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AN INTERNATIONAL REGIME

PROTECTING

THE OCEANS' ENVIRONMENT?

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INTRODUCTION :

> "The natural resources of the earth, including the air, water, land, flora and fauna and especially representative samples of natural ecosystems must be safeguarded for the benefit of present and future generations through careful planning or management, as appropriate." (1)

Recent years have heralded an upsurge in concern for the world's environment that shows the days are long gone when the peoples of the world were prepared to accept economic gain at the expense of everything else.

The aim of this paper is to look at the role international law has played and can play in one area of our environment - the sea.

At one time it was thought the sea could never be affected by the activities of men. It could be used as a dustbin for the waste products thrown out during his technological advancement and as a source of his never ending food and mineral requirements, without altering its ecological balance. After all, it could absorb these wastes and its resources could never be depleted!

This claim can no longer be accepted. Science has proved the activities of man can alter the marine environment. But, science has also provided the answer - the use and exploitation of the oceans must be regulated and managed. Regulation on the national scene can be achieved and enforced through domestic law, and on the international scene environmentalists have looked to international law to achieve the same result.

In this paper it is proposed to examine the success international law has had so far, and its chances of success in the future. Generally the international solutions fall into the two catagories of customary and conventional law.

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(1) Principle 2 : Stockholm Declaration on the Human Environment

"The emergence of a customary rule of law occurs where there has grown up a clear and continuous habit of performing certain actions in the conviction that they are obligatory under international law." (2) On the other hand, conventional law is created by an international agreement between two or more states on any matter governed by international law.(3)

These two sources of law are not unrelated, however, and a conventional rule may at the same time evidence the existence of a customary rule.

> "Some rules of international law are of a mixed sort: conventional as regards states parties to treaties in which they are laid down, and customary as regards others. This is far from unusual. It is a situation which constantly arises in connection with codification, as also where a practice originally based on particular treaties acquires those characteristics of generality and continuity which the process of creation of customary rules demands." (4)

For this reason, when the possible existence of a customary rule is being discussed it is often necessary to introduce conventional environmental law (or even the lack of it) to determine the exact nature of the rule. For instance, what was said at the Stockholm Conference on the Human Environment may be a very valuable guide to the scope of a customary rule. (5)

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(2) J.E. Mann : French Nuclear Testing & International Law (1969) Rutgers L.R. 144 at 146/7

(3) M. Sorensen : Manual of Public International Law at p 124

(4) p 129 ibid

(5) Declarations such as that produced at Stockholm are included in the catagory of conventional law in this paper.

International environmental law covers a very wide field and this paper can only hope to cover a few of the areas in any detail. Those areas which are discussed are thought to be the most representative. One field that will not be covered in depth is the exact nature of the threat to the environment. This job can be left to the scientist. (6) To appreciate the size of the problem when reading the paper, however, it is helpful to keep in mind the four catagories into which most environmental questions fall :

(i) Ultra hazardous such as tanker collisions and nuclear testing.

(ii) Cumulative hazards to climate and resource purity arising from sustained human activity. Examples are the discharge of mercury and the use of DDT.

(iii) Extinction of animal species arising from excessive exploitation. The best example is the whale.

(iv) Allocating rights among competing uses such as between ocean mining and fishing or between economic gain and the aesthetic quality of nature. (7)

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(6) Kennan : To Prevent a World Wasteland
48 Foreign Affairs 401

(7) R. Falk: Environmental Policy as a World Order Problem
12 Nat. Res. J. (1972) 161 at 166

CUSTOMARY INTERNATIONAL LAW

Problem 1 : A Question of Standing :

Damage caused to the marine environment falls into two totally separate catagories. First there is damage to areas within the national jurisdiction of other states. That is, damage to either their territorial sea or shoreline. Alternatively damage can be caused to the "res communis". (8)

With the first catagory there is no problem of standing. The country suffering the injury has the legal interest or "locus standi" to press for compensation.

But, what about the situation when damage is caused to an area outside national jurisdiction? Does this mean that the danger to the environment could remain unchecked as far as customary international law is concerned because no single state can establish standing? This has been seen as one of the main drawbacks to the development of customary rules protecting the international environment. Commentators have grappled with this problem without really overcoming it. The following is fairly typical of the optimistic plea they tend to put forward :

> "Whenever there is a significant threat of harm to the 'res communis', an international legal order lacking institutions capable of effective public representation cannot require a showing of a unique interest on the part of objecting states as a prerequisite to standing." (9)

New Zealand was faced with a similar problem in the French Nuclear Testing case. One of its claims was that atmospheric nuclear testing "violated the rights of all members of the international community including New Zealand to the preservation from unjustified artificial radioactive contamination of the terrestrial, maritime and aerial environment..." (10)

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(8) The term "res communis" in this paper is used in the sense of the "shared environment". The area of high seas and the seabed beyond national jurisdiction to which all states have equal rights.

(9) F.L. Kirgis : "Technological Challenge to the Shared Environment United States Practice : 68 AM JI Int'l L 290, at pp 292-293 (1972)

(10) para 28 (b) N.Z. Application Instituting Proceedings, filed at the International Court of Justice on 9 May 1973

The policy argument behind this claim was that general interests (if they exist at all) are worthless without some recognition of a right on the part of individual countries to protect them.

It is a view which has received some judicial support. In the two South West Africa Cases Judge Jessup in dissenting opinions (11) concluded that there are situations in which states are given a right of action without any showing of individual prejudice or substantive interest. This view that a state can have a legal interest in duties owed to the international community as a whole was later accepted by the majority of the International Court in the Case Concerning the Barcelona Traction, Light and Power Co. Ltd.(12) The Court distinguished between two sets of obligations. On the one hand there were those owed by a State to the international community as a whole ("erga omnes"), which because of their importance, gave all states a legal interest in their protection. On the other hand, there were those obligations which only arose vis-a-vis another state. The example given was diplomatic protection which depended on the supposition that the defendant state had broken an obligation owed to another state in respect of its nationals. In that situation only the party to whom the international obligation was due could bring a claim.

Into which of these two catagories does the protection of the environment fall? Further assistance can be gained from the Barcelona Traction case which listed some of the areas of international law which give rise to obligations owed to the international community as a whole. These included obligations derived from the outlawing of agression and genocide. Also principles concerning basic human rights including protection from slavery and racial discrimination. (13) Obviously this list is not exhaustive but it does give some indication of the importance which must be attached to any obligation before it can be said to be owed to the internatic community as a whole.

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(11) Preliminary Objections : I.C.J. Rep. (1962) pp 425-433
2nd phase : I.C.J. Rep. (1966) pp 373 - 388

(12) 2nd phase : I.C.J. Rep. (1966) p.3

(13) ibid at p.32

Because of the decision it reached, the majority in the Nuclear Testing case (14) did not have to consider the validity of the New Zealand claim, that it could represent the interest of the world and more specifically that of the Pacific in trying to achieve a pollution free environment. But the minority (15) briefly dealt with this issue. They said :

> "The question of legal interest cannot be separated from the substantive legal issue of the existence and scope of the alleged rule of customary international law." (16)

Therefore, the question of whether a duty is owed erga omnes depends in turn on the nature of that duty.

Since 1958 there has been a growing body of law aimed at preventing pollution of the environment and confirming that the area of the oceans beyond national jurisdiction belongs to all mankind. Article 2 of the Geneva Convention on the High Seas in that year proclaimed the high seas are "open to all nations (and) no state may validly purport to subject any part of them to its sovereignty." Likewise Article 25 required every state to take steps to prevent pollution of the seas from the dumping of radio-active waste and also to co-operate to prevent all other forms of pollution.

A more recent example is the Stockholm Conference on the Human Environment which met in 1972 and reflects the concern of the international community to overcome the problem of pollution. Its Declaration represents agreement on the part of one hundred and thirteen of the countries on this Earth on the question of the environment. The Conference decided :

> "States shall take all possible steps to prevent pollution of the seas by substances that are liable to create hazards to human health, to harm living resources and marine life, to damage amenities or to interfere with other legitimate uses of the sea." (17)

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(14) Delivered 20 December 1974 : I.C.J. Rep. (1974) p 457

(15) Judges Onyeama, Dillard, Jiménez de Arechaga and Sir Humphrey Waldock

(16) I.C.J. Rep. (1974) 457 at p 521 para. 52

(17) Principle 7 of the Declaration on the Human Evnironment.

and :

> "the marine environment and all the living organisms which it supports are of vital importance to humanity, and all people have an interest in assurring that this environment is so managed that its quality and resources are not impaired." (18)

But perhaps the clearest statement evidencing a duty owed to the international community as a whole can be found in General Assembly Resolution 2749 (XXV) adopted on 17 December 1970 known as the Declaration of Principles Governing the Sea-bed and Ocean Floor beyond the limits of National Jurisdiction. (19)

The first principle declares :

> "the sea-bed and ocean floor, and the sub-soil thereof, beyond the limits of national jurisdiction, as well as the resources of the area are the common heritage of mankind."

Principle II then went on to state that with this in mind :

> "With respect to activities in the area and acting in conformity with the international regime to be established, States shall take appropriate measures for and shall co-operate in the adoption and implementation of international rules, standards and procedures for, inter alia :
>
> (a) The prevention of pollution and contamination and other hazards to the marine environment, including the coastline, and of interference with the ecological balance of the marine environment:
>
> (b) The protection and conservation of the natural resources of the area and the prevention of damage to the flora and fauna of the marine environment."

These statements and many of the rules, both developed and developing, which will be mentioned in this paper show there is now a duty on states not to subject the natural resourses of the high seas to any unwarranted environmental hazard. They also point to the obligation being one owed to the international community as a whole under the test in the Barcelona Traction case with the resulting recognition that an individual state has standing in any claim to prevent damage being caused by pollution to the "res communis".

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(18) Recommendation 92 of the Declaration on the Human Environment. This recommendation is the statement of objectives and guiding principles for the Law of the Sea Conference and the Inter-Governmental Maritime Consultative Organisation (IM.C.O.) Marine Pollution Conference.

(19) The resolution was passed with 108 votes in favour, none against and 14 abstentions.

The Nature of the Customary Environmental Rules :

> "States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental policies and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction." (20)

The development of international rules regulating man's use of the environment has been hampered by the conflicting principles of the territorial sovereignty of States and State responsibility.

The concept of state sovereignty in its most extreme form provides the basis for allowing the selfish use and enjoyment of resources, with no corresponding duty to protect those resources. L. Oppenheim expressed this traditional view in the following way.

> "An act of a State injurious to another State is nevertheless not an international delinquency if committed neither wilfully and or maliciously nor with culpable negligence." (21)

But, international law has over the last few decades seen a shift away from any notion of absolute state sovereignty, towards a more balanced approach to this question. It is reflected in the principle quoted above from the Stockholm Conference which attempts to balance the right of a State to control what goes on within its own territory with its responsibility to ensure that this does not cause damage to others.

The question to be decided, however, is the extent to which that principle represents customary international law.

A State's sovereignty over the exploitation of resources within its own territory cannot be denied. Rather it is the second branch of the principle concerning State ~~sovereignty~~ responsibility that poses the real problems. (22)

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(20) Principle 21 : Stockholm Declaration on the Human Environment 1972

(21) L. Oppenheim, International Law (8th Edition) Edited by H. Lauterpacht (1955) at p. 343.
An "international deliquency" is defined at p. 338 as any injury to another State committed by the Head or Government of a State in isolation of an international duty.

(22) The question of State responsibility is not only causing difficulties in the field of environmental law. It is one of the major problems confronting the International Law Commission at the present time.

There has been very little international litigation in the field of environmental protection or in areas directly applicable but what cases and arbitered decisions there are have been extensively used, in some cases far beyond their limited scope.

The best starting point is the Corfu Channel Case,(23) because although no question on environmental damage arose on its facts, the International Court of Justice was required to reconcile the two possibly conflicting principles of "sovereignty" and "responsibility". The Corfu Channel Case involved a claim by Great Britain for compensation from Albania. It arose when two British ships struck a minefield while passing through the Corfu Channel Strait in Albanian territorial waters. Several British seamen were killed or injured and considerable damage was caused to the two ships. Albania had not laid the minefield and the facts from which its knowledge of the minefield's existence was ultimately inferred were in dispute. The International Court found Albania liable

> ".... on certain general and well-recognised principles, namely elementary considerations of humanity, even more exacting in peace than in war; the principle of the freedom of maritime communication and every State's obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States." (24)

Liability stemmed from the presence of the mine in Albania's territorial waters. Not from any malevolence or neglect which the applicant State might have to prove.

The concept of sovereignty thus contains two elements. The first is the right of every State to use its own in any way it wishes. But, at the same time it must recognise that other States also have this very same right in relation to their own territory, which cannot be interferred with. (25)

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(23) /1949/ I.C.J. Rep.4

(24) /1949/ I.C.J. Rep.4 at p.22

(25) Individual States also have rights in relation to shared resources. See part II (ante)

The Corfu Channel Case, although of great value in the field of environmental law, was not concerned with that type of injury. The only international decision directly concerned with environmental damage is the Trail Smelter Arbitration.(26) Perhaps because of its status as a "lone light on the horizon", the case has been extensively cited as stating general principles of environmental law well beyond the limited terms of reference assigned to the Arbitration Tribunal. The case has been so widely used that one commentator has suggested :

> "Every discussion of the general international law relating to pollution starts,and must end, with a mention of the Trail Smelter Arbitration" (27)

Although his remark has obvious sarcastic overtones, at the same time it does show the importance of the Tribunal's ruling. The facts were relatively straightforward. A zinc smelter at Trail in British Columbia emitted sulphur dioxide fumes which floated across the Canadian, United States border causing damage to fisheries, lumber, fruit and stock growing interests in the state of Washington. The dispute was submitted to an "ad hoc" arbitral tribunal on the basis of a special convention. In 1938 the Tribunal reached an interim decision and a temporary regime was decreed permitting the smelter to operate at a reduced level. At the same time the compensation payable for damage already caused was assessed at $78,000. Then in 1941 the Tribunal gave its final decision which required the parties to carry on implementing the regime introduced in the interim judgment. It also sought to justify its earlier finding and after looking at the law governing disputes between cantons in Switzerland, and pollution crossing the internal borders of the United States, the Tribunal concluded that :

> "Under the principles of international law as well as the law of the United States, no State has the right to use or permit the use of its territory in such a manner as to cause injury by fumes in or to the territory of another, or the properties or persons therin, when the case is of serious consequence and the injury is established by clear and convincing evidence." (28)

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(26) 3 U.N.R.I.A.A. 1905 (1941); (1941) 35 A.J.I.L. 684

(27) A. Rubin; Pollution by Analogy - The Trail Smelter Arbitration (1970/71) 50 Oregan L.R. 259 at p.259

(28) 35 AM. JI. Int'l L. 684 at p.716

The third, and most recent decision relevant to environmental protection is the Lake Lanoux Arbitration in 1957. (29) Lake Lanoux is in France and is the source of the Carol River which flows from that country into Spain. Since 1917 various schemes had been mooted for the utilisation of the waters of Lake Lanoux but these schemes were all objected to by Spain. The issue before the Tribunal was whether a change to the river course proposed by France for the generation of hydro-electric power violated earlier treaties between the two countries.

Two questions came before the Tribunal. The first was whether Spain's interests could be adversely affected. It was held that there was no such effect because the French agreed to restore to the Carol River an amount of water equal to that removed for generation purposes.

> "The water which by nature constitutes a fungible item may be the object of restitution which does not change its qualities in regard to human needs. A diversion with restitution, such as that envisaged by the French Project, does not change a state of affairs organised in function of the requirements of social life" (30)

The second question was whether agreement was necessary before a change was made on French Territory which would not adversely affect Spain. In deciding this point the Tribunal considered customary international law as well as the relevant treaty agreement. It was held there was no obligation on France to get Spain's consent.

> "(the present convention) in no way alters the freedom of each State, within the framework of international law, to carry out within its territory all operations for the development of hydraulic power which it desires." (31)

Simply a recognition of French State sovereignty. The converse of this finding, however, involves questions of state responsibility for injury and the Tribunal admitted :

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(29) Condensed version in 53 AM JI Int'l L. 156 (1959)

(30) ibid at p.161

(31) ibid at p.165

> "It could have been argued that the works would bring about a definitive pollution of the waters of the Carol or that the returned waters would have a chemical composition or a temperature or some other characteristic which could injure Spanish interests. Spain could then have claimed that her rights had been impaired..." (32)

The question that must now be considered is the value of the Corfu Channel Case and the Trail Smelter and Lake Lanoux Arbitrations in environmental law.

As has been pointed out already, the dirth of authority in customary international law dealing with pollution of the environment has resulted in these decisions being "flogged to death". Commentators have been able to find in them pointers to almost every type of international responsibility.

The interpretations of these decisions basically fall into four catagories :

(i) Strict or Absolute Liability : Before there is responsibility for any injury there must be an unlawful act or omission by one state resulting in loss or damage, but the injury need not result from any fault or negligence. Usually the unlawful act or omission is the breach of the applicant state's sovereign rights either individually or collectively in the case of shared resources. (33)

(ii) Good Neighbourliness : The maxim "sic utere tuo ut alienum non laedas", - us your property in such a manner as not to injure that of another. The three decisions are said to represent this emerging principle of international law which is based on broad standards of respect and recognition. (34) Its doctrinal base can be found in Article 74 of the Charter of the United Nations which although appearing in Chapter XI dealing with non-selfgoverning territories, is extended to all states by the emphasised words:

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(32) ibid at pp 160-161

(33) L.F.E. Goldie : Liability for Damage and International Law 14 Int. & Comp. L.Q. 1189 (1965) asserts that customary international law may well be on the threshold of accepting strict liability in cases where one state creates unnecessary hazards for others.

(34) J. Hargrove : Law Institutions & the Global Environment pp. 129-131

> "Members of the United Nations also agree that their policy in respect of the territories to which this Charter applies, no less than in respect of their metropolitan areas, must be based on the general principle of good neighbourliness, due account being taken of the rest of the World, in social economic and commercial matters"

(iii) Abuse of Rights : The observations particularly in Corfu Channel, but also in the two arbitered decisions lend support to the view that lawful activities must be carried out with regard to the interests of other states.

(iv) Equitable Utilization : This theory introduces the test of the "reasonable user" (35) and it tolerates a certain amount of contamination and pollution. It arises most often when resources are shared between states. The best example is in the field of international rivers and lakes. Article X of the Helsinki Rules on the pollution of international rivers states :

> "(1) Consistent with the principle of equitable utilization of the waters of an international drainage basin, a state :
>
> (a) must prevent any form of water pollution or any increase in the degree of existing water pollution in an international drainage basin which would cause substantial injury in the territory of a co-basin state." (36)

These interpretations are by no means opposed to one another. Rather they represent the different emphasis which commentators have placed on the decisions and the purposes for which they have been used. Those coming within the two catagories of "good neighbourliness" and "abuse of rights" are usually either seeking to justify the decisions or show the direction international rules of responsibility are heading in. Apart from this, however, the maxims are of marginal utility because they have little specific legal content, and any attempt to add this simply brings them within one of the other two catagories.

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(35) A. Rubin : Pollution by Analogy - The Trail Smelter Arbitration 50 Oregan L.R. 259 (1970/71). Also F.L. Kirgis : Technological Challenge to a Shared Environment : United States Practice 66 AM JI Int'l L. 290 at p 294 (1972)

(36) See International Law Association : Report of the Fifty-second Conference - Helsinki (1966) pp.496-501

These remaining interpretations of strict or absolute liability and equitable utilization can be reconciled, although at first they may seem to conflict. If, in the decisions, the obligations said to be owed by the defendant State are considered in relation to the relief sought it can be seen that two theories are developed. One involves the concept of "RISK" while the other is concerned with "WRONGS".

A doctrine of "risk" is recognised when the relief sought is compensation. Thus, a State is perfectly entitled to carry on activities which may cause damage to another State or the shared resources of mankind, but at the same time it is liable for any injury that might result.

In Corfu Channel there was no evidence Albania had laid the minefield and conflicting testamony as to whether it could have been laid without her knowledge. But, the International Court decided Albania must have known of the existence of the minefield. The Court "implied" this knowledge from Albania's actions both before and after the incident took place.

Liability flowed directly from this knowledge. There was no attempt by the United Kingdom to prove negligence, or even any claim by Albania that this should be proved.

Likewise, in Trail Smelter part of the claim by the United States was for damage that had already been caused. In its first decision in 1938 the Tribunal assessed the value of this damage at $78,000 and in the second, 1941 decision, ruled that any future damage would have to be compensated.

> "... if any damage ... shall have occured since October 1, 1940, or shall occur in the future, whether through failure on the part of the smelter to comply with the regulations therein prescribed or notwithstanding the maintenance of the regime an indemnity shall be paid for such damage ..." (37)

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(37) 35 AM JI Int'l L. 684 at p. 733

Some of the complaints concerning the value of Trail Smelter are based on the fact that this was all the Tribunal was asked to do - assess the amount of damage. Consequently, it is argued, any ruling by the Tribunal concerning the duties owed by Canada to the United States was "stating the obvious" because the existence of these duties was recognised in the Convention between the parties.

The Tribunal, however, did not base its conclusions solely on its terms of reference. It said any duty owed by Canada arose "apart from the undertakings in the Convention!" (38)

But, more importantly, the greatest value of Trail Smelter lies in the original agreement to submit the dispute to arbitration. This is a very important piece of state practice. The admission by Canada of responsibility for any injury caused by the sulphur dioxide fumes emitted by the smelter shows that country recognised international claims for pollution damage could be made and also recognised the doctrine of "risk".

Canada's action is not the only state practice in this area. In 1954 the United States exploded a hydrogen bomb on one of the Marshall Islands in the Pacific Ocean and despite the establishment of a warning zone several Japanese fishermen suffered serious radiation injury and one died. Additionally many tons of fish were destroyed. The Japanese Government presented claims to the United States for the injury and damage caused and received $2 million compensation. The fact that compensation was paid solely on proof of injury shows once again the existence of a doctrine of "risk".

The French adopted a similar attitude while conducting nuclear tests in the Pacific. In a note from the French Ministry of Foreign Affairs to the New Zealand Embassy on 10 June, 1966 the following appears :

> "... every precaution will be taken with a view to ensuring the safety and harmlessness of the French nuclear tests. In these circumstances it will be apparent to the Government of New Zealand that in the event of an accident in connection with the French test programme, the French Government would not be abl t to accept being held even partially responsible except after meticulous study of the circumstances of the case."

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(38) ibid at p.717

The proviso only concerns the question of causation. In other words the French claimed their safety precautions were so tight that they would only accept responsibility where the link between the nuclear testing and the damage was proved to their satisfaction. But, once this causal link had been established it is implicit in the note that the French would accept responsibility.

Thus, international law allows a state to engage in activities which create a "risk" of transnational injury, but that state must be prepared to compensate for any harm that might result.

International Law adopts a different attitude, however, when the particular conduct in question is claimed to be "wrong". The question then is not whether the defendant state is liable in damages, but whether it should be able to carry on the activity at all? Then, the test is one of "equitable utilization" or reconciling competing interests in the way which is considered most desirable by the world community. In the Lake Lanoux Arbitration, Spain was not asking for compensation for any damage that might be caused, but rather it was seeking an order restraining France from diverting the waters of the River Carol without Spain's permission. This claim was rejected by the Tribunal on grounds which reflect an application of the test of equitable utilization. It said :

> "But it has never been alleged that the works envisaged present any other character or would entail any other risks than other works of the same kind which today are spread all over the world. It has not been clearly affirmed that the proposed works would entail an abnormal risk in neighbourly relations or in the utilization of the waters." (39)

Similarly in Trail Smelter the Tribunal imposed a regime on the operation of the Smelter, as well as assessing the compensation Canada had to pay for damage already caused. The regime was imposed to balance the socially beneficial interests on both sides.

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(39) 53 AM JI Int'l L. 156 at p 161

> "It would not be to the advantage of the two countries concerned that industrial effort should be prevented by exaggerating the interests of the agricultural community. Equally, it would not be to the advantage of the two countries that the agricultural community should be oppressed to advance the interests of industry." (40)

Under the award the Smelter was permitted to continue its activities but these were sufficiently restricted to enable a suitable environment for agricultural, lumber and fishery interests on the other side of the border to flourish.

The rational behind these decisions seems to be that before any activity is declared to be "wrong", the court or Tribunal concerned will look at the rights and duties of all the parties and balance them so that from an overall perspective the most equitable utilization of resources is achieved.

This means the recognition of one right might carry with it the recognition of a "right to pollute" because equitable utilization is aimed at achieving the community interest of maximum benefit from competing rights. (41) An example occurs in the transportation of oil by sea. By allowing grant tankers to move around the world with the possibility of oil pollution never far away,(42) the world community recognises that the benefit

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(40) 35 AM JI Int'l L. 684 at p.685

(41) See International Law Association : Report of the Fifty-Second Conference : Helsinki p.499 where in the nodes a "right to pollute" is explicitly recognised.

(42) The "Torrey Canyon" disaster in March 1967 caused considerable pollution damage to both the English and French coasts. It was at that time the third largest tanker operating in the world, but it would now be dwarfed by the new generation of "super-tankers" afloat. One of these, the "Showa Maru" ran aground in the Malacca Straits in January 1975 and Malaysia is claiming $7,700,00 compensation from her Japanese owners.

But the danger of shipwreck is not the only problem. Pollution damage is also caused by the discharge of oil in normal operations while at sea.

to be gained from the use of oil is greater than any loss the activity causes to the environment. The right of freedom of navigation could be curtailed in the interests of oceans free from oil pollution, but at the present time this would not be accepted as an equitable balancing of competing rights. (43)

However, while the test of "equitable utilization" remains the same, the standard or emphasis given to respective rights changes with improved technology and changing attitudes towards pollution. In Trail Smelter it was said that the case must be of "serious consequence". Since 1941, however, the technological devices available to limit pollution have become more efficient. This means that while a balance other than outright prohibition had to be tolerated in 1941 if the benefits of heavy industry were to be retained, it is not at all clear this same balance would be accepted today.

> "The development of international relations causes changing estimates of the effect of the conduct of the individual state upon the life of the international community. These may serve to attach a sinister significance to acts which in the previous decade or centry were looked upon with unconcern..." (44)

A beneficial outcome of the Stockholm Conference on the Human Environment is that it provides concrete evidence of just such a change in the value which the international community places on a world free from pollution. In the light of the attitudes highlighted there it is very likely that a much stricter regime would be imposed if the Trail Smelter Arbitration was decided in 1975 rather than 1941.

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(43) The question of equitable utilization is far more evenly balanced in the area of nuclear weapons testing. For an interesting discussion of whether or not this is an international "wrong" see the competing views of E. Margolis "The Hydrogen Bomb and International Law" 64 Yale L.J. 629 (1955) and M.S. McDougal & N.A. Schlei The Hydrogen Bomb Tests in Perspective : Lawful Measures for Security 64 Yale L.J. 648 (1955)

(44) I.C. Hyde : International Law Chiefly as Interpreted and Applied by the United States : (2nd Edition) pp.7-8 (1945)

The existence of two different tests, one to determine activities that are merely "risky" and another to decide when they are "wrong" raises the question of the relationship, if any, between the two.

The only decision in which both remedies were sought was Trail Smelter. The Tribunal adopted the attitude that these two concepts were separate parts of the same continuum. At one end is conduct which is completely lawful while at the other it is "wrong" and outlawed. In between these two extremes fall activities which are considered "risky", including activities which have been restricted in some way so as to remove them from the prohibited "wrongful" class, because the international community considers the restriction a more equitable way of achieving a balance between competing rights. This was the case with Trail Smelter. The Smelter was not allowed to operate at its peak output; that was "wrong", but it could act at a reduced level. At the same time any future damage, even at the reduced level, would still have to be compensated.

But, although basic rules of responsibility exist in international law, there is still a major problem - these rules only come into play when the label "pollution" is attached to an activity. The Trail Smelter Arbitration limited its holding to cases "of serious consequence (where) the injury is established by clear and convincing evidence". The argument has already been made that what the world community considers to be of "serious consequence" has changed with a more widespread concern to protect the environment. Similarly what is considered to be "pollution" in the first place has also changed because improved technology allows the damage which might be caused by any activity to be more accurately assessed and also because greater knowledge now exists of the irreparable consequences of pollution.

What, however, is the situation where the damage is only potential? Even with the improved technology available to scientists the extent of future damage cannot always be established by "clear and convincing evidence". (45) This problem arises most

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(45) Trail Smelter Arbitration : 35 AM JI Int'l L. 684 at p.716

often in new areas of activity. There are no problems as far as any doctrine of "risk" is concerned since any injury caused later on must be compensated, but real difficulties are encountered when it is complained that the activity will be "wrong".

At the present stage of development of international environmental protection laws the applicant state must be able to prove the damage that has or will be caused. In many cases this postpones the chance of a remedy until it is too late. But, the changing attitude towards the protection of the environment may lead to the development of a new test. The requirement of an environmental impact report is now common in many domestic jurisdictions, particularly in parts of the United States, and it would not be surprising to see the gradual development of a similar device in international law. This will not occur immediately but the stage might be reached when there exists a rule of international law which forbids any meddling with natural processes until the meddler can prove the absence of significant effect; regardless of whether science is able to determine if the effect is detrimental to any established human interest.

The Practical Problem : States' Attitudes to the Environment

Therefore, at its present stage of development international law contains basic rules concerning state responsibility for pollution damage caused by "risky" activities and also precedent for the imposition of a regime or injunction to prevent further pollution being caused where the activity is "wrong". The test in the former situation is one of strict liability while in the latter the test is equitable utilization or balancing interests.

At the same time, however, the law is by no means well settled, these rules only being based on three major decisions and some state practice. This points to the basic failing of customary international law in the field of environmental protection. The doctrines seem to be accepted only as that - "doctrines". Time and again the sentiments behind these rules

have been reflected in resolutions of The General Assembly and declarations at various conferences, but while it is one thing for states to acknowledge that responsibility is owed to the environment it is quite another thing to bring states to actually discharge this responsibility. The problem is not so much substantive but rather the initial difficulty of getting the parties before a court or tribunal.

For this reason current activity in international environment protection is directed at broadening procedural processes rather than trying to get agreement on substantive rules.

CONVENTIAL LAW : ANOTHER APPROACH TO AN INTERNATIONAL SOLUTION

The practical difficulties encountered with customary international laws protecting the environment have led to effort in another field, namely conventional law.

It is realised that in this area there have been many attempts to reach international solutions ranging from bilateral arrangements between two countries with a common border or shared interests, to truly international conventions involving nearly all the countries of the world. To attempt to cover all these in this paper would be impossible and it is proposed to take only a few examples from the law dealing with the pollution of the oceans which evidence the more important trends that have developed and which show the direction any international law of pollution is heading in. Therefore the summary which follows is not intended as a complete listing of all the conventional law in this very large area.

The starting point for any discussion of the conventional law relating to pollution of the seas must be the Geneva Convention on the High Seas of 1958.

Article 2 lays down the principles governing the freedom of the high seas and declares "no State may validly purport to subject any part of (the high seas) to its sovereignty", since they are open to all nations. The Article goes on to list some of these freedoms, although it is not intended to be a complete enumeration because "others recognised by the general principles of international law" are also included. The limitation imposed by the Article is that the freedoms :

> "shall be exercised by all States with reasonable regard to the interests of other States in their exercise of their freedom of the high seas."

The limitation is particularly relevant when a state exercising any freedom of the high seas causes pollution. It can be taken as imposing a general obligation on states to

refrain from activities which cause a greater risk of pollution than can be justified according to the test of reasonableness. (46)

Articles 24 and 25 of the High Seas Convention also impose controls on environmental damage. Article 24 concerns a duty to "draw up regulations" to prevent pollution of the seas by the discharge of oil from ships or pipelines or from activities on the seabed. Article 25, paragraph 1 concerns the special problem of "dumping radioactive waste" while paragraph 2 is broader requiring states to"co-operate with the competent international organisations in taking measures for the prevention of pollution of the seas..."

These three articles form the broad base of obligations on which the future environmental law of the oceans developed. By themselves they are too general to act as an effective deterrent, but they pathed the way for the future development in the law.

Yet, even before the Geneva Conventions were signed there had been conventional activity in the field of oil pollution.

In 1926 an international conference of thirteen maritime nations was held and agreement was reached prohibiting discharge of oil or oily mixtures by vessels carrying oil in bulk or as fuel, in special zones 50 to 150 miles from land. Enforcement was to be undertaken by the flag state and incentives were included to encourage operators to comply with regulations designed to further prevent pollution of the seas. But despite the fact that the Convention was to go into effect after only five ratifications it was never ratified.

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(46) The test is very similar to that developed by international customary law and it accepted Article 2 is declaratory customary law. Some proof can be found in the pre-amble to the High Seas Convention which expresses a desire to "codify the rules of international law relating to the high seas".

There was little further international activity until the 1954 Convention for the Prevention of Pollution of the Sea by Oil. (47) The principle problem which the convention was concerned with was the prevention of deliberate pollution by tanker cleaning operations.

Article III restricted the intentional or negligent discharge of heavy oils or any like oily mixture from a tanker or any other ship, in certain zones. (48) These prohibited zones included all sea within fifty miles of land and larger areas in the Adriatic and North Seas, the North-east Atlantic and the waters around Australia.

Under Article X prosecution for violation on the high seas was by the contracting flag state although under Article XI the contracting state retained the power to take measures within its own jurisdiction. (49)

The 1954 Convention did not come into effect until 1958. Originally supervision was to have been undertaken by the Intergovernmental Maritime Consultative Organisation (I.M.C.O), but in 1954 it had not been organised. The I.M.C.O. was proposed soon after the establishment of the United Nations in 1945, but because of political and economic differences among the Powers it was not established until 1958. It then became the twelfth specialised agency of the United Nations with the functions of collecting and disseminating technical information concerning oil pollution; circulating to contracting governments acceptances of its conventions and convening further conferences with a view to eliminating all oil pollution. (50)

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(47) Thirty-two nations attended the London Conference which adopted the Convention. It came into force in 1958.

(48) Under Article III (1) oil in any oily mixture of less than 100 parts of oil in 1,000,000 parts of the mixture was deemed not to foul the surface of the sea.

(49) Surveillance was in the form of the Oil Record Book and it was thought violations could be proved by mathematical computations from that Book.

(50) For a summary of the formation, purposes and ratifications of the IM.C.O. Convention see Singh, International Conventions of Merchant Shipping (2nd Ed.) (1973) pp.1588-1607

With this last aim in mind, a further conference was convened in London in 1962 to review the 1954 Convention. Its purpose was to make the earlier Convention more acceptable to coastal states. (51) The greater influence exerted by these states at the Conference resulted in an expansion of the prohibited zones, one hundred miles around Canada, Iceland, the Mediterranean and most of the seas bordering the Middle East. Furthermore, the list of exempted vessels was cut down and ships over 20,000 tons begun after the date on which the Amendment came into effect were forbidden to discharge oil even outside the prohibited zones, except in special circumstances. (52) The enforcement provisions remained much the same. This Amendment came into force in 1967 upon the receipt of ratifications of two-thirds of the parties to the 1954 Convention. At present it has been ratified by forty-four governments.

A further amendment to the 1954 Convention was adopted in 1969 by the Assembly of I.M.C.O. once again meeting in London. The amendment has yet to come into force and it requires ratification by two-thirds of the contracting governments to the previously amended convention.

The new Amendment dispenses with the zone system used in the two earlier conventions and instead Article III (a) limits the rate of discharge of oil or oily mixture from ships other than tankers anywhere to no more than sixty litres per mile and the oil content of the discharge to 100 parts per 1,000,000 parts of the mixture, or less. The requirements under Article III (b) for tankers are even more strict. Discharge of oil is prohibited except where the tanker is more than fifty miles from the nearest land and the total quantity of oil discharged on a ballast voyage does not exceed 1/15,000 of the total cargo carrying capacity.

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(51) Forty-one countries attended the Conference

(52) Article III (c). The circumstances had to be reported to the Flag Government by the Master

But, the major concerns of coastal states remain unchanged. Article IV still exempts from the prohibited class :

> "The escape of oil or of oily mixture resulting from damage to a ship or unavoidable leakage, if all reasonable precautions have been taken after the occurance of the damage or discovery of the leakage for the purpose of preventing or minimising the escape."

Also, enforcement (in any area outside the contracting states own jurisdiction) is still in the hands of the flag state. This remains a basic complaint of coastal states because of the existence of "flags of convenience". The chief offending states are Panama and Liberia. For example, under Liberian law it is permissable for an alien corporation to register a vessel and obtain Liberian nationality for it. (53) By 1957 Liberia had (and still continues to have) the largest fleet in the world, most of it benefically owned by American interests. In fact, in 1966 it was estimated American flag carriers carried only 5.5% of oil cargoes to and from the United States. (54) It should be noted, however, that "flags of convenience" have not arisen simply to avoid the pollution conventions. Their primary aim is to avoid United States labour and taxation laws. But, the attitudes of Liberia and Panama do not help the development of an international regime governing pollution.

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(53) Generally local law requires ships registered in a nation must be owned by the citizens of that nation. This requirement can be satisfied by a "dummy" Liberian corporation. A typical pattern is as follows : A vessel is owned and registered in Liberia by a Liberian corporation. The Liberian corporation with only a nominal office in Liberia, is wholly owned by a Panamanian Corporation, having only a nominal office in Panama. The Panamanian Corporation is wholly owned by an American firm. Apparently the only reason for the injection of the Panamanian Corporation is to further cloud who is really the beneficial owner.

(54) J. Sweeney Oil Pollution of the Oceans, 37 Ford L.R. (1968/69) 155 at 190 (footnote 187)

The year 1969 was a very busy one since it also heralds the start of a change in direction of the conventional law dealing with the pollution of the oceans.

The reason probably goes back to 1967 and the break up of the "Torrey Canyon" (incidently a Liberian tanker). (55) The British Government, as a result, proposed that I.M.C.O. should urgently consider ways to protect potential victims of oil pollution. These matters were taken up at the Brussels Conference of the Organisation and two important conventions resulted.

The first is the 1969 Convention Relating to Intervention on the High Seas in cases of Oil Pollution Casualties. It gives a coastal state a right to intervene against a ship on the high seas in situations similar to those surrounding the break-up of the "Torrey Canyon". Article I provides :

> "Parties to the present Convention may take such measures on the high seas as may be necessary to prevent, mitigate or eliminate grave and imminent danger to their coastline or related interests from pollution or threat of pollution of the sea by oil, following upon a maritime casualty or acts related to such a casualty, which may reasonably be expected to result in major harmful consequences."

The important requirements are that there be "grave and imminent danger" following a "maritime casualty" such that "major harmful consequences" are reasonably expected. Article V then lays down that the measures taken by the coastal state must be proportional to the threatened or actual damage and shall not go beyond what is reasonably necessary to achieve the aims of Article I (quoted above). Unfortunately the Convention has not yet entered into force and only two countries, Denmark and Great Britain, have ratified it. (56)

Although it is jumping ahead a little, in 1973 the Convention for Intervention on the High Seas was supplemented by a Protocol relating to rights of intervention in situations involving substances other than oil.

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(55) See footnote 42 (ante)

(56) As at 1 January, 1971

The other product of the 1969 Brussels Conference is the Convention on Civil Liability for Oil Pollution Damage. Article III provides :

> "Except as provided in paragraphs 2 and 3 of this Article, (57) the owner of a ship at the time of an incident, or where the incident consists of a series of occurrences at the time of the first such occurence, shall be liable for any pollution damage caused by oil which has escaped or been discharged from the ship as a result of the incident."

Liability is limited to damage caused to the territory of a contracting state but it is not based on fault, although under Article V, a ship owner who is at fault cannot avail himself of the limit on liability imposed by the Convention. (58) Jurisdiction is given to the coastal state sustaining the damage. (59) This represents an expansion to the jurisdiction of that state. As long as damage has been caused to its territory or territorial sea it can bring an action in its courts no matter where the incident occured, even if on the high seas.

Finally the owner of any ship registered in a contracting state and carrying more than 2,000 tons of oil in bulk as cargo, is required to maintain insurance to cover his liability for pollution damage under the Convention. The responsibility for ensuring a ship is insured is on the contracting states. They must check that ships entering or leaving their harbours carry certificates proving they are insured. (60)

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(57) The exceptions concern acts of war, and the failure of governments to maintain lights or other navigational aids etc.

(58) The limitation is the aggregate of 2,000 francs ($135 U.S.) for each ton of the ship's tonnage up to a maximum of 210 million francs (about $15 million U.S.)

(59) Article IX

(60) Article VII (II) But once again the major problem is that the Convention is not yet in force. In fact, as at 1 January 1971 it had not been ratified by a single state.

As can easily be imagined neither the coastal states nor the shipowners were satisfied with the Convention (though for different reasons) and at the close of the 1969 Conference, a resolution was passed instructing I.M.C.O. to hold another international conference no later than 1971 :

> "(a) To provide compensation for pollution damage to the extent that the protection afforded by the Liability Convention is inadequate.
>
> (b) To give relief to shipowners in respect of the additional financial responsibility imposed on them by the Liability Convention, such relief being designed to ensure compliance with safety at sea and other conventions.

So read Article III of the International Convention for the Establishment of an International Fund for Compensation for Oil Pollution Damage adopted in 1971. Under the Convention contributions are made by those citizens and companies of contracting states who benefit from the carriage of oil by sea. (61)

Generally, the fund covers circumstances where the Civil Liability Convention would fail to provide adequate coverage or protection, although even under the 1971 Convention liability is limited to 450 million francs (≠30 million U.S.)

As far as the indemnification of shipowners is concerned, in 1957 the Brussels Rules Relating to the Limitation of Liability of the Owners of Seagoing Ships restricted an owner's liability to ≠7 million. Under the 1971 Convention shipowners are relieved from any further liability by the fund unless the pollution damage results from the "actual fault or privity of the owner" in that the ship did not comply with expressly mentioned conventions, including the 1954 Oil Convention and all its amendments. (62)

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(61) Article 10 (I) : "Contributions to the Fund shall be made in respect of each contracting state by any person who ... has received in total quantities exceeding 150,000 tons ..." of oil carried by sea to the ports or terminal installations of that state.

(62) Article 5 (3)

Up until 1972 therefore, the conventional regulation of marine pollution was to a large extent restricted to pollution caused by shipping and even more specifically to pollution by oil from tankers. In some ways this is an understandable result of the work carried out by I.M.C.O. But, in others it represents a strange emphasis because while oil is broken down by natural processes many of the other chemicals which end up in the sea cause far greater damage to its ecology.

To try and rectify this imbalance a meeting was held in London in late 1972 - the Intergovernmental Conference on the Convention of the Dumping of Wastes at Sea. The resulting Convention supplants a regional instrument, (the Oslo Convention for the Prevention of Marine Pollution by Dumping) signed by states bordering the Northeast Atlantic early in 1972.

In the London Convention "dumping" is defined as "any deliberate disposal at sea of wastes and other matter from vessels, aircraft, platforms or other man-made structures at sea". (63) But, it does not include the disposal of wastes or any other matter related to the normal operations of vessels, aircraft etc.

Under Article IV dumping of waste is prohibited:

- In all cases if the waste is contained in Annex I (e.g. Mercury, crude oil, radio-active wastes, materials produced for biological and chemical warfare).

- Unless a prior special permit is obtained in the case of wastes listed in Annex II (e.g. Arsenic, fluorides).

- In the case of all other wastes unless a prior general permit is obtained.

The difference between a "special" and a "general" permit is with the former the precautionary measures to be taken are more demanding. (64)

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(63) Article III (1)

(64) See Annexs II and III

Article VII deals with the implementation of the permit system :

> "Each Contracting Party shall apply the measures required to implement the present Convention to all :
>
> (a) vessels and aircraft registered in its territory or flying its flag.
>
> (b) vessels and aircraft loading in its territory or territorial seas matter which is to be dumped.
>
> (c) vessels and aircraft and fixed or floating platforms under its jurisdiction believed to be engaged in dumping".

Therefore, jurisdiction over vessels on the high seas is reserved to the flag state. But, the Convention also includes agreement to "co-operate in the development of procedures for the effective application of /the/ Convention particularly on the high seas" (65)

As an aside it is interesting to note in Article VII (1) (c) the use of the word "jurisdiction". The oslo Convention used the words "territorial sea". (66) This could represent recognition in the London Convention of claims such as those of Canada to specialised jurisdiction beyond the territorial sea.

The next, and the latest step in the development of the conventional law relating to the pollution of the oceans is the International Convention for the Prevention of Pollution from Ships. Again it is a result of the work of I.M.C.O. and it was adopted in 1973 at a London Conference attended by 61 countries.

The 1973 Convention applies to the deliberate, negligent and accidental release of oil and other harmful substances. Under Article 2 (2) a "harmful substance" is one which -

> "... if introduced into the sea, is liable to create hazards to human health, to harm living resources and marine life, to damage amenities or to interfere with other legitimate uses of the sea."

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(65) Article VII (3)

(66) Article 15 (1) (c)

The expansion beyond oil pollution is the first and major change introduced by the latest Convention. But, as well, its annexes impose stricter controls on operational pollution. The new Convention creates "special areas" in which no discharge whatsoever is permitted. (67) Also, all other parts of the oceans are subjected to restrictions at least as severe as the limitations imposed by the 1954 Convention in its prohibited zones. Discharges are restricted both in amount per nautical mile and in the total quantity as a percentage of the cargo carried. (68)

In the case of noxious substances other than oil, their discharge is prohibited in certain circumstances, depending on the potential harm the discharge could cause to the environment. (69)

Finally there is the question of enforcement. To avoid some of the problems in earlier conventions equipment, construction and safety standards are imposed. (70) These are designed to minimise both the risk of accidental damage and the desirability of intentional discharge. In the case of oil they will hopefully influencethe design of new tankers. Many "preventable" cases of oil pollution are "inavoidable" results of present tanker construction. Failure to comply with any of the rules or obligations imposed by the 1973 Convention will result in sanctions being imposed either under the law of the Administration of the ship (normally the flag state), or if the violation occurs within the jurisdiction of a party to the Convention (including a failure to comply with the regulations) proceedings can be taken in accordance with its own laws. (71) But there is an addition. In order to promote universal compliance with the standards established by the 1973 Convention and to encourage nations to become parties to it, Article 5 (4) states :

> "With respect to the ships of non-parties to the Convention, Parties shall apply the requirements of the present Convention as may be necessary to ensure that no more favourable treatment is given to such ships."

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(67) These areas include the Mediterranean, Baltic and Black Seas and the Persian Gulf.

(68) Annex I, Reg. 9 (1)(a)

(69) Every liquid substance is evaluated and placed in one of four catagories (A,B,C or D - Annex II Regs 3 & 4

(70) Annex I

(71) Article 4

The approach adopted is an attempt to "blackmail" non-parties into ratifying the convention.

But, it should not be thought the latest effort of I.M.C.O., even if ratified, would totally eliminate pollution of the oceans. It only deals with pollution from ship generated sources and :

> "such sources of pollution are, if the phrase be allowed, a mere drop in the ocean, actually about 10%. Most of the pollution in the sea comes from either atmosphere or from rivers." (72)

However, pollution from land based sources more properly comes within the domain of domestic legislation. Although it has effects on the "res communis" the effect is far greater in the territorial sea and what has become known as the "Economic Zone" - A developing concept in the law of the sea which is discussed in more detail later in the paper.

The foregoing summary of the chronological development of the laws attempting to regulate and minimise the pollution of the oceans, even though it only deals with part of the problem, pollution from ship based sources, gives an invaluable insight into the development of international law in this area.

Before analysising this conventional law, however, it is useful to look at two other examples of environmental regulation which help to further explain the trends which seem to have developed in this particular area of international law.

The most ambitious attempt to achieve global agreement in the area of environmental protection occurred in 1972 when the United Nations Conference on the Human Environment was held in Stockholm. One hundred and thirteen nations attended. The only major nations not in attendance were the U.S.S.R. and all the Eastern European states with the exception of Romania and Yugoslavia, who boycotted the Conference over the political issue of the failure to invite East Germany. But even their absence cannot detract from the universality of the decisions reached at Stockholm because these were submitted to the General Assembly of the United Nations, who in turn referred the matter to its Second Committee. In the ensuing debate the Soviet representative

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(72) P.Stone : Did We Save the Earth at Stockholm? (1973) p. 84

stated that in principle his delegation was "not opposed to the current session of the General Assembly taking note of the Declaration".(73)

Four main instruments were adopted at the Conference :

(i) The Declaration on the Human Environment. A seven paragraph proclamation followed by twenty-six principles. The principles are essentially statements of what must be done.

(ii) The Action Plan on the Human Environment One hundred and nine recommendations based on the unprecedented amount of research that went into the conference.

(iii) Resolutions on institutional and financial arrangements.

(iv) Other Conference Resolutions. An example was the condemnation of nuclear testing instigated in the general debate by New Zealand and Peru.

The important resolutions of the Conference should be briefly summarised.

The whole tone of the Conference was set by Principle 2 which was quoted in the introduction. Similarly Principle 7 and Principle 21 were discussed in detail in the section dealing with customary international law.

Principle 22 must be mentioned. It imposes an obligation on states to co-operate "to develop further the international law regarding liability and compensation for the victims of pollution and other environmental damage caused by activities within the jurisdiction or control of such states to areas beyond their jurisdiction".

This principle only requires states to "co-operate". It is intended as a "back-up" to Principle 21 ensuring compensation is paid for any breach of the obligations imposed by the earlier principle.

These three, principles 7,21 and 22 cover the general ground into which most of the other recommendations fall and to state them all here would only result in repetition.

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(73) See L.B. Sohn : The Stockholm Declaration on the Human Environment 14 Harv. Int'l L.J. (1973) 423 at 432

The more important question to be considered is the status that should be given to the instruments adopted by the Conference. Assuming they have some sort of status there are three possibilities.

First they could identify potential areas for international legislation. The Stockholm Conference spent a considerable amount of time stressing the nature of the threats to the environment.

> "It marked the first time that the nations of the world collectively acknowledged that something had gone wrong with the way in which man had be managing ... his relationship with the natural world on which his survival depends". (74)

Another view of their significance goes right to the other extreme and claims a Conference such as Stockholm at which nearly all the countries of the world were present, had the power to make instant law. Thus the following view has been expressed.

> "Whether the language of the declaration is wholly faithful to the Trail Smelter doctrine is now academic. It has transcended it."(75)

In the view of those commentators, Stockholm and the instruments which came out of it now represent "the law" on pollution.

The third view, which is probably the best, involves a half-way house situation. The whole Conference (including the Declaration) represents more than a mere statement of objectives. It reflects agreement on what ought to govern the conduct of states when they are involved in activities with consequences outside their sovereign territory. In other words the Conference represents an international yardstick against which an individual state's actions can be measured. The international equivalent of the "reasonable man" or "the Man on the Island Bay bus". (76)

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(74) M. Strong (Secretary General to the Stockholm Conference): Can Business Survive the Economic Crisis?(1972) 79 Can Barker 29,30

(75) J. Barros & D. Johnston : The International Law of Pollution (1974) p.76

(76) Per Turner J. in Bognuda v Upton and Shearer Ltd /1972/ N.Z.L.R. 741,764

The second example of environmental activity is the International Whaling Commission (I.W.C.) It was established under the auspices of the United Nations in 1946. The I.W.C. meets every year to regulate the industry but it has great difficulty acting because each member state has a veto power over any regulation which is thought by it to be too restrictive. This provides the Japanese and the Russians, who together account for 85% of the whaling activity in the oceans, with the legal authority to continue the whale killing. And, even when the I.W.C. does act it is almost impossible for it to police its decisions. In 1965 the catching of humpback whales was limited to four days in the year to try and protect the decline in numbers of that species. When the total catch was computed at the end of the year, however, it was found 1,245 whales had been caught. (77) So much for the four day season!

The Stockholm Conference also provides another example of its failure. It had been said :

> "The Conference needed a symbol and the whaling industry provided an ideal one". (78)

But, what the whaling industry provided instead was a classic example of the obstacles facing international environmental protection. At the Conference a ten year moratorium on the commercial killing of whales was recommended, despite the fact that the Japanese scientists could not see what all the fuss was about. The spirit of conservation reflected in the recommendation, however, was not present at the next meeting of the I.W.C. held in London in June 1972 and it rejected this proposal by a 6 - 4 vote with four abstentions.

The six countries who voted against the recommendation cannot be blamed for their action. They had national industries dependant on the hunting of whales. Rather the situation represents the classic conflict between short and long term planning; between the industrialist and the conservationist.

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(77) F.D. Ommanney: Lost Leviathan, Whales & Whaling (1971) p.237
(78) P. Stone at p.80 (see footnote 72 ante)

Analysis :

TABLE I

DATE
1954
1958
1962
1967
1969
1971
1972
1973

Analysis :

DATE	EVENT OR CONVENTION	SUBSTANCE	NATURE OF OBLIGATION	COMPENSATION RIGHTS	ENFORCEMENT AND COASTAL STATES RIGHTS	RATIFICATION
1954	PREVENTION OF POLLUTION OF SEA BY OIL	HEAVY OILS	NO INTENTIONAL OR NEGLIGENT DISCHARGE IN ZONES.		FLAG STATE	YES
1958	GENEVA CONVENTION					
	I.M.C.O. FORMED					-
1962	AMENDMENT TO 1954 CONVENTION	HEAVY OILS	NO INTENTIONAL OR NEGLIGENT DISCHARGE IN WIDER ZONES		FLAG STATE	YES
1967	"TORREY CANYON" DISASTER					
	2ND AMENDMENT TO 1954 CONVENTION	HEAVY OILS	INTENTIONAL OR NEGLIGENT DISCHARGE RESTRICTED NO MATTER WHERE IT OCCURS. MAXIMUM RATES OF DISCHARGE IMPOSED		FLAG STATE	NO
1969	INTERVENTION CONVENTION	HEAVY OILS			COASTAL STATE: TO TAKE ACTION ON HIGH SEAS TO PREVENT GRAVE DANGER TO COASTLINE	NO
	CIVIL LIABILITY CONVENTION	HEAVY OILS		STRICT LIABILITY FOR DAMAGE CAUSED BY ANY ESCAPE OR DISCHARGE.	COMPULSORY INSURANCE TO BE ENFORCED BY CONTRACTING STATES. JURISDICTION GIVEN TO INJURED STATE.	NO
1971	COMPENSATION FUND ESTABLISHED	HEAVY OILS		COMPENSATION WHEN TORTFEASOR CANNOT PAY RELIEF TO SHIPOWNERS		NO
	STOCKHOLM CONFERENCE					
1972	DUMPING CONVENTION	ALL WASTES	NO DELIBERATE DISPOSAL UNLESS SPECIFIED PRECAUTIONS TAKEN		FLAG STATE AND STATES WHERE VESSELS ARE LOADING.	NO
1973	PREVENTION OF POLLUTION FROM SHIPS	ANY SUBSTANCE WHICH MIGHT CAUSE HARM TO THE ENVIRONMENT.	ANY DISCHARGE PROHIBITED IN SPECIAL AREAS AND RESTRICTED ELSEWHERE. REGULATIONS IMPOSING STANDARDS.		FLAG STATE BUT ALSO POWER TO REQUIRE COMPLIANCE WITH REGULATIONS GIVEN TO COASTAL STATES BOTH AGAINST CONTRACTING STATES AND AGAINST OTHERS	NO
	INTERVENTION PROTOCOL	ANY SUBSTANCE WHICH MIGHT CAUSE HARM TO THE ENVIRONMENT.			COASTAL STATE: TO TAKE ACTION ON HIGH SEAS TO PREVENT GRAVE DANGER TO COASTLINE	NO

Analysis :

The "conventional law" (79) summarised in this section can be arranged in the form of a chart (see Table I) to show more clearly the development of international pollution laws and the changing attitudes they reflect.

The first point which can be raised is that the conventional law has developed in a sporadic fashion. Rather than attempt to comprehensively deal with all forms of pollution of the seas, the conventional laws have only dealt with specific and often pressing problems. The most obvious example and also the best, is the relationship between the "Torrey Canyon" disaster in 1967 and the 1969 conventions relating to Intervention on the High Seas and Civil Liability. The adoption of the former at the Brussels Conference in fact had two purposes. As well as legalizing intervention in the future (when it comes into force), it validated the action of Great Britain in bombing the "Torrey Canyon" in an attempt to eliminate the danger to ~~their~~ its coasts and those of the French. As it turned out this action was largely unsuccessful.

A similar increase in activity can be seen about the time of the Stockholm Conference. The unprecedented amount of research undertaken before the Conference took place and the meeting at Stockholm itself further exposed, and more importantly publicised, the harm being caused to the oceans by pollution.

This sporadic development of the law is in many ways understandable. In the international arena it requires an event like the "Torrey Canyon" disaster or the Stockholm Conference to spur enough states into action to try and do something about a particular problem. The I.M.C.O. by itself cannot adopt conventions, it can only initiate action.

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(79) The term "conventional law" is used for convenience. It includes all the conventions relating to oil and other harmful substances and also the discussion on the Stockholm Declaration and the I.W.C.

The influence of Stockholm is also reflected in the substances covered by the conventions. In 1954 the law was restricted to those oils which could be generally classified as heavy oils. Now the conventions are concerned with any substance which might cause harm to the environment. A far wider field.

In a similar way the restrictions on pollution have expanded from a fifty mile zone in the first international convention on oil pollution to a world regime in 1973.

perhaps one of the most interesting lines of development however, can be seen in the changing nature of the obligation owed by contracting states to others. It can be divided into three separate stages:

The first stage prohibited intentional and negligent discharges. This points very much to a law based on a concept of "fault". The attitude that shipowners should only be liable if they had acted in a way which could be considered blame-worthy.

Perhaps as a result of the "Torrey Canyon" disaster there was, in 1969, a change of emphasis away from looking at the acts which caused pollution, towards a recognition that others had equal if not greater interests. Attitudes were no longer governed by concepts of fault, but instead the emphasis was on "compensation". The year 1969 saw the introduction of strict liability for oil pollution damage and 1971, the institution of a fund designed to ensure that those injured received compensation.

The third and final stage reached fruition in 1973 and by far the major emphasis in the Convention of that year is on "prevention". The move started with the 1969 Convention Relating to Intervention on the High Seas in Cases of Oil Pollution Casualties which gave coastal states limited rights to take action to prevent pollution in exceptional cases. The 1973 Convention, however, goes further by imposing equipment, construction and safety standards. By this method the Convention hopes to eliminate the causes of pollution by making it much more difficult for harmful substances to escape.

The gradual change of emphasis reflects the different nature of the pressures which are now being exerted on developing international maritime law. The laws of 1954 and earlier were designed mainly with the shipowner in mind. At that time it was a law made by the seafaring nations of the world. The change in emphasis has been brought about by the increased influence exerted by the smaller nations of the world, and coastal states in particular. (80) It is these claims which are forcing a re-evaluation of the laws governing the sea and its seabed.

The influence of coastal states is also reflected in the provisions in the conventions relating to enforcement. The traditional view was that while a state had power to take measures within its own jurisdiction, prosecution for violation on the high seas was in the hands of the flag state. The Intervention Convention recognises a coastal state can act on the high seas when its own environment is threatened, but the most dramatic development came in the 1973 Convention which required the parties to the Convention to apply the requirements it lays down, even to the ships of non parties. Therefore while a party to the Convention which is not the flag state will not be able to prosecute in respect of discharge on the high seas, it can enforce in its own ports the regulations contained in the convention aimed at preventing the discharge from occurring in the first place. It is an attempt to "blackmail" non-parties into ratifying the Convention.

The problem of non-parties which the 1973 Convention attempts to solve is the major stumbling block in the way of the development of an effective international regime regulating pollution of the oceans. The Stockholm Conference has been heralded by some as reflecting a change in attitude, a recognition of the dangers facing our environment, and proof that the selfish attitude of states is changing. (81) But is this really the case :

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(80) There are now about 113 coastal states.

(81) See M. Strong : Text accompanying footnote 74 (ante)

"... enlightened awareness and mere acknowledgment are not substitutes for effective action." (82)

The fact that all the Conventions were originally adopted shows there was awareness and recognition of the problems. But, when it comes to effective action (ratification) a completely different attitude is adopted and as can be seen from Table I, only two of the conventions have come into force.

The picture painted by some after the Stockholm Conference is that the principle resistance to a rational policy on international environment comes from Third World capitals. That they see environmental regulation as a conspiracy to hold back the economics of developing countries.

But, of far greater consequence are the competing relations of the principal industrial states. Relations that rest on rivalry and an over-riding concern with self-interest. Therefore, even though the Stockholm Conference points to a common concern for the environment the prospect of an implementing (as distinct from a pious) consensus on action remains poor. A classic example of this "self interest" in action can be seen in the restriction on catches imposed by the International Whaling Commission because of the scarce numbers of whales inhabiting the oceans. The quotas simply led to an increase in what is known as "whaling intensity". As the quarry became scarcer and harder to find competition became keener among the hunters. Attempts to regulate catches merely increased the ingenuity by which the regulations were circumvented because compliance simply transferred the benefits of the market to a competitor, and the final result was a further decline in whale numbers.

Therefore the only conclusion that can be reached is international conventional law in the same way as customary international law has not provided a suitable answer to the problem of the pollution of the environment. Once again the problem is a procedural one and although the 1973 Convention

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(82) S.L. Udall : Some Second thoughts on Stockholm 22 AM. U.L.R. 717 at 717 (1973)

goes part of the way to solving some of the difficulties, its very provisions constitute a recognition of the fear or selfishness in individual states which stops them becoming firmly committed to an international regime.

THE ALTERNATIVE - UNILATERAL ACTION BY COASTAL STATES

On 8 April, 1970 the Arctic Waters Pollution Prevention Act was introduced and read for the first time in the Canadian House of Commons. In introducing it Prime Minister Trudeau said :

> "Until [an] international regime has been developed we are stuck with the law as it has developed in the past centuries, and the centuries before when in the era of steamships and sailing ships, there was no danger of pollution, and it was important for commercial and other reasons that the nations could communicate on the high seas." (83)

The failure of international law, both customary and conventional, to provide the means necessary to protect the marine environment (a point highlighted in this paper) led to Canada introducing changes by unilateral action. Canada claimed the need to act immediately was particularly important when the unique characteristics at the Arctic are considered. In that area it claimed, there exists an intimate relationship between the sea, ice and the land so that one act of pollution could cause irreparable damage.

The Key provisions of the Canadian legislation are as follows :

Application of the Act : The Act's provisions only apply to "arctic waters" which are defined as waters in both a liquid and a frozen state up to one hundred nautical miles from the nearest Canadian land. (84)

Shipping Safety Control Zones : The Governor General in Council is empowered to prescribe "shipping safety control zones".(85) He may then make regulations prohibiting any ships from navigating in any of these zones without complying with requirements relating to hull and fuel tank construction, the quantity of cargo, and the periods when

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(83) Canadian Prime Minister's remarks on the proposed legislation. Reproduced in 9 Int'l Legal Mat. 600 at 603 (1970)

(84) S.3 Arctic Waters Pollution Prevention Act, 1970

(85) S.11 ibid

ships will be required to carry a pilot in the zone or even completely banned. (86) Foreign ships may be exempted from the application of the regulations where standards substantially equivalent to those prescribed by the Canadian regulations are enforced by their flag state. (87)

Pollution Prevention Officers : These officers have broad powers including authority to board ships within a shipping safety control zone to determine whether a ship complies with the regulations. Similarly an officer may order shipping in or near a safety zone to stay outside that zone if it is suspected that the ship fails to comply with the standards laid down in the regulations.(88)

Depositing Waste in Arctic Waters : The Act forbids the depositing of "waste" in Arctic Waters. "Waste" is defined very broadly as :

> "any substance that, if added to any waters, would degrade or alter or form part of a process of degradation or alteration of the quality of those waters to an extent that is detrimental to their use by man or by any animal, fish, or plant that is useful to man" (89)

The Act imposes an obligation on those discharging waste, including the masters of ships, to report that fact to a pollution officer. They are liable for all costs incurred in mitigating the damage and also to compensate for any loss which might be caused. (90) In the case of a ship both the owners of the ship and the owners of the cargo can be held liable. (91) Liability is absolute and does not depend on proof of fault or negligence. (92) Finally, owners of ships which navigate within

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(86) S.12 (1) ibid
(87) S.12 (2) ibid
(88) S.15 (3) ibid
(89) S.2 (h) ibid
(90) S.6 ibid
(91) S.6 (1)(c) ibid
(92) S.7 (1) ibid

shipping safety zones can also be required to provide evidence of financial responsibility in the form of insurance or an indemnity bond. (93)

Offences : Any person depositing waste in Arctic waters is liable to a fine of $5,000 and in the case of a ship, $100,000 (94) with each day on which the offence is committed being considered a separate offence. In addition any person failing to make the various reports required by the Act or any ship navigating within any shipping control zone which fails to comply with the regulations or other provisions of the Act is liable to fines not exceeding $25,000.(95) Furthermore, a Pollution Prevention Officer may, with the consent of the Governor General in Council seize a ship anywhere in Arctic Waters when he suspects on reasonable grounds that the ship has contravened the provisions of the Act. (96) If that ship is then convicted of an offence under the Act a Canadian Court can order the forfeiture of either the ship or cargo (or both) in addition to any other penalty imposed. (97)

Finally the Governor in Council can order the destruction or removal of ships in distress where it is reasonable to believe they are likely to deposit waste in Arctic waters. (98)

Not surprisingly the introduction of such measures up to one hundred miles off the Canadian coastline provoked international protest particularly from the United States.

> "The enactment and implementation of these measures would affect the exercise by the United States and other countries of the right to freedom of the high seas in large areas of the high seas and would adversely affect our efforts to reach international agreement on the use of the seas." (99)

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(93) S.8 ibid

(94) S.18 ibid

(95) S.19 ibid

(96) S.23 ibid

(97) S.24 ibid

(98) S.13 ibid

(99) The United States Department of State Statement on Canada's Legislation of April 15, 1970 reproduced in 9 Int'l Legal Mat. 605 (1970)

The Canadian government in defending its position pointed to the large number of states that have asserted various forms of limited jurisdiction beyond their territorial sea including the United States, who in 1935 claimed the authority to extend customs enforcement activities as far out to sea as sixty-two miles.

Canada also claimed the threat to the environment of a state constitutes a threat to its security and therefore the Arctic Waters Pollution Prevention Act 1970 constituted a lawful expansion of a limited form of jurisdiction to meet particular dangers.

The right to self-defence, however, has been narrowly defined in international law and is justified only in the case of :

> "an instant and overwhelming necessity for self-defence leaving no choice of means, and no moment for deliberation". (1)

Likewise Article 51 of the United Nations Charter concerning self-defence only forsees it arising in the case of armed attack. At the present stage of development of international law it is stretching things too far to try and bring the threat of possible pollution damage within the scope of the right to claim self-defence.

Although there is no exact precedent for the action of Canada it argues principles underlying widely accepted claims and practices support unilateral action to protect special interests. Three established concepts arguably support it :

The first is the concept of the Contiguous Zone which was confirmed by the Geneva Conference on the Law of the Sea in 1958. (2) Within that zone the coastal state can exercise limited authority. The Convention contains a twelve mile limit (3) but the Canadians claim its acceptance is based on

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(1) Daniel Webster : American Secretary of State quoted from J. Brierly The Law of Nations (6th Ed.)(1963) p.406

(2) Article 24 (1): Convention on the Territorial Sea and Contiguous Zone, 1958

(3) Article 24 (2) ibid

the notion that it provides an appropriately sized area in which to deal with the problems envisaged at Geneva - preventing infringement of "customs, fiscal, immigration or sanitary regulations". The argument continues that when the nature of pollution and the problem of environmental control is looked at, it is appropriate to extend this zone to one hundred miles.

The second concept again established at Geneva is a universal duty on the part of states to participate in measures to conserve the living resources of the sea (4). This duty was confirmed at the Stockholm Conference in 1972. Canada argues the 100 mile zone established by the Arctic Waters Pollution Prevention Act is its contribution to this duty.

The third concept is the special interest of the coastal state in maintaining the productivity of the living resources of the high seas in areas adjacent to its territorial sea. (5) "A fortiori" these adjacent states have a special interest in maintaining the quality of the marine environment, which entitles them to take reasonable measures to protect those areas from a wide variety of dangers, even to the extent of unilateral action where international safeguards are absent.

Basically all these arguments favouring the unilateral action of Canada rest on two assumptions. The first is the aim of the economic zone (to prevent pollution) is acceptable in the eyes of international law and the second is the measures taken are appropriate and necessary to meet this end. But, even if both these assumptions are correct, this does not mean that under international law the action is lawful. Just because there is a problem to which an answer has been found, it does not necessarily follow that anything goes! Certainly Canada as a major coastal state bordering on the Arctic, has a special interest in that area, as any coastal state has in the area of the high seas adjacent to its territorial waters,

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(4) Article 25 : High Seas Convention, 1958

(5) Article 6(1): Convention on Fishing and Conservation of the Living Resources of the High Seas, 1958

but the solutions stressed by the conventions Canada seeks to rely on are international ones which take into account the interests of other states :

> "All states shall co-operate with the competent international organisations in taking measures for the prevention of pollution. (6)

This is probably the most distressing aspect of Canada's action. It is now merely an academic question whether its action islegal or illegal in terms of international law. By narrowing its acceptance of the compulsory jurisdiction of the International Court of Justice in 1970, Canada removed the likelihood of its action being challenged before an international tribunal. Anyway the rules established by the Act could hardly be considered unfair since they bear remarkable similarity to the rules which would be governing the area anyway, if all the I.M.C.O. conventions were fully in force. The only major extension is the coastal state's right to interfere in limited cases up to one hundred miles from shore.(7)

What is frightening, however, is that Canada's action forms a dangerous precedent for other states to use an economic conservation zone as an excuse to extend their territorial sovereignty over one hundred miles or more of ocean. The precedents established by the Act (although limited to preventing pollution) are clearly capable of widespread abuse by other, perhaps less reasonable states.

Canada's answer to the claim its unilateral action could be abused is as follows :

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(6) Article 25 (2): Convention on the High Seas, 1958

(7) The similarity is not surprising. Canada played an active role in I.M.C.O. particularly at the Brussels Conference in 1969. The failure of that Conference to take positive steps to prevent pollution as distinct from compensating it was the final straw leading to Canada's unilateral action.

> "If /Canada's/ limitations of purpose are lost sight of, the fault does not lie with Canada's claim, but with those who fail to identify the points of necessary distinction and find in 'creeping jurisdiction' an excuse for either their own ineptitude or pusillanimity. States exclusive jurisdiction can only creep forward if the contraposed community interests withdraw them" (8)

But, this is avoiding what is perhaps the most dangerous consequence of Canada's action so far as international law is concerned. Canada's unilateral claim is self-judging and although that country claims it is hastening the development of international law, in fact it is shying away from it. By admitting that it does not have confidence in international law Canada is inviting other countries to follow suit perhaps even in other areas. It is furthering an already existing trend :

> "With respect to the interplay of unilateral action and the development of community law, movements since World War II have tended to be overwhelmingly in the direction of an extension of national, exclusive claims at the expense of international and community rights and freedom. This is shown by the Truman Proclamation which led to the Convention on the Continental Shelf... Similarly the result of the Canadian claim to a 100 mile zone of exclusive policing of pollution is likely to lead to parallel claims by other nations rather than the creation of international institutions. As international lawyers we must be aware of this negative trend - negative from the point of international law making, international institutions and the international community". (9)

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(8) L.F.E. Goldie : Development of an International Environmental Law - an Appraisal. In J.L. Hargrove Law Institutions and the Global Environment (1972) p. 104 at 116

(9) W. Friedmann Panel : The U.N. and Lawmaking Proceedings of the American Society of International Law (1970) pp. 59-60

POLLUTION AND THE FUTURE LAW OF THE SEA :

In the year 1975 the international law of the environment is at the crossroads. The preceding discussion makes one point very clear. International law has yet to successfully implement a regime protecting the resources of the oceans from pollution. To make matters worse the Canadians seem to have found an answer but this answer ignores international law and instead is based on unilateral action.

To be successful, an international regime must be aimed at the fulfilment of a common interest among nations. (10) This common interest must be stronger than the mere verbal accord expressed at Stockholm and on the international scale is almost impossible to find at present. Using the whaling industry as an example, what is the common interest there? Any one member of the I.W.C. has an incentive to get all the other members to accept the quotas, while at the same time it does not want to burden its own operations.

There is an alternative approach, however, which requires going to the other extreme and appealing to the selfish attitude of states to think of their own interests first. One of the trends which can be seen in the conventional law attempting to control pollution of the sea is the ever increasing recognition of the role the coastal state has to play in maritime law. Gone are the days when these states were prepared to accept a three mile territorial sea with the rest of the oceans classified as high seas and open to all. They want greater recognition and more control.

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(10) Discovering and clarifying a common interest or trading off interests has had considerable success in regional and bilateral agreements. The many agreements of this type are too numerous to list in this paper and their success is very closely related to the special factors which led to the agreement in the first place.

The latest conference on the Law of the Sea recognises these claims because it has accepted in principle the concept of a territorial sea of twelve miles and an economic zone extending a further 188 nautical miles from the edge of the territorial sea. In this economic zone the coastal state will have :

> "Sovereign rights for the purpose of exploring and exploiting, conserving and managing the natural resources, whether renewable or non-renewable, of the bed and subsoil and super adjacent waters," (11)

This will almost certainly include :

> "jurisdiction with regard to the preservation of the marine environment including pollution control and abatement." (12)

A "right" to the resources found in a two hundred mile zone from a state's coastline gives that state a selfish interest in preserving the environment in that area. It will, of course, have the right to use these resources in any way it thinks desirable, but at the same time the particular state has a vested interest in ensuring the actions of others do not cause any damage to the environment of the economic zone.

The recognition of a greater interest on the part of coastal states may also be influential in bringing about a decrease in pollution from land based sources. A coastal state with interests stretching twelve miles from its coastline might be prepared to accept damage caused by land based pollution to that area because a greater utility can be gained from the carrying on of the activity causing the harm. As well, any pollution damage caused, outside a state's territorial sea is not a direct cost to it personally, but is shared by all other states with an interest in the area.

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(11) Article 45 (1)(a) Informal Negotiating Test of the Convention of the Seabed and the Ocean Floor and the Subsoil thereof Beyond the Limits of National Jurisdiction. May 9, 1975 A/CONF. 62/WP.8/Part II

(12) Article 45 (1)(d) ibid

As the coastal state gains a greater interest in the seas off its coasts, however, the relative values placed on land based pollution causing activities and a pollution free economic zone change. There is a greater incentive to restrict this land based pollution.

The most controversial aspect of environmental protection in an economic zone, which will cause considerable discussion at the next Law of the Sea Conference is the question of what standards should be imposed. Although enforcement is in the hands of the coastal state, should it enforce internationally agreed standards or on the other hand, will a state be allowed to follow in the footsteps of Canada and apply special standards where it thinks adequate international rules have not yet been established? The danger with the former approach is the chance of achieving a consensus of views is remote and it may be many years before adequate rules are established, while the claimed danger in the latter is it raises a very serious threat of uncontrolled interference within the zone. The argument is that shipping to and from a majority of coastal states, while on route, has to pass within two hundred miles of other states and would accordingly be subject to interference if coastal states were given jurisdiction to establish pollution standards for vessels transiting their economic zones.

But, whichever one of these approaches is finally adopted, it should not be forgotten that the 188 mile economic zone involves rights which are given to the coastal state by the international community and as such, a state in exercising these rights is subject to international law. It cannot simply do what it wants and when deciding what will be accepted by the international community and international law the Stockholm Conference provides a useful guide. It provides an international yardstick against which individual state action can be measured.

The enforcement envisaged above by the coastal state in the economic zone can be contrasted with the unilateral claims of Canada. Its claim was not one made under international law

but under domestic law. As was discussed earlier in this paper, by altering its acceptance of the compulsory jurisdiction of the International Court of justice it was turning its back on the international community and international law.

Although the recognition of an "economic zone" will alleviate many of the problems of enforcing pollution standards in that area, there will still remain a large area of ocean which is "res communis". The regulations to prevent pollution in this area must be truly international because by definition it is an area over which no state can claim sovereignty. Provided the coastal states take the measures in the way suggested to control land based pollution the main problem in this area will be harm to the environment resulting from shipping. The approach with the best chance of success is one based on the same principles as those outlined in the 1973 International Convention for the Prevention of Pollution from Ships. The 1973 Convention (as has already been stated) details equipment, construction, and safety standards which are aimed at preventing pollution in the first place, and to solve the problem of non signatory states, places on all those who have signed the Convention the obligation to make sure all ships in their ports or even entering waters under their jurisdiction obey these standards. The advent of the economic zone will make it even more advantageous to coastal states to enforce this obligation because such standards will help eliminate pollution in their zone as well as in the oceans outside.

Coastal state enforcement of regulations becomes more difficult, however, when the question is one of conservation of living resources on the high seas. There are very few preventative (as distinct from restrictive) rules which have the practical effect of regulating activities and which at the same time can be enforced within a coastal state's jurisdiction. The difficulties inherent in an international regime protecting living marine resources are well illustrated

by the failure of the International Whaling Commission. It can only be hoped the international concern for the environment expressed at Stockholm will be transformed in this area into positive action by the participating states before they find that in their desire for short term gain they have forgone any chance of a long term solution by "killing off" whole species.

CONCLUSIONS :

The present paper is based on certain premises the most important being that the Stockholm Conference reflects a genuine concern for the environment, because without this there is no hope, Therefore, although a state's first concern is generally its own interests, it can be "pushed" into taking measures to protect the environment. The need to be "pushed" has arisen because of the rather two faced attitude adopted by states at international forums. At these forums, especially in the field of environmental law the discussion tends to be on principles. These, states are readily prepared to agree with. But, a change overcomes them sometime between then and the time they have the opportunity of putting these principles into practice. Suddenly, other considerations become more important particularly their own self interests.

This procedural aspect is the main hurdle in the path of the development of an international legal order regulating pollution because customary international law already provides the legal rules of responsibility for "risky" activities and also precedent for imposing restrictions on activities which are considered "wrong".

The increased concern with procedural rules is evidenced in the changing stance adopted by the Conventions and the ever increasing recognition of coastal state enforcement. But, some countries have not been prepared to wait until an international solution is reached and instead have taken unilateral action, and while their action may have been based on very noble grounds it represents a sad precedent for international law. The Arctic Waters Pollution Prevention Act, 1970 and the circumstances surrounding its enactment provide proof of the failure of international law to grapple with the problem of protection of the environment in any concrete (as distinct from purely theoretical) way. It is to be hoped that Canada's Pollution Prevention Act does not remain on its statute books for long and the developing concept of the economic zone allows it to protect the Arctic

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