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The legal protection of the marine environment : is Jamaica ready for a serious pollution incident?

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THE LEGAL PROTECTION OF THE MARINE ENVIRONMENT: IS JAMAICA READY FOR A SERIOUS POLLUTION INCIDENT?

BY

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

The contents of this dissertation reflect my personal views and are not necessarily endorsed by the University

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ABSTRACT

The names Torrey Canyon, Amoco Cadiz, Exxon Valdez and Braer need no introduction. This infamous catalogue of marine disasters is not closed and it is not unlikely that Jamaica will be associated with a similar marine pollution incident which seems to be an ineluctable consequence of modern day sea transport.

This bleak prognosis is correct though inconsistent with the fact that the majority oil and hazardous cargoes are delivered safely. The evidence however, in support of the above conclusion is overwhelming and should not be treated lightly.

The purpose of the thesis is to examine the Jamaican legal system to determine if it is capable of providing adequate and proper relief to the marine interests of the country. The deficiencies in the legal system as it relates to marine environment protection will be outlined and arguments will be produced showing cause why international marine environmental law precedents should be followed to give Jamaica the protection it needs.

Chapter 1 will examine existing and potential threats to the marine environmental interests of Jamaica which necessitate legislative protection.

In Chapter 2 the existing legal framework will be examined and an analysis on the Common Law approach to marine environment protection will be made.

Chapter 3 will contain an analysis of the institutional framework in addition to an examination of the problems affecting the implementation of rules concerning the protection of the marine environment.

The use of key international marine environment law

precedents as a source of regulation to complement the existing sources will be examined in Chapter 4.

In Chapter 5 suggestions for Jamaican marine pollution legislation will be made and concluding remarks will be made in Chapter 6

The golden thread running through the thesis is that the threats to Jamaica's marine environment are too great to ignore and internationalism is the best possible philosphy for the Jamaican government to adopt in its effort to protect its marine related interests.

TABLE OF CONTENTS

ABBREVIATIONS AND ACRONYMS

AC	- Appeal Cases
BIMCO	- Baltic International Maritime Conference
CAP	- Caribbean Action Plan
CARIB J. Sci.	- Caribbean Journal of Science
CARICOM	- Caribbean Community
CARIPOL	- Caribbean Petroleum Pollution Monitoring Project.
CEP	- Caribbean Environment Programme
CLI	- Caribbean Law Institution
CLJ	- Cambridge Law Journal
CTO	- Caribbean Tourism Organisation
ECD	- Environmental Control Division.
EEC	- European Economic Community
EEZ	- Exclusive Economic Zone
GESAMP	- Group of Experts on The Scientific Aspects of Marine Pollution
GT	- Gross Tonnage
ICJ Reps.	- International Court of Justice Reports
IMO	- International Maritime Organisation
IOC/CARIBE	- Intergovernmental Oceanographic Commission's Regional Subcommission for the Caribbean and Adjacent Regions
IOPC FUND	- International Oil Pollution Compensation Fund
ITOPF	- International Tankers Owner Pollution Federation
J.Mar L & Comm.	- Journal of Maritime Law and Commerce

JANEAP	- Jamaica National Environment Action Plan
JLR	- Jamaica Law Reports
Lloyds Rep.	- Lloyds Law Reports
NGO	- Non Governmental Organisation
NRCA	- Natural Resources Conservation Authority
PIOJ	- Planning Institute of Jamaica
PSA	- Particularly Sensitive Sea Area
QB	- Queens Bench
SPAWS	- Protocol on Specially Protected Areas and Wildlife
SIDA	- Swedish International Development Authority
ULCC	- Ultra Large Crude Carrier
UNCLOS	- United Nations Conference on the Law of the Sea
UNCTAD	- United Nations Convention on Trade and Development
UNEP	- United Nations Environment Programme
USCG	- United States of America Coast Guard
UWI	- University of the West Indies
VLCC	- Very Large Crude Carrier
WILJ	- West Indies Law Journal
WIR	- West Indies Reports
WMU	- World Maritime University.

CHAPTER ONE

INTRODUCTION

Accidental pollution is ineradicable; It is part of the price man must pay for the benefits of an industrial society [1]

1.1 HISTORICAL OVERVIEW

Jamaica has always been dependent on the waters of the Caribbean Sea, whether it be for fishing and primitive transport by the Arawaks or for the transport of its primary products to the mother country in the pre independence period.

Pre Independence Period[2]

Monoculture was the main agricultural activity practiced in this period where 'King Sugar' and 'Green Gold' were titles given to the main export commodities namely sugar and bananas. These products were joined in the immediate post independence period by Bauxite which quickly became the chief foreign exchange earner.

Marine Pollution in this period appeared not to have been a major societal ill, at least not chronic enough to require a legislative cure. The Assembly and subsequently Legislature, established for the purpose of passing laws and raising taxes, were preoccupied during this period with passing social legislation to govern

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[1] David Abecassis, The Law and Practice relating to oil pollution from Ships: London: Butterworths 1978), 67

[2] Jamaica gained its independence from Great Britain on August 6, 1962

the society comprised of a large number of disenfranchised blacks and a small group of propertied English planters. The law in this era was used as an instrument to preserve society but preserving society meant promoting social order and not preserving the environment for the benefit of present and future generations.

British colonial legislation throughout the empire had stark similarities. The legislation in the immediate preindependence period of Jamaica appeared to touch and concern the protection of the environment but when similar legislation of other colonies is studied it reveals that the aim of the legislation is to maximise the exploitation of natural resources.

Most of the pre independence legislation governing the exploitation of natural resources has been production and revenue oriented exemplifying the British government's interest in getting the resources out of the country as cheaply as possible.[3] Sustainable development principles were definitely not considered in colonial policy.

The Mining Acts of Jamaica are good examples of this colonial policy and the apparent glimpse of environmental awareness in the regulations[4] concerning the rehabilitation of bauxite mines should not be accepted as a serious step to develop and preserve the environment.

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[3] Nick Rashid, The Environmental Law in Malaysia: A Survey of Environmental Law and Policy in the Pacific Basin Area ed.Ichiro Kato et al. (Tokyo : University of Tokyo Press 1980): 12.

[4] Mining Regulations, 1947 requires the restoration of mined out areas.

Gold [5] notes that a single ocean use has been the historical basis for marine policy and this may account for the presence of Merchant Shipping legislation and the absence of specific marine environment related legislation on the Jamaican statute books.

Post Independence period

Industrialisation by invitation was the economic model to which most newly independent states including Jamaica became converts in order to hasten the stages of development.

Some attention was given to the environment in the form of legislation regulating land use and development but where environmental quality goals conflicted with industrialisation, especially on the coastal zone, the latter prevailed. Marine environment protection in general and pollution control in particular, was seen as inimical to the attraction of foreign capital.[6]

Unfortunately and ironically the Tourism industry which depends heavily on the marine environment is a perfect example of the maxim "where Industry and Environment conflict, Industry prevails".

Tourism, though not the form of industrialisation by invitation considered by the development economists, has become a recognised industry and has steadily progressed to become the sine qua non of the Jamaican economy. This industry is not subject to the whims and fancies of

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[5] Edgar Gold, Lectures given at Maritime Law Seminar WMU May 1992.

[6] Gajray, A., The Environmental Impact of development in the Caribbean from 1660 to present: Proceedings of the ROPME Workshop on Coastal Area Development ROPME No. GC5 -5\ 006 UNEP Regional Seas Reports and Studies No 90.

the international primary commodity market but is extremely fickle and highly susceptible to natural disasters, political and social instability and last but not least, marine pollution incidents.

It is said that conduct involving substantial risk to the environment may be perceived as less hazardous in countries that place great value on activities that would have to be given up to minimise the risk.[7] This has certainly been the case for the tourism industry in Jamaica.

Though marine pollution prevention was not high on the priority list of the Government Jamaica's marine jurisdiction in this period, expanded from the original British 3 nautical mile territorial sea claim to a 12 nautical mile territorial sea.

This development was in keeping with the pivotal role Jamaica played in the United Nations Conference on the Law of the Sea (UNCLOS) which saw newly emerging states seeking to expand their jurisdiction for political rather than environmental management reasons.

For various reasons, environment related legislation has been passed to control activities which threaten the environment but marine environment related legislation continues to occupy the back burners of the legislators.

1.2.0 MARINE POLLUTION IN JAMAICA

Definition and Scope

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[7] Palmer, G., "New Ways to Make Environmental Law" American Journal of International Law 86 (1992): 259.

The thesis will be confined to vessel and land based sources of marine pollution to the exclusion of atmospheric sources. Issues of Coastal Zone Management will not be examined here although marine pollution control must be addressed within the context of an integrated approach to sea use planning.

A serious pollution incident in this thesis will be primarily limited to a discharge of pollutants which pose a threat to the marine environment or to the coastline or related interests of Jamaica which requires emergency action or other response.[8]

Cognizance will therefore be taken of operational spills from ships and land based pollution but emphasis will be placed on the recovery of pollutants and compensatory damages from accidental pollution.

More emphasis will also be placed on serious vessel source marine pollution incidents. This is because the exercise of the legal system's jurisdiction over stationary, land based polluters is more certain than the exercise of jurisdiction and control over the operation of fleet footed foreign flag vessels.

1.2.1 Vessel Source

The writer will restrict the scope of the thesis to pollution from large merchant vessels and therefore pollution from small fishing vessels and yachts though potential threats to the marine environment will be excluded. Vessel source pollution contributes to

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[8] See generally the International Convention on Oil Pollution, Preparedness, Response and Cooperation 1990.
Article 2.

approximately ten percent (10%)[9] of marine pollution and the incidence of such pollution has fallen significantly since the development of international regulations.

This class of pollution may be further divided into accidental and operational discharges.

Accidental

Accidental pollution may occur during loading or discharging cargo, bunkering or ballasting, or in association with a vessel casualty such as a collision, grounding, fire explosion or structural failure.[10]

Accidents cause only a fraction of total marine pollution; but, because of the catastrophic damage and loss which results, and the media's penchant for sensationalising these incidents, it is problem that needs urgent attention. The most prominent and serious spills therefore tend to be accidental with few exceptions such as the pollution arising out of the Gulf war in 1989.

Oil tankers are the chief sources of this type of pollution while spills from chemical tankers though potentially more devastating assume a lower profile. This may be due to the general ignorance of its less visible effects and/ or the apparent infrequency of such

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[9] UNCED, Report of Secretary General of the Conference quoted in N.A.Robinson et al., eds., Agenda 21 and the UNCED proceedings, 2 vols.(New York : Oceana Publications,1992), 1:464.

[10] Abecassis, D. and Jarashow, R., Oil Pollution from Ships - International, United Kingdom and United States Law and Practice London 1985 p.61.

spills.[11]

Operational

Operational pollution occurs from all types of merchant ships in the form of discharges from machinery spaces, dirty ballast, oily bilges, and tank washings to make room for new cargo.

Wade notes that

> '...the major source of tar arriving on Jamaican beaches is thought to be oil residues discharged from illegal ballasting and washing activities of ships as they leave port...'.[12]

Wade's findings indicate that operational pollution, though not as catastrophic as accidental pollution, is no less important as it gravely affects other uses of the Jamaican coastal zone.

The cruise trade is dependent on oil free beaches and seas but it is not an innocent user of the marine environment. It is responsible for some of the operational pollution present in the coastal zones where tourism is concentrated.

Jamaica is not the only victim of cruise ship pollution and neither is garbage the only pollutant associated with cruise ships.

In 1992 RCCL's Nordic Prince caused a 450 metre oil

only 450 metres?

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[11] Simon Barker, "Hazardous Goods at Sea: Are safe ships and clean seas mutually exclusive ? A Canadadian Perspective". Marine Policy July 1992: 306.

[12] Wade, B., Provan, M., Gillett, V., Carroll, P. Oil Pollution Of Jamaican Coastal Waters and Beaches: Results of The IOCARIBE\CARIPOL Monitoring Programme (Jamaica), 1980-1983. Carib.J.Sci.23 (1):93-104 (1987) p.93

slick in St Georges, Bermuda for which they were fined $US 8,500. [13]

The Caribbean Tourism Organisation (CTO) and more recently the United States of America Coast Guard have recognised the potential threat posed to the marine environment by cruise ships (which are also increasing in size) and have launched an offensive against it, albeit using different methods.[14]

Enforcement by Caribbean states of pollution regulations as it relates cruise ship pollution continues to be insufficient because governments fear that strict enforcement will result in the vessels shifting to more 'accommodating' competitors.[15]

The Caribbean is not only a political basin but because of the high amount of vessel traffic and the absence of laws and enforcement measures it can also be regarded as a basin for oily water waste.

Shipowners are not on an evangelistic mission but possess ships because of the profits that can be made in sea transport. The flag state's requirements may be such that the vessels comply with convention equipment standards, but coastal states should appreciate the fact that having the ability to comply with the relevant conventions does not mean that discharge standards will be adhered to. In the absence of incentives or

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[13] "Shipping and the Environment", Lloyds Shipping Economist Supplement June 1993.

[14] "USCG plans to launch an offensive against cruise ships via naval airborne forces deployed in normal patrol and drug interdiction missions". BIMCO Weekly No. 12 1993.

[15] supra., n.14.

deterrents in the form of local legislation implementing the convention standards, the present practice of operational pollution will continue unabated.

International regulatory bodies can however take some satisfaction in the fact that operational pollution has been significantly reduced through their untiring efforts but, it cannot be over stressed that conventions without the local legislation to give effect to them effect are 'paper' agreements.

The designation of the Wider Caribbean as a Special Area under the International Convention on the Prevention of Pollution from Ships (MARPOL 73\78) Annex 5 [16] is testimony to this fact.

The stringent discharge standards which apply by virtue of this status cannot be enforced without the necessary local legislation and the establishment of reception facilities. In view of their absence, life will continue as normal and the Special Area Status will be a paper status only.

1.2.2. Land Based

Land based sources of pollution account for 87% of marine pollution world wide.[17] In Jamaica, a number of circumstances have led to this problem including urban sprawl coupled with the inability of the present sewage system to adequately treat the waste received. The result has been that primary treated industrial,

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[16] The 1991 Amendments to MARPOL 73/ 78 entered into force on April 4, 1992.

[17] The Group of Experts on the Scientific Aspects of Marine Pollution (GESAMP). The 87% consists of 44% by way water borne sources and 33% from atmospheric emissions and 10% by marine dumping.

urban and agricultural waste enters the coastal ecosystem and upsets the delicate balance present therein.[18]

Two of the chief point sources of this type of pollution are the government itself and the hotels which serve the tourist trade. The former creates a dilemma in that there is a very lax attitude to compliance with the law because the law maker himself cannot comply. In the latter case the hotel industry is akin to Damocles feasting on foreign exchange earnings while ignoring the pollution it is causing to the resources that are its raison d'etre.[19]

The problem of land based pollution is endemic to a nation and must addressed by action at the local level applying land use and development laws that are intergrated in scope. This is because land based pollution involves non point sources which are difficult to regulate at the International level. International law can therefore only serve as a general guide with the bulk of the work being left to the national administration.

At present, preliminary scientific studies on land based pollution are being carried out at the regional level through the United Nations Environment Programme (UNEP) Regional Seas Programme for the Wider Caribbean.

The standards for discharge must be uniform for both land based and vessel source pollution so that no

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[18] Sewage, Industrial air pollution, municipal Garbage, Toxic wastes and agricultural run off are the chief sources of pollution in the Kingston Harbour. Mission Report of the IMO team to Jamaica, (11-20 January 1988). IMO/SIDA Programme for the Protection of the Marine Environment. April 1988

[19] ibid.

legal conflicts can arise in their application. In Canada the absence of similar discharge standards for land based facilities and vessels in the Great Lakes has resulted in shipborne waste entering the lakes through reception facilities.

Land based pollution and its effects are already being felt in Jamaica with the latest incident being a fish kill in the vicinity of the Kingston Harbour, the cause of which could not be attributed to any person or process.[20] Previous incidents include leakages in pipelines at the Reynolds pier, Texaco oil and more recently at Port Esquivel and Kingston Harbour.[21]

1.3 PRESENT CONDITIONS AND FUTURE TRENDS IN CARIBBEAN SEA TRANSPORT

1.3.1 THE PROBLEM

A major pollution incident arising at sea has yet to seriously affect Jamaica but there are many factors which combine to create a recipe for such an incident.

There appears to be a disproportionate amount of data on oil pollution compared to chemical pollution and therefore the writer will develop his arguments primarily in the context of oil pollution.

The writer however fully appreciates the fact that chemical pollution incidents can be more devastating than incidents involving oil and that clean up may be

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[20] Radio Jamaica News report January 1993.It is the writers belief that the fish kill was attributed to the accumulation of various pollutants including foreign substances introduced by deballasting activities.

[21] Jamaica Environmental Profile September 1987.

five times as lengthy and up to ten times as costly as an equivalent volume of oil.[22]

1.3.2 CURRENT PATTERNS OF TANKER TRAFFIC

The transport of oil is by far the most important contributor to the volume of vessel traffic in the Caribbean region. It also poses the greatest potential threat to the marine environment.[23]

Jamaica, though largely dependent on oil for its survival, imports only a fraction of the oil that is transported through its waters on a daily basis. This fraction has decreased substantially with the passage of the Exclusive Economic Zone Act of 1991 which has extended Jamaica's maritime jurisdiction and increased the volume and risk of traffic that may cause harm to its resources.

Jamaica as a coastal state will bear a great risk for traffic which it has no interest in but accommodates for distant states.

There are three main trades for oil traffic through the waters of the Caribbean that directly affect Jamaica[24]. These are:

a. Transport of Middle Eastern, West African and North African crude oil to the United States by

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[22] Public Review Panel on Tanker Safety & Marine Spills Response Capability, 'Protecting our Waters', Final Report, Ministry of Supply Services 1990.

[23] Underwood, P.C: " The Marine Environment and Ocean Development in the Eastern Caribbean," New Law of the Sea for the Caribbean ed. Edgar Gold, New York: Springer Verlag , 1988.

[24] Jamaica here refers to areas of land and sea over which Jamaica has jurisdiction.

supertankers that will stop for refining, transhipping, lightering and subsequent transport by smaller vessels to the US coast,

b. transport of crude or refined products from Mexico, Venezuela, Aruba and Curacao en route to various world markets, and

c. shipment of Alaskan crude oil via the Panama Canal to the US Gulf Coast and East Coast refineries.[25]

Venezuelan crude is the primary type of oil imported and the presence of non Venezuelan crude oil on the tourist beaches on the north coast of Jamaica has been attributed to 'non Caribbean' crude oil being transported through regional shipping lanes[26].

1.3.3 Physical Oceanographic Conditions.

The movement of oil slicks on the water surface is controlled primarily by surface currents or by local winds if these exceed the current speed.[27]

The physical conditions prevailing in the Caribbean Sea satisfy the criteria for MARPOL 73/78, Annex 5 Special Areas and of importance to a serious pollution incident is the fact that the sea current flows

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[25] Underwood loc cit.

[26] Wade loc cit.

[27] Mervin Fingas, Wayne Duval and Gail Stevenson, The Basic of Oil Spill Cleanup: With Particular Rreference to Southern Canada (Quebec: Supply and Services Canada, 1979) 20.

northwestward through the Caribbean.[28] This means that spills from the areas with the heaviest tanker traffic could be brought by these currents in Jamaican waters.

Oil, once present, can remain on the site for many years as the rate of decomposition is dependent on external physical conditions in situ and on its constituents.

While these facts do not make it a certainty that spilled oil will reach Jamaica's shoreline, at times it appears that it is only good fortune that keeps oil from offshore casualties at sea.

In 1989 the vessel Kharg 5 exploded on the high seas and currents took the oil slick to within a few kilometres of the shoreline of Morocco. Then miraculously, a change in conditions took it back out to sea. In the Aegean Sea incident favourable currents were also responsible for averting a further environmental catastrophe.

Unfortunately these fortuitous circumstances cannot be relied on to give protection to Jamaica's marine environment.

1.3.4 PRESENT STATE OF THE TANKER INDUSTRY

a Ownership and Control

At present tanker standards are influenced by many parties including shipbuilders, shipowners, classification societies, hull and liability insurers, flag states, charterers and international regulatory bodies such as the IMO. With too many players having different motives, standards are not adhered to at all

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[28] Underwood loc cit.

times.

The industry is also very fragmented with the average shipowner's fleet being comprised of less than two ships. Major oil companies which have the capability to implement, enforce and control standards now own less than 15% of the world tanker fleet.[29]

Ownership by groups of business men such as dentists hidden behind several layers of corporate veil and whose dominant purpose is achieving the highest revenues with the lowest costs is becoming a characteristic of the industry. Because their primary activity and long term survival does not depend on shipping more risks will be taken in the interest of profit. With this trend more, and more decisions involving risk will be made in a comfortable office thousands of miles away from the ship and totally oblivious to potential consequences of the decision.[30]

b. The Tanker Market

Most shipowners contrary to popular belief are very much interested in prevention of accidents as they have no interest in losing their valuable cargo, vessel or reputation in their insurance club.[31] However the

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[29] "The Oil Tanker Industry" BIMCO Bulletin 2\93.

[30] The Amoco Cadiz tragedy is an example of the head office's failure to appreciate the conditions prevailing at sea. The Delay in agreeing upon salvage terms caused by the head offices' reluctance to accept the terms offered resulted in the ship drifting too close to the coast where it subsequently grounded.

[31] Edgar Gold, "Marine Pollution Liability After Exxon Valdez: The U.S. "All or Nothing" Lottery" 22 J.Mar.L.& Com. 423 (1991).

state of the market is such that there are too many tankers chasing too few cargoes, a legacy of the oil boom in the early 1970's. Charterers who may not all have laudable standards, dominate the market and increase the risk factor in the decision making process.

Shipowners can rely on the statistics indicating that 99.9995% of all oil cargo arrives safely,[32] to corroborate their commitment to the prevention of pollution. However when one considers the large amount of risk taking involved, the " unsafe" 0.0005 % of the 1.4 billion tons of oil that is transported annually in tankers does not result in a figure that can give Jamaica or the Caribbean any comfort.

c. Age of Tanker Fleet

The age of the vessel is not directly related to the likelihood of accidents but with the difficulties being faced by shipowners and charterers in generating revenue, ships tend to be kept in service for periods longer than minimal maintenance programme should allow.

This factor, combined with the present shortage of seafarers and the presence of unscrupulous charterers willing to charter substandard ships destined for the scrap yard, means that for some time to come the seas, including the Caribbean Sea, will be trafficked by ships which are potential pollution hazards.

The Caribbean region however appears to condone the presence of such ships as some states are indifferent towards having unseaworthy vessels in their fledgling registries.

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[32] ibid.

1.3.5 THE OIL POLLUTION ACT OF 1990[33] (OPA 90)

The now accepted permanent presence of OPA 90 and the consequential closure of American ports to a fair amount of tanker tonnage is not a fact that Jamaica and other states should consider lightly. The result of the that legislation is that the nearby United States and other terminals in the Caribbean will have increased transhipment activity from ships which cannot enter

United States waters. This will result in the prostitution of Caribbean States' waters by the transference of the risk of pollution there.[34] It is still cost effective for ULCC's to be used for long haul trips because of their economies of scale and it is likely that double hull investment will for the time being be directed at the shuttle fleets which can maximise the shallow loading draft of the United States ports.[35]

The contemplated presence of only double hull vessels in the future will offer no salvation for pollution prevention. The presence of a double hull did not prevent the break up of the tanker Aegean Sea when it ran aground outside La Coruna harbour in December of 1992 spilling 79,000 tons. The vessel had a good safety record and had passed the annual Lloyds register survey

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[33] Pub.L.No.101-380,104 Stat.484(1990)

[34] Fairplay October 29, 1992.

[35] ibid.

a month before the accident.[36]

The United States is the second largest consumer of oil in the world and imports of crude are projected to increase between 20-60% during the period from 1990 to 2000[37]. Additionally it is projected that much of the increase will come from short haul areas such as the Caribbean.[38]

Caribbean states should ask themselves whether they can afford the transference of the risk to them of that much oil.

1.3.6. OTHER LEGISLATION

The growing awareness of the government and people of the developed world of waste disposal methods as reflected in their legislation is a portent which Jamaica cannot ignore.

As waste disposal legislation in those countries becomes more stringent ipso factor costly, waste producers and receivers will resort to the seas to dispose their products.

The uncontrolled seas, including the coastal waters of countries like Jamaica will provide a cheaper dumping ground for chemical waste including toxic waste.

In 1988, 4000 tons of hazardous waste (labeled as fertilizer) from a Philadelphia municipal incinerator was dumped on a beach in neighbouring Haiti. Investigations revealed that another 10,000 tons were

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[36] Marine Pollution Bulletin Vol 26 No.2 February 1993.

[37] Lloyds List August 9, 1993.

[38] ibid.

dumped at sea.[39]

This possible development is compounded by the large time lag between the commission and the effect of the unlawful act. In these circumstances finding the polluter and recovering any compensatory damages for the loss suffered will be difficult.

1.3.7 THE CAUSES OF ACCIDENTS

The IMO estimates that over 90% of marine pollution incidents world wide are caused by Human error.[40] Better trained crew will result in improvements but man will continue to err.

Abbecassis comments that

> " In general, there are now enough international instruments in existence to ensure seas which are tolerably clean from oil pollution if those instruments were universally adhered to - the frailty of man is such that accidents will always happen ... " [41]

The statement above supports the view that no amount of preventive action in the form of legislation will stop the occurrence of oil pollution incidents and Jamaica should prepare itself for the inevitable.

In the face of the inevitable, adequate response measures can be taken to minimise the effects of the accidents. Liability will also flow from human error causing pollution damage, and it is important for the

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[39] CEP News Vol.6 No.3 September, 1992. p.4

[40] Final Report Public Review Panel on Tanker Safety and Marine Spills Response Capability (Brandt Smith Report) Canada 1990.

[41] Abecassis loc cit. at p.8.

legal system to be prepared to provide the relief claimed by affected persons.

1.3.8 Marine Pollution Incidents in the Caribbean.

There have been a number of serious marine pollution incidents in Caribbean waters with the latest being the **Vistabella** on March 7 1991[42]. Other incidents have also been recorded[43].

The Vistabella

This seagoing barge carrying approximately 2000 tons of heavy fuel oil separated from the tow line and sank 15 miles south east of Nevis. An unknown quantity of oil was spilled, coming ashore in St Barthelemy[44], St Kitts, Nevis, St Maarten, Saba and on March 22 in the British Virgin Islands and the US Virgin Islands. A week later the oil was reported to have reached Puerto Rico, over 250 miles away.

Five jurisdictions were affected and despite the efforts of the United States Coast Guard and the French Navy to recover the oil at sea, the weather conditions prevailed and manual cleanup of the oiled shoreline had to be carried out.

Only the department of Guadeloupe and the British

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[42] Annual Report of the International Oil Pollution Compensation, 1991.

[43] Other incidents include The Fourth Field, 1975 (112 500 bbls) and CYS 1978 (112 500 bbls). Survey of the status of oil pollution control in the South American sub - region of the Wider Caribbean region. UNEP Regional Seas Reports and Studies No. 111 1990.

[44] St Barthelemy is a Department of Guadeluope, France.

Virgin Islands were parties to the International compensatory regimes for oil pollution damage and were able to recover immediate compensation for the costs incurred. For the other countries however, the likelihood of recovery for the damage suffered and the costs incurred is not very positive for many reasons.

First, the vessel was not entered in any P& I club and the insurance cover is uncertain. Second, the financial position of the shipowner is uncertain in addition to the fact that he is non cooperative. Finally, it is the view of the director of the IOPC Fund that he (the shipowner) may not be able to meet his obligations under the Civil Liability Convention.

Jamaica should draw many lessons from this incident.

a. No amount of response and recovery technology and prevented oil spilled on the high sea from reaching the shoreline. This conclusion is supported by the Braer incident where adequate response equipment and manpower were present and available at the scene of the incident but could not be deployed because of the weather conditions. The subsequent pollution of the beaches could not have been avoided.

Dr. Allen Hicks of the International Oil Tankers Pollution Fund (ITOPF) notes that Current technology for recovery of oil spilled at sea is rarely able to receive more than 10 % of the pollution[45]. This dubious statistic has been challenged by oil recovery experts and though likely to vary according to sea conditions indicates, that in the absence of favourable natural conditions, spilled oil is likely to result in coastal pollution.

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[45] BIMCO Weekly 7, February 1993 p.4.

b. Protracted and uncertain litigation which is costly and non beneficial to the country is the only alternative
to recovery from the IOPC Fund in marine pollution cases.

c. The presence of underinsured ships and shipowners of straw will result in inadequate compensation even when a proper case is made.

Aegean Captain / Atlantic Express

This incident is the most significant pollution incident ever to occur in the Caribbean and ranks as the worlds most disastrous marine pollution incident in terms of the amount of oil released into the marine environment, eclipsing the Amoco Cadiz, Torrey Canyon and Exxon Valdez disasters. This accident is eclipsed only by the estimated one(I) million tonnes of oil discharged as result of the Gulf war.[46] The total amount of oil spilled in the Aegean Captain \ Atlantic Express incident was 280,000 tonnes.[47]

Accident statistics betray the true significance of this collision by creating a distinction without a difference.

The two ships have been given separate rankings in the top ten largest pollution incidents with the Aegean Captain claiming fifth (5th) place with 49 million gallons spilled and the Atlantic Empress seventh (7th)

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[46] IMO News No 1 1992 p. 19.

[47] Ocean Orbit Newsletter of the International Tanker Owners Pollution Federation Ltd. April 1993 p. 1.

Collision

place with 41.5 million gallons spilled.[48] This is a very grave record bearing in mind that the Torrey Canyon disaster ranks eighth (8th) on the list but their combined effect is much greater.

The pollution was the result of a collision between the two vessels, a ULCC and VLCC respectively which occurred in the Tobago\Grenada Passage in July 1979.

The low profile that this collision holds in the history of marine pollution incidents may be due to the fact that the incident did not occur in a 'country of influence' in the world of shipping. A more likely reason is that no oil pollution damage occurred in the coastal states and therefore no damage claims arose to be settled as occurred in the other disasters.

Pollution damage was avoided because of the successful attempts of the salvors to tow the larger vessel to the Atlantic Ocean and away from any land mass. The salvors suffered the greatest loss as they found themselves caught by the 'no cure no pay principle' when the vessel subsequently sank.

On another occasion, Anguillan administration when faced with an oil spill affecting its beaches, found no readily identifiable law in place to deal with the problem and therefore no effective action could be taken to minimise the effect of the damage done.[49]

1.3.9 Marine Pollution incidents in Jamaica

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[48] Weghrauch, B., Oil Spill Litigation : Private party law suits and limitations Land and Water Law Review Vol XX VIII: 1992: 363.

[49] Duke Pollard ed. The Environmental Laws of the Caribbean (1992) p.49.

The modern history of marine pollution in Jamaica dates back to 1974.

In this year a significant oil pollution incident on the south coast severely damaged mangrove stands. The cause of the accident was tank cleaning operations conducted just outside of the ship channel.[50] In the same year the MVC Sankeaty ran aground spilling 170 tons of sulphur.[51]

In 1981 another cluster of pollution incidents occured. In that year the grounding of the ERODONAS at Port Kaiser on the south coast, led to the discharge of 600 tons of fuel oil which caused phyical and economic losses to several fishermen in the area as well as the contamination of several miles of coastline. That year also witnessed a pipeline leakage at Reynolds pier, and a fire at the Esso storage tank in Montego Bay, both reulting in marine pollution.[52]

The year 1984 received its fair share of pollution incidents including a leakage in Texaco's oil storage pipeline resulting in 3500 tons being spilled and a 'mystery spill' caused by tank cleaning operations which caused damage to the coastal ecosystem.[53]

The last recorded incident occured in 1985 when 1200 tons of ferrosilicone ore was discharged into the marine environment.[54]

It appears that no serious claims for loss and

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[50] Jamaica Country Environmental Profile Government of Jamaica, September 1987 p.102.

[51] ibid.

[52] ibid.

[53] ibid.

[54] supra n. 12.

✓ Tank cleaning improper + pipeline leakage
4 Grounding
* Pipelines leakage
† fire

damage were made in any of the cases though it does not mean that serious damage and loss was not suffered.

Jamaica, though fortunate not to have been affected by a serious pollution incident is, as indicated above, not immune to such an occurrence and with 83% of our energy requirements being filled by oil imports,[55] steps must be taken to address our compensatory capabilities in addition to those of response.

1.4.0 MARINE INTERESTS AT RISK

In the event that a pollution incident occurs several interests of Jamaica as a coastal state will be directly or indirectly threatened or affected. These interests may be broadly classified as physical and socioeconomic.

1.4.1 Physical

Jamaica may not contribute to a marine pollution incident but with a uniquely fragile ecology we are disproportionately vulnerable to such an event. The natural resources that would be compromised in the event of a pollution incident would be the beaches, coastal waters, coral reefs, seagrass beds, mangroves, fisheries and sea birds.[56]

Pristine white sand beaches and clear blue seas are the chief marketing tools for the tourist trade. These

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[55] Jamaica National Report on the Environment - submitted to the United Nations Conference on Environment and Development. 1992.

[56] Assessment of the economic impacts of Hurricane Gilbert on the coastal and marine resources in Jamaica UNEP Regional Seas Reports and studies No. 110, 1990 p.2

natural gifts cannot be developed on a sustainable basis but can be maintained for the benefit of future generations of Jamaicans and tourists.

Unfortunately these resources will be the first to be affected by a pollution incident and to compound matters, they do not have a market value. The absence of a market value will be recognised in law as being of no value and therefore no loss would be deemed to have occurred as a result of its destruction.

The principal ecosystems are the coral reefs, seagrass beds and mangrove swamps which are extremely vulnerable to all forms of human activity.

Coral reefs

These provide coastal protection from destructive wave activity, and habitats and food for fish and other marine life habitats. The coral reefs and algae associated with Turtle grass beds are an important source of sand for white sand beaches.[57]

Mangrove swamps

Studies have revealed that mangrove ecosytems occupy 10-15% of Jamaica's coastline.[58] Mangrove swamps provide coastal protection by stultifying wave action and are the nursery and breeding grounds for many

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[57] Richard Payne, "Marine Natural Products in the Caribbean: A Possible Key to Further development of the Caribbean". Paper presented at XV Annual Conference of the Caribbean Studies Association, Port of Spain, Trinidad and Tobago May 22-26 1990.

[58] UNEP (1990) "Assesment of the economic impacts of Hurricane Gilbert on Coastal and marine resources in Jamaica" UNEP Regional Seas Reports and Studies No.110

species of fish, shrimp and more recently, oysterculture. The mangroves exixting in Jamaica have actual and potential tourism and educational uses and their estimated value is approximately
US$71.5 M yr^{-1}.[59]

Fisheries

Fishing activity is primarily artisanal in nature. Several thousand small fishermen, using simple equipment, depend on the fish stock located in the coral reefs and other areas of inshore waters, for their livelihood.

The offshore fishing sector is not well developed and is facing fierce competition from the Commercial fishing operations of several countries including Cuba, Honduras and more recently the Federation of Russian States.

Food production will definitely be affected if the stock is polluted and the fishermen along with their dependents will experience both loss and damage.

The components of the coastal ecosystem, though playing a very important role in maintaining marine life and the human lives which depend upon it, are of no value in the eyes of the law and serious consideration must be given to reviewing the law in this area.

Other Marine Resources

The Caribbean Sea in general has been identified as containing untapped marine resources with potential as sources of chemical compounds used inter alia for drugs, in the case of the anti inflammatory properties of sponges, templates for synthetic analogues and

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[59] ibid., p.15.

commercially viable materials.[40]

The Caribbean Sea is not rich in manganese nodules and science will have to travel a long way before the untapped potential mentioned above can bare monetary fruit.

Marine Pollution converts potentially harvestable resources into unharvestable resources and when these harvestable resources form the economic base of a nation, marine pollution should become a matter of national security.

1.4.2 Socio- Economic

Jamaica like many newly independent states has an open economy and suffers from the vagaries of the international commodity markets which appear to dictate the prices which primary goods will fetch. The governments' preoccupation over the past ten years with the means and ways of influencing the demand for foreign exchange, ipso facto the rate of the Jamaican dollar to the major world currencies is testimony to the fact that foreign exchange inflows are the life support machines for the country.

Bauxite and Alumina

The bauxite, alumina and tourism industries have been the main source of foreign exchange inflows to Jamaica for many years but the statistics show that though production in bauxite and alumina sectors have

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[40] Payne,Richard Marine Natural Products in the Caribbean:A possible key to further development of the Caribbean, XV Annual Conference of the Caribbean Studies Caribbean Studies Association Port of Spain, Trinidad and Tobago May 22-26 1990.

increased steadily since 1985 the value of the exports have not responded favourably.

There is an inverse relationship between production and value of export of alumina in 1991.[61] This in the writers' humble opinion is due to the dictates of the world market and outside the control of Jamaica.

Expansion of these industries may not be possible nor bring an increase in foreign exchange but may yet result in declining revenues.

Tourism

Tourism, as indicated by visitor arrivals and revenue earnings has continued to grow due to aggressive marketing campaigns and increased investment by both local and foreign interests. Tourism in Jamaica is coastal in nature and though the coastal zone may not be utilised at all times, its aesthetic characteristics (sun, sea and sand are the chief symbols marketed abroad.

In 1992 the sector earned over 886 million dollars (US)[62] and directly employed over 20,000 persons.[63] An even larger amount were indirectly employed in related activities including air travel, ground transport, fishing, agriculture, construction and small scale business sectors (restaurants, lodges, hawkers, etc.). This industry accounted for 84.4 percent of

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[61] Review of the current market situation and outlook. Bauxite, alumina and aluminum statistics 1982 -1991 - Prepared by the UNCTAD secretariat, TD/B/CN.1/RM/BAUXITE/3, 11th February 1993.

[62] Joseph Cox, "Tourism: A Time For Review", The Financial Journal vol.1 # 5 May\ June 1993. p. 17.

[63] Economic and Social Survey Jamaica 1990 PIOJ May 1991. p 13. et seq.

Jamaica's total exports in 1992.[64]

The encouraging trend towards local ownership of hotel chains and the all inclusive concept which is labour intensive means that this sector will continue to develop and cement itself in the area of employment and foreign exchange earnings as the sine qua non of the Jamaican economy.

In 1985 and 1986 there was a drastic decline in the GDP because of the contraction in the bauxite and alumina industries resulting in debt servicing problems and severe austerity measures.

This is evidence of the economy's vulnerability to the health of the 'life support' industries and a contraction in the tourism industry due to the effects of marine pollution can have catastrophic consequences.

Public perception pays a big role in the success or failure of a tourism product and the perception of marine pollution incidents created by the international media could be more destructive than the actual damage caused by the pollutants.

Gold[65] notes

> " The seriousness of the damage is not necessarily related to the amount of pollutant which enters the marine environment" [66]

This statement is supported by **Abecassis** [67] and is very pertinent when any attempt at analysing the true

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[64] Cox loc cit.

[65] Gold loc.cit.

[66] ibid

[67] Abecassis loc.cit.

impact of oil spills is made. This is because the peculiar physical conditions of the area where the spill occurs, the type of litigants, attorneys and judges involved and the media's perception the incident, dictate the amount and type of loss suffered.

It is highly unlikely that there was a decline in the GDP of the United States or Scotland when the oil polluted the pristine Prince William Sound or the beaches of the Shetland islands respectively. Tourism may have suffered but it is doubtful whether the loss in tourism and foreign exchange earnings troubled the governments to any considerable degree[46].

In the Exxon Valdez incident the United States government was primarily concerned with satisfying various interests and the general populace that it had

taken all steps possible to protect their pristine marine environment and not with an impending economic crisis.

On the other hand tourism's significance in the Jamaican economy (84.4% of total exports in 1992) would mean that a pollution incident affecting this industry will dramatically affect the Gross National Product of the country.

Though the Exxon Valdez and Braer spills may have been very spectacular a less serious spill in Jamaica would have disproportionately adverse consequences.

Gold's comment above should also be borne in mind by the Jamaican government as it attempts to attract more cruise ship tonnage to the island's ports in

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[46] Tourism earnings in Alaska and the Shetland islands may have been boosted by the onslaught of media and spill response personnel.

addition to recovering the Countries status as the Caribbean's a transhipment hub for containerised cargo.

Much time and money has been spent on increasing the berth capacity for cruise ships and improving the security arrangements to prevent the placing of narcotics in containerised cargo and this time and money could not have ben more wisely spent.

The result of success in both cruise shipping and transhipment operations will be a huge increase in vessels traversing Jamaican waters and entering its harbours.

If the findings of CARIPOL study, namely, that much vessel source pollution is caused by deballasting operations carried out outside the entrance to the main port of Jamaica, are to be taken seriously, then steps must also taken to prevent the imminent increase in vessel source pollution in addition to the increasing likelihood of accidents from the increased traffic.

The IMO has estimated that 50% of all cargo carried by sea today can be classified as dangerous, hazardous and or harmful[49] and undoubtedly these dangerous goods will occupy a sizeable proportion of containerised cargo. The need for precautionary action will become even more critical.

1.5.0 OTHER CONDITIONS

1.5.1 Public Perception

Jamaica is also vulnerable to hurricanes over which we have no control. The last major hurricane in 1988 had severe economic consequences but act of god disasters tend to evoke sympathy and a subsequent outpouring of

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[49] Focus on IMO August 1992: 1.

aid, financial or otherwise, to help the country recover from its losses. In fact in the post 'Gilbert' period the IMF postponed its debt scheduling arrangements with the country.[70]

It is unlikely that a similar reaction will be forth coming in the aftermath of a marine pollution incident.

Any emotional response will be in the form an anti shipping and pro- environment sentiment aided and abetted by the media. Interest however will not be focussed on how best to give assistance to the affected country as it is assumed that, notwithstanding its size, a nation can rely on its legal system to recover compensation from the
villain shipowner.

The threat of damage by oil pollution tends to be eliminated in the long run because of the chemical composition of oil and it has been argued that the high publicity and public outrage that occurs after a spill is unwarranted.[71]

This may be true but Jamaica's economic base, tourism, is highly dependent on public perception and therefore the question of actual damage in the short or long run is irrelevant.

With an inadequate legal regime Jamaica might find itself hardput to recover any damages for the losses suffered especially in the critical but fickle tourism sector.

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[70] Anthony Payne, "The'new Manley & the new political economy of Jamaica" Third World Quarterly 13 1992:465.

[71] Oil Pollution-Ecological Catastrophe or Short Term Problem BIMCO Bulletin 1/93 p.7.

1.5.2 Post Incident reaction

It appears that experience is the way forward in the area of marine pollution regulation. Only experience can shake the status quo; but, Jamaica cannot afford to gain the experience of a pollution incident for it to move forward.

Many lessons can be drawn from the national and international reactions immediately after an incident.

Post incident reaction is generally of three types, namely; far reaching national legislation, the establishment of commissions of enquiry and international legal instruments.

1.5.3 National legislation

The catastrophe at Prince William Sound, Alaska caused the Federal Government to react in two ways.

The government's desire to avoid being found guilty by the court of public opinion incident resulted in a massive clean up operation being organised which,it has been suggested, did, in certain instances, more damage to the environment than the oil itself.[72]

Of more import was the passage of unilateral legislation in the form of the Oil Pollution Act of 1990. Its passage was catalysed by the activities of the green movement and self interested politicians wishing to appease their constituents.

Congress' attempts to provide a "uniform programme tool to ensure prompt compensation for oil pollution damage ... was trodden upon by the rush to enact

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[72] Bimco Weekly No.7 February 1993 :4.

responsive legislation".[73] As a result, the efforts of the IMO to provide an acceptable and standardised civil liability regime was stymied.

The post incident reaction therefore had adverse consequences at the local and international level.

Insurance clubs have also found it impossible to cover ships which may be found liable under the provisions of the Act and the new causes of action now available, will only throw the law into a cloud of uncertainty when pollution damage claims fall to be assessed. This will be beneficial only to lawyers.

1.5.4 Commissions of Enquiry

The establishment of commissions of enquiry prior to legislation is associated with Canada and the United Kingdom after the Nestucca and Braer incidents respectively. The Brandt Smith Commission in Canada embarked on a detailed analysis of Canada's capability to respond to a pollution incident including the compensatory regimes and it is likely that the commission headed by Lord Donaldson will do much the same thing in the United Kingdom.

These commissions, armed with the wisdom of hindsight tend to result in the presentation of recommendations to cure the problem.

1.5.5 International Legal Instruments.[74]

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[73] Gold loc cit., at p 430.

[74] See generally Gold, E., The Development of Pollution Responsibilities. International Maritime Law : Basic Principles Course Materials World Maritime University 15-18 June 1992.

History shows that major international instruments are positively related to major pollution incidents.

The direct result of the Torrey Canyon disaster of 1967 which affected the coast of England caused the birth of two new international conventions.

The International Convention on Civil Liability for Oil Pollution Damage 1969 (CLC 69) which changed the traditional determinants of liability from fault and negligence to strict liability and the International Convention Relating to Intervention on the High Seas in Cases of Oil Pollution Casualties 1969 (Intervention Convention) were the international response to the problems encountered in the Torrey Canyon incident.

The International Convention For the Prevention Of Pollution from Ships, 1973 was also heavily influenced by the Torrey Canyon incident and its protocol of 1978 was the culmination of efforts to address the numerous tanker disasters which occurred between December 1976 and January 1977.[75] The Amoco Cadiz and Aegean Captain/Atlantic Empress incidents also influenced the development of the international marine law of Salvage and the former influenced the International Convention on the Safety of Life at Sea, 1974 (SOLAS) as well.[76]

The draft International Convention on Liability and Compensation for Damage in connection with the Carriage of Dangerous goods by Sea, the chemical equivalent to the (CLC 69), highlights the difficulties faced in drafting a convention without any 'experience' (major accident).

Jamaica can and should take advantage of the

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[75] ibid.

[76] ibid.

international precedents resulting from the past incidents and must ensure that it does not fall into the trap of passing unilateral and uncertain legislation.

The world is more likely to adjust, albeit reluctantly, to the requirements of OPA 90 because the United States is the second largest importer of oil.

Jamaica on the other hand, relies on oil imports for 83% of its energy needs but its demand has no effect on the international oil trade. This means that unilateral legislation which adversely affects the oil trade can result in severe hardships if the ships carrying 83% of our energy, decide to trade else.

The establishment of 'after the fact' enquiries to assess pollution damage which has already been done, but which could have easily been avoided, is also a example of action Jamaica should not rely on to protect it interests.

1.6 SUMMARY OF CHAPTER ONE.

Jamaica's environmental security is a matter of national security as is national defence to the United States and other world powers.

Jamaica cannot afford to accept the quotation at the beginning of the chapter stating that spills are part of the price man must pay for industrial development. Spills may be inevitable but their risk and frequency can be reduced through the reorganization of the legal frame work, especially in the area of prevention response and compensation.

Jamaica is fortunate to be able to draw on the present international instruments and the mistakes of other countries. 'Justice delayed is justice denied' and action taken to please the court of public opinion in

the frenzy following an incident has been proven to bring more harm than good.

With these lessons and guidelines the present legal system can be adjusted to properly secure the interests of Jamaican industry, business and people.

CHAPTER TWO

THE PRESENT LEGAL FRAMEWORK

2.1. THE LEGAL BASIS FOR MARINE POLLUTION CONTROL

Any attempt to address the problem of marine pollution will involve the application of law in one form or another. Pollution control measures must as of necessity have some legal basis or will face the consequence of being rendered null and void because of their unconstitutional nature or if they are contrary to international practice affecting the sovereign rights of other states.

To determine the appropriate rules of law in marine pollution matters the Jamaican legal system is therefore bound to consider rules which are drawn from municipal and international legal sources.

2.2.0 SOURCES OF MARINE ENVIRONMENTAL LAW

2.2.1 MUNICIPAL SOURCES

The primary sources of municipal law are the constitution, legislation case law and other sources.

Constitution

With the advent of independence a United Kingdom Act of Parliament was required to bring the Constitution into force. As a result, the Jamaica Independence Act, 1962 was passed supported by the Jamaica (Constitution)

Order in Council, 1962 which is referred to as the Jamaican Constitution.

The Jamaica Constitution, by virtue of section 2, is deemed to be the supreme law of the land and any inconsistent legislation is deemed null and void to the extent of the inconsistency. The Constitution as such is the chief source of law in the country.

The Constitution of 1962 is an independence constitution and it has been suggested that major amendments should be made to reflect Jamaica's current position on various issues over thirty years later.

Among the suggestions is the need to make specific provision for critical need to protect the environment in general.[77]

Including such a provision is a necessary step in constitutional reform as our national priorities will be formalised but its absence is not fatal to the attempts to establish measures to protect our marine environment related interests.

More important would be a provision establishing the treaty making power of the state bearing in mind the fact that marine environment protection law is increasingly being created within treaties.

The fundamental rights provisions give citizens a judicial remedy for the violation or threatened violation of their rights including the right to enjoy property.[78]

The fundamantal right to enjoy property may be be interpreted to be a right to enjoy a healthy environment as the Constitution makes no distinction between private property and public property.

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[77] Lloyd Barnett, The Jamaican Constitution : Basic Facts and Questions (Sangsters : 1992)

[78] J.A. Constitution, Chapter III s.13(a)

However when the fundamental rights provisions are examined in toto, one finds that the Constitution seeks to protect private property rights only and is therefore limited in scope. An expressed fundamental environmental right safeguard persons who suffer loss unrelated to the ownership of private property.

Legislation

Ball[79] notes;

> "Law plays an often underrated but enormously important role, alongside scientific technological, social and economic solutions in helping to combat environmental degradation." [80]

This statement is accurate if the law referred to is legislation which will be increasingly used as a source and tool for the management of the marine environment. The common law however is limping behind science in the attempt to combat the problems faced in the marine environment.

Jamaican marine environment legislation also appears to be out of tune with scientific developments and it is ironic that the legislators claim to be waiting on scientific certainty before regulations outlining proper discharge standards can be produced.

Nevertheless legislation is a key source of marine environmental law serving to fill the void left by the common law.

Section 4 (1) of the **Constitution** vests in the parliament the power to make law for the peace order and

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[79] Simon Ball and Stuart Bell, Environmental Law (London: Black Stone, 1991)

[80] ibid., p.4

good government of Jamaica land and it is from this section that all post-independence legislation will flow.

Some uncertainty arises under the same section which provides that preexisting colonial laws unless amended or repealed by the Jamaican parliament will remain in force.

What preexisting sources of legislation can be tapped is not very clear and resort must be had to legal research dating back to the reception of law in Jamaica in the seventeenth century.

Patchett concluded that the common law was received in Jamaica by a proclamation in 1661.[81] Legislative confirmation of this was evidenced in 1728 by the provisions of a local statute which stated inter alia that

> "... all such Laws and Statutes of England as have been at any time esteemed, introduced, used, accepted or received as laws in the islands...are hereby declared to be and continue laws of... Jamaica"[82]

What laws were at that time esteemed introduced, used, accepted or received as laws in Jamaica is not totally clear but it can be safely argued that marine pollution in that period was not regulated by legislation.

There is therefore no need to remove the banquet of dust to find the appropriate rules of law to apply especially since the present international rules governing the subject are clear.

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[81] Keith Patchett, " Reception of law in the West Indies." JLR, 7 (1972).

[82] 1 Geo.2 c.1. (1728), s.22, quoted in Patchett, loc cit

Case Law

Case law embodying the common law tort principles of trespass, negligence, nuisance and Rylands and Fletcher has been reluctantly conscripted to combat marine pollution.

Ball[83] notes however that the dominance of legislation in this field will most likely result in case law not being judge made law but the judges interpretation of statutory provisions. It can be argued however that the latter practice can have the result of judge made law. There are few reported cases in Jamaica and the West Indies involving maritime matters much less marine environment matters and this area of case law is still in its prenatal stage.

Only in the area of criminal, labour, landlord and tenant law can a claim be made to '.. a fledgling Jamaican or West Indian flavoured jurisprudence'.[84]

Other Sources

Literary sources are few in number there being one text devoted to environmental law in the Caribbean.[85]

The writings of legal scholars on maritime matters tend to be of an international nature consistent with the active part played by Jamaican attorneys at law in the Preparatory Commissions of UNCLOS. Marine Pollution

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[83] Ball & Bell loc. cit. at p.16

[84] Hugh Hyman. "Enforcement of Maritime claims in Jamaica: Preliminary legal issues and the International dimension," Master of Science thesis., WMU Sweden, 1989.

[85] Duke Pollard, ed., The Environmental Laws of the Commonwealth Caribbean, (C.L.I. 1992).

however appeared not to be the forte of these scholars and therefore never formed the central theme of their writings.

Environmental issues in the West Indies have been given fleeting attention by lay writers but emphasis has been placed on environmental degradation of land flora and fauna and not marine related matters.[86]

The establishment of a Environmental Law course in 1992 at the Faculty of Law at Cave Hill UWI was long overdue and the growing interest in the subject shown by young attorneys may improve the record of legal scholarship in this area.

Recommendations by competent international agencies[87] have stressed the need for a Maritime law course at the UWI faculty of law in keeping with the heavy dependence by Caribbean states on the marine environment but such a step has not been taken.

Policy

Policy is a major source of marine pollution control. This is due to the peculiar nature of environmental law which cannot be classed alongside other types of law such as contract and land law. As Ball notes, environmental law (in the British common law system) is not "food for lawyers" but as in the case of the marine environment, involves principles of management and planning.

The sources or bases for action are therefore found

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[86] Watts, I., The West Indies: Patterns of Development, Culture and Environmental Change since 1492.(New York: Cambridge University Press 1987)

[87] Mission report of the IMO team to Jamaica (11-20 January 1988)., IMO/SIDA Programme for the Protection of the Marine Environment.

in policy documents from relevant ministries or the general practice of statutory bodies such as the **Natural Resources Conservation Authority (NRCA)** which have direct responsibility for the environment. This lends full support for the view that decisions on the environment are generally politically motivated.

2.2.2 INTERNATIONAL SOURCES

Marine pollution has no respect for national boundaries and international customary law and treaties are employed as legal sources for remedial action.

Customary International Law

This comprises acceptable rules of international law which emerge from the practice of a great number of interested states over a period of time.[88]
International Customary law was made applicable to the Jamaican legal system by virtue of the decision of R v DPP and Another ex parte Daphney Schwartz[89] where it was stated that,

> "Customary rules of International law are deemed to be part of our municipal law subject to two important qualifications."[90]

Inconsistency with rules enacted by statute or finally declared by the courts are the qualifications

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[88] North Sea Continental Shelf Cases, ICJ Reports 1969, p.3

[89] (1976) 15 JLR 7.

[90] ibid

referred to in the above passage.[91]

Treaties[92]

" **Treaties are ... a source of obligation rather than a source of law.**"[93] But, in many they cases reflect existing law in the form of customary international law.

A prime example of customary rules of international law having been codified or crystallised into a treaty is the 1982 Convention on the Law of the Sea, the negotiation of which Jamaica played an important part culminating in its adoption in Montego Bay. Codified customary law occupies 80 % of the provisions of this convention.

Article 192 of the Convention makes it the general obligation of states '.. to protect and preserve the marine environment.', which serves as the primary legal basis for the management of the marine environment.

The Convention serves as a constitution for the ocean and as the supreme law of the ocean, all laws and regulations which have marine significance must be consistent with its letter and spirit.

The fifty sixth (56) ratification has been received and it is likely that the Convention will enter into force in the near future. Pending that event, Jamaica has a duty under the Vienna Convention not to do anything to defeat the purpose of the treaty.

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[91] ibid., per Lord Atkin in Chung Chi Cheung v The King [1939] A.C. 160 at 167. (P.C)

[92] Multi lateral treaties are commonly termed conventions

[93] Starke, J., Introduction to International Law, (London: Butterworths 1989).

The writer believes that an omission or indifference to carry out the provisions of the treaty is a breach of that principle.

This and other conventions have been drafted by a myriad of United Nations and other international agencies with the IMO being responsible for 42 legal instruments, many of which touch and concern the protection of the marine environment.[94]

2.3 INCORPORATION OF INTERNATIONAL SOURCES INTO MUNICIPAL LAW

Municipal law is superior to international law and therefore international legal sources will have to satisfy certain tests in order to be incorporated into Jamaican law.

a. Daphney Schwartz Test.[95]

As mentioned above international customary law may be deemed part of Jamaican law so long as it is not inconsistent with present legislation dealing with the same subject matter.

b. Ratification of a treaty is an executive act indicating Jamaica's commitment to be bound by the treaty provisions but this executive act must at some stage be followed by legislative assent for the treaty

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[94] See generally, Edgar Gold, " USE THEM IF YOU DARE The Application of International Maritime Conventions in Canada". Prepared for presentation at the Canadian Maritime Law Association Seminar for Judges of the Federal Court of Canada, Ottawa, 12 March 1993.

[95] supra., n. 11

to be incorporated in Jamaican law.[96]

Legislative assent will involve translating the treaty provisions into the national law, amending the law or creating new legislation to give effect to the treaty.

Having overcome the hurdles of inconsistency with present legislation and the rules of incorporation, international law may be applied to Jamaica.

In Jamaica the passage of maritime legislation incorporating treaties seems to be a sisyphean task with marine pollution related bills having very long shelf lives.[97]

The case of **DPP and Another ex parte Daphney Schwartz** above gives temporary relief as it gives Jamaica the possibility of applying customary international law without being a party to any treaties. This position is supported by the International Court of Justice in the **Nicaragua Case (Merits)**[98] where it was stated that

> " there are no grounds for holding that when customary international law is comprised of rules identical to those of treaty law , the latter 'supervenes' the former so that the customary international law has no further existence of its own"

Gold[99] argues that treaties which have been in force for a long period of time become international norms and subsequently customary international law which

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[96] Canada v A.G. Ontario (Labour Conventions) (1937) A.C. 326.

[97] The Clean Sea Bill for example, has been a bill for over 12 years.

[98] I.C.J. Rep. 1986, p. 14 at p 95.

[99] Gold loc cit.,

has the effect of converting former non customary law provisions into international customary law.

Jamaica should not use this possibility to apply treaty provisions and at the same time avoid the financial technical and operational obligations associated with being party to a treaty. The government should however accept the responsibilities arising from the treaty after concluding for itself that the benefits obtained thereunder outweigh the corresponding obligations.

As a non party to a treaty, Jamaica would not be able to influence or become a part of the adjustment of interests as new practices emerge. If the new practice results in changes in the way the convention is implemented to the disadvantage of Jamaica, there will be no possibility to object or make use of the dispute resolution provisions.

The protection of the marine environment is immersed in politics and the time taken to make the decision to be bound by treaties is influenced by many unrelated factors.

Legal counsel however have the opportunity of arguing customary international law and judges applying it in their decisions, without having to wait on the legislation to limp into operation.[100]

2.4. EXISTING LEGISLATION

Many pieces of legislation touch and concern the marine environment but modern day society requires specific laws which reflect the problems, threats and opportunities that have been identified.

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[100] ibid.

The legislation should therefore cover the primary concerns of marine pollution namely prevention, response and compensation.

Though the pieces of legislation discussed below will not comprehensively deal with all the available provisions that could be clutched to in order to seek some relief, the deficiencies highlighted can be applied across the board.

The Clean Sea Bill when enacted will render many of the provisions dicussed below irrelevant but the birth date of this Bill is very uncertain. It is likely therefore that the present legislation will continue to be valid for a considerable period.

SCOPE

All legislation will be limited by the geographical area over which Jamaican courts have jurisdiction.

The two Acts which establish jurisdiction are the Territorial Sea Act, 1971 and the Exclusive Economic Zone Act,1991

THE TERRITORIAL SEA ACT, 1971

This Act incorporates the provisions of the Convention on the Territorial Sea and the Contiguos Zone and declares that the sovereignty of the state extends beyond its land territory to a distance of twelve miles.

The Act makes no specific reference to marine pollution matters but typical of British legislation the development of regulations which could cover this area is left to the discretion of the Minister[101]

The maximum fine for breach of any such

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[101] section 6.

regulations is five thousand dollars.[102]

In respect of civil proceedings jurisdiction can also be exercised as long as it is not inconsistent with the Convention.

The Convention provides that the coastal state may levy execution against or arrest a ship in respect inter alia, to liabilities incurred by the ship during its voyage through the Territorial Sea.[103] This provision enables Jamaica to enforce any regulations passed governing the recovery of compensatory damages and clean up costs from vessels which cause pollution. Unfortunately, no such legislation has been passed.

THE EXCLUSIVE ECONOMIC ZONE ACT, 1991

The Exclusive Economic Zone Act vests in the crown inter alia, jurisdiction in respect of the prevention and control of marine pollution[104] up to two hundred miles from the baselines from which the territorial sea is delimited.

No specific provisions on marine pollution prevention are listed in the Act which has as its chief objective the management of living and non living marine resources.

This is because the EEZ concept is resource oriented and therefore the management of the fish stock takes precedence.

The Minister under the Act may exercise his discretionary powers to make regulations for the

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[102] section 6 (1)(c)

[103] Article 20.(2)

[104] section 4 (c) (ii).

preservation and protection of the marine environment and the prevention and control of marine pollution but no such regulations have been passed.[105]

This Act is fairly new and covers a wide range of issues and therefore it may be a long time before the regulations are passed. Additionally negotiations with the countries whose ocean space conflicts with that of Jamaica are still in progress.

The Act however has made some important steps by specifically extending the courts' jurisdiction over this zone. Enforcement of the law will devolve on Marine Officers who may range from the coast guard to fisheries officers.

Vessel Source Pollution

At present there is no legislation that incorporates the provisions of the international conventions which govern the prevention of vessel source pollution.

The Harbours Act, 1874[106]

Under the Harbours Act of 1874 the Harbour Master is encharged with the maintenance of navigational aids and channels leading into or out of the area prescibed as a Harbour which will reduce the likelihood of accidental pollution there.[107]

Section 19 (1) of the Act proscribes the depositing inter alia of any 'rubbish, earth, ballast' or similar

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[105] section 21 (j)

[106] The Harbours Act, 1874. 480/1973 (L.N).

[107] section 8.

material or any oil, mixture containing oil or oil residue in any channels leading into or out of any harbour or within the harbour itself'.

The definition or 'oil' is very wide and would encompass oily water waste but when the ejusdem generis rule is applied to the non-oil pollutants listed, it is unlikely that many hazardous substances which are being transported today would be included.

The use of the words 'shall' or 'permit' when determining the proscribed activity means that the element of mens rea or intention, must be established in the accused person. This will cause many problems when guilt is being established by the prosecution. In the absence of witnesses to the alleged offence, proof of guilt will be almost impossible.

This appears to be the only piece of legislation which specifically addresses the prevention of marine pollution, though scantly.

The penalty for contravening the provisions of the section shall not exceed two thousand dollars (J$ 2000.00), a paltry amount which shipowners will be more than willing to pay for deballasting.

Additionally the cost of establishing culpability and prosecuting a case before the courts will far exceed the penalty which, as mentioned above can hardly be a deterrent to the shipowner.

The Port Authority Act, 1972

The Port Authority of Jamaica is given responsibility for a wide range of activities granted to it by the Crown. These primarily concern the maintenance of wharves and other constructions on the area of the port.

Though not specifically mentioned the provision of

reception facilities for the reception of oily water waste may be inferred in section 6 of the Act.

The 1980 Port Authority Bill which will replace the outdated Harbours Act and Port Authority Act, will bring the maintenance of navigational aids directly within the purview of the Port Authority.[108] Additionally the Port Authority will be given power to make regulations on vessel source pollution control including powers of boarding and inspection.[109]

While these provisions are a welcome improvement in the law, harmonisation of the law on marine pollution prevention may be compromised. Steps should therefore be taken to ensure that no jurisdictional conflicts will arise with other enforcement agencies such as the Jamaica Defence Force Coast Guard, the Natural Resources Conservation Authority or other enforcement agencies designated under the 1980 Clean Sea Bill.

The Merchant Shipping Act, 1894

This Act does not cover vessel source pollution per say but governs the safe operations of ships at sea which falls under the heading of pollution prevention. The Act however is anachronistic and the fines payable for breaches of its provisions are just as archaic.[110]

Land Based Pollution

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[108] The Port Authority Bill, section 5.

[109] ibid., section 30.

[110] Section 68 (1) states that fines of £100 are payable for breaches of the Act.

The Natural Resources Conservation Authority Act, 1991

This Act sets out the functions of the Authority established which include the undertaking of studies on the effect of the release of certain substances into the environment and research into techniques for the management of pollution.

This Act concerns the protection of the environment in general and therefore marine pollution could not be specifically addressed.

A system of permits will be used to control and monitor the release of effluents into the environment. Waste management is addressed in the act and construction of sewage systems must be approved by the Authority.

The discharge of sewage or trade effluent or any poisonous, noxious or polluting matter in to 'waters' is prohibitted without a valid licence from the authority.[111]

Contravention of those provisions will invite a fine not exceeding fifty thousand dollars and or a prison term not exceeding two years.

The fines provided under this Act are more in keeping with the modern day developments and can serve as a deterrent.

The Act also provides for the taking of preventive measures where it appears that pollution is likely to occur. Where pollution has actually occured steps may be taken to recover the polluting matter and restoration of the waters to its previous state.

The costs reasonably incurred by the Authority in

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[111] section 12 (1).

taking preventive and restoration activities is recoverable in a Resident Magistrates Court 'without limit as a civil debt'.

Damage to other elements of the marine environment which is not unlikely in a serious pollution incident is considered in section 8 of the Act.

In this section a person carrying out an activity which poses a threat to natural resources can be required by an enforcement notice to restore the natural resources to their condition before the activity took place.

The Authority may also recover in a court of law any expenses it incurred in restoration activities taken on behalf of the offender.

The presence of civil liability provisions is an important advance in the law and will allow for restoration of the environment in the wake of a serious marine pollution incident. Consideration though should be given to the recovery of compensatory damages for the restoration of private property damaged by pollution.

The use of the words 'discharge on', 'cause' or 'permit' in the establishment of the offence invites the proof of intention or mens rea into the offence which has a limiting effect on the successful prosecution of a case. Holders of licences who have caused serious pollution may claim that they had a statutory right to carry out the activity causing the pollution and the presence of licences may serve as an undesriable shield to polluters.

The Minister under section 38 of the Act has been given the power to make regulations covering a number areas which will play progressive role in combatting land based marine pollution.

One area where this discretion has been exercised

has been in the management of marine parks.

The Natural Resources (Montego Bay Marine Park) Order, 1992 prohibits the pollution of the waters of the marine park and the penalty for contravening the section is a fine not exceeding twenty thousand dollars or a handsome prison term.[112]

The ability to establish marine parks and protected areas enables ecologically sensitive areas to be given the added protection by legally excluding them from vessel traffic.

The NRCA is given full powers to assess and approve constructions that may have an environmental impact. This power appears to conflict or erode the Jurisdiction of the Port Authority over activities such as pier construction and dredging. The conflicting provisions can be reconciled in favour of the NRCA which has almost unlimited jurisdiction over all activities that may affect the natural resources of the country.

Of fundamental importance is the responsibility given to the Authority to develop an Environmental ethic.

Such an ethic is the first step in the prevention of marine pollution prevention and will involve changing the values and attitudes presently reflected by citisens, industry and government policies.

With such an ethic the industrial community will be more willing to comply with environmental regulations and the enforcement officers will not be diffident and indifferent in their approach to their duties.

Additionally the public at large will not accept pollution damage as a necessary evil but will take advantage of the rights and remedies provided by the law and therefore constantly remind industry, government and

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[112] section 6.

the legal fraternity of their obligations to society.

The Litter Act, 1985 [113]

This Act attempts to curb the growing scourge of environmental degradation by garbage and other types of waste or polluting substances.

Marine pollution was not the ill that the law makers contemplated eradicating when drafting the Act but beaches or foreshores are included in the definition of 'public place'. Fines of up to one thousand dollars can be levied by a Magistrate under the Act.

The Petroleum Act, 1979[114]

This Act was passed to manage and develop any petroleum resources that may be discovered in Jamaica.

All petroleum in its natural state within the maritime jurisdiction of Jamaica is vested in the Crown and the relevant Minister is given power to make regulations inter alia 'for the prevention of pollution and the taking of remedial action in repect of any pollution which occurs'.[115]

This provides many possibilities especially in the area of civil liability which is absent in other legislation. To date however, the Minister has not exercised this power.

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[113] The Litter Act, 1985, 172/1986 (L.N.)

[114] The Petroleum Act, 1979, 87/1986 (L.N.) .

[115] Section 26 (1).

The Wild life Protection Act, 1945[116]

This Act contains provisions for protecting fish from activities which can be described as polluting activities but it is hardly likely that this legislation can be used for marine pollution prevention matters especially since the fine for breaching the Act is five hundred dollars.[117]

The Fishing Industry Act, 1975

This Act governs the conservation of the fish stock through licensing of fishermen and the mandatory application of appropriate fishing methods.

Section 25 states that "the Minister may from time to time make regulations prescribing measures for the conservation of fish". This provision can be used to pass marine pollution regulations but this is yet to be done.

2.4.1 CONCLUSION

Serious oil and chemical marine pollution incidents incur two major types of damage, namely clean up expenses and physical damage to public and private property. Jamaican law in this area is woefully inadequate and can hardly be relied upon to give any relief for cleanup expenses or property damage.

One has to dig deep to extract provisions which have

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[116] The Wildlife Protection Act, 1945 480/1973 (L.N.)

[117] section 11.

fleeting references to marine pollution and this clutching for straws cannot be the appropriate means of providing the protection needed.

The NRCA ACT has gone a long way in providing some specificity in the law in the area of land based pollution and if properly enforced could combat land based sources of pollution but vessel source pollution regulations are too embarrassingly ancient to be even mentioned in legal proceedings.

Vessel source pollution controls are in large measure dictated by international legal instruments and these instruments must be incorporated into the law.

The absence of provisions related to intervention and response to marine pollution incidents will mean that resort will have to be made to customary international law.

Common problems in the existing legislation include:

i. very low fines which cannot serve as deterrents to offenders or support to the enforcement officers;

ii. the absence of civil liability and financial responsibility requirements in the majority of the Acts and the requirement of mens rea which makes the establishment of guilt very difficult. (Strict liability provisions may prove more advantageous in cases of accidental marine pollution); and

iii. the vesting of discretion in the relevant Minister of Government for the passing of specific regulations or Orders with no means of ensuring that such regulations or orders are drafted.

As stated above the development of an environmental ethic will play a substantial role in the creation and

proper enforcement of legislation which is the most efficient means of protecting the marine environment related interests of Jamaica in the wake of a serious pollution incident.

2.5 THE USE OF THE COMMON LAW IN MARINE POLLUTION

Introduction

'The justice of the common law will supply the omission of the legislature'.[118] Lord Denning's pronouncement may have been relevant in the context of administrative law but the reverse may be true in the area of marine environmental law. The Common Law in this area has not been flexible and it is legislation that has to be used to supply remedies.

The Common Law is primarily composed of a body of case law precedents which have been developed over time and will continue to develop to meet the needs of society. In former times marine environment protection was not seen as one of the society's needs and as such the common law did not evolve in that direction.

Today Common Law tort principles have, as mentioned above been reluctantly conscripted to fight in the war against polluters, including marine environment polluters. These principles are apparently being made to fit the needs of the modern 'green society' but its evolution in the direction of the marine environment is very slow.

It has been stated that law and medicine are marching forward but the law is a little behind and limping. The

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[118] per Lord Denning MR. R v Gaming Board for Great Britain ,ex parte Benaim & Khaide [1970] 417.

same is true for the Common Law and marine pollution.

Jurisdiction

The **Colonial Courts of Admiralty Act, 1890** establishes the Jurisdiction of the Admiralty Court of Jamaica and under this Act the Admiralty Court has jurisdiction over cases involving damage done by a ship.

Damage done by a ship has been accepted in the English courts as including pollution damage[119] and it is therefore likely that the Admiralty Court of Jamaica (though seldomly used) will hear maritime lien claims for pollution damage.[120]

2.5.1 Common law Remedies

Unfortunately Jamaican marine pollution victims will have to rely on common law remedies pending the maturity of international marine environmental law. This latter class of law is ostensibly the supreme source of law in the area of marine pollution because of its global significance.

The common law always defended the right of persons to enjoy their property and tried to balance competing rights by assessing the reasonableness of activities carried on their property.

The underlying commandment of the common law was 'use your property so as not to injure your neighbours' (sic

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[119] The Eschersheim [1976] 2 Lloyd's Rep.1, at p.8 (H.L.).

[120] The U.K. Supreme Court Act ,1981 s.20 (e) has specifically granted jurisdiction in the English Admiralty Court to hear and determine pollution damage cases. See generally William Tetley, Maritime Liens and Claims, (London, 1985) p.72.

utere tuo at alienum non aedas)[121]

The ownership of property which has suffered harm was and still is, fundamental to the application of common law remedies and because of that fact, creates a permanent disability in the fight against marine pollution.

This is because marine pollution primarily affects the coastal zone and its resources which are in most cases public property under the ownership or trusteeship of the government.

The general common law principles that can be used to protect the marine environment are Nuisance, Negligence, Trespass and the Rule in Rylands and Fletcher.

The environmental significance of these principles have been discussed in detail elsewhere and there is therefore no need to embark on a serious analysis of them.[122] However, the extent that Jamaican marine pollution claimants namely, fishermen, hoteliers and the government can rely on these principles, will be outlined.

Nuisance

The law of nuisance is divided into two areas namely private nuisance and public nuisance.
Private nuisance is concerned with the unlawful interference with a person's reasonable use and

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[121] Nancy Scott, Comparative Environmental Legislation and Acts, International and Comparative Law Quarterly 29 (1990): 619.

[122] Ball and Bell, loc cit., Winfield and Jolowitz on Tort (13th ed., Sweet and Maxwell, 1989) David Abecassis, The Law and Practice relating to Oil Pollution .from Ships, (Butterworths, 1978)

enjoyment of land,[123] while public nuisance affects a wide class of the public.

In the case of Esso Petroleum Corporation Ltd. v South Port Corporation,[124] the application of the law of nuisance was discussed obiter.

The case involved a master of a stranded oil tanker who discharged some of his cargo. The oil eventually washed ashore onto a beach owned by Southport causing damage.

Denning L.J., commented that the discharge of oil was not a private nuisance since it did not involve the defendants use of any land. It seems however that the law now allows a shipowner or other defendant to be found liable in nuisance even though his acts did not emanate from any land.[125]

Trespass

Trespass is the direct interference with personal and property rights without lawful excuse. This interference must be intentional or negligent and the inevitability of damage flowing from the act must be established.

Though trespass was not the head of damage claimed by the plaintiff in Esso v Southport Corporation, some members of the House of Lords nevertheless felt that such a claim would fail because the oil was carried to the beach by wind and wave action and therefore it was not inevitable that it would cause damage there.

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[123] Ball and Bell loc cit., p.133

[124] [1956] AC 218.

[125] Abecassis loc cit., p 121.

Marine pollution is therefore caught in a dilemma. It's existence is to some extent inevitable, its susceptibility to sea and weather conditions is inevitable but the same circumstances make the passing of the 'inevitability test' in a trespass claim far from certain.

Negligence.

For a negligence claim arising from a marine pollution incident to succeed, the person who suffers harm must satisfy the three limbs of the principle. He must show that a duty was owed to him by the polluter, that there was a breach of that duty and the damage resulting from the breach was foreseeable.

In the **Esso Petroleum Corporation Co.** case the plaintiff pleaded negligent navigation and the defendant was held liable since the grounding of the vessel did not happen in the ordinary course of things with a seaworthy vessel. The Law Lords in this case felt that all the limbs of negligence were satisfied.

The success of a marine pollution claim in negligence is aided by the fact that the plaintiff need not own or control property to obtain locus standi,[126] but forseeability and remoteness criteria is often used to restrict the applicability of this head of damage.

It was stated in Esso Petroleum Co. v Southport Corporation[127] that coastal land owners must accept inevitable hazards from maritime traffic and cannot sustain a claim without proof of fault.

This statement indicates the Judges attitude towards

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[126] ibid., p.114.

[127] supra., n.45.

marine pollution which they felt was a necessary evil. It is unlikely that, with this attitude, the maximum benefits of the remedies will be utilised in favour of plaintiffs.

The Rule in Rylands and Fletcher[128]

The Rule in Rylands and Fletcher owes its development from the case which name it bears and states that if a person brings unto his property a dangerous substance he 'must keep it at his peril' and will be strictly liable for damage caused by its escape.

This rule may be used to control land based sources of pollution where an industry discharges hazardous waste onto the Coastal Zone. A Polluting industry may however seek cover behind a number of defences including that of 'Common Benefit'. The defence of common benefit will stand where the plaintiff benefits from the carrying on of the harmful activity.

The industries which are situated alongside the Kingston harbour provide vital goods, services and employment to the country and could therefore successful use this defence.

Additionally the courts will in most cases conclude that industrial inputs, though sometimes hazardous, do not make the industry a non natural user of land and therefore the Rylands v Fletcher principle would not be satisfied.[129]

Vessel source pollution is prima facie outside the scope of the rule in Rylands and Fletcher as the 'thing'

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[128] Rylands v Fletcher (1866) L.R. 1 EXC AT P 279.

[129] The rule does not apply to the wrongful act of a third party. see Mandrai v Texaco Trinidad Inc. [(1969) 15 WIR AT P.280.

causing damage must have escaped from land. It is doubtful whether pollution arising from loading operations could be covered by the rule.[130]

It can be concluded that Jamaican claimants will have to rely on nuisance and negligence principles in their quest for compensation due to the grave obstacles posed by the other principles.

2.5.2 Claimants

All pollution damage claims have to satisfy certain procedural rules before they can be addressed by the legal process. One such procedural hurdle is termed locus standi.

Locus Standi

As mentioned earlier the use of land by either the plaintiff or defendant is a crucial component for all the remedies save and except negligence. If a potential claimant has no property which has been damaged, he will have no locus standi or standing to sue.

a. Fishermen

Jamaican fishermen will be one of the chief victims of a serious pollution incident. Common Law principles may be used to recover compensatory damages for the fouling of their boats and damage to their fishing gear

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[130] In Cambridge Water Company v Eastern Counties Leather Plc.(reported in Lloyds List,January 29 1993) the court held that an industry liable for spillages, despite the fact that subsequent damage was unforseeable. Rylands and Fletcher principles were avoided by distinguishing between 'escape' and 'spillage'.

but beyond that, the doors of the legal system will be closed.

Ownership of Property

A serious pollution incident especially one involving chemicals may cause damage to fish stock and fishing in a defined area may also be closed by the Fisheries authorities pending its rehabilitation. In both instances fishermen will suffer further losses. These losses may be deemed non recoverable because the fishermen have no property in the fish until they are caught.

Hugo Grotius himself supported this concept by stating that, "all property is grounded upon occupation which requires that moveables shall be seized and immoveable things must be enclosed. Whatever cannot be seized or enclosed is incapable of being the subject of property."[131] It appears however that the 1982 Law of the Sea Convention is moving away from this principle, or at least in the case of Anadromous stocks.[132]

Under the Beach Control Act, 1956[133], Territorial Sea Act, 1971, and the Exclusive Economic Zone Act, 1991 ,[134] fish and all other living and non living marine flora are vested, to various degrees, in the Crown.

It is likely therefore that the Crown will be the only body able to bring an action for pollution damage

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[131] quoted from Kenneth Rattray, The Law of the Sea : The Implications for Jamaica, the Caribbean and the Third World.Unpublished Lecture November, 1981 Jamaica.

[132] Article 66.

[133] section 3.

[134] section 4.

to the fish stock.

Nuisance

The absence of property in the fish is equivalent to the absence of locus standi and therefore the fishermen will be denied the right to bring private nuisance claims.

Fishermen may claim in public nuisance because the fish are public property and the act of polluting would have affected the public right to fish.

Fishing in Jamaica is not restricted to any class of persons and fishermen would not be able to show that they suffered damage over and above that suffered by the general public.

Gordon Bisaro[135] notes that fishermen may overcome their locus standi impediments in a private nuisance claim when fishing becomes organized and the public right to fish is restricted to a specific class of persons.

This may done by the granting of licences to a privileged few who would therefore suffer substantial injury over and above that suffered by the general public.

Under the **Natural Resources Marine Park Orders,**[136] permission is required in order to fish in the park area and such persons may be manipulated into the special class required by public nuisance actions. Whether the permission is granted orally or through

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[135] Gordon Bisaro, Economic Loss Claims of Fishermen. Federal Court of Canada Judges\Canadian Maritime Law Association Admiralty Seminar Ottawa: March 12, 1993.

[136] The Natural Resources (Montego Bay Marine Park) Order, 1992 s.8(1)

licences is not known and this may play an important role in the success of a public nuisance claim.

The value of fishing licences will be outlined further on and it is important that the fisheries authorities embark on a rigid organisation and management of Jamaica's living marine resources.

Having overcome locus standi problems fishermen will be frustrated by another piece of procedural tapestry bequeathed by the English common law, relator proceedings[137]. Finally, a public nuisance falls under the purview of the criminal law which offers little assistance to fishermen who have suffered substantial losses.

Pure Economic Loss

Invariably fishermen in Jamaica when making claims in negligence will claim under the head of pure economic loss[138]. Pure economic loss is financial loss sustained otherwise than as a result of physical loss or damage.[139]

Chemical pollution may kill fish but oil pollution will only result in tainted fish. In oil pollution cases fishermen will not be prevented from fishing but there will be a loss of fishing time pending the return of the stock to a marketable condition.

This loss of fishing time will amount to much

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[137] see Chapter 3.

[138] For an extensive discussion of economic loss see William Tetley, Damages and Economic Loss in Marine Collision: Controlling the Flood Gates, 22 J. Mar. Law & Comm. 539.

[139] CMI, Draft Guidelines on Assessment of Claims for Oil Pollution Damage. August 1993.

financial losses and hardship where fishing is a livelihood. Additionally, the fouling of mangroves will adversely affect the breeding of the inshore fish which are the type of fish harvested by Jamaican fishermen.

Generally claims for economic loss caused by negligence are not recoverable where no physical damage is involved[140] and fishermen's claims for lost fishing time will not be allowed by the courts.

This is because the learned judges feel that if there are no limits on the liability of the polluter towards those who have suffered economic loss, it opens the flood gates of claims and throws the law into uncertainty.

The American and Canadian courts seem to be progressing in this area and have allowed economic loss claims where the environmental damage adversely affects the claimants livelihood.

Fishermen have been deemed to have a special interest distinct from the public at large and therefore been able to successfully bring actions.[141]

b. Hotel Owners and other persons in the Tourist Trade.

Two main sectors of the tourist industry will suffer losses from the effects of a serious pollution incident.

These sectors are Travel, (travel agents, airlines

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[140] Spartan Steel and Alloys Ltd v Martin and Co. (Contractors) Ltd. [1973] QB 27.

[141] Louisiana v Testbank (1985) 752 F (2d) 1019. Union Oil v Oppen (1974) 501 F (2d) 558. Burgess v Tamano (1973) 37o f. Supp 247. Norsk Pacific Steam ship v CNR [1992] 1 SCR 1201.

and bus companies) and Accommodation and Catering (hotels, guesthouses and restaurants).

Almost all of the claims of this class of persons will fall under the head of pure economic loss. Exceptions will arise where pollution damage occurs on a private beach. In those cases a private nuisance action may be brought[142].

Real estate prices in the resort areas are very high at present and there will be a drastic diminution in the value of the property as a result of the fouling of beaches. The cancellation of bookings will also result in heavy losses.

However, hotel owners and other resort business men have no direct relationship with the beach or the sea much less a proprietary interest in them.

Their income depends on the perception and use of those resources by a third party namely tourists. It is therefore the tourists who will be directly affected by the pollution incident and the loss suffered by resort related businesses will be non recoverable.

In Ballard Shipping Co v B & M Distributing Inc. et. al.[143] the American court barred the pure economic loss claims filed by tackle shops and boat rental operators which arose out of an oil spill. It was held that such claimants were middlemen and were not similar enough to fishermen to warrant recovery in the absence of physical damage. Other recent decisions reflect the same attitude to cases involving economic

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[142] supra n.33.

[143] American Maritime Cases (May 1993 No.5-1413) reported in Fairplay 8th July 1993.

loss[144]

Jamaican judges are much more conservative than their American brothers and it is likely that hoteliers and restauranteurs will be barred from recovery despite the fact their livelihood will be critically affected.

The financial losses suffered by the hoteliers and Jamaica in general by the non arrival of tourists will be very heavy and judicial decisions must support these special circumstances even in the absence of binding British precedent.

c. Damage to the Environment[145]

The importance of marine resources, especially the beaches,mangroves and coral reefs to Jamaica's economy has been outlined above. Unfortunately it will be impossible for the government, as owner of these resources to recover any compensation for pollution damage.

The courts tend to apply the principle of restitituo in integrum when assessing compensatory damages. Economics dominates this principle as the award made is based on the diminution in value or the cost of repairs of the property damaged. The measure of damages will be the difference between the market value of the property before and after the pollution incident.

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[144] In the Matter of the Petition of Cleveland Tankers INc.,791 F. Supp. 669 CED March 1992. In these case the court held initer alia, that only subsistence reliance on natural resources to obtain the minimum necessities for life could justify economic damages stemming from the damage of such resources.

[145] For further discussion, see Catherine Ridgwell, "Compensation for oil pollution damage: Quantifying environmental harm". Marine Policy 16 (1992) 90.

'Value' is assumed to be a market or monetary value and in the absence of a reliable means of attaching a monetary value to marine resources they cannot be claimed to have diminished in value by a pollution incident.

Many methods have been developed for the economic valuation of resources among them being the Contingent Valuation Method.[146] Here, a sample population is asked what monetary value they would place on certain natural resources and thereafter an estimate is made.

American natural resource legislation has considered some of the methods of economic valuation in damage assessment, but the high level of subjectivity involved, tends to make these methods inconsistent and unreliable.

The American courts have attempted to the quantify environmental harm.

In the case of CommonWealth of Puerto Rico v The SS Zoe Colocotroni,[147] the court was faced with a set of circumstances that could have easily occurred in Jamaica.

The case involved a claim for damage to Puerto Rico's south coast mangrove stands, caused by the running aground of the tramp oil tanker the **SS Zoe Colocotroni.**

A statute gave the Environmental Quality Board of Puerto Rico authority to bring damages actions for environmental injury and the court had to give effect to

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[146] For a short discussion on the methods of economic valuation see Public Review Panel on Tanker Safety and Marine Spills Response Capability. (Brandt Smith Report) September 1990, Canada. p. 100. James Spurgeon, "The Economic Valuation of Coral Reefs," Marine Pollution Bulletin 24 (1992): 529.

[147] 628F. 2d. 652 (1st Cir. 1980), disc. rev. denied, 450 U.S. 912 (1981). The case was discussed in Kalo, loc cit.

the statute although common law principles disallowed that type of action.

The court appreciated the fact that the traditional restitutuo in integrum principle was inapplicable in these circumstances and considered that the measure of damages should be,

> " the cost reasonable incurred by the sovereign...to restore ... the environment in the affected area... without grossly disproportionate expenditures." [148]

Jamaican courts will have to take bold steps and apply a similar approach to the recovery of compensation for damage to resources that provide the nation with its bread and butter.

The absence of reliable methods of attaching a market value to the environment will continue to be a major obstacle to the acceptance by judges of environmental damage as a head of damage.

One should however question the methods by which judges arrive at monetary values for various heads of general damage such as pain and suffering and loss of amenities.

A market value cannot be attached to a witnesses testimony that he or she experienced a lot of pain as a result of the defendants action. The same can be said for loss of amenity claims where the plaintiff alleges he or she can no longer pursue hobbies, dance or enjoy the marine environment. Judges arrive at monetary values in these cases by following precedent but one is unlikely to locate the original precedent and the methods of arriving at that award.

Developing a precedent for an award for environmental

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[148] ibid., at p 568.

damage is not therefore a bold but not totally far fetched step.

The courts will however find themselves in a similar position to the higher court in the **SS Zoe Colocotroni** which concluded,

> "to say that the law on this question is unsettled is vastly to understate the situation ...we... have ventured far into uncharted waters..(and cannot)..anticipate where the journey will take us".[149]

2.5.3 Conclusion

The Common law though flexible, appears not to take cognisance of the special nature of marine pollution related claims. Its remedies tend to be reactive rather than preventive which is not sufficient for marien pollution regulation.

The principle of stare decisis and the 'flood gates phobia' imprisons common law judges who tend to 'use the status quo as the way forward'[150] and fail to broaden the scope of the common law to meet the present challenges.

American Judges have seemingly loosened themselves from their bonds and in certain cases have allowed claims of pure economic loss and environmental damage.

Unfortunately American courts have the reputation of being too 'liberal' and it is unlikely that Jamaican or West Indian judges will be moved to allow such claims

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[149] quoted in Shabman, L., and Batie, S., "Mitigating Damages from Coastal Wetlands Development: Policy, Economics and Financing", Marine Resource Economics 4 (1987): 234.

[150] Bishop of Exeter, quoted in Gold loc.cit.

until irretrievable steps are made in the British courts.

2.6 SUMMARY OF CHAPTER TWO

Political will is the first step in protecting the marine environment but after such commitment is obtained any action taken must have a proper legal foundation.

There are many legal bases on which marine environment protection rules can be established including legislation, the Common Law and treaties.

National legislation is and will continue to be a key basis for action as the Common Law is unreliable but the existing laws cannot give Jamaica the protection it needs.

Developments in international marine environmental law such as the Law of the Sea Convention 1982 must therefore be the guiding force behind any national legislation passed.

CHAPTER THREE

THE INSTITUTIONAL FRAMEWORK

3.1 Introduction

International marine environmental law may outline the responsibilities for marine environment protection but the way these responsibilities are carried out is totally dependent on the administration of each contracting state.

The administration of marine environment protection responsibilities involves a number of persons from a myriad of agencies, local and international, with different agendas, expertise and jurisdictions. A framework must therefore be in place to eliminate conflicts and overlapping while coordinating the application of the best available resources.

In the Exxon Valdez incident a myriad of different but interested parties converged on the locus, asserting partial jurisdiction but lacking the legal authority to take on full and sole responsibility for determining the action to be taken.

It is argued that these circumstances protracted and increased the cost of the response activities and highlights the need for Jamaica to have a proper framework in place.

It may be suggested that the presence of the Jamaica Marine Pollution Contingency Plan[151] (hereafter the Contingency Plan) will solve most of the potential problems but it is also likely that

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[151] The Jamaica Marine Pollution Contingency Plan for Spills of Oil and other hazardous substances.

comprehensive contingency plans existed when the Exxon Valdez, Braer and other serious incidents occurred.

Additionally, the framework and the policies which govern it must be oriented towards the integrated approach to sea use planning of which marine pollution response is but one part.

3.2 Private v Public Maritime Administration

Economic interests pervade and dominate all aspects of life and marine pollution prevention is not excluded.

It is felt that governments only react to major spills after the damage has been done because public administration is handicapped by its huge size and bureaucratic systems.

This may be true but the reactive approach to marine pollution prevention is partly due to the fact that economic interests dominate government policy. It does not pay in the short run to invest in the prevention of an event that may never occur as in pure commercial terms the costs of the investment may outweigh the benefits and the money would be better spent in another area.

Private commercial interests cannot be depended on to manage marine pollution even though they are said to be more efficient and have deeper pockets than government.

This is because financial considerations should not play a major role in public service activities such as search and rescue and marine pollution prevention and control. Only the government can appreciate and accept the long run costs and benefits involved in these activities.

3.3 The Sectoral Approach to Maritime Administration.

The present institutional framework is modelled on the British system where many disparate agencies are involved in the protection of the marine environment.

Adam King[152] correctly concludes that specific marine interests have been lumped with land interests and therefore the marine environment is left in a weak position within the central government.[153]

The Jamaican Government is fully aware of the need to update its legislation and take other steps to fulfil its marine environment obligations and King's comment, though made in a British context, may explain why marine environment legislation has never been passed in Jamaica.

Many have argued that the sectoral approach is inadequate but other common law countries such as Canada which have a similar colonial framework have shown that there is no need to change this approach.

A single maritime administration with responsibility for all marine related interests is therefore not the answer; neither is an inter-ministerial committee charged with environmental matters. Of more importance is the type of policy pursued and this umbrella policy will traverse and control all the relevant departments in the government.

3.4 THE EXISTING INSTITUTIONAL FRAMEWORK

The existing framework consists of many central government ministries and subsidiary agencies.

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[152] Adam King, "Marine Conservation: a new policy era" Marine Policy 17 (1993): 40.

[153] ibid., p.188.

3.4.1 MINISTRIES

Ministry of Tourism and the Environment

By its title the Ministry of Tourism and the Environment would appear to be the lead agency in Environmental matters. However with a staff of less than four persons in the Environment portion of the Ministry, it functions only as a policy making body overseeing and acting on the advice of the **Natural Resources Conservation Authority** on matters relating to the management and development of the environment. Its role as a policy making body must not however be underestimated bearing in mind the role policy plays in environmental management.

The marriage of the two sectors is appropriate when one considers that a serious marine pollution incident will primarily affect the tourist trade which, as discussed in Chapter one, holds an important place in the economy.

Ministry of Public Utilities and Transport.

This Ministry plays the most important role as a source for marine pollution control through its marine division. Its jurisdiction over sea transport matters gives it full responsibility over the control of vessel source pollution.

Unlike Canada Transport, the Canadian equivalent to this ministry, the control over policy and legislative development in this area is absent which has led to confusion and inaction.

Many reasons may be proffered for this problem, including the shortage of qualified staff and/or the absence of clearly defined responsibilities coupled with

the practice of stamping activities as legal and subsequently handing over the bulk of the regulatory process to the Attorney General's department. The latter department is burdened with the task of wearing too many hats on the very few heads available.

Ministry of Local Government.

The management of garbage disposal will always play a major role in the prevention of land based pollution and therefore the local government, as the primary organisation encharged with waste disposal is placed within the framework.

In the aftermath of a pollution incident which affects the coastline, the disposal of the pollutants recovered will be the responsibility of the local government in whose jurisdiction the waste is located. Disposal will have to be carried out according to the laws governing that jurisdiction.

The National Water Commission, established under this Ministry is responsible for the operation of sewage treatment plants which is reported to be a major source of land based pollution in Jamaica.

The Water Commission's treatment plant is one of the major contributors to the Kingston Harbour's pollution woes and therefore the government's hands are tied when it comes to enforcement. The presence of high nutrient levels in the coastal resort areas are also partially attributed to inadequate sewage treatment.[154]

The disposal of oily water and other vessel source

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[154] Mission Report of the IMO Team to Jamaica (11-20 January 1988). IMO/Sida Programme for the protection of the Marine Environment.

pollutants in the event that reception facilities are constructed will also fall to be regulated by this organisation.

The local government through the Parish Councils must be given a large measure of responsibility in both preventive and response activities.

The Coast Guard has ostensible authority in pollution response but the local authority will be the first organized body on the scene. Reaction time is a key determinant of the amount of loss prevention that can be achieved and the local authority (which also has a personal interest to serve), must be given some clear and well documented legal responsibility.

Reports arising out of the Exxon Valdez incident state that, in the rush to respond convincingly, more harm was done to the marine environment in some areas from the heat and dispersants used in the cleanup operations, than from the oil itself.[155]

It is likely that the initial response from the local community will be spontaneous and that they will subsequently be employed on to effect cleanup operations.

The likelihood of an Exxon Valdez type consequence must be in the contemplation of the local government who will have a great interest in ensuring that the clean up operations do not contribute to the harm done without usurping the authority of the designated lead agency.

In Canada a volunteer programme has been established by Transport Canada to avoid the problems mentioned above. In this programme ordinary persons in vulnerable coastal areas were given basic training in spill response techniques with the local authority given the responsibility of organising these persons and providing

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[155] BIMCO No.7 February 1993.

on site training in the event of a serious pollution incident.

This will not only ensure a timely and appropriate response but will avoid the local government having to bear the medical expenses of persons who may be injured from exposure to chemicals of which they were ignorant or insufficiently advised.

Only costs reasonably incurred in response activities will be recovered under the oil compensation conventions and therefore the local government should be involved as much as possible in the administrative framework.

The Parish Councils will also play a role in building an environmental ethic in local populace as well as providing mechanisms for the reporting of pollution incidents.

The Ministry of Agriculture

The presence of the fisheries division within the Ministry of Agriculture is another colonial legacy.

Colonial policy never contemplated fisheries as playing a separate and major role in the Jamaican economy but as the authority responsible for the Jamaican fishing industry, it is drawn into the framework.

Fishermen are the first victims of land based and vessel source pollution in Jamaica because the overwhelming majority (95%) operate inshore.[156]

In keeping with their mandate to develop the fisheries resources there must a mechanism in place to assess the stock and attach a value to the resource.

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[156] Jamaica Country Environmental Profile September 1987. p.173.

This is especially true for recreational fishing which is a high value activity.

Fishing can be regulated through a variety of means including licensing arrangements or taxes based on the estimated revenue per boat and it is important that this agency has proper documentary evidence indicating the value of the resource to support its regulations and for use in the compensatory aspects of marine pollution incidents.

For affected fishermen to successfully prove loss or damage before the IOPC FUND or the national court there must be reliable evidence to support their claim. The Fisheries Division will be relied upon at this stage to produce statistics supporting the fact that there existed before the incident a revenue earning activity.

Other Ministries

The Ministry of Foreign Affairs is responsible for the executive act of ratification and members of its overseas staff represent the country at international conferences which may touch and concern the marine environment. Under the Contingency Plan they have the responsibility of coordinating outside assistance.

The Ministry of Construction (Works) is the body which has authorised the Contingency plan.

3.4.2 AGENCIES

Natural Resources Conservation Authority

The Natural Resources Conservation Authority (NRCA) was established under the Natural Resources Conservation Act of 1990 and is an attempt to create a single agency to coordinate environment protection activities.

The portfolio and powers of this authority are very wide as it has taken over and unified the regulatory functions of the Beach Control Authority, the Watershed Protection Commission, the Wildlife Protection Committee, the Natural Resource Planning Unit, the Marine Authority Committee and the Kingston Harbour Water Quality Monitoring Committee. [157]

However, as will be discussed in the following Chapters, there may arise problems of public accountability and the use of the discretionary powers vested under the Act.

Though the authority is mandated to take such steps such as are necessary to properly manage the natural resources of the country which includes its ocean space, closer analysis of the Act reveals that its role in the marine pollution management is far from clear. It is uncertain for instance if the NRCA can deal directly with industry and order closures of factories or must seek judicial remedies which are time consuming and nullify effective action.

This may be defended as being evidence of the British common law tendency to pass vague, flexible, framework legislation which allows the policy of the authority to dictate the approach taken. Such autonomy is necessary to encourage efficiency but, the attitude of successive administrations to the organisation belies the importance given to it.

The government though, through the NRCA has taken some laudable steps towards the preservation of the marine environment by establishing national marine parks under section 5 of the Act.[158]

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[157] ibid., p. 29

[158] The Natural Resources (Montego Bay Marine Park) Order 1992.

The benefits of marine parks include Job creation through the harvest of living and non living resources on which a monetary value can be placed and this is important when the assessment of damages is undertaken in the aftermath of a pollution incident.

Additionally the NRCA is carrying out an assessment of the inputs and effluents of industries to form the basis for reasonable discharge standards.

The Port Authority

The Port Authority was established under the Harbours Act of 1874 as amended and the Port Authority Act of 1972 and plays an important role in the management of operational pollution. Marine pollution prevention and control was never its core function and its jurisdiction in relation to the NRCA needs to be clarified in the Draft Port Authority Bill, to avoid the 'Exxon Valdez problem' discussed above.

The Port Authority's duty, to maintain the aids to navigation[159] will be very significant when the Civil Liability Convention is ratified and incorporated into national legislation. A shipowner who has caused pollution can avoid liability if he can show that the damage was caused by the breach of duty by the relevant authority to maintain the aids to navigation.

The importance of the Port Authority's duty was highlighted in the court decision which followed the substantial pollution of the coastline of Sweden by the vessel **Tsesis**. During the proceedings initiated by the Swedish government to recover damages, the shipowner successfully pleaded that the authorities failure to maintain up to date charts contributed to the grounding

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[159] The Harbours Act, 1874 s. 8.

and subsequent discharge of oil. The Swedish government was thereafter barred from recovery and had to bear their losses.[140]

The consequences of implementing MARPOL 73/78 especially the requirements under Regulation 12 of Annex 1, for providing reception facilities will fall on the Port Authority of Jamaica.

Annex V of the convention will be very important in the drive to prevent cruise ship pollution and the Port Authority staff will have to be au fait with the particular requirements stated in the guide lines published by the IMO[141].

The Port Authority will also play a key role in facilitating the expeditious movement of anti pollution equipment in and out of the country.

The Jamaica Defence Force Coast Guard

The Jamaica Defence Force Coast Guard falls under the purview of the Ministry of Justice. The Coast Guard is the ostensible authority in marine pollution response for no other reason than the fact that it has benefitted from specialised training in this area and is best organisation to enforce the relevant laws.

At this moment however there is no legislation placing the responsibility for the organisation of marine pollution response on any person or entity and the choice between a government agency or a private body is still available.

In the USA the owners of tankers are required to

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[140] Christopher Hill, Maritime Law (London:Lloyds of London, 1989) p. 291.

[141] Guidelines for the Implementation of Annex V of MARPOL, IMO London 1988.

organise cleanup response but a number of government authorities are vested with some decision making powers. In Europe on the other hand, governments are responsible for organising the cleanup of major spills.[162]

The fact that the Braer and Aegean Sea each spilled twice as much oil than the Exxon Valdez[163] but appeared to have a comparatively short and effective clean up operation lends much support to the need to make the government fully responsible.

It was also recommended by an IMO team after examining the legal framework in Jamaica that prevention and control of pollution from shipping should be assigned to the Coast Guard.[164]

Coast Guard personnel could therefore be trained to serve as ship inspectors under MARPOL 73\78. With special training in the investigatory aspects of pollution prevention they could also act as pollution prevention officers vested with powers to inspect and initiate legal proceedings.

Mere presence and knowledge of Coast Guard personnel being pollution prevention officers will deter illegal deballasting in the inland waters and Territorial Sea.

The experience in drug interdiction will put the Coast Guard in good stead when dealing with shipowners experienced in pollution enforcement and who in the face of stiff penalties would employ 'resources' including experienced lawyers, to circumvent the law.

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[162] Ocean Orbit News Letter, The International Tanker Owners Federation April 1993.

[163] ibid., The oil spilled from the Exxon Valdez was much heavier than the European spills in addition to the different environmental conditions of the affected areas and this must be taken into consideration.

[164] ibid., p.22

It is hardly likely that the salary the government could afford for pollution prevention officers would ensure that the law is complied with at all times and that the procedure of investigation are detailed and accurate.

It is likely however that the increased needs for port state inspections under MARPOL 73/78 may mean that the Coast Guard will have to hire and train other persons to carry out the required amount of inspections. The use of civilians for vessel inspections is not uncommon. The Canadian Coast Guard which is responsible for the enforcement of marine pollution laws is a civilian organisation.

The legislation that will be passed to incorporate the provisions of the OPRC Convention which the Government should ratify as a matter of urgency, will 'legitimize' the role of the Coast Guard which is a necessary step in the pollution prevention effort.

The Attorney Generals Department

The Attorney Generals department falls under the purview of the Ministry of Justice and is the legal representative of the government in civil law matters.

At present the law does not provide for private actions or citizen suits in marine pollution activities. This is logical when one considers that it is the government which ratifies the pollution conventions and assumes the obligations flowing from them.

The state is owner and trustee of the marine resources and therefore the Attorney General, as the legal advisor of the state will be required to take action on its behalf for any damage done thereto.

Statutory bodies like the NRCA do not possess an in house attorney and all matters are therefore transferred

to the Attorney General's department for advice and action.

Additionally in the 18th century the Attorney General was in the habit of going to Chancery and asking for injunctions on behalf of private citizens[165]. Bad history makes bad law and due to old habits private citizens and public authorities today cannot sue for a breach of a public right (such as damage to a national marine park or a public beach by pollution) unless the Attorney General gives his consent to a relator action.

This means that without the permission of the Attorney General to use his name in the suit no action can be taken.[166] This practice is supported by the CPC Code law[167] and the Attorney General's refusal to give consent is not reviewable by the court.[168]

The inability of statutory bodies vested with wide jurisdiction over the environment, to institute legal action without the consent of the Attorney General, whose department is already overburdened and short staffed is a grave obstacle in the way of marine environment protection. Polluters are therefore inadvertently shielded by the law from civil liability.

In 1970 American law began to facilitate 'citizen suits' where private citizens or associations could bring actions before the court to enforce environmental laws. This has given some teeth to the environmental laws there and it would be wise to consider a similar

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[165] Coral, C., & Smith, J The Foundations of Property & Property Law 45 CLJ 1986 p.459.

[166] Gouriet v Union of Post Office Workers [1978] AC 435,

[167] The Consolidated Judicature (Civil Procedure Code) Law. Chapter 177. June, 1989.

[168] supra., n. 62. per Lord Dilhorne at 494 and 93

provision in Jamaican law.

The Attorney General's department will play a key role presenting claims for pollution before the IOPC FUND and so it must as of necessity be au fait with the hybrid legal practice and procedure of the FUND and marine environmental matters in general.

This department has to fulfil its primary task in marine pollution matters of giving of advice on marine pollution conventions before they can be ratified and incorporated into legislation. Its role in other aspects of marine environment protection must therefore be clearly delimited.

The Office of Disaster Preparedness (ODP)

Under the Contingency Plan this office is responsible for the overall coordination of the activities in the event of a major pollution emergency incident and its Director is the designated National Coordinator.

Non Governmental Organisations (NGO'S)

There are a number of active NGO'S operating in Jamaica with enthusiastic personnel committed to the protection of the environment. These NGO's play a major role in raising public awareness in environmental matters in general and their importance has been recognised in the Environment section of the Jamaica National Five Year Plan 1990. The presence of 'citizen suit' clauses mentioned above, could greatly assist these organisations in their marine environment activities.

3.4.3 CONCLUSION

The achievements of this framework have been far from successful. Land based sources of pollution have not been controlled, operational vessel source pollution continues unabated and it is unlikely that a serious pollution incident could be properly managed.

This is in large part due to the present approach to marine environmental protection. There does not appear to be a single clear marine policy governing all the activities of all the relevant agencies. Non ratification of relevant conventions and the failure to incorporate the provisions of conventions which have been ratified into national legislation are also some problems affecting the operation of the framework.

The writer presumes that with a knowledge of the international obligations involved in marine environment protection and the steps that have to be taken to fulfil them, the role and jurisdiction of the various elements of the framework will be clearly identifiable and subsequently cemented within the legislation.

Policy however is the root of all legislative action and its absence has been the root of inaction. An umbrella marine policy needs therefore to be developed.

3.5 THE APPROACH TO MARINE ENVIRONMENT PROTECTION

As mentioned above the present institutional framework is modelled on the British approach.

Characteristics of this approach have been outlined by **Bell**[169] who notes that there is:

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[169] Bell and Ball loc. cit.

(a) decentralisation of decision making to quasi governmental bodies;

(b) the presence of wide administrative discretion; and

(c) gradualism when introducing pollution control regulations embodying standards[170].

3.5.1. Decentralisation

The decentralisation of decision making in Jamaica has resulted in the presence of many mini marine policies being followed by the various organisations namely NRCA, UDC, ECD, Town Planning Department, Coast Guard, Port Authority and the Fisheries Division of the Ministry of Agriculture. These policies are related but are not defined within the context of an umbrella policy.

The absence of a uniform marine policy means that the standards set and the monitoring thereof will differ from organisation to organisation which cannot be an acceptable approach to marine environment protection. The United States has avoided this problem by 'legislating' the environmental policy of the government in the form of the National Environmental Policy Act (NEPA) of 1969.[171] It is a characteristic of British type legislation however to refrain from stating policy objectives in legislation.

Canada's marine environment policy like Jamaica's cannot be found in a single document but lies to a large extent in the governments response to the

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[170] ibid., at p. 73. et seq.

[171] Joseph Kalo, Coastal and Ocean Law (Texas:John MArshall 1990) 163.

recommendations of the Brandt Smith Report.[172]

Canada also embraces the sectoral approach to marine matters but it's institutional framework contains a Corporate division concerned with policy and coordination. This division lies within Canada Transport and examines policy initiatives arising from the various departments within the ministry and ensures that potential conflicts are smoothed out. This division also provides continuous liaison with equivalent bodies in other ministries to ensure that the said policies are not in conflict with the policies of other ministries. Potential unilateral policies of other ministries and departments within Transport Canada cannot therefore stultify the primary operations of the marine division.

The Cabinet members in the Jamaican government meet once per month to discuss environmental matters and resolve jurisdictional conflicts which are brought before it by the NRCA Secretariat. Therefore the Cabinet performs a similar function to the policy and coordination division above. Sectoral conflicts are far less complex than in Canada but Cabinet should not have enter into the arena where these conflicts are ironed out unless it is necessary.

Additionally the proposed Environmental Inter Ministerial Committee mentioned in the Jamaica National Environmental Action Plan (JANEAP) should resolve sectoral conflicts.

It is the writers belief that an umbrella policy should be developed which will not only provide a single focus for the various government bodies but also

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[172] Canada's Green Plan for a healthy environment: Government of Canada 1990,This policy document a global report on the environmental position of the government.

incorporate the now accepted polluter pays and precautionary principles so that they will have general appication. Every agency will therefore adopt these principles to its area of responsibility whether it be prevention, response or compensation.

3.5.2 Wide Administrative Discretion

Wide administrative discretion made possible through vague framework legislation compounds the problem of incoherence, although through this approach the process of regulation is supposedly freed from bureaucracy.

Wide discretion does not guarantee public accountability and there will always be some difficulty in finding the responsible body when taking legal action is being considered. This is in contrast to the approach adopted by the USA which is more rigid and rule oriented and supported by a very vigilant legal fraternity and judicial system.

3.5.3 Gradualism

Gradualism as the philosophy governing the establishment of pollution controls is not, and should not be used in Jamaica. The seemingly relaxed approach to environmental standard setting in Jamaica is not determined by a conscious effort to rely on the goodwill of industry to gradually increase their environmental quality standards, as their economies permit but on the general lack of resources to set and enforce appropriate standards[173].

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[173] This is due to the lack of resources and the lost presence in the field. Interview with Mr.Leary Miller, Director Ministry of Tourism and the Environment. January 1993.

Industries situated on the Kingston water front have begun to improve their discharge standards but this is more due to the need to display good corporate citisenship in a 'green' age than to the efforts of the NRCA and other environmental agencies.

Industry has been encouraged not to wait on the Government to force them to improve their discharge standards and many enterprises have responded positively. This is commendable, though unfortunate. However, it would be unwise for the relevant environmental agency to adopt a combatitive and litigious stance against industry as pertains in the United States. The industrial community especially in a small society, is far too strong for such an approach to bear any fruit.

The NRCA has taken a step in the right direction by requiring industry to produce information on the levels and type of discharges, which will serve as a basis for regulations. The law however must give the agency sufficient power to ensure that industry complies willingly with its requirements.

Gradualism does not only involve holding industry's hand while waiting for it to improve standards. Gradualism also involves waiting on scientific proof of the harmful effects of discharging potential pollutants into the marine environment before regulations are developed. The approach to marine environmental protection therefore becomes reactive rather than preventative.

There is no excuse for the government's approach to land based and operational vessel source pollution to be reactive but its approach should incorporate preventive and precautionary measures which do not depend on scientific certainty.

3.5.4 Conclusion

The British approach to marine environment protection is not entirely appropriate in the Jamaican milieu. The marine environment is peculiar to Jamaica and the 'maritime administration' must reflect this peculiarity.

The approach must therefore be 'Jamaican' and in the writers humble opinion should involve more rigid controls while at the same time take advantage of the international principles of the precautionary approach.

3.6.0 THE LEGISLATIVE PROCESS

Changing the approach to the protection of the marine environment will depend on the policy adopted. But, in many cases it will be necessary to pass legislation reflecting aspects of the policy.

The process by which policy is developed into an Act is known as the legislative process[174]. The process also involves the revision and amendments of existing Acts but new Acts are generally passed to implement treaties and conventions.

Background

The legislative process for Jamaican marine environment legislation is another piece of procedural tapestry bequeathed by the mother country and has many unfortunate things in common.

The Merchant Shipping Act, Harbours Act and Port Authority Act which serve as the present legislative

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[174] The Federal Legislative Process in Canada, Development Canada, February 1991.

reference, all have bills which will one day replace these outdated Acts. It should be noted too that the former Acts date back to the nineteenth century.

Significantly all of these bills in addition to the Clean Sea Bill (which covers operational pollution) have remained bills for many years despite being visited and revisited by experts from the IMO.[175]

3.6.1 Institutionalised Inertia.

The legislative process for Jamaican marine environment legislation appears to be inordinately long and is suffering from inertia.

The Canadian legislative process for the implementation of marine environment conventions is also long but it is due to the established and documented policy of that government.

The passage of Canadian legislation is meticulously slow to ensure that no constitutional problems will arise and that all the persons likely to be affected by the legislation will be in no doubt as to its purpose and application when it is enacted.

It is also the policy of the Canadian Government not to present their instrument of accession before the regulations are in place. It is difficult for the legislative process to be postponed indefinitely because it will reflect badly on the executive as well as the legislature.

The inordinate time taken to incorporate marine environment conventions in Jamaica cannot be attributed to factors similar to those prevailing upon the Canadian legislative process.

Three reasons may be given to explain this problem

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[175] The Clean Sea Bill is over twelve years old.

namely the absence of a clear marine policy, conflicts and independence of departments and the legislative process itself. The former factors have been mentioned above and it is not necessary to discuss them here.

The legislative process itself is dictated by the internal organisation of the departments involved and it can be concluded that all the problems besetting it are inherent in the institutional structure itself. The problems have therefore been described as institutional inertia.

The joint responsibility and cooperation between the ministries and legal counsel is an integral part of the process. It appears however that the absence of a rigid system to manage the process has made the responsibility not joint but several on the part of the legal advisors.

The apparent absence of a well documented system has also resulted in the absence of a rigid but realistic time frame for each player to complete his task.

If passing parent legislation is such a difficult process then the task will be even greater for passing regulations under them. This is because in the common law system parent legislation tends to be very vague and skeleton-like, leaving the details to the discretion of the regulators.[176]

International and local public pressure cannot be borne against the government to correct the problems above because of the separation of the executive act of ratification and the legislative process. It is easy for the government to appease both members of the public by presenting the instruments of ratification and having the countries name published on the list of ratifying countries.

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[176] Ball and Bell loc cit. p. 16

Having done this there is no pressure, ipso facto urgency, to pass the implementing legislation until unfortunate circumstances serve to catalyze the process after the damage has been done.

3.6.2 Stages In The Process [177]

The stages in the legislative process are as follows:

1. Policy formulation and approval
2. Drafting of implementing legislation
3. Printing of implementing legislation
4. Approval of implementing legislation by Legislation Committee and Cabinet
5. Introduction to Parliament.[178]

In the writers opinion the main problems in the legislative process arise in the first two sections. This however is not to assume that the other stages have no problems.

The lack adequate human and financial resources plagues all the stages in the legislative process. The absence of financial resources to make the Government Printing office more efficient is the most serious problem facing stage three. Stages four and five also experience problems associated with the priority the government gives to marine pollution legislation which cannot compete with social and economic legislation for

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[177] See generally, Legislative Drafting notes Norman Manley Law School, Jamaica 1989. The Federal Legislative Process in Canada. supra n.98.

[178] The above steps govern public bills under which marine pollution legislation would fall and not privately initiated Bills.

Cabinet and Parliament's front burners.

3.6.3 STAGE ONE - Policy Formulation and Approval

Legislation must have its source in a policy statement which the legislation is intended to reflect. After the policy is formulated it must be approved by Cabinet who will determine if instructions should be given to the Office of the Parliamentary Council to commence drafting.

Policy generally originates from the relevant government ministry but may have other sources including the public and the Judiciary. Judicial decisions may lead to the development of policy and therefore the Judiciary and legal fraternity can, as stated earlier play a major role in establishing legislation on marine environment protection.

Conventions

Conventions are the chief source of marine pollution related policies.

The presence of conventions which have been drafted and thoroughly argued by experts have 'pre cooked' the type of policy necessary to establish implementing legislation.

This, prima facie, makes the legislative process simpler but the absence of representation at the conferences which develop these conventions is fatal.

Financial constraints may be the reasons given for the lack of representation but it is important that the people who will become involved in the legislative process are not presented with complex documents of which they have no prior knowledge. Uncertainty brings fear and inaction and it is therefore important that

such persons attend meetings where the convention provisions are being discussed and developed.

Conventions are constantly being ammended to take cognisance of new developments. There is need therefore to continue attending IMO meetings to ensure that any new amendments will be in Jamaica's interest.

Jamaica retained a high profile in the United Nations Conference on the Law of the Sea and through the group of 77, many provisions which were in Jamaica's interest were included. There is no reason why the same policy cannot be applied to the IMO.

In the absence of participation at IMO meetings, Jamaica will continue to receive Conventions and consultants, followed by inaction.

At Canada Transport and the Canadian Ministry of Justice certain staff members are sent to various IMO meetings and these persons are able to keep the relevant ministries abreast of the developments in the conventions in addition to competently assisting in the legislative process.

The lack of prior knowledge on conventions may explain why incomplete policy formulation continues to be a problem despite the presence of 'pre cooked' conventions.

Incomplete policy does not only delay the Cabinet's approval but will drag the Attorney General's Department and the Parliamentary Council into the process of policy finalization and protract the time taken for drafting the Bill.

The legal department of the relevant ministry should be consulted and allowed to peruse the policy document before it is sent to the Cabinet for approval. The Attorney General's department need not enter into the legislative process at this stage.

Policy is presented to the Cabinet for approval in

the form of a Memorandum to Cabinet. The form of approval given by the Cabinet and the content of the legislation which will flow from its decision will be dictated by the way the memorandum is drafted.

The Memorandum to Cabinet touches and concerns legislation and so legal experts should become involved. If the legal department of the relevant Ministry does not have the competence to give advice here then the advice of the Attorney General should be sought. The drafting of the Memorandum to Cabinet however, remains a ministerial function which should not be delegated to legal advisers.

The reverse has been true in Jamaica due to custom or the belief that such an important document should be drafted by legal experts.

In Canada, guidelines and standards for the preparation of Memoranda to the Cabinet entitled Memoranda to Cabinet a Drafters guide, were prepared to ensure that the preparation of this critical document is carried out competently. A similar set of guidelines could be drafted for the use of Jamaican Government departments so that they could carry out their function more completely.

3.6.4 STAGE TWO - DRAFTING OF IMPLEMENTING LEGISLATION

Based on the instructions contained in the Cabinet's response to the Memorandum the Chief Parliamentary Council will assign draftsmen to draft the legislation.

The competence and skill of the legal draftsmen in the Office of the Chief Parliamentary Council is beyond question, but to properly carry out their function instructing officers must be assigned to work with them. These instructing officers should

(a) work in the ministry in which the policy was formulated;

(b) be at a senior management level to facilitate easy access to the Minister and Deputy Minister when key decisions are required; and

(c) have a thorough knowledge of the policy area in question.

The technical expertise in marine pollution matters required in (c) above is not always forth coming from the relevant ministry. This may be especially true in the case of the Ministry of Transport and Public Utilities regarding **MARPOL 73/78.** The lack of expertise to guide the draftsmen delays the drafting of the Bill and is major factor contributing to the apparent inertia.

Expertise may be obtained from outside the Ministry or even from the Technical Cooperation division of the IMO. But, extreme caution must be taken before invitations are extended.

The Government of Jamaica has total sovereignty over matters that affect the peace and good order of the nation. Draft legislation is a privileged document and should not therefore be shown to the public or persons not involved in the legislative process without proper approval from the Cabinet.

It is important therefore that the procedure consistent with our sovereign status is followed before the assistance of outside experts is requested.

Regulations

The problem of passing regulations under parent acts has been seen in Chapter 2 to be a major problem. Regulations are much more detailed than Acts of

Parliament and will therefore involve much more effort in the form of discussion and text formulation.

A well documented procedure will also help to eliminate inertia but problems also arise when the regulations are passed.

Often times regulations are the subject of litigation because it is unsatisfactory to both environmentalists and industry alike. This is because the regulations are passed by the relevant Ministry or government agency without much participation from the persons likely to be affected by them. It is only at the litigation stage that good recommendations for ammendments to the rules are put forward. This however, is at the great expense of the court, the government agency and industry.[179]

This situation can be avoided if participation by all parties who may be affected by the proposed regulations is an established part of the procedure.

In the United States the Negotiated Rulemaking Act of 1990, was passed to introduce regulatory negotiation (known as "reg neg") into the regulatory process.[180]

The concept of regulatory negotiation involves bringing the interested parties together to negotiate the content of proposed rules that may affect them. Once negotiated, the regulations can be passed with a very strong chance of being accepted and respected.

Regulatory negotiation has been succesful in the United States and is being used in the development of oil response plans required under the Oil Pollution Act

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[179] Kathrin Lassila, "See You Later, Litigator : Regulatory negotiation towards consensus". The Amicus Journal Summer 1992:5

[180] ibid.

of 1990.[101]

Industry may appear to be much stronger than government agencies in Jamaica but it does not prevent regulatory negotiation being used to produce rules that are impartial and have the benefit of the common good as their goal.

Whatever the approach, it is important that consultation with the parties who will be affected by the Act or regulation, is made an entrenched part of the legislative proccess. Affected parties will also include other Ministries and government agencies whose jurisdiction may overlap with another.

The absence of consultation is highlighted by the uncertainties arising from the Port Authority Bill and the Natural Resources Conservation Act, 1991.[102]

Persusal of files and Interviews conducted with persons at the Port Authority seem to indicate that there was insufficient or no consultation with that organisation when the Natural Resources Conservation Act was being developed. This has led to uncertainty and apprehension on the part of the Port Authority as to their jurisdiction over environment related matters associated with the ports under their control.

Other interviews conducted by the writer showed that the jurisdictions of both organisations can be reconciled under the various Acts but this fact could have been made clear during consultations between both parties.

The integrated approach to marine pollution prevention is the ideal approach. For it to succeed

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[101] ibid.

[102] see Chapter two above.

however, there must be no conflicts between the various government departments. The integration of their jurisdictions can be achieved by making consultation during the legislative process mandatory.

3.6.5 CONCLUSION

It is the writers belief that problems outlined above exist because there does not seem to be a standardised legislative process to follow. The problem of inertia is compounded by the fact persons involved in the legislative process do not have a thorough knowledge of the process itself and the duties they are required to fulfil. Increasing the awareness of these persons is therefore a useful step to take.

Steps have already been taken to examine and prioritise the conventions by a group of persons. It may be useful if the same group of persons be given responsibility for administering the legislative process in respect of all conventions on the environment.

This committee would also play a coordinating role by assisting the ministries to ensure that regulations made under the parent Acts are established quickly and are not in conflict with those of other Ministries.

This is a short term solution but it would ensure that a body of expertise is built up and that ratification and implementation of legislation proceeds quickly and correctly.

The presence of persons having responsibilities similar to that of the policy and coordination committee in Canada would assist in the operation of the legislative process.

The responsibility for convening meetings on conventions will always devolve upon these persons and not various others from time to time. These persons

will also be able to ensure that all the relevant persons are present, interested and active.

A rigid and well documented system with time limitations for task completion should also be developed to ensure that Bills don't become lost in the process to subsequently die a natural death.

Sufficient opportunity should be given for all the parties who will be affected, especially the shipowners, to discuss the ramifications of the legislation. Knowledge before hand of what is expected will eliminate uncertainty and confusion as to responsibility and liability.

Inertia in passing legislation is not peculiar to Jamaica or other developing countries and neither are successful precendents only to be found in places such as Canada.

Caribbean minds in the form of the Plenipotentiary Conference on the Protocol on Specially Protected Areas and Wildlife (SPAWS),[183] have provided Jamaica and other states with a very good precedent for a legislative process.

The signatories to the Protocol resolved that ratification would not take place until the necessary annexes were concluded. Thereafter, the conference established a procedure and timetable which would guide the process culminating in the adoption of the Annexes. The Annexes were successfully completed eighteen months later, a unique achievement for an international conference.

The above example supports the approach where ratification of international treaties is made

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[183] This is one of three Protocols to the The Convention for the Protection and Development of the Marine Environment of the Wider Caribbean, (Cartegena, 1983).

contingent on the development of the necessary regulations. The development of these regulations would in turn be guided by a well documented but realistic procedure.

3.7 SUMMARY OF CHAPTER THREE

The institutional framework of Jamaica has been influenced by a tradition which is not consistent with marine environment protection and there is a need for filling the void between related ministries through a single policy.

An umbrella marine policy must be developed in order determine the approach to take and align each ministry towards the common objective.

The legislative process is the only means of incorporating aspects of marine policy, including relevant conventions into national legislation and it is therefore important that this process be revised to ensure the timely implementation of Jamaica's obligations.

CHAPTER FOUR

OPPORTUNITIES AND OBLIGATIONS OF INTERNATIONAL MARINE ENVIRONMENTAL LAW

4.1 INTRODUCTION

The greatest pollution risks facing Jamaica's invaluable coastline will be posed by foreign flag ships and only international cooperation will provide the source of protection that will be needed.

Additionally, Jamaica must enforce its rights as a coastal state to protect its interests as the presence of tanker and cruise ship pollution in its waters is sufficient evidence to indicate that flag state compliance cannot be relied on.

Jamaica is in the fortunate position of being able to take full advantage of the legal instruments developed by international organisations even though this is not reflected by her record of ratification and implementation.

The marine environment legislation developed, will be based on the final text of the relevant treaties and will therefore be in total conformity with International law.

The problems now being faced by Canada and its Arctic Waters Pollution Act[184], and the Bahamas and Guyana with regards to the enforcement measures provided for by their marine legislation compared to those permitted under The Law of the Sea Convention 1982, will

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[184] RSC 1970, 1st Supp.C.2.

be avoided.[188]

The most important legal instrument will be the Law of the Sea Convention of 1982, signed aptly in Montego Bay, Jamaica. This document lends full support to the reliance on international cooperation by making it mandatory for states to 'harmonize their policies' and 'cooperate on a global and regional basis', 'directly or through Competent International Organisations'.

Because of its constitutional character, all legal instruments on the marine environment will flow from the Convention.

The obligations arising from the conventions covering the three main components of marine pollution management namely, prevention, intervention and compensation will be examined here.

Some of the conventions which will be examined have been recently ratified but not implemented while it is hoped that the examination of other conventions will lend weight to the need to ratify and implement them as a matter of urgency.

Before the convention obligations are discussed, mention will be made of two principles of international environmental law namely the polluter pays principle and the precautionary principle.

4.1.2 The Polluter Pays Principle

The polluter pays principle states that

" natural or legal persons governed by public or private law who are responsible for pollution must pay the costs of

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[188] Ralph Carnegie, The Law of the Sea in the Commonwealth Caribbean ; The Domestic Law Context. The New Law of the Sea for the Caribbean ed.Edgar Gold.(New York:Springer Verlag:1987):99.

such measures as are necessary to eliminate that pollution or reduce it so as to comply with the standards or equivalent measures"[186]

This principle has already been mentioned in various government of Jamaica policy documents but is yet to be reflected in legislation.

Application of this principle involves the relevant government agency in charge of spill response operations making every effort to identify the polluter and collect the costs reasonably incurred to control accidental or operational pollution.[187] Potential polluters who are faced with the possibility for paying the cost of preventive or other anti pollution measures will recognise that it makes economic sense to adopt environment friendly policies.

4.1.3 The Precautionary Principle

This principle is said to be ripening into a norm of Customary International Law.[188] Whatever its status may be, the application of this principle is a very important tool in modern day marine environment management.

The precautionary principle states that preventive

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[186] Council Recommendation (EEC) 75/ 436 (OJL19425.7.75p1), paragraph 2. Reported in Daniel Alexander, "Competition, Subsidy and Environmental Protection" Environment and Planning Law, (Butterworths 1991).

[187] Remarks of David Bodowsky, The American Society of International Law, Proceedings of the 85th Annual Meeting, 1991. p.413.

[188] ibid.

measures should be taken to protect the marine environment in the absence of full scientific certainty.[107]

The lack of scientific certainty has always hindered the development regulations and other measures to be taken relative to the marine environment. This principle is an advancement in marine environment management as it moves away from the traditional reactive approach to the anticipatory for marine pollution control.

The Precautionary Principle allows governments to err on the side of the environment by giving it the benefit of the doubt when preventive measures are being proposed.

The UNCED document known as AGENDA 21 has appreciated the need for coastal states to adopt a precautionary approach to the protection of the marine environment. In the introduction to Chapter 17 it states that states must 'adopt approaches which are integrated in content and are precautionary and anticipatory in ambit in scope'. This document therefore provides a legal basis for precautionary measures.

4.2.0 The Law of the Sea Convention, 1982

The Law of the Sea Convention of 1982 (hereafter the Convention) has been regarded as the longest and most complex conference in history and provides a comprehensive enforceable system for the protection of

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[107] 1990 Bergen Ministerial Declaration. CSCE\RMP:6. Draft Report of the meeting of the Mediterranean.

the marine environment. Its critics are many but that is not uncommon when a document is the result of the multilateral diplomacy of several countries and groups with motives of self interest.
The principle of 'consensus' governed the adoption of the Convention's provisions. This has meant that the rights and obligations found therein are essentially the highest common denominator possible in the circumstances and though some issues may be have been left inadequately addressed, the Conference must be commended for the comprehensive document produced.

The Economic Exclusive Zone

The establishment of a 200 nm Exclusive Economic Zone (EEZ)[170] is one of the innovative features of the Convention. In 1991 Jamaica proclaimed its sovereign rights over the living and non living resources lying in its 200 mile EEZ in the form of the Exclusive Economic Zone Act.

Jamaica however was never in support of such a zone during the negotiations on the Convention, for two main reasons.

1. Jamaica cannot uniformly proclaim a 200 mile EEZ around its coastline. In the North and West it is locked in by Cuba and Haiti respectively, and to the east by the British Protectorate of the Cayman Islands. In the South where its jurisdiction is greatest, there are conflicting claims with the countries of Nicaragua, Honduras and Columbia which are in the process of being resolved.

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[170] Article 55.

2. The waters lying outside the 12 mile territorial sea surrounding Jamaica are not considered to be rich in resources.[171]

It can be safely assumed that one of the main purposes of proclaiming such a zone was to enhance the ability to protect the resources of the Coastal Zone from marine pollution. One may question the wisdom of proclaiming an EEZ primarily for pollution prevention purposes when proper surveillance of the Territorial Sea is impossible[172] and the costs of management, enforcement and other obligations are so high.

The rights of a coastal state to control vessel source pollution in the EEZ are limited by the fundamental principle of freedom of navigation which the Convention seeks to maintain.

The opportunity cost of not proclaiming an EEZ when examined however, is much greater than the cost of the obligations as marine pollution could render whatever potentially harvestable living resources are present, unharvestable.

Juda[173] notes that an EEZ provides the coastal state with an instrument for economic management especially where there is high maritime traffic and will therefore suit the conditions prevailing in the waters off the Jamaican coastline.

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[171] Patrick Robinson, "The Right of Common Ownership and Development of the Extra Territorial Resources of the Region (eg. The United Nations Law of the Sea)" W.I.L.J. 1 :1986:1.

[172] Jamaica National Report on the Environment Presented to the UNCED,Brazil 1992. Government of Jamaica, 1992.

[173] Lawrence Juda, and Richard Burroughs, "The Principles for Comprehensive Ocean Management" Marine Policy 14 January: 1990: 23.

In the event of a serious pollution incident, Article 220(5) provides that a coastal state may take certain action in the event of the commission of marine pollution in its EEZ which results in a 'substantial discharge causing or threatening significant pollution.'

Article 220(6) also allows a coastal State to take action in the event of marine pollution committed in the EEZ of the state, 'causing major damage or threat of major damage to the coastline or related interests of the coastal State, or to any resources of its territorial sea or [EEZ].. threatening significant pollution.'

The action permissible under the Convention includes:

1. physical inspection of the vessel to obtain information relevant to the institution of proceedings and,
2. detention of the vessel.

The inspection is however limited to the examination of the internationally required certificates, records and other documents. Further inspection will depend on the results of that initial inspection.[194]

To benefit from these provisions Jamaica must fulfil certain criteria listed below.

1. 'Where there is no law there can be no transgressor' and there must therefore be in place laws and regulations prohibiting pollution in the EEZ and Territorial Sea.[195]

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[194] Article 226.

[195] Article 220.

2. There must be proceedings governing the detention of vessels and the institution of proceedings which will not unduly delay the vessel.[196]

3. The laws and regulations must be adopted in accordance with the Convention or applicable international rules and standards.[197]

The legislation must clarify the vague burden of proof standard provided by the Convention. The Convention states that 'clear grounds'[198] and 'clear objective evidence'[199] are the burdens of proof which the coastal state must relieve itself of before it can take the action outlined above.

It is therefore up to our legislation and\ or Judiciary to give interpretation to these words.

As an International legal instrument the Convention has an international currency of its own and must be interpreted accordingly. This means that the interpretation given to these words cannot reflect peculiar Jamaican circumstances or interests but be must consistent with the spirit of the Convention and the need for uniform interpretation of international legal instruments.[200]

As mentioned at the beginning of the chapter the

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[196] Article 226 (1) (a). Proceedings to impose penalties must be instituted within three years of the date of the violation. Article 228.

[197] ibid.

[198] Article 220 (2) and (5).

[199] ibid (6).

[200] Per Lord Scarman Fothergill v. Monarch Airlines Ltd., [1980] 2 Lloyd's Rep. 295, at 311.

Convention was the result of lengthy negotiation and may as a result contain provisions which are skeletal in nature. These include the provision that preventive measures should be taken in accordance with the capabilities of the state and it is therefore for Jamaica and Jamaica alone to maximise its capabilities through law and administration to successfully combat marine pollution.

4.3.0 REGIONAL OBLIGATIONS

It has been aptly stated that the management of the resources of the newly proclaimed EEZ's by Caribbean states is not only a matter of " enlightened self interest, but also a requirement of international law".[201] It is hardly likely that Caribbean states with their developing economies will be able to single handedly fulfil the obligations placed on them by international law, and therefore, regional cooperation is the logical solution.

Logical though it appears, the regional solution to the management of the marine environment was not always aggresively supported by Caribbean states. This fact was evident in the UNCLOS.

During the UNCLOS negotiations the learned Jamaican delegates enthusiatically and cogently argued for the acceptance of the Matrimonial Sea concept. This concept was proposed as an alternative to the Patrimonial Sea Concept and envisioned Caribbean states equitably sharing the living and non living resources beyond their

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[201] Duke Pollard et al., ed. The Environmental Laws of Commonwealth Caribbean ,(C.L.I. 1991): 346.

twelve mile Territorial Sea.[202]

Jamaica supported this concept not only because it believed that the proclamation of an EEZ did not bring major advantages for the reasons stated above but, also because it felt that regional stewardship and management of the resources of the Caribbean was better than single self serving small states managing oversized EEZ's in which developed countries had exploitative intentions.[203]

For various reasons this proposal did not receive the desired support but it appears that the spirit of this concept has re-entered through the back door in the form of the United Nations Environment Programme (UNEP) Regional Seas programme.

The Programme appears to have the full support of all the Caribbean states some of whom opposed each other during the UNCLOS proceedings.

The presence of this new found spirit of cooperation the writer suggests, is because the Programme does not seek to redistribute the wealth of the marine resource rich countries but rather addresses the degradation of those resources by marine pollution which affects all of the states equally. The Port of Spain Accord on the Management and Conservation of the Caribbean Envrionment adopted, in 1989 by the first CARICOM Ministerial Conference on the Environment is further testimony to this new found cooperative spirit.

4.3.1 The UNEP Regional Seas Programme[204]

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[202] Robinson loc cit.

[203] ibid.

[204] For a brief summary see Martin Glassner, "Management of Marine Resources as a Binding Force in the Eastern Caribbean" Ocean & Coastal Management

The UNEP Regional Seas Programme has its origins in the United Nations Conference on the Human Environment (Stockholm, 1972) but was formaly initiated in 1974 with the Caribbean Sea being one of several semi enclosed seas selected for initiation of the programme.

The Programme seeks to tackle a wide range of marine environment problems by establishing a legal and institutional framework for regional environmental management.

In this respect UNEP acts as an initiator and facilitator for cooperation through negotiations between participating states. This role is carried out in the hope that the participating states will become fully committed to the goals agreed upon and will thereafter devote the requisite financial and other resources necessary for its continued success.[205]

4.3.2 The Caribbean Action Plan[206]

The Caribbean Action Plan (CAP) was initiated in 1981 and is a foundation for the framework for the management of the marine environment of Wider Caribbean.

The plan aims to strenghen, through cooperation, the capacity of states of the Wider Caribbean cooperation

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20: 1993: 63-80.

[205] Unfortunately an evaluation of the Action Plan has indicated declining interest and financial commitment to the programme. See "The Action Plan for the Caribbean Environment Programme: evaluation of its development and achievements" UNEP Regional Seas Reports and Studies No.109.

[206] See generally, "Action Plan for the Caribbean Environment Programme: UNEP Regional Seas Reports and Studies No.26: 1983.

"for implementing sound environmental management practices and thus achieve the development of the region on a sustainable basis."[207]

The Action plan has many components, one of which is the assessment of marine pollution in the region. This involves, inter alia, determining the national and regional capabilities for preventing and combatting pollution and using accidental spills to determine the effects of oil on marine and coastal resources.[208]

Capacity building of technical institutional financial and human resources to prevent, control and clean up accidental spills at a national and regional level is also required under the Action Plan.

4.3.3 The Convention for the Protection and Development of the Marine Environment of the Wider Caribbean (Cartegena, 1983)

The legal framework for the CAP is provided by the Cartegena Convention which entered into force in 1986.

The obligations of this convention have already been identified[209] and it is unnecessary to repeat them in detail.

Of relevance to the thesis are the obligations to:

i. take all appropriate measures to prevent reduce and control vessel source pollution, dumping and land based pollution by implementing international legal precedents where available.

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[207] ibid., p.1.

[208] ibid., p.4.

[209] Pollard loc cit.

ii. cooperate in developing appropriate mechanisms for responding to pollution incidents.

iii. adopt appropriate internationally accepted rules on liability and compensation for pollution damage.

iv. individually or jointly establish protected areas to manage and protect sensitive ecosytems.[210]

The obligations mentioned in i, ii and iii above involve the ratification and or implementation of the MARPOL 73/78, LDC 1972, OPRC 90, CLC and FUND 69 Conventions respectively, all of which will be discussed below.

The harmonisation of liability and compensation regimes for pollution damage is of major importance when one considers that a serious pollution incident will affect several jurisdictions.

The adoption of the OPA 90 in the United States has resulted in two liability regimes coexisting in North America which serves only to fuel uncertainty in this area.

If a transboundary spill occurs there, as happened in the Nestucca incident, shipowners and their insurers will be faced with two rules governing liability while claimants will have available different causes of action and different amounts of compensation flowing from the same incident.[211]

This situation should be avoided by all means

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[210] ibid., p.354. The Convention also refers to pollution from the exploration of the sea bed and from atmospheric sources.

[211] The Annual Report of the Ship Source Oil Pollution Fund. 1991-1992: Canada: p.8.

especially since the Caribbean states belong to several families of law namely civil law, common law, mixed law and socialist law.

A transboundary spill affecting Jamaica is likely to involve the civil law system of Haiti or the socialist based system existing in Cuba which are already disimilar to the common law system of Jamaica.

The Convention is supported by three protocols namely the Protocol Concerning Cooperation in Combatting Oil Spills in the Wider Caribbean Region which entered into force simultaneously with the Convention, the Protocol on Pollution from Land Based Sources(1986) and the Protocol on Specially Protected Areas and Wildlife(SPAWS).

It should be noted that the OPRC 90 Convention is modelled on the Protocol Concerning Cooperation in Combatting Oil Spills in the Wider Caribbean Region.

4.3.4 Protected Areas

The best form of prevention is abstention and the SPAWS Protocol reflects the present trend of states to exclude shipping and other potentially threatening activities from areas deemed to be vulnerable.

This trend has been termed 'creeping jurisdiction' as coastal states have taken advantage of the current global pro environment climate to recover some of the jurisdiction lost to two principles of international law, namely freedom of the seas and innocent passage.

Under the SPAWS Protocol contracting parties undertake individually and on a joint basis, to protect and conserve special areas and species within their jurisdiction and to manage these areas on a 'rational

and sustainable basis'.[212]

The SPAWS Protocol provides Jamaica with a firm legal basis to establish Special Areas which as mentioned above has become a powerful tool for pollution prevention activities.

Marine protected areas appear in many forms and with different titles[213] and the term 'Special Area' is commonly associated with the Law of the Sea Convention and the MARPOL 73/78.

4.3.5 Special Areas

Article 211 (6) of the Law of the Sea Convention provides that states may adopt pollution prevention laws for areas designated Special.

In these Special Areas mandatory measures for the prevention of vessel source pollution can be enforced because oceanographical and ecological conditions, the utilisation of resources in the area, as well as the character of the vessel traffic, require such measures.[214]

The Special Area under the Law of the Sea Convnetion differs from that under the MARPOL 73/78 in three main respects outlined below;

i. The Law of the Sea Convention considers the

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[212] David Freestone, "Protection of Marine Species and Ecosystems in the Wider Caribbean : The Protocol on Specially Protected Areas and Wildlife" Marine Pollution Bulletin 22: 1991: 579.

[213] Marine Parks, Areas to be Avoided (ATBA) Particular Sensitive Areas (PSA) and Special Areas are all forms of Marine Protected Areas.

[214] ibid.

utilisation or protection of the resources in the proposed Area in its criteria for establishing a Special Area while MARPOL 73/78 does not.

ii. The type of area which can become a Special Area is not defined in the Law of the Sea Convention and therefore areas not covered in MARPOL's definition may be established as Special Areas.

iii. The onus is on the coastal state under the Law of the Sea Convention to devise the measures which it proposes to impose and thereafter obtain IMO approval of them. Under MARPOL 73/78 such measures are already established by the Convention.

4.3.6 Particularly Sensitive Sea Areas

The Special Area referred to in the SPAWS Protocol could also encompass the concept of Particular Sensitive Sea Areas (PSA) which is more relevant to Jamaica's needs.

A PSA is defined as "an area which needs special protection through action by the IMO because of its significance for recognised ecological or socioeconomic or scientific reasons and which may be vulnerable to damage by maritime activities."[215] This concept had its origin in the International Conference on Tanker Safety and Pollution Prevention held in 1978 and has more recently been included in Chapter 17 of Agenda

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[215] Guidelines for the Designation of Special Areas and the Identification of Particularly Sensitive Sea Areas (A 17/ Res.7209 January 1993 para.3.1.2. p. 27.

21.[216]

The PSA is similar to the Special Area envisioned by the Law of the Sea Convention because its physical area is left undetermined. This means that any area including areas in the EEZ and within an existing Special Area may become a PSA once the criteria established has been satisfied.

These criteria are ecological, social, cultural and economic and scientific and educational.Only one criteria needs to be satisfied in a proposal for the establishment of a PSA.

The ecological criteria involves establishing, inter alia, the uniqueness of the area (eg. the presence of endangered species), vulnerability to natural events or human activities and dependency (where ecological processes are highly dependent on biotically structured systems such as coral reefs and mangroves).

The social, cultural and economic criteria is satisfied when the proposed area is shown to provide important living marine resources (Economic benefit), or has special significance for recreation and tourism (Recreation) and plays an important role in supporting traditional subsistence and other needs of the human population (Human Dependency).

A Jamaican proposal for a PSA could easily satisfy all of the criteria required. However it is the writer's belief that the strongest case could be made under the social, economic and cultural criteria, bearing in mind that Tourism provides the country with its bread and butter.

It is the advantage gained by establishing such areas and not the ease with which it can be done which

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[216] Agenda 21 Chapter 17 para. 17.70.

is the important consideration and some of these advantages will be outlined.

a. Advantages

The PSA is the only internationally accepted marine zone in which the precautionary principle can be fully applied.

Under the Law of Sea and Intervention Conventions the coastal state cannot take pecautionary action but must wait until the danger is imminent or threatening. The measures to be applied in the PSA are a combination of rules available under the MARPOL, COLREG and SOLAS Conventions which include the ability to institute routeing measures such as areas to be avoided as well as vessel traffic services (VTS).

Action can therefore be taken to exclude ships from traversing too close to very vulnerable areas. Jamaica would be able to take these steps with IMO support which it could have never hoped to do unilaterally

The most important obstacle to the full implementation of Special Area conditions under MARPOL 73/78, and the Law of the Sea Convention when it comes into force, is the requirement for reception facilities.

The requirement for reception facilities is not a criterion for PSA status because it appreciates that there are countries like Jamaica whose primary threat comes from ships which do not call at its port.

Reception Facilities should not be viewed as a burden to small coastal states like Jamaica and every effort should be made to acquire them. However, pending their availability, the establishment of PSA's will go a long way in providing the protection that the country needs.

At a more local level the granting of PSA status

to the Kingston Harbour will greatly aid in its rehabilitation. The natural harbour has great income earning potential from tourism and recreatioanal activities which can carried on in its sheltered waters.

Rules based on the precautionary principle will also provide much support for the enforcement of operational and accidental pollution regulations.

b. Obligations

No specific obligations have ben mentioned in the Guidelines for the Designation of Special Areas and the Identification of Particularly Sensitive Sea Areas, but the proposal to IMO for the identification of PSA's should contain a proposal for the adoption of the required protective measures.

This obligation is similar to the Special Area condition under the Law of the Sea Convention and entails, inter alia, the establishment of the coordiantes of the proposed area, an examination of present vessel traffic routes in relation to sensitive areas, analysis of spill trajectories and the implementation of a Vessel Traffic System. Such a proposal, it is felt, should also seek to show that the presence of the PSA would not adversely affect the present vessel traffic.

At present the Great Barrier Reef in Australia is the only Area designated as a PSA and in its proposal use was made of documented casualties occurring in the region of the reef. It may be useful therefore for a well documented system of reporting casualties to be established.

Jamaica should consider the concept and with the legal basis of the SPAWS protocol take precautionary steps to pevent accidental pollution from foreign flag

ships traversing its Exclusive Econonmic Zone.

4.4.0 INTERNATIONAL OBLIGATIONS

4.4.1 PREVENTION

a. MARPOL 73/78.

MARPOL 73/78 has as its primary aim the prevention of operational pollution from ships.The Convention provides technical solutions for limiting the discharge of pollutants which involve the application of rules of design, construction and equipment aboard ships. Jamaica is by no means a ship owning nation and as far as design, construction and equipment is concerned her contribution will primarily be in the form of supporting the measures adopted by the IMO.

Operational discharges will not prima facie result in serious pollution but one must bear in mind the comment made above that the amount of pollutants discharged is not necessarily related to the seriousness of the damage.

Cruise and Bauxite piers are located near tourist resort areas and compete for the use of the limited coastal zone. The close proximity of these vessels means operational discharges can do grave damage. Additionally, the studies carried out by CARIPOL indicate that operational discharges are a cause for concern.[217]

The Convention contains five annexes which cover oil, noxious liquid substances carried in bulk, the transport of dangerous goods in packaged form, sewage

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[217] supra n.13.

and garbage. It sets out various procedures for storage, discharge, transfer and loading and unloading of identified potential pollutants.

The provisions of MARPOL 73/78 apply to all tankers over 150 GT and to all other ships over 400 GT. Warships howver are exempted.

b. MARPOL 73\ 78 v OIL POL 54[218]

The 1954 Convention for the Prevention of Oil Pollution of the Sea by Ships Convention OILPOL 54 is the precursor to MARPOL 73\78 and until recently was the convention Jamaica proposed to rely on to protect its marine environment.[219]

One of the major differences between MARPOL 73\78 and OIL POL 54 is that in the latter convention, regulation and enforcement was left entirely up to the flag state and there was no requirement for ships to carry monitoring equipment. Jamaica would not therefore be able to take action against foreign ships to prosecute the conventions provisions.

Under MARPOL 73/78 Jamaica will be able to exercise certain rights as a coastal state over all vessels over a certain size as the convention is not limited to tankers. All vessels over 400 gross tonnes are required to carry an oily water separator for discharges from machinery spaces and discharges of oily water are limited to 15 parts per million within 12 miles of the

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[218] The 1954 Convention for the Prevention of Pollution of the Sea by Oil.

[219] The Clean Sea Bill incorporated the provisions of OILPOL 54 prior to its indefinite suspension in order to take advantage of MARPOL 73/78.

coastline and 100 parts per million beyond 12 miles.[220]

OILPOL 54 as its name states is limited to the prevention of oil pollution and is therefore narrow in scope. The MARPOL 73/78 convention incorporates the provsions of OILPOL 54 in addition to covering a host of other types of marine pollution and is therefore far superior to OILPOL 54.

Jamaica presented its instruments of ratification of MARPOL73/78 in 1991 and is obliged to implement the provisions of Annex 1 and 2 which are a condition of accession to the Convention.[221]

As Jamaica hopes to increase its transhipment and cruise tonnage, the remaining Annexes namely harmful substances in packaged form, sewage and garbage[222] should also be adopted.

c. OBLIGATIONS

(i) Reception Facilities

Under Annex 1 ports are obliged to provide reception facilities to receive oily waste and oily water from ships using the port.[223]This provision has become the Achilles heel for many countries like Jamaica

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[220] Tankers over 150 GRT are also required to carry monitoring equipment for their discharges from tank washings and ballast operations.

[221] Annex 1 covers oil discharges and Annex 2 covers noxious liquid substances in bulk.

[222] Annexes 3,4,and 5, respectively.

[223] Similar facilities are required for ship generated garbage.

who find it difficult to construct or acquire these facilities. The estimated costs for constructing such facilities until the year 2000 are US $84 million per year[224] but this figure is likely to vary from country to country.

The granting of Special Area status in the Caribbean makes the requirement for such facilities even more important as the 'no discharge' rules can only be enforced if adequate reception facilities are available.

As the United States Coast Guard becomes more vigilant in enforcing pollution laws on cruise ships, the disposal of their waste in the Caribbean Sea (outside of the jurisdiction of the United States) will become more attractive than it is already, especially since it is be cheaper than using the facilities in the United States.

This will pose a problem to the Caribbean islands which, in the absence of reception facilities will not be able to seek the aid of MARPOL 73/78. The construction of reception facilities will be no easy task for some islands where the local population in the tourist area generates far less sewage and garbage than the large cruise ships.[225]

In Canada the problem of providing reception facilities is not necessarily one of finance but it was found to be uneconomical for the hundreds of small and medium size ports that dot its vast coastline. Their approach to the problem was to inform the ships of where ports along their route had such facilities and request

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[224] Manfred Nauke and Geoffrey Holland, "The Role and Development of Global Marine Conventions; Two Case Histories." Marine Pollution Bulletin 25: 1992: 77.

[225] Only Venezuela and Trinidad and Tobago have adequate Reception facilities.

them to proceed there in lieu of providing new facilities.

Cruise ship routes are circuitous and involve many calls in a relatively short period of time. A concerted effort to provide reception facilitates in a designated port may be an option that could be investigated.

(ii) Enforcement

Pollution prevention officers will be the most important persons involved in the implementation of MARPOL 73/78. The tasks of prevention, control, investigation and prosecution will devolve upon them and total reliance will be placed on their skill and discretion to decide whether or not to initiate legal proceedings to enforce the provisions of the relevant legislation.

The nature of their investigations will also determine the outcome of the case and therefore these officers must be fully cognizant of their powers and relevant procedures which must be outlined in detail to remove any shadow of uncertainty.

One such power, that of intervening in the various maritime zones, should be sufficiently outlined and in accordance with international practice.

Experienced P and I representatives and attorneys representing the shipowner will converge on the locus of any incident and attempt to protect their insured's or clients interests. In these situations the pollution prevention officer must be au fait with their rights as well.

Proper training will be essential for such persons to be able to make professional judgements as the fulfilment of their tasks should not cause any undue delays to ships.

(iii) Reporting

Every party to MARPOL 73/78 is mandated to provide reports of incidents and the investigations and the methods of reporting must be in accordance with the Protocol to the Annex.

d. Discharge Standards

In Canada conflicts arose when the discharge levels permissible under their legislation on vessel source pollution control in the Great Lakes were dissimilar to the discharge levels for land based sources of pollution. Ship borne waste could therefore be received by reception facilities and subsequently released back into the marine environment within the bounds of the law.

Rationalisation of the discharge levels permissible under all legislation affecting marine pollution could be a wise decision in order to remove any conflicts which may arise out of the discrepancies.

e. Penalties

In the same vein, penalties under the various acts should not be too dissimilar. The penalties should reduce the desire of the shipowners to weigh the cost of prosecution against the cost of delaying a ship by proceeding to a reception facility. Often the fine imposed on the ship which is found guilty is less than the cost of delaying the ship and the ship will find it more 'profitable' to pollute.

The convention states that penalties "shall be adequate in severity to discourage violations". The penalties should reflect the intentions of the shipowner

with regard to the incident and if his actions are found to be calculated the penalties should be akin to exemplary damages.

The penalty for failure to report should also attract fines which are as high as the fine for committing the offence. The regulations should grant the court some creativity in determining the penalty by including some guidelines.

Sufficiently high penalties will also provide the support needed for the pollution prevention officers to carry out their investigatory tasks comprehensively.With low penalties the resources spent to initiate the legal process will far exceed the result of the process and will tend to frustrate the officers.

f. Cooperation

Effective cooperation with the United States Coast Guard and the oil ports of the states bordering the Gulf of Mexico will play a major role in enforcing the provisions of MARPOL and other conventions.

Almost all of the tanker traffic which traverses Jamaican waters will have their next port of call at one of the Gulf ports and it is only with their kind cooperation that establishment of guilt and the enforcement can take place.

4.4.2 RESPONSE

Responding to a spill will occur after preventive measures have failed. The major international legal instrument dealing with spill response is the Oil Pollution Preparedness and Response Convention of 1990 (OPRC). Of major importance too is the International

Convention relating to Intervention on the High Seas in Cases of Oil Pollution Casualties 1969 (Intervention Convention). Jamaica has acceded to the latter convention.

Most of the countries in the Wider Caribbean have already ratified the OPRC convention and it is important for Jamaica to follow suit bearing in mind the importance that regional cooperation plays in its success.

A. The Oil Pollution Preparedness and Response Convention 1990 (OPRC).

This convention is an attempt to improve the existing international arrangement for combating major incidents or threats of marine pollution.

The problems of uncertainty of jurisdiction and inaction experienced in the Exxon Valdez incident are generally addressed by this convention which inter alia, stresses the importance of prompt and effective action to minimise the damage caused by oil spills.[226]

(i) BENEFITS

The benefits that will accrue to Jamaica are invaluable and will flow from the fundamental principle of international and regional cooperation that underlines the convention. The benefits include participation in research and development, the exchange of information, education and training and technical cooperation in the area of oil spill response. These benefits (the cost of which will be subsidised by the region) will enable Jamaica to have available the latest spill response technology and data in addition to the

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[226] Preamble to the Convention.

local and foreign expertise to apply it in the event of an incident.

Legally based joint action by neighbouring states having similar response systems will reduce the difficulties posed by cross boundary incidents. The Nestucca incident in Canada exposed these difficulties and resulted in grave pollution. The pollution traversed both Canada and the United States of America whose legal systems are not too dissimilar but the absence of detailed plans resulted in delay and consequent grave pollution.

The legal systems of Jamaica and its neighbours Cuba and Haiti are very dissimilar and the standardisation brought by the convention will overcome obstacles imposed by the differing legal systems.

Article 6 of the convention provides for parties, through bilateral or multilateral agreements, to establish an arrangement to coordinate the response to a pollution incident while Article 7 allows for a party to request assistance. The reimbursement of costs of such assistance is addressed in the Annex to the convention.

Jamaica's surveillance capabilities are insufficient to adequately monitor the territorial sea much less the Exclusive Economic Zone for oil pollution incidents.[227] The 'early warning system' that the convention envisages through regional cooperation will therefore boost those capabilities.

The convention is limited to oil spills, but the 1990 conference resolved, inter alia, that the convention's provisions could be extended to other

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[227] Jamaica National Report on the Environment Presented to UNCED, Brazil 1992. Government of Jamaica 1992.

hazardous substances.[228] The ambitions of the conference to extend the convention's scope will not be easy due to the difficulties faced in defining hazardous substances.

(ii) OBLIGATIONS

The obligations which Jamaica would have to fulfil as a party to the convention include;

(a) Establishing a national system for combating oil pollution incidents including the designation of a competent national authority and the establishment of a national contingency plan.

(b) Establishing procedures for Governments and ships for reporting oil pollution incidents

(c) Requiring the port authority and operators of oil handling facilities to have oil pollution emergency plans or similar arrangements which are coordinated with the national and regional systems for preparedness and response.

(d) Reporting requirements for persons in charge of ships, port authorities and civil aircraft pilots, of actual discharge or threatened discharges of oil pollution.

(e) Informing states likely to be affected by the pollution incident of the details of the incident and the action that has been taken or will be taken.

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[228] Law of the Sea Report of the Secretary General A\46\ 724. December 5, 1991. p.24.

(f) The taking of legal or administrative measures to facilitate:

a. the arrival, utilisation and departure from its territory of ships, aircraft, equipment and personnel, and other requirements for dealing with the pollution incident; and

b. the expeditious movement into, through and out of its territory of personnel materials and equipment referred to in subparagraph (a) above.

B. Analysis of obligations

1. There is already in place a national oil spill contingency plan for Jamaica and the competent authorities would be the Office of Disaster Preparedness and the Jamaica Defence Force Coast Guard. These designations appear to be informal at this time and therefore legislation giving a Minister of Government power to designate such authorities, would be necessary. The provisions of the legislation must be compatible with similar legislation of other parties to the convention.

2. The reporting procedures may mutatis mutandis be applied to non oil spills, but the role and jurisdiction of the Natural Resources Conservation Authority relative to that played by the designated competent authority must be clearly defined in the legislation.

Simple reporting procedures may have to be established for artisanal fishermen who must be urged to look out for evidence of pollution and convinced of the value of their surveillance to their ultimate survival.

This obligation should also be reflected in the fisheries legislation.

3. The oil terminals in Jamaica have oil spill recovery plans close examination is needed to ensure they are consistent with the guidelines developed by the IMO[229] which the OPRC requests should be taken into account.

Legislation will standardise the oil pollution emergency plans since they are obligated to be consistent with the national system for response.

Again it may be wise to standardise non-oil emergency plans through similar legislation so that prompt action can for example be taken in the event of discharges from bauxite and alumina terminals.

4. Reporting obligations for the polluter, whether it be an oil handling facility operator or master of a vessel should be supported by stiff penalties. Guilty persons do not readily report their crime and the cost of non reporting should encourage the polluter to report the incident and pay for the clean up operations.

5. The government's obligation to assess oil spill reports received and thereafter inform states likely to be affected by it of the details and action, amounts to a state responsibility and is therefore very serious.

Failure to fulfil the obligations will amount to a breach of the convention and the government may find its self contributing to the damages claimed for clean up costs and losses suffered as result of the pollution.

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[229] Manual on Oil Pollution, Section 11- Contingency Planning.

It is important for Jamaica to enter into joint agreements with its neighbours so that a lead agency will be immediately acknowledged in the event that a spill affects more than one jurisdiction.

6. The facilitation of expeditious movement of personnel and equipment in and out of the country is required if the quick and effective action promoted by the convention is to be realised.

Cumbersome custom clearance procedures, long stays in warehouses with consequent storage charges, losses and pilferage, and low capabilities of clearing and forwarding which are from time to time be experienced by exporters and importers of goods, are unacceptable under the convention.

The **Customs Act of Jamaica** and the regulations made thereunder need to be examined closely to see if amendments will have to be made to provide special arrangements for oil spill recovery equipment.

Immigration procedures should also recognize and facilitate the expeditious movement of oil spill personnel.

The polluter pays principle is applicable in response efforts. Marine pollution prevention legislation should not only give the legal authority and responsibility to respond to a single office or organization, but should also make it an obligation on the polluter to clean up the spill.

With these provisions in place it will be the task of the relevant government agency to identify the vessel responsible for the spill as the first objective so that the costs incurred in the response efforts can be recovered.

4.4.3 INTERVENTION

The OPRC presumes that states will have a legal basis for responding to an incident when it speaks of 'taking action' or 'rendering assistance', although it is silent on the question of intervention.

The Law of the Sea Convention provides the legal basis for responding to pollution incidents in the Territorial Sea and EEZ,[230] but this right is limited by evidential burdens which have to be satisfied.

The International Convention relating to Intervention on the high seas in Cases of Oil Pollution Casualties, 1969 (Intervention 1969) and its Protocol of 1973,[231] were developed to facilitate the taking of action or rendering of assistance by a coastal state where there is a casualty.

Jamaica ratified this convention in 1991 and under Article 1 will be able to 'take measures on the high sea to prevent, mitigate or eliminate grave and imminent danger to its coastline or related interests from pollution or threat of pollution of the sea by oil ...'

'Related interests' under the convention covers the major interests that Jamaica needs to protect from a pollution incident, namely the fishing industry, tourist attractions and the marine flora and fauna.[232]

This convention provides Jamaica with the ability to respond to and control spills immediately after the incident. This will increase the chances of recovering most or all of the pollutants which would not have had

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[230] Articles 220 & 221.

[231] Protocol Relating to Intervention on the High seas in Cases of Pollution by substances other than Oil 1973 (Intervention Protocol 1973).

[232] Article ii.

the chance to disperse.[233]

More importantly there is no evidential burden limiting the taking of immediate action as is the case for taking action under the Law of the Sea Convention. The ability to take precautionary action without infringing the freedom of the high seas principle allows the state to take preventive measures instead of response measures.

Intervention based purely on environmental grounds enhances the common law which only allows compensatory remedies where a proprietary interest has been affected.[234]

a. Obligations

(i). Consultation

The Intervention Convention is inextricably linked with the OPRC Convention and requires effective consultation and communication by the coastal state with:

i. the flag state
ii. IMO
iii. other states who may be affected by the casualty and
iv. interests within the country before any action is taken.

The legislative provisions for i, ii and iii above

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[233] After 8 hours the recovery rate is very low. Inreview with Lisa Keller. Environment Canada, February 1992.

[234] Abecassis loc cit., p. 88.

will be the same as for the OPRC convention but iv highlights the need for the tourism and fishing industry to become involved in marine pollution prevention. These industries cannot continue to benefit from resources owned by the crown and not contribute to pollution prevention.

The obligations of fishermen in surveillance has been mentioned above but there appears to be no place for hoteliers, resort businesses and their associations in the marine pollution prevention picture.

If government is obliged to consult these interests on proposed measures for intervention they must be prepared to make a contribution to the response efforts similar to the oil and chemical industry although such a duty would not be based on the polluter pays or other legal principles.

Cooperation between the local government as the central government's representative in the resort areas and these tourism related interests should be encouraged in the area of marine pollution response.

b. Mode of Intervention

Article V of the Intervention Convention states that the measures taken must be proportionate to the damage actual or threatened to it. Certain criteria must be taken into account in considering whether the measures are in fact proportionate to the damage.

Failure to observe the criteria may expose the government to legal suits involving claims for damage to 'others'[235] which is a wide class of claimants.

The provision of dispute settlement options will

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[235] Article VI.

enable the government, if found in contravention of the convention, to arrive at settlements with no undue costs.

4.4.4 COMPENSATION

Compensation is the third and last line of defence in marine pollution management. The success of efforts to prevent and respond to marine pollution especially accidental marine pollution is dictated to a large extent by external conditions present at the site of the spill. Pollution damage will always be a high possibility.

The OPRC Convention appreciates this fact and in its preamble speaks to the compelling need to ratify the International Convention on Civil Liability for Oil Pollution Damage (CLC), 1969 and the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage (Fund),1971 along with their protocols.[236]

1. CLC 1969

Under this convention owners of ships belonging to a contracting party, carrying persistent oil (eg. crude oil, heavy diesel oil and lubricating oil) in bulk will be strictly liable (no proof of fault) for any pollution damage caused by the escape of its cargo.

In order to escape liability the shipowner must bring himself with the exceptions listed under Article

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[236] The OPRC Convention refers to the 1984 Protocols which have been superseded by the 1992 Protocols.

111 of the convention.

Additionally compulsory liability insurance or other financial guarantee is required from ships carrying over 2000 tons of oil and this sum will be equivalent to the limit of its liability.[237] A certificate evidencing such requirements must be carried by ships of contracting parties as well as ships flying the flag of a state which is not a party to the convention. The limit of liability is determined by the ship's tonnage.

2. Fund 1971

The regime of compensation under this convention is administered by the **International Oil Pollution Compensation Fund (IOPC FUND)** and therefore states party to the convention are automatically members of the IOPC Fund.

The Fund Convention provides compensation for pollution damage to the extent that the compensation under the CLC is inadequate[238] and differs from that convention in that it consists of contributions from oil importers. The burden of liability in claims arising out of a serious pollution incident will therefore be shared between both ship owner and cargo interests when such claims exceed the CLC limits.

3. The Protocols[239]

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[237] Article VII (1).

[238] Fund Convention Article 2.

[239] See generally, International Oil Pollution Compensation Fund : General Information on Liability and Compensation for oil Pollution Damage. IOPC FUND. January 1993.

The Protocols to both conventions have been subject to many amendments culminating with those adopted by the 1992 conference.

The main amendments arising out of that conference include;

a. An increase in the limit of compensation payable by the CLC to 59.7 SDR's and by the IOPC fund to 135 million SDR'S ($US 186 million).

b. An extension in the geographical scope of the conventions to include the EEZ.

c. Compensation for pollution damage is extended to spills of persistent oil from unladen tankers.

d. Acceptance of claims for costs incurred in preventive measures where no spill of oil has actually occurred. Recovery however is dependent on whether there was a grave threat of imminent danger of pollution damage.

e. A new definition of pollution damage.

These amendments will provide Jamaica with the opportunity of obtaining compensation for pollution damage occurring in its EEZ, caused by tankers in ballast.

Unlike the 1976 Protocols however, Jamaican claimants under the 1992 Protocols have the burden of showing that the shipowner caused the incident intentionally or recklessly for the limitation of liability to be broken.

One may ask why contribute to the IOPC Fund when the

Protection and Indemnity Clubs are now offering $US 500 million plus an extra $US 200 million coverage for oil pollution risks which is way above the CLC and Fund limits.

The sum may be attractive but the Caribbean case involving the Vistabella barge serves to remind us that there are many vessels which may not be entered with any P and I clubs. Owners like that of the Vistabella may be hard to find and the vessel itself may not be able to cover the amount of damages claimed.

The CLC and Fund convention provide a sense of security that is absent when the claimant is left exposed to the shipowner and or his insurer. The right of subrogation under the Fund convention is even more important when one considers the battery of experienced P & I Club pollution attorneys (who will most likely arrive at the scene before the claimants) pitted against anxiety stricken claimants.

The IOPC Fund also enjoys an enviable reputation of providing prompt compensation which is necessary when incidents attract much media attention and public pressure for assistance to the human and 'non human' victims.

The Amoco Cadiz accident of 1978 is a prime example of the alternative to the CLC and FUND conventions. In that case a settlement was reached after fourteen (14) years of litigation,[240] at a cost which Jamaican claimants could ill afford.

Of major importance is its superiority over the common law in the area of marine pollution. The weakness and uncertainty of the common law in this area will only result in expensive litigation and this can be

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[240] Interview with Alfred Popp Q.C. Ministry of Justice, Canada. February 1993.

avoided when recovery is based on the principles adopted by the IOPC FUND.

4. Obligations of CLC and FUND Conventions

a. Maintenance of navigational aids.

The owner of a polluting vessel may be exempted from liability if he brings himself within the exceptions provided in the convention.

One of such exceptions is when the pollution damage is " wholly caused by the negligence or other wrongful act of any Government or other authority responsible for the maintenance of lights or other navigational aids in the exercise of that function".[241]

It is therefore incumbent on the Port Authority of Jamaica, as the authority responsible for the maintenance of navigational aids, to ensure that such aids are maintained in proper working order.

In the "Tsesis",[242] a case involving a Soviet tanker which grounded on an uncharted rock in Swedish waters, it was held that the Swedish government contributed to the pollution damage by their negligence in failing to provide accurate charts. The Soviet shipowner Successfully sought the aid of a similar provision in the Swedish law to avoid being found strictly liable for the pollution damage.

Pollution damage resulting from an incident could easily cause grave damage and negligence on the part of the Port Authority to pursue its duties under the act

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[241] CLC Convention Art.111(c).

[242] Christpher Hill, Maritime Law (London: Lloyds of London 1989): 291.

may have the result of the Jamaican government having to bear its own losses.

b. Contributions

When a state becomes a member of the Fund, an initial contribution is required which is based on the amount of oil received in the country in a particular year. The amount payable is calculated on the basis of (US$0.0043) per tonne. If a member state has not received over 150,000 tonnes of oil in the year preceding that in which it became a member of the fund no initial amount is required.

An annual contribution is also levied by the Fund and such payments are also dependent on the amount of contributing oil received.

c. Notification of legal action

When legal action is taken against the shipowners or his insurers to recover damages, the Fund is to be notified of the action in accordance with Article 7.6 of the convention. The IOPC Fund will thereafter exercise its right to intervene as a party to the legal proceedings.[243]

d. Limitation Period

Proceedings must be brought within the three (3) years of the date on which the damage occurred and not more than six years after the incident occurred.

e. Documentation

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[243] Fund Convention Art. 7.4.

Documentation must be conclusive and where it does not exclude other sources the IOPC will incur no obligation to pay compensation under Article 4.2(b)

In the TOLMIROS case[244] the Swedish government took action against the Greek vessel after 220 tonnes of oil came ashore in Gothenburg. The evidence presented was held by the IOPC Fund to not exclude other sources and the Swedish claims were rejected. This case shows that conclusive documentation is very important.

5. Analysis of Obligations

Based on the obligations above and the requirements of shipowners to provide compulsory liability insurance, Jamaica will be obtaining free insurance for oil pollution risks with low obligations by becoming a party to the conventions. Jamaica imported 18.6 million barrels of oil in 1991 and would therefore contribute minimally (approximately $US 2000) to the Fund Convention. It should be noted also that the limits of the Fund have never been succeeded but for two incidents in its history.

6. CLC and FUND v TOVALOP and CRISTAL

The oil importing companies at present contribute to the TOVALOP and CRISTAL compensatory agreements developed by the oil industry.

The scope of application of both regimes are similar to that of the CLC and Fund conventions save that the industry schemes cover pure threat situations and spills from tankers in ballast. However the maximum

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[244] IOPC FUND Annual Report, 1992, p. 39 & 40.

compensation available under TOVALOP and CRISTAL is lower than that of the CLC and Fund conventions and the claimant under CRISTAL must have taken all reasonable steps to obtain compensation from other sources be for CRISTAL will come to its assistance.

Jamaican oil Importers will not have to pay more in the way of contributions if they decide to continue with the CRISTAL agreement subsequent to Jamaica's ratification of the CLC and Fund conventions as they may be reimbursed by CRISTAL for their contributions to the IOPC Fund.

This is in keeping with the spirit of the voluntary industry schemes which were developed to complement the CLC and FUND convention until they achieved world wide acceptance.

For that reason the demise of these voluntary schemes is imminent and they are due to expire on February 20,1994. The chairman of the International Tanker Owners Pollution Federation Ltd (ITOPF) which operates the schemes has himself stated that any further extension of the agreements would be of a short duration and that CLC and Fund conventions are 'the only way forward that can guarantee a stable and effective, long term solution for governments and claimants alike.'[245]

With such words Jamaica has no alternative but to ratify the conventions as soon as possible.

7. Limitations of the Conventions

The CLC convention provides a comprehensive regime for compensation which is substantially superior to the

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[245] Peter Goulandris, "Time to look at the Protocols", Ocean Orbit April 1993.

common law remedies.This convention however, was drafted to cure a specific evil and therefore is limited in scope. Some of the limitations are listed below;

a. The CLC convention considers spills of persistent oil from oil tankers and therefore incidents involving bunker oil from ships other than tankers are not covered.

b. Damage caused by non persistent oil (gasoline, light diesel oil, kerosene) is not covered.

c. Non oil spills are not covered.

d. 'Mystery Spills' are not covered.

Based on the records of pollution incidents in Jamaica which have been mentioned above, spills from oil tankers are not the only incidents to be guarded against. It is probable that spills will occur from all manner of ships while discharging cargo in addition to spillages of bunker oil which may occur from 'non tankers'.

In 1989 the New Zealand Caribbean (a container ship), collided with a pier in North Vancouver thereby discharging bunker fuel oil into the Vancouver Harbour.[246]

Other Canadian incidents causing pollution damage or incurring costs for remedial measures taken, include an Indian flag bulk carrier which discharged fuel following bunkering, a United States flag tank landing craft which discharged 3,800 gallons of diesel fuel, threatening a lobster fishery, and a collision between a Chinese flag bulk carrier and a Japanese flag factory ship in a

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[246] Ship-source Oil Pollution Fund Annual Report 1991-1992 p. p11.

fishing zone which incurred costs and expenses exceeding CAN.$4,000,000.[247]

Cruise ship tonnage is increasing in the Caribbean region and so are the sizes of cruise ships which are increasing in order to maximise economies of scale. The incident involving RCCL's Nordic Prince which caused an oil slick of 450 metres in Bermuda serves to remind us that cruise ships which are not covered by the convnetion can, by their sheer size, cause oil spills of significance.[248]

It is not unlikely, with the increase in transhipment tonnage being planned for, that a containership could become involved in a collision or allision causing pollution damage in the Kingston Harbour. That type of incident would also not be covered by the Fund.

One may question the need to guard against non persistent oil which will disperse very quickly leaving little or no readily visible damage. The cases listed above provide the answer by showing that such oils may threaten the opening of a lobster season or may occur immediately prior to harvesting in oyster, mussel or other fisheries operations.

The tourist trade was referred to as being dictated by public perception and whether the damage is persistent or shortlived substantial losses will still occur.

'Mystery spills' are spills from unidentified sources. These spills may devastate small fishermen or other persons who have no resources to rehabilitate

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[247] ibid.

[248] Shipping and the Environment, Lloyds Shipping Economist June 1993.

themselves in the absence of compensation from the polluter. The IOPC Fund will not and cannot satisfy claims where no polluter is identified and the persons who suffer losses will have to bear them. Mystery fish kills have occurred more than once in Jamaica and there is a need for some measure of compensation for those persons who suffer damage and loss from those incidents.

The limitations addressed above do not detract from the very important function played by the CLC and FUND Conventions but emphasize the need for further legislative provisions to fully satisfy the needs of the country.

8. Admissibility of Claims

The major obstacle that Jamaican claimants under the IOPC Fund will be themselves. The Fund will only render claims admissible or acceptable when they are made according to their guidelines and principles.

Over the years the IOPC has developed guiding principles for the admissibility of claims and it is wise therefore the Attorney General and privaate persons to be au fait with these principles as well as the direction the 'IOPC FUND law' is taking.

The membership of the IOPC Fund spans many families of law and legal systems and the legal principles that are applied by the Director and the Executive Committee are sui generis international.

It has been stated above that Conventions have an 'international currency of their own' and must be interpreted in that context and a similar observation may be made with regards to the legal principles applied by the IOPC Fund.

As a result, this International compensation regime

has two major advantages. In the first instance it is far advanced to the Common Law in the area of pollution prevention, and secondly, its principles are influenced by the negotiations between the claimants and the director.

In the absence of an out of court settlement much reliance will depend on the decisions of the Jamaican courts which will be based on the interpretation of the legislation incorporating the conventions and general principles of Jamaican law governing the admissibility of claims. Of primary importance will be the court's interpretation of "pollution damage".[249]

Jamaica must take full advantage of the opportunity to negotiate and the progressive state of the law applied by the IOPC FUND, especially in the area of economic loss and environmental damage. These areas, as discussed above, are yet to be appreciated by the common law.[250]

The Claims Manual published by the IOPC Fund serves as a guide for the filing of claims including the contents and mode of presenting claims. These claims include costs for clean up operations and preventative measures,Damage to property, Additional costs and fixed costs, salvage operations,loss of earnings and damage to the environment.

9. TYPES OF CLAIMS

All claims will flow from the interpretation of pollution damage in the CLC and FUND conventions. Articles 1.6 and 1.7 read;

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[249] CLC Convention. Article 1.6.

[250] See Chapter 2 above.

1.6 "'Pollution damage' means loss or damage caused outside the ship carrying oil by contamination resulting from the escape or discharge of oil from the ship, wherever such escape or discharge may occur, and includes the costs of preventive measures and further loss or damage caused by preventive measures."

1.7 "'Preventive measures' means any reasonable measures taken by any persons after the incident has occurred to prevent or minimize pollution damage."

The interpretation of these articles is not strict and the infamous Italian courts and claimants have exercised the minds of the legal advisors of the FUND by giving various interpretations to pollution damage.[251] Jamaican courts will also have to give interpretation to it but such interpretation must be consistent with the spirit of the conventions and the attitude of the IOPC FUND towards their provisions.

a. Pure Economic Loss

The Fund has appreciated the fact that certain claims that are unrelated to property damage will have 'far reaching consequences'[252] and has paid compensation in respect to them.

The IOPC FUND however pays particular attention to the fact that only 'damage by contamination' is covered in the definition of pollution and a limit is therefore placed on the recovery of compensation for pure economic loss.

In the Tanio case the IOPC FUND rejected claims from a commune for lost tax revenues due to the

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[251] See generally, Fund/EXC.34/2. which considered claims arising from the Haven incident in Genoa, Italy.

[252] FUND/EXC.34/2. March 1, 1993 paragraph 3.12.

reduction in income of business man as a result of the incident. They stated that in the absence of documentation, proof of such losses was difficult.

(i) Hotel and Other Tourist Resort services

In the Tanio case claims for loss of income from hotels and restaurants and shopkeepers at seaside resorts were deemed admissible by the fund.

The IOPC FUND is still considering whether a claim for the cost of an action plan involving advertisements to reassure customers of the quality of Shetland fish products, fell within 'preventive measures' under the conventions.

This claim arose from the Braer incident and a similar claim could arise from the tourism industry in Jamaica, which plays a role equivalent to that of the fishing industry in the Shetlands.

The Haven case has led to claims by Tourist agents for loss of commission, cancellations and for an extra advertisement to counteract the negative impact of the incident. The admissibility of these claims have not been considered by the Fund but the presence of accurate and sufficient documentary proof will determine the final decision.

(ii) Fishermen

Pure economic loss claims by fishermen will be admissible by the Fund as long as there is proof that the claimant was actually prevented from fishing and sufferered quantifiable loss as a result of the incident.[253]

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[253] ibid., para.3.13.

It appears that claims made by four fish processors who were deprived of a supply of fish from the exclusion zone created after the Braer incident, will be accepted by the IOPC FUND. This is in spite of the fact that they fell within the category of pure economic loss. The IOPC FUND has treated these claims on equal footing with claims by hoteliers and restaurateurs.[254]

b. Environmental Damage

The Italian government submitted claims valued at £45 million for environmental damage arising from the Haven incident. The jury is still out on the question whether these claims will be satisfied by the Fund but the absence of supporting documentary evidence will be fatal.

Recovery for environmental damage is very slim as the attitude of the Assembly towards this area was made known in a resolution adopted in 1980. The resolution stated that the assessment of compensation for damage to the marine environment is not to be made on the basis of an abstract quantification of damage calculated in accordance with theoretical models.[255]

Sufficient and reliable Documentation of losses suffered will be the single most important factor determining the success or failure of claims before the IOPC Fund.

Jamaican claimants must also be warned that only claimants who have a legal right to a claim in Jamaica will be able to succeed. Jamaican law must therefore be

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[254] FUND \EXC .34\5\ ADD.2, pararaph 3.29.

[255] Resolution No. 3 1980.

developed so as not to obstruct claimants in their quest for compensation.

4.5 SUMMARY OF CHAPTER FOUR

It was claimed by a senior attorney that Jamaica is 'pregnant with possibilities' for protecting its marine environment because implementing legislation would be based on the final text of the major marine pollution treaties.

This statement was made in 1980 but is relevant today because there appears to have been a miscarriage in the legislative process.

The obligations of the conventions concerning prevention, response and compensation are not impossible to fulfil and their costs are totally overshadowed by the benefits to be derived.

Where the conventions fail to address areas of concern to Jamaica, the implementing legislation should take cognizance of them.

CHAPTER FIVE

SOME SUGGESTIONS FOR MARINE POLLUTION LEGISLATION

5.1 Introduction

Legislation incorporating international treaties but at the same time reflecting the peculiar threats and opportunities facing Jamaica will form the legal basis for anti pollution activities.

The legislation must not only reflect the urgent need to protect the marine environment from pollution but must also facilitate development that is sustainable. The spirit of the legislation must therefore appreciate the need for shipping and other industrial activities to operate without unreasonable obstacles.

5.2 The Clean Sea Bill

Jamaican marine pollution law will be incorporated in the Clean Sea Bill. As mentioned earlier, the passage of this Bill had been delayed to take cognisance of the final text of the Law of the Sea Convention of 1982 and more recently the International Convention for the Prevention of Pollution from Ships (MARPOL 73/78).

The failure to pass the Bill into law may however have put Jamaica in an advantageous position. The writer believes that apart from the entry into force of the International Convention Relating to Liability for the Carriage of Hazardous and Noxious Substances at Sea

(HNS Convention,1984) all the International conventions on vessel source pollution control have reached maturity and no further major amendments are likely.

There is no excuse now for delaying the drafting of this Bill as there will be a high level of certainty that the legislation will be in harmony with acceptable international rules.

The Clean Sea Bill will incorporate MARPOL 73/78, OPRC 90, the Intervention Convention,London Dumping Convntion and the Civil Liability and Fund Conventions and therefore the legislative provisions as they relate to these conventions, will be identical to the articles of these conventions.

There are certain other provisions that the writer believes should be included in the Bill which will give better protection to the peculiar marine environment related interests of Jamaica. These provisions will attempt to fill the lacunae left by the conventions which were drafted to deal with specific issues.

5.3.0 Proposals for the Clean Sea Bill.

5.3.1 Policy

The writer believes that the policy of the Jamaican Government, namely to prohibit all forms of oil and hazardous substance pollution in the coastal zone, Territorial Sea and Exclusive Economic Zone of the Country should be expressed in the legislation. With such a statement of policy, the provisions of the Bill will be put in perspective and the spirit of the act will be more evident to those persons it will affect.

5.3.2 SCOPE

a. Vessels

The description of vessels that come under the provisions of the act should be very wide.

Many vessels are not covered by MARPOL 73/78 due to their size or peculiar nature such as barges and sport fishing vessels. The Vistabella pollution incident in 1991 was caused by a barge and therefore potential risk of pollution caused by these vessels warrants their inclusion in the legislation.

In the previous chapter it was shown that many vessels such as container ships cruise ships, bulk carriers and ships carrying non-persistent oil and hazardous substances are not covered by the CLC and Fund Conventions. These vessels have been shown to be potential sources of serious pollution incidents and must therefore fall under the scope of the liability and compensation provisions of the Bill.

b. Geographic Area

The Clean Sea bill should apply to all foreign flag and Jamaican vessels calling at Jamaican ports. Specific reference should be given to its applicability to vessels transiting the Territorial Sea and Exclusive Economic Zone, bearing in mind the fact that the greatest risk of serious pollution of the marine environment of Jamaica will be posed by foreign flag ships traversing the EEZ.

The Exclusive Economic Zone Act of 1991 gives the relevant minister power to make regulations on marine pollution prevention and these regulations must be consistent with those made under the Clean Sea Bill.

The Territorial Sea Act of 1971 should be amended to specifically include the marine pollution measures

found in the Law of the Sea Convention of 1982 and the Clean Sea Bill should be consistent with the provisions of this Act as well.

The writer suggested that a case could be made for establishing certain ecologically sensitive areas such as the Kingston Harbour as Particularly Sensitive Sea Areas. In these areas the discharge criteria could be made more strict than those found under the Conventions.

c. Pollutants.

The definition of pollutants should not only be consistent with those found in the various conventions but also harmonized with the definitions found in other legislation such as the NRCA Act.

5.3.3 Liability

Persons who can be found liable under the Bill should include owners and operators of vessels and facilities and these persons should be subject to both criminal and civil liability for their actions. Present Jamaican legislation fails to incorporate civil liability provisions which is a serious omission.

5.3.4 Pollution damage

Liability for pollution damage should be strict (absence of fault). This will avoid the problems involved in relieving the burden of proof which can make enforcement very difficult. The use of Strict liability is also consistent with the provisions of the CLC and Fund Conventions.

5.3.5 Damages Recoverable

The Common Law remedies for marine pollution have been shown to be inadequate and the legal principles currently applied by the IOPC FUND when assessing claims are definitely superior.

It may be wise to provide statutory remedies to cure the deficiency of the legislation which are consistent with those available under international regimes.

These heads of damage include:

1. the costs incurred in preventing or minimising pollution damage;

2. Clean up costs;

3. Losses resulting from the destruction of real and personal property;

4. Economic losses. This would be limited to persons who directly depend on the marine resources affected for their livelihood such as fishermen and seaside resort owners, and

5. Damage to Natural resources. The measure of damages in this case would be the costs reasonably incurred by the state in restoration activities. Stewardship of the damages awarded under this head will be very important and safeguards should be in place to ensure that it used only for the designated activities.

5.3.5 Enforcement

The Bill should grant power in the relevant Minister

of Government to designate enforcement officers under the Act. The powers of these enforcement officers should be clearly outlined as it concerns powers related to boarding, inspection and detention of vessels as well as overseeing loading and unloading operations.

Harmonisation of Jamaican environmental law is very important where enforcement is concerned. There are a myriad of enforcement bodies designated under the various Acts and Bills and their relationship to each other should be made clear so that scarce resources will not be wasted due to overlapping.

Under the Port Authority Bill discussed above, persons designated under that Bill are given powers of boarding and inspection. It is important therefore that this Bill and the Clean Sea Bill be reconciled and harmonised so that there will be no jurisdictional conflicts causing undue delay to vessels.

5.3.6 Fines

The level of fines that the court can award will play a significant role in deterring marine pollution and enforcement of the regulations in general. The Clean Sea Bill's provisions on fines must not only be up to date in terms of the amount of fines that can be awarded but should also reflect the concept of fines in environmental regulation. Fines in Environmental law should not only punish but serve as a means of developing an environmental ethic in the polluter.

Fines should reflect the attitude of the liable person to his polluting activities. Paying a fine may be calculated by the liable person to be more profitable than the cost of delaying the vessel. Fines must therefore be sufficiently high to prevent such decisions being contemplated and a form of exemplary damages

make calculated decisions to pollute.

The fines for failing to immediately report incidents to the authorities should also invite very high fines under the Bill. The level of fines should encourage immediate reporting of incidents which will in turn permit timely and effective response measures.

5.3.7 Orders of the Court

The Canadian Fisheries Act[256] provides some useful provisions which can guide the court when making orders after a person is convicted of an offence under the Act.

The provision gives the court the discretion to make a number of orders having regard to "the nature of the offence and the circumstances surrounding its commission"[257]

These orders include:

> "(d) directing the person to pay the Minister an amount of money as compensation, in whole or in part, for the cost of any remedial or preventive action taken by or caused to have been taken on behalf of the Minister as a result of the commission of the offence;
>
> (e) directing the person to perform community service in order with any reasonable conditions that may be specified in the order;
>
> (f) directing the person to pay... an amount of money the court considers appropriate for the

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[256] R.S.C. F-14,s.1.

[257] s. 79.2

purpose of promoting the proper management and control... or conservation and protection of...[the marine environment]."[258]

These provisions will be more relevant to land based polluters but will ensure that criminal offenders will directly contribute to marine environment activities in lieu of paying a fine which becomes lost in the Consolidated Fund operated by the government.

The development of an Environmental Ethic is a long term preventive measure. The ability of the court to make the orders mentioned above will aid in the development of such an ethic as the polluter will become directly involved in marine environment management.

5.3.8 Locus Standi

At present only the Attorney General's department, through the relator action, can initiate legal actions for marine pollution that affects the public interest.

The problems associated with the relator action and the limited resources of the department has been discussed in Chapter 2. In that chapter, the need to make legislative provision for 'citizen' suits was mentioned to help eliminate the relator action problems.

Citizen suits have been used in the Federal Water Pollution Control Act,[259] to allow interested persons or organisations to commence civil suits for violation of the provisions of the Act. Additionally 'citizen suits' may be initiated against government

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[258] s.79.2

[259] 33 U.S.C (1988) s. 505.

agencies who fail to carry out their responsibilities under the Act and therefore such a provision serves to ensure that the legal framework operates efficiently.

Damages awarded from successful litigation will not be granted to the plaintiffs and therefore public interest and not personal gain will be the motive behind initiating suits.

The legislation however should make provision for the recovery of Attorneys and expert fees incurred by the plaintiffs in litigation.[260]

5.3.9 Response

The Clean Sea Bill should give the government the right to respond to and remove spilled oil and hazardous material after a pollution incident occurs.

When serious pollution incidents occur the government should be given the right under Bill, to coordinate the clean up effort.

In keeping with this responsibility the Customs Act should also be amended to facilitate the smooth and expeditious movement of response equipment and personnel in and out of the country.

5.4 FUNDING MARINE POLLUTION ACTIVITIES

At present oil cargo interests contribute to the TOVALOP and CRISTAL schemes. These schemes are due to be phased out in the near future and it is important that these interests contribute to the IOPC FUND when

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[260] Cameron,James., Environmental Public Interest Litigation.CECLD Series - EC Environment and Planning Law (1991) p.281

the CLC and FUND Conventions are ratified.

'Non oil' interests such as the Bauxite, Alumina and chemical industries (which have caused major spills in Jamaica) could, along with the oil industry be made to contribute to a single local fund out of which pollution damage claims could be satisfied in addition to the CLC and Fund obligations.

It is likely that a fund similar to the IOPC Fund, will be created by the HNS Convention when it is completed. The financial obligations of Jamaica to such a fund could also be satisfied out of the local fund which the writer proposes.

It is likely that the contributions to this local fund made by each of the industries mentioned above will be very small and after a short period the interest generated from the fund will be sufficient to cover the international obligations without the need for further contributions. This has been the case in Canada with the Ship Source Oil Pollution Fund.

The resort owners who have so much to lose from a serious pollution incident and at the same time freely benefit from pollution prevention activities can be made to contribute to this fund. This fund would also be used to compensate persons who suffer from 'mystery spills'.

5.5 SUMMARY OF CHAPTER FIVE

Jamaican marine pollution legislation must embody the provisions of international marine environmental law and at the same time reflect the peculiar needs of the marine environment.

In order to reflect the peculiar needs of Jamaica some suggestions on the possible scope and content of the law were made. These suggestions including broadening the

scope of the legislation to cover all possible threats and making specific provisions for the type of claims that may arise out of a pollution incident.

The legislation should also reflect the policy of the government on marine environment protection. Its provisions should therefore not only seek to punish offenders but also create in them a sense of awareness for the marine environment.

CHAPTER SIX

CONCLUSION

Throughout this study the writer has attempted to make three points. These points, simply stated are that the threats to the marine environment of Jamaica are real and serious, the present legal framework for marine environment protection is inadequate and in addressing both challenges, the international approach is the way forward.

The need for action to be taken is urgent because the marine environment upon which the Jamaican economy relies is seriously threatened by land based and vessel source pollution.

Marine pollution is not new to Jamaica and statistics indicate that the probability of a serious pollution incident occurring is not very high. However the low probability of occurrence of an incident that can have catastrophic consequences necessitates the establishment of marine environment protection legislation.

Jamaica is pregnant with opportunities for establishing such legislation which, on its passing, will be adequate and at the same time consistent with international rules.

This is because the present international marine environmental law precedents covering prevention, response and compensation issues have been tried, tested and proven to be reasonably adequate.

It is therefore left to the legal framework to

incorporate these precedents into national legislation and thereafter implement and enforce the laws.

Ratification and incorporation of the major Conventions have however proven to be a difficult task due to the low profile which marine pollution (especially vessel source pollution) holds in the Government's eyes.

The absence of a single marine policy is a cause and effect of this indifferent attitude to marine pollution and there is need for such a policy to coordinate and focus the different sectors which have marine environment responsibilities.

An examination of the existing legal remedies indicate that they cannot be relied on and there is an urgent need for legislation reflecting a more modern approach, to be developed.

The absence of a serious pollution incident to test the effectiveness of the present legislative framework and the Common Law remedies on which the legal system relies, has not provide any reason for the status quo to change but Jamaica cannot afford to experience such a test.

The development of new legislation is stymied by the apparent lack of a specific legislative process to follow and the unavailability of competent personnel to carry out the various steps involved.

There needs to be a review of the present legislative process and the establishment of a well documented system which sets out in detail each step in the process and the role of each person involved.

The legislative process should not end with the production of local replicas of Conventions but legislation developed should reflect the peculiar needs and threats facing the Country. With this in mind, the

obligations and limitations of the major conventions were examined and their appropriateness for Jamaican marine pollution legislation was discussed.

Conventions were developed to respond to particular challenges facing the marine environment and are therefore limited in scope.

Suggestions were therefore made for Jamaican marine pollution legislation to include, inter alia, provisions governing compensation for pollution damage caused by cruise and containerships whose tonnage in Jamaican waters is projected to increase in the near future.

The Clean Sea Bill has been designated as the piece of legislation that will govern vessel source and to some extent land based pollution.

Total reliance will therefore be placed on this Act when passed, to protect the interests of Jamaica and it is necessary that it be comprehensive in nature.

Recommendations were therefore made for the inclusion of provisions which will provide teeth in the law and at the same time contribute to the sustainable development of the marine environment.

Harmonisation of the law is very important especially since Jamaica has recently passed and is on the verge of passing a number of pieces of legislation that have marine environment significance.

If the roles of each Act and the authorities designated thereunder are not reconciled and harmonised the Clean Sea Act will be 'born in confusion and raised in controvery'

Legislation no matter how carefully drafted must be used wisely by those who have been given the responsibility to enforce it.

The Jamaica Defence Coast Guard will be the agency

most likely to enforce the marine pollution law and should therefore be given the resources to properly train personnel and provide them with the necessary equipment.

Additionally the awareness of the Judges and attorneys who will be involved in marine pollution cases must be increased. It makes no sense having provisions for high fines when Judges exercise their discretion in favour of low fines for the reason that they do not appreciate marine pollution issues.

Training will therefore be very important in ensuring that the legislation receives the full support that it requires.

Jamaica must transform itself from being a 'receiving' country to a 'participating country'. Over the decades Jamaica has received its laws, consultants, IMO teams and conventions with no apparent commensurate developments in the area of marine pollution law. Jamaica must participate in the work of international bodies such as the IMO so that the expertise in marine pollution prevention can be developed.

'Justice delayed is justice denied.' Jamaica is definitely not ready to experience a serious pollution incident and legislative action should be taken now before it is too late.

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APPENDIX 1

JAMAICA AT A GLANCE

HISTORY

1494 Columbus arrived in Jamaica.
1655 The British expelled the Spanish settlers
1962 Independence from Great Britain was achieved.

GEOGRAPHY

Jamaica is an Island situated at 18 N and 77 W

Area	- 4244 sq miles
Climate	- Tropical Maritime (Average temp 27 C)
Capital	- Kingston
POPULATION	- 2.4 million
LANGUAGE	- English
CURRENCY	- Jamaican dollar. (US$ 1.00 = J$ 26.00)
RELIGION	- Christian
GOVERNMENT	- Parliamentary Democracy
PRINCIPAL PORTS	- Kingston and Montego Bay.

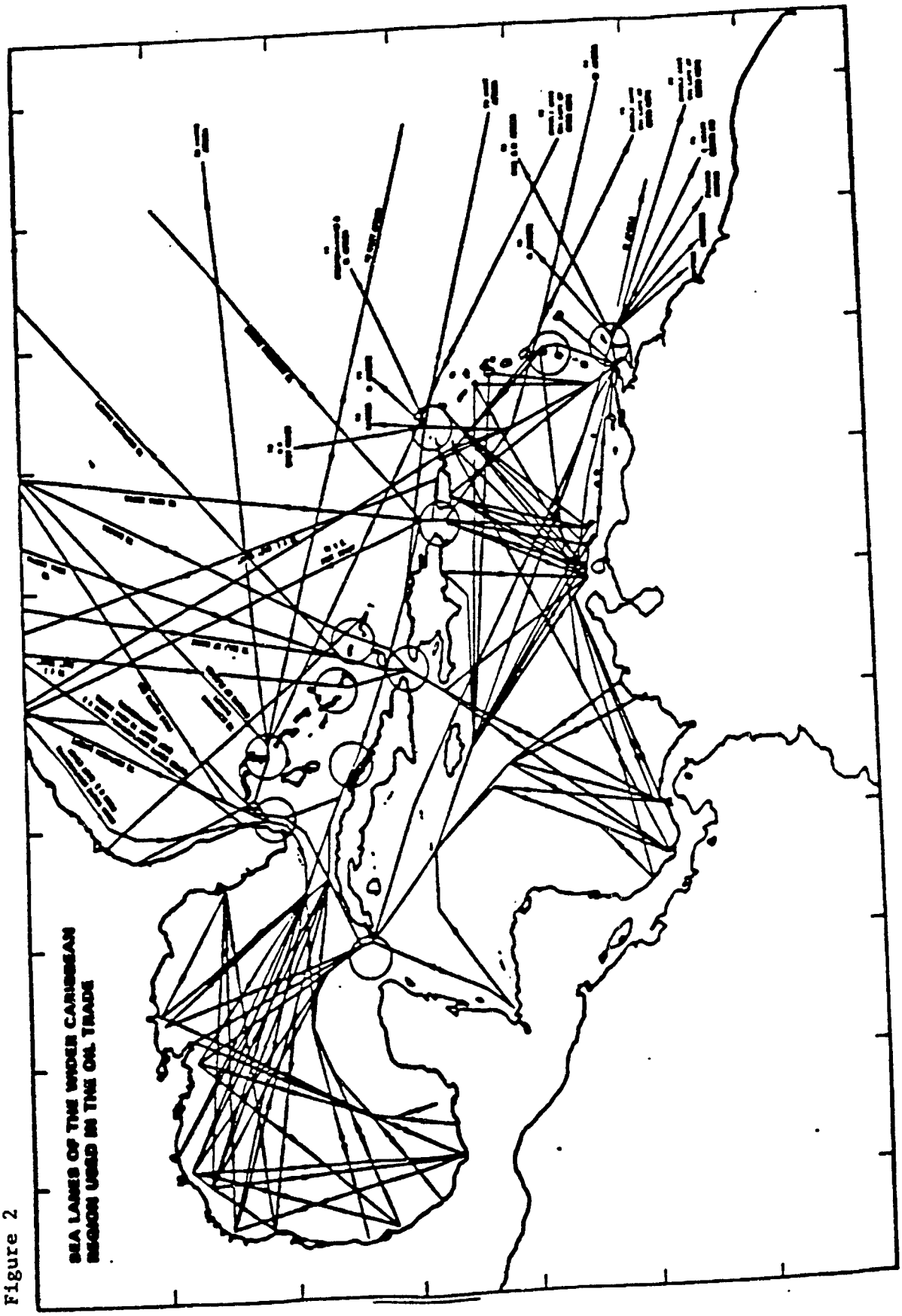

Figure 2

(Reinburg, 1984)