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Recent Developments--Recent Decisions

Philip B. Barr, Jr.

Michael Stukenberg

RECENT DEVELOPMENTS

ENVIRONMENTAL LAW—A SURVEY OF INTERNATIONAL MARINE POLLUTION CONTROLS: PRELUDE TO GENEVA

I. INTRODUCTION

All nations recognize the enormous problem of marine pollution. The sources of marine pollution are definable, and there are methods by which these sources may be restricted. Virtually all mankind would prefer less pollution to more. Prevention, however, becomes less attractive in light of its costs, which assume both political and economic characteristics. Varying political and economic climates coupled with problems of sovereignty and national self-interest render agreement on the imposition of standards difficult. This Recent Development will chart past and present efforts at the preservation of the marine environment, consider the issues confronting the United Nations Third Conference on the Law of the Sea and the United Nations Environment Program, and attempt to predict future approaches to this area of international law.

II. BACKGROUND: PIECEMEAL APPROACH OF THE PAST

A. *United Nations Sponsorship*

Treaties, conventions, and agreements relative to marine pollution are myriad. Summaries of modern international efforts to prevent pollution generally begin with the 1954 Convention for the Prevention of Pollution of the Sea by Oil.[1] This convention defines the classes of regulated vessels,[2] prohibited discharges,[3] protected

1. Convention for the Prevention of Pollution of the Sea by Oil, May 12, 1954, [1961] 3 U.S.T. 2989; T.I.A.S. 4900; 327 U.N.T.S. 3. 1962 Amendments: [1966] 2 U.S.T. 1523; T.I.A.S. 6109; 600 U.N.T.S. 322 [hereinafter cited as 1954 Convention]. BNA INTERNATIONAL ENVIRONMENTAL GUIDE 21:0301 (1974) [hereinafter cited as BNA].

2. 1954 Convention, arts. II, III.

3. 1954 Convention, arts. III, V. Articles IV and V are exceptions to discharge prohibition.

areas,[4] methods of detecting and reporting violations,[5] and violation prosecution procedure.[6] The provisions for protection of only limited ocean areas,[7] detection of violations by use of vessel-based log books,[8] and prosecution of violations by use flag state[9] severely lessened the convention's impact. Amendments proposed in 1969[10] and 1971[11] would strengthen and further detail the convention's provisions, but are not yet in force.[12]

Three United Nations Conventions, drafted at the First Law of the Sea Conference in 1958 and now in force, incorporate provisions designed to protect the marine environment. The Convention on the Territorial Sea and the Contiguous Zone[13] allows coastal states to circumscribe the right of innocent passage by laws and regulations in conformity with international law.[14] Provisions of the Convention on the High Seas[15] limit oil pollution[16] and waste disposal [17] and allow only flag state jurisdiction.[18] The Convention

4. 1954 Convention, Annex A. Sixteen specific protected areas are listed, in addition to the general protected area extending 50 miles from land.

5. 1954 Convention, arts. IX, X.

6. 1954 Convention, arts. IX, X and XIII. Flag state prosecution is preferred. If necessary, disputes are resolved in the International Court of Justice or by arbitration.

7. 1954 Convention, art. III & Annex A.

8. 1954 Convention, art. IX & Annex B.

9. 1954 Convention, art. X(2).

10. BNA at 21:0321. Quantitative limits are placed upon discharges and log book procedure is stricter.

11. BNA at 21:0341. These amendments would regulate tank arrangements and size requirements for oil cargo.

12. These amendments were not yet in force as of December 1973. BNA at 21:0321.

13. April 29, 1958, [1964] 2 U.S.T. 1606; T.I.A.S. 5639; 516 U.N.T.S. 205. BNA at 21:0901. This Convention is in force and had 43 parties as of January 1, 1974 (Treaties in Force at 355 (1974)) [hereinafter cited as Territorial Sea Convention].

14. Territorial Sea Convention, arts. 14, 16, 17.

15. April 29, 1958, [1962] 2 U.S.T. 2312; T.I.A.S. 5200; 450 U.N.T.S. 82. BNA at 21:0501. This Convention is in force and had 53 parties as of January 1, 1974 (Treaties in Force at 354 (1974)) [hereinafter cited as High Seas Convention].

16. High Seas Convention, art. 24. This article calls for regulations to prevent discharge of oil from vessels, pipelines, or seabed exploitations.

17. High Seas Convention, art. 25. Radioactive waste is the only specifically named pollutant, but provision is also made to prevent disposal of undefined "other harmful agents."

18. High Seas Convention, arts. 6, 11.

on the Continental Shelf[19] limits exploration and exploitation to activities that will not interfere with essential oceanographic or scientific research, navigation, fishing, or the living resources of the sea.[20] Safety precautions with regard to sea life and navigation must accompany installations and devices on the shelf.[21]

The "Joint Group of Experts on the Scientific Aspects of Marine Pollution" (GESAMP) was created in March 1969 under United Nations auspices to advise its six supporting agencies on marine pollution.[22] In September 1969 the Intergovernmental Oceanographic Commission (IOC) submitted to the General Assembly a report,[23] which recommended structuring and coordination of scientific projects dealing with marine pollution.[24]

Three conventions resulted from a 1969 conference in Brussels sponsored by the Inter-Governmental Maritime Consultative Organization (IMCO). The first[25] would permit coastal states to take emergency action under certain conditions against vessels on the high seas "to prevent, mitigate, or eliminate any grave and immi-

19. April 29, 1958, [1964] 1 U.S.T. 471; T.I.A.S. 5578; 499 U.N.T.S. 311. BNA at 21:0701. This Convention is in force and had 52 parties as of January 1, 1974 (Treaties in Force at 354 (1974)) [hereinafter cited as Shelf Convention].

20. Shelf Convention, art. 5(1),(7),(8). The Convention allows establishment of 500 meter safety zones around installations to prevent interference. Art. 5(2), (3).

21. Shelf Convention, art. 5(2),(3),(5),(6).

22. *See* Brown, *International Law and Marine Pollution: Radioactive Waste and "Other Hazardous Substances,"* 11 NATURAL RESOURCES J. 239, 240 (1971) [hereinafter cited as Brown]. The six sponsoring agencies are the Inter-Governmental Maritime Consultative Organization, the Food and Agriculture Organization, the United Nations Educational, Scientific, and Cultural Organization, the World Health Organization, the World Meteorological Organization, and the International Atomic Energy Agency.

23. The Commission was authorized to prepare a "Comprehensive Outline of the Scope of the Long Term and Expanded Program of Oceanic Exploration and Research". *See* G.A. Res. 2467D, 23 U.N. GAOR Supp. 18, at 17, U.N. Doc. A/7218 (1968).

24. Brown *supra* note 22, at 238.

25. The International Convention Relating to Intervention on the High Seas in Case of Oil Pollution Casualties, *reproduced in*, 9 INT'L LEGAL MATERIALS 25 (1970); BNA at 21:1301 [hereinafter cited as Casualty Convention]. This Convention had been signed by 36 parties, ratified by five, and was not in force as of December 1973 (BNA at 21:1301,02).

nent danger of oil pollution to their coastlines," but only after a marine accident has occurred.[26] The second[27] imposes strict liability on shipowners for damage due to oil discharged or allowed to escape into territorial seas of party states,[28] but exceptions[29] and a damage ceiling[30] limit its effectiveness. The convention optimistically provides for jurisdiction by the affected states.[31] The third[32] would create an international fund to provide relief to pollution victims. Allowable damages are limited,[33] and exceptions to liability of the fund are delineated.[34] Affected states would have enforcement jurisdiction.[35]

Since the 1969 Brussels Conference, various schemes have been presented in an attempt to achieve workable international marine

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26. Casualty Convention, art. I.

27. Convention on Civil Liability for Oil Pollution Damage, *reproduced in*, 9 INT'L LEGAL MATERIALS 45 (1970); BNA at 21:1501 [hereinafter cited as CLC]. This Convention had been signed by 32 parties, ratified by one, and was not in force as of December 1973 (BNA at 21:1501,03).

28. CLC, art. III.

29. CLC, art. III. The major exceptions are acts of war, natural phenomena "of an exceptional, inevitable, and irresistible character," sabotage, and governmental negligence with respect to navigational aids.

30. CLC, art. V. "[Damages] shall not in any event exceed 210 million francs [for any one incident]."

31. CLC. art. IX. Allowing enforcement by coastal rather than flag states should significantly increase CLC's effectiveness.

32. 1971 Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, *reproduced in*, 11 INT'L LEGAL MATERIALS 284 (1972); BNA at 21:1701 [hereinafter cited as Fund Convention]. This Convention has been signed by eighteen parties, ratified by none, and was not in force as of December 1973 (BNA at 21:1701,06). The Fund would supplement recoveries provided by the Civil Liability Convention (*see* note 27 *supra* and accompanying text) by placing liability upon oil cargo interests in addition to ship owners. Fund Convention, Preamble and art. 2.

33. "[T]he aggregate amount of compensation . . . shall in respect of any one incident be limited, so that the total sum of that amount and the amount of compensation actually paid under the Liability Convention . . . shall not exceed 450 million francs." Fund Convention, art. 4(4)(a).

34. Fund Convention, art. 5, 6. The Fund is not liable for indemnification if the incident or damage was caused in any measure by non-compliance of the vessel to listed Conventions (including the 1954 Convention, note 1 *supra*). There is also a statute of limitation.

35. Fund Convention, art. 7. Jurisdiction would be equivalent to similar CLC provisions. *See* note 31 *supra*.

pollution guidelines. A 1972 "Dumping Convention"[36] expanded jurisdiction,[37] broadened the definition of dumping and of controlled substances[38] and utilized a three-tiered substance classification.[39] The Convention contains problems relative to issuance of dumping permits, standards of liability, impartial dispute settlement and damage to "world resources."[40] Another pollution convention is designed to supersede the 1954 IMCO Pollution Convention.[41] Discharge, substances, vessels, and dumping are subject to more comprehensive definitions.[42] Application is broadened,[43] enforcement jurisdiction expanded,[44] and dispute settlement is dealt with via arbitration.[45] Criticism levelled at this convention has been technical in nature,[46] indicating the success of the

36. 1972 Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter, *reproduced in*, 11 INT'L LEGAL MATERIALS 1291 (1972); BNA at 21:1901 [hereinafter cited as Dumping Convention]. As of December 1973 this Convention had been signed by 48 parties and ratified by two. BNA at 21:1901,06. The Dumping Convention was enacted by the United States as 33 U.S.C. § 1401 (1974).

37. Dumping Convention, art. VII. Flag state jurisdiction is further eroded in this provision.

38. Dumping Convention, art. III.

39. Dumping Convention, art. IV. The dumping of a certain substance may be entirely prohibited, or require a special or general permit.

40. *See generally* Note, *Saving a Dying Sea? The London Convention on Ocean Dumping*, 7 CORNELL INT'L L.J. 44, 44-46 (1973). The basis and procedure for permit issuance could particularly cripple the Convention's effectiveness. Liberal standards or biased ministers would be an easy path to Convention relaxation.

41. 1973 International Convention for the Prevention of Pollution from Ships, art. 9, *reproduced in* 12 INT'L LEGAL MATERIALS 1319 (1973); BNA at 21:2301 [hereinafter cited as 1973 Convention]. Furthermore, "[n]othing in the present Convention shall prejudice the codification and development of the law of the sea by the United Nations Conference on the Law of the Sea." Art. 9(2).

42. 1973 Convention, art. 2. The Convention specifically leaves the topic of pollution by dumping to the Dumping Convention, *supra* note 36.

43. 1973 Convention, art. 3. This provision expands application to ships which are not entitled to fly the flag of a Party State, but who operate under the authority of a Party.

44. 1973 Convention, art. 4. Flag or injured state jurisdiction are provided for at the discretion of the injured state.

45. 1973 Convention, art. 10. Protocol II of the Convention sets forth ten articles describing the creation and function of an Arbitration Tribunal.

46. *See, e.g.*, Smith, *The Prevention of Pollution from Ships*, THE ENVIRONMENTAL J. 2, 35 (Jan. 1974).

drafters in creating a definitive document. The convention was opened for signature on January 15, 1974.[47]

B. *Regional Agreements*

Nations that share marine resources because of geographical proximity have begun to recognize common pollution problems. Response to these problems has taken various shapes. For example, the North Atlantic Treaty Organization (NATO) entered the environmental field in 1969 via its Committee on the Challenges of a Modern Society.[48] Employing a pilot program approach, the NATO Committee explored the topic of oil spills in its 1970 Brussels Colloquium on Pollution of the Sea by Oil Spills.[49] Another regional solution is attempted by the Agreement Concerning Pollution of the North Sea by Oil.[50] The North Sea Agreement establishes individual zones of responsibility that each party must administer.[51] Observation and communication are the primary purposes of the agreement.[52] Assistance in cleanup is encouraged, but a "best efforts" provision leaves the effectiveness of cleanup cooperation in doubt.[53] The Agreement contains no provision for *prevention* of pollution. The 1972 Oslo Convention for the Prevention of Marine Pollution by Dumping from Ships and Aircraft was

47. 12 INT'L LEGAL MATERIALS 1319 (1973).

48. BNA at 41:0902. The major emphasis of the NATO committee is the generation and exchange of environmental knowledge with a view to common action.

49. *See* Brown, *The Prevention and Control of Marine Pollution: A Progress Report*, 1 ANGLO-AMERICAN L.R. 53 (1972).

50. 704 U.N.T.S. 3, *reproduced in*, 9 INT'L LEGAL MATERIALS 359 (1970) [hereinafter cited as North Sea Agreement]. This agreement entered into force on August 9, 1969. Belgium, Denmark, France, the Federal Republic of Germany, the Netherlands, Norway, Sweden and the United Kingdom are parties.

51. North Sea Agreement, art. 6 & Annex. The division into zones is for the purpose of this agreement only. Article 6(5) provides that such division is not a basis for later precedent or argument concerning sovereignty or jurisdiction.

52. North Sea Agreement, arts. 4-6. Each Party is to inform the others of casualties in the North Sea, especially those within its respective zone, and of national pollution prevention measures.

53. North Sea Agreement, art. 7 provides: "Parties called upon for help in accordance with this article shall use their best endeavours to bring such assistance as is within their powers."

signed by twelve Northeast Atlantic states.[54] This convention requires party states to monitor dumping,[55] utilizes a three-tier substance classification,[56] and recites exceptions[57]—provisions that were adopted in modified form by the drafters of the 1972 Dumping Convention.[58] The 1974 Convention on the Protection of the Marine Environment of the Baltic Sea has been signed by seven states.[59] The convention includes comprehensive definitions of prohibited substances and discharges as well as a definitive settlement agreement.[60] Guidelines for the determination of damages were not resolved at the date of signing.[61]

C. *Bilateral Treaties*

Marine pollution control has recently become an area of cooperation between the United States and the Soviet Union.[62] A 1972

54. 1972 Oslo Convention for the Prevention of Marine Pollution by Dumping from Ships and Aircraft, *reproduced in*, 11 INT'L LEGAL MATERIALS 262 (1972) [hereinafter cited as Oslo Convention]. Party states are Belgium, Denmark, Finland, France, the Federal Republic of Germany, Iceland, the Netherlands, Norway, Portugal, Spain, Sweden, and the United Kingdom. Poland and the U.S.S.R. declined an invitation to join the Convention. 11 INT'L LEGAL MATERIALS 262 (1972).

55. Oslo Convention, art. 15. Monitoring will be undertaken by maritime inspection vessels and aircraft.

56. Oslo Convention, arts. 5-7. The dumping of Annex I substances is entirely prohibited, dumping of Annex II substances requires a specific permit, and dumping of Annex III substances requires a general permit.

57. Oslo Convention, arts. 8, 9. Emergencies and the disposal of trace amounts of contaminants in certain instances are excepted.

58. *See* notes 36-40 *supra*, and accompanying text.

59. Convention on the Protection of the Marine Environment of the Baltic Sea, 29 U.N. GAOR, Supp. 25, at 11 (note 9), U.N. Doc. A/9625 (1974). The signing occurred on the final day of the second session of the UNEP Governing Council.

60. U.N. Doc. A/CONF.62/C.3/L.1 at 4, 9 (1974). The Baltic Marine Environment Protection Commission was established to ensure the viability of the Convention. Dispute settlement is by negotiation, mediation, or by the International Court of Justice.

61. *Id.* at 9. The parties are to develop liability and remedy criteria and procedures.

62. 1972 Agreement Between the U.S. and the U.S.S.R. on Cooperation in the Field of Environmental Protection, art. 2, May 23, 1972, [1972] 1 U.S.T. 845; T.I.A.S. 7345; BNA at 31:0801 [hereinafter cited as U.S.-U.S.S.R. Agreement].

agreement anticipates joint study and development of coordinated projects in basic and applied sciences.[63] Means of implementation are not embodied in the agreement, however, and will require further negotiation.[64]

The United States has concluded a similar agreement with the Federal Republic of Germany.[65] Environmental informational exchange, data gathering, and establishment of standards are the most tangible goals of the agreement,[66] with provision for future cooperation in environmental quality maintenance and control of marine pollution.[67]

D. *Unilateral Measures*

Canada's Arctic Waters Pollution Prevention Act became effective August 2, 1972.[68] This unilateral measure empowers Canadian officials to enforce standards designed to prevent oil pollution in an area extending 100 miles from the Arctic coast of Canada.[69] Canada has attempted to soften the controversial tone of this Act by promulgating standards that "would be reasonable, effective, and generally acceptable to the international community."[70] These

63. U.S.-U.S.S.R. Agreement, art. 3. Personnel and document exchange, conferences, projects in basic and applied sciences, and other forms of cooperation to be agreed upon at a later date were enunciated as goals of the agreement.

64. *See generally Soviet-U.S. Environmental Protection Agreement*, 14 NATURAL RESOURCES J. 276 (1974).

65. 1974 Agreement Between the Government of the United States of America and the Government of the Federal Republic of Germany on Cooperation in Environmental Affairs, *reproduced in*, 13 INT'L LEGAL MATERIALS 598 (1974) [hereinafter cited as U.S.-German Agreement].

66. U.S.-German Agreement, art. III. The projected forms of cooperation include: (1) meetings, symposia, and conferences on policy issues and possible projects; (2) implementation of projects; (3) information and data exchange relative to all aspects of environmental progress; (4) exchange of personnel; and (5) coordination of specific research activity.

67. U.S.-German Agreement, art. IV. Marine pollution is used as an example of an area of possible future cooperation, as are air pollution, solid waste management, pesticides, noise pollution, and water quality management.

68. Arctic Waters Pollution Prevention Act, S.C. 1970, c.67; BNA at 51: 1101,07, *reproduced in*, 9 INT'L LEGAL MATERIALS 543 (1970) [hereinafter cited as Canadian Act].

69. Canadian Act, art. 3.

70. For a Canadian's view of the Act *vis-à-vis* international laws see Beesley,

efforts, however, did not end the controversy over the broad jurisdictional claims made in the Act.[71]

Great Britain also took unilateral action toward pollution prevention by enacting the 1971 Prevention of Oil Pollution Act,[72] which prohibits discharge of defined oils into seas without and within United Kingdom territorial waters.[73] The shipping casualties provisions are an obvious response to the Torrey Canyon incident and claim broad powers when oil pollution threatens. In case of a defined accident situation,[74] certain preventive action[75] may be taken against ships that are neither registered in Great Britain nor within that country's territorial waters.[76]

Iceland has also adopted unilateral measures to curb marine pollution. The Icelandic Althing (Parliament) unanimously approved a Fisheries Jurisdiction Resolution authorizing the Government to "declare unilaterally a special jurisdiction with regard to pollution in the seas surrounding Iceland."[77]

E. *Nongovernmental Efforts*

Nongovernmental bodies have become involved in the study and prevention of marine pollution. The International Council of Scientific Unions[78] has classified pollution of the ocean and coastal

The Canadian Approach to International Environmental Law, XI CAN. Y.B. INT'L L. 6 (1973).

71. The United States response was immediate and negative: *See* Statement of Robert J. McCloskey, N.Y. Times, April 10, 1970, at 13, col. 3.

72. Prevention of Oil Pollution Act, c.60, (1971), *reproduced in,* 11 INT'L LEGAL MATERIALS 849 (1972) [hereinafter cited as U.K. Act].

73. U.K. Act, §§ 1, 2. The Act applies to crude, fuel, lubricating, and heavy diesel oils.

74. U.K. Act, § 12.1. The defined powers are available whenever necessary in event of an accident occurring to or in a ship which will cause pollution on a large scale in the applicable waters.

75. U.K. Act, §§ 12.3,4. Authorized actions range from route definition to sinking or destruction.

76. U.K. Act, § 16.

77. Resolution of Feb. 15, 1972, of the Althing on Fisheries Jurisdiction, § 5, *reproduced in,* 11 INT'L LEGAL MATERIALS 643 (1972).

78. The International Council is an "association of scientific unions, academies, national research councils, and related scientific and governmental institutions, aimed at coordinating and facilitating activities among these groups in the natural sciences," and the organization has formed an ad hoc committee on global human environment problems. BNA at 41:0901,02.

waters as a "[g]lobal threat against the whole planet."[79]

Private shipping interests have concluded two conventions to parallel those proposed by the 1969 Brussels Conference.[80] First, a voluntary agreement among tanker owners, TOVALOP,[81] applies to spills and threatened spills. TOVALOP requires tanker owners to clean up negligent spills or reimburse governments for reasonable cleanup costs. For threatened spills, signatories must either remove the threat or reimburse the government for reasonable expenses incurred in removing the threat.[82] There is a damage ceiling for any government recovery.[83] Withdrawal is allowed at any time, but presently 99 per cent of the tanker tonnage of the non-Communist world is bound,[84] and no owner had given notice of withdrawal as of early 1974.[85] The Contract Regarding an Interim Supplement to Tanker Liability for Oil Pollution (CRISTAL), in operation since April 1, 1971, presently supplements TOVALOP.[86] CRISTAL is an agreement among oil companies, as owners of oil cargo, to repay tanker owners for certain cleanup expenses and to supplement inadequate awards to parties damaged by oil pollution.[87] Certain conditions must be met in order for CRISTAL to apply,[88] and a ceiling is placed on damages awarded under the agreement.[89] Though parties may withdraw at any time "the receivers of well over 90 per cent of the world's cargoes of crude and fuel oil are presently parties to the agreement."[90]

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79. BNA at 41:0902.

80. CLC, *supra* note 27. Fund Convention, *supra* note 32.

81. Tanker Owners Voluntary Agreement Concerning Liability for Oil Pollution, Oct. 6, 1969. *See* Becker, *A Short Cruise on the Good Ships TOVALOP and CRISTAL*, 5 J. MAR. L. & COMM. 610 (1974).

82. TOVALOP, clause IV(A). *Id.* at 611.

83. *Id.* at 612. The ceiling per incident is 100 dollars per gross registered ton of the tanker involved or 10 million dollars, whichever is less.

84. *Id.* at 610.

85. *Id.* at 613.

86. CRISTAL would also supplement CLC (note 27 *supra*) if the latter comes into force. *Id.* at 614.

87. CRISTAL, clauses IV, V. *Id.* at 615.

88. There are three basic conditions: (1) ownership by a party to CRISTAL; (2) entry of the tanker in TOVALOP (prior to CLC ratification); and (3) tanker owner liability under the CLC definition. *Id.* at 615-16.

89. Thirty million dollars is the per incident ceiling. *Id.* at 616.

90. *Id.* at 614. CRISTAL will automatically terminate if the Fund Convention

III. Recent United Nations Approaches

A. *Stockholm Conference*

The 1972 Stockholm Conference on the Human Environment[91] adopted several significant recommendations. The Action Plan for the Human Environment contained specific recommendations concerning marine pollution: detailed exhortations to governments, existing agencies, and intergovernmental bodies to work together for the compilation of pollution data; establishment of an environmental monitoring system; promulgation of regulations; and restatement of the ultimate goal of eliminating marine pollution.[92] The Intergovernmental Working Group on Marine Pollution draft convention[93] on ocean dumping, though not adopted,[94] was included as an annex to the Conference report,[95] and was recommended as a guide for future conventions with special emphasis on the 1972 London Dumping Convention and the Law of the Sea Conference.[96] Also, a second Stockholm Conference was called for,[97] and a comprehensive institution and finances resolution recommending creation of a Governing Council for Environmental Programmes was adopted.[98]

(note 32 *supra*) comes into force. Furthermore, the administering body may terminate CRISTAL after five contract years if CLC (note 27 *supra*) has not come into force. *Id.* at 617-18.

91. *See* G.A. Res. 2398, 23 U.N. GAOR Supp. 18, at 2, U.N. Doc. A/7218 (1968) (calling for a Human Environment Conference); G.A. Res. 2581, 24 U.N. GAOR Supp. 30, at 44, U.N. Doc. A/7630 (1969) (establishing a Preparatory Committee for the Conference); G.A. Res. 2657, 25 U.N. GAOR Supp. 28, at 51, U.N. Doc. A/8028 (1970) (incorporating the Preparatory Committee's recommendations); and G.A. Res. 2850, 26 U.N. GAOR Supp. 29, at 72, U.N. Doc. A/8429 (1971) (approving the provisional Conference agenda and draft rules of procedure, requesting circulation of draft documents prior to the Conference, and inviting parties).

92. U.N. Doc. A/CONF.48/14/Rev.1, at 6, 22-24 (1972).

93. The Working Group had been established and charged with preparation of a draft convention prior to the Stockholm Conference. *See* Note, *Saving a Dying Sea? The London Conference on Ocean Dumping*, 7 Cornell Int'l L.J. 42, 42 n.57 (1973).

94. N.Y. Times, June 5, 1972, at 24, col. 8.

95. U.N. Doc. A/CONF.48/14/Rev.1 at 73 (1972).

96. *Id.* at 22.

97. *Id.* at 32.

98. *Id.* at 29.

B. *United Nations Environment Program (UNEP)*

Subsequent to the Stockholm Conference, the General Assembly created the United Nations Environment Program and its Governing Council.[99] In its first session, the Governing Council set policy objectives and program priorities and established the procedural, organizational, and institutional framework of the Program.[100] Detection and prevention of marine pollution are policy objectives, while oceans per se are fifth in overall priority.[101] The director's tasks in the field of marine pollution are to assess existing problems, survey ongoing conservation activities, identify sources of pollution, promote pollution control agreements, and develop a monitoring program.[102] In 1973 the General Assembly requested the Governing Council to survey living marine resources, to report on environmental protection of those resources, and to consider its role at the forthcoming Third Conference on the Law of the Sea.[103] During its 1974 session,[104] the Governing Council reached no consensus on its role in preservation of the marine environment, but many delegates advocated an active role for UNEP at the upcoming Conference in Caracas.[105]

C. *1974 Conference on the Law of the Sea*

Prior to the 1974 Conference, preparatory work was done by Subcommittee III of the Committee on the Peaceful Uses of the Sea-Bed and the Ocean Floor Beyond the Limits of National Jurisdiction, which created a working group to consider marine pollution solutions. Their work product and membership carried over to the Marine Environment subcommittee of Committee III at the LOS

99. *See* G.A. Res. 2997, 27 U.N. GAOR Supp. 30, at 43, U.N. Doc. A/8730 (1972). The resolution further established a secretariat and coordination board. *Id.* at 43-44. The secretariat is headquartered at Nairobi, Kenya. G.A. Res. 3004, 27 U.N. GAOR Supp. 30, at 48, U.N. Doc. A/8730 (1972).

100. 28 U.N. GAOR, Supp. 25, U.N. Doc. A/9025 (1973).

101. *Id.* at 37-42.

102. *Id.* at 42-43.

103. *See* G.A. Res. 3133, 28 U.N. GAOR Supp. 30, at 50, U.N. Doc. A/9030 (1973). *See also* U.N. Doc. A/CONF.48/14/Rev. 1 (1972) (on the Stockholm Conference recommendations).

104. 29 U.N. GAOR, Supp. 25, U.N. Doc. A/9625 (1974).

105. *Id.* at 5 (para. 18), 11 (para. 45), 13-14 (para. 57), 63 (para. (e)).

Conference, with hope that this head start foreshadowed a successful Conference.[106] When the Conference convened in Caracas, Committee III was charged with three agenda items: (1) Transfer of Technology; (2) Marine Scientific Research; and (3) Preservation of the Marine Environment.[107] The third topic was assigned to the Marine Environment subcommittee. Its initial problem was to define, or reach consensus, on the function of the Conference with respect to marine pollution. To define more clearly the Conference's function, Committee III devoted its first meetings to organization of work and delegate statements, but the role of the Conference in preservation of the marine environment was never clarified.[108] For example, Mr. Hernandez of Cuba expected the conference to "endorse the conventions of marine pollution . . . prepared under the auspices of IMCO . . . with provision for sanctions against the violation of its provisions . . . [as well as to] . . . establish a body that would regulate maritime activities, including pollution,"[109] in short, advocating a supranational regulatory agency. Under Hernandez' view the Conference function would be the integration of provisions already developed by other agencies. Mr. Barberan of Spain on the other hand looked to the Conference for "not merely a statement of principles on the maritime environment but a series of basic articles on pollution control and the preservation of the marine environment, which could later be supplemented and developed by regional or specialized agencies."[110] Advocating the converse of Hernandez' proposition, Barberan proposed the development of a body of regulations by the Conference and regulation by existing bodies.

Mr. Hassan O. Ahmed, UNEP Conference Observer, explained UNEP's role in preservation of the marine environment in terms of the divergent views of the function of the Conference.[111] Ahmed asserted that UNEP will attempt to add a new dimension to inter-

106. U.N. Doc. A/CONF.62/C.3/SR.1 (1974).

107. U.N. Doc. A/CONF.62/29, items 12-14 (1974). Preservation of the Marine Environment was one topic on the Plenary Agenda. *Id.*

108. U.N. Doc. A/CONF.62/C.3/SR.1-6 (1974).

109. U.N. Doc. A/CONF.62/C.3/SR.6 at 15, 16 (1974).

110. *Id.* at 17. This contrast is only exemplary; cursory examination of delegate statements reveals such conflict repeatedly. The Chairman of Committee III also acknowledged this function problem in his summary. *Id.* at 23-24.

111. *See* U.N. Doc. A/CONF.62/C.3/SR.14 at 4-7 (provisional) (1974); State-

natinal environmental cooperation by being a forum for coordination and action.[112] In addition, he stated that UNEP will not be a supranational regulatory agency but will "encourage, support, coordinate, and consolidate" actions of other international environmental protection agencies.[113] In effect, Ahmed has stated: (1) that UNEP will not compete with agencies *created* by the Law of the Sea Conference to regulate the marine environment, and (2) that if the Conference merely endorses *existing* conventions, it will be in direct competition with UNEP and by so doing will have effectively legislated away any marine environment protection powers to UNEP. That is, if the Conference could potentially draft substantive articles, but instead endorses existing conventions, it will have lost any chance of pre-empting UNEP as a forum for marine pollution protection. Ahmed also suggested that "the convention could recognize UNEP as the appropriate forum for the international community of States in its endeavor to establish both at the regional and the global levels, standards, rules and regulations for the prevention of marine pollution from land based sources."[114] This statement has three strong implications. First, the United Nations is a proper forum for drafting and implementing marine pollution regulations. Secondly, UNEP is the proper organ for controlling land-based marine pollution. Thirdly, UNEP is not the proper forum for control of marine-based sources of marine pollution. Left unstated, but uncontroverted, is the assumption that the Conference is the proper forum for the draft of a substantive convention on prevention of marine-based pollution of the sea. Ahmed's statement and its implications nicely answer the function problem of the Conference. It came late in the Conference, after the function problem had become manifest. His address provides a convenient way for the parent United Nations to propel the Conference toward codification of a comprehensive treaty on marine-based sources of marine pollution in 1975.

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ment of Mr. Hassan O. Ahmed, UNEP Observer, before Committee III of the Third United Nations Conference on the Law of the Sea, Caracas, Venezuela, August 9, 1974 [hereinafter cited as AHMED].

112. *Id.* at 5; AHMED at 2.

113. *Id.*; AHMED at 2-3.

114. *Id.* at 7; AHMED at 5.

Faced with divergent views of its own goals, the Marine Environment Subcommittee predictably accomplished little. Efforts by the subcommittee meeting in informal sessions resulted in common texts on seven draft articles.[115] The draft articles encompass: (1) the basic obligation to protect and preserve the marine environment; (2) the right of States to exploit their own natural resources; (3) the particular obligation of States to adopt measures to combat marine pollution; (4) the obligation not to transfer pollution from one area to another; (5) global and regional cooperation; (6) technical assistance; and (7) economic factors in respect of land-based sources of marine pollution.[116] The language used in the draft articles is predictedly broad and general in its purported regulation or restriction of activities.[117] The total output of Conference Committee III was minimal: isolation of the common texts alone; and an outline "Method of Work" for future sessions.[118]

IV. Conclusion

In 1974, Conference Committee III failed to eliminate any of the confusion surrounding preservation of the marine environment. A more meaningful result may be forthcoming, however, when the Conference reconvenes in Geneva in 1975. Detailed, stringent regulations with strong enforcement provisions are not expected. Instead, the Conference should result in a broadly worded convention. Such a convention would answer the function problem encountered in Caracas: in essence, no function specifically would be adopted. By its nature, the convention would be infused with detailed regulation at a later date. This solution would neither satisfy nor preclude any function for the Conference convention. Proponents of each competing view would be assured that their view

115. U.N. Doc. CRP/MP/15 (1974).

116. U.N. Doc. A/CONF.62/C.3/L (1974); U.N. Doc. CRP/MP/14/Rev.1 (1974).

117. The most specific of the draft articles is article III, which outlines particular obligations of States. In "detailing" the measures to be taken in pursuit of pollution minimization, part 4 is still extremely broad and general in its obligations. The measures called for are "those designed to minimize to the fullest possible extent" various instances of pollution. *Id.* art. III, part 4(a-d).

118. U.N. Doc. A/CONF.62/C.3/L (1974); U.N. Doc. CRP/MP/14/Rev.1 (1974); U.N. Doc. CRP/MP/15 (1974); U.N. Doc. CRP/MP/10 (1974).

ultimately may prevail. Similarly, those who favor stringent regulation and those who favor more relaxed standards could leave those differences for settlement at a later date. A broadly worded convention will at least acknowledge worldwide concern for protection of our seas and at most lead to homogenous worldwide standards. It leaves only the question of whether such an amorphous convention is better than no convention to all, since most differences will be ignored temporarily rather than reconciled.

*Philip B. Barr, Jr.**

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RECENT DECISIONS

JURISDICTION—FEDERAL MARITIME COMMISSION HAS JURISDICTION UNDER SECTION 15 OF THE SHIPPING ACT TO REVIEW ASSESSMENT FORMULAS IN COLLECTIVE BARGAINING AGREEMENTS

Plaintiffs, the New York Shipping Association (NYSA)[1] and the International Longshoremen's Association, AFL-CIO (ILA) filed a joint petition with the Federal Maritime Commission (FMC)[2] for an order declaring that a formula in their collective bargaining agreement was not subject to the filing or approval requirements of section 15 of the Shipping Act of 1916.[3] The formula in question established a method for assessing charges to fund a benefit plan created to mitigate the impact on longshoremen of unemployment

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1. NYSA is an organization of common carriers, stevedoring contractors, terminal operators, and other employers, representing the New York shipping industry. NYSA's principal function is to negotiate and to administer collective agreements with the appropriate longshoremen's union.

2. Originally the Shipping Act of 1916, ch. 451, 39 Stat. 728, *as amended*, 46 U.S.C. §§ 801, *et seq.* (1970), conferred jurisdiction to implement its regulatory provisions on the United States Shipping Board, an entity created by the Act. Jurisdiction was then transferred to the United States Board, Bureau of Department of Commerce (Exec. Order No. 6166 (1933)); to the United States Maritime Commission (Merchant Marine Act of 1936, ch. 858, § 201, 49 Stat. 1985); to the Federal Maritime Board (Reorganization Plan of 1950, §§ 103-05, 64 Stat. 1273); and finally to the Federal Maritime Commission (Reorganization Plan of 1961, § 103, 75 Stat. 840, *as amended*, 46 U.S.C.A. § 1111(a) (Supp. 1975)).

3. The Shipping Act of 1916, § 15, 46 U.S.C. § 814 (1970), *formerly* ch. 451, § 15, 39 Stat. 728 [hereinafter cited as Shipping Act]. Section 15 provides in pertinent part: "Every . . . person subject to this chapter shall file immediately with the Commission a true copy . . . of every agreement with another . . . person subject to this chapter . . . to which it may be a party or conform in whole or in part, fixing or regulating transportation rates or fares; [or] controlling, regulating, preventing, or destroying competition . . . .

"The Commission shall by order, after notice and hearing, disapprove, cancel or modify any agreement . . . that it finds to be unjustly discriminatory or unfair . . . or to operate to the detriment of the commerce of the United States, or to be contrary to the public interest, or to be in violation of this chapter, and shall approve all other agreements, modifications or cancellations . . . .

. . . .

"Any agreement and any modification or cancellation of any agreement not approved, or disapproved, by the Commission shall be unlawful, and agreements . . . shall be lawful only when and as long as approved by the Commission . . . ."

caused by technological innovation.[4] Petitioners alleged that the formula was not an agreement between persons subject to the Act[5] and, therefore, was not within the purview of section 15. In addition, they argued that because the assessment arrangement was part of the collective bargaining agreement between NYSA and ILA, it was exempt from the provisions of the Act in all respects.[6] With one member dissenting, the FMC found the parties subject

4. In the early 1960's labor sought to mitigate the growing loss of jobs due to mechanized methods of loading and unloading ships. Principal among these labor saving methods has been containerization. Containerization is the practice of loading and unloading cargo in containers holding up to forty tons of freight rather than item by item. This procedure reduces by approximately one-third the amount of labor required for a given job. Thus, the mitigation of the effects of the "container revolution" became the top priority of the ILA in the late 1960's. In 1968 the union agreed to mechanization in exchange for extensive fringe benefits intended to compensate for lost work opportunities. The 1968 plan, however, met with collection difficulties and disagreement among association members as to the proper allocation of costs among competing modes of cargo movement. Therefore, in 1971, the union demanded that it be permitted to take part in negotiating a new assessment and collection arrangement. In 1972, this demand resulted in an assessment formula that was incorporated into the collective bargaining agreement. The assessment formula provides for a charge on each ton of non-exempt cargo loaded or unloaded in the Port of New York. The assessment is collected from each carrier by the employer serving that carrier and paid into the NYSA Fringe Benefit Escrow Fund. For discussion of the nature of the assessment agreement and its background see *Transamerican Trailer Transport, Inc. v. Federal Maritime Comm'n,* 492 F.2d 617, 620-22 (D.C. Cir. 1974).

5. The term "person" for the purposes of the Shipping Act includes corporations, partnerships, associations, and "other person(s) subject to this chapter" who are "carrying on the business of forwarding or furnishing wharfarage, dock, warehouse, or other terminal facilities in connection with a common carrier by water." Shipping Act § 2, 46 U.S.C. § 801 (1970). Stevedoring contractors who are not terminal operators would apparently not come within this definition, although many are members of NYSA.

6. In a prior case, the FMC suggested that there may be instances in which national labor policy will call for exemption of certain collective bargaining agreements from the Act. United Stevedoring Corp. v. Boston Shipping Ass'n, 15 F.M.C. 33 (1971) (collective bargaining agreement allocating union labor in Port of Boston not subject to Shipping Act). *See* notes 30, 31 *infra* and accompanying text. The FMC, upon application or upon its own motion, may exempt any class of agreements between persons subject to the Shipping Act from the filing requirement if it finds that an exemption will not substantially impair effective regulation by the FMC; or that it is not unjustly discriminating; or that it is not detrimental to commerce. Shipping Act § 34(a), 46 U.S.C. § 833(a) (1970).

to the Act. Since the agreement directly and substantially affected competition under the Shipping Act, the FMC further asserted jurisdiction over the assessment under section 15.[7] On direct appeal to the Second Circuit Court of Appeals,[8] *held*, affirmed. Since FMC regulation of the assessment formula would have minimal impact on the collective bargaining process, whereas exempting the agreement from regulation would expose certain classes of shippers to potentially massive and inequitable cost increases, the assessment formula is subject to the filing and approval requirements of the Shipping Act.[9] *New York Shipping Association v. Federal Maritime Commission,* 495 F.2d 1215 (2d Cir.), *cert. denied*, 95 S. Ct. 224 (1974).

The Shipping Act gives the FMC primary jurisdiction to determine whether an agreement comes within the requirements of section 15 and to evaluate the legality of any agreement submitted to

7. As reported in *New York Shipping Ass'n v. Federal Maritime Comm'n,* 495 F.2d 1215, 1221 (1st Cir. 1974). The Commission, however, granted temporary approval to the assessment formula subject to a separate proceeding to determine its lawfulness under the Shipping Act. The Act prohibits discriminatory rates and other discriminatory acts which give "undue" or "unreasonable" advantage or disadvantage to any person, locality or type of traffic. Shipping Act, §§ 16, 17, 46 U.S.C. §§ 815, 816 (1970).

8. The Administrative Orders Review Act § 2(c), 28 U.S.C. § 2342(3) (1970) gives the court of appeals exclusive jurisdiction to directly review final orders of the FMC rendered under the Shipping Act.

9. Justice Friendly, writing for a unanimous court, first dealt with the preliminary issue of whether the Commission's conditional approval of the formula subject to a separate proceeding constituted a final order for the purpose of review within the meaning of the Administrative Orders Review Act § 2(c), 46 U.S.C. 2342(3) (1970). The court applied the tests developed by the Supreme Court in *Rochester Telephone Corp. v. United States*, 307 U.S. 125 (1939) (FCC order to show cause why Rochester should not be subject to FCC filing requirements final and reviewable) and *Frozen Food Express v. United States,* 351 U.S. 40 (1956) (ICC order declaring non-exempt goods carried by plaintiff's carriers final for review purposes). It then assessed the impact of the decision on the interests of the parties and decided that the order, although declaratory, "touches the vital interests" of the parties. In light of the strong probability that NYSA and ILA will be bargaining for a new agreement before review can be had, management and labor have a strong interest in knowing whether the assessment formula that may be included therein will be subject to Commission review. Therefore, the order was final and subject to review. 495 F.2d at 1218-20. *See also* 3 K. DAVIS, ADMINISTRATIVE LAW TREATISE, ch. 21 (1958, Supp.1970).

it pursuant to the section.[10] In dealing with collective bargaining agreements under section 15, the FMC first decides whether the parties and subject matter involved fall within the terms of the section.[11] If they do, the agreement in question must be filed with the Commission. The FMC then determines whether the proposed agreement complies with the Act. Determination of compliance involves, among others, antitrust considerations to which the FMC and the courts have been particularly sensitive. The Shipping Act gives the FMC broad powers to determine the antitrust implications of various agreements and proposals submitted for its approval.[12] The Act further prohibits discriminatory rates and any activity giving a party subject to the statute an unreasonable advantage.[13] In general, the FMC is charged with the responsibility of protecting the shipping public from conduct that is unjustly discriminatory or detrimental to commerce.[14] Nevertheless, prior to 1968, in apparent disregard of antitrust factors, the FMC interpreted its jurisdiction to exclude agreements to defer the costs of union benefit plans by assessing charges on shippers.[15] In 1968, the

10. Shipping Act § 15, 46 U.S.C. § 814 (1970). *See* Isbrandsten Co. v. United States, 211 F.2d 51 (D.C. Cir.), *cert. denied*, 347 U.S. 990 (1954) (FMC has primary jurisdiction under Shipping Act to determine legality of section 15 agreements).

11. *See* note 3 *supra*.

12. Shipping Act § 15, 46 U.S.C. § 814 (1970), *as amended*, 46 U.S.C. § 814 (Supp. 1974). An agreement filed with and approved by the Commission is immunized from challenge under the antitrust laws. Since the Act makes lawful those agreements approved by the FMC, its effect is to vest the FMC with power to shield agreements from antitrust attack. On the other hand, any agreement subject to section 15 filing that is not both filed and approved is unlawful and subject to antitrust attack. Carnation Co. v. Pacific Westbound Conference, 383 U.S. 213 (1966) (rate making agreements between shipping companies not approved by FMC subject to antitrust laws).

13. *See* note 7 *supra*.

14. *See* Federal Maritime Comm'n v. Seatrain Lines, Inc., 411 U.S. 726 (1973) (FMC must consider the antitrust implications of corporate merger agreements).

15. *E.g.*, Volkswagenwerk Aktiengesellschaft v. Marine Terminals Corp., 9 F.M.C. 77 (1965). The FMC held that an agreement creating a "mechanization fund" was not the kind of agreement required to be filed with the Commission. Without expressly requiring the association to pass the assessments on to the carriers and shippers, the formula would not come within the purview of the Shipping Act. On appeal the circuit court affirmed. Volkswagenwerk Aktiengesellschaft v. Marine Terminals Corp., 371 F.2d 747 (D.C. Cir. 1966).

Supreme Court overruled the FMC's restrictive interpretation of its jurisdiction in *Volkswagenwerk Aktiengesellschaft v. Federal Maritime Commission.*[16] The Court held that assessment agreements having more than a "de minimis or routine" effect on competition are subject to the prior approval of the FMC. Volkswagenwerk claimed that an assessment agreement among members of the employer's association created pursuant to a collective bargaining agreement between the association and the dock workers' union[17] was unenforceable because the assessment agreement had not been filed with the FMC. The Supreme Court felt that the Commission had taken an extremely narrow view of section 15, despite the section's expansive language. The Court instructed the Commission to go beyond the narrow issue of whether the assessment agreement per se affects competition and to consider the agreement in the context of economic realities that require most of the assessment charges to be passed on to the shippers.[18] Holding the assessment agreement subject to filing, the Court emphasized that the validity of the separate collective bargaining agreement was not at issue, since this was within the primary jurisdiction of the National Labor Relations Board.[19] Jurisdiction of the FMC was restricted to consideration of the possible effects of the assessment agreement upon commerce. In his concurring opinion, Justice Harlan offered a test for resolving jurisdictional conflicts between the FMC and the NLRB when the assessment agreement is contained within the collective bargaining agreement itself.[20] Harlan considered the central problem in *Volkswagenwerk* to be that of defining FMC jurisdiction in such a way that the Commission would not be improperly embroiled in labor matters.[21] He concluded, therefore, that should the FMC be called upon to consider an assessment within the collective bargaining agreement itself, it could properly do so if the assessment formula raised shipping problems

16. 390 U.S. 261 (1968).

17. The union agreed to use labor-saving devices and to eliminate certain restrictive work practices in consideration for the association's promise to establish a twenty-nine million dollar "mechanization fund" to mitigate the effect of technological unemployment.

18. 390 U.S. at 273-75.

19. 390 U.S. at 278.

20. 390 U.S. at 282-95.

21. 390 U.S. at 286.

logically distinct from the industry's labor problems.[22] Commission decisions following *Volkswagenwerk* indicated that the status of maritime collective bargaining agreements under the Shipping Act remained unsettled.[23] In *United Stevedoring Corp. v. Boston Shipping Association*[24] the FMC held agreements in a collective bargaining compact providing for allocation of longshoremen labor[25] to be subject to filing and approval under section 15. The Commission rejected arguments that longshoremen labor contracts are subject only to NLRB jurisdiction and that granting jurisdiction over these agreements to the FMC would cause a breakdown in the collective bargaining process.[26] The Commission found its ruling not only necessary for comprehensive regulation, but also imperative to comply with *Volkswagenwerk.*[27] When the Association sought appellate review of the FMC decision, the FMC petitioned the court for remand to reconsider its holding.[28] In granting the

22. 390 U.S. at 291 n.7.

23. For a case by case discussion of this situation see *Maritime Collective Bargaining Agreements, Administrative Survey: 1972,* 5 LAW & POL. INT'L BUS. 630 (1973).

24. 15 F.M.C. 33 (1971).

25. There were three agreements involved in *Boston Shipping Ass'n.* The incorporation papers and by-laws of the Boston Shipping Association (BSA) constituted the first agreement. The second agreement dealt with allocation of labor gangs among stevedores. The third agreement dealt with the "first call-recall" system. In this system "a stevedore in addition to having the 'first call' on any of the gangs assigned to him may 'recall' any of his assigned gangs to any single vessel, even though the gangs might not have completed work on the vessels from which they are recalled." 15 F.M.C. at 38. For a discussion of the labor allocation problems which have traditionally plagued the dock workers and their employers see V. JENSEN, HIRING OF DOCK WORKERS IN NEW YORK (1964).

26. 15 F.M.C. at 45. The Examiner noted the bargaining difficulties that the "first call-recall" system had presented for the negotiating parties. The organization and allocation of work gangs, like the containerization issue, had been a particularly sore spot in collective bargaining.

27. 15 F.M.C. at 44-45. The Commission concluded its discussion with the broad assertion that "[a]ny cooperative working arrangement dealing with or pertaining to ocean transportation within the scope of the Shipping Act is an agreement subject to the Commission's scrutiny." 15 F.M.C. at 45.

28. The Justice Department filed an amicus brief in circuit court arguing that the FMC had erroneously expanded its jurisdiction to labor matters. The NLRB and the Labor Department had previously written the Justice Department to complain that the assertion of jurisdiction by the FMC over terms of the collective bargaining agreement was inconsistent with *Volkswagenwerk* and impermissibly

remand, the court labelled the Commission's ruling as "plainly erroneous."[29] On remand the Commission recognized that there may be cases in which national labor policy will call for exemption of certain collective bargaining agreements from the Shipping Act.[30] The Commission declared it would apply this new labor exemption in accordance with criteria laid down by the Supreme Court in dealing with collective bargaining agreements in other areas.[31] The Commission recognized that the national labor policy in favor of collective bargaining requires immunity from antitrust laws for agreements arising from good faith collective bargaining.[32] By weighing the effect on competition against the need for celerity in implementing collective bargaining agreements,[33] the FMC found the labor agreement in *Boston Shipping Association* to be exempt.[34] Though the decision left doubts concerning the nature of the new labor exemption,[35] it clearly indicated that the FMC was

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intruded into sensitive areas of labor relations. The FMC, surprised and concerned by this opposition, apparently sought remand to consider the views of the NLRB and the Labor Department. *See* Sher, *The Federal Maritime Commission and Labor Related Matters; the Aftermath of the Volkswagenwerk Decision,* 3 J. MARITIME L. & COM. 675 (1972) [hereinafter cited as Sher].

29. Boston Shipping Ass'n v. United States, No. 72-1004 (1st Cir. May 31, 1972).

30. United Stevedoring Corp. v. Boston Shipping Ass'n, No. 70-3, at 8 (F.M.C., Aug. 25, 1972), *as cited in Maritime Collective Bargaining Agreements, Administrative Survey: 1972,* 5 LAW & POL. INT'L BUS. 630, 632 (1973) [hereinafter cited as Boston Shipping Ass'n].

31. Boston Shipping Ass'n, at 6. As defined in *United Mine Workers v. Pennington,* 381 U.S. 657 (1965), these criteria are as follows: (1) whether the collective bargaining that resulted in the agreement was in good faith; (2) whether the subject of the agreement in question is a mandatory subject of bargaining; (3) whether the agreement imposes terms on entities outside the collective bargaining unit; and (4) whether the union is acting in conspiracy with management.

32. Boston Shipping Ass'n, at 8. The Commission cited in this regard Supreme Court cases extending antitrust immunity to agreements arrived at by good faith collective bargaining. *E.g.*, United Mine Workers v. Pennington, 381 U.S. 657 (1965).

33. Boston Shipping Ass'n, at 8.

34. Boston Shipping Ass'n, at 12. The Commission observed further that rulemaking proceedings under section 35 of the Shipping Act, 46 U.S.C. § 834 (1970), might be appropriate to establish exemptions from the filing requirements of the Shipping Act for certain collective bargaining agreements.

35. Commissioner Clarence Morse, concurring in part and dissenting in part, raised some of the analytical difficulties faced in a new Shipping Act labor exemp-

narrowing the scope of the *Volkswagenwerk* decision.

In the instant case, the court determined that the assessment agreements were within the scope of section 15.[36] The petitioners sought to distinguish *Volkswagenwerk* from the instant case on the basis that the employers' association in *Volkswagenwerk* unilaterally arrived at an assessment, whereas the union in the instant case not only took an active part in negotiating the assessment, but was a party to the agreement itself.[37] The court found this to be a meaningless distinction. The FMC retains a statutory duty to determine whether the formula is reasonable in its effect on shipping, regardless of whether the ILA has succeeded in negotiating the issue of the assessment. Relying on the Commission's determination that the assessment agreement affected competition,[38] the court sought to establish a basis for resolving the conflict that arises when both the NLRB and the FMC may reasonably assert jurisdiction.[39] Justice Friendly emphasized that a maritime agreement does not always fall neatly under the jurisdiction of one

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tion. Morse argued that mixed membership agreements, in which persons subject to the Act and persons not subject to the Act are both parties, were not intended to come within the scope of section 15. Boston Shipping Ass'n, at 15-16. It has also been noted that an agreement exempt from filing cannot ipso facto be immune from antitrust laws, because no FMC approval can be granted without a prior filing. *Maritime Collective Bargaining Agreements, Administrative Survey: 1972), 5* LAW & POL. INT'L BUS. 630, 633-34 (1973). The FMC merely exempted the agreement from filing and could not confer any antitrust immunity, for none exists to be given without first filing for approval. *See* note 12 *supra* and accompanying text.

36. 46 U.S.C. § 814 (1970). *See* note 3 *supra.*

37. *See* note 4 *supra.* The majority in *Boston Shipping Ass'n* rejected a similar argument that mixed membership agreements, those agreements between persons subject to the Act and others not subject to it, were not intended to come within the scope of section 15. Boston Shipping Ass'n, at 3-4.

38. *See* note 7 *supra* and accompanying text.

39. The designated purpose of the NLRB, as defined in the National Labor Relations Act of 1935, ch. 372, § 1, 49 Stat. 449, *as amended* 29 U.S.C. § 151 (1970), is to promote industrial peace and stability by encouraging collective bargaining and to enhance the public interest by eliminating obstructions to interstate commerce. *See, e.g.*, NLRB v. Sands Mfg. Co., 306 U.S. 322 (1939). The stated purpose of the FMC is to protect the shipping public from conduct that is unjustly discriminatory or detrimental to commerce. Shipping Act § 15, 46 U.S.C. § 814 (1970), *as amended* 46 U.S.C. § 814 (Supp. 1974).

agency to the exclusion of the other.[40] A single contract may raise issues of concern to both. The multi-employer collective bargaining agreement presents inherent conflicts between policies favoring free bargaining and policies prohibiting restraint of trade.[41] Thus, FMC jurisdiction depends upon whether the agreement raises shipping problems logically distinct from the industry's labor problems.[42] Upon its subsequent determination that the Shipping Act problems clearly predominated over the labor interests,[43] the court found the assessment agreement subject to FMC regulation.[44] Noting that labor interests in the agreement do not disappear upon a finding of FMC jurisdiction, the court stressed that the Commission must weigh policy considerations under the Shipping Act against labor problems as they arise in the various portions of the agreement, before it determines what action should be taken. Thus, the Commission must act cautiously in dealing with those aspects of the agreement that have substantial impact on the collective bargaining process. Since regulation of the assessment formula would have little impact on the collective bargaining process, whereas exempting it would expose certain classes of shippers and carriers to potentially massive and inequitable cost increases,[45]

40. Friendly was relying on the observation made by Harlan in *Volkswagenwerk*. *See* 390 U.S. at 286 (Harlan, J., concurring).

41. These conflicting interests are represented in the respective purposes of the NLRB and the FMC. *See* note 39 *supra*. In *Volkswagenwerk* Harlan discussed the anti-competitive effects of collective bargaining agreements. He noted that the need for expeditious and effective industrial bargaining must be reconciled with competing policies promoting competition. 390 U.S. at 283-84 (Harlan, J., concurring).

42. Harlan, in *Volkswagenwerk*, stated that the test for FMC exercise of jurisdiction in the area of collective bargaining agreements is whether or not the regulatory antitrust problems raised by the agreement can be severed from the labor aspects of the agreement. 390 U.S. at 287-90 (Harlan, J., concurring).

43. The court found that since the primary concern of the ILA was whether the NYSA made payments into the "mechanization fund" and not how the funds were actually collected, the ILA had no real interest in how the payments were actually collected. Thus, the court reasoned, the Shipping Act problems predominated over labor interests. 495 F.2d at 1222. *See also* 390 U.S. at 278, 290.

44. The court's determination that provisions unilaterally determined by management and then incorporated into collective bargaining agreements are subject to agency approval is understandable. Otherwise, FMC jurisdiction could be defeated simply by placing items in the labor contract that are not of vital concern to the union.

45. The formula agreed upon by the association and the union determined

the court found the assessment agreement subject to filing and approval under section 15.

In the aftermath of *Boston Shipping Association*, it appeared that the new labor exemption would remove the FMC from the area of collective bargaining agreements.[46] The court in the instant case limited the scope of the Commission's review to those aspects of the contract actually affecting shipping competition. Nevertheless, the instant decision effectively thrusts the FMC into the collective bargaining process in a manner that both the Department of Labor and the NLRB oppose.[47] Since this decision establishes the Commission as another forum in which the legality of these agreements can be adjudicated, it is reasonable to expect more uncertainty and a lack of uniformity in the area of collective bargaining.[48] Moreover, this case illustrates that the presently existing FMC administrative process is inappropriate when collective bargaining is involved. The time element alone renders FMC review unworkable in these situations.[49] Because of the nature of the administrative process and the complexity of the evidence, it

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how the cost of maintaining a "mechanization fund" would be divided among carriers utilizing different stevedoring techniques and thus among different classes of shippers. It was estimated that the assessment formula would increase the handling costs of shippers using noncontainerized, break bulk methods about three times over that of shippers using containerization, with a corresponding effect on rates charged. Agreement No. T-2336, 15 F.M.C. 301 (1971).

46. *See* notes 32-34 *supra* and accompanying text. *See also Maritime Collective Bargaining Agreements, Administrative Survey: 1972*, 5 LAW & POL. INT'L BUS. 630, 631-34 (1973).

47. The NLRB filed an amicus brief opposing FMC jurisdiction over the assessment agreement. The Department of Justice supported the Commission's position but annexed to its brief a contrary memorandum from the Department of Labor.

48. Sher points out that the bargaining parties require a degree of certainty that their agreement will not be greatly altered by administrative review. Sher, *supra* note 28, at 678.

49. The extent of the litigation on various aspects of the assessment formula took the better part of five years and over five different lawsuits. Each time the FMC came up with a "solution," either the NYSA was forced to change the formula to meet new costs or the ILA was renegotiating a contract. The instant case began on July 31, 1972, when the petitioners filed their petition for a declaratory order, and ended on April 8, 1974, when the circuit court rendered the final decision. The total time elapsed was eighteen months; whereas, contract agreements in this area are re-negotiated every three years on the average.

is doubtful whether the Commission can render decisions early enough to avoid disrupting the tenuous nature of the bargaining process.[50] Although there have been no massive breakdowns in negotiations thus far,[51] delays of only a few weeks in an industry burdened with volatile labor problems could have disastrous consequences.[52] It is questionable, then, whether the FMC is an appropriate body to review these cost allocation agreements. The extensive litigation over the NYSA formula indicates that such labor-related agreements present an almost unmanageable conundrum for the Commission. Some, such as the Department of Labor, feel the entire matter should be left to the NLRB.[53] Others have suggested that a more appropriate process is binding arbitration.[54] If

50. The FMC is cognizant of the special problems posed in collective bargaining and of the need for some immediate legal certainty concerning FMC approval of the agreement. Consequently, as in the instant case, the Commission generally approves the formula *in toto* as presented without evidence or a hearing. Thus, as a practical matter, the Commission has done away with the touchstone of section 15—approval after hearings on the basis of evidence. In labor matters the key procedural and regulatory safeguard of section 15, embodied in the requirement of prior agency scrutiny before implementation, has been abandoned. The net effect is to strengthen the position of the employer association against objecting interests and give rise to what is, in effect, ad hoc antitrust immunity. *See* Sher, *supra* note 28, at 681.

51. Justice Douglas criticized the Court's approach in *Volkswagenwerk* for frustrating speedy and legitimate collective bargaining in the maritime industry. Douglas feared that if an allocation agreement acceptable to the FMC, the employer association, and the union could not be devised, then the "mechanization fund" would never be established. The end result would be an impediment to mechanization and continued unrest in the maritime industry. 390 U.S. at 312-13 (Douglas, J., dissenting).

52. The ILA and NYSA have rarely negotiated a new collective bargaining agreement without a strike. In addition, the ILA has been ordered back to work under Taft-Hartley injunctions (25 U.S.C. § 178(1970)) more times (eight) than any other union. For an empirical study of the calamitous effects of a prolonged longshoremen's strike on the nation's economy see U.S.MARITIME ADMINISTRATION, REPORT: IMPACT OF THE WEST COAST MARITIME STRIKE, MARCH 16 TO APRIL 11, 1962 (1963) (income loss estimated at $23.5 million per day with some 148,000 put out of work). *See also* SENATE COMM. ON LABOR AND PUBLIC WELFARE, LEGISLATION FOR SETTLEMENT OF WEST COAST DOCK STRIKE, S. REP. No. 605, 92d Cong., 2d Sess. (1972).

53. *See* note 47 *supra*.

54. Sher argues for arbitration on the basis that the narrower scope of judicial review of arbitration proceedings gives arbitration more finality than an agency

the FMC is to maintain an active role in regulating such agreements, this author believes that the FMC must make its position known at the inception of negotiations. FMC staff representatives should attend labor-management negotiations. The Commission should be kept informed of the nature and adequacy of collections through periodic reports from the employer associations. With the FMC serving in an advisory role, lengthy and disruptive administrative review could generally be avoided. In any case, the Commission certainly should not continue dealing with these problems on an isolated, ad hoc basis,[55] with few facts and little time for review. If the Commission is to take jurisdiction over agreements with labor-related problems, it should take steps to allocate manpower to deal specifically with such problems on a continuing basis. Only in this way can the Commission exercise its independent judgment at a stage early enough to avoid disruption of labor-management negotiations.

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decision. Also, the arbitrator possesses more flexibility in fashioning compromises than exists in the statutorily controlled rule-making of the Commission. Sher, *supra* note 28, at 681.

55. According to the FMC, its policy continues to be to deal with labor-related problems on a "case-by-case basis," with *New York Shipping Ass'n* representing a good example of this approach. Letter from Albert J. Dennis, Public Information Officer, Federal Maritime Commission, to the *Vanderbilt Journal of Transnational Law*, January 27, 1975.