of the 2012 judgment which was granted in October 2016. A provision for miscellaneous receivable has also been made for the overpayment of compensation to the three private claimants in the Volgoneft 139 incident. Also included under other receivables is accrued interest on investments and contributions.

(e) At its first session, the 1992 Fund Assembly instructed the Director to carry out the tasks necessary for the setting up of the International Hazardous and Noxious Substances Fund (HNS Fund) as requested by the HNS International Conference (document 92FUND/A.1/34, paragraphs 33.1.1–33.1.3) on the basis that any related expenses would be treated as loans from the 1992 Fund. An amount of £341 551 (including interest of £36 411) is due from the HNS Fund when established. This amount includes loans of £26 656 made from the General Fund in 2016.

(f) Provision for compensation has been made for claims received before 31 December 2016, assessed and approved but not paid by 31 December 2016. With respect to the Hebei Spirit incident provision also includes claims in court for compensation made before 31 December 2016 where final judgment has been made but not paid by 31 December 2016. A total provision of £64 157 256 (2015 Financial Statements – £68 487 495) has been made in 2016 as follows:

<table>
<thead>
<tr>
<th>Incident</th>
<th>OMR 44 702.90</th>
<th>£93 953</th>
</tr>
</thead>
<tbody>
<tr>
<td>Prestige incident</td>
<td>€84 781</td>
<td>£72 370</td>
</tr>
<tr>
<td>Volgoneft 139</td>
<td>RUB 244 836 997</td>
<td>£3 245 935</td>
</tr>
<tr>
<td>Hebei Spirit</td>
<td>KRW 90 529 626 414</td>
<td>£60 659 637</td>
</tr>
<tr>
<td>Alfa I incident</td>
<td>€100 000</td>
<td>£85 361</td>
</tr>
</tbody>
</table>

(g) Provision for employee benefits (short-term and long-term) of £564 180 (2015 Financial Statements – £485 189) has been made for accrued annual leave and separation benefits.
(h) Contributors’ account has a balance of £765 279 (2015 Financial Statements – £1 202 730) made up of reimbursement of contributions in accordance with the Assembly’s decisions and net overpayments by contributors. Contributors have been informed by the Secretariat of their credit balances but some contributors have decided to retain the amounts with the 1992 Fund to be offset against the future levy of contributions.

(i) The Provident Fund is made up of two elements, namely Provident Fund (PF1), which is invested with the 1992 Fund assets, and the newly introduced Provident Fund (PF2), which is managed by an independent financial broker in the name of the 1992 Fund. Participation in PF2 is entirely voluntary and new staff members can only participate in PF2 after completing one year of service in the Secretariat. Investing in PF2 is to be made only from the cash balance available in PF1. There is no possibility of investing private funds in PF2. All fees paid by those participating in PF2 are based on the proportion of their investment in PF2.

The PF1 had a balance of £3 688 691 (2015 – £4 228 157) on the accounts of staff members as at 31 December 2016. This balance reflects contributions to the Provident Fund during the financial year, transfer to PF2, withdrawals and repayments of housing loans, withdrawals on separation and interest earned (£35 957) on the investment of the assets of the Provident Fund (see Note 14 to the Financial Statements).

A transfer of £763 000 was made by staff members from PF1 to PF2 in 2016. Value of the funds in PF2 was £1 360 359 on the 31 December 2016.

(j) The net assets position presented in Statement I shows a closing net balance position of £67 375 843, a decrease of £19 977 027 from the balance on 31 December 2015 of £87 352 870.

7 2016 Financial Statements – Statement of Financial Performance (Statement II)

7.1 Revenue and expenses

In 2016, total revenue was some £7.2 million and total expense was some £27.1 million.

(a) With regards to contributions, the 1992 Fund Assembly decided in October 2015 to levy £4.4 million to the General Fund payable in 2016.

(b) Contributions-in-kind (£324 152) is the reimbursement received from the United Kingdom Government of 80% of the rent of the Secretariat offices in Portland House and after relocation in 2016, rent of the office in the International Maritime Organization (IMO) building.

(c) Compensation payments during 2016 amounted to some £36.6 million. The payments related mainly to the Hebei Spirit incident of some £24 million and some £10.8 million in respect of the Alfa I incident.

(d) There was a decrease in provision for compensation payments of some £4.3 million, mainly comprising of an increase of £4.7 million in relation to the Hebei Spirit incident due to claims submitted before 31 December 2016 but not yet paid as at 31 December 2016 and decrease in provision made in respect of Alfa I in 2015 of some £8.8 million which was paid in 2016. Compensation was partly paid by the General Fund (£3 732 420 being the balance of SDR 4 million) and balance by the Alfa I Major Claims Fund. Since the Alfa I Major Claims Fund had no assets, payment of compensation was made from a loan provided by the General Fund.
(e) Claims-related expenditure incurred in 2016 amounted to some £3 million mainly with respect to the *Hebei Spirit* incident (£2.2 million).

Under the Memorandum of Understanding (MoU) with the International Group of P&I Clubs, in 2016 the relevant P&I Clubs’ share of joint costs amounted to £356 917, made up of £19 264 and £337 653 for the *Prestige* and *Hebei Spirit* incidents, respectively.

These amounts have been offset against claims-related expenditure resulting in net expenditure of £2.6 million.

(f) The total administrative expenses for 2016 in the Statement of Financial Performance is £4 478 098 (2015 – £4 435 903) made up of staff and other personnel costs of £2 780 970 (2015 – £2 643 510), other administrative costs, excluding relocation cost, of £1 697 128 (2015 – £1 792 393). The expenses included in the Statement of Financial Performance are based on the requirement of the accounting standards and relate to the 1992 Fund only.

<table>
<thead>
<tr>
<th>Expenses included</th>
<th>£</th>
</tr>
</thead>
<tbody>
<tr>
<td>Statement of Financial Performance</td>
<td>4 478 098</td>
</tr>
<tr>
<td><strong>Less:</strong></td>
<td></td>
</tr>
<tr>
<td>In accordance with IPSAS:</td>
<td></td>
</tr>
<tr>
<td>Accommodation costs reimbursed by the United Kingdom</td>
<td></td>
</tr>
<tr>
<td>Government</td>
<td>324 152</td>
</tr>
<tr>
<td>Depreciation and amortisation</td>
<td>47 143</td>
</tr>
<tr>
<td>Adjustment to provision for employee benefits</td>
<td>78 991</td>
</tr>
<tr>
<td><strong>1992 Fund expense only:</strong></td>
<td></td>
</tr>
<tr>
<td>External Auditor’s fees – Chapter VI</td>
<td>50 000</td>
</tr>
<tr>
<td><strong>Add:</strong> Fixed asset purchase – Chapter II</td>
<td></td>
</tr>
<tr>
<td>Joint Secretariat expenses on budget basis (paragraph 7.1(h))</td>
<td>3 985 620</td>
</tr>
</tbody>
</table>

(g) The budget for running of the joint Secretariat is prepared on a modified cash basis. The total joint Secretariat expenses on a comparable basis to the budget amounts to £3 985 620 (see paragraph (h) below). This amount is 9.6% less than the 2016 budget appropriation of £4 407 360.

(h) Expenses for running the joint Secretariat were made under six chapters (Statement of Comparison of Budget and Actual Amounts – Statement V) as set out in the table below:

<table>
<thead>
<tr>
<th>Chapter</th>
<th>2016 Budget appropriations £</th>
<th>2016 Budget out-turn £</th>
<th>Underspend/(overspend) as % of original budget appropriations</th>
</tr>
</thead>
<tbody>
<tr>
<td>I Personnel</td>
<td>2 942 160</td>
<td>2 701 979</td>
<td>8.2</td>
</tr>
<tr>
<td>II General services</td>
<td>777 200</td>
<td>645 381</td>
<td>17.0</td>
</tr>
<tr>
<td>III Meetings</td>
<td>110 000</td>
<td>109 426</td>
<td>0.5</td>
</tr>
<tr>
<td>IV Travel</td>
<td>100 000</td>
<td>95 753</td>
<td>4.2</td>
</tr>
<tr>
<td>V Miscellaneous expenditure</td>
<td>418 000</td>
<td>372 200</td>
<td>11.0</td>
</tr>
<tr>
<td>VI Unforeseen expenditure</td>
<td>60 000</td>
<td>60 881</td>
<td>(1.5)</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td><strong>4 407 360</strong></td>
<td><strong>3 985 620</strong></td>
<td></td>
</tr>
</tbody>
</table>

Two transfers were made between chapters in accordance with the authority provided to the Director under Financial Regulation 6.3.
I Personnel

Expenditure under Personnel covers salaries, separation/recruitment, staff benefits/allowances, and training which accounts for 69% of the total administrative expenditure. As stated above the increase in provision for employee benefits is not included in the budget out-turn figure.

II General services

Of the expenses under this chapter some 40% relates to office accommodation, 30% to office machines and 15% to public information (includes website and publications costs).

The 1992 Fund Secretariat relocated to the IMO Headquarters building in 2016. On 15 February 2016, the Secretary-General of IMO and the Director of the IOPC Funds signed an agreement whereby IMO agrees to underlet office space on the first floor rear wing in its Headquarters building to the IOPC Funds. The term of the lease entered into effect on 1 March 2016 and will expire on 25 October 2032. The rent has been fixed at £258 000 per annum with a break on 31 October 2024.

The United Kingdom Government meets 80% of the costs related to the rental space of the Secretariat offices in the IMO Headquarters building.

The budget out-turn includes the cost of purchase of fixed assets amounting to £7 808 whereas the Statement of Financial Performance (Statement II) includes only the depreciation and amortisation cost of £47 143 in line with IPSAS.

Costs under this chapter make up 16% of the total administrative expenditure.

III Meetings

In 2016 the IOPC Funds governing bodies held eight days of meetings over two sessions.

Costs under this chapter make up 3% of the total administrative expenditure.

IV Travel

Where possible, costs incurred by travel to various conferences and seminars and to hold workshops on claims handling is shared with travel in relation to incidents. Budgeting for travel is difficult as invitations for conferences and seminars are not normally provided in time to be included in the preparation of the budget.

Costs under this chapter make up 2.4% of the total administrative expenditure.

V Miscellaneous expenditure

Expenses under this chapter include consultants’ fees which amounted to £122 534. Consultant’s fees include non-incident related studies and legal fees in pursuing contributors in the Russian Federation.

VI Unforeseen expenditure

Expense under this chapter amounted to £60 881 related to the Plate Princess incident. The amount of legal costs was awarded to the 1992 Fund by the Court in 2015 and off set against legal
consultancy costs. In 2016 it has been decided that the Fund should not pursue enforcement of the judgment (i.e. the recovery of the costs) against the Puerto Miranda Union. It would involve enforcing the judgment in Venezuela and there is no Treaty in place between the United Kingdom and Venezuela on the enforcement of judgments.

1992 Fund expense only:

VII  External audit fees

The External audit fees paid in 2016 for the audit of the 1992 Fund’s 2015 Financial Statements amounted to £50 000. This was in excess of the budget of £47 500. The increase in fees was for additional work involved in the handover by the outgoing auditor.

VIII  Relocation costs

The Secretariat was relocated to the IMO Headquarters building in July 2016 following the termination of the lease in Portland House.

Within the budgets of the years 2014 to 2016 an amount of £250 000 had been set aside each year to cover the cost of relocation to spread the burden on the contributors. The total cost of relocation was £744 075 against the budget of £750 000.

The following table provides a breakdown of costs in each of the years.

<table>
<thead>
<tr>
<th>Budget year</th>
<th>BUDGET APPROPRIATIONS</th>
<th>BUDGET OUT-TURN</th>
<th>BALANCE OF APPROPRIATIONS</th>
</tr>
</thead>
<tbody>
<tr>
<td>2014</td>
<td>250 000</td>
<td>35 859</td>
<td>214 141</td>
</tr>
<tr>
<td>2015</td>
<td>250 000</td>
<td>26 115</td>
<td>223 885</td>
</tr>
<tr>
<td>2016</td>
<td>250 000</td>
<td>682 101</td>
<td>(432 101)</td>
</tr>
<tr>
<td>TOTAL</td>
<td>750 000</td>
<td>744 075</td>
<td>5 925</td>
</tr>
</tbody>
</table>

7.2  General Fund and Major Claims Funds’ balances

7.2.1  The General Fund balance on 31 December 2016 was £17 446 504, which is lower than the working capital of £22 million set by the 1992 Fund Assembly at its October 2004 session. The working capital is established to ensure that the 1992 Fund is in a position to meet compensation and claims-related expenses which have not been foreseen and may occur between the regular sessions of the governing bodies.

The balances on the respective Major Claims Funds are specific to incidents. The balances on the established Major Claims Funds are as follows:

<table>
<thead>
<tr>
<th>Major Claims Fund</th>
<th>£</th>
</tr>
</thead>
<tbody>
<tr>
<td>Prestige</td>
<td>26 063 584</td>
</tr>
<tr>
<td>Volgoneft 139</td>
<td>3 411 470</td>
</tr>
<tr>
<td>Hebei Spirit</td>
<td>27 796 868</td>
</tr>
<tr>
<td>Alfa I</td>
<td>(7 342 583)</td>
</tr>
</tbody>
</table>

7.2.2  The contingent liabilities as at 31 December 2016 were estimated at some £46.3 million in respect of 12 incidents. Further details on the incidents are provided in Note 27 to the 2016 Financial Statements.
7.2.3 A schedule of compensation and claims-related expenditure incurred in respect of incidents involving the 1992 Fund is provided at Attachment II. Since the adoption of IPSAS in 2010, costs in the schedule are shown on an accruals basis.

7.2.4 A summary of the total compensation and claims-related expenditure, excluding provision, (from both the General Fund (up to SDR 4 million) and the Major Claims Fund established for the incident) is as follows:

<table>
<thead>
<tr>
<th>Incident</th>
<th>Date of incident</th>
<th>Compensation £</th>
<th>Claims-related expenses £</th>
<th>Total £</th>
</tr>
</thead>
<tbody>
<tr>
<td>Prestige</td>
<td>13.11.02</td>
<td>83 119 382</td>
<td>23 007 214</td>
<td>106 126 596</td>
</tr>
<tr>
<td>Solar 1*</td>
<td>11.08.06</td>
<td>6 491 623</td>
<td>227 469</td>
<td>6 719 092</td>
</tr>
<tr>
<td>Volgoneft 139</td>
<td>11.11.07</td>
<td>1 837 310</td>
<td>1 205 231</td>
<td>3 042 541</td>
</tr>
<tr>
<td>Hebeil Spirit</td>
<td>07.12.07</td>
<td>35 966 403</td>
<td>34 834 414</td>
<td>70 800 817</td>
</tr>
<tr>
<td>Incident in Argentina</td>
<td>26.12.07</td>
<td>-</td>
<td>242 339</td>
<td>242 339</td>
</tr>
<tr>
<td>Redferm</td>
<td>30.03.09</td>
<td>-</td>
<td>68 116</td>
<td>68 116</td>
</tr>
<tr>
<td>JS Amazing</td>
<td>06.06.09</td>
<td>-</td>
<td>79 537</td>
<td>79 537</td>
</tr>
<tr>
<td>Haekup Pacific*</td>
<td>20.04.10</td>
<td>-</td>
<td>16 058</td>
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<td>-</td>
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* Under STOPIA 2006

8 **Sustainability**

8.1 The 1992 Fund Convention provides the 1992 Fund Assembly the authority to levy contributions that may be required to balance the payments to be made by the 1992 Fund. It also places an obligation on the contributors to make payment by a due date or bear interest on any arrears.

8.2 Based on the net assets held at the end of the period and the generally high percentage of receipt of the contributions levied by the due date, the going concern basis has been adopted in preparing the 1992 Fund’s Financial Statements.

9 **External Auditor’s recommendations from previous financial years and for 2016**

9.1 The External Auditor’s recommendations for the 2016 financial year and the Director’s response thereto are set out in Attachment III to this Annex.

9.2 Appropriate action has been/is being taken on all previous financial years’ recommendations.

***

Jose Maura
Director
23 June 2017

IOPC/OCT17/5/6/1, Annex I, Page 9
### ATTACHMENT I

**States Parties to both the 1992 Civil Liability Convention and the 1992 Fund Convention as at 31 December 2016 (114 States)**

<table>
<thead>
<tr>
<th>Country</th>
<th>Country</th>
<th>Country</th>
</tr>
</thead>
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<td>Guinea</td>
<td>Papua New Guinea</td>
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<td>India</td>
<td>Portugal</td>
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<td>Iran (Islamic Republic of)</td>
<td>Qatar</td>
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<td>Ireland</td>
<td>Republic of Korea</td>
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<td>Saint Lucia</td>
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<td>Saint Vincent and the Grenadines</td>
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<td>Samoa</td>
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<td>Sierra Leone</td>
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**<sup>2</sup>** The 1992 Fund Convention applies to the Hong Kong Special Administrative Region only.
## ATTACHMENT II

**Claims and claims-related expenditure**  
**as at 31 December 2016**  
*(Figures in pounds sterling)*

<table>
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<tr>
<th>Incident</th>
<th>Year</th>
<th>Compensation £</th>
<th>Legal fees £</th>
<th>Technical fees £</th>
<th>Various fees £</th>
<th>Other £</th>
<th>Total £</th>
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<td>-</td>
<td>(19 264)</td>
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<td>141 183</td>
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<td>-</td>
<td>(92 062)</td>
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<td>(218 703)</td>
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<td>-</td>
<td>(171 669)</td>
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<td>-</td>
<td>(20 135)</td>
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<td>-</td>
<td>(2 144 000)</td>
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<td>1 244 384</td>
<td>524 757</td>
<td>106 126 596</td>
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</table>

**Cofor J**  
*(Under STOPIA 2006)<sup>**cd**</sup>*

<table>
<thead>
<tr>
<th>Incident</th>
<th>Year</th>
<th>Compensation £</th>
<th>Legal fees £</th>
<th>Technical fees £</th>
<th>Various fees £</th>
<th>Other £</th>
<th>Total £</th>
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<td>8 692</td>
<td>636</td>
<td>-</td>
<td>897</td>
<td>28 022</td>
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<td>-</td>
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<td>2 005 194</td>
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Total to date                   |       | 6 491 623     | 107 007     | 5 091            | 3 046         | 112 325 | 6 719 092|

<sup>cd</sup> Joint costs reimbursement by P&I Club.  
<sup>**cd**</sup> Compensation payments reimbursed by the P&I Club under STOPIA 2006.
<table>
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<tr>
<th>Incident</th>
<th>Year</th>
<th>Compensation £</th>
<th>Legal fees £</th>
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*$5 million (£3,137,550) received as a result of legal settlement between the 1992 Fund and the P&I Club with Samsung Heavy Industries and Samsung C&T Corporation. The amount is accounted under “Other revenue” in 2012.*

IOPC/OCT17/5/6/1, Annex I, Page 12, Attachment II
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