1-1-1982

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Recommended Citation
William N. Hancock and Robert M. Stone, Liability for Transnational Pollution Caused by Offshore Oil Rig Blowouts, 5 Hastings Int’l & Comp. L. Rev. 377 (1982).
Available at: https://repository.uchastings.edu/hastings_international_comparative_law_review/vol5/iss2/4

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Liability for Transnational Pollution Caused by Offshore Oil Rig Blowouts

By William N. Hancock and Robert M. Stone
Members of the Class of 1982.

I. INTRODUCTION

On June 3, 1971, an exploratory oil well located in Mexican national waters off the Yucatan Peninsula suffered a serious blowout. The well, which was being drilled by the Mexican national oil company, Petroleos Mexicanos (PEMEX), pumped 3.1 million barrels of crude oil into the Gulf of Mexico before it was capped more than nine months later. The slick created by the spill crept northward, crossed into United States waters, and fouled the Texas coast barrier islands and Texas mainland beaches. It caused indirect damage to the Texas coast tourist industry, and it was feared that the slick would also have an impact on the Gulf Coast fishing industry.

In September of 1979, United States Gulf Coast fishermen, local governments on the Texas coast, and representatives of the Texas coast tourist industry filed suit in federal district court seeking $255 million in damages for injuries caused by the spill. Named as defendants in one or more of the suits were PEMEX, Sedco (the U.S. company which owned the drilling rig involved in the blowout), and Perforaciones Marinas del Golfo (Permargo), a private Mexican drilling contractor that had leased the rig.

1. N.Y. Times, June 9, 1979, at 1, col. 1.
3. N.Y. Times, Aug. 5, 1979, at 1, col. 3.
4. Id. at 26, col. 1.
6. PEMEX is the nationalized oil company of Mexico, and thus essentially an arm of the government.
In the face of these claims, the Mexican government stated that it would pay nothing to the United States for damages caused by the spill, implying that the government believed it was not liable for the damage under principles of customary international law.

This Note will explore the liability of one nation for damage to another nation caused by an oil spill which originates from a drilling platform operating within the first nation's territorial waters. The authors conclude that there is ample authority in customary international law to support the proposition that a state is liable under these circumstances. However, no treaty has directly addressed the problem of national liability for international oil pollution caused by offshore drilling platform blowouts. Therefore, this Note will also explore the reasons why no such treaty exists and will offer suggestions to facilitate the future implementation of a treaty addressing this problem.

II. SOURCES OF CUSTOMARY INTERNATIONAL LAW SUPPORTING LIABILITY

The argument that a state is liable for transnational pollution caused by oil exploration activities occurring within its territory is supported by the decision in the *Trail Smelter Arbitration*, Principle 21 of the Stockholm Declaration on the Human Environment, the concept of territorial sovereignty, and the conventions which address international pollution caused by spills from oil tankers.

9. See Wells, Mexico's Burden in a 2-Million-Barrel Spill, N.Y. Times, Sept. 9, 1979, § 4, at 18, col. 4.
11. The sources of international law are summarized in article 38 of the Statute of the International Court of Justice:
   (a) International conventions, whether general or particular, establishing rules expressly recognized by the contesting states; (b) International custom, as evidence of a general practice as law; (c) the general principles of law recognized by civilized nations; (d) Subject to the provisions of Article 9, [denying precedential value to decisions of the I.C.J.] judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

12. See text accompanying notes 16-32 infra.
13. See text accompanying notes 33-40 infra.
14. See text accompanying notes 41-48 infra.
15. See text accompanying notes 51-86 infra.
A. The Trail Smelter Arbitration

The Trail Smelter Arbitration involved a claim by the United States against Canada.\(^1\) The United States sought damages for harm caused to the State of Washington by fumes originating from a privately owned smelter located in British Columbia.

The Trail Smelter Arbitral Tribunal (Tribunal) was convened under the authority of a 1935 convention between the United States and Canada.\(^1\) The two countries initially agreed that Canada would pay the United States $350,000 as compensation.\(^2\) This initial payment was only intended to cover damages sustained up to January 1, 1932.\(^3\) After agreeing upon this initial payment, the parties also agreed to form an arbitration Tribunal to determine liability for any future damages.\(^4\)

In its final decision,\(^5\) the Tribunal determined that the Trail Smelter should be enjoined from causing future damage to Washington crops and timber.\(^6\) In order to make this determination, the Tribunal first examined available sources of international law. Finding no clear precedent in existing international legal principles,\(^7\) the Tribunal turned to decisions of the United States Supreme Court\(^8\) and to a Swiss decision\(^9\) for guidance. Relying on these authorities, the Tribunal formulated its seminal rule of international law:

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 of persons therein, when the case is of serious consequence . . . .\(^10\)

Commentators who have accepted the Trail Smelter Arbitration as a basis for an international duty among states have defined that duty in somewhat broader terms. Gerhard von Glahn maintains that states

\(^{16}\) 3 R. Int'l Arb. Awards 1938 (1941).
\(^{18}\) Id.
\(^{19}\) Id.
\(^{20}\) Id.
\(^{21}\) Trail Smelter Arbitration, 3 R. Int'l Arb. Awards at 1938.
\(^{22}\) Id. at 1962.
\(^{23}\) Id. at 1963.
have an international duty to see to it that no acts are performed within their jurisdictions that pollute the waters or air of neighboring states.\textsuperscript{27} Professor von Glahn relies largely on the \textit{Trail Smelter Arbitration} in developing this concept of duty.\textsuperscript{28}

Another commentator states that the specific rule laid down in the \textit{Trail Smelter Arbitration} has been extended to any "damage caused by or deprivations resulting from manipulation of environmental variables."\textsuperscript{29} Finally, the late Supreme Court Justice William O. Douglas cited the \textit{Trail Smelter Arbitration} in partial support of the proposition that international law embraces a broad duty to refrain from causing environmental harm to neighboring states.\textsuperscript{30}

These commentators have not expressly extended the rule of the case to include a duty to compensate for environmental damage. However, the facts of the \textit{Trail Smelter Arbitration} suggest that once a transnational environmental injury has occurred, there is also a duty on the part of the polluting state to compensate.\textsuperscript{31}

In sum, the \textit{Trail Smelter Arbitration} is the seminal decision defining an international environmental duty between nation states. Subsequent international decisions have accepted the rule of this case as one of customary international law.\textsuperscript{32}

\section*{B. The United Nations Conference on the Human Environment}

A second source of a state's environmental duty to neighboring states can be found in Principle 21 of the Stockholm Declaration. This Principle was formulated at the United Nations Conference on the Human Environment which met in Stockholm in June 1972.\textsuperscript{33} The

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{27} See G. \textsc{von glahn}, \textit{supra} note 11, at 175.
\item \textsuperscript{28} Id.
\item \textsuperscript{29} Note, \textit{New Perspectives on International Environmental Law}, 82 \textsc{Yale L.J.} 1659, 1665 (1973).
\item \textsuperscript{30} Douglas, \textit{Environmental Problems of the Oceans; the Need for International Controls} 1 \textsc{Envt'l L.} 149, 154 (1971). \textit{See also} Tiewul, \textit{International Law and Nuclear Test Explosions on the High Seas}, 8 \textsc{Cornell Int'l L.J.} 45 (1974).
\item \textsuperscript{31} See text accompanying notes 18-19 \textit{supra}.
\item \textsuperscript{32} \textit{See, e.g.,} Corfu Channel Case (United Kingdom v. Albania) [1949] I.C.J. 4, 22 ("and every State's obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States."); Lake Lanoux Arbitration (France v. Spain) 24 I.L.R. 101, 111-112 (Arbitral Tribunal, November 16, 1957), 12 R. Int'l Arb. Awards 281 (1957), \textit{reprinted in} 53 \textsc{Am. J. Int'l L.} 156 (1959) ("the correlative duty not to injure the interests of a neighboring state . . . ").
\end{itemize}
\end{footnotesize}
Principle declares that:

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.\(^3\)\(^4\)

This Principle amounts to a broad international acceptance of the rule of the *Trail Smelter Arbitration*.\(^3\)\(^5\) One commentator has suggested that Principle 21 of the Stockholm Declaration should be understood to encompass responsibility for damage from land-based sources of atmospheric and marine pollution.\(^3\)\(^6\) Although this interpretation only refers to land-based sources of atmospheric and marine pollution, there is no apparent reason why Principle 21 should not also be construed to encompass fixed marine-based sources of pollution operating within a state’s jurisdiction or control, including drilling platforms operating within a state’s territorial waters.

Under Principle 21, as under the rule of the *Trail Smelter Arbitration*, primary responsibility to ensure that activities do not cause transnational environmental damage is assigned to the various states. This suggests that if a transnational environmental injury occurs, the injured nation is entitled to compensation directly from the sovereign body which has jurisdiction over the activity causing the damage. This would be true even where the activity which causes damage is privately owned and operated.\(^3\)\(^7\) The sovereign would then be left to seek compensation from those directly responsible for the activity through its domestic legal system.

Thus direct compensation from a sovereign can be had where the activity causing the harm was not only located within the sovereign’s jurisdiction, but was also directly within the sovereign’s control (as was the drilling rig operated by PEMEX in the Bay of Campeche).

Principle 22 of the Stockholm Declaration adds another element to the general policy enunciated in Principle 21. It states that:

States shall co-operate to develop further the international law re-

\(^3\) DEP’T STATE BULL. at 118.

\(^4\) The result of the vote on Principle 21 by the nations represented at the Conference was 112 in favor, none against, and 10 abstentions. UN Doc. A/PV. 2112, at 6 (1972).


\(^6\) This has, in fact, been the course followed by many international decisions in this area. See generally cases cited at note 32 supra.
regarding liability and compensation for the victims of pollution and other environmental damage caused by the activities within the jurisdiction or control of such States to areas beyond their jurisdiction.\footnote{38}

To some extent, the nations of the world have heeded Principle 22's suggestion. Treaties have established environmental standards and liability systems for oil tanker spills and pollution caused by the normal operation of ships.\footnote{39} However, no treaty has addressed the problem of liability for transnational damage caused by offshore oil rig blowouts.\footnote{40}

C. The Concept of Territorial Sovereignty

A third source of a nation's duty to prevent activities within its jurisdiction from causing environmental damages to other states is territorial sovereignty.\footnote{41} Generally, territorial sovereignty is defined as a state's right to exercise exclusive jurisdiction over its own fixed territory.\footnote{42} As a corollary, a state has a right to exclude unwanted intrusions into its territory. Such unwanted intrusions would include pollutants which cross national boundaries. One commentator has stated that "[t] is still the sovereign right to territorial integrity which serves as the primary legal defense of a state affected by transnational pollutants."\footnote{43}

Before a state can claim damages for transnational pollution based on a violation of its territorial sovereignty, it must show that the pollution caused "material damage."\footnote{44} The threshold requirement for a claim based on a violation of territorial sovereignty (i.e., "material damage") is established by merely showing that a transnational crossing of pollutants has occurred.\footnote{45} The extent of damage caused by the

\footnote{38. Stockholm Conference, supra note 33, 67 Dep't State Bull. at 118.}
\footnote{40. See Lay, supra note 10.}
\footnote{42. See G. Von Glahn, supra note 11, at 65.
\footnote{43. Handl, supra note 41, at 54. It should be noted that Professor Handl's analysis of territoriality may suggest that this concept should be classified not as a "third source" of international environmental duties, but rather as the underlying foundation of the duties enunciated in Principle 21 and the Trail Smelter Arbitration.
\footnote{44. Id. at 66.
\footnote{45. Id. at 75-76.}}
pollutants would determine the amount of compensation to be paid to the injured state.

The principle of territorial sovereignty was the basis for Australia's claim against France in the Nuclear Tests Case. In that case, Australia sought an injunction in the International Court of Justice to prevent France from conducting further atmospheric testing of nuclear devices in the southern Pacific Ocean. Australia based its claim on its sovereign right to exclude fallout caused by the test blasts from crossing into its territory. The International Court of Justice declined to rule on Australia's claim because the court considered it moot. Prior to the conclusion of the suit, France agreed to cease testing nuclear devices in the South Pacific. However, the case underscores the utility of territorial sovereignty as a tool for seeking injunction and damages in cases of transnational pollution.

III. AN ANALOGY IN CONVENTIONAL INTERNATIONAL LAW: PREVENTION OF OIL POLLUTION FROM SHIPS

The three sources of customary international law discussed above indicate that there is a widely accepted duty of a state to ensure that activities carried on within its jurisdiction or control do not cause damage to the environment of other states or to areas beyond the limits of its national jurisdiction. Once a transnational environmental injury has occurred, there is a duty on the part of that state to compensate those who were injured. Partially in recognition of this duty, several multilateral international conventions have addressed the problem of oil pollution damage caused by discharges or spills from ships.

Although none of these conventions specifically address the problem of oil pollution damage caused by oil platform blowouts, some legal mechanisms utilized in those conventions may prove useful in a future convention which addresses this problem.

47. Id. at 272.
49. See text accompanying notes 31 and 37 supra.
A. The International Convention on Civil Liability for Oil Pollution Damage

The International Convention on Civil Liability for Oil Pollution Damage51 (Civil Liability Convention) addresses the problem of liability for transnational pollution damage caused by oil tanker spills.52 The Civil Liability Convention does not cover oil platform spills.53

The problem that the Civil Liability Convention addresses is closely analogous to the problem of transnational environmental damage caused by drilling platform blowouts.54

There are several basic (and conceptually important) similarities between transnational damage caused by a tanker spill and transnational injury caused by an offshore drilling platform blowout. First, both situations present the prospect of extensive liability to the individual or entity found to be responsible for the underlying activity.55 Sec-

51. Civil Liability Convention, supra note 50, at 45. The signatories to the convention include Belgium, Cameroon, the Republic of China, the Federal Republic of Germany, France, Ghana, Guatemala, Iceland, Indonesia, Italy, Ivory Coast, the Malagasy Republic, Monaco, Poland, Portugal, Switzerland, the United Kingdom, the United States, and Yugoslavia. See Final Act of the International Conference on Marine Pollution Damage, 1969, 9 I.L.M. 20 (1970).


53. For the purpose of the Civil Liability Convention, a “ship” is defined as “any seagoing vessel and any seaborne craft of any type whatsoever, actually carrying oil in bulk as cargo.” Art. 1, para. 1. “Pollution damage” is defined as “loss or damage caused outside the ship carrying oil by contamination resulting from the escape or discharge of oil from the ship, wherever such escape or discharge may occur, and includes the costs of preventive measures and further loss or damage caused by preventive measures.” Art. 1, para. 6.

54. Two other conventions between nations involve attempts to protect the marine environment from oil discharged from ships. They are the Oil Pollution Convention, supra note 39, and the International Convention for the Prevention of Pollution from Ships, supra note 50, which was intended to supersede the Oil Pollution Convention. However, the thrust of these Conventions is to promulgate minimum standards designed to prevent damage to the marine environment, rather than to establish a scheme of compensation for damage that has already occurred. The Convention for the Prevention of Pollution from Ships discusses special standards and procedures required to minimize the discharge of oil occurring during the normal operation of an offshore drilling rig at annex I, reg. 21. Although promulgation of technical standards designed to minimize the risk of oil platform blowouts is worthy of further international attention, it is a subject which is beyond the scope of this Note.

55. As stated earlier in the text, as of Sept. 23, 1979, suits seeking $255 million in damages had already been filed in federal district court against the various defendants in the Bay of Campeche case. See text accompanying note 5 supra. As of Nov. 25, 1980, the total claims arising out of this incident were estimated at $375 million. L.A. Daily J., Nov. 24, 1980, at 2, col. 3. Furthermore, this total could reach $455 million if the federal government decides to sue PEMEX to recover $80 million authorized by the House of Representatives to compensate U.S. citizens for damages arising from the spill. Id. and note 5 supra.

Damages sought in suits arising out of tanker spills have also been substantial. For
ond, both of the underlying activities are extremely valuable to the international community, and that community has a strong economic interest in promoting those activities. Finally, it would be impossible through the exercise of due care to totally eliminate the risks of harm inherent in those activities.56

Given these similarities, it is reasonable to examine some of the legal mechanisms utilized in conventions addressing liability for tanker spills and to test their applicability to the situation in which transnational pollution is caused by oil rig blowouts.

The Civil Liability Convention incorporates several of these "legal mechanisms." The first mechanism is the standard of care which the Civil Liability Convention places on the owner of a vessel. Subject to specified exceptions, the ship owner is held strictly liable.57

Part of the example, the Torrey Canyon spill, involving the wreck of a supertanker off the coast of Brittany in 1967, resulted in claims somewhat in excess of $12 million (measured in 1967 dollars). Comment, Post Torrey Canyon: Toward New Solution to the Problem of Traumatic Oil Spillage, 2 CONN. L. REV. 632, 639 (1970). The Amoco Cadiz disaster, involving a spill from a supertanker off the coast of France in 1979, resulted in claims by the French Government against Amoco International for $300 million. N.Y. Times, Mar. 18, 1979, at 1, col. 2; N.Y. Times New Service—Supplementary Material, Sept. 15, 1979, at 69. Although the Bay of Campeche oil spill eventually became the largest in history, nine of the world's ten largest oil spills have involved tankers. N.Y. Times, July 22, 1979, at 18, col. 1.

56. Students of the law of torts will recognize a similarity between the three factors mentioned here and some of the factors to be considered in determining whether an activity is "abnormally dangerous" for the purpose of strict liability. See RESTATEMENT (SECOND) OF TORTS § 520, especially factors (b), (c), and (f).

57. Article III of the Civil Liability Convention, supra note 50, states:

1. Except as provided in paragraphs 2 and 3 of this Article, 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 occurrence, 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.

2. No liability for pollution damage shall attach to the owner if he proves that the damage:

(a) resulted from an act of war, hostilities, civil war, insurrection or a natural phenomenon of an exceptional, inevitable and irresistible character, or
(b) was wholly caused by an act or omission done with intent to cause damage by a third party, or
(c) was wholly caused by the negligence or other wrongful act of any Government or other authority responsible for the maintenance of lights or other navigational aids in the exercise of that function.
rationale for selecting strict liability as the standard of care for the Civil Liability Convention can be traced to the difficulties inherent in recovering for oil pollution damage based on negligence, trespass, or nuisance.58 The exceptions to liability provided by the Convention are similar or identical to the common exceptions allowed in strict liability.59

Secondly, the Civil Liability Convention imposes a limit on liability.60 This limit is based on the ship's tonnage,61 with an absolute liability ceiling of 210 million "francs."62 An owner is not protected by these limitations on liability if the spill is caused by his own "actual fault."63 In order to avail himself of the liability ceiling, the owner is required to set up a fund equal to the limit of his liability with the court or other competent authority.64 This fund must be deposited in the state or states which are claiming injury from the spill.65 The Civil Liability Convention also outlines general procedures for the distribution of the fund,66 and gives exclusive competence to determine all matters relating to the distribution of the fund to the courts of the state where the fund has been deposited.67

A third point of interest is the Convention requirement that ships exceeding a cargo capacity of 2,000 tons be certified as being financially

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3. If the owner proves that the pollution damage resulted wholly or partially either from an act or omission done with intent to cause damage by the person who suffered the damage or from the negligence of that person, the owner may be exonerated wholly or partially from his liability to such person.


58. Ingram, supra note 56, at 183.

59. Id. at 183-84. Article III, para. 2(c) of the Civil Liability Convention parts company with traditional strict liability theory. The exception was inserted because of a fear that one government might benefit from the negligence of another. Id. at 184.

60. Civil Liability Convention, supra note 50, art. V.

61. Id. art. V, para. 1.

62. Id. This franc should not be confused with the Swiss or French franc. It is a unit of measure specifically defined by the Convention. Paragraph 9 defines a franc as: "a unit consisting of sixty-five and a half milligrams of gold of millesimal fineness nine hundred. The amount mentioned in paragraph 1 of this Article shall be converted into the national currency of the State in which the fund is being constituted. . . ." The Convention was drawn up during a period of stable gold prices. Based on 1969 gold prices the value of 210 million francs as defined by the Convention was $14,112,000. Healy, supra note 57, at 321. With current gold prices, the figure may be as much as ten times greater.

63. Civil Liability Convention, supra note 50, at art. V, para. 2.

64. Id. art. V, para. 3.

65. Id. art. IX, para. 1.

66. Id. arts. V, VI.

67. Id. art. IX, para. 3.
responsible up to the applicable limit of liability. Under the Convention, any compensation claim may be brought directly against the insurer or other person providing security for liability.

Finally, the Civil Liability Convention provides that a nation has a duty to directly compensate another nation for damage caused by spills from ships which it owns. Furthermore, a ship owned by a state must be certified (as private ships must be certified) as being financially responsible for damages up to the limits prescribed by the Civil Liability Convention.

It is apparent from the language of article XI that the Civil Liability Convention incorporates the "restrictive immunity" doctrine. Under this doctrine, sovereign acts of a government (jure imperii) are protected by sovereign immunity, while commercial activities (jure gestionis) are not. The treatment of nationalized oil companies under this doctrine, and its importance in the context of the Bay of Campeche spill, is discussed in section IV of this Note, infra.

B. The International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage

After the Civil Liability Convention was approved, it was recognized that the requirements for financial responsibility did not afford full protection for victims in all cases. In 1969, a resolution was attached calling for an International Legal Conference to consider an International Compensation Fund. This led to the drafting in 1971 of the Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage (International Fund Convention).

The three main purposes of the International Fund Convention

68. Id. art. VII, paras. 1, 2.
69. Id. art. VII, para. 8.
70. "With respect to ships owned by a Contracting State and used for commercial purposes, each State shall be subject to suit . . . and shall waive all defences on its status as a sovereign State." Id. art. XI, para. 2 (emphasis added). The Convention does not apply to warships or other ships owned by a state which are used for governmental non-commercial purposes. Id. art. XI, para. 1.
71. Id. art. VII, para. 12.
72. See note 70 supra.
73. I. BROWNLIE, supra note 11, at 327.
75. Convention on the Establishment of an International Fund for Compensation for
are: 1) to provide compensation for pollution damage to the extent that the protection provided by the Civil Liability Convention is inadequate; 2) to provide relief to shipowners in respect to the extra financial burden placed on them by the Civil Liability Convention; and, 3) to more equitably distribute the costs of oil pollution damage among the industries involved in bringing petroleum products to market.

The International Fund Convention seeks to fulfill the first purpose by increasing the 210 million franc liability limit established by the Civil Liability Convention. Under the International Fund Convention, the liability ceiling is increased to 450 million francs for any one incident. The International Fund Convention also provides compensation to injured persons in situations where the ship owner could not be held liable under the Civil Liability Convention. Where no shipowner is liable, or is unable to meet this liability, the Fund will be fully responsible up to the 450 million franc ceiling. Also, the International Fund Convention provides a mechanism by which the liability ceiling can be raised to 900 million francs if circumstances later warrant the increase.

The International Fund Convention seeks to fulfill its second purpose—to provide financial relief to shipowners—by indemnifying the shipowner for a portion of his liability under the Civil Liability Convention. This indemnification is at the rate of 1,500 francs for each ton of the ships tonnage, or 125 million francs, whichever is less.

Finally, the International Fund Convention seeks to fulfill its third goal—to facilitate a more equitable distribution of costs—by requiring persons with an annual total of more than 150,000 tons of crude or fuel oil transported by sea to contribute to the fund. This would encom-
pass oil companies and other large-scale users and refiners of oil. The contribution provision insures that part of the additional cost imposed by the Civil Liability Convention will be borne by those who benefit from the production of offshore petroleum.85

The underlying rational of the contribution provision is consistent with environmental economic theory. Environmental economists maintain that the "external costs" of producing and transporting a good (such as the cost of damage to the environment caused during the production and transportation of oil) should be reflected in the price to the consumer so as to underscore the true cost of producing the good.86

IV. LOOKING TO THE FUTURE—APPLICABILITY OF EXISTING CONVENTIONAL MECHANISMS TO THE PROBLEM OF OFFSHORE BLOWOUTS

At least two reasons can be put forth to explain the absence to date of any international convention addressing the problem of transnational oil pollution caused by offshore oil well blowouts.

A. Infrequency of Offshore Blowouts

Besides the Bay of Campeche spill, only one other blowout with international consequences has received the attention of the world press.87 However, given the magnitude of the Bay of Campeche spill contributed depends on the number of tons of oil the contributor receives via the sea. Id. art. 11, para. 1.

85. Although it might be argued that the additional costs to shippers resulting from the requirements of the Civil Liability Convention would be passed on to those large scale users and refiners (and eventually on to the small consumer) through normal market pricing mechanisms, it must be remembered that not all nations will necessarily become parties to the Civil Liability Convention. Hence, shippers operating under the flag or ownership of a contracting state will be forced to compete against other shippers, operating under the flag or ownership of non-contracting states, who are not burdened by the additional financial requirement of the Civil Liability Convention. Therefore, market competition would likely prevent contracting state shippers from passing on most of these additional costs.

86. See C. SCHULZE & A. KNEESE, POLLUTION, PRICES, AND PUBLIC POLICY (1975) for a good general discussion of environmental economics.

87. This was the North Sea blowout of April, 1977. An offshore oil rig operated by Phillips Petroleum and located approximately 160 miles off the coast of Norway suffered a cracked well pipe. This resulted in a 180-foot-high oil fountain, which spewed out 49,000 gallons of oil per hour. N.Y. Times, April 24, 1977, at 1, col. 5. The spill was capped within a week and resulted in a loss of more than 7.5 million gallons of oil (compared to more than 100 million gallons lost in the Bay of Campeche spill). N.Y. Times, May 1, 1977, § 1, at 1, col. 1. Although the slick created by the spill threatened the southern Norwegian and Danish coasts, five months after the spill occurred the Norwegian Institute for Marine Research
and the legal uncertainties it brought to light, it is likely that increased world attention will be focused on resolving some of these legal ambiguities.  

Also, as world supplies of land-based petroleum dwindle (and prices increase), it can be expected that oil producers will venture further, and more often, into coastal waters in search of oil. Mexico, despite the Campeche disaster, intended to drill fifty additional wells in the Gulf of Mexico in 1979. Increased offshore exploration brings an increased danger of large scale blowouts. Existing wells in the North Sea still present dangers to the countries of northern Europe, and it is conceivable that wells off the coast of California could present an environmental menace to Mexico’s Baja California.

In short, the likelihood of offshore oil well blowouts with international consequences will increase in the future. This will bring about a concomitant increase in the need for international solutions to the problems presented by those spills. A logical response to the dangers inherent in this increased offshore activity would be an international convention addressing the problem of liability for disastrous spills.

B. Fear of Obstructing Development

The lack of any treaty addressing the problem of offshore oil well blowouts may also be explained by the fact that an energy-conscious
international community is unwilling to place any additional obstacles in the path of petroleum exploration and development and is fearful of the tremendous liability which might attach for damage caused by such a spill. However, this fear should not present an insurmountable obstacle to the drafting of an international convention on the subject of liability for offshore oil well blowouts. It can be argued that such a convention would remove obstacles from the path of offshore exploration and would serve as an incentive to exploration.

Given the current uncertain status of international liability for these incidents, participants in an offshore oil exploration venture may face greater risk under the current disorder than they would under an ordered convention placing reasonable limits on liability and outlining a predetermined standard of care. Whether or not a plaintiff has a clear cause of action, if his damages are great enough, he is likely to bring suit against any defendant over which he can obtain jurisdiction. The multiplicity of suits arising out of the Bay of Campeche spill and the Torrey Canyon accident support this proposition. In the long run, it may be best to face certain (but limited) liability under a comprehensive international convention rather than face a large number of claims based on less certain liability.

A convention could also allocate the burden of risk and liability for damage among a large number of persons who benefit from offshore oil exploration. An international fund could be developed along the lines of the International Fund Convention discussed previously. Contributions could be required of oil companies with offshore oil rigs. These contributions might be based on the amount of oil a company produces from its offshore facilities or on the amount of gross sales directly attributable to offshore exploration activities. This scheme would internalize at least part of the "external" costs of producing offshore oil and reflect the costs in the price of oil to the consumer.

Unlimited liability could be avoided by setting limits on individual liability similar to those incorporated in the Civil Liability Conven-

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91. Note that placing restrictions on the transport of oil in the form of additional financial responsibility would not directly curtail the aggregate oil supply or provide any direct disincentive to exploration. This may be one reason why oil transport, but not oil exploration, has been the subject of an international liability convention.

92. See text accompanying notes 5-7 supra.

93. Comment, supra note 55, at 637-41.

94. See text accompanying notes 75-84 supra.

95. See text accompanying notes 84-86 supra. For an interesting analysis of the liability of offshore oil rig operators for economic harm, see Union Oil Co. v. Oppen, 501 F.2d 558 (9th Cir. 1974).
tion\textsuperscript{96} or those applied to accidents arising from the operation of nuclear power plants.\textsuperscript{97} These limits would allow society to promote an activity it deems necessary or desirable, even though that activity carries with it the potential for immense environmental damage.

However, the liability limit for each drilling-platform blowout should probably be somewhat higher than the ceiling placed on individual liability by the Civil Liability Convention.\textsuperscript{98} The potential size (and capacity for damage) of a blowout spill, as evidenced by the Bay of Campeche incident, is much greater than the potential size of a spill from a single tanker.

\section*{C. Other Considerations}

\subsection*{1. Standard of Liability}

Other considerations in developing a future convention merit brief discussion. The standard of liability to be chosen in such a convention could logically follow the lead of the Civil Liability Convention and choose a form of strict liability as the standard.\textsuperscript{99} This should be done primarily because offshore oil exploration will probably be classified as an "abnormally dangerous activity."\textsuperscript{100} An additional reason is the difficulty in establishing the fact that an offshore blowout was caused by negligence.\textsuperscript{101}

The only international document addressing the problem of liability for oil platform blowouts\textsuperscript{102} did, in fact, adopt a form of strict liability\textsuperscript{103} in language almost identical to that used in the Civil Liability Convention.\textsuperscript{104}

\subsection*{2. Sovereign Immunity}

A second consideration is the problem of sovereign immunity and

\begin{footnotes}
\item 96. See text accompanying notes 60-67 \textit{supra}.
\item 98. See note 62 \textit{supra}.
\item 99. See text accompanying notes 57-59 \textit{supra}.
\item 100. See note 56 \textit{supra}.
\item 101. See text accompanying note 58 \textit{supra}. There were claims that Mexico attempted to cover up the facts of the Campeche spill. \textit{N.Y. Times}, Sept. 9, 1979, \S \hspace{1ex}1, at 37, col. 1. In this hostile atmosphere, any critical dispassionate investigation into the facts of the case by either side seems unlikely.
\item 102. Offshore Pollution Liability Agreement, 13 I.L.M. 1409 (1974) [hereinafter cited as \textit{OPOL}].
\item 103. \textit{Id.} \hspace{1ex} \textit{cl. IV}, para. B.
\item 104. \textit{Id.} See text accompanying notes 57-58 \textit{supra}.
\end{footnotes}
how it might be restricted in a future convention involving states with nationalized oil companies. Again, logically, those drafting the future convention would follow the lead of the Civil Liability Convention and incorporate a form of "restrictive immunity." At least one international decision has already applied restrictive immunity against a nationalized oil company, in a case involving the National Iranian Oil Company's alleged breach of contract. Therefore, at least for those activities which are deemed "commercial" as opposed to "governmental" in nature, it is unlikely that a nationalized oil company would be able to avail itself of the protection of sovereign immunity, even in the absence of a convention specifically abrogating that protection.

3. Scope of Coverage

A third consideration in any future convention addressing the problem of offshore blowouts is the scope of the territory to be covered by the agreement. The Civil Liability Convention attached liability for pollution damage "wherever . . . it may occur." However, the scope of the Civil Liability Convention was necessarily global, since it addressed a problem that was global in nature. The constant meanderings of oil tankers, sailing under a variety of national ownerships and registries, would make a tanker spill agreement between only two or three states ineffective. Under such an agreement, only a small fraction of the tankers entering the waters of a contracting state would be bound by the Convention.

The problem of oil well blowouts, however, could be addressed at a more "local" level. Oil rig platforms generally operate in a narrow band along a nation's continental shelf or in relatively shallow seas. Therefore, an agreement between only two or three nations may prove effective in providing a scheme of liability for offshore blowouts. For example, an agreement between the United States and Mexico, or among the United Kingdom, France, and Belgium, may be on a scale sufficient to provide true protection to the contracting states.

A small scale agreement already exists: the Offshore Pollution Liability Agreement (OPOL). OPOL is an agreement among thirteen

105. See text accompanying notes 70-73 supra.
107. Id. See text accompanying notes 72-73 supra.
108. See Comment, supra note 7, at 10221.
109. See note 53 supra.
110. OPOL, supra note 102.
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OIL COMPANIES designed to provide compensation to persons or states who are injured by an offshore oil well blowout. At the time it was drafted, the agreement only applied to "offshore facilities" operating within the jurisdiction of the United Kingdom. However, OPOL provides for an extension of its coverage to "offshore facilities" operating within the jurisdiction of other "designated states," if the parties to the agreement elect to amend it. OPOL also provides a $16 million limit on liability for each incident and requires that parties to the agreement establish and maintain their financial responsibility to fulfill their obligations under the contract.

OPOL has adopted a number of the mechanisms discussed in connection with the Civil Liability Convention. However, it should be kept in mind that OPOL is not a convention between states, but a contract between oil companies and certain "designated states" chosen by those companies.

4. Primary Liability

A final consideration in the drafting of a future convention among nations is the determination of the location of primary liability for damages arising from an offshore blowout. Both the Civil Liability Convention and OPOL place primary liability on the owner or operator of the tanker or oil well involved. However, in a convention among nations which addresses this problem, it may be best to make the contracting states primarily liable to claimants.

There are three reasons why a state should be held primarily liable:

1) direct liability should serve as an added incentive to all contracting states to insure that all offshore oil rig operators are financially responsible to the convention limits;

2) any burden of recovering damages from the private owner or operator would be placed on the nation which most directly

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111. The parties to the agreement are: Amoco, British Petroleum, Burmah, Compagnie française des pétroles, Continental, Exxon, Gulf, Hamilton, Mobil, Petrofina, Phillips, Shell, and Texaco. Id. at 1409.

112. Id. cl. IV.

113. Id. cl. I, paras. 4-7.

114. Id. cl. I, para. 4, cl. X.

115. Id. cl. IV.

116. Id. cl. II, para. C(2).

117. Id. cl. I, para. 4.

118. Id. cl. IV; Civil Liability Convention, supra note 50, art. III, para. 1.
benefitted from the offshore activities (in the form of employment, taxes, license fees, etc.); and

3) it would be consistent with the Trail Smelter case and Principle 21 of the Stockholm Declaration in emphasizing a nation's duty to see to it that activities within its jurisdiction or control do not cause damage to the environment of other states or to the common environment.  

Once the nation had satisfied claims against it, it would be entitled to full indemnification from the private interest responsible for the damage. Indemnification would be sought through mechanisms established in its own internal legal system.

V. CONCLUSION

The recent oil pollution catastrophe involving the United States and Mexico has demonstrated the need for international cooperation to address the problem of pollution from offshore drilling rigs. There is already a basis in international law for establishing the liability of a polluting state. By using principles already established for related problems, such as oil tanker pollution, a mechanism could be created for dealing with future incidents of transnational pollution. As the need for fossil fuel continues to grow, so in turn does the likelihood of the next pollution disaster, and the need to allocate this risk.

119. See text accompanying notes 26-32 and 33-37 supra.