

Any Port in a Storm? The Right of Entry for Reasons of *Force Majeure* or Distress in the Wake of the *Erika* and the *Castor*

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At sea, prudent mariners constantly strive to be keenly aware of the location of all nearby ports and harbors. Should a ship encounter foul weather or suffer mechanical or structural failures, a captain's ability to get her ship to sheltered waters could be the difference between life and death. Many mariners put their faith in a concept vaguely referred to as "force majeure." They believe that this concept will allow them to lawfully seek shelter in the closest harbor, regardless of nationality. In short, they believe that in the event of danger, they will be able to run to any port in a storm.

*Despite this belief, the author demonstrates that the question of whether a coastal state will grant entry to a distressed ship is now highly debatable. The author analyzes two recent high-profile cases, the *Erika* and the *Castor*, where European coastal states denied entry to distressed vessels, primarily out of environmental and political concerns. The author then examines the legal obligations of coastal states regarding distressed ships. He finds no definitive answers. In fact, the author finds sound legal and policy arguments on both sides of the issue, highlighting the confused state of international law in this area. He then turns to the efforts of the International Maritime Organization (IMO). The IMO is considering implementation of a voluntary regime of pre-designated places of refuge, partly in response to the treatment of the *Erika* and the *Castor*. The author questions the IMO's plan on both legal and policy grounds. In the alternative, he proposes an integrated case by case approach for dealing with distressed ships that he argues would be both more effective and consistent with international law.*

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I. INTRODUCTION

Emergency situations at sea implicate, at times, difficult and ambiguous aspects of international, environmental, and maritime law. In turn, these legal issues may involve dynamic interaction between state actors, non-state actors, and international institutions. They may raise concerns of safety, environmental protection, state sovereignty, self-defense, and treaty interpretation and application. This note analyzes two recent controversial events that have crystallized these issues and concerns.

Specifically, this note tells the tale of two tanker ships, the *Erika* and the *Castor*. Both ships found themselves in distress on the high seas, with cracks in their decks and oil in their holds. Both ships requested permission from coastal authorities to enter protected waters. European coastal states, naturally fearful of the environmental and political consequences that harboring a large disabled vessel might raise, refused entry to both ships.

The *Erika* was ultimately destroyed, its hull split open by the relentless power of the North Atlantic. The oil it was carrying spoiled the French coast.¹ Its crew was miraculously saved by a combined search-and-rescue force from the French Coastguard, the French Navy, and the British Royal Navy. The *Castor* was ultimately spared by the seas, but only after a hellish forty days at sea and a series of harrowing at-sea rescue and cargo removal operations performed by Spanish search-and-rescue forces and commercial mariners.² Both incidents highlight difficult tensions and ambiguities in international law.

First, for centuries ships in distress on the high seas have enjoyed a right of entry into the waters of coastal states. Such entry had to be necessary for the safety of the vessel or its crew.³ The ship's predicament typically had to be caused by some condition of *force majeure* or distress.⁴

The right of entry is now codified under the United Nations Convention on the Law of the Sea ("UNCLOS"), discussed below.⁵ It is an exception or defense to the coastal state's exercise of jurisdiction over the disabled ship.⁶ This

¹ See Clare Garner, *Diesel Oil Tanker Snaps in Two off the French Coast*, INDEPENDENT (London), Dec. 13, 1999, at 9.

² See *Safety—Saving the Castor*, LLOYD'S LIST (London), Feb. 15, 2001, at 14.

³ See C. JOHN COLUMBOS, THE INTERNATIONAL LAW OF THE SEA § 353, at 329–30 (6th ed. 1967).

⁴ *Force Majeure*: "[Law French 'a superior force'] An event or effect that can be neither anticipated nor controlled; the term includes both acts of nature (such as floods and hurricanes), and acts of people (such as riots, strikes, and wars) . . . Cf. ACT OF GOD." BLACK'S LAW DICTIONARY 263 (pocket ed. 1996).

⁵ See U.N. CONFERENCE ON THE LAW OF THE SEA, THE LAW OF THE SEA at 6–7, U.N. Sales No. E.83.V.5 (1983).

⁶ See *id.*

exception or defense to the coastal state's jurisdiction prohibits, *inter alia*, the coastal state from excluding the disabled ship from its territorial sea. Arguably, both *Erika* and *Castor*, as ships in distress, should have been entitled to this right of entry.⁷

Second, and conversely, coastal states have an inherent right of self-defense. This right in some circumstances arguably gives states the right to keep dangerous ships away from their shores. Further, coastal states have sovereign duties to protect their populations and their environmentally sensitive coastal areas. These concerns make coastal states naturally wary of allowing disabled vessels carrying hazardous cargoes into their waters. Consequently, as illustrated by the *Erika* and *Castor* incidents, some coastal states are not allowing disabled vessels into their waters. Coastal states have justified their actions on several legal and factual grounds, discussed below. This tension in international law⁸ has motivated the International Maritime Organization ("IMO") to consider adopting a regime of pre-designated places of refuge.⁹ The basic idea is that coastal states would have at least one area where vessels in distress could seek shelter. The IMO is currently drafting non-mandatory guidelines in this field.¹⁰ Given the ambiguous state of international law in this field, such a scheme is on questionable legal ground. It is a poor public policy choice.

The IMO's plan, while well intended, is misguided. The IMO should continue to focus on doing what it does best—raising international shipping

⁷ See *infra* notes 66–83 and accompanying text.

⁸ See Kristina Martin, Note, *Conflicts in Marine Environmental Protection: The Turkish Straits as a Case Study*, 9 *TRANSNAT'L L. & CONTEMP. PROBS.* 681, 702 (1999).

The necessity for coastal states to protect their marine and coastal environment is undisputed, particularly in an age where eighty percent of international trade takes place over the oceans and much of what is being transported is hazardous material. The conflict between the right of innocent passage or freedom of transit and the need to create mandatory systems to control the flow of maritime traffic is fundamentally a political and economic one. But increased risk of collision where the numbers [sic] of vessels traveling the seas without the security of some sort of superfund or the preventative measures of vessel traffic systems will lead to disaster. This is particularly the case in geographical areas such as straits, where conditions are such that the risk of collision or grounding is highest. Coastal states must be permitted not only to regulate their territorial seas but also to exercise some amount of jurisdiction where foreign vessels do not comply, for the economic and environmental burden falls on their shoulders. More authority should be granted to the IMO to work together with coastal states in the implementation and enforcement of regulations to prevent vessel-source pollution of the marine environment.

Id.

⁹ See "Places of Refuge"—A Priority Issue for IMO, IMO Maritime Safety Commission, at http://www.imo.org/Newsroom/contents.asp?topic_id=67&doc_id=1059 (June 8, 2000).

¹⁰ See Lowery et al., *Shock as Castor's Salvor Has Award Slashed by a Third*, *LLOYD'S LIST* (London), May 23, 2002, at 1.

standards and encouraging flag state responsibility.¹¹ At the same time, the right of entry for vessels in distress should be preserved. Incidents like the *Erika* and the *Castor* should be dealt with on a case by case basis. Rather than forcing all disabled vessels, no matter what their particular circumstances, to transit to a pre-designated place of refuge, a case by case approach would allow coastal authorities, rescue personnel, and professional mariners to work together to make the best of a bad situation—preserving life and property at sea, while protecting coastal populations and environmentally sensitive coastal areas. The integration of the global maritime community through technological and legal regimes such as Automated Identification Systems (“AIS”), highlights the feasibility, practicability, and desirability of a case by case approach.¹²

This note analyzes the recent *Erika* and *Castor* incidents.¹³ It then analyzes the tension between a distressed ship’s right of entry and the rights of coastal states.¹⁴ This note then analyzes the IMO’s pre-designated places of refuge concept.¹⁵ In the end, the IMO’s plan, while well-intended, is not well-suited to meet its objective.¹⁶ A major factor in isolated casualties like the *Erika* and the *Castor* incidents is substandard shipping.¹⁷ In the short term, adopting pre-designated places of refuge will have the effect of keeping substandard shipping in distress at sea longer.¹⁸ It will also further erode the right of entry.¹⁹ Neither of these will measurably improve the quality of international shipping.²⁰ In fact, the IMO’s plan could put coastal states and mariners in greater danger.²¹

¹¹ See *Montreal—IMO Shipping Safety Culture Also Applies to Ports Says O’Neil*, LLOYD’S LIST (London), May 24, 2001, at 22.

¹² See Molly Kavanaugh, *Tougher Maritime Security is Focus of Great Lakes Meetings*, PLAIN DEALER (Cleveland), Jan. 31, 2002, at B1. AIS integrates global positioning data, electronic navigational charts, shipboard transponders, and shore-based command and control facilities. See Captain Robert G. Ross, United States Coast Guard, Briefing, Technical Innovations in Navigation Safety, Slides 26–29, at http://www.uscg.mil/vtm/briefs/TRB_all/sld001.htm (last visited Oct. 25, 2002). They provide Vessel Traffic Services (VTS) with real-time information regarding the position and movement of commercial ships within their area of operation. *Id.* This same information is available to all other ships transiting in a given area. AIS is akin to an air-traffic control system. *Id.* In a shipboard emergency, AIS greatly reduces the response time of professional search-and-rescue personnel. *Id.* AIS also enhances the ability of nearby commercial mariners to respond and assist. *Id.*

¹³ See *infra* notes 22–57 and accompanying text.

¹⁴ See *infra* notes 66–166 and accompanying text.

¹⁵ See *infra* notes 170–214 and accompanying text.

¹⁶ See *infra* notes 184–214 and accompanying text.

¹⁷ See *id.*

¹⁸ See *id.*

¹⁹ See *infra* notes 65–83 and accompanying text.

²⁰ See *infra* note 214.

²¹ See *infra* note 212.

II. ERIKA & CASTOR—NOT IN MY BACKYARD

Recent events suggest that the noble tradition of sheltering distressed ships is disappearing. It may already be gone. Consider the stories of the *Erika* and the *Castor*—tanker ships which plead for entry into the protected waters of European coastal states only to be left to the mercy of the high seas.

A. Erika—Disaster on the French Coast

In December 1999, the *Erika*, a twenty-five year old, 590-foot tanker registered in Malta, was traveling from the Netherlands to Livorno, Italy.²² It was carrying 26,000 tons of diesel oil.²³ On this voyage, the *Erika* encountered severe weather conditions with winds in excess of sixty miles per hour. The ship was battered by the relentless power of the North Atlantic.²⁴

According to the ship's captain, Karan Sundar Mathur, the *Erika* sent out a distress call on December 11, 1999.²⁵ There is a dispute over this fact, though, as local French authorities denied that a request was made.²⁶ The captain then allegedly requested permission to enter the French port of Saint Nazaire, citing "serious structural problems."²⁷ Here again, there is another dispute on the facts since, according to the French Navy, the call was allegedly canceled by the ship an hour later.²⁸ At 6 A.M. on December 12, the *Erika*, pounded by the relentless power of the Atlantic Ocean, split in half seventy miles south of Brest.²⁹ On December 13, the *Erika* sank.³⁰

The French Navy and Coastguard lacked the helicopter capacity to rescue *Erika*'s twenty-seven person crew initially.³¹ The French government requested assistance from the British Royal Navy, which was equipped with large Sea King

²² See David Montgomery & Susan Bell, *Stricken Tanker Breaks in Two*, SCOTSMAN, Dec. 13, 1999, at 5.

²³ See *id.*

²⁴ See *id.*

²⁵ See Vaiju Naravane, *The Master is All at Sea*, HINDU (India), Dec. 25, 1999, www.lexis.com, News Group File, All.

²⁶ See *id.*

²⁷ Montgomery & Bell, *supra* note 22; see also Naravane, *supra* note 25.

²⁸ See Naravane, *supra* note 25.

²⁹ See *id.* Brest is a city located in the Brittany region of France. Brittany, the western most region of France, is a large peninsula with 750 miles of coastline.

³⁰ See Naravane, *supra* note 25.

³¹ See Montgomery & Bell, *supra* note 22.

helicopters.³² The combined force was able to dramatically rescue all twenty-seven members of *Erika*'s crew.³³

Ten-thousand tons of the oil carried by the *Erika* spilled along the French coast.³⁴ Experts described the *Erika* incident as the "worst oil disaster in European history."³⁵ The oil slick killed more than 200,000 birds.³⁶ It blackened beaches.³⁷ The vacation season was jeopardized for the region's 750,000 tourists.³⁸ *Erika*'s captain was subsequently arrested for violating France's domestic environmental laws.³⁹

³² See *id.*

³³ See *id.* The rescue of personnel from the disintegrating deck of the *Erika* is a compelling tale of heroism and teamwork under pressure:

Earlier, two Royal Navy helicopters helped the French coastguard to lift all 26 crew to safety from the 590-foot vessel, about 70 miles south of Brest, the main port of Brittany.

As the first five crew members were rescued by a French navy [sic] Super Frelon helicopter, the tanker broke into two pieces. Most of the remaining crew scrambled into the stern while others took refuge in the tanker's life boats.

They were winched to safety in a dramatic manoeuvre involving two Royal Navy Sea King helicopters from RNAS Culdrose, Cornwall. The French coastguards at Etel had made the request for the Sea Kings because a local helicopter was capable of carrying only five people.

....

Lt Fraser Hunt [sic], the pilot of one of the Royal Navy helicopters, said his aircraft helped search the scene for crew as French helicopters winched them to safety. "It was very rough. The bow of the tanker was in one place and the superstructure was about a quarter of a mile away."

Id.

³⁴ See Tim Finan & Stephen Bevan, *Oil Death Toll May Rise to 300,000 Birds*, SUNDAY TIMES (London), Jan. 9, 2000, at 28; see also Garner, *supra* note 1.

³⁵ Finan & Bevan, *supra* note 34.

³⁶ See *id.*

³⁷ See *id.*

³⁸ See *id.*

³⁹ See Naravane, *supra* note 25. Some considered the captain's arrest ironic given the fact that it appears French authorities had denied safe harbor to the *Erika*. Public opinion on the *Erika* incident in France was divided

between the ship owner, who sent out an unsafe vessel; the French oil company Total-Fina, which chartered the ship without proper checks; and French authorities who failed to inspect the ship in Dunkirk and refused it entry to the port of refuge at St Nazaire [sic], sending the captain back out to founder in the storm.

Jonathan Wills, *French Join Forces to Combat Tide of Oil Spills*, SCOTSMAN, Jan. 28, 2000, at 18.

B. *Castor*—A “Pariah Ship” and a Near Miss

Next, in December 2000, the *Castor* was navigating the Mediterranean Sea on its voyage from Constanza, Romania to Lagos, Nigeria.⁴⁰ *Castor*, a Cyprus flagged tanker⁴¹ built in 1977,⁴² was carrying 29,500 tons of gasoline.⁴³ Encountering severe winter weather, including a force-12 gale, the *Castor* developed a twenty-six meter crack across its main deck.⁴⁴

Thus began *Castor*'s forty day, 1000 mile saga.⁴⁵ Nearly crippled by rough seas, the *Castor* sought sheltered waters in which it could offload its cargo, for the safety of the ship, her crew, and nearby coastal states.⁴⁶ On New Year's Eve, Morocco denied *Castor*'s request.⁴⁷ *Castor*'s plea for shelter was subsequently denied by Algeria, France, Gibraltar, Greece, Italy, Malta, Spain, and Tunisia.⁴⁸

Spain allegedly feared that the grinding metal from the crack on the ship's deck would create sparks that might cause the ship's cargo to ignite.⁴⁹ However, there is serious doubt that the *Castor* posed any risk of explosion.⁵⁰ In addition, *Castor* was merely seeking sheltered waters, a place of protection from which to offload her cargo and effect minor repairs, so *Castor* need not have entered a port facility.⁵¹ Spanish search-and-rescue authorities evacuated many of the ship's crew on the high seas.⁵²

Finally, after forty days as a homeless pariah, wandering the Mediterranean for 1000 miles, *Castor*'s gasoline cargo was offloaded onto two shuttle tankers in a risky at-sea transfer operation in exposed waters off the coast of Malta.⁵³

⁴⁰ See Donald Urquhart, *Stricken Vessel Off Europe Denied Refuge*, BUS. TIMES (Singapore), Jan. 12, 2001, Shipping Times, at 1.

⁴¹ See Donald Urquhart, *Outcast Castor's 40-day Ordeal Close to End*, BUS. TIMES (Singapore), Feb. 20, 2001, at 1.

⁴² See *id.*

⁴³ See Urquhart, *supra* note 40.

⁴⁴ See *id.*; Brian Reyes, *Salvage Chief Warns That 'Leper' Ship Will Sink*, LLOYD'S LIST (London), Jan. 29, 2001, at 3.

⁴⁵ See Reyes, *supra* note 44.

⁴⁶ See *id.*

⁴⁷ See Urquhart, *supra* note 40.

⁴⁸ See *id.*

⁴⁹ See David Hughes, *Priorities Must be Identified When Handling Casualties*, BUS. TIMES (Singapore), Jan. 15, 2001, Shipping Times, at 2.

⁵⁰ See *Montreal—IMO Shipping Safety Culture Also Applies to Ports Says O'Neil*, *supra* note 11.

⁵¹ See *id.*

⁵² See Urquhart, *supra* note 41.

⁵³ See Urquhart, *supra* note 40.

Malta's refusal to grant shelter to the *Castor* is perhaps ironic, given that Malta was the flag state of the *Erika*.⁵⁴

Many of the coastal states involved in the incident decried the *Castor* as a substandard ship.⁵⁵ They argued that their citizens should not be put at risk because of a substandard ship.⁵⁶ Yet there is a dispute over the facts as to this point. According to the American Bureau of Shipping, the vessel's classification society, the *Castor* was a properly maintained, seaworthy vessel that simply incurred damage from heavy weather.⁵⁷ The fact that the *Castor* was able to remain afloat for forty days on the high seas, despite the large crack in its deck, arguably supports this contention.

III. TENSION

The *Erika* and *Castor* incidents highlight an area of difficult tension and ambiguity in international law. What is the status of a distressed ship's right of entry for reasons of *force majeure* or distress?⁵⁸ On the one hand, under customary international law and UNCLOS, distressed ships have a right of entry into the territorial sea of coastal states.⁵⁹ Conversely, there must be some limit to a distressed ship's right of entry. Coastal states have an inherent right of self-

⁵⁴ See *id.*

⁵⁵ See David Hughes, *Issue of Scrapping Hazardous Ships Becoming More Pressing*, BUS. TIMES (Singapore), Feb. 26, 2001, at 1; 'Super-rust' Threat, LLOYD'S LIST (London), Apr. 10, 2001, at 1.

⁵⁶ See Hughes, *supra* note 55; 'Super-rust' Threat, *supra* note 55.

⁵⁷ See Julian Bray, *Conference—'Squabbling' IACS Told to Work as a Team*, LLOYD'S LIST (London), Apr. 11, 2001, at 3.

⁵⁸ See BLACK'S LAW DICTIONARY, *supra* note 4, at 263 (defining *force majeure*).

⁵⁹ See COLUMBOS, *supra* note 3, § 353, at 329–30:

When a ship is driven to take refuge in a foreign port by stress of weather, or is compelled to do so by *force majeure* or any other overruling necessity, she is not subject to the local regulations of the port with regard to any incapacity, penalty, prohibition, duties or taxes in force at that port. This rule was affirmed as far back as 1809 by Lord Stowell in *The Eleanor*, where he held that "real and irresistible distress," proved by clear and satisfactory evidence, "must be at all times a sufficient passport for human beings," entitling them to the rights of hospitality in a British port. The French Court of Cassation also decided in *The Carlo-Alberto* that a ship in distress "is placed, among civilised nations, under the protection of good faith, humanity, and generosity." . . . In order to exempt, however, a vessel from the local regulations, it is required "that the necessity be urgent and proceed from such a state of things as may be supposed to produce, on the mind of a skillful mariner, a well-grounded apprehension of the loss of the vessel and cargo or the lives of the crew." The rule based on circumstances of *force majeure* extends to ships seeking refuge in a foreign port for vital repairs or a strict necessity of provisioning.

Id. (footnotes omitted).

defense and sovereign duties to protect their populations and environmentally sensitive coastal areas.⁶⁰ Additionally, one could argue that, based on the facts of each case and their attendant circumstances, the *Erika* and the *Castor* might not have been entitled to invoke the defense of right of entry as an exception to coastal state jurisdiction.⁶¹

A. Right of Entry for Reasons of Force Majeure or Distress

The right of entry is essentially a defense for a ship against the exercise of jurisdiction by the coastal state.⁶² If a ship can validly assert this defense, it is generally not subject to the jurisdiction of the coastal state.⁶³ This means, *inter alia*, that the coastal state's ability to exclude the distressed vessel from its territorial sea is greatly diminished.⁶⁴ All of the states involved in both incidents were bound by the rules that give a distressed ship a right of entry, either under UNCLOS or as a matter of mandatory customary international law.⁶⁵

1. A Distressed Ship's Right of Entry

Under customary international law that is now codified in various instruments, including UNCLOS, ships enjoy the right of innocent passage.⁶⁶ This means that ships have the right to transit through the territorial sea of a coastal state, provided such passage is innocent.⁶⁷ UNCLOS contains a list of situations when a ship's passage could fail to be classified as innocent, in which case the coastal state will obtain jurisdiction over that ship.⁶⁸ Thus, the

⁶⁰ See *infra* notes 111–27 and accompanying text.

⁶¹ See *supra* notes 22–57 and accompanying text.

⁶² See *infra* notes 77–83 and accompanying text.

⁶³ See *id.*

⁶⁴ See *id.*

⁶⁵ See *infra* notes 87–109 and accompanying text.

⁶⁶ The territorial sea of a coastal state can extend up to twelve nautical miles from that state's baseline. The baseline is an imaginary line that roughly corresponds to the low-water line along the coast. The limits of a coastal state's jurisdiction are measured from this line. The coastal state exercises some sovereignty in its territorial sea. However, the coastal state does not have the authority to hinder passage of foreign vessels through the territorial sea. This right of foreign vessels to transit through the territorial sea of another state is known as innocent passage. See ARND BERNAERTS, BERNAERTS' GUIDE TO THE LAW OF THE SEA: THE 1982 UNITED NATIONS CONVENTION 27–28 (1988). See generally MYRON H. NORDQUIST, UNITED NATIONS CONVENTION ON THE LAW OF THE SEA 1982: A COMMENTARY (Martin Nijhoff ed., publishers ed. 1989) (explaining the function and operation of the U.N. Convention on the Law of the Sea).

⁶⁷ See BERNAERTS, *supra* note 66, at 28.

⁶⁸ *Id.* UNCLOS defines innocent passage as “[t]ransitory navigation . . . [that must] not be

presumption is that a ship transiting through the territorial sea of a coastal state is not subject to the jurisdiction of that coastal state.⁶⁹

In the territorial sea, the coastal state does exercise some jurisdiction.⁷⁰ However, the general structure of international law is that freedom of navigation is the presumption.⁷¹ The territorial sea is a grant of limited jurisdiction to the coastal state.⁷² International law also grants some jurisdiction to coastal states in the form of the contiguous zone and the exclusive economic zone (“EEZ”).⁷³ However, as long as a ship is merely transiting through the territorial sea of a coastal state and does not engage in any activity which threatens the rights of the coastal state such that its passage would no longer be considered innocent, it enjoys the freedom of navigation.⁷⁴ The general rule is that transit must be “continuous and expeditious.”⁷⁵ This means that the ship cannot stop and loiter in the territorial sea.⁷⁶

However, there is an exception. When a ship is forced to transit through the

prejudicial to the peace, good order or security of the coastal state.” *Id.* UNCLOS includes an explanatory list of activities that would put a ship outside of innocent passage including “any other activity not having a direct bearing on passage . . . practice with weapons . . . [and] serious pollution.” *Id.* Also, the “foreign vessel must be in passage, i.e., in transit through the territorial sea between any two points not in this zone, and the passage must be continuous and expeditious . . .” *Id.* If a foreign vessel’s conduct qualifies as innocent passage, “a coastal state may not exercise its jurisdiction . . . unless there is a serious threat to the coastal state.” *Id.* See generally NORDQUIST, *supra* note 66 (explaining the function and operation of the U.N. Convention on the Law of the Sea).

⁶⁹ See BERNAERTS, *supra* note 66, at 27–28. See generally NORDQUIST, *supra* note 66 (explaining the function and operation of the U.N. Convention on the Law of the Sea).

⁷⁰ See BERNAERTS, *supra* note 66, at 27–28. See generally NORDQUIST, *supra* note 66 (explaining the function and operation of the U.N. Convention on the Law of the Sea).

⁷¹ See BERNAERTS, *supra* note 66, at 27–28. See generally NORDQUIST, *supra* note 66 (explaining the function and operation of the U.N. Convention on the Law of the Sea).

⁷² See BERNAERTS, *supra* note 66, at 27–28. See generally NORDQUIST, *supra* note 66 (explaining the function and operation of the U.N. Convention on the Law of the Sea).

⁷³ See BERNAERTS, *supra* note 66, at 27–28. The contiguous zone extends for twenty-four nautical miles beyond the baseline. *Id.* It encompasses the territorial sea. *Id.* States are not automatically entitled to a contiguous zone under international law. *Id.* They must properly declare a contiguous zone. *Id.* Within the contiguous zone, coastal states have some limited jurisdiction with regard to enforcement of customs laws. *Id.* It is used primarily to regulate commerce that is bound for the coastal state itself to facilitate enforcement of its own domestic laws. *Id.* The EEZ grants states some control over the natural resources in the waters up to 200 nautical miles from the baseline. *Id.* See generally NORDQUIST, *supra* note 66 (explaining the function and operation of the U.N. Convention on the Law of the Sea).

⁷⁴ See BERNAERTS, *supra* note 66, at 27–28 (defining innocent passage and when it applies).

⁷⁵ *Id.*

⁷⁶ See *id.*

territorial sea of a state and stop there, for reasons of *force majeure* or distress, such passage is deemed innocent.⁷⁷ This principle, incorporated in UNCLOS, is an ancient and well-established principle of customary international law.⁷⁸ It was such an important exception to coastal state jurisdiction that it was incorporated into UNCLOS without debate or controversy.⁷⁹ Thus, when a vessel is forced to

⁷⁷ See *id.* Under normal circumstances, a vessel transiting through the territorial sea is considered to be engaged in innocent passage and is therefore not subject to the jurisdiction of the coastal state. *Id.* Being outside the jurisdiction of the coastal state would in turn mean, *inter alia*, that the coastal state would have difficulty in excluding that vessel from the territorial sea. *Id.* Normally, the vessel's passage must be "continuous and expeditious." *Id.* However, the vessel's presence within the territorial sea can be considered innocent, and thus beyond the coastal state's jurisdiction, "for navigational purposes and other acceptable reasons." *Id.* at 28 (emphasis added). *Force majeure* and distress are defined by UNCLOS as such "other acceptable reasons." *Id.* at 27–28. Articles 17 and 18 of UNCLOS are on point. They state in part:

Article 17

Right of innocent passage

Subject to this Convention, ships of all States, whether coastal or land-locked, enjoy the right of innocent passage through the territorial sea.

Article 18

Meaning of passage

....

2. Passage shall be continuous and expeditious. However, passage includes stopping and anchoring, but only in so far as the same are incidental to ordinary navigation or are rendered necessary by *force majeure* or distress or for the purpose of rendering assistance to persons, ships, or aircraft in danger or distress.

U.N. CONFERENCE ON THE LAW OF THE SEA, *supra* note 5, at 6 (emphasis added). Thus, Articles 17 and 18 provide that a ship forced to stop in the territorial sea of a state for reasons of *force majeure* or distress is still considered to be engaged in innocent passage. Thus, if a ship engaged in innocent passage is forced to stop in the territorial sea of a coastal state for reasons of *force majeure* or distress, that ship arguably is still engaged in innocent passage. This in turn means that the coastal state would not have jurisdiction over that ship and would therefore, *inter alia*, be unable to order that ship out of its territorial sea. *Id.* at 158. Note that UNCLOS operates generally to give flag states the broad right to use the world's oceans and doles out limited exceptions to the general rule where coastal states may exercise some jurisdiction. See Margaret L. Tomlinson, *Recent Developments in the International Law of the Sea*, 32 INT'L LAW. 599, 600 (1998). Under UNCLOS, flag states have "the protection of freedom to use ocean space without undue interference." *Id.* See generally NORDQUIST, *supra* note 66 (explaining the function and operation of the U.N. Convention on the Law of the Sea).

⁷⁸ See COLOMBOS, *supra* note 3, § 353, at 329–30.

⁷⁹ There is no drafting history surrounding adoption of the *force majeure* exception to coastal state jurisdiction over the territorial sea. This lack of controversy and debate suggests that the drafters of UNCLOS simply accepted *force majeure* as such, an ancient and long-

enter the territorial sea of a state due to an extreme condition, all of the rules discussed above about innocent passage apply to that ship.⁸⁰ The coastal state does not have jurisdiction over that ship.⁸¹

Thus, it is settled international law that a foreign vessel has the right to enter the territorial sea of a coastal state when such entry is necessary for the safety of the vessel or persons aboard.⁸² The distressed vessel must leave the territorial sea once the conditions that made the entry necessary have ceased to exist.⁸³

2. *The Obligations of the Specific Coastal States at Issue*

In understanding the *Erika* and *Castor* incidents and their relationship to the right of entry, it is helpful to examine the obligations of the coastal states in question. UNCLOS went into force on November 16, 1994.⁸⁴ The coastal states at issue, with the exception of Gibraltar, had all ratified UNCLOS by the time of the *Erika* and *Castor* incidents.⁸⁵ The flag states, Malta and Cyprus, had also each ratified UNCLOS by the time of the incident, so there is no issue of mutuality which might somehow excuse the coastal states' actions.⁸⁶ Each state filed declarations with its ratification.⁸⁷ None of the declarations in any way suggest

standing principle of international law that was incorporated into UNCLOS without dissent. *See generally* NORDQUIST, *supra* note 66, (explaining the function and operation of the U.N. Convention on the Law of the Sea); LAW OF THE SEA: THE COMMON HERITAGE AND EMERGING CHALLENGES (Harry N. Scheiber ed., 2000) (discussing the history, development, and new challenges of the law of the sea and the role of *force majeure*); TULLIO TREVES, *New Trends in the Settlement of Disputes and the Law of the Sea Convention*, in LAW OF THE SEA: THE COMMON HERITAGE AND EMERGING CHALLENGES, *supra*, at 61, 61–62 (noting that coastal states can use international dispute resolution tribunals to resolve environmental problems); THE INTERNATIONAL LAW OF THE SEA: CASES, DOCUMENTS, AND READINGS (Gary Knight & Hungdah Chiu eds., 1991) (analyzing the international law of the sea through diverse and compelling perspectives).

⁸⁰ See *supra* notes 66–76 and accompanying text.

⁸¹ See *id.*

⁸² See *id.*

⁸³ See BLACK'S LAW DICTIONARY, *supra* note 4, at 263 (defining *force majeure*).

⁸⁴ See *United Nations Convention on the Law of the Sea*, United Nations Division for Ocean Affairs and the Law of the Sea, at http://www.un.org/Depts/los/convention_agreements/convention_agreements.htm (last modified Sept. 10, 2002).

⁸⁵ See *Chronological Lists of Ratifications of, Accessions and Successions to the Convention and Related Agreements as of 12 November 2001*, United Nations Division for Ocean Affairs and the Law of the Sea, at http://www.un.org/Depts/los/reference_files/chronological_lists_of_ratifications.htm (last updated Sept. 27, 2002).

⁸⁶ See *id.*

⁸⁷ See *id.*

that these coastal states did not feel bound by Articles 17 and 18.⁸⁸ On the contrary, two of the declarations explicitly stress the importance of a limitation to their jurisdiction over the territorial sea in cases of *force majeure*.

Specifically, Spain's declaration purports to limit somewhat the scope of Article 39, paragraph 3(a), "*except for force majeure or serious difficulty*."⁸⁹ Similarly, Algeria's declaration purports to require advance notification for warships transiting through its territorial sea, "*except in cases of force majeure as provided in the Convention*."⁹⁰ These two declarations highlight coastal states acknowledgment of the importance of the *force majeure* exception to coastal state jurisdiction.⁹¹ They demonstrate that these states were not only aware of the *force majeure* limitation on their jurisdiction.⁹² Rather they recognized the *force majeure* exception to jurisdiction was such a clear and important principle of international law that they wanted to be certain it survived their declarations.⁹³ The declarations highlight that at least those two states believed *force majeure* was a doctrine worthy of reaffirming.⁹⁴

That these two states later denied entry to a vessel in distress, the *Castor*, a vessel that had a colorable claim to entry for reasons of *force majeure*, is important. The record, as evidenced through their declarations, is that they knew about the right of entry and thought it was important.⁹⁵ Yet, their actions taken in the *Castor* incident contradict this longstanding principle of international law.⁹⁶ Their affirmation of the right of entry for reasons of *force majeure* puts them in an awkward position and weighs against arguments they raised against the *Castor*'s right of entry.⁹⁷

Gibraltar, which has not yet ratified UNCLOS, also was, and continues to be, obligated to permit vessels in distress to enter its territorial sea for two reasons. First, UNCLOS itself is generally accepted to reflect mandatory customary

⁸⁸ See *supra* notes 66–83 and accompanying text.

⁸⁹ *Spain's Declarations to the United Nations Convention on the Law of the Sea*, United Nations Division for Ocean Affairs and the Law of the Sea, at http://www.un.org/Depts/los/convention_agreements/convention_declarations.htm#Spain (last modified Sept. 17, 2002) (emphasis added).

⁹⁰ *Algeria's Declarations to the United Nations Convention on the Law of the Sea*, United Nations Division for Ocean Affairs and the Law of the Sea, at http://www.un.org/Depts/los/convention_agreements/convention_declarations.htm#Algeria (last modified Sept. 17, 2002) (emphasis added).

⁹¹ See *supra* notes 89–90.

⁹² See *id.*

⁹³ See *id.*

⁹⁴ See *id.*

⁹⁵ See *id.*

⁹⁶ See *supra* notes 40–57 and accompanying text.

⁹⁷ See *infra* notes 134–38 and accompanying text.

international law that binds all states.⁹⁸ Second, as discussed above, the principle of *force majeure* itself is such an ancient and established doctrine in international law that its status as mandatory customary international law is not seriously debated.⁹⁹

Thus, a distressed ship's right of entry is settled international law.¹⁰⁰ Every coastal state involved in the *Erika* and *Castor* incidents had an obligation, either as a matter of treaty or as a matter of customary international law—and in most cases both—to grant safe harbor to vessels in distress.¹⁰¹ *Erika* and *Castor* were clearly vessels in distress.¹⁰² Both vessels clearly had “a sense of urgency in seeking refuge” and not just entry as a “mere matter of convenience in making repairs or in avoiding a measure of difficulty in navigation.”¹⁰³ As such, both

⁹⁸ See Ted L. McDomon, *Port State Enforcement: A Comment on Article 218 of the 1982 Law of the Sea Convention*, 28 J. MAR. L. & COM. 305, 305 (1997):

The 1982 United Nations Convention on the Law of the Sea (LOS Convention) establishes the constitutional framework for the exercise of national jurisdiction over ocean space, resources, and activities. The treaty came into effect for ratifying States in November 1994. *That prominent ocean users such as the United States, the United Kingdom, and Canada are not yet parties is usually treated as a technical matter unrelated to the adoption of much of the LOS Convention into national practice and international law.*

(emphasis added).

⁹⁹ See *The Paquete Habana*, 175 U.S. 677, 700 (1900):

[In] [i]nternational law . . . resort must be had to the customs and usages of civilized nations; and, as evidence of these, to the works of jurists and commentators, who by years of labor, research, and experience, have made themselves peculiarly well acquainted with the subjects of which they treat. Such works are resorted to . . . for trustworthy evidence of what the law really is.

See also 2 ERASTUS BENEDICT ET AL., *BENEDICT ON ADMIRALTY* § 112(a) (2001):

Under unusual circumstances called “distress,” foreign vessels entering a state’s territorial waters are ordinarily accorded immunity from administration of local customs laws. However, distress requires a sense of urgency in seeking refuge and not just entry as a “mere matter of convenience in making repairs or in avoiding a measure of difficulty in navigation.”;

COLOMBOS, *supra* note 3, § 353, at 329–30 (noting that *force majeure* has sustained a distressed ship’s right of entry since 1809); John Waite, *Confusion on Ports of Safe Haven*, LLOYD’S LIST (London), Sept. 17, 2001, at 19 (noting that the *Castor* incident “highlights deficiencies in [the] understanding of international law regarding vessels in distress seeking shelter”).

¹⁰⁰ See *supra* notes 66–99 and accompanying text.

¹⁰¹ See *id.*

¹⁰² See *supra* notes 22–57 and accompanying text.

¹⁰³ 2 BENEDICT ET AL., *supra* note 99, § 112(a).

vessels had the right to enter the territorial sea of the nearest coastal state.¹⁰⁴ None of the coastal states involved in either incident met that obligation.¹⁰⁵ These states, therefore, arguably violated their obligations under public international law.¹⁰⁶

On the other hand, the facts of the *Erika* and *Castor* incidents could be construed as not giving rise to the right of entry.¹⁰⁷ The exercise of the right of entry implies that ships are forced into the territorial sea such that not entering the territorial sea is impossible.¹⁰⁸ In both the *Erika* and the *Castor* cases, the masters requested permission to enter from the coastal state.¹⁰⁹ This is a slightly different scenario than what seems to be envisioned by the law.¹¹⁰

¹⁰⁴ See *id.*

¹⁰⁵ See *supra* notes 22–57 and accompanying text.

¹⁰⁶ See 2 BENEDICT ET AL., *supra* note 99, § 112(a).

¹⁰⁷ See *Focus on Ship Safety Not Ports of Refuge Says Spain*, LLOYD'S LIST (London), Jan. 11, 2001, at 1.

¹⁰⁸ See BLACK'S LAW DICTIONARY, *supra* note 4, at 263 (defining *force majeure*).

¹⁰⁹ See *supra* notes 25–28, 46–49 and accompanying text.

¹¹⁰ Conceptually, the right of entry and the doctrine of *force majeure* are rules of hindsight. For example, the basic idea is that authorities of a coastal state wake up one morning, look out into the harbor after a storm, and see a foreign flagged ship at anchor. Perhaps they then instruct their local coast guard, border patrol, or harbor master to go aboard the ship and conduct an administrative inspection. If the ship was forced to enter the coastal state's waters due to horrific weather conditions, for example, the master could invoke the right of entry. She could argue that, although she is at anchor and thus stopped in the territorial sea, her ship is there because of some circumstance of *force majeure*. Thus, the right of entry would protect that ship from the coastal state's exercise of jurisdiction.

The meaning of *force majeure* can also be gleaned from the language of the draft articles on state responsibility for wrongful acts. See *Commentaries to the Draft Articles on Responsibility of States for International Wrongful Acts*, U.N. GAOR, 56th Sess., Supp. No. 10, at 48–49, U.N. Doc. A/56/10 (2001), available at [http://www.un.org/law/ilc/texts/State_responsibility/responsibility_commentaries\(e\).pdf](http://www.un.org/law/ilc/texts/State_responsibility/responsibility_commentaries(e).pdf) (last visited Oct. 25, 2002). Articles 23 and 24 provide exceptions for state responsibility for reasons of *force majeure* or distress. See *id.* Under Article 23, a state can be excused from its obligations if it is forced to do so for reasons of an “irresistible force” or “unforeseen event.” *Id.* This *force majeure* exception is inapplicable, though, if the situation arises due to the state's own conduct or as a result of a risk assumed by the state. See *id.* The language in Article 24 on distress has a similar limitation. See *id.* This explanatory language does not appear in UNCLOS. One could argue therefore that the concept of *force majeure* and distress are broader under UNCLOS than they are under the Law of State Responsibility. However, that seems to be a strained construction. The better reading is that the Draft Articles provide greater clarity as to what distress and *force majeure* mean. Since the same terms are used in both documents, they must have very similar if not identical meanings. Thus, an implied limitation on the right of entry for reasons of *force majeure* or distress could be construed in UNCLOS itself.

Additionally, part of the confusion over the right of entry and the doctrine of *force majeure* stems from the fact that these ships are not just showing up in foreign ports when forced to do

B. *The Coastal State's Right of Self-Defense*

Additionally, weighing against the right of entry are the rights and needs of coastal states. States can be excused from breaching their international obligations for reasons of self-defense.¹¹¹ Thus, even if a flag state were to take up its ship's

so due to extreme weather conditions. Modern communication technology gives masters the ability to notify coastal authorities of their problems as they develop. Thus, vessels in distress are in communication with coastal authorities in a way not envisioned by our customary international law principles that originated from a time when a ship at sea might as well have been in the deep reaches of space. Indeed, that a master is asking for permission to enter the territorial sea of a coastal state could itself be evidence of a lack of a circumstance of *force majeure*. If masters still have sufficient control over their vessels such that they are capable of requesting permission to enter port as opposed to simply being driven into port against their will by the elements, then arguably the circumstances do not yet give rise to the right of entry. This is the area from which the confusion stems.

¹¹¹ See *id.* at 124–33. The Draft Articles on Responsibility of States for Internationally Wrongful Acts were promulgated by the International Law Commission, an arm of the United Nations, in 2001. While not adopted as a treaty in force, the Draft Articles are generally understood to represent mandatory customary international law. See *id.* The reason for this is that they are generally understood to reflect state practice. See *id.* The Draft Articles suggest that a state may breach international law to defend itself. This is logical because a state's inherent right of self-defense is paramount under international law. Self-defense naturally enjoys exalted status on the hierarchy of international rights and obligations. Thus, even if any of the states involved in the *Erika* and *Castor* incidents did breach an international obligation, under UNCLOS, *inter alia*, the Draft Articles suggest that such a breach may be permissible under international law if it is necessary for self-defense:

Chapter III

Breach of an international obligation

Article 12

Existence of a breach of an international obligation

There is a breach of an international obligation by a State when an act of that State is not in conformity with what is required of it by that obligation, regardless of its origin or character.

Article 13

International obligation in force for a state

An act of a State does not constitute a breach of an international obligation unless the State is bound by the obligation in question at the time the act occurs.

....

Article 15

Breach consisting of a composite act

1. The breach of an international obligation by a State through a series of actions or

cause and argue that a coastal state's denial of that ship's entry violates its international obligations,¹¹² something that factually did not happen in either the *Erika* or *Castor* incidents, that coastal state would have a strong argument that its denial of entry was justified on the grounds of self-defense.¹¹³

In international law, self-defense is typically thought of in military terms.¹¹⁴ A typical self-defense analysis focuses on whether military action taken by a state was justified by self-defense.¹¹⁵ To be justified, it is generally accepted that a

omissions defined in aggregate as wrongful, occurs when the action or omission occurs which, taken with the other actions or omissions, is sufficient to constitute the wrongful act.

2. In such a case, the breach extends over the entire period starting with the first of the actions or omissions of the series and lasts for as long as these actions or omissions are repeated and remain not in conformity with the international obligation.

....

Chapter V

Circumstances precluding wrongfulness

....

Article 21 Self-defence

The wrongfulness of an act of a State is precluded if the act constitutes a lawful measure of self-defence taken in conformity with the Charter of the United Nations.

Id. at 46–47, 48.

¹¹² First, it would have to be established that one of the coastal states breached its international obligations. Although the law at issue here is a multilateral treaty, the alleged injury caused by denying refuge to a ship is bilateral, state to state. A ship's flag state would have to take up its ship's cause. To date, none of the flag states have made any efforts to allege that the coastal states involved violated their international obligations. Additionally, the conditions that excuse state responsibility would arguably provide strong defenses to any state in such a situation.

¹¹³ See Judith Gail Gardam, *Proportionality and Force in International Law*, 87 AM. J. INT'L L. 391, 403 (1993).

¹¹⁴ See *id.* at 402–03.

¹¹⁵ Self-defense in international law evolved to deal with the paradigm of state-to-state armed conflict. A state's right to take lawful actions under international law in self-defense is thus normally analyzed in terms of military threat posed by another state. It is therefore somewhat awkward conceptually to apply these concepts with regard to a distressed ship. This awkwardness is manifest in at least three ways.

First, the threat is posed by a non-state actor (a ship). Secondly, the threat is nonmilitary in nature. The aggrieved state is not confronting an imminent armed attack. Third, the aggrieved state's response to this threat is non-military in nature. It is probably not going to destroy the distressed ship. Rather, the aggrieved state is just trying to keep the distressed ship out of its near-shore waters (although perhaps the threat of force is implied if the distressed ship does not comply with the orders of the aggrieved coastal state). While it is possible to apply concepts of

state's actions in self-defense must be both proportional to the threat and necessary.¹¹⁶ The necessity must be instant and overwhelming.¹¹⁷

In this light, from one perspective, a distressed ship could argue that the concept of self-defense in international law is applicable solely to conflicts involving a use of force and not to the situation of a distressed ship seeking safe harbor.¹¹⁸ Yet, the Draft Articles on the Law of State Responsibility do not have any specific limitations on the term self-defense.¹¹⁹ Thus, it is plausible to read the term self-defense broadly.¹²⁰ In this light, self-defense could be read to include things such as keeping dangerous ships and cargoes away from coastal populations and environmentally sensitive areas.¹²¹

This broader reading of self-defense dovetails with a concurrent narrow reading of *force majeure* and distress.¹²² If *force majeure* and distress are limited by notions of fault and assumed risk, it makes sense to say that a state has some claim to self-defense where a dangerous ship is seeking entry and that ship is at

self-defense in international law on a sliding scale, the language and rules of self-defense are not so couched. They are couched in terms of taking great measures to protect a state from a grave threat to the state's very existence.

The *Caroline* incident, the benchmark for the rules of self-defense under customary international law, illustrates this point. Citing this case, international law practitioners and scholars have consistently relied on terms such as self-preservation, necessity, instant, and overwhelming in analyzing the right of states to take action in self-defense. This is in language of dire, *in extremis* circumstances. This supports the idea that the concept of self-defense under international law is steeped in terms of protecting a state from imminent armed attack. This makes its application to the case of distressed shipping, while not implausible, at least intellectually awkward.

The following excerpt is instructive in this regard and stresses the importance of the *Caroline* incident. See Gardam, *supra* note 113, at 403:

[T]he incident that provided the basis of the most commonly accepted formulation of proportionality in the pre-Charter system, that proposed by Webster in the *Caroline* incident, was regarded by many writers as an example of self-preservation. The formulation was as follows: "It will be for [the British Government, in this case] to show, also, that the local authorities of Canada, even supposing the necessity of the moment . . . did nothing unreasonable or excessive; since the act, justified by the necessity of self-defense, must be limited by that necessity, and kept clearly within it."

(citations omitted).

¹¹⁶ See *id.*

¹¹⁷ See *id.*

¹¹⁸ See *Commentaries to the Draft Articles on Responsibility of States for International Wrongful Acts*, *supra* note 110, at 48.

¹¹⁹ See *id.*

¹²⁰ See *id.*

¹²¹ See *id.*

¹²² See *id.* at 48–49.

least partly responsible for the condition in which it finds itself.¹²³ Thus, the actions of coastal states in the *Erika* and *Castor* incidents could be understood to fall within the concept of self-defense.¹²⁴

Implicit in the *Erika* and *Castor* incidents is the idea that coastal states should not be forced to put themselves at risk by accepting allegedly substandard ships, even if those ships are in distress.¹²⁵ For example, the Maltese government apparently relied only on the rationale that its primary obligation was to protect its own citizenry.¹²⁶ In this light, the actions of those states might not have been in violation of international law.¹²⁷

C. Arguments Against the Application of the Right of Entry

Next, five rationales suggest that the right of entry was not implicated in the *Erika* and *Castor* incidents. First, perhaps modern search-and-rescue capabilities of coastal states obviate the need to allow entry to distressed ships.¹²⁸ Second, arguably states could prohibit entry to distressed ships as a proportional countermeasure to the unlawful acts of other states.¹²⁹ A third argument is that the need to protect the marine environment gives states the power to keep dangerous vessels out of their territorial sea.¹³⁰ A fourth argument is that a coastal state's

¹²³ See *id.*

¹²⁴ See *Commentaries to the Draft Articles on Responsibility of States for International Wrongful Acts*, *supra* note 110, at 48–49.

¹²⁵ There is obviously considerable domestic political pressure on states because “[t]he tolerance . . . of the general public for shipping incidents that merely threaten pollution has evaporated.” *Point of View—Critical Issues Confronting Class*, LLOYD’S LIST (London), Feb. 15, 2001, at 14. This pressure is compounded by the fact that sheltered waters are typically found near popular resorts and marinas. See Andrew Spurrier, *France Rina Hits Back at Official Erika Disaster Report*, LLOYD’S LIST (London), Dec. 19, 2000, at 3; Sandra Speares, *Malta Defends Decision to Deny Castor Safe Haven*, LLOYD’S LIST (London), June 7, 2001, at 3; Jean-Pierre Dobler, *Areas of Refuge Must be Decided*, LLOYD’S LIST (London), Jan. 22, 2001, at 5.

¹²⁶ See Aline De Bievre, *Tankers: Rust Sank the Erika Says Malta Report*, LLOYD’S LIST (London), Oct. 4, 2000, at 1.

¹²⁷ See *id.*

¹²⁸ See *Focus on Ship Safety Not Ports of Refuge Says Spain*, *supra* note 107.

¹²⁹ See *Commentaries to the Draft Articles on Responsibility of States for International Wrongful Acts*, *supra* note 110, at 123–33.

¹³⁰ See Alan Boyle, *Marine Pollution Under the Law of the Sea Convention*, 79 AM. J. INT’L L. 347, 370 (1985) (arguing that the U.N. Convention on the Law of the Sea placed increased duties on coastal states to protect the environment). See generally *Stockholm Declaration on the Human Environment: Declaration on the Human Environment*, U.N. Doc. A/CONF.48/14 Corr. 1 (1973) (pronouncing that states should do all that is possible to protect marine areas from hazardous substances).

needs for border control and security¹³¹ heighten its interest and authority in keeping all ships, including endangered ships, out of its territorial sea.¹³² Lastly, international shipping has changed so dramatically over the last fifty years, both in terms of total tonnage and the actual size of the ships themselves, such that the right of entry for reasons of *force majeure* or distress is an antiquated notion.¹³³ While none are dispositive and some of these rationales are in fact questionable, taken together they perhaps add some quantum of legitimacy to the actions of coastal states involved in the *Erika* and *Castor* incidents.

1. Modern Search-and-Rescue Capabilities

For instance, Spain argued that given modern search-and-rescue capabilities, granting a distressed ship entry is no longer necessary.¹³⁴ Spain's theory was that they could protect both the lives of the mariners and the sanctity of the coastline.¹³⁵ Yet, the facts of both the *Erika* and *Castor* incidents suggest that the search-and-rescue rationale might not comport with reality.¹³⁶ Indeed, the fact

¹³¹ See Stephen E. Flynn, *America the Vulnerable*, FOREIGN AFF., Jan.–Feb. 2002, at 60, 70–74.

¹³² See *id.*

¹³³ See *infra* notes 161–66 and accompanying text.

¹³⁴ See *Focus on Ship Safety Not Ports of Refuge Says Spain*, *supra* note 107:

But when a country maintains a search and rescue facility such as Salvamento Marítimo Español, with its network of navigational control and essential facilities such as rescue boats and helicopters, which enables us to save lives and, in many cases, ships and cargoes, perhaps it is not so urgent for such countries to additionally offer ports of refuge, particularly for ships in poor condition carrying dangerous cargoes.

¹³⁵ See *id.* Following the *Castor* incident, Spanish authorities justified their actions, in part, on the idea that simply granting a ship in distress safe harbor was no longer necessary. See *id.* The idea behind this argument is that a government has both an obligation to the crew of a ship in distress and to its own citizens. See *id.* While granting safe harbor to a ship, consistent with the right of entry, might be best for the crew, Spanish authorities argued that this ran counter to the government's duty to protect its own citizens. See *id.* In the short term, Spanish authorities argued that, given their modern search-and-rescue capabilities, pulling the endangered crew off the ship while leaving the ship itself to the mercy of the seas, away from the Spanish coast, was at that time the optimal way to balance the competing interests. See *id.*

¹³⁶ Spain's assumption that contemporary search-and-rescue capabilities mitigate the need for the right of entry is debatable. In the *Erika* incident, French coastguard and naval personnel lacked the capability to rescue all of *Erika's* crew. See *supra* note 31. The storm-battered sailors were saved, in part, by daring acts of heroism performed by the British Royal Navy using large military helicopters. See *supra* notes 32–33. France, although a major military and maritime power, was unable on its own to muster the resources to rescue *Erika's* crew. *Id.* If France lacked adequate rescue capabilities, what does that suggest about the rest of the world's search-and-rescue capabilities? How would Spain react if one of her naval vessels became disabled due to heavy weather and was denied entry into sheltered waters near a country that lacked the

that France, a modern military and maritime power, was unable to muster the resources to rescue *Erika*'s crew¹³⁷ suggests that Spain's theory is flawed.¹³⁸

2. Countermeasures

Next, states are permitted to take proportional countermeasures against other states in response to unlawful acts.¹³⁹ Thus, if State A had previously denied entry

capacity to rescue the Spanish sailors? States must always be mindful of the fact that the positions they take today can easily create awkward situations for themselves in the future when the shoe is on the other foot.

Furthermore, is it a good idea to bank on daring rescue and salvage operations in foul weather and sea conditions as part of the rationale for abandoning or diluting the *force majeure* defense to coastal state jurisdiction? Amazingly, no one was injured or killed in the rescue of the *Erika* and *Castor* crews. See *supra* notes 31–33, 50–53. A skilled team of mariners was able to offload *Castor*'s cargo in a risky at-sea operation. See *supra* note 53. If this becomes the norm, someone will get killed; it is just a matter of time. Search-and-rescue operations and salvage-and-recover operations are inherently risky and unpredictable. In these operations:

[t]here are no hard and fast rules . . . only what is considered the best practice by experienced and capable seamen may be stated. So many elements control the application of the general rules—such as sea, wind, urgency of immediate assistance, maneuverability of the assisting ship, and the training and experience of the boat crews—that each case must be decided according to the circumstances.

KNIGHT'S MODERN SEAMANSHIP § 11.17, at 324 (John V. Noel ed., 1989). The number of factors that can be diminished or mitigated, such as severity of weather (by moving closer to shore or getting a lee from the shore) and proximity to search-and-rescue facilities (also by moving closer to shore), greatly increase the chances of success. See *id.* at 324–25. Indeed, these practical realities of basic seamanship and rescue operations generally highlight the very reasons that the *force majeure* doctrine became customary international law in the first place.

¹³⁷ See *supra* note 31.

¹³⁸ See *id.*

¹³⁹ See *Commentaries to the Draft Articles on Responsibility of States for International Wrongful Acts*, *supra* note 110, at 46–47, 48, 54, 56–57:

Chapter III

Breach of an international obligation

Article 12

Existence of a breach of an international obligation

There is a breach of an international obligation by a State when an act of that State is not in conformity with what is required of it by that obligation, regardless of its origin or character.

Article 13

International obligation in force for a state

An act of a State does not constitute a breach of an international obligation unless the

State is bound by the obligation in question at the time the act occurs.

....

Article 15

Breach consisting of a composite act

1. The breach of an international obligation by a State through a series of actions or omissions defined in aggregate as wrongful, occurs when the action or omission occurs which, taken with the other actions or omissions, is sufficient to constitute the wrongful act.

2. In such a case, the breach extends over the entire period starting with the first of the actions or omissions of the series and lasts for as long as these actions or omissions are repeated and remain not in conformity with the international obligation.

....

Chapter V

....

Circumstances precluding wrongfulness

Article 22

Countermeasures in respect of an internationally wrongful act

The wrongfulness of an act of a State not in conformity with an international obligation towards another State is precluded if and to the extent that the act constitutes a countermeasure taken against the latter State in accordance with chapter II of Part Three.

....

Part Three

The Implementation of the International Responsibility of a State

Chapter I

Invocation of the responsibility of a State

....

Article 43

Notice of claim by an injured State

1. An injured State which invokes the responsibility of another State shall give notice of its claim to that State.

....

Chapter II

Countermeasures

Article 49

Object and limits of countermeasures

to a ship in distress from State *B*, State *A* would later have difficulty arguing that one of its ships should be allowed entry into the waters of State *B*. State *B*'s denial in that hypothetical situation could be understood as a lawful and proportional countermeasure.¹⁴⁰ State *B*'s theory would be that State *A*'s actions in denying entry to State *B*'s distressed vessel in the past was a breach of State *A*'s obligations under UNCLOS and therefore unlawful.¹⁴¹

In this light, a state involved in either the *Erika* or the *Castor* incident, such as France, might have been able to justify its refusal to allow entry to either vessel on the grounds that it was responding to the unlawful act of another state.¹⁴² However, this is not the factual or legal situation that actually occurred.¹⁴³

1. An injured State may only take countermeasures against a State which is responsible for an internationally wrongful act in order to induce that State to comply with its obligations under Part Two.

2. Countermeasures are limited to the non-performance for the time being of international obligations of the State taking the measures towards the responsible State.

3. Countermeasures shall, as far as practicable, be taken in such a way as to permit the resumption of performance of the obligations in question.

....

Article 51

Proportionality

Countermeasures must be commensurate with the injury suffered, taking into account the gravity of the internationally wrongful acts and the rights in question.

Article 52

Conditions relating to resort to countermeasures

1. Before taking countermeasures, an injured State shall:

(a) Call on the responsible State, in accordance with article 43, to fulfill its obligations under Part Two;

(b) Notify the responsible State of any decision to take countermeasures and offer to negotiate with that State.

¹⁴⁰ Typically though, a countermeasure would be preceded by some form of diplomatic protest. State *B* would have objected to State *A*'s refusal in the first instance. Then, when the tables turned, State *B*'s actions could be understood as a lawful countermeasure. Absent such procedural history, State *B*'s later denial of entry would arguably fall out of the rubric of lawful countermeasures.

¹⁴¹ See *supra* notes 62–83 and accompanying text.

¹⁴² See *id.*

¹⁴³ See *supra* notes 22–57 and accompanying text. France, when it denied entry to either *Erika* or *Castor*, did not state, either formally or informally, that it was doing so in response to maltreatment of one of its own vessels at the hands of either flag state. Indeed, there is no indication that any of the flag states involved in the *Erika* or *Castor* incidents are themselves

At some time in the recent past, a vessel flying France's flag would have had to have been denied entry by the flag state of either the *Erika* or the *Castor*.¹⁴⁴ In response to this denial of entry, France would have had to do several things. First, France would have had to give notice to either flag state that it considered their actions an illegal act under international law. Second, France would have had to give notice to those flag states that it intended to take proportional countermeasures in response. Third, France would have needed to specify that as one such countermeasure, it was going to respond in kind by denying entry into French waters to distressed ships from those flag states.¹⁴⁵ No such prior incident occurred¹⁴⁶ and no such notice was given. Therefore, while at least theoretically possible, neither the *Erika* nor the *Castor* incidents could be understood as lawful and proportional countermeasures.¹⁴⁷

3. *Protection of the Marine Environment*

Over the past thirty years coastal states have increasingly had more control over their territorial sea for the purpose of preventing pollution and protecting coastal populations under international law.¹⁴⁸ International law has generally shifted away from what some decried as a "freedom to pollute" towards an emphasis on the need to protect the marine environment.¹⁴⁹ This trend has resulted in greater focus on flag state responsibility. It has also resulted in increased port state control over coastal waters to prevent pollution.¹⁵⁰ This shift

interested in pressing either incident as a violation of international law on the part of the coastal states.

¹⁴⁴ See generally *Commentaries to the Draft Articles on Responsibility of States for International Wrongful Acts*, *supra* note 110, at 145.

¹⁴⁵ See *id.*

¹⁴⁶ See *supra* notes 22–57 and accompanying text.

¹⁴⁷ See *id.*

¹⁴⁸ See TREVES, *supra* note 79, at 61–62; Brian Reyes & Nigel Tutt, *Tanker Plight of Castor Prompts IMO Plea*, LLOYD'S LIST (London), Jan. 9, 2001, at 1; Agustín Blanco-Bazán, *IMO Interface With the Law of the Sea Convention*, at http://www.imo.org/InfoResource/mainframe.asp?topic_id=406&doc_id=1077 (Jan. 6, 2000).

¹⁴⁹ Boyle, *supra* note 130, at 370.

¹⁵⁰ The port state arguably has the greatest incentive to prevent maritime pollution caused by shipping traffic in and out of its harbors. A flag state, on the other hand, in a race to the bottom to attract business, might be lax in enforcement of international pollution regulations and suffer no direct consequences. This dichotomy creates a tension in that the flag state has the greatest amount of legal authority, as the sovereign, to regulate its vessels. Given this dichotomy and the increasing importance of international environmental law, port states have increasingly come to enjoy more of the bundle of sovereignty rights over shipping than was once the case. The following material highlights this point:

Enforcement action for all sources of pollution will also for the first time be a duty for

arguably further ameliorates a distressed ship's right of entry as a defense to coastal state jurisdiction. Thus, the coastal state's power to prohibit the distressed ship's passage is enhanced.¹⁵¹

As an aside, the difficulty in weighing a distressed ship's right of entry versus a coastal state's inherent right of self-defense perhaps stems in part from a lack of progress in the development of additional international environmental regulatory regimes.¹⁵² To the extent that progress can be made in the arena of international environmental law, states might either be better able or less likely to deal with dangerous, disabled ships.¹⁵³

states, while in respect of vessels, the flag state must share its traditional primacy in enforcement matters with a more general concurrent port state jurisdiction and a wider coastal state protective jurisdiction

A second important sense in which the legal regime of the Convention can be seen as comprehensive is in its emphasis on protecting the marine environment as a whole. This aspect appears most obviously . . . in the requirement to take measures to prevent, reduce, and control pollution of the marine environment and not merely the environment of other states, in the extension of port state jurisdiction to cover high seas pollution offenses and in the statement that "States are responsible for the fulfillment of their international obligations concerning the protection and preservation of the marine environment."

Id. See generally *Stockholm Declaration on the Human Environment*, *supra* note 130 (pronouncing that states should do all that is possible to protect marine areas from hazardous substances).

¹⁵¹ See Boyle, *supra* note 130, at 370–71.

¹⁵² See Sean D. Murphy, *Prospective Liability Regimes for the Transboundary Movement of Hazardous Wastes*, 88 AM. J. INT'L L. 24, 74–75 (1994) (noting that although some regulations have been successful, "too often the rhetoric at the conclusion of these agreements has far surpassed their latter implementation").

¹⁵³ Effective enforcement of international law is invariably difficult. A finding that a state or one of its nationals violated international law (public or private) by no means guarantees that the aggrieved party will receive an adequate remedy. A coastal state therefore has a strong incentive to keep dangerous shipping away from its shores in the first place. A later finding that a sunken vessel violated international environmental law would be of little solace to a coastal community cleaning up a major oil spill. It would be of even less value if that vessel had inadequate insurance and the coastal state could not be reimbursed for the recovery costs. The following material supports this idea:

The international community has adopted more than 170 environmental multilateral agreements covering atmospheric, marine and land pollution, protection of wildlife and preservation of shared global resources. More than two-thirds of these agreements were reached since the early 1970s, when the international environmental movement came of age. While some have been remarkably successful even in their early stages, too often the rhetoric at the conclusion of these agreements has far surpassed their later implementation. For this reason, international lawyers and policy makers must pursue means of increasing the effectiveness of international environmental agreements, whether through enhanced monitoring and verification, more systematic funding, better use of international institutions, or the creation of supplementary regimes such as those relating to liability and

4. Border Security

Furthermore, the recent tragedy of September 11, 2001 arguably only furthers this need for a coastal state to exercise greater authority over its territorial sea.¹⁵⁴ All coastal states are now more cognizant over their legitimate need for border control in order to prevent devastating terrorist acts from taking place on their soil.¹⁵⁵ Controlling which ships enter their territorial sea is therefore part of that legitimate need and interest.¹⁵⁶ This interest would seem on balance to heighten a coastal state's right to refuse a vessel's entry into the territorial sea.¹⁵⁷ Arguably, because a distressed ship would not actually have to dock in the coastal state ameliorates its concern for border security.¹⁵⁸ On balance, though, self-defense

compensation. Just as the regimes created by these agreements are addressed to the underlying environmental problem, so should be any liability and compensation regime.

Recent regulatory controls on the transboundary movement of hazardous substances are now under review. The economic importance of the trade, whether for disposal or recycling, together with the dangers from its mismanagement, makes it incumbent upon states, international organizations and nongovernmental organizations to ensure that any proposed liability regime reinforces the standards set in regulatory instruments, the most significant of which is the Basel Convention. Moreover, the liability regime should not undermine these standards by creating incentives for private actors to operate outside the system for fear of extensive claims for damages.

Id. (footnote omitted).

¹⁵⁴ See Flynn, *supra* note 131, at 60 (viewing the September 11, 2001 tragedy as forcing the United States to protect its vulnerable ports).

¹⁵⁵ See *id.* at 62–63.

¹⁵⁶ See *id.* at 69–73.

¹⁵⁷ The attacks of September 11, 2001 have highlighted the vulnerability of seaports:

The United States is trying to plug potentially disastrous security gaps in the nation's seaports

. . . .

The relaxed policies around U.S. ports . . . make it possible for terrorists to retrieve illicit arms and explosives undetected—or even to hijack ships.

. . . .

“A terrorist act involving chemical, biological, radiological, or nuclear weapons at one of these seaports could result in extensive loss of lives, property, and business, affect the operations of harbors and the transportation infrastructure, including bridges, railroads and highways, and cause extensive environmental damage”

. . . [S]ecurity specialists warn there's nothing to stop attackers from shipping a “weaponized container” directly at almost any targeted U.S. metropolitan area.

August Gribbins, *Seaports Seen as Terrorism Target; U.S. Will Secure Harbors, but Actions Likely to Hurt Trade*, WASH. TIMES, Jan. 22, 2002, at A1.

¹⁵⁸ Yet given the high profile nature of *force majeure* incidents, it seems unlikely, on

concerns for coastal states in light of September 11, 2001 are heightened, and this perhaps detracts from a distressed ship's right of entry.¹⁵⁹

5. Changing Conditions—The Impact of Supertankers

Next, another rationale offered by coastal states is that *force majeure* is perhaps an outdated notion, given the great increase in the size and scope of international shipping.¹⁶⁰ International shipping has changed so dramatically in the last fifty years that simply forcing coastal states to accept any vessel in distress is no longer viable.¹⁶¹

Weighing against this argument, though, is the fact that the acceptance of the right of entry and the doctrine of *force majeure* into UNCLOS happened without protest or debate.¹⁶² Also, it is generally accepted under international law that

balance, that a ship could somehow abuse the right of entry in order to smuggle in terrorists or weapons of mass destruction. As witnessed in the *Castor* and *Erika* incidents, those ships were under tremendous scrutiny from coastal military and civilian authorities and the international media. See *supra* notes 22–50 and accompanying text. Given this level of scrutiny, the concerns raised by the tragedies of September 11, 2001, although of the most serious weight, are probably not altered significantly by the right of entry. Additionally, a distressed ship's right of entry merely excuses it from coastal state jurisdiction while in the territorial sea. It does not grant that ship a right actually to dock in the coastal state.

¹⁵⁹ On balance, legitimate port and border security concerns do undoubtedly add some quantum of legitimacy to the argument that coastal states should have greater control over the territorial sea, as a general matter. This heightened need and power, although arguably inapplicable in a right-of-entry case, does further cloud the issue over the right of entry, when added to the coastal state's legitimate environmental and safety concerns. As Stephen E. Flynn, a Senior Fellow at the Council on Foreign Relations, highlights, all border control concerns are interrelated. See Flynn, *supra* note 130, at 60. The key security issue for states is achieving transparency over borders. See *id.* at 74. Many states argue that increasing their authority and capability in one arena, such as counter-narcotics, necessarily has the effect of a virtuous cycle when combating other ills related to border security, such as terrorists. See *id.* at 69–73.

¹⁶⁰ See *A Refuge—Between a Rock and a Hard Place*, LLOYD'S LIST (London), Feb. 14, 2001, at 7:

It was one thing to cope with a tweendecker full of pit-props and a thirty-degree list, or an ore carrier with the cargo shifted. But at some time during the 1960s, when, in an astonishing extrapolation of ship sizes, a "supertanker" grew from 50,000 dwt to five times that tonnage in about that many years, a ship in distress became a most unwelcome guest.

¹⁶¹ See *id.* at 7.

¹⁶² UNCLOS went into effect in 1994. See *United Nations Convention on the Law of the Sea*, *supra* note 84. All of the states involved that ratified UNCLOS did so within the past twenty years. See *Chronological Lists of Ratifications of, Accessions and Successions to the Convention and Related Agreements as of 12 November 2001*, *supra* note 85. If conditions had changed in such a dramatic way as to require a change to the right of entry and the doctrine of *force majeure*, an ancient and long-standing principle of customary international law, then

changing conditions alone do not excuse a state from meeting its international obligations.¹⁶³ Thus, even if there had been a sudden change in the condition of international shipping, this change alone would not have excused coastal states from their international obligations. Moreover, it is doubtful that there was a sudden change in international shipping. By the time UNCLOS was adopted, ships were already large and getting larger. The volume of international trade was already high and getting higher.¹⁶⁴ Thus, examining solely the changing condition's rationale, for a state's actions not to constitute violations of international law, the law would first have to be changed.¹⁶⁵ A change to the law is exactly what is under consideration by the IMO.¹⁶⁶

surely the issue would have been debated. No such debates are on record. *See supra* note 79. The *force majeure* clause was accepted without protest. *See id.*

¹⁶³ Customary international law and the Vienna Convention on the Law of Treaties set a high bar for excusing a state from its voluntarily undertaken international obligations. A state cannot merely argue that something has changed. The change must be drastic and unforeseen. The following text supports this idea:

[C]hanged circumstances "must be" of such a nature, either individually or collectively, that their effect would radically transform the extent of obligations A fundamental change of circumstances must have been unforeseen; the existence of the circumstance at the time of the Treaty's conclusion must have constituted an essential basis of the consent of the parties to be bound by the Treaty.

Hungary/Slovakia, 1997 I.C.J. 3, 37 INT'L LEGAL MATERIALS 162, 195 (1998). Granted, foreseeability tests can be difficult to apply. Logically, events cannot be easily categorized into either completely foreseeable or completely unforeseeable. In the real world, events are perhaps either more foreseeable or less foreseeable. Where a given event or set of circumstances falls on this scale can always be debated.

Even so, the increase in the size and scope of international shipping falls into the more foreseeable category. Ships have been getting longer and drawing more water for time immemorial. Coastal states have been consistently and aggressively pursuing dredging projects to accommodate vessels of deeper and deeper drafts in order to attract the accompanying international trade. A state could not argue, in an intellectually honest way, that it became a party to UNCLOS and dredged its harbors to deeper drafts and yet did somehow not contemplate that shipping was going to get larger. The changed circumstance argument therefore fails.

¹⁶⁴ *See id.*

¹⁶⁵ *See* Vienna Convention on the Law of Treaties, May 23, 1969, art. 53, 1155 U.N.T.S. 331, S. Treaty Doc. No. 92-1; Richard Morrison, *Efficient Breach of International Agreements*, 23 DENV. J. INT'L L. & POL'Y 183, 213-17 (1994) (positing that a fundamental change in circumstances is an excuse in the most limited of circumstances).

¹⁶⁶ *See IMO Safety Talks to be Held in Secret*, LLOYD'S LIST (London), Mar. 5, 2001, at 7; "Places of Refuge"—A Priority Issue for IMO, *supra* note 9.

IV. PRE-DESIGNATED PLACES OF REFUGE

The *Erika* and *Castor* incidents demonstrate that, not surprisingly, the rights of coastal states are largely winning out over the rights of distressed vessels.¹⁶⁷ Unfortunately, the *Erika* incident in particular demonstrates that this tension can result in a worst-case scenario in the real world where no one wins—the ship can be destroyed resulting in a disastrous oil spill for the coastal state and great peril for the mariners.¹⁶⁸ Recognizing that keeping dangerous and disabled ships at sea is not in anyone's interest, the IMO is correctly seeking to prevent future *Erikas* and *Castors*.¹⁶⁹

Specifically, the IMO is considering adoption of a regime of pre-designated places of refuge.¹⁷⁰ The basic idea is that coastal states would have at least one area where vessels in distress could seek shelter.¹⁷¹ While the events of September 11, 2001, naturally motivated the IMO to focus heavily on the importance of maritime, transport, and port security, the IMO continues to work on voluntary guidelines for places of refuge.¹⁷² In the final analysis, the IMO's plan, while well-intended, is not well-suited to meet its objective. A major cause of incidents like the *Erika* and the *Castor* is arguably substandard shipping.¹⁷³ In

¹⁶⁷ See *supra* notes 22–57 and accompanying text.

¹⁶⁸ See *supra* notes 22–39 and accompanying text.

¹⁶⁹ The IMO is a specialized agency of the United Nations. See *Introduction to the IMO*, at <http://www.imo.org/HOME.html> (last visited Oct. 25, 2002). It was established by the IMO Convention “which entered into force in 1958.” *Id.* The IMO has 162 Member States. See *id.* The IMO's purpose is to:

“[P]rovide machinery for cooperation among Governments in the field of governmental regulation and practices relating to technical matters of all kinds affecting shipping engaged in international trade; to encourage and facilitate the general adoption of the highest practicable standards in matters concerning the maritime safety, efficiency of navigation and prevention and control of marine pollution from ships.”

Id. (quoting Article 1(a) of the IMO Convention). In short, the IMO focuses on safe shipping and pollution prevention. See *id.* The IMO has adopted over forty conventions related to these issues. See *id.* The IMO also focuses on pressuring and assisting governments to adopt implementing legislation of the IMO conventions. See *id.*

¹⁷⁰ See generally “Places of Refuge”—A Priority Issue for IMO, *supra* note 9.

¹⁷¹ See *id.*

¹⁷² See Lowry et al., *supra* note 10.

¹⁷³ Subsequent investigation of the *Erika* and *Castor* incidents suggests that both ships may have suffered from a form of “super-rust.” See ‘Super-rust’ Threat, *supra* note 55. This “potent new form of corrosion . . . could threaten a whole generation of ageing products tankers, and possibly also newer hulled vessels.” *Id.* Consequently, many in the international shipping industry believe that steps must be taken quickly by the private sector to deal with this threat. *Id.*; see also Andrew Spurrier, *An Inspector at St. Malo Set Alarm Bells Ringing About Corrosion on the Andina Trader*, LLOYD'S LIST (London), Mar. 17, 2001, at 4 (discussing a

the short term, adopting pre-designated places of refuge will have the effect of keeping substandard shipping in distress at sea longer.¹⁷⁴ It will also further erode the right of entry.¹⁷⁵ Neither of these will measurably improve the quality of international shipping.¹⁷⁶

In the alternative, the IMO should continue to focus on doing what it does best—raising international shipping standards and encouraging flag state responsibility.¹⁷⁷ At the same time, the right of entry for vessels in distress should be preserved. Incidents like the *Erika* and the *Castor* should be dealt with on a case by case basis. Rather than forcing all disabled vessels, no matter what their particular circumstances, to transit to a pre-designated place of refuge, a case by case approach would allow coastal authorities and professional mariners to work together to make the best of a bad situation—preserving life and property at sea, while protecting coastal areas and coastal populations.¹⁷⁸

controversial inspection and subsequent detention of the *Andina*); *IMO Safety Talks to be Held in Secret*, *supra* note 166 (listing various ideas to improve the monitoring of fleet conditions); *A Refuge—Between a Rock and a Hard Place*, *supra* note 160 (detailing the lax practices of modern shipping); *Anave Urges Concerted Approach to Safety Issues*, LLOYD'S LIST (London), June 14, 2001, at 14 (documenting a movement to enforce shipping quality in Spain); Sandra Speares, *Malta Defends Decision to Deny Castor Safe Haven*, *supra* note 125 (describing the risks ports take in allowing entry of an injured vessel).

¹⁷⁴ A simple hypothetical situation illustrates this point. Suppose a Canadian fuel tanker was transiting from Sarnia, Ontario (north of Detroit, Michigan on the St. Claire river) to Toledo, Ohio on the Great Lakes. Suppose that the United States, in response to the IMO's places of refuge initiative, had pre-designated Buffalo, New York, at the eastern edge of Lake Erie, as its place of refuge for Lake Erie. Then suppose that this Canadian fuel taker became disabled at the western end of Lake Erie, perhaps near Monroe, Michigan.

The pre-designated refuge plan would force this ship to attempt to travel more than 200 miles across the entire lake. In the interim, the ship could sink, its crew could be killed, or it could run aground, spilling its cargo along the shores of Michigan, Ohio, Pennsylvania, or New York. A pre-designated refuge plan fails to account for this basic geographic problem. We do not get to choose when and where emergencies happen. A flexible, case by case approach, is necessary to protect lives and the environment.

¹⁷⁵ See *A Refuge—Between a Rock and a Hard Place*, *supra* note 160; Hughes, *Issue of Scrapping Hazardous Ships Becoming More Pressing*, *supra* note 55.

¹⁷⁶ "Although many tank owners flinch at the prospect of new regulations and more stringent surveys, leading classification societies are already forming the view that more has to be done." *'Super-rust' Threat*, *supra* note 55.

¹⁷⁷ See *Introduction to the IMO*, *supra* note 169.

¹⁷⁸ See KNIGHT'S MODERN SEAMANSHIP, *supra* note 136, § 11.12, at 324–25.

A. IMO's Plan—Pre-designated Places of Refuge

The proposition being taken up by Committees of the IMO is that coastal states would pre-designate various areas as places of refuge.¹⁷⁹ Instead of distressed vessels being permitted to seek “any port in a storm,” they would be forced to transit to a coastal state’s pre-designated place of refuge.¹⁸⁰ Many fear that action is needed so that the treatment of the *Castor* does not become a model for coastal states to follow in the future when confronted with a request for shelter by a ship in distress.¹⁸¹

B. Obstacles to Adopting Pre-designated Places of Refuge

However, a change in the law towards pre-designated places of refuge raises two significant problems. First, it is probably beyond the IMO’s power to alter coastal states’ obligations under UNCLOS.¹⁸² UNCLOS itself would have to be amended.¹⁸³ Second, as a policy matter, adopting a rigid regime that forces disabled ships to transit to a pre-designated place of refuge is not sound. The right of entry for a disabled vessel should be preserved and incidents like the *Erika* and *Castor* should be dealt with, albeit more effectively, on a case by case basis.

First, any consensus IMO reached on places of refuge would not, in and of

¹⁷⁹ “A spokesman for the European Commission said: ‘This situation clearly shows the need for our post-Erika proposals to oblige members to nominate ports of refuge.’” *Mediterranean Crew Threat to Abandon Stricken Tanker Castor*, LLOYD’S LIST (London), Jan. 6, 2001, at 3.

¹⁸⁰ “All the parties involved in this incident are fearful that the political treatment of the *Castor* may become a precedent for future casualties and believe it is imperative that sensible, risk based guidelines on sheltered areas be developed at an intergovernmental level within IMO.” *Safety—Saving the Castor*, *supra* note 2; *see also Places of Refuge—Reaction to the Castor*, IMO Maritime Safety Committee, 74th Sess., at http://www.imo.org/Newsroom/mainframe.asp?topic_id=110&doc_id=1151 (May 8–June 2001) (noting that the Maritime Safety Committee, over the next two years, will develop guidelines covering “action expected from coastal states providing ‘places of refuge’ to ships in distress”); Dobler, *supra* note 125:

However, it may still prove possible to find some less developed coastlines where it will be possible to consider that a small number of residents can be evacuated in case of a risky cargo transfer operation, the cost of such evacuation and that of possible damages being taken in charge by the disabled ship’s P&I club.

The IMO Marine Safety Committee may consider to undertake such a study in order to determine a list of suitable sites.

¹⁸¹ *See* Dobler, *supra* note 125; “Places of Refuge”—A Priority Issue for IMO, *supra* note 9.

¹⁸² *See* Blanco-Bazán, *supra* note 148.

¹⁸³ *See id.*

itself, modify Articles 17 and 18 of UNCLOS.¹⁸⁴ This raises a thorny issue of treaty interpretation. The language of UNCLOS discussed above suggests that prohibiting a vessel in distress from seeking shelter is simply a power that coastal states do not have.¹⁸⁵ An agreement under the auspices of the IMO granting coastal states the power to require vessels only to enter pre-designated places of refuge is not harmonious with this concept.¹⁸⁶ It would perhaps violate the rule that IMO regulations must conform to UNCLOS since UNCLOS is now a treaty in force and acts as a “Constitution of the oceans.”¹⁸⁷

Beyond the potential ultra vires issue, there is a practical issue as to whether the IMO could adopt a meaningful pre-designated places of refuge regime any time in the near future.¹⁸⁸ IMO prides itself as an international body capable of acting quickly.¹⁸⁹ It touts its tacit acceptance procedure as a quick and innovative way of promulgating new international maritime standards.¹⁹⁰ To the IMO’s credit, it has been capable of rapidly adopting new shipping standards.¹⁹¹

¹⁸⁴ *See id.*

¹⁸⁵ *See id.*

¹⁸⁶ *See id.*

¹⁸⁷ Blanco-Bazán, *supra* note 148. “The last important element of the story was added when UNCLOS moved from its customary law status to that of a treaty in force. Entry into force of UNCLOS meant that IMO instruments, rather than simply taking into account UNCLOS, had to conform with its regulations.” *Id.*

¹⁸⁸ *See* David Hughes, *IMO Backs “Places of Refuge” Concept*, BUS. TIMES (Singapore), June 19, 2001, at 2 (suggesting that many countries and ship masters will ignore overly restrictive rules).

¹⁸⁹ *See* IMO’S 50th Anniversary—A Record of Success, at http://www.imo.org/About/mainframe.asp?topic_id=321 (last visited Oct. 25, 2002) (listing various examples of rapid responses by the IMO).

¹⁹⁰ Adopting detailed and meaningful administrative regulations at the domestic level can be an enormously difficult task. Such an undertaking at the international level is necessarily even more difficult and complicated. The IMO has been at the forefront of international dispute resolution by experimenting with consensus and tacit acceptance techniques. Rather than seek a unanimous up or down vote on every new proposal, the IMO has tried to use a consensus approach where states must expressly reject new regulations. Interim regulations take effect and, after a time, become permanent. While creating interim regulations in the first place can pose formidable technical and legal challenges, subject to intense negotiations, the IMO has used creative techniques to speed their implementation. The following passage justly credits the IMO for its innovation:

IMO adopted a new amendment system known as tacit acceptance. Instead of an amendment entering into force only after being positively accepted by a specified number of Parties, it was assumed that the amendment would automatically enter into force on an agreed date unless it was positively rejected by a specified number of Parties. Because of the consensus approach used by IMO when adopting measures this system was approved and has now been incorporated into nearly all of IMO’s technical instruments

The time taken to bring SOLAS amendments into force under tacit acceptance has been

However, IMO is not without its critics.¹⁹² Some suggest that any new IMO plan in this arena would be a “burden on the industry and ignored by ports and coastal states.”¹⁹³ Additionally, even if there are pre-designated places of refuge, it is likely that in egregious situations, such as where a large tanker carrying fuel is badly damaged and might explode or leak, the same domestic political concerns that motivate states to disregard the distressed ship’s right of entry will cause states to avoid their obligations.¹⁹⁴ Coastal states are apparently flouting the law now without consequence.¹⁹⁵ How would adopting a new, watered down regime change that fundamental problem?¹⁹⁶

Thus, the problem really might not be solved. Pariah ships like the *Erika* and the *Castor* would, in distress, continue to be without a home, both endangering their crews and increasing the likelihood that such ships would be destroyed at sea and possibly spill their dangerous cargo into the seas, damaging the environment and the coastline of coastal states, such as the *Erika* did to France.¹⁹⁷ Thus, the

steadily reduced until now urgent measures can be adopted and in force within 18 months—and they will apply to more than 98% of world tonnage.

Id.

¹⁹¹ *See id.*

¹⁹² *See Hughes, supra* note 188.

¹⁹³ *Id.* Critics fear that the IMO’s plan will place new restrictions on shipping without producing the promised benefit—namely, having at least one place in each coastal state where distressed ships could seek refuge. This attitude grows out of the general problem frequently faced by both states and their nationals, that of obtaining an adequate remedy for violations of international law, public and private. *See id.*

¹⁹⁴ Brian Reyes, *Castor O’Neil Pledge on Ports of Refuge*, LLOYD’S LIST (London), Jan. 25, 2001, at 1.

¹⁹⁵ *See supra* notes 84–106 and accompanying text.

¹⁹⁶ *See id.*

¹⁹⁷ As a policy matter, simply forcing substandard ships out to sea is not a good idea. Obviously, the coastal state runs the risk that the ship will break apart in an uncontrolled manner. The *Erika* incident itself aptly illustrates this risk. *See supra* notes 22–39. Given that “[c]arrying out . . . cargo transfer[s] in protected waters would dramatically increase the chances of success,” are coastal states really better off if pariah ships are left to the mercy of the seas? Brian Reyes, *Castor Spain Presses for Haven Debate*, LLOYD’S LIST (London), Jan. 16, 2001, at 3. This argument, in a sense, is a kind of Russian roulette. Maybe the ship will not break apart, in which case the gamble will have paid off. Or, if it does break apart, maybe it will happen along another state’s coast. But maybe, depending on the circumstances, the coastal state will end up with an *Erika*, in which case the coastal state will pay a heavy price, arguably a much heavier price than that state would have paid had an incident occurred in port, under more controlled conditions. *See Montreal—IMO Shipping Safety Culture Applies to Ports Says O’Neil, supra* note 11. Furthermore, the threat posed by an in-port incident is perhaps overrated:

Many of the coastal states that denied the *Castor* access to their territorial waters did so from a belief that the vessel posed an unacceptable hazard, either from explosion or cargo spill

effectiveness of places of refuge, even if adopted, is questionable.¹⁹⁸ In this light, going through a potentially lengthy process to change the law might not be effective.¹⁹⁹

Furthermore, any action by the IMO on ports of refuge in the near future would likely not be in the form of mandatory obligations on the part of coastal states.²⁰⁰ In fact, the IMO is currently working on non-mandatory guidelines.²⁰¹ The states that are now urging that the law be changed to having pre-designated places of refuge are themselves arguing that such a scheme be optional.²⁰² Also, at the end of the process, there could still be the problem of states ultimately deciding that, under substantial domestic political pressure, they are not going to shoulder their international burdens.²⁰³ Simply put, they could still end up keeping the *Erikas* and the *Castors* out of their waters, despite whatever pre-designated places of refuge regime to which they agree.

Next, even if states are able to shift to a system of pre-designated places of

. . . [I]ndependent scientific analysis of both scenarios clearly showed that the risk of an explosion was minimal and that the potential pollution threat was far worse if the vessel was to sink in deep water.

Safety—Saving the Castor, *supra* note 2. Additionally, as discussed above, the great risk to the lives of the distressed vessel's crew is similarly another obvious counter-argument.

Furthermore, even if a coastal state could justifiably keep substandard ships in distress out of its territorial sea, it raises the thorny issue of what constitutes a substandard ship. *Erika* had a significant rust problem, yet it was inspected in Sicily and was authorized to operate until its re-inspection in January 2000. Montgomery & Bell, *supra* note 22. *Castor* was considered to be in excellent condition. *See id.* The issue of what constitutes a substandard ship is beyond the scope of this note. However, given that both the *Erika* and *Castor* were fully and validly certified for service at sea under international maritime standards, it is doubtful that even if there were a substandard ship exception to a distressed ship's right of entry for reasons of *force majeure* or distress, that either ship would have fallen into that category. *But see* Spurrier, *supra* note 125. Additionally, arguing over whether a duly certified ship is substandard in an emergency situation only delays needed action. Ships in the *Erika*'s and the *Castor*'s respective situations need shelter and assistance. Forcing them to sea while coastal authorities debate certification issues puts both mariners and coastal populations at risk.

¹⁹⁸ *See Global Authority Should Rule on 'Leper' Ships*, LLOYD'S LIST (London), Sept. 20, 2001, at 5 (urging that "a new international authority should be appointed with powers to overrule individual governments seeking to shun ships that become 'maritime lepers'").

¹⁹⁹ *See id.*

²⁰⁰ "We're not starting from the point of view of a mandatory regime to say to countries, 'you must do this.'" Reyes, *supra* note 194 (quoting IMO Secretary General William O'Neil).

²⁰¹ *See* Lowry et al., *supra* note 10.

²⁰² "[R]eflecting the position of the governments that have to date refused shelter to the disabled vessel . . . [p]orts of refuge cannot be imposed on governments or states." Reyes, *supra* note 197.

²⁰³ *See supra* notes 84–106 and accompanying text.

refuge someday, this in turn raises an equitable issue of environmental justice.²⁰⁴ Indeed, any pre-designated places of refuge are likely, as a matter of political power and influence, to be poorer areas. Should poorer people be more likely to suffer the consequences of an environmental disaster than others?²⁰⁵ The logical consequence of shifting to pre-designated places of refuge might create such a result as a matter of systemic design.²⁰⁶ Thus, this issue should be openly debated as part of the consideration of pre-designated places of refuge and ultimately weigh against shifting to such a system.²⁰⁷

Additionally, coastal states have an overlapping obligation to protect the marine environment.²⁰⁸ Heightening the risk of major oil spills by forcing the distressed vessel to limp to a pre-designated place of refuge²⁰⁹ is inconsistent with this duty to protect the marine environment.²¹⁰

Besides, is abandoning a distressed vessel's right of entry in favor of pre-designated places of refuge a good policy choice? Many argue that the intent of coastal authorities in both the *Erika* and *Castor* incidents was simply to push the disabled vessels offshore and thus push the consequences of any problems away.²¹¹ As discussed above, such a policy clearly endangers the lives of mariners.²¹² Further, as discussed above, it puts coastal states at heightened risk of having hazardous cargoes spilled on their shores.²¹³ Lastly, it does not directly

²⁰⁴ See generally Richard J. Lazarus, *Pursuing 'Environmental Justice': The Distributional Effects of Environmental Protection*, 87 NW. U. L. REV. 787, 790 (1992) (explaining how fairness and minority interests conflate with changing environmental policy).

²⁰⁵ In the domestic context, many argue that interest group politics results in environmental regulation that pushes pollution sources closer to "racial minority communities and low income neighborhoods." See Lazarus, *supra* note 204, at 849. Similarly, in the international context, it is plausible to believe that similar interest group pressures might normally and naturally motivate states to have their pre-designated place of refuge near poorer areas with limited political clout. This issue should therefore be openly debated and considered by the IMO in debating the wisdom of a pre-designated places of refuge system.

²⁰⁶ See *id.*

²⁰⁷ See *id.*

²⁰⁸ See Jon M. Van Dyke, *Sharing Ocean Resources in a Time of Scarcity and Selfishness*, in *LAW OF THE SEA: THE COMMON HERITAGE AND EMERGING CHALLENGES*, *supra* note 79, at 3, 26; see also Dobler, *supra* note 125 ("[A]ny ship casualty is a menace for the marine environment.").

²⁰⁹ See *IMO Safety Talks to be Held in Secret*, *supra* note 166; "Places of Refuge"—A Priority Issue for IMO, *supra* note 9.

²¹⁰ See Van Dyke, *supra* note 208, at 26.

²¹¹ See Wills, *supra* note 39.

²¹² See *supra* note 52.

²¹³ See *supra* note 34.

address what most believe causes these incidents in the first place—substandard shipping.²¹⁴

V. RECOMMENDATIONS

Rather than put so much to chance, such as the risk of having a tanker break apart off the coast or having mariners killed at sea, there is another way. The *Castor* incident demonstrated the skill and ingenuity of the international professional maritime community, the dedication and expertise of classification societies, and the responsiveness, preparedness, and daring of emergency search-and-rescue personnel.²¹⁵ Rather than letting the clock tick on these disasters and letting bad situations get worse, an optimal solution simply would have been both to act sooner and to bring an international private and public team together quickly in emergency situations to minimize and mitigate the consequences of *Erika* and *Castor* situations.

For example, when a ship in distress seeks refuge consistent with its right of entry, the coastal state should grant that ship's request. The ship should be permitted not necessarily to dock, but rather to seek shelter in the nearest available area.²¹⁶ Simultaneously, the ship owners, the relevant classification society, ship yard repair personnel, and salvage crews should be activated and mobilized.²¹⁷ The coastal state's rescue personnel should be standing by, focused on mitigating the environmental consequences of the damaged vessel. This is the more logical approach. It is better for these people to be working together in a much faster time period and in a much safer environment.²¹⁸

In contrast, letting the clock tick on situations like the *Erika* and the *Castor* unnecessarily invites disaster. Commercial mariners, corporations, classification societies, and government officials, including search-and-rescue personnel, all ultimately end up getting involved and playing a role in these situations, as

²¹⁴ See 'Super-rust' Threat, *supra* note 55 (citing evidence of new types of corrosion in shipping vessels); Spurrier, *supra* note 173 (discussing a controversial inspection and detaining of the *Andina*); *IMO Safety Talks to be Held in Secret*, *supra* note 166 (listing various ideas to improve monitoring of fleet conditions); *A Refuge—Between a Rock and a Hard Place*, *supra* note 160 (detailing the lax practices within modern shipping); *Anave Urges Concerted Approach to Safety Issues*, *supra* note 173 (documenting a movement to enforce shipping quality in Spain); Speares, *supra* note 125 (describing the risks ports take in allowing entry of an injured vessel).

²¹⁵ See *supra* note 52.

²¹⁶ See *Montreal—IMO Shipping Safety Culture Also Applies to Ports Says O'Neil*, *supra* note 11 (explaining that allowing entry into a port may not be necessary to help an injured vessel).

²¹⁷ See 'Super-rust' Threat, *supra* note 55.

²¹⁸ See KNIGHT'S MODERN SEAMANSHIP, *supra* note 136, § 11.17, at 324–25 (outlining general guidelines for crew rescue).

highlighted by recent events. But under the *Erika* and *Castor* models, they end up having to do so under the worst of circumstances—having to offload personnel²¹⁹ and hazardous cargo²²⁰ from heaving decks on disabled ships hundreds of miles from shore while simultaneously bracing coastal communities for potential environmental catastrophe.

Given that all of the major players are necessarily involved in response, it is both in their mutual interest and logical to cooperate on prevention. Under a cooperative approach that recognizes both the right of entry for reason of *force majeure* and distress and the rights of coastal states, the relevant private and public entities could be brought to bear in a safer and more timely, effective way.²²¹ When the next *Castor* comes along, rather than roll the dice, point fingers, and force her back to sea, the relevant coastal states should spring into action to stabilize the situation—and the classification society, shipping company, regional governments, and other major players should get on board promptly to get the situation under control.²²²

Coastal states themselves would be safer and less likely to have an *Erika*.²²³ Maritime crews would be safer. It is a possible win-win situation. The IMO should resist the temptation to backpedal and rationalize by changing the rules of the game and pinning hopes on luck and daring.²²⁴ Rather, the IMO should encourage member states to meet their obligations while partnering with industry and classification societies and rescue personnel to protect life and property at sea and ashore.²²⁵

The technical and legal infrastructures are largely in place for coastal states and professional mariners to operate in this cooperative manner.²²⁶ In fact, when

²¹⁹ See *supra* notes 25–42 and accompanying text.

²²⁰ See *supra* notes 43–60 and accompanying text.

²²¹ See *Global Authority Should Rule on 'Leper' Ships*, *supra* note 198. Some urge the creation of an independent organization—

[l]ed by non-political, independent professionals [which] . . . would be backed by a system in which vessels would be forced to take out insurance against pollution damage, wreck removal costs, and explosions. While the dilemma has been highlighted by the notorious *Castor* emergency . . . it was stressed that was just one of many cases. As the conference met, South African salvor Smit Pentow was battling to find a refuge for the flooded 9,300 gt Liberian cargoship *Bismihita'la*, denied access to Cape Town and ports as far away as Namibia.

Id.

²²² See *id.*

²²³ See *supra* notes 22–39 and accompanying text.

²²⁴ See KNIGHT'S MODERN SEAMANSHIP, *supra* note 136, § 11.17, at 324 (“There are no hard and fast rules for rescuing the crew of a wreck.”).

²²⁵ See Bray, *supra* note 57.

²²⁶ See *Introduction to the IMO*, *supra* note 169; see also Paul Stephen Dempsey,

a ship is in distress, cooperation across jurisdictional lines, both public and private, domestic and international, is the norm.²²⁷ Under the 1974 International Convention for the Safety of Life at Sea (“SOLAS”), which now covers in excess of ninety-eight percent of the world’s commercial shipping, coastal states are required to, and do, maintain search-and-rescue capabilities.²²⁸ In addition,

Compliance and Enforcement in International Law—Oil Pollution of the Marine Environment by Ocean Vessels, 6 NW. J. INT’L L. & BUS. 459, 558–60 (1984) (analyzing two multi-lateral environmental conventions which aim to deter pollution); Franz Xaver Perrez, *The Efficiency of Cooperation: A Functional Analysis of Sovereignty*, 15 ARIZ. J. INT’L & COMP. L. 515, 579 (1998) (noting that “states are increasingly willing to [cooperate] as the interdependencies grow”).

²²⁷ See *Introduction to the IMO*, *supra* note 169. The practices of mariners and coastal states in dealing with distressed vessels evolved from humankind’s best instinct—the impulse to help those in need. In modern times, states have adopted formal legal and technical regimes to fulfill this ideal and to help distressed mariners in systematic ways. The following material fleshes out this point:

In the 1970s a global search and rescue system was initiated. The 1970s also saw the establishment of the International Mobile Satellite Organization (INMARSAT), which has greatly improved the provision of radio and other messages to ships.

In 1992 a further advance was made when the Global Maritime Distress and Safety System began to be phased in. In February 1999, the GMDSS became fully operational, so that now a ship that is in distress anywhere in the world can be virtually guaranteed assistance, even if the ship’s crew do not have time to radio for help, as the message will be transmitted automatically.

Id.

²²⁸ See *IMO and the Safety of Navigation*, at <http://www.imo.org/home.asp> (last visited Oct. 25, 2002); see also International Convention for the Safety of Life at Sea (SOLAS), Nov. 1, 1974, at http://www.imo.org/Conventions/contents.asp?topic_id=257&doc_id=647#3 (last visited Oct. 25, 2002):

Technical provisions

The main objective of the SOLAS Convention is to specify minimum standards for the construction, equipment and operation of ships, compatible with their safety. Flag States are responsible for ensuring that ships under their flag comply with its requirements, and a number of certificates are prescribed in the Convention as proof that this has been done. Control provisions also allow Contracting Governments to inspect ships of other Contracting States if there are clear grounds for believing that the ship and its equipment do not substantially comply with the requirements of the Convention—this procedure is known as port State control. The current SOLAS Convention includes Articles setting out general obligations, amendment procedure and so on, followed by an Annex divided into 12 Chapters.

Chapter I—General Provisions

Includes regulations concerning the survey of the various types of ships and the issuing of documents signifying that the ship meets the requirements of the Convention. The Chapter also includes provisions for the control of ships in ports of other Contracting

pursuant to the IMO's 1994 amendment of SOLAS, coastal states have the power to implement mandatory reporting systems for ships, which are useful in expediting emergency operations.²²⁹ Such mandatory reporting schemes are in effect in Europe.²³⁰

Looking to the future, the outlook for coordination technologies continues to improve dramatically. The IMO Subcommittee on Safety of Navigation has adopted standards for the use of automatic ship reporting systems.²³¹ Using the Global Positioning System, shipboard transponders, and electronic charting systems, the technology exists for a ship's exact position and movements through a sensitive area to be automatically reported and tracked by coastal authorities. On the Great Lakes, for example, the United States and Canada are on the verge of implementing such a system, known as the Automated Identification System ("AIS").²³² In an emergency, such a system takes the search out of search-and-

Governments.

....

Chapter V—Safety of Navigation

Chapter V identifies certain navigation safety services which should be provided by Contracting Governments and sets forth provisions of an operational nature applicable in general to all ships on all voyages. This is in contrast to the Convention as a whole, which only applies to certain classes of ship engaged on international voyages.

The subjects covered include the maintenance of meteorological services for ships; the ice patrol service; routing [sic] of ships; and the maintenance of search and rescue services.

This Chapter also includes a general obligation for masters to proceed to the assistance of those in distress and for Contracting Governments to ensure that all ships shall be sufficiently and efficiently manned from a safety point of view.

A new revised chapter V was adopted in December 2000, entering into force on 1 July 2002. The new chapter makes mandatory the carriage of voyage data recorders (VDRs) and automatic ship identification systems (AIS) for certain ships.

Id. (emphasis added).

²²⁹ See International Convention for the Safety of Life at Sea (SOLAS), *supra* note 228, at http://www.imo.org/Conventions/contents.asp?topic_id=257&doc_id=647#31.

²³⁰ See *id.*

²³¹ See *id.*

²³² See Kavanaugh, *supra* note 12. "Rear Admiral James Hull, Ninth District commander, said that by this summer most ships entering the St. Lawrence Seaway will be equipped with an electronic program called Automatic Identification System. This will allow ports and ships to identify the exact location of all vessels on the water." *Id.* AIS integrates global positioning data, electronic navigational charts, shipboard transponders, and shore-based command and control facilities. See Ross, *supra* note 12. They provide Vessel Traffic Services (VTS) with real-time information regarding the position and movement of commercial ships within their area of operation. See *id.* This same information is available to all other ships transiting in a

rescue.²³³ Coupled with modern communication technologies, other merchant ships transiting the area are also well poised to assist, as is their obligation under SOLAS.²³⁴ Given the technological and legal forces moving the international maritime community closer together,²³⁵ it is logical to maintain a case by case approach that minimizes both risk to mariners and danger to coastal populations and environmentally sensitive coastal areas.

The United States is already in some ways a model of public and private cooperation in both preventing marine pollution and responding to it.²³⁶ Regional Captains of the Port (COTP) coordinate extensively with the marine industry.²³⁷ Government and industry work together in preparing contingency scenarios for likely events.²³⁸ Rigorous enforcement of civil liability penalties, in addition to the ever present possibility of bad press (no company wants to be the owner of the next *Exxon Valdez*),²³⁹ provide the necessary incentives for private industry to

given area. AIS is akin to an air-traffic control system. *See id.* In a shipboard emergency, an AIS greatly reduces response time of professional search-and-rescue personnel. It also enhances the ability of nearby commercial mariners to respond and assist. *See id.*

²³³ *See* Kavanaugh, *supra* note 12.

²³⁴ *See* International Convention for the Safety of Life at Sea (SOLAS), *supra* note 228, at http://www.imo.org/Conventions/contents.asp?topic_id=257&doc_id=647#9.

²³⁵ *See* Introduction to the IMO, *supra* note 169.

²³⁶ *See* Robert C. North, *Ten Years Later . . . Oil Spill Prevention and Response in the United States*, COAST GUARD J. SAFETY SEA, Jan.–Mar. 1999, at 1–18, available at <http://www.uscg.mil/hq/g-m/nmc/pubs/proceed/insert99.pdf> (last visited Oct. 25, 2002). Since passage of the Oil Pollution Act of 1990 (OPA 90), the average number of oil spills over 10,000 gallons in the United States has dropped by fifty percent. *See id.* at 7. In fact, “the total volume of tankship oil spills in the U.S. peaked in 1989 and has remained below 200,000 gallons since 1991.” *Id.* After OPA 90, the United States implemented the Response Management System, which is described as follows:

Response Management System: The National Contingency Plan requires On-Scene Coordinators (OSCs) to direct response efforts and coordinate all actions at the scene of a spill or release. There are 47 OSCs at Marine Safety Offices and Activities located at strategic ports around the country. A response management system brings together federal and state governments, and the responsible party This allhazard/allrisk response management system has enabled much more effective response efforts since its adoption.

Id. at 10–11.

²³⁷ *See id.* at 7–12.

²³⁸ *See id.*

²³⁹ The *Exxon Valdez* spilled more than ten million gallons of oil in Prince William Sound, Alaska, when it ran aground on a reef in 1989. *See* Elizabeth R. Millard, *Anatomy of an Oil Spill: The Exxon Valdez and the Oil Pollution Act of 1990*, 18 SETON HALL LEGIS. J. 331, 331 (1993). The words *Exxon Valdez* have come to “symbolize the devastation and disaster that accompany large scale spills.” *Id.* Simply put, companies have strong and obvious financial, legal, and public relations incentives to be certain that one of their ships does not become similarly synonymous with environmental catastrophe.

cooperate.²⁴⁰ The practice in the United States of preventing marine casualties and responding to them on a case by case basis, particularly over the past decade, provides a viable alternative to the scheme under consideration by the IMO.

Masters of vessels that become in distress should be clear in communicating with coastal states that they are only seeking a place of shelter.²⁴¹ Coastal authorities might be more willing to grant a vessel entry into protected waters than they would be to allow it access to a port facility located near a populated area.²⁴² An initial miscommunication or misunderstanding could be enough to arouse the domestic political concerns that motivate states to keep disabled ships away from their shores in the first place.²⁴³ By being absolutely clear in the initial communication that a ship is only seeking a temporary shelter from severe sea and weather conditions and that such shelter need not be a port (it might only be getting a lee from a coastal peninsula or island),²⁴⁴ distress requests might have a better chance of being granted.²⁴⁵

Lastly, the current lack of viability of the doctrine of *force majeure* and the prospect of greater regulation for an already heavily regulated industry serve as warning and motivation to private shipping companies and to classification societies, such as the American Bureau of Shipping.²⁴⁶ Ultimately these companies and their vessels are the ones likely to be stranded at sea.²⁴⁷ In the short term, and perhaps the long term as well, the real answer may lie in vigorous efforts by private entities targeted at eliminating substandard shipping.²⁴⁸

²⁴⁰ See North, *supra* note 236, at 13–14.

²⁴¹ See *Montreal—IMO Shipping Safety Culture Also Applies to Ports Says O'Neil*, *supra* note 11.

²⁴² "Mr. Tsavlis described 'port of refuge' as a 'misconstrued term' and said that while 'most people thought we wanted to come into a sophisticated port, we were referring to a place of shelter.'" Speares, *supra* note 125.

²⁴³ See *A Refuge—Between a Rock and a Hard Place*, *supra* note 160.

²⁴⁴ To get a lee means to take shelter on the leeward side of a body of land. If the wind is blowing from the north, a distressed ship might get a lee by anchoring on the south side of an island and thus be protected from the elements. See KNIGHT'S MODERN SEAMANSHIP, *supra* note 136, § 11.17, at 324–25.

²⁴⁵ See *Montreal—IMO Shipping Safety Culture Also Applies to Ports Says O'Neil*, *supra* note 11:

To be clear: a disabled vessel such as the *Castor* does not necessarily need to enter a port. When dealing with ships in distress, the requirement is to find them an area of sheltered water where the situation can be stabilised, the cargo made safe and the salvors and authorities can evaluate what further steps are necessary without the pressure of a crisis—frequently political—hanging over their heads.

²⁴⁶ See Hughes, *supra* note 55.

²⁴⁷ See '*Super-rust*' Threat, *supra* note 55.

²⁴⁸ IMO chairman William O'Neil said in a low-key speech that the shipping industry

VI. CONCLUSION

In conclusion, the *Erika* and *Castor* incidents suggest that coastal states are increasingly unlikely to recognize a distressed ship's right of entry. The *Erika* and *Castor* incidents also demonstrate that forcing disabled ships to stay at sea is a dangerous proposition for both maritime crews and coastal populations. The IMO is attempting to address this problem by adopting pre-designated places of refuge. As discussed above, though, the IMO's efforts here, while well intended, will probably not solve the problem.

Alternatively, the IMO should continue to focus on doing what it does best—raising international shipping standards and encouraging flag state responsibility. At the same time, the right of entry for vessels in distress should be preserved. Isolated incidents like the *Erika* and the *Castor* should be dealt with on a case by case basis. Rather than forcing all disabled vessels, no matter what their particular circumstances, to transit to a perhaps distant pre-designated place of refuge, a case by case approach would allow coastal authorities and professional mariners to work together to make the best of a bad situation—preserving life and property at sea, while protecting coastal areas and coastal populations.

'must take action together.' He claimed there was underway 'a quiet revolution in the safety of shipping' with most voyages completed without incident." Bray, *supra* note 57.