

D. PREVENTION MEASURES

1. SAFETY OF SHIPPING

The term safety of shipping expresses the interest of shipowners, seafarers, passengers, cargo owners, and insurers as well as of the community at large that sea transportation by ship should be as safe as possible, especially for the protection of the marine environment. Regulations for the safety of shipping generally have to a greater or lesser degree an impact on the interests of the parties mentioned above. But as the Convention deals with public law and order rather than commercial aspects, its concerns are clearly related to safety of life at sea and pollution prevention matters on a scale represented principally by the work of the International Maritime Organization (IMO), especially as exemplified by the following list of Conventions:

- (a) Convention on the Safety of Life at Sea (SOLAS), 1974;
- (b) Convention on Loadlines, 1966;
- (c) Convention for Preventing Collision at Sea (COLREG), 1972;
- (d) Convention on Safety of Fishing Vessels, 1977;
- (e) Convention on Standard of Training, Certification, and Watchkeeping for Seafarers, 1978;
- (f) Convention on Maritime Search and Rescue, 1979;
- (g) Convention for the Prevention of Pollution from Ships (MARPOL), 1973.

The central provision of the Convention in this respect requires flag states to exercise control in administrative, technical, and social matters to ensure the safety of ships at sea by taking various measures ranging from construction of the ship to the training of the crew, (Art. 94, Para. 1-4; Art. 194, Subpara. 3(b); Art. 211) while other provisions are related only to matters of navigation such as preventing collisions, (Art. 21, Para. 2; Art. 39, Para. 2; Art. 94, Subpara. 2(b)) the use of sea lanes and traffic separation schemes, (Art. 22; Art. 41; Art. 53, Para. 10) and safety measures in respect to artificial installations, (Art. 60; Art. 147; Art. 260-262) or when the Convention requires that ships render assistance to persons in danger at sea and that coastal states establish a search and rescue system. (Art. 98)

The Convention refers only to generally accepted international regulations, procedure, and practice (Art. 94, Para. 5) or uses similar wording, e.g., (Art. 211, Para. 2) but never specifically to any established conventions. There was a two-fold purpose to this method. On the one hand, it avoids a situation where states parties to the 1982 Convention would be bound to conventions which they have not ratified, and, on the other hand, opens several possibilities for interpretation as shown by the following example: when in regard to general safety of ships the 1982 Convention requires the flag state to "conform to...international regulations," (Art. 94, Para. 5) there is a certain leeway for freedom of interpretation, a deliberate measure to lessen the burden on developing countries trying to establish their own shipping industry. But it can easily be imagined that a precise determination would not be simple one way or the other.

2. PRESERVATION OF THE MARINE ENVIRONMENT

The part of the Convention dealing with the global regime for the prevention of pollution is one of the most detailed in the entire document, regulating the obligations, responsibilities, and powers of the states. (Part XII) There are two possible reasons for this. One is that pollution prevention law is a new legal field which is not burdened with older legal concepts; but of greater impact have undoubtedly been the shocks following disastrous tanker accidents and the growing concern that unless action is taken to stop the spread of pollution from vessels and other sources the marine environment will suffer serious and long-term damage. A major step towards the implementation of global and regional regulations and measures for the prevention of pollution and for the general protection and preservation of the marine environment was taken at the United Nations Conference on the Human Environment in 1972 in Stockholm. Following this conference, many regional agreements negotiated under the auspices of the UN Environment Programme (UNEP) were prepared.

The 1982 Convention defines pollution (Art. 1, Subpara. 1(4)) and establishes a general duty to protect the marine environment and the measures to be taken, (Art. 192; Art. 194) and outlines methods of co-operation, including monitoring and technical assistance. (Art. 197-206).

With respect to various sources of pollution, the Convention adheres closely to the policy of legislation, followed by enforcement. The pollution regulations can be divided into two parts: (a) pollution from the sources "land-based", (Art. 207; Art. 213) "seabed", (Art. 208; Art. 209) atmosphere, (Art. 212) and all kinds of dumping, (Art. 1, Subpara. 1(5); Art. 210; Art. 216; Art. 214; Art. 215) and (b) pollution from vessels, except warships and other governmental vessels in non-commercial service (Art. 236). Pollution matters in the second case are separate from the other sources in that provisions are implemented supplementary to the basic concept of legislation and enforcement in order to balance the interests between the flag state and the coastal state with respect to their jurisdiction.

The legislation provisions display the typical Convention approach in requiring the responsible states to adopt international regulations and standards, varying its requirements from "taking into account" (atmospheric (Art. 212, Para. 1) and land-based (Art. 207, Para. 1) sources) to "no less effective" (Art. 208, Para. 3; Art. 209, Para. 2; Art. 210, Para. 6) and "shall at least have the same effect" (for vessels) (Art. 211, Para. 2)). There are already conventions in force for the prevention of pollution by dumping and vessels, which can serve as guidelines for what is meant by "global rules and standards" to prevent dumping. (Art. 210, Para. 6) Where vessels are concerned, the provisions are quite precise, as reference is made to "generally accepted international rules and regulations established through the competent international organizations or general diplomatic conference." (Art. 211, Para. 2) The emphasis should be placed on "competent organization," in this case the International Maritime Organization (IMO), which adopted the

- Convention for the Prevention of Pollution from Ships (MARPOL), 1973, is also responsible for handling secretarial duties of the
- Convention on the Prevention of Marine Pollution by Dumping, 1972,
- and has issued many recommendations and codes directly or indirectly concerned with vessel pollution matters, e.g.,
- International Maritime Dangerous Goods Code (IMDG),
- Code for the Construction and Equipment of Mobile Offshore Drilling Units (MODU), and
- Code of Safety for Nuclear Merchant Ships.

There are no corresponding international agreements for prevention of pollution from land-based sources, aircraft, or sea-bed activities. Regulations to control pollution resulting from deep sea mining must be adopted by the Sea-Bed Authority. (Art. 145; Annex III, Art. 17; Art. 1, Subpara. 1(b)(xii)) In cases of pollution from other seabed activities, (Art. 208) from the atmosphere, or from land-based sources, the states are to establish global or regional regulations. (Art. 207, Para. 4; Art. 208, Para. 5; Art. 212, Para. 3)

Where vessels are concerned, responsibility for national legislation and enforcement depend on two states: the flag state and the coastal state. Whereas the coastal state has little

manoeuvring room for enacting legislation, it can exercise a right to enforce anti-pollution laws to quite some degree. By and large, legislation by the coastal state has to reflect international rules. (Art. 21, Subpara. 1(f); Art. 211, Para.4-6; Art. 234) The right of a coastal state to enforce such laws by means of investigations, inspections, proceedings, and detention is dependent on the location of the incident and degree of pollution and the location of the vessel. (Art. 218-220; Art. 222) While in port, ships which are unseaworthy in respect to pollution can be detained. (Art. 219; Art. 226, Subpara. 1(c)) In order to avoid pollution resulting from “maritime casualties” (Art. 221, Para. 2) the coastal state can enforce measures beyond the territorial sea, pursuant to international customary or conventional law. (Art. 221, Para. 1) In this context, reference can be made to the

International Convention Relating to Intervention on the High Seas in Cases of Oil Pollution Casualties, Brussels 1969.

The coastal state may even institute investigations and proceedings against a vessel because of discharge beyond its general pollution jurisdiction. It may act on its own initiative if there are incidents on the high seas and in specific cases on request. (Art. 218)

In order to specify and limit the circumstances under which a coastal state may intervene, the Convention includes a set of safeguard regulations. (Art. 223-232). Coastal states bordering straits may not apply these regulations for ships in transit passage. (Art. 233) They may implement laws in regard to discharge of oil and similar substances. (Art. 42, Subpara. 1(b)) Both user states and states bordering straits are to co-operate by means of agreements in pollution matters in straits. (Art. 43)

All states are to respect any obligations assumed under special conventions, but these obligations are to be carried out in a manner consistent with the general provisions of the 1982 Convention, (Art. 237) and no agreements may be made which affect the basic principles of these provisions. (Art. 311, Para. 3) States are responsible for the fulfillment of their obligations and are liable according to international law (Art. 235; Art. 304) and are to ensure prompt compensation for any damage. (Art. 235, Para. 2)

3. INDEMNITY

The Convention rarely touches the question of damage compensation. This is largely a matter of other international conventions and sources of law, especially of private law; for example, in pollution matters, some important sources would be

- the Convention on Civil Liability for Oil Pollution Damage, 1969,
- the Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, 1971,
- the Tanker Owners' Voluntary Agreement Concerning Liability for Oil Pollution (TOVALOP), and
- the Contract Regarding an Interim Supplement to Tanker Liability for Oil Pollution (CRISTAL);

or a more general convention on liability like the

- Convention Relating to the Limitation of the Liability of owners of Sea-Going Ships, Brussels, 1957, or one closely related to questions of liability, such as the
- Convention Relating to the Arrest of Sea-Going Ships, Brussels, 1952.

The Convention employs the principle that its provisions are without prejudice for the application of existing or newly developed international law. (Art. 304) Convention provisions having to do with this question concern the liability of the flag state for warships and other governmental vessels in non-commercial service, (Art. 31; Art. 42, Para. 5; Art. 54; Art. 42, Para. 5; Art. 236) activities in the Area, (Art. 139) marine scientific research, (Art. 263) hot pursuit, (Art. III, Para. 8) pollution, and others. (Art. 106 (Piracy); Art. 110, Para. 3 (Right to

visit)) In pollution matters, the Convention provides a general clause stating that states are responsible for the fulfillment of their international obligations and that they are liable in accordance with international law. (Art. 235) In addition, coastal states which take unlawful measures against foreign vessels are liable for damage or loss resulting from said measures. (Art. 232) International governmental organizations which accede to the Convention bear the same responsibility as states parties. (Art. 1, Subpara. 2(2); Annex IX, Art. 6) Where indemnity is called for, the Convention requires states to adopt laws providing procedures for compensation, (e.g., (Art. 235, Para. 2; Art. 232)) just as it does in the case of breakage of or damage to cables and pipelines. (Art. 112-115)