

## COMPENSATION FOR OIL POLLUTION AT SEA: AN INSURANCE APPROACH

*Torrey Canyon* has come to represent the ultimate in oil spill devastation. The accidental breakup of this jumbo-sized 118,000 deadweight (dwt.) ton tanker off the coast of southern England caused more than 80,000 tons of crude oil to be spilled into the water between France and England.<sup>1</sup> The sums expended by the British and French governments to clean up the oil amounted to more than \$16 million.<sup>2</sup> However, the actual damages were many times greater than \$16 million when private property damage, injury to marine organisms, and loss of fishing are considered. Despite the scope of the damage, both in terms of cleanup costs and private property damage, Union Oil and its insurers were able to settle their liability for only \$7.2 million.<sup>3</sup> Most of the damage was therefore borne by the victims of the catastrophe.

Union Oil carried liability insurance protecting it<sup>4</sup> against claims by third parties in the approximate amount of \$4.5 million.<sup>5</sup> With possible damages running into the tens of millions of dollars, the \$4.5 million coverage appeared to be inadequate to fully protect the insured. However, based on a peculiarity within the shipping industry whereby a shipowner is given the right to limit his liability for damages to third parties, a vessel owner's legal liability has traditionally been much lower than the actual damages. For example, at the time of the breakup of the *Torrey Canyon*, Union Oil could have limited its total liability under British law to only \$2.8 million.<sup>6</sup> Under the 1957 Brussels Convention, the liability of

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1. E. COWAN, OIL AND WATER: THE TORREY CANYON DISASTER 11 (1968) [hereinafter cited as COWAN].

2. *Id.* at 195, 200.

3. Note, *Liability for Oil Pollution Clean Up and the Water Quality Improvement Act of 1970*, 55 CORNELL L. REV. 973, 982 (1970).

4. The record owner of the *Torrey Canyon*, Barracuda Corporation, was the technical defendant. However, Barracuda had an indemnity agreement with Union Oil Co., leaving the latter liable for the occurrence. See COWAN, *supra* note 1, at 213.

5. See COWAN, *supra* note 1, at 214.

6. Under the British Merchant Shipping Act of 1958, 6 & 7 ELIZ. 2, c. 62, liability was limited to \$58 per net registered ton. With the *Torrey Can-*

the *Torrey Canyon* shipowners could have been limited to \$3.6 million.<sup>7</sup> Under American law,<sup>8</sup> liability could have been limited to *fifty dollars*, since American limits have been based on the value of the ship and cargo *after* the occurrence, and a fifty-dollar lifeboat was all that was left of the \$16.5 million supertanker after its breakup. As with the *Torrey Canyon*, the legal limits of liability have often proved beneficial to the shipowners at the expense of coastal countries and populations.

*Torrey Canyon* thus represents more than oil spill destruction. The ship's insurance situation, aided by the limitation of liability principle, exemplifies the grave inadequacy of protection and compensation for potential victims of tanker oil spills.

This comment will first discuss the potential damages aspect of oil spills. Then, the various limits of liability now existing will be presented, followed by a discussion of tanker indemnity insurance. Against this background, suggestions for a more equitable distribution of the risks of oil pollution from tankers will be made.

## I. POTENTIAL OIL DISASTERS

In order to capitalize on the higher profit margins afforded by transporting oil in larger ships,<sup>9</sup> the shipping industry has greatly increased the size of tankers and their capacity for carrying oil in the last decade.<sup>10</sup> Concomitant with this trend has been the increase in cleanup costs for oil spills.<sup>11</sup> Inflation and the prohibition

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*yon's* net registered tonnage of 48,477, liability would be limited to approximately \$2.8 million.

7. International Convention Relating to the Limitation of the Liability for Owners of Seagoing Ships, Brussels, Oct. 10, 1957 [hereinafter cited as 1957 Brussels Convention], reprinted in 6A BENEDICT, ADMIRALTY 634, (7th ed. (rev.) A. Knauth and C. Knauth 1969).

8. 46 U.S.C. § 183 (1966); *see also* notes 22-29 and accompanying text, *infra*.

9. Basically, profit margins increase as the size of the ship increases. Thus, it is less expensive to operate one 200,000 dwt. ton tanker than two 100,000 dwt. ton tankers. *See* COWAN, *supra* note 1, at 13-16.

10. The *Torrey Canyon* was approximately 118,000 dwt. tons and was considered to be one of the three or four largest tankers in the world in 1967. In 1972, forty-two tankers of 240,000 dwt. tons and larger were in use, seven of those being over 300,000 dwt. tons. In its 1974 third quarter report, Texaco announced the launching of its second 500,000 dwt. ton tanker. Japan had previously announced its plans to build tankers as large as 800,000 and one million dwt. tons. *See, e.g.,* Comment, *Post Torrey Canyon: Toward a New Solution to the Problem of Traumatic Oil Spillage*, 2 CONN. L. REV. 632 (1970); Note, *Toward a State Remedy for Oil Spill Damages: An Insurance Approach*, 47 N.Y.U. L. REV. 60 n.3 (1972).

11. Using the cost of cleanup figures which applied to the *Torrey Canyon*—\$16,000,000/80,000 or \$200 per dwt. ton—the cleanup costs of a 240,000 dwt. ton tanker discharging a full load of cargo would be \$48 mil-

of cheap chemicals traditionally used as oil dispersants have caused the per-ton cleanup cost to rise sharply in the past few years.<sup>12</sup>

Notwithstanding the sizable costs involved in cleanup operations, liability for other types of damages often makes cleanup costs seem miniscule. Other recoverable damages might include injury to private, beach-front property, loss of profits to fishermen caused by the destruction of fish or the inability of the fishermen to navigate in oil-spoiled waters,<sup>13</sup> loss of profits to other businesses relying on an oil-free beach or ocean,<sup>14</sup> and loss of such riparian rights as swimming, boating, and picnicking.<sup>15</sup>

One recent example of the huge amount of damages involved beyond cleanup costs was a recent spill in Maine from an oil facility into Seaport Harbor.<sup>16</sup> The Attorney General of Maine brought a seventy million dollar damage suit against National Services Corporation, which operated the oil facility for the United States Air Force. The damages included \$10 million for injury to the tidal waters, \$10 million for future injury before corrective measures could have any effect, and \$5 million for damages which will continue indefinitely as a result of the devastation of the clam industry in the harbor and to other marine life. The alleged \$70 million in damages was caused by approximately 32 dwt. tons of fuel oil.<sup>17</sup> Using the *Torrey Canyon* cleanup figures of \$200 per dwt. ton of oil, the cost to clean up the spill would have been only \$6,400. This amounts to only a fraction of one percent of the total alleged damages.<sup>18</sup> If it can be assumed that the same percentage of cleanup costs to overall damages might exist in a larger oil spill,<sup>19</sup> the poten-

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lion; the cleanup costs of a 500,000 dwt. ton supertanker would be \$100 million. Cf. note 123 and accompanying text, *infra*.

12. See notes 121-24 and accompanying text, *infra*.

13. See, e.g., 5 Env. Rep. 248 (1974); cf. 5 Env. Rep. 158-78 (1974).

14. *Id.*

15. See Petition of New Jersey Barging Co., 168 F. Supp. 925 (S.D.N.Y. 1958).

16. 5 Env. Rep. 184, 184-85 (1974).

17. *Id.* at 185. One dwt. ton of oil is equal to approximately .55 gross registered tons of oil, or approximately 7.5 barrels of oil, or approximately 315 gallons of oil.

18. At \$200 per dwt. ton, the computation is as follows:  $200 \times 32 / 70,000,000 = 64 / 70,000 \sim .000009 \sim 9 / 10,000$  of one percent.

19. Such a low percentage of cleanup costs to overall damages could also exist in very large oil spills if, for example, resort beaches were involved. Imagine the huge amount of lost profits if a 200,000 dwt. ton tanker dis-

tial liability becomes astronomical. However, because of a shipowner's right to limit his liability, a great amount of damage can occur without remedy to the injured person.<sup>20</sup>

## II. LIMITATION OF LIABILITY

The policy of allowing shipowners to limit their liability to third persons injured as a result of negligence centers on the idea of encouraging investment in a risky and hazardous business.<sup>21</sup> Presumably, fewer people would take the risks involved in owning and operating a vessel if they would also be held to unlimited liability for the negligence of the charterer or crew.

In the United States, the limitation of liability was first granted to shipowners by the Limited Liability Act of 1851.<sup>22</sup> The owner or charterer of a vessel could limit his liability to the value of his interest in the ship and cargo. However, the privilege would be lost where the shipowner had knowledge or privity of substandard conditions and failed to take any action to correct the problem. For example, if the shipowner knew of the unseaworthiness of his vessel and still allowed it to depart, or if the spill could be traced to any willfulness on the part of the owner, he would be denied the liability limit and would be fully responsible for any ensuing damage.

The advantage of limited liability in the absence of privity or knowledge was greatly enhanced by an 1871 Supreme Court case<sup>23</sup> which held that liability could be limited to the value of the ship-

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charged its cargo into the waters off Miami Beach during the peak season, thereby closing the beaches.

20. Pollution caused by the accidental breakup of supertankers is only one source of oil pollution of the seas. Of the estimated total of 1.4 million tons of oil discharged into the seas each year, 70% is caused by tank cleaning operations; bilge pumping leaks and bunkering spills account for 7%; terminal facilities cause the discharge of approximately 5%; and tanker accidents account for the remaining 18%. See 5 Env. Rep. 184 (1974).

The insurance factor for intentional pollution by tankers is insignificant. Most shipowners and oil companies carry insurance with a deductible amount far in excess of the fines or small compensation claims involved in this type of pollution. Also, most liability insurance policies exclude coverage for intentional acts of the insured.

The civil liability aspects of intentional oil pollution are also insignificant when compared to negligent oil pollution. Discharges caused by cleaning operations are presumably controlled to some extent; the damage resulting from such planned discharges is usually kept to a minimum based on the shipowner's interest in reducing his liability for any possible damage.

21. *Hearings on S.7 and S.544 Before the Senate Subcomm. on Air and Water Pollution of the Senate Comm. on Public Works*, 91st Cong., 1st Sess., pt. 1, at 124 (1969) [hereinafter cited as 1969 Hearings].

22. Act of March 3, 1851, ch. 43, §§ 3, 9 STAT. 635; 46 U.S.C. § 183 (1966).

23. *Norwich Company v. Wright*, 80 U.S. (13 Wall.) 104 (1871).

owner's interest in the ship and cargo *after* the accident had occurred, rather than before. Thus, following the *Torrey Canyon* disaster, the American shipowners were allowed to file a petition to limit their liability to fifty dollars, the value of the one remaining lifeboat.<sup>24</sup>

Since insurers only become liable for those amounts which their insured becomes legally liable to pay, shipowners' limited liability has meant low premiums and broad coverage. For over one hundred years, there was no ceiling written into liability policies for the reason that the value of the vessel set the upper limit of the insurance contract.<sup>25</sup> However, recent changes in the limitation of liability, especially with regard to oil pollution damage, have had a sobering effect on insurers as well as shipowners.

The first change in legislation modifying the statutory right to limit liability was a 1966 amendment to the Oil Pollution Act of 1924.<sup>26</sup> The 1966 amendment provided that a shipowner had to immediately remove any oil intentionally discharged upon navigable water regardless of the cleanup costs and his limited liability rights. If he failed to do so, the Secretary of the Interior was empowered to remove the oil and charge the cost to the shipowner. However, there would be no liability at all if the discharge was caused by simple negligence or collision with another vessel.<sup>27</sup> Since insurance contracts generally exclude coverage for intentional acts by the insured, the 1966 amendment meant that liability for a shipowner's *intentional* discharge of oil would be borne entirely by the shipowner himself.

The 1966 amendment was followed by the 1970 Water Quality Improvement Act.<sup>28</sup> As noted, the 1966 amendment assessed liability against the shipowner only if the oil discharge was willful or intentional. The 1970 act, however, assesses liability for both negligent and intentional oil discharges. No limitation of liability is applic-

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24. COWAN, *supra* note 1, at 202.

25. See Healy, *Water Pollution Liability from an Insurance Standpoint*, 9 HOUSTON L. REV. 662, 663-4 (1972) [hereinafter cited as Healy].

26. Act of June 7, 1924, ch. 316, 43 Stat. 604, *as amended*, Act of Nov. 3, 1966, Pub. L. No. 89-753, § 211 (a), 80 Stat. 1252 (repealed 1970).

27. *Id.*

28. 33 U.S.C. § 1161 *et seq.* (1970). The 1970 Water Quality Improvement Act was incorporated into the broader Federal Water Pollution Control Act of 1972, 33 U.S.C. § 1321 *et seq.* (Supp. 1973). Since the relevant provisions of both statutes are identical, they will be used interchangeably.

able in cases of willful conduct. In all other cases, the shipowner can limit his liability for cleanup costs to a total of fourteen million dollars or one hundred dollars per gross registered ton, whichever is less. Consequently, liability insurance protection against oil pollution after 1970 was no longer written without a ceiling. Limits of up to fourteen million dollars were included in virtually all oil pollution endorsements immediately after the 1970 act went into effect.<sup>29</sup>

Changes in the limitation of liability for shipowners using United States waters coincided with changes in such limitations throughout the world. The first international convention to adopt limits of liability for discharges of oil was the 1957 Brussels Convention on the Limitation of Shipowners' Liability.<sup>30</sup> The limits established by the Convention were sixty-seven dollars per gross registered ton.<sup>31</sup> In an apparent attempt to forestall even higher limits, the shipping industry, the American Merchant Marine Institute, the American Bar Association, and the Maritime Law Association lobbied on behalf of adoption of the Convention by the United States.<sup>32</sup> Congress failed to ratify the Convention, however, and by the time it came into force among those who did ratify it,<sup>33</sup> proposals for higher limits were already under consideration throughout the world.

Such proposals were a direct result of the *Torrey Canyon* incident in 1967.<sup>34</sup> As noted, the *Torrey Canyon* generated approximately sixteen million dollars in cleanup costs with the discharge of eighty thousand tons of oil.<sup>35</sup> The per-gross registered ton amount of cleanup costs was in excess of \$250.<sup>36</sup> These figures, when compared to the inadequate limits of liability appearing in the 1957 Brussels Convention, caused sufficient consternation among the signatories of that Convention and other nations to spark interest in another conference to revise such limits.

### 1969 Civil Liability Convention

An increase in the limits of the 1957 Brussels Convention was

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29. Healy, *supra* note 25, at 664.

30. 1957 Brussels Convention, *supra* note 7.

31. *Id.* art. 3(1)(a).

32. 1969 *Hearings*, *supra* note 21, at 125.

33. The convention finally came into force in 1968 when Israel became the thirteenth state to ratify the treaty.

34. See, e.g., Daud, *Compensation for Oil Pollution Damage: Further Comment on the Civil Liability and Compensation Fund Conventions*, 4 J. MARITIME L. & COM. 525, 526 (1973).

35. See notes 1-3 and accompanying text, *supra*.

36. The per-deadweight ton amount of damage was in the vicinity of two hundred dollars. See note 17, *supra*, for conversion figures.

the primary focus of the draft convention entitled the International Convention on Civil Liability for Oil Pollution Damage,<sup>37</sup> convened in Brussels in 1969. The Convention finally adopted limits of approximately \$134.40 per gross registered ton and a total liability of approximately \$14,112,000,<sup>38</sup> more than double the limits of the 1957 Brussels Convention.

Another salient feature of the draft convention was that the basis of liability adopted was one of strict liability,<sup>39</sup> in accord with the Water Quality Improvement Act.<sup>40</sup> The owner can escape liability only if he can prove that the pollution damage resulted from an act of war, hostilities, civil war, insurrection, an act of God, an act or omission done with intent to cause damage by a third party, or the ". . . negligence or other wrongful act of any Government or other authority responsible for the maintenance of lights or other navigational aids in the exercise of that function."<sup>41</sup>

If the shipowner is held liable, he can only limit his liability to the prescribed amounts if the pollution is not the result of the owner's actual fault or knowledge.<sup>42</sup> This provision concurs with the Water Quality Improvement Act, which also disallows a limited liability when the shipowner has knowledge or is personally at fault.<sup>43</sup> As noted, most insurance agreements exclude coverage for intentional acts; therefore, if the shipowner is personally at fault, he might lose not only his right to limit his liability, but also his insurance coverage.

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37. International Convention on Civil Liability for Oil Pollution Damage, *Opened for Signature*, Nov. 29, 1969 [hereinafter cited as Civil Liability Convention], reprinted in L. NORDQUIST, *NEW DIRECTIONS IN THE LAW OF THE SEA*, DOCUMENTS II 602-10 (1973 [hereinafter cited as NORDQUIST]); for a report of the Civil Liability Convention, see Healy, *The International Convention on Civil Liability for Oil Pollution Damage*, 1969, 1 J. MARITIME L. & COM. 317 (1970).

38. Civil Liability Convention, art. V(1). The figures of \$134.40 and \$14,112,000 are based on the exchange rate in existence in 1969. According to the October 8, 1974, edition of the *Wall Street Journal*, at 33, the present exchange rate is .2104 American dollars for one French franc. Applying this to the convention limits would mean a per-gross registered ton limit of \$420.80 and a maximum liability of \$44,184,000.

39. Civil Liability Convention, *supra* note 37, art. III(1).

40. 33 U.S.C. § 1161 *et seq.* (1970).

41. Civil Liability Convention, *supra* note 37, art. III(2)(a), (b), (c), (3).

42. *Id.* art. V(2).

43. 33 U.S.C. § 1161 *et seq.* (1970).

A major element of the Civil Liability Convention which distinguishes it from the Water Quality Improvement Act of 1970 is that liability extends to private damage claims and not just to cleanup costs.<sup>44</sup> Thus, a private party suffering property damage could recover from the fund deposited into the applicable court by a shipowner or insurer pursuant to the Civil Liability Convention. However, only the U.S. Government can recover—and only for cleanup costs—from a like fund established pursuant to the Water Quality Improvement Act of 1970.<sup>45</sup>

#### *International Compensation Fund*

Complementing the Civil Liability Convention was the 1971 draft convention entitled the International Convention on the Establishment of an International Fund for Oil Pollution Damage.<sup>46</sup> The purposes for establishing the fund are:

- a) to provide compensation for pollution damage to the extent that the protection afforded by the Liability Convention is inadequate;
- b) to give relief to shipowners in respect of the additional financial burden imposed on them by the Liability Convention, such relief being subject to conditions designed to ensure compliance with safety at sea and other conventions.<sup>47</sup>

Among the pollution damage claims which the International Compensation Fund would cover would be: 1) damages resulting from acts of God;<sup>48</sup> 2) damages caused by a shipowner who was financially incapable of meeting his responsibility;<sup>49</sup> and 3) occurrences where total damages resulting from the spill exceed the shipowner's limit of liability as prescribed in the Liability Convention, up to a maximum recovery of thirty million dollars.<sup>50</sup>

However, the coverage is restricted in several ways. Payouts are not made for oil damage resulting from an act of war.<sup>51</sup> Also, a claimant must prove that the oil was discharged by a ship, since discharges from in-place facilities are beyond the scope of the

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44. Civil Liability Convention, *supra* note 37, art. III(1).

45. 33 U.S.C. § 1161 *et seq.* (1970).

46. International Convention on the Establishment of an International Fund for Oil Pollution Damage, *Opened for Signature*, December 18, 1971, [hereinafter cited as International Compensation Fund], *reprinted in* NORRQUIST, *supra* note 37, at 611.

47. *Id.* art. 2(1) (a), (b).

48. Civil Liability Convention, *supra* note 37, art. III(2) (a).

49. International Compensation Fund, *supra* note 46, art. 4(1) (b). This situation could arise when, for example, the shipowner is sailing under a non-contracting state's flag, and is not required to maintain insurance under the laws of that country.

50. *Id.* art. 4(4) (a).

51. *Id.* art. 4(2) (a).



Fund.<sup>52</sup> This requirement may be particularly onerous in light of the extreme difficulty in determining which ship, if any, was responsible for a particular discharge, especially in areas of well-travelled sea lanes.<sup>53</sup>

A major aspect of the draft convention is that shipowners may, under certain circumstances, seek indemnification from the Fund for damages they have already paid out.<sup>54</sup> In effect, this provision means that shipowners will be sharing liability for oil pollution with the oil companies, since the Fund is made up exclusively of contributions from cargo owners.<sup>55</sup>

The following example shows how both conventions are supposed to work. Assume that a 200,000 dwt. ton tanker accidentally discharges its cargo, generating cleanup costs of \$20 million and private property claims of \$40 million for a total of \$60 million. If the country suffering the damage and the flag-state of the tanker are both contracting states of the conventions, the case will probably be retained by the victim-state.<sup>56</sup> In order to limit his liability pursuant to the Civil Liability Convention, the shipowner will deposit into court a certificate of insurance in the amount of his maximum liability.<sup>57</sup> The shipowner is thereby relieved of all further responsibility in the case, and the claimants will litigate their claims directly against the insurer.<sup>58</sup> Since the total amount of claims exceeds fourteen million dollars, claimants may file for reimbursement from the International Compensation Fund. There is

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52. *Id.* art. 4(2) (b).

53. See, e.g., Hunter, *The Proposed International Compensation Fund of Oil Pollution Damage*, 4 J. MARITIME L. & COM. 117, 124 (1972).

54. International Compensation Fund, *supra* note 46, art. 5.

55. Article 10 of the International Compensation Fund provides that contributions are to be made by all persons or companies who receive in excess of 150,000 tons of oil a year if the oil is carried by sea to the ports of the contracting state. Contracting states are bound to ensure any obligation for contributions owed by one of its citizens. Also, each state must supply a list of persons who have received enough oil to make them liable for contributions. The Fund, once it becomes operative, will cover damages up to thirty million dollars per incident.

56. Contracting states waive their right to adjudicate claims involving ships sailing under their flag. Plaintiffs are given the choice of bringing the action either in the jurisdiction of the country where the damage occurs or in the jurisdiction of the flag state. See Civil Liability Convention, *supra* note 37, art. IX(1).

57. *Id.* art. V(3).

58. *Id.* art. VII(8).

no ranking of claims in either the Civil Liability Convention or the International Compensation Fund, as all victims share proportionately in the recovery.

Thus, the claimants could recover \$14.1 million pursuant to the Civil Liability Convention and \$15.9 million<sup>59</sup> from the International Compensation Fund. The remaining \$30 million of damages would go uncompensated. Claimants could not litigate further on the basis that the shipowner's U.S. limits—value of the vessel and cargo after the accident—had not as yet been involved, since recovery pursuant to the conventions relieves the shipowner of any further liability.

*Tanker Owners Voluntary Agreement Concerning Liability for Oil Pollution*<sup>60</sup> (TOVALOP)

TOVALOP represents a commendable effort on the part of tanker owners and oil companies to deal with the problem of tanker pollution. The agreement was reached prior to the Civil Liability Convention, and TOVALOP became operational in January, 1969. Basically, the agreement provides that the participating shipowners and bareboat charterers<sup>61</sup> will provide a source of recovery for national governments who have expended money in removing oil caused by the negligent discharge of a participating tanker.<sup>62</sup> No recovery is allowed for private parties or for any property damage. A government's claim against a participating owner must be based on fault of the tanker owner, though the burden of proof is put on the defendant.<sup>63</sup> Thus, if a government files a claim against a member of TOVALOP for expenses in removing oil allegedly spilled by the tanker, the tanker owner must disprove negligence in order to defeat the claim. A tanker owner's liability is limited by the agreement to one hundred dollars per gross registered ton or ten million dollars maximum, whichever is the lesser.<sup>64</sup> The government's claim for cleanup costs, if accepted and paid pursuant to the terms of TOVALOP, precludes further recovery by the government in any other forum.<sup>65</sup>

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59. International Compensation Fund, *supra* note 46, art. 4(4) (a).

60. The Tanker Owners Voluntary Agreement Concerning Liability for Oil Pollution [hereinafter cited as TOVALOP], is reprinted in NORRQUIST, *supra* note 37, at 641.

61. A bareboat charterer is a charterer who takes on the added responsibility of finding a crew and navigating the tanker at his own expense.

62. TOVALOP preamble, NORRQUIST, *supra* note 37, at 641.

63. *Id.* art. IV(B).

64. *Id.* art. VI(A).

65. *Id.* art. VII(F).

Over 90% of the tanker industry participates in TOVALOP and carries insurance with TOVALOP's representative, the International Tanker Indemnity Association, Ltd. (I.T.I.A.).<sup>66</sup> When a claim does arise from a negligent discharge, liability is placed solely on the participating owner and I.T.I.A.<sup>67</sup> Other participating members do not become liable to the victim-state. This precludes a government from seizing a participating member's ship in order to satisfy a claim against another participating tanker which had polluted the claimant's waters.<sup>68</sup>

A significant provision of TOVALOP is that the tanker owner is able to recover monies which he has spent in removing any discharged oil from the group's insurer.<sup>69</sup> Further, he can recover for any cleanup expenses even though he was not legally liable for the spill.<sup>70</sup> Thus, recovery from I.T.I.A. by a government is predicated on the negligence of the tanker owner; whereas, recovery by the tanker owner is allowed in any case of a discharge from his tanker, regardless of legal liability. Presumably, this provision acts as an incentive to promote quick cleanup, thereby minimizing damages in the long run.

A major criticism of TOVALOP was that it only provides compensation for a government's cleanup expenses.<sup>71</sup> Private property owners who suffer oil pollution damage are excluded from recovery. In a sense, the criticism was unfair, since the members of TOVALOP were not obligated to provide *any* source of reimbursement for pollution damage, much less to private property owners. However, to provide a more complete program of recovery, the oil industry announced in 1971 an interim project to compensate private victims of oil spills.

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66. See Becker, *Vehicles for Reimbursement of Oil Pollution Damage*, 9 HOUSTON L. REV. 669 (1972).

67. TOVALOP, *supra* note 60, art. IV(A).

68. This misfortune occurred to the *Torrey Canyon's* sister ship, the *Lake Palourde*. While docking in Singapore approximately four months after the devastating oil spill, the *Lake Palourde* was seized by British authorities to provide another possible source of compensation for damages done by the *Torrey Canyon*. See COWAN, *supra* note 1, at 193-203.

69. TOVALOP, *supra* note 60, art. V.

70. *Id.*

71. See, e.g., Swan, *International and National Approaches to Oil Pollution Responsibility: An Emerging Regime for a Global Problem*, 50 ORE. L. REV. 504 (1971) [hereinafter cited as Swan].

*Contract Regarding an Interim Supplement to Tanker Liability for Oil Pollution*<sup>72</sup> (CRISTAL)

CRISTAL went into effect on April 1, 1971. It operates in much the same way as the International Compensation Fund, providing a fund for victims who have been unable to obtain relief from other sources. According to the terms of CRISTAL, it will terminate automatically upon adoption of the International Compensation Fund.<sup>73</sup> The reason is that both plans are funded from the same source—the cargo owners. However, the International Compensation Fund has not as yet come into force, so CRISTAL remains the sole international source of compensation for private damages from oil pollution.<sup>74</sup>

CRISTAL's fund is operated by a Bermuda corporation, the Oil Companies Institute for Marine Pollution Compensation, Ltd. Claims against the fund will be paid only if the oil damage resulted from oil owned by one of the contracting oil companies.<sup>75</sup> In addition, recovery for a polluting incident is reduced by the amounts which could have been recovered in any other forum.<sup>76</sup> These provisions greatly reduce the efficacy of CRISTAL, especially in cases where cleanup costs are large, since the fund for the particular incident is reduced by the amount which the government can recover under TOVALOP.<sup>77</sup>

Despite the shortcomings of TOVALOP and CRISTAL, they are nonetheless noteworthy in that: 1) they are the only currently op-

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72. The Contract Regarding an Interim Supplement to Tanker Liability for Oil Pollution, [hereinafter cited as CRISTAL], is reprinted in NORQUIST, *supra* note 37, at 646.

73. CRISTAL, art. III (C) (1) (iii).

74. Since the Civil Liability Convention, *supra* note 37, is also not in force, TOVALOP and CRISTAL represent the major operative international schemes for oil pollution recovery.

75. CRISTAL, *supra* note 72, art. IV (A) (1), (2).

76. *Id.* art. IV (B). For example, assume that a 100,000 ton U.S.-flag tanker negligently discharged oil into U.S. waters causing a governmental cleanup expense of ten million dollars. Assume also that the tanker owner, a member of TOVALOP, spent an additional six million dollars in his own cleanup efforts. Then, assume that the ship and remaining oil had a value of twenty million dollars. CRISTAL would not pay off on any private claims because the amount to be deducted exceeds the thirty million dollars per incident fund. TOVALOP would pay out ten million dollars to the government for its cleanup expense, and six million dollars to reimburse the tanker owner for his expenses. This would leave fourteen million dollars left to be claimed from CRISTAL. However, the limit of liability of the shipowner under U.S. law is the value of the shipowner's interest in the ship and the cargo after the occurrence, or twenty million dollars in this case. This amount, added to the amounts paid out by TOVALOP, equals thirty six million dollars, wiping out the CRISTAL fund by six million dollars.

77. *Id.*

erating international schemes for dealing with tanker oil pollution; 2) they were started by members of the oil and shipping industries and not by any international governmental body; and 3) despite criticism that the plans were forwarded in order to ". . . placate ecology-conscious legislators and to forestall, if not completely preempt, more stringent liability schemes under national and international law,"<sup>78</sup> most claims, at least under TOVALOP, are fully settled by the group insurer to the satisfaction of the claimant-government.

### III. INSURING AGAINST TANKER OIL POLLUTION

Insurers have excluded contamination or pollution damage from coverage in the standard public liability policies protecting the average entrepreneur against suits by third persons. The typical exclusion reads:

It is agreed that the insurance does not apply to bodily injury or property damage arising out of the discharge, dispersal, release, or escape of smoke, vapors, soot, fumes, acids, alkalis, toxic chemicals, liquids or gases, waste materials or other irritants, contaminants or pollutants into or upon land, the atmosphere or any water-course or body of water; *but this exclusion does not apply if such discharge, dispersal, release, or escape is sudden and accidental.*<sup>79</sup>

A slightly different form of exclusion is used in liability policies covering oil risks. The last clause is changed to read "whether or not the event is sudden and accidental."<sup>80</sup> It is necessary to delete this exception regarding sudden and accidental discharges since oil spills are more often than not sudden and accidental. Otherwise, the exclusion would have little effect in restricting the coverage offered. Protection against liability for oil pollution damage may still be obtained by a buy-back endorsement, whereby the exclusion is made inoperative.

Providing coverage against pollution is disfavored for at least two reasons. First, the ability to insure against pollution could presumably act to lessen the incentive on the part of polluters to prevent pollution. Apparently acting on this premise, the New York

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78. Swan, *supra* note 71, at 516.

79. See *Contamination or Pollution Exclusion*, FIRE, CASUALTY & SURETY BULL., Casualty & Surety section, COP-1, 2 (May 1971) (emphasis added) [hereinafter cited as FIRE, CASUALTY & SURETY BULL.].

80. *Id.*

Legislature recently amended its insurance law to prevent the sale of pollution insurance.<sup>81</sup>

Pollution insurance has also been disfavored by the insurance industry based on its general reluctance to accept exposure to liability for risks of unknown dimensions. As more and more cases of pollution in general and oil spills in particular are reported, underwriters will undoubtedly develop greater expertise in rating the particular risks, and reluctance to underwrite pollution risks may fade. However, less than three years ago, the Insurance Rating Board proposed that coverage for oil pollution be excluded from standard liability policies based on the fact that data concerning costs involved in indemnifying polluters was sorely lacking.<sup>82</sup> The problems for insurers were aptly expressed in the May, 1971 edition of *Fire, Casualty, & Surety Bulletin*:

[L]egal theories revolving around the problem [of pollution] are in a state of flux. The spirit of the times seems to be "stop the polluters" by almost any means—a dangerous time for any insurer to accept the transfer of such a risk. Rating an exposure of such unknown dimensions presents another problem. . . . The insured's position as a "target" risk would have to be ascertained (in an anti-war atmosphere, a munitions manufacturer is more apt to be singled out for a pollution suit than is the maker of baby carriages); chances of the insured being lumped in a suit with all similar concerns in his area because *some* of them are contributing to pollution would have to be judged.<sup>83</sup>

Despite the reasons supporting the reluctance of insurers to accept a pollution risk, oil tankers have long been protected against third party claims arising from oil pollution damage by the limitations on a shipowner's liability. Since liability was always limited by the shipowner's interest in the ship and cargo, insurers have traditionally insured an oil tanker risk without a ceiling on coverage.<sup>84</sup>

Most marine liability insurance is handled by the London Group of Protection and Indemnity Associations and various worldwide underwriters.<sup>85</sup> The London Group consists of sixteen mutual protection and indemnity associations. Protection against oil pollution, personal injury and death to members of the crew or third persons, cargo loss or damage, and property damage are among the risks covered.<sup>86</sup>

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81. N.Y. INS. LAW § 46 SUBD. 13, 14 (McKinney supp. 1973).

82. See, e.g., McGeough, *The Applicability of Liability Insurance Coverage to Actions Involving Environmental Damage*, 1971 ABA SECTION OF INS., NEG., AND COMP. LAW PROCEEDINGS, 312, 318.

83. FIRE, CASUALTY & SURETY BULL., *supra* note 79, at COP 3.

84. See Healy, *supra* note 25, at 663.

85. *Id.* at 662-63.

86. See statement and testimony of John C.J. Shearer, partner in the firm of Thos. R. Miller & Son (managers of the United Kingdom Steamship As-

Each association is made up of shipowners, charterers, and bareboat charterers. The association covers its members up to a certain "retention point." This retention point, beyond which reinsurance becomes necessary, varies from year to year depending on the claims experience of the reinsurers. If insurance coverage is desired beyond that point, contracts for reinsurance made with underwriters each year come into play.<sup>87</sup> In the unlikely event that a loss exceeds both the retention point and the reinsurance, the members of the Association can be called upon to meet whatever additional amount remains uncovered.<sup>88</sup>

The P & I groups must be distinguished from TOVALOP and its insurance affiliate, I.T.I.A. TOVALOP was a response by oil companies and tanker owners to the problem of cleanup expenses incurred by governments and tanker owners. The P & I clubs, however, cover all types of liability to third parties. A tanker owner belonging to both TOVALOP and to one of the P & I clubs would seem to have double coverage against claims for oil pollution cleanup. However, I.T.I.A. would be the primary insurer, since standard marine liability policies contain excess insurance clauses,<sup>89</sup> whereas TOVALOP is silent on the subject of other insurance.

The present cost of adding an oil pollution endorsement to the general liability package carried by the P & I clubs for coverage of \$20 million is approximately 4¢ per dwt. ton of crude oil and 5¢ per dwt. ton of refined oil.<sup>90</sup> Thus, the owner of a 20,000 dwt.

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insurance Association Ltd., largest of the London Protection and Indemnity Associations), in 1969 *Hearings*, *supra* note 21, at 139 *et seq.*

87. See statement and testimony of Peter N. Miller, also a partner in Thos. R. Miller & Son, *supra* note 86, in 1969 *Hearings* at 156 *et seq.*

88. See Healy, *supra* note 25, at 663-64. A claim for damages would be paid as follows: 1) the responsible member would pay the claim up to his deductible, which could reach one million dollars in the case of large, oil company-owned tankers; 2) the club members, through their P & I association, would pay any amounts between the deductible and the retention point; 3) the reinsurer would pay all sums in excess of the retention point up to the policy limits, but no more than the legal limit of the shipowner's liability; and 4) the individual club members could be called upon to meet any remaining claims beyond the reinsurance coverage.

89. See Bue, *Yaka and Jackson: P & I Casualty Insurance; Contractual Liability*, 43 *TUL. L. REV.* 530, 561 (1969).

90. Much of the material in the text that follows was obtained in three telephone interviews, October 13 and 14, 1974, with ocean marine experts of Marsh and McLennan, an insurance brokerage firm [hereinafter cited as Marsh and McLennan]. Marsh and McLennan is one of the largest broker-

ton tanker would have to pay \$800 (or one thousand dollars if he were carrying refined oil) for one year of oil pollution coverage of \$20 million.

The cost of other liability coverage varies greatly depending on several different factors. In his testimony before the Senate Subcommittee on Air and Water Pollution, Paul Kreuzkamp, vice-president of an international insurance brokerage firm, gave the following example of the different amounts involved:

I have taken the American owner of 10 tankers of 20,000 gross registered tons in comparison to the foreign owners of similar tonnage in relation to limits of liability and premium cost.

I will just take the American owner. Estimated premium of \$60,000 per unit per annum with a limit of liability of \$2,500,000, excess marine insurance of \$15 million, with an estimated annual cost per unit of between \$10,000 and \$15,000 per unit, which would produce on a fleet of 10 vessels an annual insurance premium of \$750,000.

The foreign owner: Identical equipment, protection, and indemnity insurance of \$6,000 premium per unit per year, limit present time at least \$50 million. Ten units cost \$60,000.<sup>91</sup>

Using Kreuzkamp's figures, which are undoubtedly less than the cost of liability insurance today for tankers, the cost of the oil pollution endorsement at the rate of 4¢ per dwt. ton amounts to only one percent of the total liability premium in the United States; in foreign countries, only 13⅓% of the total.<sup>92</sup> Further, the total insurance cost—including both hull insurance and liability insurance—amounts to approximately five percent of the operating expense of a foreign tanker and close to ten per cent for an American tanker.<sup>93</sup> Thus, the cost of \$20 million of coverage to protect against oil pollution damage amounts to less than one percent of the total operating expenses of a foreign tanker; in the United States, the cost of this insurance amounts to less than one tenth of one percent of the total operating costs.<sup>94</sup>

### *Factors Affecting Premiums*

Among the factors affecting the overall liability premium of a  
age firms dealing in protection and indemnity coverages. As Union Oil Company's American insurance broker in 1967, Marsh and McLennan handled the insurance on the *Torrey Canyon*, placing the insurance with some 120 different syndicates and companies. See COWAN, *supra* note 1, at 96, 98.

91. 1969 *Hearings*, *supra* note 21, at 158.

92. The computation is as follows: \$8000 (cost of oil pollution coverage for a 200,000 dwt. ton tanker) divided by \$750,000 (total insurance premium) equals .0107, or approximately one per cent. For foreign tankers, the computation is:  $8000/60,000 = 13\frac{1}{3}\%$ .

93. Marsh and McLennan, *supra* note 90.

94.  $5\%$  of  $1\%$  =  $1/20$ th of  $1\%$  or  $.05\%$ ;  $5\%$  of  $13\frac{1}{3}\%$  =  $1/20$ th of  $13\frac{1}{3}\%$  or  $.66\frac{2}{3}\%$ .



tanker and to some extent, the oil pollution endorsement, are: 1) the flag of the vessel; 2) prior loss record; 3) operating area; 4) the rating of the ship; and 5) the limits of liability of the shipowner.<sup>95</sup>

Kreuzkamp's figures imply that the ship's flag-state is probably the most significant factor in setting the premium for liability insurance. In the absence of a treaty or international convention, the legal liability of the shipowner and his insurer is determined by the law of the state of registry.<sup>96</sup> A country's practice in awarding large judgments to oil pollution victims will serve to increase premiums paid by tanker owners. On the other hand, a country which solicits ships to sail under its flag, such as Liberia, generally has liberal rules of liability favoring the shipowner. In such cases, insurance premiums are reduced.<sup>97</sup>

The prior loss record of a ship and crew and the operating area of the ship are somewhat less important than the flag-state factor in determining premiums. A tanker with past losses operating on busy lanes or docking in heavily-populated areas will, however, pay a higher premium than a tanker without prior losses, operating on lightly travelled sea lanes.

A significant element affecting rates, and of great interest to conservationists, is the condition or rating of the ship. The ship's rating or classification is sometimes undertaken by the country under whose flag the ship is operating. It is most often handled by Lloyd's Register of British and Foreign Shipping of London, which is the world's largest ship classification society.<sup>98</sup> Classification is based on a ship's structure and general seaworthiness. The shipowner warrants that the ship is classified as he represents. Therefore, if an accident occurs and it is later shown that the ship was not in as good a condition as its classification indicated, the

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95. Marsh and McLennan, *supra* note 90.

96. See, e.g., article 6(1) of the 1958 Geneva Convention on the High Seas, providing:

Ships shall sail under the flag of one state only, and save in exceptional cases expressly provided for in international treaties or in these articles, shall be subject to its exclusive jurisdiction on the high seas . . . .

Convention on the High Seas, *done at Geneva, April 29, 1958*, art. 6, para. 1, 2 U.S.T. 2312, 2315, T.I.A.S. No. 5200.

97. 1969 *Hearings*, *supra* note 21, at 162.

98. COWAN, *supra* note 1, at 9.

insurer would be able to escape liability based on breach of warranty.<sup>99</sup>

The classification system promises to be the best means to induce shipowners to maintain their tankers in the best possible condition. By making it more costly in terms of higher insurance costs to operate a faulty and unseaworthy ship than to repair the ship and make it seaworthy, insurers would provide the incentive to shipowners to maintain their tankers in good condition. Unfortunately, premium cost based on classification has not varied enough to make it worthwhile for tanker owners to repair their ships.<sup>100</sup> It is still cheaper for them to pay the higher premium and leave their ships in a lower classification than it is to spend the necessary funds to make their ships more seaworthy and thereby gain a lower premium.

The premium cost for tanker liability insurance is most directly affected by the shipowners' limits of liability.<sup>101</sup> Attempts to increase those limits or remove them altogether have met with resistance from insurers who, as noted, would be exposed to unknown amounts of liability. This resistance was seen in the 1969 Hearings before the Senate Subcommittee on Air and Water Pollution involving two bills prescribing limits of liability for cleanup costs of \$450 per gross registered ton and a total limit of fifteen million dollars.<sup>102</sup>

It was stated in the hearings that even though the increased liability of the insurer could be passed along to the insured in the form of higher premiums, insurers would not write insurance for the proposed limits.<sup>103</sup> Among the reasons given in support of this

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99. Marsh and McLennan, *supra* note 90.

100. As stated in the text accompanying notes 90-91, *supra*, the cost of oil pollution coverage is in the vicinity of 4¢ per dwt. ton for \$20 million of coverage. For a ship as big as the *Torrey Canyon*, the premium for this coverage would only amount to about \$8,000 per year. Not much repair work can be done on a \$16.5 million ship (what the *Torrey Canyon's* hull insurance amounted to—see COWAN, *supra* note 1, at 98) for \$8,000. Thus, even if the shipowner was to get oil pollution coverage for no charge if his vessel were in a specified condition, it would not be economically feasible for him to repair his ship to that condition if such repairs exceeded \$8,000.

101. Marsh and McLennan, *supra* note 90. In the interview, one of the brokers stated that if the limits of liability were increased, the cost of oil pollution insurance could also be expected to increase, though there was no definite ratio between increasing limits and increasing premium costs.

102. S. 7 and S. 544, 91st Cong., 1st Sess. (1969). The bills sought to amend the Federal Water Pollution Control Act of 1966, 33 U.S.C. § 466e (1966).

103. See, e.g., statement of Paul J. Kreuzkamp, vice-president of the insurance brokerage firm of Alexander & Alexander, Inc., 1969 Hearings, *supra* note 21, at 157 *et seq.*

position was that the underwriters had a dearth of data upon which to base their premiums.<sup>104</sup> Underwriters feared that with the higher limits, their potential liability would exceed their potential reserves, because they had little idea of the frequency or remedial costs involved in oil spills and could not gauge their premiums accordingly.<sup>105</sup>

Another basis expressed in the hearings for the underwriters' reluctance was that along with increased limits of liability, the bills sought to make shipowners absolutely liable for cleanup expenses.<sup>106</sup> The practical effect of holding a shipowner absolutely liable has been said to shift the burden of proof of the origin of the oil from the claimant to the vessel owner.<sup>107</sup> Only if the shipowner could prove that the oil came from another ship could he escape liability under an absolute liability standard. However, similar results could exist if a negligent standard—which was favored by insurers—and principles of *res ipsa loquitur* were used. In both cases, the shipowner has the burden of proof. Under absolute liability, he must show that the oil came from another ship; under *res ipsa loquitur*, he must disprove his negligence. Since many spills are caused by untraceable negligence in the maintenance of the ship or in the transporting of the oil from the ship to harbor facilities, a shipowner's usual means of rebutting the presumption of negligence is to prove that the oil came from another ship,<sup>108</sup> as with absolute liability.

Underwriters' opposition to absolute liability, however, was not based on any unjustified fear of increased liability for oil pollution damage under an absolute liability standard. The insurance industry argued that if absolute liability were imposed on shipowners

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104. 1969 *Hearings* at 153. Another reason for the reluctance was that insurers do not like to be overexposed on any one risk. See 1969 *Hearings* at 140 for a list of the risks insured against.

105. *Id.* at 153. The two bills before the Senate would have increased the underwriters' and shipowners' liability by seven times in cases involving ships of less than 33,000 dwt. tons. (\$450/\$67 ~ 7).

106. See S. 544, 91st Cong., 1st Sess. § 12(e)(2) (1969), reprinted in 1969 *Hearings*, *supra* note 21, at 19.

107. See Becker, *supra* note 66, at 669-70.

108. See Sweeney, *Oil Pollution of the Oceans*, 37 *FORD. L. REV.* 155, 176-181 (1968). When there is an oil discharge whose cause cannot be determined, proof of actual negligence by the plaintiff as a prerequisite to recovery is unnecessary in either case. All that must be shown is that the oil came from the defendant-shipowner's vessel to have liability assessed under either the doctrine of *res ipsa loquitur* or the rules of absolute liability.

for oil pollution damage, it might be imposed with respect to other risks. The opinion of James J. Reynolds, President of the American Institute of Merchant Shipping, was representative of the insurance industry on this topic in testimony before the Senate Subcommittee on Air and Water Pollution:

If the concept of absolute liability is imposed for oil pollution, then I can well imagine the maritime unions shortly coming in and demanding absolute liability for injury or death of a member of the crew, regardless of his own conduct; absolute liability for cargo damage, absolute liability for third parties for property damage, et cetera.<sup>109</sup>

Congress eventually passed the Water Quality Improvement Act of 1970 and the Water Pollution Control Act of 1971 with a modified standard of absolute liability.<sup>110</sup> The opposition to the standard proposed in the bills<sup>111</sup> presumably had some effect, however. Unlike the standard proposed in the bills, the Water Quality Improvement Act and Water Pollution Control Act relieve a shipowner of liability if he can prove that the oil spill resulted from an act of God, an act of war, third-party negligence, or negligence of the government.

The limits of liability of the shipowner and his insurer for oil pollution damage have not changed from the conventions and legislation proposed in the 1969 to 1971 period. In the United States, liability limits are presently \$100 per gross registered ton for cleanup costs up to a \$14 million total, while liability to third persons is limited to the value of the ship and cargo after the incident.<sup>112</sup> TOVALOP limits are also \$100 per gross registered ton, but only provide a maximum of \$10 million. Also, TOVALOP will only indemnify national governments for cleanup costs.<sup>113</sup> The Civil Liability Convention, although not as yet operative, has proposed limits of \$134 per gross registered ton with a maximum of approximately \$14.1 million, covering both cleanup expenses and liability for damages to third persons.<sup>114</sup>

#### IV. SUGGESTIONS FOR A MORE EQUITABLE DISTRIBUTION OF COSTS OF TANKER OIL POLLUTION

A practical and equitable means of distributing the risk of oil pollution would be to remove all limits of liability for cleanup

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109. 1969 *Hearings*, *supra* note 21, at 1446.

110. 33 U.S.C. § 1161(f) (1) (1970).

111. See S. 7, 91st Cong., 1st Sess. § 12(d) (1) (1969), *reprinted in* 1969 *Hearings*, *supra* note 21, at 8-9.

112. See notes 22-29 and accompanying text, *supra*.

113. See notes 60-65 and accompanying text, *supra*.

114. See notes 37-45 and accompanying text, *supra*.

costs, while retaining present limits for private, third party damages. All cleanup expenses should be paid for in full by the shipowner and his insurer before any third party claims are compensated. Shipowners should be required to carry insurance in amounts which would fully compensate for potential cleanup expenses, based on the true cost of cleanup and not on any artificially-created figures as now exist. Third party claims should be limited by the value of the shipowner's interest in the cargo and vessel. Third party claims which are unsatisfied by the shipowner or his insurer may be remedied by the International Compensation Fund, which should be enlarged to meet the increased potential of damages resulting from the new supertankers.

### *Third Party Damages*

The measure of damages to third persons is too uncertain to act as a basis for proposing new limits of insurance coverage for oil pollution. Unlike cleanup costs, there is great variance in per-ton amounts of damages when private property is involved. As noted,<sup>115</sup> the Maine spill of thirty-two tons of oil created claims of \$70 million. Yet, in another spill near Avocat Rock involving *twenty thousand* tons of oil, only \$28,000 in claims were filed and paid.<sup>116</sup> It would be too burdensome on shipowners to require them to carry insurance based on such extreme cases as the Maine spill, when their liability often will not exceed the Avocat Rock figure.

If such a requirement were placed on shipowners, insurance would be virtually impossible to obtain for large tankers due to the amounts involved.<sup>117</sup> Even if it could be obtained, premium costs would undoubtedly be prohibitive. Absent insurance availability, sources of capital to finance shipping ventures would undoubtedly dry up, since the risk for huge losses such as the Maine oil spill would stay with the shipowner and his backers.

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115. See notes 15-18 and accompanying text, *supra*.

116. 1969 *Hearings*, *supra* note 21, at 142.

117. If required coverage were based on the per-ton damage figures of the Maine oil spill, the amount would be tremendous for a 100,000 dwt. ton tanker. The computation is as follows: the per-ton damage figure was 70,000,000/32 or approximately \$2.07 million; multiplying this figure by 100,000 would equal \$200 billion, hardly a realistic figure upon which to base insurance.

For these reasons, present limits based on the value of the shipowner's interest in the ship and cargo should be maintained. For third party claims which go unsatisfied, claimants may look to the International Compensation Fund when it becomes operative. CRISTAL is much too restricted in its claims policy to serve as a vehicle for compensation,<sup>118</sup> and it should be replaced by the International Compensation Fund as soon as possible. Since the International Compensation Fund will be supported by contributions from the oil companies, justice will be served in that the parties owning the oil will be the ones paying for the damage caused by their product.

### *Cleanup Costs*

Cleanup costs should be the sole burden of shipowners and their insurers. From a purely practical standpoint, placing the burden of cleanup costs on the shipowners and not on the oil companies will presumably result in shipowners taking the initiative in cleaning up spills themselves in order to minimize their liability. This theory underlies the tanker-indemnification provision in TOVALOP, and it appears to be working.<sup>119</sup>

Since shipowners should be required to carry insurance to cover total potential liability for cleanup costs, it would be necessary to arrive at a per-ton figure of cleanup costs. The per-ton figure used in the bill before the Senate Subcommittee on Air and Water Pollution was \$450.<sup>120</sup> The rate was computed by taking the cost of chemicals needed to disperse one ton of oil.

The figure of \$450 is inapplicable today for two reasons. First, and most importantly, the chemicals traditionally used to clean up oil have been found to be harmful to marine organisms, and thus are no longer used in many parts of the world.<sup>121</sup> Secondly, other techniques have been developed which are more effective than the chemicals, but also much more expensive.<sup>122</sup> The present cost of oil cleanup in the United States is said to be at least \$7,000 per ton.<sup>123</sup> This figure represents the average cost for cleanup of oil

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118. See notes 72-78 and accompanying text, *supra*.

119. See Becker, *Vehicles for Reimbursement of Oil Pollution Damage*, 9 HOUSTON L. REV. 669, 670 (1972).

120. S. 544, 91st Cong., 1st Sess. § 12(e) (1) (1969), reprinted in 1969 *Hearings*, *supra* note 21, at 19.

121. This information was obtained in a telephone interview on Oct. 12, 1974, with Captain Richard Johnston (Ret.), chief engineer with Submarine Engineering Associates, Inc. This company is a San Diego firm specializing in oil spill containment systems and marine consulting and engineering.

122. *Id.*

123. *Id.* Using the figure of seven thousand dollars per dwt. ton, a ship of 50,000 dwt. tons could generate a potential cleanup cost of \$350 million.

spills which affect beaches and port facilities. Presumably the cost would drop to some extent if the spill were out at sea, thereby involving no cleanup of other ships, beaches, or terminal facilities.<sup>124</sup> Premiums would, of course, be subject to adjustment depending on where the ship was to operate. However, since a tanker could not predetermine where an accidental oil spill might occur, the maximum figure should apply.

If shipowners were required to obtain insurance based on a figure of \$7,000 multiplied by the number of tons of oil to be transported, one might expect underwriters to walk away from any such demand, due to their past reluctance to insure pollution risks for \$450 per ton. However, the past five years have brought a radical change in the outlook of marine insurers.<sup>125</sup> The *Torrey Canyon* disaster is now considered by the insurance industry as only a "partial loss" when compared to the liability claims paid out since then.<sup>126</sup> Hull insurers who would have laughed at a request for \$50 million in hull insurance on a tanker five years ago now write such insurance for \$150 million and more.<sup>127</sup>

As noted, reluctance on the part of underwriters to accept proposals for increased limits of liability had arisen soon after the *Torrey Canyon* disaster. Underwriters were in a state of turmoil at

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A ship of 200,000 dwt. tons could generate potential cleanup costs of \$1.4 billion. Such cleanup expenses are not unrealistic, especially when considering a spill in a busy harbor or resort beach. In such a case, the oil would have to be removed from virtually all property at some cost, rather than be allowed to dissipate on its own over a period of several months.

It is further believed that liability insurance can be obtained for such amounts. Soon after passage of the Water Quality Improvement Act of 1970, the Water Quality Improvement Syndicate was formed to provide the required insurance. The syndicate was made up of 27 American marine insurers. If a similar syndicate were formed by reinsurers throughout the world to underwrite these new liability proposals, insurance could conceivably be made available for the new supertankers at the proposed rates. If it could not be made available, then an incentive would arise to switch back to smaller tankers which could be insured at the proposed rates. Since much of the problem in the first place is based on the increasing size of tankers, incentives to use smaller vessels would also help to prevent such disasters as the *Torrey Canyon*.

124. However, the savings involved where there is no cleanup of port facilities or ships in port might be eroded with the increased costs of transporting the oil spill containment equipment out to sea.

125. Marsh and McLennan, *supra* note 90.

126. *Id.*

127. *Id.*

that time. Cleanup claims for the *Torrey Canyon* had amounted to far more than any other claim on record. In fact, a total of twenty-nine oil pollution damage claims had been filed with the four largest P & I associations between 1960 and 1966, and the *combined total* of all such claims amounted to less than one third of the *Torrey Canyon* settlement between Union Oil and France and Britain.<sup>128</sup>

Since *Torrey Canyon*, however, insurers have handled many similar oil pollution damage claims. With an increase in data on the type of risk involved, expertise in rating tankers has been developed. No longer are underwriters fearful that their potential liability might exceed their reserves. Therefore, an adjustment in the amount of insurance required to be carried should not meet with nearly the opposition that such an increase faced in the 1969 Senate hearings. In fact, since liability insurance is nearly always a profitable area in an insurer's group of coverages, an increased amount of insurance would probably be welcomed by the insurance industry.

In contrast, the shipping industry could be expected to oppose a cancellation of their limited liability for cleanup expenses. However, their premium for oil pollution liability has amounted to, at the most, only one per cent of their total operating costs.<sup>129</sup> Raising their insurance costs to meet the realities of present-day cleanup costs should not disrupt their operations. First dollar coverage for liability insurance is, of course, more expensive than last dollar coverage.<sup>130</sup> Thus, an adjustment of coverage based on cleanup costs of \$7,000 per ton certainly would not amount to a ten- or twenty-fold increase in premium. Even if the premium for oil pollution liability insurance were to double or triple, such an increase would not be onerous in light of the relatively small amount being paid today.<sup>131</sup> Cost increases could also be passed along to the oil companies, and ultimately, the consumer, so that the shipowner would not have to bear the burden alone.

### *Implementation*

Increased liability could readily be implemented by amending the

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128. The *Torrey Canyon* settlement was for more than \$7.2 million. See notes 2-3 and accompanying text, *supra*. The total amount for the 29 claims was 869,652 pounds or \$2,435,025.

129. See notes 90-94 and accompanying text, *supra*.

130. An example of this is that \$20,000 of auto liability insurance costs considerably less than twice the cost of \$10,000 of coverage.

131. It must be added that most damage claims in the past have been settled for considerably less than the statutory or convention limits. See 1969 *Hearings*, *supra* note 21, at 140, 184.



legislation and international conventions now in existence. Since the Federal Water Pollution Control Act of 1972<sup>132</sup> deals only with cleanup costs, these suggestions could be incorporated into that legislation by simply deleting the stated limits of liability. The Civil Liability Convention could also be easily changed by restricting its application to cleanup expenses and deleting the prescribed limits of liability.<sup>133</sup> These changes, coupled with existing provisions in the convention and legislation, would mean that a shipowner would be required to carry insurance based on present costs of cleanup of \$7,000 per ton, rather than the artificially low limits in the various provisions now in effect. Further, the International Compensation Fund is set up to apply to all claims which are unsatisfied by the Civil Liability Convention scheme. Since no private property damage claim would be satisfied by the Civil Liability Convention if the proposed changes were made, these claims would automatically fall within the scope of the Fund. Coverage by the Fund would therefore exist without having to amend its draft convention.

#### V. CONCLUSION

The potential amounts of money involved in oil spills in terms of cleanup expenses and third party damages have risen to astronomical figures in light of increases in the size of supertankers. As more and more reliance on Middle Eastern oil continues, shipment of oil in supertankers will surely increase. As illustrated by the *Torrey Canyon* spill, possible losses from a supertanker breakup can run into the tens and even hundreds of millions of dollars.

Liability of the shipowner for these losses has traditionally been confined to an artificial limit having little relationship to the actual damage involved. Although the purpose for the limitation of liability principle—encouraging investment in a risky venture—still exists, present liability limits favor the shipowner at the expense of the potential victim far too much.

A reasonable and easily-implemented reform for meeting the increased potential liability is to delete all liability limits presently applied to cleanup costs and make shipowners liable for all such expenses without a limit. The right to limit liability should apply

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132. 33 U.S.C. § 1321 (Supp. 1973).

133. Civil Liability Convention, art. 7.

only insofar as private property claims are concerned. Private property claims could be handled by such funds as the International Compensation Fund.

Shipowners should be obligated to carry insurance in amounts reflecting the total potential cost to clean up their cargo. The worldwide insurance market has the capacity and the will to indemnify shipowners for the complete cost of cleanup. The premium for increased insurance should not become prohibitive, especially in light of the relatively miniscule amounts now being paid for such insurance.

Rather than the individual governments and private parties bearing the burden of cleanup expenses in excess of present limits of liability, the worldwide insurance market can indemnify against such losses. Since the risk of loss for cleanup costs would be shifted to insurers, and with limits still applicable to private property damage claims, investors would be protected against huge amounts of liability. More importantly, governments and individuals would no longer have to bear the burden of unsatisfied claims. The cost of oil pollution would thus be borne more equally by all the parties who benefit from the shipment of oil—the shipping industry, in the form of higher premiums; the oil companies, in the form of higher shipping costs; and of course, the consumer, in the form of higher prices for petroleum products.

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