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WORLD MARITIME UNIVERSITY
Malmö, Sweden

**THE LEGAL AND PRACTICAL ASPECTS OF
PLACES OF REFUGE
IN THE CONTEXT OF SALVAGE**

By

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People's Republic of China

A Dissertation submitted to the World Maritime University in partial
Fulfilment of the requirement for the award of the degree of

MASTER OF SCIENCE

In

MARITIME AFFAIRS

(MARITIME ADMINISTRATION)

2005

DECLARATION

I certify that all the materials in this dissertation that is not my own work has been identified, and that no material is included for which a degree has been previously been conferred on me.

The content of this dissertation reflect my own personal views, and are not necessarily endorsed by the University.

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ABSTRACT

Title : The legal and practical aspects of places of refuge in the context of salvage
Degree: Msc

The dissertation is a study of the issue of places of refuge with emphasis placed on salvage-related matters.

Apparently the question of whether ships in distress shall be allowed to enter places of refuge has its answer in whether these ships have such a right, and whether Coastal States have the obligations to allow entrance. However current international law regime seems unable to provide an unequivocal answer.

Let alone the legal issues, no easy answer can be found as to, from a practical point of view, what are the desirable actions expected to be taken by respective parties. Ongoing debates have led to some solutions in order to achieve a harmonized practice, represented by the IMO Guidelines, which aim at providing a standard rule of behaviour to be followed by those involved.

However, it is necessary to examine to what degree such solutions have removed current obstacles which hamper the achievement of an optimal result – while the criteria for the term ‘optimal’ is questionable in itself. Furthermore, some elements might have influence on the degree to which such solutions are actually adopted by decision-makers, and these elements need to be considered in details.

Among others salvage related issues are prominent components that make the situation complex and at variance. Salvage is, self-evidently, deeply intertwined with shipping accidents, pollution prevention, state interventions, and places of refuge. Diversities in the appreciation of the term ‘salvage’ and in different national policies in this regard, as well as the possible conflict between the private salvors’ interests and the public implication of salvage operations, can not be ignored.

The purpose of the ongoing debate is to find an answer as to what respective parties are legally bound to do, and what should they do from a practical point of view, to achieve a ‘best’ result when a place of refuge becomes probably necessary following an accident at sea; so is the aim of this essay. It will start with the respective legal rights and obligations of parties involved and their interests at risk, followed by an analysis of the conflicts of interests and some protruding problems, as well as a review of some of the current approaches and proposals, and then tries to put forward further suggestions accordingly.

KEYWORDS : places of refuge, salvage, accidents at sea, intervention, marine pollution, risk assessment.

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The Long Lin [1995] *Schip en schade* 391, No. 95.

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Pathe Screen Entertainment Ltd. V. Handmade Films (Distributors) Ltd. (21st June 1991, unreported),

Saudi Arabia v. Aramco 27 ILR (1963), 117.

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Semco Salvage and Marine Pte. Ltd. v. lancer Navigation Co. Ltd. (The NAGASAKI SPIRIT) [1997] 1 Lloyd's Rep. 323 (H.L.)

LIST OF ABBREVIATIONS

52 Arrest Convention	International Convention for the Unification of Certain Rules relating to the Arrest of Seagoing Ships, 1952
79 SAR Convention	International Convention on Maritime Search and Rescue, 1979
93 Lien Convention	International Convention on Maritime Lien and Mortgage 1993
99 Arrest Convention	International Convention on Arrest of Ships, 1999
ABS	The American Bureau of Shipping
BP	Bollard Pull (tonnes)
CLC Convention	The International Convention on Civil Liability for Oil Pollution Damage, 1969, and Protocol 1992
CMI	Comite Maritime International
COTP	Captain of the Port (US)
Dumping Convention	The Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Materials, 1972
EEZ	Exclusive Economic Zone
EU	European Union
Fund / IOPC Fund	International Oil Pollution Compensation Fund
Fund Convention	International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage (FUND), 1971, and 1992 Protocol
ICJ	International Court of Justice
IMO	International Maritime Organization
Intervention Convention	International Convention Relating to Intervention on the High Seas in cases of oil pollution casualties, 1969, and Protocol 1973

LLMC Convention	Convention on Limitation of Liability for Maritime Claims 1976 and Protocol 1996
LOF	Lloyd's Standard Form of Salvage Agreement (No cure – no pay)
MARPOL	International Convention for the Protection of Pollution from Ships 1973 as modified by the 1978 Protocol thereto
OPA	Oil Pollution Act 1990 (USA)
OPRC Convention	International Convention on Oil Pollution Preparedness, Response and Co-operation, 1990
P&I / P&I Clubs	Protection and Indemnity Clubs (Shipowners Mutual Assurance Associations)
Salvage Convention	International Convention on Salvage 1989
SCOPIIC	Special Compensation P&I Clause
SOLAS	International Convention for the Safety of Life at Sea, 1974, and Protocols 1978 and 1988
SOSREP	Secretary of State's Representative for Maritime Salvage and Intervention (UK)
UK	United Kingdom
UNCLOS	United Nations Convention on the Law of the Sea
US/USA	United States of America
USCG	United States Coast Guard
WTO	World Trade Organization

CHAPTER 1 INTRODUCTION

The *Prestige* incident in the end of the year 2002 has been followed by claims and legal actions as well as fierce debates, either within IMO or through various media or political channels. Among the hot topics were issues concerning places of refuge for ships in distress, though they were not raised for the first time. The earliest modern example in which coastal States ordered a casualty to be destroyed in the open sea in order to control pollution to the coastline might be the *Torrey Canyon* incident in 1967; and such a phenomenon – called ‘maritime lepers’ at that time – had been observed with ‘increasing frequency’ and had given rise to concern in the late 1970’s¹, following the *Andros Patria*², the *Christos Bitas*³ and the *Atlantic Empress* incidents. More recently, the need to review the ‘customary regime’ covering such issues had been internationally recognized ‘on an urgent basis’ following the *Erika*⁴ and the *Castor* incidents in 1999⁵. The IMO Resolution A.949(23) adopted on 5 December 2003, *Guidelines On Places of Refuge For Ships In Need of Assistance*, represents the achievements of international effort up to present time.

An introduction to the issue has been well summarized in the Resolution:

¹ Colin de la Rue & Charles B. Anderson, *Shipping and the Environment – Law and Practice* (London : LLP 1998) at 823 – 824.

² See Norman Hooke, *Maritime Casualties 1963 – 1996* 2nd edition (London: LLP,1997), at p. 42.

³ See Aldo Chircop, ‘Living with ships in distress – a new IMO decision-making framework for the requesting and granting of refuge’, *WMU Journal of Maritime Affairs*, 2004, Vol. 3, No. 1, at p.34

⁴ For more information on the *Erika* accident see IMO ‘Information Resources on the Erika Accident and the 2001 amendment to Regulation 13 G of Annex I to MARPOL 73/78’,

http://www.imo.org/includes/blastDataOnly.asp/data_id%3D11910/Erika%283May2005%29.doc.

⁵ *Op. Cit.* 3 Aldo Chircop at p31.

‘When a ship has suffered an incident, the best way of preventing damage or pollution from its progressive deterioration would be to lighten its cargo and bunkers; and to repair the damage. Such an operation is best carried out in a place of refuge.

However, to bring such a ship into a place of refuge near a coast may endanger the coastal State, both economically and from the environmental point of view, and local authorities and populations may strongly object to the operation.

While coastal States may be reluctant to accept damaged or disabled ships into their area of responsibility due to the potential for environmental damage, in fact it is rarely possible to deal satisfactorily and effectively with a marine casualty in open sea conditions.’⁶

Accidents, especially tanker accidents that impose a major threat to the environment usually involve salvage, oil spill response, state intervention, and pollution liability and compensation. These issues are closely related. For example, salvage operation can be either carried out by a private salvor, or by government agencies as compulsory salvage⁷, which then can be considered as part of the oil spill response operations. Or, the orders given by the coastal State that the casualty should be towed away from the coast can be treated as both intervention measures and State’s monitoring and control over salvage operation. In circumstances like these, the essence of the problem is much more than a simple question of whether the ship in distress can have the right to enter a certain place within the internal waters or territorial sea of a coastal state. Relevant is also what actions a coastal state can take or what orders it can give in various maritime zones, i.e. whether the ship will be allowed to carry out certain operations to retrieve the property and to prevent or

⁶ IMO Resolution A.949(23) Annex, paragraphs 1.3 – 1.7.

⁷ See *Op. Cit.* 1Colin de la Rue at p 822.

mitigate the environmental pollution, and the degree to which such operations are subject to the command and monitoring of the coastal state.

An article by Eric Van Hooydonk *The obligation to offer a place of refuge to a ship in distress* provides a good summary of the four attitudes towards this question together with critical assessments, namely, the absolute right of entry, the absolute right of refusal, ‘balancing interests’, and ‘good management on the basis of the right of access’⁸. However, some arguments contained in the article are not very convincing. For instance, the right of innocent passage was cited to support the view of absolute right of access of foreign ships in distress⁹, while this is quite irrelevant when the intended place of refuge is a port or other internal waters of a coastal State. Furthermore, it ignores the differences between situations where entry is necessary for the purpose of saving human life and where it is not¹⁰.

Maritime accidents inevitably involve various parties which have their respective interests that need to be protected, however, such interests may be in conflict, as observed in the IMO Resolution and other writings such as the one by Eric Van Hooydonk. And each party has its respective rights and obligations, under international or municipal law or both, either on public or private side. On the other hand, minimizing the pollution damage can be viewed as a common goal of all parties, if preservation of the properties at risk is not another. To find an effective and balanced way to achieve these goals, considerations shall be given to not only

⁸ Eric Van Hooydonk, ‘*The obligation to offer a place of refuge to a ship in distress*’, Lloyd’s Maritime And Commercial Law Quarterly, August 2004, at pp.347 – 374.

⁹ *Ibid.* at p351.

¹⁰ *Ibid.* at footnote 86.

the legal aspects, but also the ‘management problem’¹¹. Chapter 2 will start with a detailed examination of the requirements of international law, followed by analysis of salvage-related issues and decision-making problems in Chapter 3 & 4.

¹¹ Aldo Chircop, ‘*Ships in distress, environmental threats to Coastal States, and places of refuge: New directions for an ancient regime?*’ *Ocean Development and International Law*, Vol. 33 (2002), pp. 207-226.

CHAPTER 2 IN OR OUT – A POLITICAL DECISION

The first question raised, when a ship is in distress, is whether it has the right to proceed to a place of refuge directly, or the entrance is subject to prior approval from the coastal State. Such an intended place can be either within a port of the State, or in other sheltered place outside a port but still within the internal waters¹² – such as an anchorage within a bay; it can also be a place outside the baseline, i.e. within the territorial sea. Although some authors are of the opinion that, places outside internal waters are usually not sheltered enough to provide sufficient benefits to the ship in distress and are therefore hard to be regarded as places of refuge¹³, in salvage practice, a lot of operations can be done within the territorial sea such as connecting the tow line, inspection of the casualty and redelivery of the salvaged property. Thus this chapter will discuss the right of access and the right of intervention in both of the maritime zones.

2.1 Access to Ports and other Internal Waters –right of refusal with some exceptions

Sovereignty of a State over its ports and other internal waters implies the absolute power of the State to regulate access to such territories¹⁴, **unless** such power is limited by international law, either treaties or customary law. Indeed no international conventions can be found which expressly and directly impose the obligation of

¹² Such is the approach taken in IMO Resolution A.949(23) – see *Op.Cit.* 6 at paragraph 1.19.

¹³ Richard Shaw, ‘*Places of Refuge – International Law in the Making?*’ CMI Yearbook 2003, at p. 330.

¹⁴ Churchill, P.R. & Lowe, A.V., *The Law of the Sea*, 3rd ed. (Manchester: Manchester University Press, 1999) at p. 61. See also I.A.Shearer (Editor), *The International Law of the Sea*, Volume II by D.P.O’Connell (Oxford: Clarendon Press, 1984), at p 848.

admitting ships in distress on states¹⁵; but some other sources provide for exceptions to such an absolute power.

One of the exceptions is the right of innocent passage in newly enclosed territorial waters (UNCLOS art. 8(2)). States, at least member States of UNCLOS, cannot ban ships out of such waters simply for the reason of such waters being internal. These areas are more akin to territorial seas than to internal waters, and will be included in section 2.2 in the discussion of innocent passage.

Another exception is the right of ships to enter ports for the purpose of life saving. Such right has been supported by various cases, and has been clearly and generally recognized as amounting to the status of customary law¹⁶. But the necessity of entry to preserve human life is the pre-requisite of such a right. In other words, it is a ‘limited right on humanitarian basis’, and ceases when dangers to life onboard are relieved. States do have the obligations of life saving, not only under Search & Rescue Convention, but also out of customary law, however, admittance to port is not the only applicable method. In present practice, crew and passengers onboard ships in distress are more often rescued by helicopters or life-saving crafts¹⁷, rather than carried onboard the ships in distress to a nearby port. Even in the latter situation, the coastal State can still arrange for persons onboard to safely disembark the ship just outside the port, leaving the issue of places of refuge a purely separate and independent question.

It seems that, other than the above two exceptions, research of the author found no persuasive evidence to prove that foreign ships in distress have the absolute right to enter the internal waters of a coastal state, which has removed all obstacles as to

¹⁵ *Op.Cit.*11 Aldo Chircop at p. 214, which points out that ‘The substantive law on the right of refuge is to be found in customary law, mostly evidenced through case law and the writings of authoritative jurists, and bilateral treaties.’ See also *Op.Cit.*8 Eric van Hooydonk at p 349, which referred to the theory of absolute right of entry as ‘an old rule of international customary law’.

¹⁶ *Op.Cit.*14 Churchill & Lowe at p. 63. and O’Connell at pp. 853 – 858.

¹⁷ *Op.Cit.*3 Aldo Chircop at p 34.

formation of customary international law, i.e. which has met the requirements of general state practice and *opinio juris*¹⁸. An arbitration award, *Saudi Arabia v. Aramco* 1958¹⁹, is sometimes cited to support the view that port entry is a customary right of foreign ships, but this award lacks both persuasive authorities and support of general state practices²⁰. The other authorities cited by supporters of the absolute right of entry, typically the *Rebecca* 1929²¹, appear unable to extend the principle of right of entry further than under situations when life saving is concerned²².

The fact that ships driven to port by *force majeure* enjoy certain degree of immunity is also referred to for this purpose²³. Indeed while no doubt can be cast on the established principle that ships in distress enjoy certain jurisdictional exemptions²⁴, it is worthy asking whether such a principle can be extended to, or it implies a presumption, that port entry is a prerogative of ships in distress other than on humanitarian basis. Historically the concern was on the ‘potential immunity’ rather than the right of entry²⁵, and life saving at sea was not well-organized and effective

¹⁸ For general principles of customary international law see J.G.Starke, *Introduction to International Law*, 10th Ed., (Butterworth, 1989) Chapter 1. See also Ian Brownlie, *Principles of Public International Law*, 6th Ed., (Oxford University Press, 2003) Chapter 1.

¹⁹ 27 ILR (1963), 117.

²⁰ *Op.Cit.*14 Churchill & Lowe at p. 61. Notably even this decision recognized that ports can be closed ‘when the vital interests of the State so require’, (27 ILR(1967) 212); and some distinguished authors questioned whether the purported principle adopted by the Arbitrator in this case aims at forbidding ‘discrimination among foreign ships using ports’, see *Op.Cit.*13 O’Connell at p 848. See also *Op.Cit.*11 Aldo Chircop at p. 210 that ‘[T]he dictum...is not good law’.

²¹ *Kate A. Hoff case (the Rebecca)* (1929), IV RIAA 444. See for instance *Op.Cit.*8 Eric Van Hooydonk at p 351 and its footnote 27; See also *Op.Cit.* 13 Richard Shaw at p. 330. Other cases confirming the right of access for life saving purpose include *Creole* (1853) Moore, *Int. Arb.* 4375.

²² Churchill & Lowe at p. 63.

²³ Eric Van Hooydonk at p 350, and its footnote 24 & 25. Notably some of the authoritative writings quoted to support the absolute right of entry are actually limited to the immunity issue. For instance, footnote 9 referred to D.P.O’Connell (*Op.Cit.*14) at pp353-358, which is actually the discussion of ‘[T]he idea that ships forced by circumstances within the jurisdiction of other States are immune from its exercise’. I. Brownlie (*Op.Cit.*18 at p 315) is quoted in footnote 10, however it is no more than a comment that ‘perhaps’ foreign ships entering ports as a consequence of distress are not subject to the jurisdiction of port states.

²⁴ See *Op.Cit.*11 Aldo Chircop at p. 210. for detailed discussion.

²⁵ *Ibid.* at p. 208. The limitation on this principle has been addressed by one of the Canadian cases, *Cashin v. R.*, ([1935] Ex.C.R. 103, 64 C.C.C. 258, [1935] 4 D.L.R. 547), though such limitation is not related to the right of entry. It reads, ‘It is a well-recognized principle, supported by the jurisprudence as well as by the opinions of authors on international law, that a ship, compelled through stress of weather, duress or other unavoidable cause to put into a foreign port, is, on ground of comity, exempt

as it is today. Probably this explains the difficulty in finding in case law an authoritative consideration of port entrance independent of life saving.

In the bi-lateral treaties regime, while on the one hand various bi-lateral treaties did have such an effect as to confer the right of entry on ships in distress²⁶, on the other, it is questionable how widely were such treaties applied, and thus, to what degree had their provisions come close to the status of customary norms. It could be further argued that, it was necessary to conclude such treaties exactly because there had not been such a pre-existing right – which was the ‘mischief’ that such treaties aimed to cure.

Furthermore, even if the right of entry was the custom, it is difficult to argue that it is still a general state practice in present time²⁷, as self-evidenced by the numerous cases where refusals were made – though whether such a practice is legitimate is another issue. According to the two questionnaires carried out by CMI²⁸, ‘[M]any responders anticipated that there could be a liability on a Government or Authority which acted negligently in declining a Place of Refuge’²⁹. It is a pity that no information is available which discloses the general state attitude toward the more direct question of whether Coastal States have such an obligation to offer places of refuge under existing international law; since, ‘negligence’ depends on a pre-existing duty of care, and the response does not help to clarify the extent of such a duty.

Some states such as South Africa are viewed to have conferred the absolute right of port entry to all ships in their municipal law³⁰, however, response by South Africa to

from liability to the penalties or forfeiture which, had she entered the port voluntarily, she would have incurred. The principle, however, should not be too widely interpreted. It does not carry any right to the exemption from local laws, especially revenue laws.’

²⁶ *Ibid.* at p.212.

²⁷ Eric van Hooydonk, at p 353.

²⁸ See CMI Yearbook 2002, pp. 117 – 146, and CMI Yearbook 2003, pp. 314 – 498.

²⁹ *Ibid.* CMI Yearbook 2003 at p 328.

³⁰ D.J. Devine, ‘*The Cape’s False Bay: A Possible Haven for Ships in Distress*’, South African Yearbook of International Law, Vol. 16, 1990/91 (Verloren van Themaat Centre for Public Law Studies, University of South Africa), at pp 83-84. See also Stuart Hetherington, ‘*Prestige – Can the*

CMI's questionnaire apparently does not support this view³¹. The questionnaire also reveals that 'very few' countries have enacted domestic legislation with regard to the right of foreign ships in distress to seek shelter in ports or other internal waters, and China and Norway are among the few³². While the domestic legislations of the two countries confer the privilege on such vessels to enter without prior application and approval, some restrictions are noteworthy. For instance, China requires such vessels to 'report immediately to competent Authorities' and 'obey orders'³³ and Norway requires them to contact the authorities 'by the fastest possible means' 'for specific instructions regarding anchoring or continued navigation'³⁴. Furthermore, the possibility that such vessels are required to leave the territory for whatsoever reasons is not excluded by such legislations.

Two recent cases, *The Long Lin*³⁵ and *The Toledo*³⁶ have been viewed as having applied the doctrine that '[W]hen the interests or rights of the coastal states or the risk to which it is exposed are greater than those of the ship, access may be refused'³⁷. The consideration in *The Long Lin* actually focuses on innocent passage and therefore will be discussed in the next section. The *ratio decidendi* in *The Toledo* did subscribe to such a test of 'potential harm greater than loss of ship and cargo'³⁸, however, the author ventures to question whether there is such a requirement under international law. The statement that 'the benefit of a safe haven... is primarily humanitarian rather than economic'³⁹ appears as a more accurate reflection of the current international law.

law assist?', CMI Yearbook 2003 at p. 363, which quotes from Derry Divine, 'Ships in distress – a judicial contribution from South Africa', Marine Policy Vol. 20 No. 3, 1996, pp. 229 – 234.

³¹ *Op.Cit.*28 CMI Yearbook 2002 at p. 124.

³² *Ibid.* pp. 127 - 129

³³ Maritime Traffic Safety Act 1983 (China), Article 11.

³⁴ See CMI Yearbook 2002 at p 129.

³⁵ *The Long Lin* [1995] Schip en schade 391, No. 95 (The Netherlands).

³⁶ *ACT Shipping (OTE) Ltd. v. Minister for the Marine, Ireland and the Attorney-General (The MV Toledo)*, [1995] 2 ILRM 30.

³⁷ *Op.Cit.*8 Eric Van Hooydonk at p. 362.

³⁸ See *Op.Cit.*11 Aldo Chircop at pp. 215-216 for detailed discussion.

³⁹ *Ibid.*

Sovereignty being one of the most – if not the most - fundamental principles of international law, is not easy to ‘cut into’. In fact, no international instruments have gone as far as to challenge that, whether or not to allow ships in distress to enter its ports or other internal waters is a decision to be made by the coastal State; on the contrary such was implied or recognized in, *inter alia*, 89 Salvage Convention (Art. 9), IMO Guidelines (Resolution A. 949(23) paragraph 1.7), and EU Directive (2002/59/EC Art. 20).

However, the right to make decision is not at all the same as to be right in refusing. The question of whether a refusal to shelter casualties is in breach of international obligations of the coastal State has been discussed by various authors, *inter alia*, as put forward by Richard Shaw in *Designation of places of refuge and mechanism of decision making*⁴⁰:

‘There appears therefore to be no general obligation in International Law on coastal states to designate places of refuge in their waters, but specific provisions in the European regional regime and international rules relating to oil pollution do contain general obligations which would necessarily involve such a requirement’.

Such obligations are primarily the ones of environmental protection, and Section 2.3 will go through these obligations in treaty, customary, and municipal laws, trying to determine whether a refusal or a grant of places of refuge and relevant intervention measures will make States accountable.

2.2 Territorial Sea – Innocent Passage v. Intervention

If ships seek shelter in places in the territorial sea, for instance, at an outer anchorage when the sea is relative calm, the situation is different from in the internal waters.

Opinions have been raised that ‘the right of a coastal state to take action to protect its coastline from marine pollution is well established in international law’ and that ‘[R]elevant provisions include: UNCLOS, Articles 194, 195, 198, 199, 211, 221, 225’.⁴¹ However, it is doubtful whether such articles do have the effect as to confer or recognize such a right of the Coastal States. Articles 195, 198 and 225 are clearly imposing duties on the State Parties, not conferring rights – the contents of these articles are self-explanatory. Article 194 is also the same, as evidenced by the use of the words ‘States **shall**...’ Article 211 paragraph 4 does recognize the sovereign right of the coastal States, which reads ‘Coastal States may, in the exercise of their sovereignty within their territorial sea, adopt laws and regulations for the prevention, reduction and control of marine pollution from foreign vessels, including vessels exercising the right of innocent passage.’ However, it goes on to provide that ‘Such laws and regulations shall, in accordance with Part II, section 3, not hamper innocent passage of foreign vessels.’ This is consistent with the provisions of Article 24(a), which states that ‘the coastal State shall not impose requirements on foreign ships which have the practical effect of denying or impairing the right of innocent passage’. Article 221 is especially relevant, which states that ‘Nothing in this Part shall prejudice the right of States...to take and enforce measures **beyond the territorial sea** proportionate...’(emphasis added)

Therefore the framework set by UNCLOS is apparently clear. In the territorial sea Coastal States have sovereignty, subject to the right of innocent passage. Coastal States’ right to intervene in its EEZ and on the high seas are explicitly recognized, but no specific provisions deal with intervention in the territorial sea; and in such a situation, *prima facie* the rule of ‘sovereignty subject to innocent passage’ is applicable.

⁴⁰ CMI Yearbook 2003 at p446.

⁴¹ Efthimios E. Mitropoulos, ‘Places of refuge’, BIMCO Review 2004, at p. 57.

It is then necessary to examine the test of ‘innocent passage’, to determine whether ships in distress still enjoy that right. According to Article 18, ‘Passage means navigation through the territorial sea...’, and ‘Passage shall be continuous and expeditious. However, passage includes stopping and anchoring, but only in so far as the same are incidental to ordinary navigation **or** are rendered necessary by *force majeure* or **distress** or for the purpose of rendering assistance to persons, ships or aircraft in danger or distress.’(emphasis added)

A literal interpretation would suggest that ships in distress that have stopped and anchored are still in passage. As for ships that are slow steaming, it seems they are also in the same position, since, literally the requirement of passage goes no further than that ‘to proceed with due speed under the circumstances, having regard to safety and other relevant factors’⁴². But as for ships that have totally lost their power – which could frequently be the case, either as the cause or the symptom of the distress - the situation is not clear. What if they are drifting, and what if they have been taken under tow? Some distinguished authors are of the view that stricken vessels are ‘no longer in passage’ and ‘will thus be subject to the unfettered sovereignty of the coastal States.’⁴³ Such a view was adopted in decision of *The Long Lin*⁴⁴. However, this view does not appear to be in compliance with the Convention – at least when ships in distress have managed to stop and/or anchor in the territorial sea they are still ‘in passage’, as unequivocally dictated by the Convention.

As to whether ships in distress, especially ones that have already been leaking oil, are ‘innocent’, the Convention provides no immediate and clear answer, either. On the one hand, though it is not clear whether the list contained in art. 19 is an exhaustive one, the naming of **wilful and** serious pollution might imply the exclusion of

⁴² Center for Oceans Law and Policy (University of Virginia School of Law), *United Nations Convention on the Law of the Sea 1982: A commentary, II* (Dordrecht/Boston/London, 1993) at p 162. See also Eric Van Hooydonk at pp 351 - 352, footnote 35 & 37.

⁴³ Churchill & Lowe at p 353.

accidental pollution from the category of non-innocence⁴⁵. Also, accidental pollution *per se* does not seem to endanger the status of ‘innocence’ as long as it does not prejudice the ‘peace, good order, and security’ of the coastal states⁴⁶, while the liability and remedy for pollution remains another matter.

To give efficacy to such an article in its literal meaning, an explanation could probably be that, UNCLOS was so drafted to make a distinction under various situations. If ships in distress are still capable of navigating, or if they can manage to stop and/or anchor, they are in passage; if they have completely lost power and are drifting, they are not. As for a casualty that has been taken under tow, the whole convoy – the combination of tug and tow – could be considered as ‘a ship’ which continues to enjoy the right of innocent passage. Though this explanation would probably lead to complexity, it seems reasonable, since situations other than drifting are more controllable, and thus imposing less threat to the environment.

However, it is worthy of exploration into why statements have been made by authoritative jurists which are apparently contrary to the literal meaning of the Convention. It is observed that the general view prior to 1978 was that ‘a stranded vessel disgoring oil would no longer be in passage, nor necessarily innocent’⁴⁷. Though it is difficult to find further authoritative evidence in support of this remark, context of UNCLOS might suggest certain absurdity, which adds doubt to the true intention of Article 18.

⁴⁴ *Op.Cit.35*. See also *Op.Cit.30* Stuart Hetherington at p. 362; and Welmoed van der Velde, ‘*The position of coastal states and casualty ships in international law*’, CMI Yearbook 2003, pp.481-482, for more discussion.

⁴⁵ The implication of the term ‘include’ might vary according to different interpretation approaches. It might be interpreted as an extension of the ordinary meaning and therefore does not have an exclusive effect; see Proshanto K. Mukherjee, *Maritime Legislation*, (WMU Publications, 2002) at p63. Alternatively, though subject to limited application, ‘the mention of one thing is the exclusion of another’, as dictated by the maxim of *expressio unius*; see Sir Rupert Cross, *Statutory Interpretation*, 3rd Edition (London: Butterworths, 1995) at p 140.

⁴⁶ Churchill & Lowe at pp 81 – 87; see also Eric Van Hooydonk at p 358, and *Op.Cit.44* Welmoed van der Velde, at pp.480-482.

⁴⁷ *Op.Cit.1* Colin de la Rue at p 821.

If ships in distress and ships rendering assistance to them are in the status of innocent passage, as the case may be, then *prima facie* coastal states shall have no right to drive them out of the territorial sea; they might even be forbidden to adopt any laws or regulations or take any actions which hamper such right of innocent passage, as implied by Article 211. This might then lead to a rather weird situation – that apparently the right of Coastal States to protect its own environment is greater in EEZ and on the High Seas than in its own territorial sea.

Another important fact is that, in the drafting of the 69 Intervention Convention consideration was given to whether it should cover territorial seas as well, but eventually it was decided that it was not necessary, for otherwise it would narrow the sovereign rights of the coastal states, since oil leaking vessels were considered as not in the status of innocent passage⁴⁸. Probably drafters of UNCLOS, on the one hand have clarified and extended the definition of ‘innocent passage’, on the other, forgot to ‘patch up’ the part in relation to Coastal States’ right to take action in the territorial sea.

The situation is rather confusing. In the construction of a convention, ‘the literal meaning of the wordings in their context’ as well as the ‘object and purpose’ of the treaty are equally important⁴⁹. Is the literal meaning of Article 18 at variance with the intention of the State Parties? Does it lead to manifest absurdity or repugnancy?

If Article 18 is construed as depriving the right of innocent passage of ships in distress, then such ships are subject to the sovereignty and jurisdiction of the Coastal States. If, otherwise, then it becomes necessary to determine whether there is such a rule in customary international law that, when factual or possible pollution from the

⁴⁸ *Ibid.* at p 821. See also *Op.Cit.* 14 O’Connell at p. 1007, which describes the situation prior to 1969 as ‘[I]f the grounding occurs in its territorial waters, the coastal State may be presumed to have jurisdiction to take whatever measures are necessary to eliminate or reduce the risk of damage...But if the accident occurs on the high seas, such action could only be based upon residual notions of self-defence and security...’

⁴⁹ Vienna Convention on Law of Treaties, Article 31(1).

ships threatens the interests of the coastal State, the State has certain right to intervene in various maritime zones.

UK's action of 'tow out and bomb' in the *Torrey Canyon* incident has been viewed as justified by the principle of necessity⁵⁰ or self-help⁵¹; while whether this was an established principle of customary international law is arguable, the subsequent 69 Intervention Convention and UNCLOS Art. 221 have explicitly confirmed or conferred the right to intervene on State Parties. As aptly phrased by Churchill & Lowe, '[T]he better view now is that the United Kingdom's action against the *Torrey Canyon* in 1967, coupled with its ready acceptance by other States, constituted an emerging rule of customary international law which the Intervention Convention and the Law of the Sea Convention have clarified and crystallised.'⁵² Though both conventions deal with interventions beyond the territorial sea only, it is persuasive that *a fortiori* states shall have the same right in the territorial seas, even though *prima facie* the principle established in UNCLOS is that exercise of sovereignty should be subject to the right of innocent passage.

However, such measures, either pursuant to both Conventions, or according to the said customary rule of self-help, are required to be **proportionate** to the actual or threatened pollution and 'shall not unnecessarily interfere with the rights and interests of the flag State, third States and of any persons, physical or corporate, concerned'. (Intervention Convention Art. V) It has been generally recognized that, to find the standard of proportionate is a very difficult task. Article V.3 stipulates that:

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

⁵⁰ Patricia W. Birnie and Alan E. Boyle, *International Law and the Environment* (Clarendon Press, Oxford) at p. 379. See also *Op.Cit.* 14 O'Connell at pp. 1006-1008.

⁵¹ *Op.Cit.* 22 D.J. Devine at p 85. For general principles of self-help as one of the remedies in law of tort, see W.V.H.Rogers, *Winfield & Jolowicz on Tort*, 16th ed., (Sweet & Maxwell London, 2002), at pp 794 – 796.

⁵² Churchill & Lowe at p 355.

- (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 damage which may be caused by such measures.’

This clause does not provide a precise formula to make decisions on balance of the respective extent and likelihood, and leave the question of ‘proportionate’ open to a flexible interpretation; in other words, it offers ‘too little hold for application in practice’⁵³. Indeed, amongst the conflicting interests – those of the ship and cargo owners, insurers, salvors, neighbouring countries and those of itself, it can be understandable that the decision-making state will rank its own interests above all others, and even if the actual amount saved is less than the total costs incurred on others, it is still not easy to conclude that such measures are not proportionate. On the other hand, the extent and likelihood of damage to the interests of various parties have been changed by the establishment of IOPC Fund as part of the international oil pollution liability and compensation framework as well as the article 14 of Salvage Convention and SCOPIC clause, as will be analysed in Chapter 4. Interestingly, these vague words ‘shall take account of’ also appear in the 89 Salvage Convention as an obligation of State Parties, as will be seen in more details in Section 3.4.3.

On the other hand, in determining whether an intervention measure is proportionate, consideration might have to be given to the purported fact that in the *Torrey Canyon* incident, it was when salvage had been ‘attempted as the first line of defence’ that UK took action⁵⁴. And, the criteria of ‘proportionate’ might change over time, with the development of technology and salvage and oil spill response capabilities. If the ‘tow out and sink’ action of UK was a proportionate measure in 1969, it may not

⁵³ *Op.Cit.*44 Welmoed van der Velde, at p. 489

⁵⁴ See *THE TORREY CANYON, Report of the Committee of Scientists on the Scientific and Technological Aspects of the Torrey Canyon Disaster*, HMSO, 1967. See also Colin de la Rue at p 816.

necessarily be a proportionate one in present time⁵⁵. Deliberate scuttling of the ships in distress might violate the London Dumping Convention 1972⁵⁶; even the refusal to offer a place of refuge could be deemed as not appropriate in itself, if it is proved that, at the time of the occurrence, it could be reasonably foreseen that, effort to save the ship and the cargo could have had led to a much better result than such a refusal.

To summarise, whether ships in distress continue to enjoy the right of innocent passage in the territorial sea is confusing. If they do not, *prima facie* coastal States can take actions against them by virtue of sovereignty; if they do, States can still take measures to protect the environment provided that such measures are proportionate. In both situations, considerations on other obligations of States cannot be excluded, typically the ones to protect and preserve marine environment.

2.3 State Obligations in Environmental Protection

Beyond doubt all states have certain obligations to protect the marine environment. To examine whether such obligations may override states' right to refuse entrance of casualties and to take other forms of intervention, as questioned by Richard Shaw, it might be necessary to start with the doctrine of state responsibility.

According to the prevailing doctrine of state responsibility, the breach of an international legal obligation *per se* will render the State liable, i.e. 'wrongful intent or negligence of the individual whose conduct is ascribed to the State is not a

⁵⁵ See *Op.Cit.*50 Patricia Birnie at p. 380.

⁵⁶ Apparently dumping include deliberate disposal of vessels at sea (Article III), which shall be prohibited by State Parties. However whether a refusal to offer a place of refuge constitute deliberate disposal seems to be a confusing matter of fact rather than a matter of law – could it be reasonably foreseen that the refused casualty will sink, or could it be reasonably expected that it can proceed to a sheltered place within another jurisdiction? It is noteworthy that the 1996 Protocol offers an exception 'in emergencies posing an unacceptable threat to...the environment and admitting of no other feasible solution.' On the one hand it has gone one step further in taking into consideration the environmental concerns, as compared with the 1972 Convention; on the other, will the words 'unacceptable' and 'feasible' give rise to disputes when the Protocol enters into force? See *Op.Cit.*3 Aldo Chircop at pp.35-36 for more detailed discussion.

constituent element of international State responsibility'⁵⁷. As pointed out by Patricia Birnie, “‘fault’ is almost never the basis of responsibility in environmental disputes”⁵⁸. Brian D. Smith made a further analysis of the term ‘fault’ as that: ‘it is not subjective *culpa* but simply the fact of violation of international law that serves as the basis of a state’s responsibility’⁵⁹. Therefore it is necessary to examine the exact extent of such obligations, either in treaty or customary law.

Part XII of UNCLOS deals with the obligations of States in environmental protection. Article 192 is a general statement that ‘States have the obligation to protect and preserve the marine environment.’ Art. 194 paragraph 1 goes on to provide that States shall take ‘all measures consistent with this Convention that are necessary to prevent, reduce and control pollution of the marine environment from any source, using for this purpose the best practicable means at their disposal and in accordance with their capabilities’. Typically relevant is paragraph 2 of article 194, which stipulates that:

‘States shall take all measures necessary to ensure that activities under their jurisdiction or control are so conducted as not to cause damage by pollution to other States and their environment, and that pollution arising from incidents or activities under their jurisdiction or control does not spread beyond the areas where they exercise sovereign rights in accordance with this Convention.’

Article 195 contains States’ duty not to cause transboundary pollution in taking prevention and control measures.

⁵⁷ Mohammed Bedjaoui (General Editor), *International Law: Achievements and Prospects*, (Paris: UNESCO, 1991), *Chapter 17 International State Responsibility*, by Eduardo Jimenez de Arechaga and Attila Tanzi, at pp 349 – 350.

⁵⁸ Patricia Birnie at p 142.

⁵⁹ Brian D. Smith, *State Responsibility and the Marine Environment*, (Clarendon Press, Oxford, 1988), at p15.

Apparently these articles impose a heavy burden of duty on State Parties, and some authors are of the view that ‘this duty cannot be fulfilled without offering a place of refuge’⁶⁰. Indeed the provision of Article 194 has extended the ‘territorial conduct’ limit in state obligation as established in the *Trail Smelter* case, to state’s ‘own acts and private conduct in any *locus* over which it possess a measure of legal authority’⁶¹, and ‘the boundaries of the state’s capacity to take measures to prevent environment injury to another state will define the ambit of the obligation to take such measures’⁶². However, the apparently strict requirement of ‘all measures necessary’ has been moderated by the subsequent phrases ‘the best practical means at their disposal and in accordance with their capabilities’⁶³. In considering whether such an obligation will override the right of States to refuse to offer places of refuge, it seems that, only when admittance of the ship in distress is ‘the best practicable means...and in accordance with their capabilities’, will this article deprive such a right of refusal. Especially, when the substantial interests of the coastal State is under actual or threatened damage, i.e. the leaking oil from a casualty, it would be more difficult to convince that offering a place of refuge is the best practicable means. Furthermore, ambiguity might exist in the interpretation of this article. As observed by Brian Smith,

“One might construe the term ‘necessary’, as opposed to ‘possible’ or ‘reasonable’, as suggesting that failure to prevent strictly constitutes a violation of the obligation. It is not inconsistent with this language, however, to overlay the ‘fault’ condition that responsibility will only arise in the event of an intentional or negligent failure to prevent. The Convention deftly avoided confronting the ambiguity as to the standard of performance by providing only that states ‘shall be liable in accordance with international law.’”⁶⁴

⁶⁰ Eric Van Hooydonk at p. 353 footnote 50.

⁶¹ *Op.Cit.* 59 Brian D. Smith at p 80.

⁶² *Ibid.* at p 76 – 77.

⁶³ Patricia Birnie at p 352.

⁶⁴ Brian D. Smith at p. 118. At footnote 47 it is further pointed out that ‘At least one proposal for express adoption of a strict standard was submitted to and rejected by the Conference.’

The expression used by Article 195 that ‘States shall act so as not to’ might also give rise to uncertainties in the application of the doctrine of state responsibility. Does it intend to give effect as that States will be liable when they intentionally, or negligently act to the contrary, or when they act with such an intention but fail? If transformation into any forms of pollution is strictly prohibited, then how about in-situ burning, the commonly seen oil spill response technique, which can (depending on the situation) be very effective in transforming a serious oil pollution into slight air pollution?

Most significantly, the accurate extent of the obligations imposed by such UNCLOS articles must be examined in its context. Article 221 states that ‘Nothing in this Part shall prejudice the right of States...to take and enforce measures beyond the territorial sea proportionate...’ Let alone the possible construction approach of ‘latter clause overrides previous clause’, a plain interpretation would lead to the conclusion that, even if intervention measures are likely to cause damage to another state, the State still has the right to implement such measures provided that they are proportionate. This principle is evidenced by the provisions of Intervention Convention, which by Article V paragraph 2 stipulates that ‘Such measures...shall not **unnecessarily** interfere with the rights and interests of...third States.’(emphasis added) An implication can be drawn that, damage to the rights of third States is not strictly prohibited, as long as that such measures are necessary, i.e. proportionate, and *a fortiori* measures taken within Territorial Sea.

Furthermore, as pointed out by some distinguished authors, some defences are available even when States are under strict liability, such as necessity⁶⁵. The doctrine of necessity is aptly summarized by Jimenez de Arechaga as⁶⁶:

‘...if a State, coerced by the necessity to save itself from greater and imminent danger which it has not itself induced, and which it cannot in any

⁶⁵ *Op.Cit.*57 Eduardo Jimenez de Arechaga and Attila Tanzi, at pp 355 – 354. See also Patricia Birnie at pp 142- 143.

⁶⁶ *Ibid.* Eduardo Jimenez de Arechaga and Attila Tanzi at p354.

other way escape, takes action violating a right of another State, such action does not engage its international responsibility. But the danger it is to avoid must be of such a nature as “to put on jeopardy the existence of the State, its territorial or personal statute, its government or its form of government or to limit or even make disappear its independence or international capacity.”

Though the doctrine of necessity does not directly offer a defence for States refusing to grant places of refuge, since protection of their own environment and economic interests does not meet the above standard, the author is of the view that, the legal thinking behind this doctrine shall be taken account of in the interpretation of relevant articles of UNCLOS. It is probably not justifiable to interpret these articles as that, States are under strict obligation to take necessary measures to prevent damage to third States, even if such measures would cause greater damage to its own environment. Though State Parties to UNCLOS have submitted themselves to be bound by the Convention – akin to a private contract, the true intention of the parties to the contract should be sought in its interpretation, while it is less likely that, prevention of damage to third States at the cost of greater damage to themselves is the true intention of Parties. Such a lack of intention might probably be evidenced by the result of the aforementioned CMI questionnaire⁶⁷.

In further consideration of the obligations pursuant to these articles, what if the responding States were not aware of the necessity of such measures? In other words, are States reasonably expected to have the good seamanship, and do current technology and information framework enable them, to determine what measures are necessary to achieve the end as stipulated in article 194, and enforce them accordingly? Though according to the doctrine of state responsibility fault or negligence is not a necessary ingredient, it seems unfair to attribute liability to a state for its failure to take measure that neither it, or other states, could reasonably anticipated to be the necessary one at the time of the incident, even if in a later stage

⁶⁷ CMI Yearbook 2003 at p 327-328.

it was discovered so. Difficulties in such a task of determining the necessity of such measures will be discussed in more details in section 4.2.

Similarly, one of the defences available to tort in common law jurisdiction, agony of the moment, might be necessary to be introduced for consideration of state responsibility in the context of place of refuge. Since an individual will be exonerated when he did not respond properly in a time-critical emergency, isn't it appropriate to offer such an exemption to states under similar situation, since the relation between states under international law is akin to such between individuals under municipal law? States have certain obligations to be prepared for pollution incidents, however, the current requirement of international law – OPRC Convention⁶⁸ and UNCLOS Article 199⁶⁹ – is mainly the one to establish a contingency plan, and very few contingency plans contain provisions in relation to places of refuge⁷⁰. A more detailed example might be the found in the United States arrangement⁷¹. Though as early as 1982 a National Research Council report entitled Marine Salvage in the United States has recommended the designation of safe havens and development of procedures and criteria for approval of their use, no USCG formal policies in this regard are available and the problem remains an *ad hoc* decision 'on the basis of a complex set of factors'⁷². The only exception may be in Prince William Sound, the regional policy of which provides for the captain of the port to designate safe havens when necessary⁷³.

⁶⁸ International Convention on Oil Pollution Preparedness, Response and Co-operation, 1990, Article 6.

⁶⁹ Which requires States to 'jointly develop and promote contingency plans for responding to pollution incidents in the marine environment'.

⁷⁰ CMI Yearbook 2002 at pp. 120 – 121. Of the responding countries to the first CMI questionnaire, only Australia, Denmark, Germany and New Zealand have adopted such provisions.

⁷¹ USA is not a party to UNCLOS but a party to OPRC Convention.

⁷² See *Reassessment of the Marine Salvage Posture of the United States*, by National Research Council, National Academy Press USA 1994, at pp 52 – 53. Though this report reveals situation no later than the year 1994 and no updated information has been published, up to present time no reference is made to the issue of safe havens in the National Oil and Hazardous Substances Pollution Contingency Plan or in the U.S. Coast Guard Marine Safety Manual.

⁷³ *Ibid.* p53.

On the other hand, application of Articles 194 and 195 strictly in accordance with their literal meaning would lead to such a situation that, if an accident occurs beyond ‘the jurisdiction and control’ of the State and the casualty never has a chance to cross the border, the State would be free of any responsibility; while, if the accidents occurs within such an area, the State would probably become liable for not taking the ‘necessary measures’. This might be the thinking behind some unilateral actions like the banning of single hull tankers – it has its reason, though whether it’s right or wrong is another story. The author is of the view that, if such a failure results from the lack of capability of the State, for instance, lack of expertise or equipment, or, when awareness of such measures being necessary is not a general expectation, as we will see in the difficulties in the evaluation process, it seems not so fair to hold that State liable, especially when the State itself is a victim of the pollution.

In order to get compensation pursuant to CLC/Fund Conventions State Parties may also have the duty of mitigation, as will be discussed in section 4.4. However, such a duty is rather a test for entitlement of compensation, than a ‘public’ obligation towards the ship in distress and a third country.

In the customary law regime, the most relevant might be the principle established in the *Corfu Channel* case, which requires each State ‘not to allow knowingly its territory to be used contrary to the rights of other States’⁷⁴; and the one set by the *Trail Smelter* arbitration that ‘no State has the right to use or permit the use of its territory in such a manner as to cause injury...in or to the territory of another or the properties or persons therein, when the case is of serious consequence and the injury is established by clear and convincing evidence’⁷⁵. Some authors are of the opinion that these principles coupled with convention requirement would form a general rule that ‘[S]tates must not permit their nationals to discharge into the sea matter that could cause harm to the nationals of other States’⁷⁶. However, it is questionable

⁷⁴ [1949] ICJ Rep. 3, at 22.

⁷⁵ III RIAA 1905, at 1965.

⁷⁶ Churchill & Lowe at p332.

whether it is safe to extend these principles as far as imposing an absolute liability on states to take any necessary measures to prevent environmental damage to third states, including offering a place of refuge. In the *Corfu Channel* case, as precisely pointed out by Patricia W. Birnie, knowledge of the risk of harm was an essential condition⁷⁷; while in the *Trail Smelter* case, the basis of responsibility was not considered at all but an assumed responsibility had been established in the *compromise*.⁷⁸ Also the pollution originated from the territory of the defendant State and was directly caused by the daily operation of nationals of that State, which is obviously different from the situation under which the pollution was a result of an unintentional accident of a foreign ship, and that is the ‘territorial conduct’ prerequisite which Brian D. Smith views as having been overruled by UNCLOS, which establishes a higher standard of obligation⁷⁹.

It might be noteworthy that, the general obligation of environmental protection may also be a duty that a government owes to its nationals under municipal law. As Lord Donaldson pointed out in the first sentence of his Review of Salvage and Intervention and their Command and Control, ‘[F]rom time immemorial the defence of the realm has been one of the principal responsibilities of “the Crown”, that is to say the government of the day’⁸⁰. Though the degree of such a duty might differ in various jurisdictions, the fact that international obligations are not the only whip over heads of States for environmental protection might offer an inspiration to find a practicable solution.

2.4 Summary on State Obligations

⁷⁷ Patricia Birnie at p143.

⁷⁸ Brian D. Smith at p 113.

⁷⁹ *Ibid.* at p. 80.

⁸⁰ Pub H.M.S.O. 1999 Cm. 4193, at p9.

As advised by CMI in one of its reports to IMO, ‘the present international regime is confused and unsatisfactory’⁸¹. The safe view might be that, whether States have a strict liability to offer places of refuge when it is the necessary measure to prevent accidents within its jurisdiction and control to cause damage to third States is disputable under current international law regime, probably resulting from the crucial divergence in the interpretation of ‘innocent passage’.

From a practical perspective, the incentive of the refusal is, as the past examples suggest, usually for the purpose of avoiding or reducing pollution to the coastline of the coastal State, and is subsequently followed by an order or an action to tow the ship in distress out, without which the refusal itself does not provide any benefits. Therefore the factors that States have to consider in relation to the intervention decision-making process will actually also have to be considered when deciding whether or not to grant a place of refuge. Going squarely to the core of the *Prestige* accident, questions might be asked that, had Spanish Authorities foreseen such a catastrophic result, would they have had made such an order all the same? And were they reasonably expected to have foreseen it? Furthermore, how will the channelling of liability device established by CLC/Fund Conventions have influence on the obligation and responsibility regime as discussed in this Chapter? Chapter 4 will deal with the conflicting interests, evaluation of intervention measures, and channelling of liability pursuant to CLC/FC Conventions in more details, after some discussion of salvage related issues in Chapter 3.

⁸¹ Supplementary Report on Places of Refuge, submitted by CMI to IMO on 11 February 2005, LEG 90/8, at paragraph 26.

CHAPTER 3 SALVAGE AND COASTAL STATES

3.1 *The nature of salvage*

The difficulties to define salvage have once been expressed by an English judge as:

‘It has been said that no exact definition of salvage is given in any of the books. I do not know that it has, and I should be sorry to limit it by any definition now.’⁸²

Such difficulties are recognized by modern textbooks on salvage even of today⁸³.

Notably the 89 Salvage Convention offers no definition of ‘salvage’, but only that of ‘salvage operation.’⁸⁴ Indeed before discussion of the interrelationship between salvage and coastal states, it is quite necessary to look at the complex implication of the word salvage and its various categories.

3.1.1 Salvage under traditional English law

Though it may not be safe to say that English law is the blueprint of international law governing salvage today, it may be a true situation that no other jurisdictions contain such a huge bundle of salvage cases and principles as English law does, and some of

⁸² Lord Stowell in *The Governor Raffles* (1815) 2 Dods. 14, 17.

⁸³ See William Rann Kennedy & Francis Rose, *Kennedy and Rose on Law of Salvage*, 6th Edition, (London: Sweet & Maxwell, 2001), Chapter 1. See also Geoffrey Brice & John Reeder (editor), *Brice on the Law of Salvage*, 4th Ed. (London: Sweet & Maxwell, 2003), paragraphs 1-77 to 1-81.

⁸⁴ Article 1 of 89 Salvage Convention: ‘For the purpose of this Convention – (a) Salvage operation means any act or activity undertaken to assist a vessel or any other property in danger in navigable waters or in any other waters whatsoever.’

the major principles are obviously incorporated into the 89 Salvage Convention, though with some amendments to meet the requirement of the current situation.

The law of salvage is a unique branch of law in English law, which will apply when certain standards are met, such as the principles of real danger, voluntariness, and success⁸⁵. Salvage is also used as a legal right, as envisaged in the use of the phrases ‘claim salvage’, ‘be awarded salvage’. In brief, the salvor must have assisted a ship in danger voluntarily, i.e. not out of his pre-existing obligations, and he must have obtained some degree of success in preserving the properties, even if a partial success, before he can be awarded with part of the value of the salvaged properties. The principle of success is also known as the ‘no cure - no pay’ rule.

The traditional English law of salvage might be said to be in a declining status for two reasons. First, the 89 Salvage Convention has been enacted by the UK and incorporated into its Merchant Shipping Act 1995 (as substituted by the Merchant Shipping and Security Act 1997), and therefore has somehow replaced part of the traditional salvage law. On the other hand, the emerging wide application of salvage agreement – typically the continuously renewed Lloyd’s Standard Salvage Agreement (more often referred to as the Lloyd’s Open Form or LOF) – has actually averted, if not overthrown, some old rules such as success and ‘no cure - no pay’.

However, the importance of English law, no matter that of salvage or that of general private law, cannot be ignored, especially in salvage cases pursuant to LOF, since LOF salvage is subject to London arbitration and English law, as will be discussed in Chapter 4 in relation to salvor’s implied obligations.

3.1.2 New implications under 89 Salvage Convention

⁸⁵ For general principles of salvage see *Op.Cit.* 83 Kennedy & Rose and Brice.

The 89 Salvage Convention is observed to aim at providing ‘a modernised and comprehensive restatement of the law of salvage’⁸⁶. On one hand, the principle of ‘success’ and ‘no cure - no pay’, and criteria that are used in English law to determine salvage reward are coined into the Convention; while on the other hand, Article 14 of the Convention may be said to have made a most important innovation in international salvage law regime, though it was not an invention of the Convention but rather a device that had been long used by the industry. In brief, it enables the salvors to recover their expenses when salvage operation has contributed to the actual or hopeful preservation of marine environment.

Although it might not be accurate to say that the Convention has included operations for the purpose of environmental protection into the category of salvage⁸⁷, it has at least changed the compensation / remuneration aspects of salvage operation. How this, coupled with SCOPIC clause and Fund policy, has changed the salvors’ interests at risk in situations when places of refuge are concerned, will be discussed more in section 3.2.

3.1.3 Private salvage v. compulsory salvage

Although the word ‘compulsory salvage’ does not appear in the 89 Salvage Convention, the words ‘salvage operations by or under the control of public authorities’ clearly imply the recognition of such situations⁸⁸. It could be carried out by the authorities or other designated government agencies; or it could be done by a private entity or person, according to the order of public authorities.

⁸⁶ Kennedy & Rose at p. 12. See also Brice at paragraphs. 1-78 to 1-79, and 6-88.

⁸⁷ The main debates in relation to the definition was whether ‘wrecks’ could be salvaged, as a deviation from traditional English law, see Frank Wall, *Improvements and deficiencies from a government viewpoint*, Salvage Conference Papers, (London: Lloyd’s of London Press, 1990), at p. 71.

⁸⁸ Article 5.

In English law of salvage though public officers rendering assistance services to ships in danger are also entitled salvage when such services are not within their pre-existing obligations⁸⁹, such officers are in the same position as private salvors, and no particular consideration have been given to its compulsory nature, i.e. a salvage operation in which the public authorities can actually have double characteristics: that of a private person claiming for compensation for the services he has provided, and that of a public officer giving orders on behalf of the State.

As for the Convention, it only stipulates that the rights and remedies of such public authorities are subject to the national law of the State. But the analysis of compulsory salvage is necessary since it is an important part of national accident response arrangements, and is deeply intertwined with other issues such as private salvors' interests that are likely to be influenced by intervention measures. Section 3.3 will examine the prevailing practice and problems thereto.

3.1.4 Contractual salvage – LOF v. Fixed rate services

The Lloyd's Standard Form of Salvage Agreement (more often referred to as 'Lloyd's Open Form' or LOF) has its long history in England and is the most commonly used salvage agreement of the type today⁹⁰. Statistics provided by International Salvage Union suggests that a total of 4,793 salvage operations were performed by its 52 members in the period 1978-2003, of which 2,588 operations were carried out under LOF⁹¹.

In theory 'no cure no pay' is still the principle applicable to salvage pursuant to LOF; although the incorporation of Article 14 compensation and SCOPIC clause has

⁸⁹ See Kennedy & Rose at pp. 533-557; see also Brice at paragraphs 1-211 to 1-261.

⁹⁰ See Lloyd's Agency Salvage Arbitration Branch website, <http://lloydsagency.com>. See also International Salvage Union website, <http://www.marine-salvage.com>.

⁹¹ *Ibid.* International Salvage Union website. .

changed the actual economic income that salvors are likely to be entitled, as well as the pre-requisite of such an entitlement.

Of course, LOF is not the only form of salvage agreement – there are various other forms of ‘no cure no pay’ agreement such as the Japan Shipping Exchange Form. On the other hand, let alone compulsory salvage, even private or commercial salvage operations are not always carried out pursuant to ‘no cure - no pay’ agreements. For example, as pointed out by the USA National Research Council Report, salvage operations in US waters are more often subject to a negotiated or day rate, and such services are sometimes provided by the so-called ‘independent salvors’ or ‘general marine contractors’⁹², whose work scope will be limited to a specific aspect of the whole salvage operation such as fire-fighting or emergency towing or simply consultation, vis-a-vis the overall ‘one package’ services provided by a ‘full-time professional salvor’⁹³.

Interesting to note, linguistic differences might give rise to different appreciation of the concept of salvage. For instance, in Chinese the word ‘salvage’ is sometimes used interchangeably with ‘rescue’ – a typical example can be found in the Chinese version of the 89 Salvage Convention and the 79 SAR Convention, in which the same Chinese word ‘*Jiuzhu*’ is used for both salvage and rescue. For a quite long period of time in recent history a word similar to ‘wreck-removal’ or ‘refloating’ (pronounced ‘*Dalao*’) has been used to specifically refer to what salvage means in English law, and it is only recently that another phrase ‘property salvage’ has been used in official document, vis-a-vis what can be literally translated as ‘life salvage’.

⁹² Op.Cit.51 *Reassessment of the Marine Salvage Posture of the United States*, at p 16 & p 24.

⁹³ It’s rather irrelevant but just interesting to mention that, a muddled situation may therefore be created: should these fixed-rate assistance services be included in the ‘salvage operations’ over which the 89 Salvage Convention is applicable? It might not be a serious problem in common law jurisdictions with the full set of principles especially voluntariness related to salvage: however, in a civil law jurisdiction where the 89 Convention is applicable without relevant national law restrictions, it is still quite disputable whether salvors under such agreements can claim salvage reward and compensation according to the Convention.

The word salvage might have different meanings according to different people or in different circumstances. The apprehension of English judges and lawyers might be the ‘purest’ or narrowest one; while the ‘salvage operation’ under 89 Convention has a much wider implication – a literal interpretation would include any assistance provided to vessels in danger, no matter on a compulsory or a fixed-rate basis. In the context of accident and pollution response, it is necessary to consider salvage in its widest implication, since all these kinds of salvage have a clear public effect – prevention or control of pollution, or, in very rare cases, causing deterioration on the contrary.

3.2 *Private salvors’ interests that might be influenced*

In carrying out the salvage operation, salvors would have to invest certain equipment and human resources, and in dangerous situation – which is not an uncommon scene in salvage – would have to take the risks of their own property or even human safety, in order to save other’s property and protect the environment. In return it is only justifiable that they be remunerated for the expenses, efforts and courage they have invested. Such a legal thinking is not only effected in the English salvage law and 89 Convention, but is also in conformity with the ‘unjust enrichment’ theory of civil law systems. The framework to determine remuneration has evolved greatly over the last decade, into today’s ‘three-tier’ arrangements, briefly speaking, the Article 13 reward, Article 14 special compensation, and the SCOPIC compensation⁹⁴, which represent the recognition of the international society to provide adequate incentives to professional salvors.

3.2.1 No cure - no pay and Art. 13 Reward

⁹⁴ For detailed discussion of remuneration for salvage services see Xu Jing Jing, *Assessment of salvage award under Lloyd’s Open Form*, World Maritime University Dissertation (2000).

Success is one of the criteria that are required to be met in order to be entitled salvage under English law. The principle is also known as ‘no cure no pay’, which is incorporated in article 12 of the 89 Salvage Convention, which reads ‘Salvage operation which have had a useful result give right to a reward’, and ‘except as otherwise provided, no payment is due under this Convention if the salvage operations have had no useful result’. Then the salvors’ reward will be determined according to article 13 of the Salvage Convention. Usually it will be a percentage of the value of the salvaged property, the percentage depending on various factors such as the skills and efforts exercised by the salvors and the degree of danger etc.

The 89 Convention does not provide for the definition of ‘useful result’, though in English law there are numerous cases providing interpretation for ‘success’⁹⁵. LOF provides for a more detailed arrangement, under which the salvor shall take the salvaged property to an agreed place of safety, or in case of lack of agreement, to a place of safety, before the salvage can be deemed success⁹⁶. As aforementioned, LOF is governed by English law, and the requirement for ‘place of safety’ under English law will have to be met.

It will be in vain to investigate the exact interpretation of ‘useful result’ in various jurisdictions, however, briefly salvors would not only have to save the casualties from the danger it has been threatened, but also have to bring them to a status where they are no longer threatened by, at least, the same danger, in order to be entitled Article 13 reward. In cases where a coastal state refuses to allow a casualty to enter into a certain place, no matter such a place is intended as a temporary location to carry out salvage operation or is for redelivery of the salvaged property, salvors would probably lose the chance of getting a useful result and thus would lose the chance of getting Article 13 reward.

⁹⁵ See Kennedy & Rose Chapter 8, and Brice paragraphs 1-348 to 1-352.

⁹⁶ See LOF 2000 Articles A and H.

3.2.2 Article 14 special compensation

Though Article 14 is not an invention by 89 Salvage Convention, it may be said to be the most important innovation in international salvage law regime, which provides:

‘Article 14 Special Compensation

1. If the salvor has carried out salvage operation in respect of a vessel which by itself or its cargo threatened damage to the environment and has failed to earn a reward under article 13 at least equivalent to the special compensation assessable in accordance with this article, he shall be entitled to special compensation from the owners of that vessel equivalent to his expenses as herein defined.
2. If, in the circumstances set out in paragraph 1, the salvor by his salvage operation has prevented or minimized damage to the environment, the special compensation payable by the owner to the salvor under paragraph 1 may be increased up to a maximum of 30% of the expenses incurred by the salvor. However, the tribunal, if it deems it fair and just to do so and bearing in mind the relevant criteria set out in article 13, paragraph 1, may increase such special compensation further, but in no event shall the total increase be more than 100% of the expenses incurred by the salvor.’

This article can be said to be a major manifestation of the main purpose of the 89 Convention, i.e. to offer adequate incentives to persons who undertake salvage operations, and therefore to encourage private efforts for environmental protection. Indeed with the growth of oil transport at sea, the increasing number of bigger and bigger tankers, and thus inevitably, the increased number of major oil spills, the old rule of ‘no cure – no pay’ seemed no longer an adequate motivating mechanism. If salvors spend great effort and expenses but have to face a greater risk of failing to get adequate compensation, which proved to be the factual result in several cases in the 1970’s and 80’s, it is not surprising that salvors were reluctant to take the job of

salving laden tankers in distress. This is quite adverse to the increasing concern of the coastal states to protect the marine environment, and the increased liability of shipowners and their P&I clubs after the CLC Convention entered into force. The Article 14 arrangement, originated from the previous private ‘safety net’ arrangement, when established through an international convention, reflects the general international attitude which recognized that, it is only adequate that salvors should at least be able to recover their costs for their efforts to preserve the marine environment, and they should be awarded economic bonus when their efforts have some useful result in this aspect, even when there is no useful result in preserving the marine property at risk⁹⁷.

3.2.3 SCOPIC

When in *The Nagasaki Spirit* (1997)⁹⁸, the English House of Lords made a judgment unfavourable to the salvors in determining the ‘fair rate’ in Article 14, concerns were again raised as to whether the current remuneration systems for salvors were adequate enough. As a compromise of the P&I clubs, SCOPIC clause was added to the LOF agreement. In brief, parties when fixing the LOF will have a discretion to incorporate the SCOPIC Clause, and afterwards till the end of the salvage operation, salvors can elect to invoke the incorporated SCOPIC Clause. The appendix to this clause contains a list of fixed day rate for various salvage equipment and personnel, and once it is invoked, special compensation under Article 14 will be replaced by calculation of the inputs and expenses according to this fixed rate⁹⁹.

⁹⁷ See Kennedy & Rose Chapter 5, and Brice Chapter 6. See also Thomas A.Mensah, *Deficiencies found in the Regime Established under the 1910 Salvage Convention*, and Michael J.lacey, *Expansion of the Salvage Industry to meet Modern Requirements and the Need for Substantial Rewards to Sustain the Industry*, Salvage Conference Papers, (London: Lloyd’s of London Press, 1990), at pp.1-10 and 11-24 respectively.

⁹⁸ *Semco Salvage and Marine Pte. Ltd. v. lancer Navigation Co. Ltd. (The NAGASAKI SPIRIT)* [1997] 1 Lloyd’s Rep. 323 (H.L.)

⁹⁹ See Kennedy & Rose Chapter 5 & 9, and Brice Chapter 8 for more detailed discussion.

3.2.4 Maritime Lien and Ship Arrest

The words ‘to be entitled salvage’ have implications of not only the right to be given a certain amount of remuneration, but also the right to enforce such a remuneration. Salvage is a traditional maritime lien and has high priority over various other maritime claims. According to Article 5.2 of the International Convention on Maritime Lien and Mortgage 1993, ‘maritime liens securing claims for reward for the salvage of the vessel shall take priority over all other maritime liens which have attached to the vessel prior to the time when the operations giving rise to the said liens were performed’, and maritime liens rank above all other general claims but for some exceptions (Art. 5.1, 12.3 & 12.4) The similar provisions are also contained in the Convention Relating to Maritime Liens & Mortgage, 1967. The International Convention for the Unification of Certain Rules relating to the Arrest of Seagoing Ships, 1952, by Article 1.1.c and Article 3, recognizes the right of salvors to arrest the particular ship as well as the sister ships to enforce salvage claims¹⁰⁰.

None of the above conventions, nor the 89 Salvage Convention, deal with the question of whether claims pursuant to Article 14 would fall within the category of ‘salvage reward’ or ‘maritime liens’. Instead Article 20 of the 89 Convention stipulates that ‘nothing in this Convention shall effect the salvor’s maritime lien under any international convention or national law’. The 93 Lien Convention, by Article 4, only names ‘claims for reward for the salvage of the vessel’ as maritime liens. It is also not clear whether Article 14 claims can be enforced through arrest of ships. The 52 Arrest Convention simply reads ‘a claim arising out of ... salvage’ (Art. 1.1).

¹⁰⁰ See David C. Jackson, *Enforcement of Maritime Claims*, 3rd Ed. (London; Hong Kong: LLP 2000), at paragraph 18.43-44 & 18.66-69; Francesco Berlingieri, *Berlingieri on Arrest of Ships – a commentary on the 1952 and 1999 Arrest Conventions*, 3rd Ed. (London; Hong Kong: LLP, 2000), at paragraphs I. 438 – 441; *Op.Cit.* 83 Brice at paragraph 2-12.

As aforementioned, definition of salvage is divergent. The prevailing view is that, special compensation under Article 14 does not give rise to a maritime lien, since the legal thinking behind the salvage lien is that, by a successful salvage operation some properties are preserved which create a basis for claim enforcement. In other words, salvaged properties provide some tangible securities, by the arrest of which, the salvors' claims can be secured. Furthermore, in 89 Salvage Convention the word 'reward' is specifically used to refer to Article 13 reward, and Article 14 uses the words 'special compensation' instead. Therefore it is more persuasive than not, that salvors cannot exercise maritime liens against salvaged properties for Article 14 compensation¹⁰¹.

As further evidence, Article 4.7 of Lloyd's Standard Salvage and Arbitration Clauses (which is an integrated part of the LOF Agreement) provides that '...the Contractors shall have a maritime lien on the property salvaged for their remuneration', while article I of LOF 2000 which reads 'The Contractors remuneration and/or special compensation...', implies that special compensation is not part of the 'remuneration'¹⁰².

As for the right to arrest, typically the right to arrest sister ships when the particular ship in distress is in total loss, a literal interpretation of the relevant provisions in the 52 Arrest Convention seems to approve this right¹⁰³, since it is, apparently, a claim 'arising out of salvage'¹⁰⁴.

¹⁰¹ See William Tetley & Robert C. Wilkins, *Maritime Liens and Claims*, 2nd Ed. (Montreal; Quebec: Editions Y. Blais, 1998), at pp. 342 – 345.

¹⁰² See Brice at paragraphs 8-69 to 8-74.

¹⁰³ See *Op.Cit.* 101 William Tetley at pp. 337 – 381.

¹⁰⁴ Notably the 99 Arrest Convention (not in force yet) by Article 1.1.(c) expressly include special compensation in the definition of 'maritime claims'. The Salvage Convention by Article 21 titled 'duty to provide security', has the effect of conferring a right of 'quasi possessory lien' on salvors, however, it applied to the salvaged property only and does not apply to sister ships. See *Ibid.* at p 363, *Op.Cit.* 100 David C. Jackson at Chapter 20 (particularly section 20.49), *Op.Cit.* 83 Brice at paragraph 2-76 and Kennedy & Rose at section 13.2, for detailed discussion.

3.2.5 Salvage as commercial activities

In history salvage used to be an occasional activity; as we can read from the great amount of cases in English law since the 16th century, the circumstances are often that a ship or a person in the vicinity of a ship in distress ‘gave a hand’ to the casualty and was subsequently awarded salvage. Such is not at all the situation of today. Development of technology has resulted in larger size and more complex construction and equipment of ships, thus requiring a much higher standard on the salvage expertise and equipment. Salvage are dominantly carried out by professionals, and often pursuant to an agreement, no matter a ‘no cure no pay’ form or on the basis of a fixed rate. In essence, salvage carried out by private entities is a commercial service in its nature.

However, the possible accusation that salvors make money out of accidents is a very unfair one. No matter how professional a salvor is, the risk that he has to take with regard to his own property or even safety of life still exists even with the most updated technology available. On the other hand, it might not be a well-known fact that, it is very expensive to maintain salvage equipment and personnel capable of handling major accidents. Even for ‘full-time professional’ salvors who provide ‘one package’ salvage services, the income from salvage is far less than sufficient to cover the cost of maintaining such equipment and personnel. To be capable to handle major accidents, powerful tugs with fire-fighting equipment is of necessity; so is an experienced and well-trained team¹⁰⁵. Other special craft or equipment such as a floating crane is sometimes needed. From the very beginning of the emergence of professional salvors, salvage is not the regular source of income that he can depend on. Such salvage vessels must be operated for ‘normal’ commercial purpose, such as harbour and ocean towing and offshore services, to keep the company survive, while salvage income is deemed as a bonus. Such a situation has been commented by a

¹⁰⁵ For general information on salvage methods, equipment and techniques see *IMO Manual On Oil Pollution, Section III, Salvage* (1997 Edition), (London: IMO Publication, 1997), Appendix 1. See

salvage master with humour as one of ‘bread and butter’ – the normal activity is the bread and salvage is the butter¹⁰⁶.

3.3 Salvage operations carried out or controlled by authorities

Three articles contained in the 89 Salvage Convention are relevant to this issue, namely, Articles 5, 9, and 11.

3.3.1 Authorities’ Right to Salvage

Though Article 5 is viewed by some distinguished authors as ‘clumsy’¹⁰⁷, the necessity for such a provision is obvious, as it clarifies the right of public authorities to carry out salvage operations and to claim reward and/or compensation thereof. Under English law ‘voluntariness’ is another testing for entitlement of salvage, i.e. salvors will not be entitled salvage if his services were carried out pursuant to a pre-existing obligation, such as the obligation of a public authority to assist. No matter to what degree this provision has changed the situation in English law, if at all, at least it has taken ‘particular account of the fact that different States may have different rules for public authorities which carry out salvage operations’¹⁰⁸.

3.3.2 Salvage as part of national response framework

To carry out salvage operation can be not only the right, but also the obligation of a public authority or government agency. Such pre-existing obligation does not prejudice the right of such entities to claim for remuneration provided that the national law allows so, as confirmed in the 89 Convention.

also C. Baptist, *Salvage Operations*, (London: Stanford Maritime, 1979), and Edward M. Brady, *Marine Salvage Operations*, (Cambridge: Cornell Maritime Press, 1960).

¹⁰⁶ *Ibid.* C. Baptist.

¹⁰⁷ Kennedy & Rose at p. 546.

The participation of vessels owned or operated by states or public authorities is not a rare scene in reality. Typical might be the national salvage system of China. The Salvage Bureaus under the Ministry of Communication of China (namely the China Salvage as co-ordination centre, and Guangzhou Salvage, Shanghai Salvage and Yantai Salvage as local operators) are state owned and state operated government agencies. They undertake various duties conferred by the Chinese Government, including accident response, property salvage, wreck removal as well as oil spill cleanup in Chinese territorial sea and internal waters¹⁰⁹; and they also perform obligations under international conventions and bilateral agreements on behalf of China. Though the Commercial Maritime Code of China does not specifically deal with the issue of whether public authorities can be entitled salvage, one of the Decrees given by Ministry of Communication (which in Chinese legal system have the status of legislations) specifically confers the right of claim for salvage remuneration on these organizations. Another MOC Decree (No 426 dated 22nd July 1997) stipulates that ‘...For the salvage of foreign ships, the gross tonnage of which is above 300 tons, and the properties onboard, the salvage Bureaus of MoC shall organise professional salvage teams and relevant forces in providing relief...’ China Salvage is one of the members of ISU and, apart from other numerous salvage operations, the local salvage organizations have successfully fulfilled several LOF salvage and were awarded accordingly.

China is not, of course, the only example. Though U.S.A. by OPA 90 requires vessel operators to certify that adequate salvage capability is available¹¹⁰, it maintains a salvage response capability, mainly with the Coast Guard and the Navy. Though the policy is that such resources ‘are made available for commercial use only when commercial assets are not available’, and ‘has participated in commercial salvage

¹⁰⁸ *Ibid.* at p. 547.

¹⁰⁹ Search and rescue used to be among the political duties of these organizations until an organizational reform in 2003 which separated each of the three local agencies into two organizations, responsible for salvage and rescue respectively.

only as a salvor of last resort¹¹¹, such a policy does not necessarily apply when the purpose of the salvage is to prevent or minimize pollution¹¹². Cases can be named such as the *Mega Borg* and the *Ocean 255*¹¹³. Interesting to note, a LOF was entered into for salvaging the *Mega Borg*, but case report could be found in the Lloyd's Salvage Arbitration Branch website, though generally a LOF in act will be reported and published in this way.

In Europe, a Maritime Safety Proposals by Baltic countries in 2004 proposed permanent provision of emergency tugs along main shipping routes¹¹⁴. Though it is not clear how many European countries have actually arranged salvage tugs along their coastal lines as one of the accident response systems, the question of whether services provided by such tugs should be compulsory would inevitably be raised when they have been actually put in station. South Africa has already had such an arrangement in place. A powerful towing tug is standby on duty all year round near the Cape of Good Hope. It is private owned and chartered in by the Authorities, and when there is an accident, a salvage agreement will be concluded between the tug owners and the casualty owners¹¹⁵.

The necessity to maintain government funded salvage capabilities partly results from the business environment and practices of the salvage industry. Private salvors will not normally distribute expensive tugs and equipment along the coasts, waiting for accidents and salvage agreement; if so, it would make them bankrupt. And they have no obligations to do so. To better protect the environment and the public interests, two alternative approaches are available. One is the approach taken by the 89 Salvage Convention, to encourage private salvors; the other is to maintain national

¹¹⁰ 33 CFR 155.1035

¹¹¹ *Op.Cit.72 Reassessment of the Marine Salvage Posture of the United States*, at p 14.

¹¹² *Ibid.* at p.31.

¹¹³ *Ibid.* at pp. 29, 96, & 97.

¹¹⁴ *Maritime Safety Proposals Baltic 2004*, Maritime Safety Conference Baltic December 2004, *inter alia*, Annex to Proposal No. 1, Section 5.

¹¹⁵ As advised by Captain Brian Watt, Chief Director of Maritime Administration of South Africa, in a WMU seminar in year 2004.

salvage capabilities, subject to the fiscal situation of that State. Various concerns have been expressed as to whether it is appropriate to rely solely on private salvage capabilities; for countries which are not parties to the Fund Convention, the maintenance of public-funded national salvage team appears more important.

It must be noted that, going back to the *Prestige* accident, an article comments that ‘The maritime rescue ships belonging to the Xunta de Galicia¹¹⁶ (the towing boat “Valdivia” and the supporting ship “Serra de Santiago”) could not operate due to their obsolescence and their technical incapability for this kind of actions’¹¹⁷, and points out the lack of protection to the coastlines. The comment is not accurate for that the registered owner of the two tugs is Remolcadores Nosa Terra S.A. (Spain), a private professional salvage company, not the government¹¹⁸. Two larger tugs belonging to the same company, the Ria de Vigo(120T BP) and Charuca Silveria (50T BP) were in the vicinity from a very early stage; one was on scene and the other was approaching under a pending agreement, while a LOF had been awarded to another professional salvor¹¹⁹. It is not certain whether the two smaller tugs were chartered by the government as part of the standby salvage capabilities, but the facts relating to the accident would suggest that lack of salvage capabilities was not a contributing factor to the severe final result.

3.3.3 Protection of National Salvage Industries

While article 5 of 89 Salvage Convention clarifies the right of public authorities to claim for salvage remunerations provided that the national law permits so, it does not

¹¹⁶ The regional government of Spain which was mainly involved in the initial response to the accident.

¹¹⁷ *Proposal for maritime transport*, by Nunca Mais. See Coordination Marée Noire website, http://www.coordmarenoire.net/article.php?id_article=150

¹¹⁸ See website of the company, <http://www.remolcanosa.com/en>, and Fairplay World Shipping Encyclopedia.

¹¹⁹ See Lloyd’s Agency website, Salvage cases report, <https://www.lloydsagency.com/Agency/Salvage.nsf/vwSalvageCases/952F3D178BA3850580256C7E00573320?OpenDocument>, reported by Smit Salvage B.V. on November 13, 2002.

deal with the question of whether States have the right to 'reserve' the salvage business for themselves or for national salvors.

For compulsory salvage carried out by public authorities or government agencies for the purpose of pollution prevention or reduction, the answer tends to be a confirmative one, since the right of the State to promulgate and enforce laws in its territorial sea, especially those related to environmental protection, is well recognized.

But for commercial salvage, the issue is a little more complicated. Though it has been generally recognized that salvage is by its nature a commercial service¹²⁰, at least in present time when professional salvage has become the main stream, there is no international agreements, not even the WTO instrument, which deal with the market entry permit of the salvage industry.

Then does a state have an international obligation to allow salvage in its territorial sea to be carried out by foreign salvors? No restriction is imposed in the 89 Convention - though Article 11 might be relevant it hardly contains any substantial requirement. It might be argued that the definition of innocent passage in UNCLOS would imply the right of foreign salvors to carry out salvage in the territorial sea, since ships stopping to render assistance are considered to be in the status of innocent passage¹²¹. However, ships in innocent passage will lose the status of innocence if its activities are contrary to the national laws, provided that such laws are not contrary to the international law. Allowing certain activities within one jurisdiction does not necessarily imply allowing foreign legal persons to gain economic income from such activities. For example, foreigners are of course allowed to sing and dance, but they are not necessarily allowed to perform entertainment shows and generate income therein.

¹²⁰ *Op.Cit.*3 Aldo Chircop, at p39.

¹²¹ Article 18.2.

The complexity of the question might have its root in the complexity of salvage. In some circumstances, for instance, when a small ship encounters some engine problem in the vicinity to shore, and a passing-by cargo ship can easily connect a tow line to her and tow her to an anchorage, this operation is a kind of salvage and it seems unreasonable for the national law to request the small ship in distress to wait for national salvors.

Marine salvage is unique in its public implication, which is akin to firefighting on land. Such a public implication is more and more manifest with the growing concern on environmental protection. At least, it is justifiable for States to regulate salvage activities within its territorial sea, and such a regulation can include the pre-qualification of salvors. To examine the capabilities of national salvors and certificate them can be one of the measures that a government adopts, to familiarize itself with its accident response capability, and to facilitate such private assets for the public interests when necessary. Instead of foreign salvors, whose qualification the Authority might have no clue at all, why should the State be required to refrain from reserving the business for national salvors only, especially when the State is confident on the sufficiency of its national salvage capabilities? Local salvors might have some advantage compared to a foreign salvor, for instance, they might be more familiar with the hydrology at site and more skilled in communication.

Aside from the public administration purpose, States shall have the right to favour its national salvors simply for the purpose of preventing national salvors from outside competitors, as an incentive provided to national salvage industry. At least, there is no international instrument under which a coastal State consents to waive this right. The only clear exception might, again, be where life saving is concerned, in which situation it is not only a right but also an obligation of the ships nearby to assist the ship in distress.

As a generally recognized principle in international law, a state has permanent sovereignty over its natural resources and internal economic activities, and such a principle is reinforced in the Charter of the United Nations (General Assembly Resolution 2625 XXV (e)) which reads¹²²:

‘Each State has the right freely to choose and develop its political, social, economic and cultural systems.’

And article 2, paragraph 1 of the Charter of Economic Rights and Duties of States:

‘Every State has and shall freely exercise full permanent sovereignty, including possession, use and disposal, over all its wealth, natural resources and economic activities.’

United States, one of the countries well known for its free market doctrine, actually ‘restricts the activities of foreign tugs and salvage vessels in U.S. navigable waters’¹²³. Foreign salvage vessels cannot work in coastal waters of the United States unless approval of a high customs official is granted. Interesting, Vietnam used the fact that two salvage operations were carried out by its nationals in history to support its territorial claims¹²⁴.

Not surprisingly commercial salvage is not on the negotiation table of WTO member States; it does not even seem to fit within any of the categories of WTO Service Sectoral Classification List¹²⁵. Apparently the issue has not raised concern of the maritime sectors, either, not even in the drafting of the 89 Salvage Convention. The Convention was a response to the shrinkage salvage industry and ‘declining salvage

¹²² *Op.Cit.57*, Chapter 27, *Permanent Sovereignty over Natural Resources and Economic Activities*, by Georges Abi-Saab.

¹²³ Cabotage Law (Act of 11 June 1940) 46 USC 316.

¹²⁴ WMU Dissertation 2003, Jean Ver Pugal Pia, “Conflicting *Territorial Claims in the South China Sea*”, at p30, which quotes from Gerardo Martin C. Valero, “Spratly Archipelago: Is the question of sovereignty still relevant? A roundtable discussion”, Quezon City, Philippines: Institute of International Legal Studies University of the Philippines Law Center, 1993, pp 17-18.

¹²⁵ See WTO website, http://www.wto.org/english/tratop_e/serv_e/mtn_gns_w_120_e.doc.

capability’; therefore it is natural that considerations were not paid to any provisions that might discourage private salvors, even foreign ones.

However, while the current international law framework does not provide a clear answer to whether coastal states can forbid foreign salvors to carry out salvage operation within its territorial sea and gain economic income thereof, the need of clarification is quite necessary. This is an issue of national policy; yet it is also another potential conflict of interests behind the decision of a coastal state authority with regard to the place of refuge and intervention measures.

3.3.4 Coastal State’s Right to Give Directions

Article 9 of the 89 Salvage Convention obviously refers to or recognizes the right of coastal States to take intervention measures pursuant to the Intervention Convention and other customary international law. The last sentence, ‘to give directions in relation to salvage operation’ has a wider implication. Such directions may not be limited to an order to tow the casualty out to open sea, or that the salvage operation should be carried out by national salvors, it could also be related to a specific operation, e.g. to discharge the cargo to a port reception facility instead of a ship-to-ship transfer. Legality of the latter type of directions appears to be conferred by the sovereignty of the coastal state over its territorial sea, which is a ‘generally recognized principle of international law’, as implied in Article 9.

3.3.5 Article 11 Co-operation

Article 11 of the 89 Salvage Convention apparently imposes certain obligations on coastal state when it monitors the salvage operation. However, it is doubtful whether such a requirement is substantial¹²⁶, because of the vague word of ‘take into account’.

¹²⁶ See *Op.Cit.* 11 Aldo Chircop at pp.219-220 for detailed discussion.

The same expression was used in article V.3 of the Intervention Convention, however, in the context of Intervention Convention it was put in such a way as to have established an objective standard to determine whether the captioned measures are proportionate, though this standard is also not certain and practicable enough. In Salvage Convention, the requirement that ‘A State Party...shall take into account’ can hardly be said to have any effective result. The possible questionnaire to whether State Parties have fulfilled this requirement seems to be justified only when it is proved that the States had never given a mind to the factors contained thereof; and it could be easily overruled with an answer that, ‘those factors have all been considered, but they were given up for no reason.’

Various documents suggest that Article 11 was drafted in consideration of, *inter alia*, places of refuge¹²⁷. A preparatory document of the 89 Salvage Convention, CMI News Letter Winter 1985 titled *The Montreal Draft Salvage Convention* suggests that, the need to introduce certain rules of public law dealing with salvage had been considered by the drafting Committee, including issues concerning mandatory salvage in certain urgent cases and the port of refuge. However, such an introduction was eventually given up for lack of a majority support from state parties, as expressed in the document, ‘it seems now unlikely that any additional rule of public law will be introduced in the new salvage convention’¹²⁸.

3.4 Conflicting interests that need to be balanced

It can be seen that since the time when the 89 Salvage Convention entered into force, the system to offer remuneration to salvors has changed in a large scope. Within the wide scope where the 89 Salvage Convention is applicable, salvors would be compensated by an amount determined according to Article 13 or Article 14, whichever is higher; and when LOF is the governing agreement, salvors would have

¹²⁷ *Ibid.* See also Brice at 1-388.

¹²⁸ See also IMO/LEG/83-13-3, *Matters arising from the seventy-fourth session of the Maritime Safety Committee: places of refuge*, 28 August, 2001; and *Op.Cit.105 Salvage* (1997 Edition), pp. 10-11; and *Op.Cit.87* at p 38.

a chance to get SCOPIC compensation in replacement of the Article 14. The situation is no longer that, if salvors fail to obtain success in preserving the property, they will get nothing at all. However, if such a failure is a result of the refusal and intervention of a coastal State, the salvors are still deprived of the chance of getting the higher one of Article 13 reward or special compensation.

On the other hand, had the salvage operation been unsuccessful because of the coastal State's intervention, the salvors would be deprived of the right of exercising maritime lien. Even on the presumption that salvors could arrest sister ships to enforce claims for article 14 compensation, the ambiguity and the possible differences in the interpretation of 'salvage' would add difficulties to such claims. If salvors arrest ships in non-parties to 89 Convention, it is very unlikely that they still be entitled Article 14 compensation. Another difficulty lies with the loss of maritime lien, as a result of which, the salvors' claim would have no priority above other claims.

Furthermore, the possible 'tension' between foreign salvors and national salvage capabilities might need to be paid attention to. On the one hand, the need to provide incentive, namely the salvage 'income' to cover up the high maintenance costs of national salvage capabilities, no matter they belong to government agencies or private entities, should be recognized; on the other hand, it might be the case that national capabilities are insufficient and foreign salvors should be welcomed to enhance the accident response framework of the State. Such is a matter of national policy, however, harmonization, at least transparency, is necessary for the purpose of environmental protection.

Having analysed the public impact of salvage and the roles of places of refuge and other intervention by Coastal States, it appears now necessary to re-consider the inclusion of relevant public rules.

CHAPTER 4 CONFLICTING INTERESTS, RISK-BASED DECISION MAKING, AND CHANNELLING OF LIABILITY

4.1 *Conflicting interests related to marine accidents*

In the drafting of the CLC/Fund Conventions it has been pointed out that ‘one merely has to consider the many concerns, organized and individual, public and private, national and international, which have direct and indirect interests in the various sources of the sea, to appreciate the complexity of the problems involved in any regime designed to regulate and control the use of that environment.’¹²⁹ Such is, of course, still the position in considering the issue of places of refuge. Several interested parties would usually be involved in a maritime accident, which include, *inter alia*¹³⁰:

- a) shipowners, cargo owners, and their respective insurers;
- b) seafarers (and probably passengers);
- c) salvors;
- d) the coastal state, within whose internal waters or territorial sea a salvage operation is desired for (hereinafter ‘the coastal State’);
- e) other neighbouring coastal states, whose coasts are under potential danger of pollution imposed by the ship in distress (hereinafter ‘third States’);
- f) IOPC Fund, in case of tankers.

¹²⁹ *Legal Problems Relating to Marine Pollution by Oil*, by Thomas A. Mensah, at p 294. (Publisher unknown since this article was obtained as a lecture handout.)

¹³⁰ *Op.Cit.100 Salvage 1997 Edition* contains similar analysis at p.9, however, ‘Administration’ is used instead of ‘coastal States’, and ‘third States’ and ‘IOPC Fund’ are not mentioned.

When a ship is in need of assistance following an accident, and when safety of life onboard has been ensured, the remaining interests at risk would be mainly economic ones, while some other aspects would be probably involved.

An intervention undertaken by the coastal State is likely to have impact on all of the interests involved. Properties owners, and consequently their respective insurers, would face a greater risk of losing the properties. Salvors would be deprived of various rights such as salvage reward and maritime liens, as discussed in sections 3.2 & 3.4. The environment of the coastal State and third states might be better protected when the intervention results in less pollution to the coastlines, or might suffer a much more severe damage than it could have had the salvage operation been successful, as envisaged in the *Prestige* case.

The interest of the P&I club of the ship in distress may also be influenced by such an intervention, through the shipowners' possible liability on pollution caused by the cargo or bunker of the ship. However, such an influence is probably a minor one except when the ship in question is a tanker. The difficulties to establish liabilities of pollution upon shipowners prior to the CLC Convention has been well summarized in an English case *Southport v. Esso*¹³¹, and the situation is more or less the same in most jurisdictions. Even if such liabilities are recognized by the national law of certain jurisdictions, such a judgment is difficult to enforce when the ship is lost. One-ship company is the major form of shipping companies nowadays, and direct action to P&I clubs is not likely to succeed due to the general rule of 'pay to be paid'¹³². When there is little hope that the HNS Convention and the Bunkers Convention will enter into force in the near future, the question remained unanswered: how can an injured party get proper compensation for pollution caused

¹³¹ *Esso Petroleum Co.Ltd. v. Southport Corporation*, (H.L.) [1955] 2 Lloyd's Rep. 655; [1956] A.C. 218

¹³² See Edgar Gold, *Gard Handbook on P&I Insurance*, (Arendal, Norway: Assuranceforeningen Gard, 1996) at p. 118; see also Howard N.Bennett, *The Law of Marine Insurance*, (Oxford University Press, 1996) at pp. 339-343.

by hazardous cargo other than oil and/or bunker of a non-tanker ship, no matter such pollution is caused by an accident or the following intervention.

On the other hand, the interest regime in relation to tanker accidents and pollution damage thereto has been substantially changed by the CLC/FC/LLMC conventions and their protocols. According to these conventions, strict liability shall be established upon shipowners but for some exceptions; such a liability is limited to a certain amount and will, in practice, be paid by the P&I Club. The part of the actual damage, including the clean-up costs, which exceeds the limitation, will be paid by the IOPC Fund, provided that the claiming state is a party to the Fund Convention¹³³.

Therefore, in oil tanker accidents, on the one hand, P&I Clubs and the Fund will have to pay more compensation, if intervention of the coastal State results in a greater pollution. On the other hand, the coastal states' interests at risk, at least the economic ones, have been substantially reduced, since parties to the Fund Convention will, in theory, get full compensation for the pollution damage. In principle pollution damage will be recovered pursuant to the *restitutio in integrum* rule, i.e. to such a degree as if the pollution had not occurred. However, this is only one aspect of the question.

Firstly, the recoverability of pollution damage is subject to the national jurisdiction in front of which a claim is brought¹³⁴. *Locus Standi* might be one of the difficulties in claiming for damage to the environment *per se*, since in many jurisdictions the plaintiff would have no 'standing' before the court unless he is in possession of the ownership of the environment¹³⁵. Whether 'pure economic loss' is compensable also

¹³³ See generally provisions of the CLC / Fund Convention. See also various articles such as Gotthard Gaucci, *Ship-source Oil Pollution Damage and Recovery for Relational Economic Loss*, The Journal of Business Law July 2000, (London: Sweet & Maxwell Limited), at pp 356 – 361,.

¹³⁴ See, for instance, Deana Silverstone, *Ship source pollution damage*, Marine Policy April 1985 pp 108 - 119, Butterworth & Co (Publishers) Ltd

¹³⁵ For general rules of tort see *Op.Cit.* 51 Winfield & Jolowicz on Tort, pp 21 – 23 'damage to property'. *The Commonwealth of Puerto Rico et al v. SS Zoe Colocotroni* (1980) 628 Fed. R. 2d 652 (US Ct. App., 1st Cir.) is widely cited as an example in which the plaintiff (EQB of Puerto Rico) was

depends on *lex fori* and may vary in different jurisdictions, for instance, the loss of income of fishermen, who are not able to fish not because their boats and nets are polluted by oil but because the area they usually fish is designated an exclusion zone following a spill and they have no other place to do the same job¹³⁶. The appreciation that all losses following a tanker spill is compensable to Fund Parties is a general mistake; and that might account for the political pressures that a government face in time of pollution even when the State is a party to CLC/Fund. The series of cases in which places of refuge were denied by State Parties to Fund Convention would naturally lead to a question: is the compensation provided by Fund adequate, or satisfactory?

Secondly, the compensation payable by IOPC Fund is limited to a certain amount. High as it is, it is all the same limited and might probably be lower than the admissible damage following a catastrophic accident. The total amount payable for any single accident before 1 November 2003 was approximately USD196 million, while the total claims arising out of the Prestige incident might be 6 times of that figure¹³⁷. Such might explain for the recent foundation of the Supplementary Fund, which raised the total compensation amount to approx USD1,100 million¹³⁸.

Last but not least, though Fund Protocol 92 has 88 state parties up to present time, concerns of non-parties about ‘un-insured’ pollution damage are obvious and understandable. The memory of the *Tasman Spirit* might be still fresh, in which, the

held to be the ‘property party to sue’ because it was the ‘trustee of the public trust in these (natural) resources’. See also E.D.Brown, *Making the polluter pay for oil damage to the environment: a note on the Zoe Colocotroni case*, Lloyd’s Maritime and Commercial Law Quarterly, August 1981, p 323; and Gottland Gauci, *Oil Pollution at sea: civil liability and compensation for damage*, (John Wiley & Sons), pp 253 – 256.

¹³⁶ See *IOPC Fund 1992 Claims Manual*, April 2005 Edition, pp 10 – 11. For instance, the English court is notorious for being strict in deciding the recoverability of pure economic loss for fear of opening a ‘floodgate’, see typically *Landcatch Ltd. v. International Oil Pollution Compensation Fund*, [1998] 2 Lloyd’s Rep. 552; [1999] 2 Lloyd’s Rep. 316.

¹³⁷ See *The International Compensation Regime and the International Oil Pollution Compensation Funds*, handout of Mans Jacobsson, Director of IOPC Fund, in his lecture at WMU on 4 August 2005. Such information is also available on IOPC Fund website, <http://www.iopecfund.org>.

¹³⁸ *Ibid.* p 12.

injured state seemed to appreciate that it had no better choice to get adequate compensation but to arrest the crew and the salvage master. While comment on that incident is not a task of this article, the case might lead to a question in relation to place of refuge: should the fact whether or not a State is a Party to IOPC Fund, and therefore whether or not it is capable of being better compensated in case of oil pollution, be taken into account in the consideration of ‘proportionate intervention measures’? If yes, does it imply that non-parties would have more ‘liberties’ in taking intervention measures?

Furthermore, pollution is not the only possible result of an accident. Sinking of the casualty in a traffic lane or in a port working area might give rise to damage such as wreck-removal costs and economic loss following a port closure, which could be of a high amount.

4.2 Risk-based Decision Making

Various distinguished authors have pointed out that an optimal result ‘is achievable through better informed decision making and a more organized and cooperative approach to places of refuge’¹³⁹. Evaluation needs be carried out by the coastal State, as early as when they make decisions as to whether to offer a place of refuge or not. The key issue of the evaluation would be, what would happen if the ship in distress were towed out, and what if otherwise, typically, salvage operation was permitted and a place of refuge was offered.

Both aspects inevitably involve the assessment of the condition of the ship in distress, *inter alia*, its stability and strength as well as the outer impact to it, such as the prevailing sea conditions and the towing operation. The latter aspect, expectation of

¹³⁹ *Op.Cit.*11 Aldo Chircop at p 221. See also *Op.Cit.*13 Richard Shaw at pp.335-336, and *Op.Cit.*E.E. Mitropoulos at p 56; Joop Timmermans, *Places of refuge and the best environmental option*, BIMCO Review 2004.

the outcome of the salvage operation, involves more or less the same factors, but specifically, salvage capabilities available and details of the salvage plan are needed to be taken into account in order to draw a scientific and accurate conclusion. But in reality, how difficult is it to make a scientific and accurate evaluation?

4.2.1 Assessment of damage stability and damage strength

Construction of ships is required to comply with certain international standard, typically the SOLAS and the Loadline Convention. However, the stability and strength of the ship need to be re-assessed, especially when the hull or other internal construction of the ship has suffered a damage in an accident. Such statistics can be accurately calculated, provided that necessary data are available, and these data include some drawings of the ship as well as the location and scope of the damage.

On the one hand, various computer programmes have been developed to assist in salvage analysis, such as the Shipboard Contingency Planning System developed by ABS¹⁴⁰. With the developed computer technology calculation of damage stability is no longer a time-consuming and arduous task as it might used to be in the time of Torrey Canyon.

On the other hand, one of the difficulties arises from the availability of the Line Drawing, which is necessary for the calculation of damage stability. In practice, Line Drawings are usually confidential documents of the shipyard. It reveals the design of the shape of the hull, which is crucial to the efficiency of the sailing speed and fuel consumption. Shipyards usually invest large input in the research of ship design, and therefore, naturally treat these documents as intellectual properties. Though such drawings need to be presented to the classification society for approval and certification, they are usually not delivered to shipowners, and no international

¹⁴⁰ See Op.Cit. *72 Reassessment of the Marine Salvage Posture of the United States*, at p. 47, footnote 9.

conventions, neither MARPOL or SOLAS, require such a delivery¹⁴¹. Thus, it is not surprising that when calculation of damage stability becomes urgent and necessary, delays would be caused in obtaining the drawings, if they are obtainable at all.

A private approach might provide a good example of solution. As advised by Mr J. Dimitrakopoulos, Marine Business Development Manager of Lloyd's Register, LR provides Emergency Services to its customers. Statistics necessary to accurately evaluate the condition of a casualty were imported in an electronic database, and a calculation software has been developed. When the ship has suffered a structural damage, information of the damage can be sent to LR and an accurate outcome of the damage stability and damage strength will be available within a very short time. Such services are provided on a 24 hour basis, though it's available to its customers – shipowners only.

4.2.2 Details of the damage

More important probably is the details of the damage, for instance, the exact location of the hole in the hull and its shape and dimensions. The question would immediately follow, that, how can these data be obtained?

A rough estimation can sometimes be made by eyes at sea, but when the damage occurs to the underwater part of the ship, a more complicated inspection is necessary. It can be carried out in a dry dock, or by divers when the sea condition permits. Diving operation is difficult in rough seas, and in such a case, inspection cannot be carried out unless in a sheltered place – the place of refuge. When the inspection is to be done in a dry dock, the casualty would have to enter port also. Here comes the dilemma: how can the authorities decide whether or not to offer a place of refuge

¹⁴¹ The US OPA 90 requires all tankers to have all damage stability information readily available, see 33 CFR 155.1035© (5). However this is not applicable to non-tankers, nor is it an international convention.

when the evaluation has not been effected, yet how can they make a scientific evaluation without an inspection in the place of refuge?

The answer might be found in the coastal State's obligation to ensure that intervention measures are proportionate. Though States have absolute obligations to offer a place of refuge, when a refusal is to be followed by an intervention – which is almost certainly the case - the duty is on the State to determine whether such an intervention has taken into account all the probabilities and consequences in a balanced way. Though international law does not provide a formula as to the rankings of such probabilities and consequences, it seems that, at least, states taking measures without much – or enough – investigation into the whole situation of the casualty would be acting in a reckless way.

4.2.3 The Procedure – lack of uniformity and transparency

Another question is, whose duty it is, to 'spontaneously' obtain those data necessary for the authority to make an evaluation? The issue might be better to be looked at from both the private and the public aspect.

4.2.3.1 Salvor's obligation – best endeavours

Salvors' obligation under LOF is expressed in a simple way: 'The Contractors ... hereby agree to use their best endeavours to salve the property...' (article A of LOF 2000)

The concept of 'best endeavours' has been considered by English judges in a number of non-salvage cases. Surprisingly, there does not appear to have been any authoritative determination of the meaning of 'best endeavours' in the context of

salvage, although the obligation was explicitly provided for in the very earliest forms of LOF¹⁴².

In *Terrel v. Mabie Todd & Co.*[1952] 2 T.L.R. 574, Sellers J. Held that the obligation to use best endeavours involved a standard of reasonableness which was that ‘...of a reasonable and prudent board of directors acting properly in the interests of their own company and applying their mind to their contractual obligations...’

In *IBM United Kingdom Ltd. V. Rockware Glass Ltd.* [1980] FSR 335, CA, it was held that the duty to use best endeavours was

- (1) a duty to do all that could reasonably be done (Buckley L.J. at 339), or
- (2) to take all those steps in their power that a prudent, determined and reasonable owner, acting in their own interests and desiring to achieve that result would take (Buckley L.J. at 343, Geoffrey LJ concurring at 348);
- (3) to take all those reasonable steps which a prudent and determined man, acting in his own interests, would have taken if there was a reasonable prospect of success (Geoffrey Lane LJ at 345).

IBM was followed by Mustill LJ in *Overseas Buyer v. Grandex S.A.* [1980] 2 Lloyd’s Rep. 608 at 613(lh). And in *Pathe Screen Entertainment Ltd. V. Handmade Films (Distributors) Ltd.* (21st June 1991, unreported), Morland J. preferred the approach taken in *Terrell v. Marbie Tod* to another line of cases in which it was suggested that the obligation involved leaving ‘no stone unturned’¹⁴³.

Salvors’ duty of care is also well established through a series of English cases. In the celebrated case *The Neptune* [1842], 1 W. Rob, p.297 at p300, per Dr. Lushington, it was stated that ‘in order to entitle [salvors] to a salvage reward...they must show that they possess skill commensurate with their vocation and condition in life, and

¹⁴² See *Op.Cit.*83 Brice at paragraph 8-20.

¹⁴³ The cases and analysis contained in the above four paragraphs are quoted *verbatim* from a confidential Advise Note by Lionel Persey Q.C., with his kind approval.

adequate to the duties which they undertook to perform.’¹⁴⁴ This requirement of skill is not only a footnote to the interpretation of ‘best endeavours’ but also a standard of the implied obligation of salvors under English law when salvage is not carried out pursuant to an agreement.

Article F of LOF 2000 reads:

‘Duty of property owners: Each of the owners of the property shall cooperate fully with the Contractors. In particular:

...

(ii) the Contractors shall be entitled to all such information as they may reasonably require relating to the vessel or the remainder of the property provided that such information is relevant to the performance of the services and is capable of being provided without undue difficulty or delay;

(iii) the owners of the property shall co-operate fully with the Contractors in obtaining entry to the place of safety...’

An overall appreciation of the above appears to lead to the conclusion that, in salvage operations pursuant to LOF – if not in all cases – salvors are owing a duty to do whatever reasonable for the purpose of salvaging the property. In simple words, salvors are expected to know what he should do as professional salvors, while the property owners are in a position to co-operate.

When authorities of the coastal State take control of the response action, as they are legally entitled to, certain approval from such authorities becomes necessary for the salvors to perform his salvage operation pursuant to LOF. Then to persuade the authorities with supporting data and scientific analysis would fall into the work scope of the salvors, provided that such data are available, and there is a reasonable hope of success in the persuading.

¹⁴⁴ See also F.J.J.Cadwallader, *The Salvor’s Duty of Care*, (Marit.Stua.Mgmt, 1973) at pp. 13-16

Inter alia, when access to a place of refuge is pending on decision of local authorities, it is the salvors' task – not the casualty owners, at least unless they have agreed otherwise – to apply for a permit¹⁴⁵. This is, in the author's point of view, a reasonable arrangement, not only because of the salvors' 'leading' position after they undertake the task to save, but because professional salvors are expected to possess certain skills that ordinary ship owners lack, and to exercise and effect such skills in the whole process. Article F(iii) appears as a recognition of such an arrangement, though the 'place of safety' might not necessarily be the 'place of refuge'.

However, there exists certain 'undue difficulty or delay' in obtaining some relevant information – probably the Line Drawing as aforementioned - while article F(ii) seems to be based on an awareness of such a situation. More complicated is the relation between a place of refuge and the inspection of the damage, as discussed in section 4.2.2. If information necessary for a scientific and accurate evaluation of the relevant probabilities and consequences are unavailable for reasons out of the control of the salvors and property owners, they shall not be charged with any liabilities.

Furthermore, such a duty of salvors is under LOF and English law. The situation under other forms of salvage agreement, or in other jurisdictions may be different, and it finds no definite answer in the 89 Salvage Convention. The salvors' duty 'to carry out the salvage operation with due care'¹⁴⁶ is subject to the interpretation of competent jurisdictions. And, duties of salvors providing service on a fixed-rate basis are not clear and might lead to confusion.

4.2.3.2 Procedure of Application

¹⁴⁵ Interestingly, in the *Prestige* case, parties consistently stated that ship owners had applied for a permit to enter a place of refuge and such an application had been refused by the Spanish authorities.

¹⁴⁶ 89 Salvage Convention Article 8.1.(a).

The duty of care on salvors is only in the ‘private’ side, which they owe to the property owners when they undertake the task of salvage¹⁴⁷. Whether such an obligation is due under the public law is in doubt. No international law expressly poses such a duty on the salvors as to provide such necessary information to decision-making authorities, or to make them aware of the importance of such information in the evaluation and the difficulties in obtaining them. The national law of some jurisdictions may have some relevant requirements, such as submitting the salvage plan for approval, but these requirements lack uniformity as well as transparency. It is not surprising that salvors have not been able to know to whom they should apply, and what should be included in the application, when they take up the task to salvage; and they are not expected to have such knowledge within a short period of time as necessary in urgent situations, unless they, or their lawyers, happen to be very familiar with the procedures of the coastal State. Unlike ‘normal’ shipping, in which plenty of shipping agents are ready to provide profound services and information with regard to the procedures and formalities, international salvage industry does not enjoy the privilege provided by such a network.

4.2.3.3 Who’s in control

The right of Coastal State to control salvage operations having been explicitly recognized (as discussed in section 3.3.4), the need to exercise such control is quite self-evident. However, who within the government organization has the decisive power might give rise to two general concerns¹⁴⁸. The first one is that, the bureaucratic framework of authorities might confuse the salvors and the shipowners, while involvement of too many government departments might make the government response slower and less effective. The second question is whether such persons in control have the necessary specialist skills. The UK approach of SOSREP and the

¹⁴⁷ *Ibid.*, Article 8.1 ‘The salvor shall owe a duty to the owner of the vessel or other property in danger...’.

establishment of National Response Centre of USA are recommendable solutions, as will be further elaborated in Chapter 5.

4.3 Channelling of Liability under CLC/Fund Conventions

The aforementioned CMI questionnaire reflects the general state attitude that coastal states are accountable when they act negligently; reference was made to the channelling and immunity provisions of the CLC Convention.¹⁴⁹ In order to have an accurate appreciation of the liability channel set forth in the CLC Convention, it is necessary to examine the exact wordings contained in its articles, mainly Article III paragraphs 1-5.

Paragraph 2 appears unable to provide exoneration to the owner, since it is difficult to define a place of refuge as one of the navigational aids, let alone to attribute a duty of maintenance on the States¹⁵⁰. Paragraph 3 apparently offers ‘negligence’ as an ‘escape’, but then the test of negligence would become a question at dispute. Existence of a duty of care, and breach of that duty, are generally recognized as the basic ingredients to determine negligence, but what a duty does the coastal State owe exactly? In particular, are the decision-making officers expected to possess certain professional expertise as to enable them to make a scientific evaluation? What if the approaches they take are ‘correct’ but the outcome is ‘wrong’? And, does the coastal State have the obligation to assign capable and competent officers to the positions they are now acting on? Some criticisms attributed the cause of the *Prestige* disaster to bad seamanship of the decision making authorities, but are they reasonably

¹⁴⁸ See *Report of Lord Donaldson’s Review of Salvage and Intervention and their Command and Control*, Pub H.M.S.O. 1999 Cm. 4193, at pp 39 – 40. See also *Reassessment of the Marine Salvage Posture of the United States*, at p. 47.

¹⁴⁹ *Op.Cit.*28 CMI Yearbook 2003 at pp. 327 - 328

¹⁵⁰ The Swedish case *The Tsesis* seemed to have highlighted the inadequacy of such wordings; the interpretations of ‘other’ might vary in different jurisdictions, and the difference between ‘navigational aids’ and ‘aids to navigation’ is noteworthy. See also Christopher Hill, *Maritime Law* 5th Edition, (London, Hong Kong: LLP 1998), at p 425: and Hugo Tiberg, *Oil pollution of the sea and the Swedish ‘Tsesis’ decision*, Lloyd’s Maritime and Commercial Quarterly 1984, at pp 218 – 226.

expected of good seamanship? A safe view might be that, though international law does impose certain relevant obligations on coastal States, such as the general one to protect and preserve marine environment, and the one to ensure that intervention measures are proportionate, these obligations are too general to provide ready answer to this question.

Furthermore, when damage to a third state is ‘probably’ caused by negligence of a coastal State, the owners – and hence his P&I Club and the IOPC Fund – is still liable for the compensation to such a third State, though recourse action is available to the negligent State. In this sense the said ‘channelling of liability’ function of the CLC Convention might be more properly put as ‘channelling of responsibility’, since the fundamental principle of the Convention – and its actual effect – is that the shipowners be responsible for paying compensation regardless of whether he is ‘liable’ for causing the pollution. Though in theory the third State can opt to claim against the owners or against the negligent State, in practice, it is of course much more ‘convenient’ for it to choose the owner, leaving the tremendous task of recourse with the owners. In addition to the difficulties to claim pollution damage by ‘traditional’ negligence, and the difficulties in the proof, political and diplomatic concern could sometimes hold back a state from acting against another state. The situation is the same with IOPC Fund: it always has to pay the compensation, even if shipowner is exempt, and in a later stage, can choose to exercise the right of recourse, which it inherits from the shipowners by subrogation. How likely is it, then, the Flag State would borrow its name to support the Fund action? And, for the compensation exceeding shipowners’ limitation, does the Fund have a right of recourse? This is surely not a situation likely to be welcomed by the tanker owners and the IOPC Fund, though whether it is an unexpected one is unknown.

On the other hand, as pointed out by some distinguished author, ‘The duty to mitigate loss is a legal principle of almost universal application, and it must surely

apply to claims where the CLC and Fund Conventions apply'¹⁵¹. In some jurisdictions the failure of mitigation will indeed render the claim for damage partially or even wholly in vain, however, the matter is also subject to requirement under *lex fori*, in line with other tests for admissibility of the damage.

Therefore, no matter what are the international obligations of States in relation to places of refuge and intervention, the CLC/Fund Conventions have brought the shipowners and cargo owners into such a situation as to jointly shoulder the responsibility of paying compensation, though such a compensation might be recoverable from a negligent State, provided that the burden of proof on negligence is discharged.

¹⁵¹ *Op.Cit.*30 Stuart Hetherington at p 367. See also *Op.Cit.*51 *Winfield & Jolowicz on Tort* at p762; and Gotthard Gauci, *Oil pollution at sea: civil liability and compensation for damage*, (Chichester; New York: John Wiley & Sons, 1997) at p 121 especially footnote 4.

CHAPTER 5 REVIEW OF PROPOSALS AND SOLUTIONS

Some actions have been taken and some proposals have been raised, either before or after the series of recent incidents. Some of them attempt to solve the problem by a legislative approach and some of them provide a practical solution.

5.1 IMO Resolutions

Two important resolutions were adopted in the first half of year 2004. Resolution A.950(23) Maritime Assistance Services (MAS) dated 26 February 2004 recommends that coastal States establish a maritime assistance service (MAS) as a contact point in a distress scene between parties involved. This guideline, no doubt, when being effected by States, would efficiently avoid the chaos in communication, as evidenced in various cases.

A previous resolution adopted on 2 December 1997, Resolution A.851(29) *General principles for ship reporting systems and ship reporting requirements, including guidelines for reporting incidents involving dangerous goods, harmful substances and/or marine pollutants*, recommends that a standard reporting format and procedure be established, according to which, reports from ships in distress should include brief details of the defects and damage of the ship as well as her ability to transfer cargo when relevant. This approach seems to have, at least partially, clarifies the question of what information should be submitted to the decision making authorities. However, it does not deal with other statistics necessary for the evaluation, such as the design and drawings of the casualty, since such reports are

expected to be simple and contain only essential information¹⁵². Will it have a better result if it is developed to include reports from salvors, e.g. their concrete operation plan and equipment available?

Resolution A.949(23) *Guidelines on Place of Refuge for Ships in Need of Assistance* dated 5 March 2004 is directed specifically at this issue. It provides a relatively more detailed guideline in making generic assessment and preparatory measures as well as making event-specific assessment. It also states that ‘the coastal State should weigh all the factors and risks in a balanced manner and give shelter whenever reasonably possible’¹⁵³.

The positive impact of such Resolutions can be expected¹⁵⁴. However, the question of what is ‘balanced’ and what is ‘reasonably possible’ remains unanswered. Another possible ‘pitfall’ might be the assumption that the master should undertake the assessment (though ‘with assistance of the company and/or the salvor’)¹⁵⁵, which is not necessarily the case in salvage practice, as discussed in section 4.2.3 above. And, the inspection recommended by paragraph 3.10 does not solve the problem that Authorities are not willing to allow oil-leaking tankers to approach the coastlines even for the purpose of inspection. The need to protect salvors’ interests is not mentioned, either. Finally, IMO Guidelines are only recommendations after all. Whether and to what degree they will be carried into effect is still up to the independent will of States. Though indeed guidelines are much more easy to be adopted and provide much quicker practical support than treaties¹⁵⁶, if unwillingness of States to offer places of refuge is not resolved, and if some States adopt a more active policy in offering places of refuge, casualties in the vicinity might somehow be ‘encouraged’ to head for those ‘more lenient’ States. It might not be so fair that

¹⁵² Annex to the Resolution section 1.1

¹⁵³ *Ibid.* P9

¹⁵⁴ See *Op.Cit.*3 Aldo Chircop at pp 36-46, *Op.Cit.* 13 Richard Shaw at pp 335-343, *Op.Cit.* 41 Mitsopoulos at pp. 56-58.

¹⁵⁵ Resolution A.949(23) paragraphs 2.1 & 2.2.

¹⁵⁶ *Op.Cit.*11 Aldo Chircop at p 220.

such States will probably suffer more unrecoverable damage, as discussed at *supra* pp.50-51.

While recognizing the significant contribution of these IMO Resolutions, it has to be realized that they ‘constitute a practical *modus vivendi* for a non-resolvable problem’¹⁵⁷.

5.2 EU Directive

As early as 27 June 2002 the European Parliament issued a Directive 2002/59/EC with regard to the vessel traffic monitoring and information system, as part of the ‘Post-Erika Package’. Article 20 specifically aims at the issue of Places of refuge, which reads:

‘member States, having consulted the parties concerned shall draw up, taking in account relevant Guidelines by IMO, plans to accommodate, in the waters under their jurisdiction, ships in distress. Such plans shall contain the necessary arrangements and procedures taking into account operational and environmental constraints, to ensure that ships in distress may immediately go to a place of refuge **subject to the authorisation by the competent authority**. Where the Member State considers it necessary and feasible, the plans must contain arrangements for the provision of adequate means and facilities for assistance, salvage and pollution response.

Plans for accommodating ships in distress shall be made available upon demand. Member States shall inform the Commission by 5 February 2004 of the measures taken in application of the first paragraph.’ (emphasis added)

Firstly, the Directive recognizes that entry to places of refuge is subject to the authorisation by the authorities. Secondly, as pointed out by Richard Shaw in *Places*

*of Refuge – International Law in the Making?*¹⁵⁸, European states hold different views in whether such places should be published. Some states prefer an open declaration while others are reluctant to ‘disclose them for fear of provoking either an outcry from the local authorities of the area concerned, or a flotilla of decomposing ships heading towards them’.

While the debate and actual actions within EU members are in their way, it could be said that, at least the EU Directive has encouraged its member states to prepare places of refuge for ships in need of them, which, might help to reduce the number of ‘not in my backyard’ attitude and actions in the future, within EU.

5.3 US Recommendations – decision tools & pre-designated areas

As pointed out by US National Research Council in Reassessment of the Marine Salvage Posture of the United States(1994), ‘in the absence of predesignated safe havens, the risk is increased of marine casualties having catastrophic outcomes with environmental consequences.’ It was therefore recommended that ‘The Coast Guard should promulgate the process by which a “safe haven” is identified. To the extent possible, area plans should evaluate candidates sites for potential safe haven areas.’¹⁵⁹ It was also recommended that ‘To safely address the safe haven issue and provide the COTP with the necessary decision tools and information for emergency situations, a formal analysis program, such as the one for making a decision to use oil dispersant, is needed, with predefined areas for safe havens such as the tiered dispersant areas.’¹⁶⁰

¹⁵⁷ *Op.Cit.*3 Aldo Chircop at p 31.

¹⁵⁸ CMI Yearbook 2003 at p339

¹⁵⁹ *Reassessment of the Marine Salvage Posture of the United States*, at p62.

¹⁶⁰ *Ibid.* p 53.

Comparing with the EU Directive, the US Report has gone a step further in recognizing the ‘risk-based’ nature of the decision making, and in proposing to offer a decision making model to COTP (captain of the port), who will, in normal situation, decides on whether or not a place of refuge is offered. Comparing with IMO Resolutions, a decision-making formula in the form of national legislation will be more compulsory and better implementation can be expected. However, uniformity in international law and ‘equal play rule’ can not be achieved by this approach.

5.4 UK Approach - SOSREP

In Report of Lord Donaldson’s Review of Salvage and Intervention and their Command and Control¹⁶¹, it was pointed out that conflict of interests could exist even between the various government agencies of a country. It was therefore recommended that an individual called the Secretary of State’s Representative or ‘SOSREP’ be appointed as the focal points of all government agencies and act as an interface with the owners and salvors.

This proposal is similar to the IMO Guidelines in Maritime Assistance Services, in established a single communication channel. It is actually a step ahead, since on the one hand it was published as early as 1999, on the other has taken into account the factors specific to salvage. Moreover, it has given consideration to the expertise of such a person, his knowledge in the legal and practical regimes governing pollution prevention and salvage etc.

UK has followed the proposal in appointing the Secretary of State’s Representative for Maritime Salvage and Intervention, and it was highly praised by Mr Hans van Rooij, an executive of Smit Salvage, the lead salvor of the Prestige¹⁶². Indeed it is a substantial improvement in avoiding a confusing and ineffective situation where too

¹⁶¹ Pub H.M.S.O. 1999 Cm. 4193. See also CMI p 342

¹⁶² Lloyd’s List December 05 2002, *Smit boss would not alter the way operation was handled*

many government departments are giving orders. The one little defect might be that, whether the SOSREP has the final authority to decide on the offering or refusal of places of refuge is not specifically mentioned.

5.5 Proposals From Salvage Industry

Archie Bishop, legal advisor to the ISU and consultant with Holman Fenwick & Willan, has pointed out the implication of places of refuge in its interrelation with ‘places of safety’¹⁶³. He also called for more input of experts in the decision-making process, which is in line with the proposals of Joop Timmermans, President of the ISU¹⁶⁴. In addition to other proposals that are incorporated into the IMO Resolutions, Joop Timmermans called for ‘no rejection without inspection’, ‘adequacy of salvage cover’ and ‘guaranteed salvage cover’. The latter offers a practical solution to the dilemma of national policy as discussed in section 3.3 and 3.4.

5.6 A New Convention

Proposals have also been made, to establish a new international convention on places of refuge, which should read: ‘States are obliged to offer ships in need of a place of refuge when this is necessary and proportionate to the damage. A State shall be liable for the damage caused by an unjust refusal to offer a place of refuge.’¹⁶⁵

This clear-cut approach would no doubt be enthusiastically supported by ship owners, salvors, P&I clubs and the IOPC Fund. However, resolute opposition from States could almost certainly be foreseen. Monetary incentives were proposed as a method to encourage the adoption of such a new rule; how effective can such incentives be

¹⁶³ *Salvors: the need for responder immunity and places of refuge*, Oil Pollution 22-23 April 2002, (London: Lloyd’s List Events) at pp 1-11.

¹⁶⁴ *Places of refuge and the best environmental option*, BIMCO Review 2004, pp 64-65.

expected will be discussed below. Furthermore, the word ‘proportionate’ is still inevitable in the expression, while its ambiguity and lack of practicability is almost equally inevitable.

5.7 Incentives to coastal States

A call to provide adequate economic incentives to coastal States has been made, typically by allowing coastal States providing places of refuge to share salvage reward¹⁶⁶. Similar view is taken by the International Association of Ports and Harbours, which commented that ‘Only an all-embracing system where all damages and costs incurred in the course of a place of refuge situation would be covered would allow public and/or port authorities, given the limited decision time, to focus on the key issue: refusing or granting a ship in distress access to a place of refuge on technical and environmental grounds’¹⁶⁷. Detailed approaches include providing standard Letter of Guarantee¹⁶⁸, economic compensation in the form of salvage reward¹⁶⁹, and establishment of Supplementary Fund¹⁷⁰.

When ‘compulsory’ measures – i.e. the adoption and implementation of international law - appear to have little support, providing incentives would seem a much more practicable solution. However, some uncertainties go with this approach.

The first problem is whether such incentives are adequate to ‘set-off’ the concern of public authorities, namely, the unrecoverable pollution damage and the possible public and political pressure. Coverage of normal port charges and admissible

¹⁶⁵ Welmoed van der Velde, *The Position of Coastal States and casualty Ships in International Law*, CMI Yearbook 2003 p491

¹⁶⁶ Stuart Hetherington, *Civil liability and monetary incentives for accepting ships in distress*, CMI Yearbook 2003, at pp.457 – 467.

¹⁶⁷ Liz Booth, *Any port in a storm?* Maritime Risk International Vol. 19 Issue 6 June 2005 at p15.

¹⁶⁸ *Op.Cit.*160.

¹⁶⁹ *Op.Cit.*159.

¹⁷⁰ See *supra* pp 50-51.

damage claims appear insufficient. How much, then, is sufficient? This question might be better left to be determined by negotiation postures and powers.

The second question is what form shall such 'extra' incentives take. If coastal States are entitled salvage reward pursuant to Article 13, then their remuneration depends on the success of the salvage operation, and States' willingness to provide place of refuge will vary according to the probabilities of the outcome. If the incentives include compensation in the nature of Article 14 special compensation, then they may be able to provide a stronger motivation. However, the task to fix the accurate amount of such compensation may give rise to new confusion and uncertainties. It seems extremely difficult to determine the 'actual expenses' of maintaining and providing a place of refuge. Therefore it seems better to take the form of fixed-rate similar to SCOPIC.

The third question is who should bear such incentives. In case of major tanker accidents, the P&I clubs and the IOPC Fund benefits most when places of refuge effectively avoid severe pollution; and H&M and cargo insurers will also benefit when loss of the property is prevented. If these parties should jointly shoulder the costs of incentives, what should be the portion among themselves? And consideration must be given to the fact that IOPC Fund only has a limited number of State Parties. Should non-Parties be awarded with such incentives, even if the potential pollution does not threaten the environment of a State Party? The author is of the view that they should, since the potential pollution is inherent in the dangerous nature of the cargo.

5.8 Summary

The first four approaches as aforementioned are in line with the evolving precautionary principle in marine environmental protection¹⁷¹. The IMO Resolutions are a combination of almost all other three approaches, as well as part of the proposals from salvage industry. The legislative and the incentive approach can serve as additional methods, to establish a more complete framework.

However, two legal deficiencies need to be reviewed. One is the relevant clauses of UNCLOS, in relation to innocent passage and State's right within their territorial sea as well as the ranking between such rights and their obligations in environmental protection. The other is the public rules in relation to salvage.

In addition, two practical problems remain unsolved, namely, the difficulties in the assessment of damage stability, and the expertise required of the decision-makers.

¹⁷¹ See *Op.Cit.* 18 Ian Brownlie at pp.275 – 276. See also Derek V.Ellis, *The precautionary principle and the environmental monitoring*, Marine Pollution Bulletin, Vol.46 [8] August 2003, at pp. 933-934.

CHAPTER 6 CONCLUSIONS AND RECOMMENDATIONS

As conclusion, the main problems manifest in the issue of places of refuge, which remain unsolved by the IMO Resolutions, are as follows.

From the legal perspective:

1. The confusing provisions of UNCLOS, especially those in relation to the right of innocent passage of ships in distress, and to the right of Coastal States in the Territorial Seas, as discussed *supra* pp 11-14.
2. Lack of practical and objective formula for the determination of ‘proportionate’ measures, as discussed *supra* pp 15-17.
3. Want of certain public rules in relation to salvage, such as for the transparency of national policy (section 3.3) and for the uniformity in the application procedure (section 4.2.3).

From the practical or management aspect:

1. Difficulties in damage stability assessment (section 4.2.1).
2. Need of expertise in decision making (section 5.4).
3. Pollution compensation and recourse problems (section 4.1 & 4.3).

It is therefore recommended that:

1. Review of UNCLOS Articles 18, 194, 195, 211 and 221.
2. Amendment of Salvage Convention to include:
 - 2.1 State Parties shall publish national policies in relation to salvage operations by foreign salvors, including the national policy and the pre-qualification or permit application requirements.

- 2.2 An International Places of Refuge Fund (hereinafter IPOR Fund) shall be established, jointly sponsored by the insurance industry of State Parties. Ships flying flags of State Parties shall be issued IPOR Certificate. State Parties shall offer places of refuge to such ships in need of assistance. Such places should be pre-designated and accessible without prior application or permit. Usage of such places shall be compensated by a fixed rate, calculated according to the tonnage and type of the ships, multiply the actual time of stay of such ships in such places. Such a compensation shall be paid by the IPOR Fund. In case of tankers, an additional compensation shall be paid by IOPC Fund, provided that the owners of the cargo carried onboard are nationals of State Parties to IOPC Fund. Such provisions shall not prejudice the right of State Parties over such ships, including giving orders to salvage operations, or for the ship to leave the territorial sea. However, States Parties shall not order the ship to leave the internal waters or the territorial sea before an inspection and evaluation is carried out according to IMO Guidelines, except for security reasons or for preservation of human safety, or unless there is no reasonable hope that the inspection and/or the evaluation can be carried out.
3. Amendment of the SOLAS Convention to the effect that, ships flying flags of State Parties have readily available electronic architect data for the purpose of emergency evaluation. Such data can be maintained by designated competent organizations (typically Classification Societies) and shall be available on 24 hours basis.
4. Amendment of the IMO Resolution A.949(23) to recommend States to consider the expertise of person responsible for MAS. States shall also be recommended to provide training to staff of Authorities, or propaganda to the general public, in relation to the principles and techniques of environmental protection and risk-based decision making.

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