COMMENTS

TROUBLESOME ASPECTS OF THE *SEDCO 135* DISASTER: HAS THE PLIGHT OF THE TRANSNATIONAL POLLUTION VICTIM REALLY IMPROVED IN THE WAKE OF *TORREY CANYON*?

I. INTRODUCTION

As society has become increasingly dependent upon oil as its lifeblood, it has likewise become increasingly concerned with the protection of its environment from the dangers of oil pollution. With this growing environmental awareness on the part of the public has come a realization of the inadequacies of existing national and international authority concerning the prevention and abatement of oil pollution, as well as the compensation of its victims.

The *Torrey Canyon* disaster on March 18, 1967, first focused the world's attention on the problem of vessel-source oil pollution. The accident occurred when the 119,000 ton oil tanker *Torrey Canyon*[1] ran aground on the Seven Stones Reef off the coast of Cornwall, England, and split open, discharging most of its cargo into the English channel.[2] Approximately 80,000 tons of crude oil spilled into the sea, coating English resort beaches on the Cornish coast with oil slicks and spreading to the French coast of Normandy and Brittany 225 miles away.[3] The clean-up operations reportedly cost the two governments over $16 million.[4] By illustrating the global nature of the problem of vessel-source oil pollution, the unfortunate circumstances of the *Torrey Canyon* incident set the stage for a myriad of efforts, in the form of international conventions[5] and national[6] and state legislation,[7] to develop

1. The list of countries associated with the *Torrey Canyon* illustrates the international complexities of tanker-caused pollution. The *Torrey Canyon* was owned by an American corporation operating out of Bermuda, registered in Liberia, bareboat chartered to a California corporation, sub-chartered on a voyage charter to a British corporation, and manned by an Italian master and crew. Nanda, *The Torrey Canyon Disaster: Some Legal Aspects*, 44 DEN. L.J. 400, 401 (1967).

2. The Times (London), July 4, 1967, at 2, col. 8.

3. Sweeney, *Oil Pollution of the Oceans*, 37 FORDHAM L. REV. 155, 158 (1968).

4. Ludwigson, *Oil Pollution at Sea*, in OIL POLLUTION: PROBLEMS AND POLICIES 4 (S. Degler ed. 1969).

5. International Convention Relating to Intervention on the High Seas in Cases of Oil

comprehensive régimes to deal with future *Torrey Canyon*-type incidents.

Unfortunately, the multitude of post-*Torrey Canyon* efforts to fix liability and compensation for vessel-source pollution damage has done little to reduce the size and frequency of oil spill occurrences. On March 16, 1978, the 234 ton American supertanker *Amoco Cadiz*, flying the Liberian flag and manned by an Italian crew, ran aground off the northwest coast of France.[8] Almost 220,000 tons of oil escaped from the broken ship and, aided by gale force winds and fifteen-foot seas, despoiled over 100 miles of France's Brittany coastline.[9] France reportedly incurred $300 million in clean-up costs as a result of the *Amoco Cadiz* oil spill.[10] This was the largest spill on record, twice the size of the spill resulting from the grounding of the *Torrey Canyon*[11] in the same vicinity eleven years earlier.

More recently, on June 3, 1979, the drilling rig *Sedco 135*, a semi-submersible offshore drilling unit owned by Sedco, Inc., an American corporation, and bareboat chartered to Perforaciones Marinas del Golfo, S.A. (Permargo), a Mexican company conducting drilling operations on behalf of Petroleos Mexicanos (Pemex), sustained a blowout in the Bay Campeche in the Gulf of Mexico.[12] The explosion and ensuing fire all but destroyed the rig and resulted in an uncontrolled flow of crude oil from the *Ixtoc 1* oil well into the sea.[13] The oil continued to flow into the Gulf of Mexico at a rate of ten to thirty thousand barrels a day,[14] forming a polluting slick some 300 miles long and twenty-five

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Pollution Casualties, with annex, 26 U.S.T. 765, T.I.A.S. No. 8068, *reprinted in* 9 INT'L LEGAL MATERIALS 45 (1970) (entered into force for the United States May 6, 1975) [hereinafter cited as Civil Liability Convention]; International Fund for Compensation of Oil Pollution Damage (Supplementary to Civil Liability Convention), adopted December 18, 1971, *reprinted in* 11 INT'L LEGAL MATERIALS 284 (1972) [hereinafter cited as Compensation Fund Convention]. These conventions are discussed further, *see* text accompanying notes 23 through 88 *infra*.

6. *See* Federal Water Pollution Control Act (FWPCA), 33 U.S.C. § 1321 (Supp. 1978).

7. *See* ALASKA STAT. §§ 30.25.010-.360 (1977); CAL. WATER CODE §§ 13440-13442 (West 1971); DEL. CODE ANN. tit. 7, §§ 6201-6216 (Supp. 1977); FLA. STAT. ANN. §§ 376.011-.21 (West Supp. 1978); ME. REV. STAT. ANN. tit. 38, §§ 541-560 (1970 & Supp. 1978); MD. NAT. RES. CODE ANN. §§ 8-1411-1417 (1974 & Supp. 1977); MASS. GEN. LAWS ANN. ch. 21, § 27 (West Supp. 1977); N.J. STAT. ANN. §§ 58:10-23.11a-11z (West 1977); N.Y. NAV. LAW §§ 170-197 (Consol.) (Supp. 1977); N.C. GEN. STAT. §§ 143-215.77-.102 (Supp. 1977); OR. REV. STAT. §§ 468.700-.997 (1975); S.C. CODE §§ 48-43-510-620 (Supp. 1977); WASH. REV. CODE ANN. §§ 90.48.020-.900 (1970 & Supp. 1977). For a discussion of the Florida Statute, *see* text accompanying notes 236 through 46 *infra*.

8. FORTUNE, Apr. 23, 1979, at 79.

9. TIME, Apr. 3, 1978, at 64.

10. *In re* Oil Spill by the Amoco Cadiz off the Coast of France, 471 F. Supp. 473, 475 (1979).

11. TIME, *supra* note 9.

12. 10 ENVIR. REP. (BNA) 652.

13. *Id.*

14. *Id.*

miles wide and causing untold damage to the marine life, beaches, and commercial activities of the State of Texas.[15] Texas alone has reportedly incurred in excess of $10 million in damages, including clean-up costs and environmental damages,[16] while the United States government has incurred clean-up expenses in excess of $6 million and environmental damage in an amount yet undetermined.[17] Other claims for damages, in what has surpassed the *Amoco Cadiz* disaster as the largest oil spill[18] to date, total over $355 million.[19]

With the world's growing dependence on oil and the corresponding increase in the number and size of oil tankers and drilling units, it is inevitable that the frequency and magnitude of vessel-source oil spills[20] should increase. In light of the recent *Sedco 135* spill, the national and international régimes developed subsequent to the relatively small *Torrey Canyon* spill have proven to be grossly inadequate.

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15. TIME, July 16, 1979, at 54.

16. The State of Texas has sued for in excess of $10,175,000 in damages, including at least $10 million in environmental damages and at least $100,000 in clean-up costs under the Federal Water Pollution Control Act, 33 U.S.C. § 1321 (Supp. 1978), as well as at least $75,000 in civil penalties. TEX. WATER CODE ANN. § 26.121 (Vernon Supp. 1980). The suit alleges negligence, trespass, and other fault, as well as operation of an inherently dangerous and ultrahazardous instrumentality. Texas v. Perforaciones Marinas del Golfo, S.A. (Permargo), No. H-79-1880 (S.D. Tex., filed Oct. 18, 1979) (Plaintiff's Original Claim); Texas v. Sedco, Inc., No. H-79-1880 (S.D. Tex., filed Oct. 18, 1979) (Plaintiff's Original Claim) (claims consolidated by order dated Oct. 18, 1979).

17. The United States government has filed an admiralty claim alleging Sedco, Inc. and the *Sedco 135* to be liable *in personam* and *in rem* for clean-up expenses in excess of $6 million and for substantial damage to resources and property of the United States in an amount yet undetermined. The claim alleges the unsuitability of the *Sedco 135* for its intended purpose, negligence on the part of those in charge of it in carrying out their responsibilities, failure to take proper care to stop and contain the spill or remove the oil, operation of an ultrahazardous instrumentality, and public nuisance due to interference with the free use and enjoyment of the United States waters. In addition, the claim alleges violations of the Rivers and Harbors Act of March 3, 1889, 30 Stat. 1152, 33 U.S.C. § 407 (1976), and the Federal Water Pollution Control Act, 33 U.S.C. § 1321 (Supp. 1978), United States v. Sedco, Inc., No. H-79-1880 (S.D. Tex., filed Oct. 23, 1979) (Plaintiff's Original Claim).

18. *See supra* note 12, at 652.

19. Haylock v. Sedco, Inc., No. H-79-1880 (S.D. Tex., filed Sept. 13, 1979) (two separate claims against Sedco, Inc. and against Pemex and Permargo consolidated by order dated Sept. 13, 1979); Willacy County Navigation District v. Sedco, Inc., No. H-79-1880 (S.D. Tex., filed Sept. 17, 1979); Giles v. Sedco, Inc., No. H-79-1880 (S.D. Tex., filed Sept. 20, 1979); Alaniz v. Sedco, Inc., No. H-79-1880 (S.D. Tex., filed Oct. 22, 1979); Exploration Logging, S.A. v. Sedco, Inc., No. H-79-1880 (S.D. Tex., filed Oct. 22, 1979).

20. For purposes of the present study, drilling units of the *Sedco 135* variety are considered vessels such that oil spills discharged by such units are considered 'vessel-source' oil spills. However the distinction, if any, between vessels and drilling units is discussed at length; *see* text accompanying notes 56-59 and 133-78 *infra*.

II. INTERNATIONAL CONVENTIONS REGARDING TRANSNATIONAL OIL POLLUTION

A. Civil Liability Convention

Prompted by the *Torrey Canyon* disaster, the United Nations' Inter-Governmental Maritime Consultative Organization (IMCO) established a working group to prepare a draft convention adopting an international régime to compensate the victims of oil pollution.[21] At the same time, the Comité Maritime National (CMI), an affiliation of the national maritime law associations, was preparing its own draft convention. Both drafts were presented in Brussels during November, 1969, at IMCO's International Legal Conference on Marine Pollution Damage.[22] At the conclusion of the conference, a new international agreement, the International Convention on Civil Liability for Oil Pollution Damage,[23] hereinafter referred to as the Civil Liability Convention, was opened for signature.

The Civil Liability Convention provides an exclusive remedy in cases covered by its provisions,[24] thereby preempting federal and state law.[25] The Convention establishes a system of strict liability of the vessel owner to governments and private parties for damage caused by oil discharged from his vessel.[26] The vessel owner is liable under the Convention in all cases of oil pollution damage, except when the damage is caused by an act of war or other hostilities, a natural phenomenon of an exceptional, inevitable and irresistible character, an act or omission done with intent to cause damage by a third party or the party who suffered the pollution damage, the negligence of the person suffering the damage, or the negligence or wrongful act of a government in the maintenance of navigational aids.[27] The burden of proving that a spill is covered by one of the exceptions is on the vessel owner.[28]

Under the Civil Liability Convention the vessel owner may limit his liability to $160 per gross ton or $16.8 million, whichever is less,[29]

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21. E. DOLGIN & T. GUILBERT, FEDERAL ENVIRONMENTAL LAW 615 (1974).
22. *Id.*
23. Civil Liability Convention, *supra* note 5.
24. The Convention provides that no claim for pollution damages may be made against the owner of a polluting vessel otherwise than in accordance with its provisions. Civil Liability Convention, *supra* note 5, art. III(4).
25. *A Comprehensive Oil Pollution Liability and Compensation Act: How Super is the 'Superfund'?*, DET. C. L. REV. 277, 295 (1978) [hereinafter cited as *Superfund*].
26. Civil Liability Convention, *supra* note 5, art. III(1).
27. *Id.* art. III(2), (3).
28. *Id.*
29. The aggregate amount to which a vessel owner is entitled to limit his liability under the Convention in respect to any one incident is 2,000 Poincaré francs per gross ton, or 210 million Poincaré francs, whichever is less. *Id.* art. V(1).

by establishing a fund in a competent court of the contracting state in which the action is brought in order to meet claims arising out of a given incident.[30] Once the owner has established such a fund, a claimant cannot seek to levy against other assets of the owner in order to satisfy his claim.[31] Limitation of liability, however, is not permitted if the incident is due to "the actual fault or privity of the owner."[32]

The Convention further provides that, in order to ensure that a vessel owner is capable of meeting his liability, the owner of a vessel registered in a contracting state and carrying over 2,000 tons of oil as cargo is required to maintain evidence of financial responsibility derived from insurance or other forms of financial security.[33] Such evidence must be maintained in the form of a certificate issued by the appropriate authority of the state of the vessel's registry.[34]

The Convention's enforcement provisions vis-á-vis the financial responsibility requirements provide that each nation which is a party to the Convention must ban from trading any vessels under its flag which do not have a certificate.[35] The contracting states must also ensure that all vessels of 2,000 tons or more entering their ports or offshore terminals have the necessary financial security.[36]

Under the Convention, governments must waive all sovereign immunity defenses with respect to ships used for commercial purposes.[37] Thus a claimant may proceed against a government owning a vessel just as it may against a private vessel owner. In addition, the Convention allows a claimant to bring an action directly against the insurer or other person providing financial security for the owner's liability, although the insurer can insist that the owner be joined in the proceedings.[38]

Claims pursuant to the Civil Liability Convention must be brought within three years from the date on which the incident producing the damage occurred and within six years from the first of a series of events constituting a single incident.[39] An action for pollution damage under the Convention must be brought in the courts of a contracting state where the damage has been sustained.[40] Reasonable

30. *Id.* art. V(3).
31. *Id.* art. VI(1)(a).
32. *Id.* art. V(2).
33. *Id.* art. VII(1).
34. *Id.* art. VII(2).
35. *Id.* art. VII(10).
36. *Id.* art. VII(11).
37. *Id.* art. XI(2).
38. *Id.* art. VII(8).
39. *Id.* art. VIII.
40. *Id.* art. IX.

notice of such an action must be given to the defendant.[41] Any judgment rendered by a competent court is enforceable in any contracting state, unless the judgment was obtained by fraud or the defendant was not given reasonable notice.[42]

The provisions of the Civil Liability Convention, while constituting an admirable first attempt at establishing an international scheme concerning oil pollution liability and compensation, are inadequate by modern standards. The most obvious inadequacy of the Convention is its limitation of liability provision. Although limitation of shipowner liability is an accepted international maritime concept, a $16.8 million limitation is unrealistically low in view of the nearly $400 million in claims which have been filed pursuant to the *Sedco 135* spill.[43]

In addition, although the provisions of the Convention appear at first glance to be quite broad, the definitions contained in Articles I and II, particularly when viewed in light of a spill such as that caused by the *Sedco 135*, impose considerable limitations on the Convention's scope of liability. One limiting factor of the Convention is that it imposes liability only for "pollution damage," which 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."[44] Damage caused by explosion or fire, which is not caused by contamination, is clearly not recoverable under the Convention.[45] Thus, in a hypothetical *Sedco 135* action brought pursuant to the Convention, the loss of property allegedly sustained on board the *Sedco 135* by Exploration Logging, S.A. due to the explosion and fire resulting from the blowout would not be recoverable.[46]

The geographical scope of the Convention is also limited, due to the fact that it applies exclusively to pollution damage caused on the territory including the territorial sea of a Contracting State and to preventive measures taken to prevent or minimize such damage.[47] It is clear that the scope of the Convention is territorial in nature; damage sustained by installations, such as offshore rigs, single buoy moorings, and fisheries, which are located outside the territory or territorial sea of

41. *Id.*
42. *Id.* art. X.
43. *See* notes 16, 17 and 19 *supra*.
44. Civil Liability Convention, *supra* note 5, art. I(6).
45. D. ABECASSIS, THE LAW AND PRACTICE RELATING TO OIL POLLUTION FROM SHIPS 185 (1978).
46. Exploration Logging, S.A., which allegedly owned property on board the *Sedco 135*, has brought a $300,000 admiralty suit against Sedco, Inc. Exploration Logging, S.A. v. Sedco, Inc., No. H-79-1880 (S.D. Tex., filed Oct. 22, 1979).
47. Civil Liability Convention, *supra* note 5, art. II.

a contracting state is not covered by the Convention.[48] Thus fishermen having fisheries and other installations located outside the territorial limits of the United States and having incurred damage to such installations due to the *Sedco 135* spill would not be able to receive compensation for such damage in a suit brought pursuant to the Convention.[49]

An additional limitation of the Convention is that it imposes liability only on the vessel owner.[50] "Owner" is defined as "the person or persons registered as the owner of the ship or, in the absence of registration, the person or persons owning the ship."[51] However, in the case of a ship owned by a State and operated by a company which is registered as the ship's operator, the term "owner" refers to the operating company.[52] The Convention clearly places no liability on salvagors or bareboat charterers.[53] Thus pollution victims of the *Sedco 135* spill would not be able to bring suit pursuant to the Convention against Perforaciones Marinas del Golfo, S.A. (Permargo) since the *Sedco 135* was bareboat chartered at the time of the spill.[54]

Futhermore, in order to be liable for pollution damage under the Convention, one must be the owner of a "ship."[55] Ship is defined as "any sea-going vessel and any seaborne craft of any type whatsoever, actually carrying oil in bulk as cargo."[56] Pollution damage from offshore installations such as semi-submersible or submerged oil storage installations, drilling barges, and semi-submersible fixed or floating platforms is not covered.[57] Thus damage sustained due to a spill discharged from a semi-submersible offshore drilling rig such as the *Secdo 135* is not recoverable under the Civil Liability Convention. It appears, therefore, that, due to its narrowly defined scope, public and private pollution victims in the United States could not bring suit thereunder, but would instead be forced to rely for compensation on inadequate domestic remedies.[58] In view of the increased likelihood of oil spills such as that caused by the *Sedco 135*, the narrow provisions of

48. D. ABECASSIS, *supra* note 45, at 181-82.

49. Two suits have been filed on behalf of fishermen who sustained damage due to the *Sedco 135* spill. Haylock v. Sedco, Inc., No. H-79-1880 (S.D. Tex., filed Sept. 13, 1979); and Alaniz v. Sedco, Inc., No. H-79-1880 (S.D. Tex., filed Oct. 22, 1979). *See* text accompanying notes 116-20 *infra* for further discussion of these suits.

50. Civil Liability Convention, *supra* note 5, art. III(17), (2), (3).

51. *Id.* art. I(3).

52. *Id.*

53. D. ABECASSIS, *supra* note 45, at 176-78.

54. Four suits have been filed against Perforaciones Marinas del Golfo, S.A. (Permargo). *See* notes 16 and 19 *supra*.

55. Civil Liability Convention, *supra* note 5, art. III(1), (2), (3).

56. *Id.* art. I(1).

57. D. ABECASSIS, *supra* note 45, at 174.

58. For a discussion of United States domestic remedies for oil pollution damage, see text accompanying notes 88-124 and 180-250 *infra*.

the Civil Liability Convention do not provide an adequate solution to the problem of transnational oil pollution.

B. Compensation Fund Convention

Although the overall merits of the Civil Liability Convention were generally recognized, a number of IMCO member nations refused to ratify the Convention unless its deficiencies were remedied by a supplemental convention.[59] The Scandinavian countries, for example, were interested in the concept of an international fund which would place the burden of paying for oil pollution damage directly on the oil industry, rather than on the owners of polluting vessels.[60] Also, the United States insisted that the limits of compensation afforded pollution victims were inadequate under the Civil Liability Convention.[61] A resolution was therefore adopted directing IMCO to establish a working group to study the Fund proposals and to convene a new conference in Brussels in 1971 for possible adoption of such a system.[62]

The result was the International Convention on the Establishment of an International Fund for Compensation of Oil Pollution Damage (Supplementary to the International Convention on Civil Liability for Oil Pollution Damage of 1969),[63] hereinafter referred to as the Compensation Fund Convention. The Compensation Fund Convention was to enter into force when ratified by eight nations receiving at least 750 million tons of oil in the preceding year,[64] or about ½ of the world's oil imports.[65]

As its long title indicates, the Compensation Fund Convention supplements the Civil Liability Convention; only nations party to the Civil Liability Convention can be party to the Compensation Fund Convention.[66] As promised, it raises the limits of compensation for oil pollution damage provided by the Civil Liability Convention and places the burden of compensation directly on the oil industry.

The Compensation Fund Convention establishes a "Fund" to provide compensation for pollution damage sustained by public or private

59. E. DOLGIN & T. GUILBERT, *supra* note 21, at 615.

60. *Id.*

61. Wood, *An Integrated International and Domestic Approach to Civil Liability for Vessel-Source Oil Pollution*, 7 J. MAR. L. & COMM. 1, 14 (1975).

62. E. DOLGIN & T. GUILBERT, *supra* note 21, at 615.

63. Compensation Fund Convention, *supra* note 5.

64. *Id.* art. 40(1)(a), (b).

65. D. ABECASSIS, *supra* note 45, at 233.

66. Compensation Fund Convention, *supra* note 5, arts. 37(4), 41(4). The nations which have ratified the Convention are as follows: Algeria, Belgium, Brazil, Federal Republic of Germany, Ghana, Poland, Portugal, Sweden, Switzerland, United Kingdom, United States, Yugoslavia.

persons to the extent that the protection afforded by the Civil Liability Convention is inadequate,[67] either because no liability arises under the Civil Liability Convention, because the owner liable under the Civil Liability Convention is financially incapable of meeting his obligations in full, or because the damage exceeds the owner's liability under the Civil Liability Convention.[68] Expenses voluntarily and reasonably incurred by the shipowner to prevent or minimize pollution damage rank as compensable claims against the Fund.[69]

Initially, the Fund will pay for pollution damages of up to $36 million, including payments made under the Civil Liability Convention.[70] This figure may be raised to $72 million by a vote of the Assembly of the Fund.[71] The Fund is financed by contributions from persons in each contracting state who receive more than 150,000 tons of "contributing oil"[72] per year.[73] Such contributions are calculated on the basis of a fixed sum per ton of oil received,[74] with the amount of the worldwide contribution to be modified on a yearly basis as dictated by the claims for compensation made pursuant to the Fund.[75]

Another significant feature of the Compensation Fund Convention is that it reduces the number of defenses available under the Civil Liability Convention. The Compensation Fund Convention provides compensation even in cases where the pollution damage results from exceptional, inevitable, and irresistible natural phenomena, where the damage results from an act or omission of a third party, where the claim is for preventive measures taken to minimize damages caused by the act or omission of the claimant, where the claimant cannot identify the vessel from which the oil escaped or was discharged, or where the damage was caused by faulty government maintenance of navigational aids. The only defenses retained under the Compensation Fund Convention are for damage resulting from an act of war or other hostilities, or damage caused by oil which has escaped or been discharged from a

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67. *Id.* art. 2(1)(a).
68. *Id.* art. 4(1)(a)-(c).
69. *Id.* art. 4(1).
70. The aggregate amount of compensation payable under both the Civil Liability Convention and the Compensation Fund Convention is 450 million Poincaré francs. Civil Liability Convention, *supra* note 5, art. V(1); Compensation Fund Convention, *supra* note 5, art. 4(4)(a).
71. The amount of 450 million Poincaré francs may be changed by decision of the Assembly, but must in no event exceed 900 million Poincaré francs. Compensation Fund Convention, *supra* note 5, art. 4(6).
72. "Contributing oil" is defined as crude oil and fuel oil of specified types. *Id.* art. 1(3).
73. *Id.* art. 10(1)(a), (b).
74. *Id.* art. 11(1).
75. *Id.* arts. 11-13.

ship engaged in non-commercial governmental service.[76]

Aside from significantly increasing the amount of compensation available to public and private persons sustaining pollution damage, the Compensation Fund Convention provides indemnification of vessel owners or their insurers who are liable for damages under the Civil Liability Convention. The Compensation Fund Convention indemnifies shipowners,[77] unless the pollution damage resulted from their willful misconduct, for that amount of liability under the Civil Liability Convention which exceeds $120 per gross ton or $10 million, whichever is less,[78] up to the Civil Liability Convention's limit of $160 per gross ton or $16.8 million, whichever is less.[79]

In order to encourage shipowners to continue to exercise proper care in spite of the new provisions operating in their favor, there are strict limitations on the right to shipowner relief. The Fund incurs no obligation to indemnify the shipowner and his insurer if, due to the fault or privity of the owner, the ship causing the pollution damage failed to comply with certain specified IMCO conventions[80] and regulations,[81] and the damage was wholly or partially caused by the noncompliance.[82] In such a case, the Fund is exonerated from obligation, regardless of whether the country of the ship's registry is a party to the relevant convention or regulation.[83]

Suits by claimants seeking compensation for pollution damage or shipowners seeking indemnification under the Compensation Fund Convention can only be brought in a court competent to resolve actions against a shipowner or insurer under the Civil Liability Convention.[84] When an action for pollution damage is brought before a competent court against a shipowner or insurer, the court has exclusive jurisdictional competence over any action against the Fund for compensation or indemnification with respect to that damage.[85] Claims under the Compensation Fund Convention must be brought within three years

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76. *Id.* art. 4(2)(a).

77. The Fund provides indemnification to the owner and his insurer for that portion of the aggregate amount of liability under the Civil Liability Convention which exceeds 1,500 Poincaré francs per gross ton or 210 million Poincaré francs, whichever is less. *Id.* art. 5(1)(a), (b).

78. *Id.* art. 5(1)(a).

79. *Id.* art. 5(1)(b).

80. *Id.* art. 5(3)(a). Such conventions are the International Convention for the Prevention of Pollution of the Sea by Oil, the International Convention for the Safety of Life at Sea, and the International Convention on Road Lines.

81. *Id.* Such regulations are the International Regulations for Preventing Collisions at Sea.

82. *Id.* art. 5(3).

83. *Id.*

84. *Id.* art. 7(1).

85. *Id.* art. 7(3).

from the date on which the damage occurred.[86]

The Compensation Fund Convention, having been designed to remedy the major deficiencies of the Civil Liability Convention by expanding the limits of liability, reducing the number of defenses to liability, and placing the financial burden of liability on the oil industry, is a considerable improvement over the Civil Liability Convention. Furthermore, it is likely that a Protocol to the Compensation Fund Convention will be adopted in the near future, raising the existing limits of liability and providing for some measure of monetary uniformity by substituting Special Drawing Rights for the unstable Poincaré franc,[87] and thus correcting the most serious of the Convention's faults. However, a Protocol to the Convention has not yet been adopted and, under the present Convention, the limitation of liability remains relatively low and the scope of liability relatively narrow in light of the possibility of future spills of the *Sedco 135* type.

III. United States Law Affecting Transnational Oil Pollution Cases

A. *Traditional Concepts of Maritime Tort Liability*

Since international conventions regarding oil pollution are not applicable to cases such as the *Sedco 135* spill[88] and since the federal pollution legislation provides solely for governmental compensation,[89] private parties sustaining vessel-source pollution damage in the United States must rely for compensation almost exclusively on concepts of tort liability.[90] The traditional vehicle for obtaining compensation for oil pollution damage is provided for under the federal maritime law, since the admiralty jurisdiction of the federal courts includes tortious acts occurring on the navigable waters of the United States and bearing a significant relationship to a traditional maritime activity.[91] The Extension of Admiralty Jurisdiction Act of 1948 extended United States admiralty jurisdiction to damage "caused by a vessel on navigable waters"[92] to shorefront property and persons, and the courts have held such jurisdiction to be applicable to actions for damage caused by oil discharged from a ship.[93] Thus private victims of oil spills, such as

86. *Id.* art. 6(1).
87. D. Abecassis, *supra* note 45, at 227-28.
88. *See* note 67 *supra* and accompanying text.
89. *See* text accompanying note 203 *infra*.
90. Post, *A Solution to the Problem of Private Compensation in Oil Discharge Situations*, 28 U. Miami L. Rev. 524, 525 (1974).
91. Executive Jet Aviation, Inc. v. Cleveland, 409 U.S. 249, 267-68 (1972).
92. Extension of Admiralty Act of 1948, 46 U.S.C. § 740 (1974).
93. *In re* New Jersey Barging Corp., 168 F. Supp. 925 (S.D.N.Y. 1958).

owners of beachfront property, fisheries, and boats, are afforded access to United States district courts.

However, the private litigant may hope to obtain little, if any, compensation for vessel-source pollution through civil litigation. Civil suits pertaining to pollution damage are usually based on the tort theories of negligence, trespass and nuisance, all of which place such a heavy burden of proof on the claimant that he has only a minimal chance of prevailing.[94]

A negligence action, the traditional vehicle relied upon to recover damages for the maritime tort of oil pollution, requires proof that the polluting oil was discharged negligently or intentionally, or that the spill resulted from an unseaworthy condition of the polluting vessel.[95] It is virtually impossible for a private claimant to prove negligence or unseaworthiness, for the evidence concerning the cause of the discharge generally lies wholly with the shipowner.[96] In addition, a negligence action requires proof of causation, that is, proximate cause and foreseeability.[97] If the injured party cannot identify the source of the oil pollution, no tort action for negligence will lie.[98] This requirement is a particularly onerous one for claimants near busy shipping lanes. If the damaged plaintiff is able to identify the exact source of the pollution, he must then meet the heavy burden of proving that the pollution was the proximate cause of the damages incurred, a burden which must be met even if the claimant is relying on the doctrine of *res ipsa loquitur*.[99] This is a most difficult burden to sustain since it is unlikely that a beachfront resort owner or hotelkeeper will be able to prove that his pecuniary loss due to cancellation by tourists was proximately caused by the pollution; the loss of intangible profits is simply too speculative.[100] Furthermore, the damaged party must prove that the damage sustained was foreseeable.[101] How is a beachfront restaurant owner or hotelkeeper to prove that his loss of profits due to cancellations could have been foreseen by the owner of the polluting vessel?[102] It is, of course, even more difficult for a nonbeachfront hotelkeeper or property

94. For a discussion of the inadequacy of tort concepts in an action for damage caused by oil pollution, see Post, *supra* note 90, at 531; Post, *Private Compensation for Injuries Sustained by the Discharge of Oil from Vessels on the Navigable Waters of the United States: A Survey*, 4 J. MAR. L. & COMM. 25, 37 (1972); Sweeney, *supra* note 3, at 164; Wood, *supra* note 61, at 4; Shutler, *Pollution of the Sea by Oil*, 7 HOUS. L. REV. 415, 435 (1970).

95. Wood, *supra* note 61, at 4.

96. Post, *supra* note 90, at 529.

97. Shutler, *supra* note 94, at 435.

98. Wood, *supra* note 61, at 4.

99. Post, *supra* note 90, at 529.

100. *Id.*

101. Shutler, *supra* note 94.

102. Post, *supra* note 90, at 528-29.

owner to prove that the spill was the proximate and foreseeable cause of his loss of business or reduction in property value. Again, such damages are too conjectural.[103] It is thus rare that a private plaintiff is able to sustain the heavy burden of proof in a negligence action.[104]

The plaintiff's burden is no lighter in a trespass action. He must first prove that there was an actual entry or intrusion onto his property.[105] Nonbeachfront property owners, as well as beachfront property owners whose property was not directly invaded by the discharged oil, may thus be precluded from recovery.[106] Furthermore, the injured party must prove either that the intrusion was intentional or negligent, or that the source of damage was by legal definition an ultrahazardous activity.[107] Since negligence is extremely difficult to prove against vessels and courts have not declared maritime transportation of oil to be an ultrahazardous activity, the plaintiff has little hope of recovery in a trespass action.[108]

An action for private nuisance, an interference with the use and enjoyment of property,[109] or public nuisance, an act which causes inconvenience or damage to the public,[110] offers one distinct advantage in that it does not require a showing of negligence.[111] A drawback, however, of the private nuisance theory is that many courts construe nuisance as a continuing and reccuring interference with the claimant's use and enjoyment of his property for an extended period of time.[112] Furthermore, where a private individual brings an action for the invasion of a public right, he must prove that his damage is different in kind from that of the public at large.[113] Thus it appears that, while fishery owners and beachfront owners whose property was actually invaded by polluting oil and who, therefore, suffered damage distinct from that of the general public may find an appropriate remedy in the nuisance action, nonbeachfront business owners, as well as beachfront business owners whose property was not actually invaded, may be precluded from recovery in a nuisance action for lost profits due to an oil spill.[114]

The inadequacy of recovery in civil actions based on traditional concepts of tort liability is readily apparent. The average U.S. plaintiff

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103. *Id.*
104. Sweeney, *supra* note 3, at 174-75.
105. Post, *supra* note 90, at 528.
106. *Id.*
107. Post, *supra* note 94, at 40.
108. Wood, *supra* note 61, at 4.
109. W. PROSSER, THE LAW OF TORTS 615 (3rd ed. 1964).
110. *Id.* at 605.
111. *Id.* at 595.
112. Post, *supra* note 90, at 529.
113. *Id.* at 530.
114. Post, *supra* note 94, at 43.

who sustains damages from vessel-source pollution is often left with little, if any, compensation. The true test of the adequacy of tort recovery for oil pollution damage, however, will come in the pending *Sedco 135* actions. To date, four class action suits based on traditional tort theories have been filed against Sedco, Inc. as owner of the rig, as well as against Pemex, the Mexican national oil company under contract with Sedco for exploitation of the oil and Permargo, the Mexican company to which the *Sedco 135* was bareboat chartered. A negligence action for $155 million in damages has been brought on behalf of persons along the Gulf Coast engaged in the fishing industry.[115] A $100 million suit alleging negligence and improper operation and maintenance of an instrumentality engaged in an ultrahazardous activity has been filed on behalf of several Texas municipalities which lost tax and other revenues as a result of the spill.[116] A $100 million suit for negligence, trespass, and other fault has been brought on behalf of the Gulf Coast tourist industry.[117] And a suit for an amount yet undetermined has been filed on behalf of residents, fishermen, and boat owers engaged in the fishing industry in Cameron County, Texas, also alleging negligence, trespass, and other fault, as well as the operation of an inherently dangerous and ultrahazardous instrumentality.[118] In addition, a $300,000 admiralty claim alleging negligence and unseaworthiness has been filed by Exploration Logging, S.A., which owned property on board the *Sedco 135*.[119]

The plaintiffs in these actions face the previously discussed problem of sustaining the heavy burden of proof. In particular, it will be difficult for them to prove negligence or unseaworthiness on the part of Sedco, Inc. and/or its agents, Pemex and Permargo.[120] Furthermore, while the fishing industry will likely have no difficulty proving that polluting oil from the *Sedco 135* was the foreseeable and proximate cause of the injury to its business, the Gulf Coast municipalities and the tourist industry face an onerous task in attempting to prove that their pecuniary loss and/or diminished property value was foreseeably and proximately caused by the Sedco spill.[121] In addition, in the trespass and nuisance actions, members of the tourist industry and Cameron

115. Haylock v. Sedco, Inc., No. H-79-1880 (S.D. Tex., filed Sept. 13, 1979) (claims consolidated by order dated Sept. 13, 1979).

116. Willacy County Navigation District v. Sedco, Inc., No. H-79-1880 (S.D. Tex., filed Sept. 17, 1979).

117. Giles v. Sedco, Inc., No. H-79-1880 (S.D. Tex., filed Sept. 20, 1979).

118. Alaniz v. Sedco, Inc., No. H-79-1880 (S.D. Tex., filed Oct. 22, 1979).

119. Exploration Logging, S.A. v. Sedco, Inc., No. H-79-1880 (S.D. Tex., filed Oct. 22, 1979).

120. *See* text accompanying note 96 *supra*.

121. *See* text accompanying notes 99-104 *supra*.

County residents whose property was not directly invaded by the polluting oil may be precluded from recovery,[122] while those whose property was directly invaded will have difficulty in proving in the trespass actions that the spill was due to negligence or unseaworthiness or that the *Sedco 135* was engaged in an ultrahazardous activity.[123] Thus it appears that the unfortunate circumstances of the *Sedco 135* disaster provide a perfect example of the inadequacy of traditional maritime tort remedies in an action involving vessel-source[124] oil pollution.

B. Limitation of Liability Act

Even if the private pollution victim somehow manages to meet the heavy burden of proof and obtain a judgment against the owner of the polluting vessel, his recovery is normally limited by the Federal Limitation of Liability Act of 1851, which provides that the liability of the vessel owner cannot exceed his interest in the ship and her pending freight when the ship causes damage without his "privity or knowledge."[125] The Act applies to damages occurring on water or on shore.[126] The value of the owner's interest, however, is taken after the accident or loss rather than at the beginning of the voyage.[127] Therefore, if the total amount of the various pollution claims against a vessel exceeds the value of the vessel, many claimants may not receive full compensation for their damage.[128] Furthermore, if the vessel is destroyed or badly damaged in the process of discharging the oil, pollution claimants may be left with no hope of compensation.[129] Hence, in the preliminary stages of the *Torrey Canyon* actions brought in the United States, one federal court limited the owner's liability to United States claimants to $50, the value of the one surviving lifeboat.[130]

In addition to an onerous burden of proof, private plaintiffs in the *Sedco 135* actions must face the Federal Limitation of Liability Act under which Sedco requested that the United States District Court limit its liability to $300,000, the purported value of the damaged rig and the income made from Sedco's Mexican contract.[131] If the court

122. *See* text accompanying notes 105-08 *supra*.
123. *Id.*
124. For a discussion of whether the *Sedco 135* constitutes a "vessel," see text accompanying notes 132-77 *infra*.
125. Federal Limitation of Liability Act of 1851, 46 U.S.C. §§ 183-189 (1964).
126. Richardson v. Harmon, 222 U.S. 96 (1911).
127. Norwich Co. v. Wright, 80 U.S. 104 (1871).
128. Post, *supra* note 94, at 44-45.
129. *Id.*
130. *In re* Barracuda Tanking Corp., 281 F. Supp. 228 (S.D.N.Y. 1968).
131. Plaintiff's Original Complaint, *In re* Sedco, Inc., No. H-79-1880 (S.D. Tex., filed Sept. 11, 1979).

allows Sedco to so limit its liability, many of the private claimants, whose claims total over $355 million, will not be fully compensated, even if they are able to meet the heavy burden of proof.

There is some question as to whether Sedco will be allowed to limit its liability. The right to limitation of liability has customarily been available only to the owners of "vessels"[132] engaged in activity traditionally within admiralty jurisdiction.[133] In this regard, the claimants against Sedco have filed a motion to dismiss Sedco's limitation of liability claim for lack of subject matter jurisdiction, claiming that as a semi-submersible fixed drilling unit conducting offshore drilling operations the *Sedco 135* was neither a "vessel" nor engaged in a traditional maritime activity for purposes of limitation of liability.[134] Sedco, of course, claims that the *Sedco 135* was a "vessel" within the meaning of the Limitation of Liability Act,[135] alleging that the *Sedco 135* was registered as a United States vessel, documented as having her home port in New Orleans, Louisiana, and inspected by the United States Coast Guard before leaving United States waters.[136] Furthermore, Sedco claims that the *Sedco 135* was surveyed by the American Bureau of Shipping, the American vessel classification society, on an annual basis, and that the rig carried navigation lights and was subject to the Rules of the Road.[137] In addition, Sedco alleges that the *Sedco 135* was classified as a semi-submersible mobile drilling unit which was held in place while drilling by nine anchors and which was never affixed to the ocean floor, her only contacts with the seabed being her anchors and, while drilling, the drill string.[138] Finally, in support of its contention that the *Sedco 135* was a "vessel" within the meaning of the Limitation of Liability Act, Sedco claims that, during the nine years prior to the blowout and resulting spill, the *Sedco 135* made a total of eleven voyages and logged a total distance of 15,947.5 miles, weathering the perils of the sea as would any other "vessel."[139]

As additional support for Sedco's assertions, there are several cases holding drilling rigs to be "vessels," including the Fifth Circuit case of *Cook v. Belden Concrete Products, Inc.*[140] *Cook* makes the following

132. *See* Federal Limitation of Liability Act of 1851, *supra* note 125.
133. *See* Executive Jet Aviation, Inc. v. Cleveland, *supra* note 91.
134. Motion to Dismiss for Lack of Subject Matter Jurisdiction, *In re* Sedco, Inc., No. H-79-1880 (S.D. Tex., filed Sept. 11, 1979).
135. *In re* Sedco, Inc., No. H-79-1880 (S.D. Tex., filed Dec. 11, 1979) (Memorandum of Petitioner Sedco, Inc., in Opposition to Motions of Claimants to Dismiss and in Support of Petitioner's Motion for Partial Summary Judgment).
136. *Id.*
137. *Id.*
138. *Id.*
139. *Id.*
140. 472 F.2d 999 (5th Cir. 1973), *cert. denied*, 414 U.S. 868 (1973).

statement regarding the status of such rigs:

> Conventional ships and barges as well as such unconventional craft as submersible drilling barges and floating dredges which are designed for navigation and commerce are vessels *within general maritime . . . jurisdiction* and retain such status even while moored, drydocked, or otherwise immobilized and secured to land.[141] (emphasis added)

Such a statement appears to indicate that the *Sedco 135* was a vessel for jurisdictional purposes.

Furthermore, Sedco claims that the court has jurisdiction over its limitation of liability complaint regardless of whether the claims against Sedco have a substantial connection with "traditional maritime activity,"[142] supporting its contention with the Extension of Admiralty Act of 1948,[143] which states:

> The admiralty and maritime jurisdiction of the United States shall extend to include *all* cases of damage or injury, to person or property, caused by a vessel on navigable water, notwithstanding that such damage or injury be done or consummated on land.[144]

Such language may well be interpreted to mean that the fact that a "vessel" is involved constitutes sufficient maritime connection to confer jurisdiction over the claims filed against Sedco.[145]

In the alternative, however, Sedco asserts that, even if a substantial maritime nexus is required, in addition to involvement of a "vessel," in order to confer admiralty jurisdiction in a limitation proceeding, the activities of Sedco clearly constituted a "traditional maritime activity."[146] In the Fifth Circuit case of *Kelly v. Smith*,[147] the court set forth the following factors to be considered in determining the existence of a "traditional maritime activity":

> [t]he functions and roles of the parties; the types of vehicles and instrumentalities involved; the causation and the type of injury; and traditional concepts of the role of admiralty law.[148]

On the basis of the *Kelly* test, the argument can be made that the parties and instrumentalities involved in the *Sedco 135* actions could

141. *Id.* at 1001.
142. *See In re* Sedco, Inc., *supra* note 135.
143. Extension of Admiralty Act of 1948, 46 U.S.C. § 740 (1974).
144. *Id.* (emphasis added).
145. *See In re* Sedco, Inc., *supra* note 135.
146. *Id.*
147. 485 F.2d 520 (5th Cir. 1973), *cert. denied*, 416 U.S. 969 (1973).
148. *Id.* at 525.

hardly be more maritime, since Sedco is the owner of a seagoing vessel and involvement of a vessel has traditionally been sufficient to confer admiralty jurisdiction, and since the Fifth Circuit has consistently held, in *Transcontinental Gas Pipe Line Corp. v. Mobil Drilling Barge Mr. Charlie*[149] and *Thibodaux v. Atlantic Richfield Co*.,[150] that oil field operations conducted on board a submersible drilling structure constitute a "maritime activity."[151] In addition, the types of claims presented in the *Sedco 135* actions may be viewed so as to support a finding of admiralty jurisdiction. This is particularly true in view of such cases as *Union Oil Co. v. Oppen*,[152] in which the Ninth Circuit held that damage to fishing caused by pollution from a fixed platform was within admiralty jurisdiction.[153] Finally, a strong policy argument can be made that the *Sedco 135* claims, which involve a marine casualty arising in the patrimonial sea of another sovereign state and which involve suits against entities owned and controlled by that foreign state, are of the very type envisioned by the framers of the United States Constitution when, in the interest of uniformity, they conferred admiralty jurisdiction upon the federal courts.[154] On the basis of all of the foregoing, it may be effectively argued that precedent conclusively establishes that the *Sedco 135* was a "vessel," that she was engaged in operations constituting "traditional maritime activity," and that therefore the limitation of liability proceedings instituted by Sedco are within the admiralty jurisdicition of the District Court for the Southern District of Texas.[155]

On the other hand, the claimants against Sedco in the *Sedco 135* actions are anxious to ensure that Sedco is not permitted to limit its liability. They contend that the *Sedco 135* was not a "vessel" for purposes of limitation of liability, nor was it engaged in a "traditional maritime activity."[156] According to the Fifth Circuit in *Dresser Industries, Inc. v. Fidelity and Casualty Co. of New York*,[157] the meaning assigned to the term "vessel" can vary according to the particular statutory context involved.[158] Thus, while a semi-submersible drilling rig such as

149. 424 F.2d 684 (5th Cir. 1970), *cert. denied*, 400 U.S. 832 (1970).
150. 580 F.2d 841 (5th Cir. 1978), *cert. denied*, 422 U.S. 909 (1979).
151. Memorandum of Petitioner Sedco, Inc. in Opposition to Motions of Claimants to Dismiss, *In re* Sedco, Inc., *supra* note 135.
152. 501 F.2d 558 (9th Cir. 1974).
153. *Id.*
154. 28 U.S.C. § 1333 (1977).
155. Memorandum of Petitioner Sedco, Inc. in Opposition to Motions of Claimants to Dismiss, *In re* Sedco, Inc., *supra* note 135.
156. Motion to Dismiss for Lack of Subject Matter Jurisdiction, *In re* Sedco, Inc., *supra* note 134.
157. 580 F.2d 806 (1978).
158. *Id.* at 807.

the *Sedco 135* may be considered a "vessel" for Jones Act[159] and other statutory purposes, it may not be a "vessel" within the meaning of the Limitation of Liability Act.[160]

The Limitation of Liability Act refers simply to the liability of "vessel" owners,[161] expounding on the term "vessel" only briefly as follows:

> Except as otherwise specifically provided therein, the provisions of sections 182, 183, 183b-187, and 189 of this title shall apply to all seagoing vessels, and also to all vessels used on lakes or rivers or in inland navigation, including canal boats, barges, and lighters.[162]

In the absence of a definition of the term "vessel" in the Act itself, the court in the *Sedco 135* actions must look to the purpose of the Act and to cases construing it.[163] The Act was passed in 1851 in direct response to a similar law enacted in England, and was intended to ensure the competitiveness of the domestic shipping industry.[164] Thus the argument may be made that the Act sought to address "vessels" as that term was understood in the mercantile trade, that is, a means of transportation of goods and passengers,[165] and did not contemplate protection of facilities such as the *Sedco 135* whose only purpose was to act as a platform from which to drill for oil.[166]

Furthermore, courts have traditionally construed the provisions of the Limitation of Liability Act narrowly,[167] interpreting its ambiguous language in favor of the fullest recovery possible:

> [W]e think that ambiguous language in statutory provisions relating to limitation of liability should be resolved in favor of interpretation increasing the instance where full recoveries from the limiting vessel are possible.[168]

In addition, both the Supreme Court and the Fifth Circuit Court of Appeals have criticized any attempt to judicially expand the protec-

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159. *Id.*

160. *In re* Sedco, Inc., No. H-79-1880 (S.D. Tex., filed Dec. 11, 1979) (Memorandum in Support of Claimant State of Texas' Motion to Dismiss).

161. Federal Limitation of Liability Act of 1851, 46 U.S.C. § 183(a) (1976).

162. *Id.* § 188.

163. *In re* Sedco, Inc., No. H-79-1880 (S.D. Tex., filed Dec. 11, 1979) (Memorandum of the United States in Support of Motions to Dismiss on the Ground that the *Sedco 135* is not a Vessel Pursuant to the Limitation of Liability Act).

164. 23 CONG. GLOBE, 31st Cong., 2d Sess. 714 (1851) (remarks of Sen. Davis).

165. Memorandum of the United States in Support of Motions to Dismiss on the Ground that the *Sedco 135* is not a Vessel Pursuant to the Limitation of Liability Act, *In re* Sedco, Inc., *supra* note 163.

166. *Id.*

167. *Id.*

168. Petition of the Diesel Tanker Dodge, Inc., 282 F.2d 86, 89 (2d Cir. 1960).

tion of the Act.[169] In a Supreme Court opinion Justice Black, joined by three other Justices, gratuitously offered his views of the Act in a dissenting opinion:

> Judicial expansion of the Limited Liability Act at this date seems especially inappropriate. Many of the conditions in the shipping industry which induced the 1851 Congress to pass the Act no longer prevail.[170]

The Fifth Circuit in a recent case referred to the Act as "hopelessly anachronistic," refusing to "extend the Limitation Act to a class of cases to which it has never been applied."[171]

Although there are no cases in which a court has found the Limitation of Liability Act to be applicable to the owner of a mobile drilling rig, nor are there any cases which attempt to characterize a mobile drilling rig as a "vessel" for purposes of the Act, there is one Fifth Circuit precedent, *Dresser Industries v. Fidelity and Casualty Co. of New York*,[172] in which the court held that a mobile drilling rig set in place for conducting drilling operations was a fixed object rather than a vessel.[173] On the basis of *Dresser*, the *Sedco 135* claimants argue that since the Fifth Circuit has refused to extend the benefits of the Limitation of Liability Act to the insurance industry, there is no rationale for extending it to the oil industry.[174] The implications of shielding the oil industry from liability for oil spills resulting from its drilling operations would be devastating, and far beyond the purpose of the Act and the cases currently construing it.[175] On the basis of all of the foregoing, it may be convincingly argued that the *Sedco 135* was not a "vessel" within the meaning of the Limitation of Liability Act and that therefore Sedco, as owner of the *Sedco 135*, should not be permitted to limit its liability for pollution damage sustained by claimants.[176]

Since there are no cases exactly on point in the *Sedco 135* limitation of liability proceedings, the ultimate decision of the District Court cannot be predicted with absolute certainty. Suffice it to say that the policy considerations and considerable precedent[177] weigh in favor of

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169. Memorandum of the United States in Support of Motions to Dismiss on the Ground that the *Sedco 135* is not a Vessel Pursuant to the Limitation of Liability Act, *In re* Sedco, Inc., *supra* note 163.

170. Md. Casualty Co. v. Cushing, 347 U.S. 409 (1954).

171. U. of Tex. Med. Branch v. United States, 557 F.2d 438, 452 (5th Cir. 1977).

172. 580 F.2d 806 (1978).

173. *Id.*

174. *Id.*

175. Memorandum of the United States in Support of Motions to Dismiss on the Ground that the *Sedco 135* is not a Vessel Pursuant to the Limitation of Liability Act, *In re* Sedco, Inc., *supra* note 163.

176. *Id.*

177. *Id.*

not allowing the owner of a rig such as the *Sedco 135* to limit its liability for pollution damage. However, until the unfortunate gap in the law regarding oil pollution is bridged, potential pollution victims such as the owners of residences, hotels, restaurants, fisheries, and other property situated along the coast of the United States are afforded little protection against the hazardous offshore operations of the oil industry.

C. *The Federal Water Pollution Control Act*

In view of the inadequacy of the United States civil liability law to compensate even the Government for pollution damage, Congress has been forced to enact federal legislation to deal with the problem.[178] The resulting law is an accumulation of provisions in Title 33 of the United States Code, including the Federal Water Pollution Control Act of 1948,[179] the Water Quality Improvement Act of 1970,[180] the Federal Water Pollution Control Act of 1972,[181] and the Clean Water Act of 1977,[182] all of which are collectively referred to as the Federal Water Pollution Control Act (FWPCA), or the Act.[183]

Section 1321 of the FWPCA, entitled "Oil and Hazardous Substance Liability," contains the Act's most significant provisions for the purposes of this study. Its statement of policy declares:

> . . . it is the policy of the United States that there should be no discharges of oil or hazardous substances into or upon the navigable waters of the United States, adjoining shorelines, or into or upon the waters of the contiguous zone, or in connection with activities under the Outer Continental Shelflands Act or the Deepwater Port Act of 1974, or which may affect natural resources belonging to, appertaining to, or under the exclusive management authority of the United States (including resources under the Fishery Conservation and Management Act of 1976).[184]

To that end, except where the owner of the polluting vessel or facility can prove that the discharge was caused by an act of God, an act of war, negligence on the part of the United States Government, or the act or omission of a third party, he is absolutely liable to the Government

178. For a discussion of the precedent in favor of a holding that a rig such as the *Sedco 135* should not be allowed to limit its liability for pollution damage, see text accompanying notes 156-74 *supra*.

179. Pixa, *The Clean Water Act of 1977: Expanded Competence over Vessel-Source Pollution*, 18 VA. J. INT'L L. 289 (1978).

180. S. 418, 80th Cong., 2d Sess., 94 CONG. REC. 5026 (1948).

181. 33 U.S.C. §§ 1151-1175 (1976).

182. 33 U.S.C. §§ 1251-1376 (1976).

183. 33 U.S.C. §§ 1251-1376 (Supp. I 1977).

184. 33 U.S.C.A. § 1321(b)(1) (West Supp. 1980).

for the cost of removing the spill, in an amount not to exceed $150 per gross ton or $250,000, whichever is greater, for the owner of a vessel,[185] and in an amount not to exceed $50 million for the owner of an offshore facility.[186] However, where the discharge is the result of willful negligence or misconduct within the privity of the owner, he is liable to the Government for the full amount of its removal costs.[187] Any costs incurred by the Government to restore or replace natural resources damaged or destroyed as a result of the oil spill[188] are included in the Government's removal costs.[189]

If the owner of the polluting vessel or facility has acted to remove the discharged oil, even though the discharge was due solely to one or more of the causes exempted from liability under the Act, he may recover his costs in a suit against the Government in the Court of Claims.[190] Where the owner of the polluting vessel or facility proves that the oil spill was caused by the act or omission of a third party, such third party is liable for the Government's removal costs, up to the established limit, unless the third party proves that the discharge was due solely to one of the exempted causes.[191]

In order to cover Government costs of removing oil spills, the FWPCA authorized establishment of a $35 million fund in the Treasury.[192] The FWPCA further provides that any vessel over 300 gross tons using any port in the United States or in the navigable waters of the United States must establish evidence of financial responsibility of $150 per gross ton or $250,000, whichever is greater.[193] Such financial responsibility must be established by evidence of insurance or other financial security.[194] If a vessel fails to produce evidence of financial responsibility, it may be suject to a fine of not more than $10,000[195] or denied entry to or detained in any port in the United States.[196]

Under the FWPCA, any claim for damages caused by a polluting vessel or facility may be brought directly against the insurer or other person providing evidence of the owner's financial responsibility.[197] Such a person is entitled to all rights and defenses which would have

185. *Id.* § 1321(f)(1).
186. *Id.* § 1321(f)(3).
187. *Id.* § 1321(f)(1), (3).
188. *Id.* § 1321(f)(4).
189. *Id.*
190. *Id.* § 1321(i)(1).
191. *Id.* § 1321(g).
192. *Id.* § 1321(k).
193. *Id.* § 1321(p)(1).
194. *Id.*
195. *Id.* § 1321(p)(4).
196. *Id.* § 1321(p)(6).
197. *Id.* § 1321(p)(3).

been available to the owner had the action been brought against him instead.[198]

The FWPCA further provides that any person in charge of a vessel or facility must, as soon as he has knowledge of any discharge of oil, immediately notify the United States Government.[199] Failure to do so may result in a fine of up to $10,000 or imprisonment for up to one year.[200]

The FWPCA authorizes enforcement of its provisions by boarding and inspecting vessels or facilities, except public vessels, upon the navigable waters of the United States or the waters of the contiguous zone, and by arresting any person violating its provisions in the presence of the arresting party.[201] The Act provides that the United States District Courts are vested with jurisdiction over any actions pursuant to its provisions.[202]

The inadequacies of the FWPCA are numerous. First of all, the liability provisions of the Act are very narrow in scope and purpose. The Act provides compensation for only one claimant, the United States Government, by declaring that its provisions shall not be construed so as to:

> affect or modify in any way the obligations of any owner or operator of any vessel, or of any owner or operator of any onshore facility or offshore facility to any person or agency under any provision of law for damages to any publicly owned or privately owned property resulting from a discharge of any oil or hazardous substance or from the removal of any such oil or hazardous substance.[203]

The FWPCA attempts to control oil pollution by providing for its prevention and abatement, and provides no relief to private persons seeking compensation for damages sustained as a result of the pollution.[204] Thus, in the *Sedco 135* actions, only the United States[205] and Texas[206] Governments could bring suit under the FWPCA; private claimants were forced to proceed under traditional tort theories.[207]

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198. *Id.*
199. *Id.* § 1321(b)(2)(B)(v)(5).
200. *Id.*
201. *Id.* § 1321(m).
202. *Id.* § 1321(n).
203. *Id.* § 1321(o)(1).
204. Post, *supra* note 90, at 538.
205. United States v. Sedco, Inc., No. H-79-1880 (S.D. Tex., filed Oct. 23, 1979) (Plaintiff's Original Claim).
206. Texas v. Sedco, Inc., No. H-79-1880 (S.D. Tex., filed Oct. 18, 1979) (Plaintiff's Original Claim).
207. For a discussion of traditional tort theories regarding vessel-source oil pollution, see text accompanying notes 88-124 *supra*.

Secondly, the amount of compensation provided for clean-up costs incurred by the Government, which, although not subject to the Limitation of Liability Act,[208] is limited to $150 per ton or $250,000 in the case of a vessel[209] or $50 million in the case of an offshore facility,[210] is grossly inadequate by modern standards. As a result of the *Amoco Cadiz* spill, France reportedly incurred $300 million in clean-up costs.[211] The clean-up costs and environmental damages to the United States[212] and Texas[213] due to the *Sedco 135* spill, the largest in history, are likely to far exceed that amount.

Finally, there is some question as to whether the provisions of the FWPCA will even apply to permit the United States and Texas Governments to recover their clean-up costs due to the *Sedco 135* spill. The Act defines the term "offshore facility," for purposes of imposing liability, as follows:

> "offshore facility" means any facility of any kind located in, on, or under, any of the *navigable water of the United States*, and any facility of any kind which is subject to the jurisdiction of the United States and is located in, on, or under any other waters, other than a vessel or a public vessel.[214] (emphasis added)

Since there is no question that the *Sedco 135* was located outside of the navigable waters of the United States at the time of the blowout and resulting oil spill,[215] it appears that the United States and Texas Governments are precluded from recovering their clean-up costs due to the spill. However, the ambiguous language providing for liability of the owner of "any facility . . . which is subject to the jurisdiction of the United States" remains. This language, which must be examined in light of the FWPCA's statement of policy,[216] potentially extends the Act's competence to somewhere beyond the United States' 200 mile

208. The owner of a discharging offshore facility shall be liable up to the ceiling amount specified therein, "notwithstanding any other provision of law." 33 U.S.C.A. § 1321(f)(3) (West Supp. 1980). This language has been construed to preclude application of the Limitation of Liability Act. Stuart Transportation Company, 435 F. Supp. 798, 806 n.8 (E.D. Va. 1977).

209. 33 U.S.C.A. § 1321(f)(1) (West Supp. 1980).

210. 33 U.S.C.A. § 1321(f)(3) (West Supp. 1980).

211. *In re* Oil Spill, 471 F. Supp. at 475.

212. United States v. Sedco, Inc., No. H-79-1880 (S.D. Tex., filed Oct. 23, 1979) (Plaintiff's Original Claim).

213. Texas v. Sedco, Inc., No. H-79-1880 (S.D. Tex., filed Oct. 18, 1979) (Plaintiff's Original Claim).

214. 33 U.S.C.A. § 1321(a)(11) (West Supp. 1980).

215. At the time of the blowout, the *Sedco 135* engaged in drilling operations in the Bay of Campeche in the Gulf of Mexico, at approximately latitude 19° 20′ north and longitude 92° 15′ west. *In re* Sedco, Inc., *supra* note 131.

216. *See* text accompanying note 184 *supra*.

fishery conservation zone, an area which has been traditionally regarded as high seas.[217]

Together these two provisions of the Act appear to provide a loophole whereby the United States and Texas can argue that Sedco, as owner of a facility "which is subject to the jurisdiction of the United States," is liable for clean-up costs under the FWPCA. Such an argument is further strengthened by the "objective territorial"[218] and "protective"[219] principles of international law,[220] whereby one state may obtain jurisdiction over another state even though the acts which are the subject of litigation occurred outside the territory of the state attempting to exercise jurisdicion.

However, it is difficult to argue in favor of the Act's broad jurisdictional claims in view of the United States Government's vigorous protest in the past of similar claims by other nations. For example, when Canada created a 200-mile Arctic pollution control zone, the United States declared:

> [i]nternational law provides no basis for these proposed unilateral extensions of jurisdiction on the high seas, and the United States can neither accept nor acquiesce in the assertion of such jurisdiction.[221]

Furthermore, several European nations have expressed strong opposition to the "wide extension of jurisdiction" contained in the Act, stating that "in some cases these provisions would be contrary to international law and contrary to the common objectives being sought in international fora."[222] Even President Carter indicated his awareness of the serious international consequences of the Act as he signed it into law:

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217. Pixa, *supra* note 179, at 292.

218. Under the principle of objective territorial jurisdiction, it is possible to obtain jurisdiction over a foreign person, entity, or State if acts engaged in by such person, entity, or State caused injury "in or to the territory" of the State attempting to obtain jurisdiction "or the properties or persons therein, when the case is of serious consequence and injury is established by clear and convincing evidence." United States v. Canada (Trail Smelter Case), Arbitral Tribunal, 1941, III U.N. Rep. Int'l Arb. Awards 1905, 1907 (1949).

219. Under the protective principle of jurisdiction, a State may obtain jurisdiction over another State, even if the acts which are the subject of litigation occur outside the State attempting to exercise jurisdiction, as long as a significant national interest is at stake (and an exercise of jurisdiction is not otherwise impermissible under international law). *See* Rivard v. United States, 273 U.S. 593 (1926).

220. For a comprehensive discussion of the objective territorial and protective principles of international law, *see* Paust, *The Mexican Oil Spill: Jurisdiction, Immunity, and Acts of State*, 2 HOUS. J. INT'L L. 239 (1980).

221. United States Statement on Canada's Proposed Legislation, 9 INT'L LEGAL MATERIALS 605 (1970).

222. Communication of the Governments of Belgium, Denmark, Finland, Greece, the Federal Republic of Germany, the Netherlands and the United Kingdom to the United States (Sept. 16, 1977), *reprinted in* 18 VA. J. INT'L L. 318 (1978).

> Amendments to the oil and hazardous spill provisions of the 1972 act will extend domestic jurisdiction to the ocean beyond the contiguous zone, where the fisheries and other natural resources of the United States may be adversely affected. Oil pollution is a global problem, and accidents on the oceans prove the need for effective international solutions.
>
> We have been working through international forums to achieve broader acceptance for higher worldwide pollution standards. I believe that the legislation I am signing may raise issues of consistency with international law, and I know that many members of the Congress share this concern. Our clear objective is to achieve maximum consistency with applicable principles of international law regarding the protection of the marine environment and to encourage ongoing and future international efforts to combat pollution of the ocean. If that objective should require amendments to the act that I am signing into law, I am confident that the Congress and the administration will work together next year to make any necessary adjustments.[223]

It is not within the scope of this study to exhaustively discuss the ramifications of the FWPCA's broad zone jurisdictional claims[224] or the international bases for assertion of such claims.[225] It is sufficient to say that the United States and Texas face a formidable task in their argument in favor of such claims, and that there is a distinct possibility that the court in the *Sedco 135* actions will hold Sedco not liable for clean-up costs pursuant to the FWPCA. Thus the Federal Water Pollution Control Act, which provides no relief for those persons actually harmed by an oil spill, and little, if any, relief to the Government in its clean-up efforts, is unrealistic and inadequate in view of the ever-increasing magnitude and frequency of oil spill occurrences.

D. State Statutes

Although the Federal Water Pollution Control Act does not itself provide a means whereby private parties may be compensated for damages sustained as a result of vessel-source oil discharges, it does allow the states to provide such relief by declaring that:

> Nothing in this section shall be construed as preempting any State or political subdivison thereof from imposing any re-

223. Statement on signing H.R. 3199 into law, 13 WEEKLY COMP. OF PRES. DOC. 1933, 1934 (Dec. 8, 1977).

224. For a thorough discussion of the international ramifications of the broad jurisdictional claims of the FWPCA, *see* Pixa, *supra* note 149.

225. *See* Paust, *supra* note 220.

> quirement or liability with respect to the discharge of oil or hazardous substance into any waters within such State. Nothing in this section shall be construed as affecting or modifying any other existing authority of any Federal department, agency, or instrumentality, relative to onshore of offshore facilities under this chapter or any other provisions or law, or to affect any State or local law not in conflict with this section.[226]

The general failure of United States law to compensate private victims of oil pollution inspired a number of states to enact special statutes dealing with civil liability for oil pollution damage sustained as a result of a vessel's discharge of oil on the navigable waters of the United States, where these waters are concurrently under the jurisdiction of a particular state.[227] Nearly all of the state enactments impose some form of strict liability for oil pollution and assure recovery for damaged claimants by requiring oil tanker owners to establish proof of financial responsibility within the state.[228] Beyond these basic requirements, the statutes vary according to each state's particularized needs.[229]

The Florida Pollutant Spill Prevention and Control Act[230] sets up a Coastal Protection Trust Fund of $35 million funded by an excise tax on terminals handling oil within the state.[231] The Fund covers costs for abatement and removal of spilled oil, rehabilitation of wildlife and other natural resources, as well as all provable costs and damages which are proximate results of the spill.[232] The state may recover such costs, on behalf of itself and private persons, without having to prove negligence.[233] Further, each owner or operator of a terminal, vessel, or barge using a Florida port must maintain evidence of financial responsibility for damages up to the required limits.[234] In sum, the Florida law closely parallels federal statutes and regulations, except that it provides recovery for individuals sustaining pollution damages.[235]

Both the oil companies and the oil carriers have vigorously opposed the adoption of varying state statutes on civil liability for oil pollution and have challenged the statutes in state and federal courts, raising the issues of federal preemption and unconstitutional intrusion by the state upon federal maritime authority.[236] In *Askew v. American*

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226. 33 U.S.C. § 1321(o)(2), (3) (1976).
227. *See* note 7 *supra*.
228. Wood, *supra* note 61, at 7.
229. *Id.*
230. FLA. STAT. ANN. §§ 376.011-.21 (West Supp. 1981).
231. *Id.* §§ 376.11(2), (4)(b).
232. *Id.* § 376.11(5).
233. *Id.* § 376.12(3).
234. *Id.* § 376.14(1).
235. *Id.* § 376.11(5)(d).
236. *Superfund, supra* note 25, at 292-93.

Waterways Operators, Inc.,[237] the Supreme Court addressed these issues and the validity of the Florida statute. The Court upheld the validity of the statute, stating that the Water Quality Improvement Act of 1970[238] clearly allows state regulation and that the federal law is not to be construed as preempting any state from imposing any requirement of liability, at least where the state and federal laws are not in conflict.[239] The Court also ruled that the state and the federal statutes were harmonious on many points, or, at least, had not yet been construed by the state courts to determine if there was a conflict.[240] Thus, after the *Askew* decision, the states are free to legislate liability for vessel-source oil spills, barring clear conflict with federal statutes.

The *Askew* decision, however, left open many questions, including the amount of liability which state statutes can impose on vessels notwithstanding the Federal Limitation of Liability Act of 1851.[241] Although the Act generally limits recovery under the state enactments, the Court postponed a decision on this question by stating that the Florida law was susceptible to an interpretation which would not be in conflict with the federal statute.[242] The Court dismissed any potential problems with the Extension of Admiralty Act of 1948,[243] which allows recovery for maritime torts incurred on land. Even though Congress extended the traditional admiralty jurisdiction ashore, the Court did not wish to extend the jurisdiction of federal courts into areas traditionally within the competence of the states.[244]

In summary, the lack of federal preemption evidenced by the Water Quality Improvement Act of 1970 and the lack of fatal conflict between the federal and state statutory schemes allowed Florida to constitutionally regulate maritime activities concurrently with the federal government.[245] Thus the Supreme Court in the *Askew* decision in effect signalled its approval for states to enact their own statutory provisions regarding liability and compensation for oil spills. If Texas had taken the Court's cue and enacted such legislation, the private claimants in the *Sedco 135* actions would be in a much better position to recover the damages which they seek. In view of Texas' spill-prone location on the Gulf of Mexico, it is hoped that the *Sedco 135* spill will

237. 411 U.S. 325 (1973).
238. *Supra*, note 181. This statute was the forerunner of the present FWPCA.
239. 411 U.S. at 329.
240. *Id.* at 330-37.
241. Federal Limitation of Liability Act of 1851, 46 U.S.C. §§ 183-89 (1974).
242. 411 U.S. at 331.
243. Extension of Admiralty Act of 1948, 46 U.S.C. § 740 (1974).
244. 411 U.S. at 340-41.
245. *Superfund, supra* note 25, at 294.

lead to adoption of a state statute designed to adequately protect the interest of potential pollution victims.

E. The Foreign Sovereign Immunities Act[246]

In addition to the inadequacy of traditional tort remedies, the possiblity that Sedco will be allowed to limit its liability under the Limitation of Liability Act, and the possibility that the United States and Texas will not be allowed to recover their clean-up costs under the Federal Water Pollution Act, both public and private claimants in the *Sedco 135* actions also face the possibility that the Foreign Sovereign Immunities Act of 1976[247] prohibits suits against the Mexican national oil company in United States courts.[248] To that effect, Petroleos Mexicanos (Pemex) has filed a motion to dismiss the complaints against it for lack of subject matter jurisdiction.[249]

The Foreign Sovereign Immunities Act, hereinafter referred to as the FSIA, was enacted to codify the "restrictive" principle of sovereign immunity, as recognized in international law, whereby the immunity of a foreign state from suit in another nation's courts is restricted to suits involving the foreign state's sovereign or public acts and does not extend to suits based on its commercial or private acts.[250] The FSIA provides as follows:

> Subject to existing international agreements to which the United States is a party at the time of enactment of this Act a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States except as provided in Sections 1605 to 1607 of this chapter.[251]

As defined in the FSIA, a "foreign state" includes not only the state itself and its political subdivisions, but also its agencies and instrumentalities.[252] An "agency or instrumentality" of a foreign state is defined as follows:

246. For a general discussion of the Foreign Sovereign Immunities Act, *see* Comment, *Breaking Out of the Capitalist Paradigm: The Significance of Ideology in Determining the Sovereign Immunity of Soviet and Eastern-Bloc Commercial Entities*, 2 HOUS. J. INT'L L. 425 (1980).

247. 28 U.S.C. §§ 1330, 1602 (Supp. 1980).

248. For an excellent discussion of the Foreign Sovereign Immunities Act as it relates to the pending *Sedco 135* actions, *see* Handl, *The Case for Mexican Liability for Transnational Pollution Damage Resulting from the Ixtoc 1 Oilspill*, 2 HOUS. J. INT'L L. 229 (1980); Paust, *supra* note 220.

249. Haylock v. Petroleos Mexicanos (Pemex), No. H-79-1880 (S.D. Tex., filed Nov. 26, 1979) (Motion of Defendant Petroleos Mexicanos for an Order Dismissing the Complaint for Lack of Personal and Subject Matter Jurisdiction).

250. H.R. REP. No. 1487, 94th Cong., 2d Sess. 7 (1976).

251. Foreign Sovereign Immunities Act of 1976, 28 U.S.C.A. § 1604 (West Supp. 1980).

252. *Id.* § 1603(a).

> An "agency of instrumentality of a foreign state" means any entity—
>
> (1) which is a separate legal person, corporate or otherwise, and
>
> (2) which is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof, and
>
> (3) which is neither a citizen of a state of the United States as defined in Section 1332(c) and (d) of this title, nor created under the laws of any third country.[253]

Among the exceptions to the jurisdictional immunity of foreign states is the following:

> A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case—. . .
>
> > in which the action is based . . . upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States.[254]

Pemex, as the Mexican state oil company formed in 1938 to take over all aspects of the production and distribution of Mexico's petroleum resources as well as the implementation of Mexico's political and economic plan with respect to such resources,[255] is clearly "an agency or instrumentality of a foreign state" within the meaning of the FSIA.[256] However, because Pemex was engaged in oil exploration at the time of the Ixtoc 1 blowout, it has been argued that Pemex was conducting a commercial activity and would therefore be liable to suit under the "commercial activity" exception[257] to the FSIA.[258]

"Commercial activity" is defined in the FSIA as "either a regular source of commercial conduct or a particular commercial transaction or act."[259] The House report accompanying the original legislation describes the kinds of activities contemplated by this provision as follows:

> A "regular course of commercial conduct" includes the carrying on of a commercial enterprise such as a mineral extraction

253. *Id.* § 1603(b).
254. *Id.* § 1605(a)(2).
255. Congressional Research Service, *Mexico's Oil and Gas Policy: An Analysis* 11 (1978).
256. Carey v. National Oil Corp., 453 F. Supp. 1097, 1100-01, n.2 (S.D.N.Y. 1978), *aff'd*, 592 F.2d 673 (1979).
257. Foreign Sovereign Immunities Act of 1976, 28 U.S.C.A. § 1605(a)(2) (West Supp. 1980).
258. Willacy County Navigation District v. Sedco, Inc., *supra* note 19.
259. Foreign Sovereign Immunities Act of 1976, 28 U.S.C.A. 1603(d) (West Supp. 1980).

company, an airline or a state trading corporation. Certainly, if an activity is customarily carried on for profit, its commercial nature could be readily assumed.[260]

At least two Federal Courts have viewed the activities of Pemex as commercial in nature. In *D'Angelo v. Petroleos Mexicanos*,[261] the court held that the Mexican government's oil expropriation decree was an act of state which could not be reviewed by United States courts. In coming to that conclusion, however, the court stated that "Pemex is engaged in a commercial business, the operation in Mexico of an oil company for profit," although it held the expropriation itself to be a sovereign act and not incident to the commercial activity.[262]

And in the case of *S.T. Tringali Co. v. Tug Pemex XV*,[263] the court held in dicta that a vessel owned by Pemex was liable to seizure not only for jurisdictional purposes but also for the satisfaction of any judgment against it, explaining its denial of the Pemex claim of sovereign immunity as follows:

> The vessels of Petroleos Mexicanos . . . are not considered as being owned by the Republic of Mexico, but an independent corporation engaged in a private commercial activity; and I, therefore, hold that the vessels of Petroleos Mexicanos . . . may not only be seized to acquire jurisdiction, but will have to respond for damages; . . . and if damages are assessed against Petroleos Mexicanos, the vessel may be sold to satisfy the judgment.[264]

Although it may appear, therefore, that Mexico's ownership of an exploratory oil well, an activity which is presumably carried out with the ultimate goal of producing and marketing crude oil, is a "commercial activity" for purposes of the FSIA, such activity must be analyzed in light of *International Association of Machinists and Aerospace Workers v. Organization of the Petroleum Exporting Countries*,[265] hereinafter referred to as *IAM v. OPEC*, a case with a seemingly contrary holding. In this antitrust action in which plaintiffs complained of OPEC's price setting activities, the court, after considering at some length the "commercial activity" exception to the FSIA, concluded as follows:

> [i]n view of our own State and Federal domestic crude oil activities, there can be little question that establishing the terms and conditions for removal of natural resources from its terri-

260. H.R. REP. No. 1487, 94th Cong., 2d Sess. 16 (1976).
261. 422 F. Supp. 1280 (D. Del. 1976), *aff'd mem.*, 564 F.2d 89 (3rd. Cir. 1977).
262. *Id.* at 1286.
263. 274 F. Supp. 227 (S.D. Tex. 1967).
264. *Id.* at 230.
265. [1979] 932 ANTITRUST & TRADE REG. REP. (BNA) E-1.

tory, when done by a sovereign state, individually and separately, is a governmental activity.[266]

The court's holding in *IAM v. OPEC* is, however, qualified in several respects. First, although the court affirmed the principle that a sovereign state has the sole power to control its natural resources,[267] the court also pointed out that control over oil resources is an especially sovereign function with respect to OPEC nations since oil is their principal, if not sole, source of revenue. To that effect, the court made reference to the testimony of a court-appointed expert who testified that it was "difficult or impossible" to separate the role of the OPEC nations as governments from their role as oil producers.[268]

In addition, the court qualified its holding by indicating that, while government ownership of an oil company engaged in the extraction of oil resources from its territory may constitute "commercial activity," the fact of ownership is not the determinative factor. To that effect, the court made the following observation:

> Here, a clear distinction must be drawn between the activities each government engages in by virtue of its proprietary interests and the activities in which it engages by virtue of its status as a sovereign. The activities of which plaintiff complains are clearly governmental. These activities are engaged in by the defendants in their status as sovereigns and not in their status as proprietors. This determination is conclusively established by looking to the nature of these activities and comparing them with governmental activities of other nations.[269]

Thus, according to the court's analysis, it is necessary to look at the nature of the specific activity engaged in, in order to determine whether such an activity is indeed a "commercial activity" for purposes of the FSIA.

In applying the court's reasoning to the facts of the Pemex actions, it appears that, while oil resources are perhaps the sole source of revenue for the OPEC nations, such is not the case for Mexico where oil revenues, although a major factor in the economy, account for only approximately thirty percent of that nation's total exports.[270] Thus it seems that it would be possible to distinguish Mexico's role as a sovereign from its role as an oil producer.[271]

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266. *Id.* at E-7.
267. *Id.* at E-6, E-7.
268. *Id.* at E-7.
269. *Id.*
270. *Mexico's Oil and Gas Policy, supra* note 255, at 41.
271. Congressional Research Service, *Whether the Foreign Sovereign Immunities Act of*

Applying the court's analysis in *IAM v. OPEC* to the facts of the Pemex case with respect to the second qualification—whether the actual process of oil exploration is an inherently sovereign activity—is a bit more difficult. Pemex has argued, in effect, that since the government of Mexico is the sole entity engaged in oil production and distribution in Mexico, all of the activities of Pemex are sovereign.[272] However, as indicated above, at least two United States courts have viewed Pemex as a commercial enterprise.[273] In addition, at least one foreign court, in the case of *N.V. Cabolent v. National Iranian Oil Co.*, has held that a nationalized oil company, wholly owned and controlled by the state, would not be entitled to sovereign immunity with respect to a commercial agreement.[274]

On the basis of these decisions and the court's analysis in *IAM v. OPEC*, it may be argued that Pemex's policy-making function vis-à-vis the exploitation of its petroleum resources, a function which was held to be an essentially sovereign function by the court in *IAM v. OPEC*, may be distinguished from its inherently commercial function involving the actual exploration and production of such resources.[275] The possibility of such a separation of functions has been recognized by at least one United States case, *Yessenin-Volpin v. Novosti Press Agency*,[276] in which the court found that although Novosti, the Soviet national information agency, did engage in commercial activities such as the sale of articles to foreign media, those activities were distinct from activities such as collaboration with other governmental agencies in the publication of articles in Soviet journals.[277]

The argument that Pemex is subject to suit in United States courts under the "commercial activity" exception to the FSIA would be further strengthened if it could be determined that the oil which is the subject of exploration and production by Mexico is eventually marketed abroad, rather than simply diverted to domestic use.[278] In addition, the court in the Pemex actions may look to whether the exploration and production of petroleum resources is an activity which

1976 Authorizes Suits Against the Mexican State-Owned Oil Company (Pemex) in United States Courts 9 (1979) [hereinafter cited as Congressional Research Service]. Copy on file at HOUSTON JOURNAL OF INTERNATIONAL LAW.

272. Haylock v. Petroleos Mexicanos (Pemex), No. H-79-1880 (S.D. Tex., filed Nov. 26, 1979) (Motion of Defendant Petroleos Mexicanos for an Order Dismissing the Complaint for Lack of Personal and Subject Matter Jurisdiction).

273. *See* notes 261-65 and accompanying text *supra*.

274. [1969] 484 N.J. 1329 (Hague Ct. of App. 1968), *reprinted in* 9 INT'L LEGAL MATERIALS 152 (1970).

275. Congressional Research Service, *supra* note 271, at 10.

276. 443 F. Supp. 849 (S.D.N.Y. 1978).

277. *Id.* at 856.

278. Congressional Research Service, *supra* note 271, at 12.

could be performed by a private person,[279] an issue which almost cetainly would be decided in the affirmative. This consideration has long been recognized in international law as a basis for granting or denying sovereign immunity.[280] Furthermore, a United States court, in *Grant v. Tennessee Valley Authority*,[281] a suit for damages due to crop injuries resulting from flood waters under the jurisdiction of the TVA, made the following distinction between the TVA's liability for damages arising from its government function regarding flood control and its commercial functions involving the production and sale of electricity:

> By a long line of cases it has definitely been settled that neither the government nor its instrumentalities would have to respond in damages arising in the development and maintenance of waters for purposes of navigation and flood control, including claims for negligence. It may be noted that this position is not because of governmental immunity from suit but on the grounds of public policy . . . .
>
> But the functions of the defendant in the commercial field are entirely different. Upon principle and authority, it is quite clear that the government should respond in damages for wrongs committed when it is engaged in the same activities as its citizens. It is my judgment that Congress intended that the defendant can be sued for all wrongs committed for conduct pertaining to its generating, use and sale of electric energy made from the power created by its dams.[282]

It appears, therefore, that, assuming a case could be made that a national monopoly such as Pemex can engage in sovereign as well as commercial activities, and that oil exploration, when engaged in by such a monopoly, is in itself a commercial activity, the Federal Sovereign Immunities Act would allow Pemex to be sued in United States courts.[283] However, because international law standards defining sovereign vis-á-vis commercial activities are rather unclear,[284] it is difficult to predict with certainty the court's ruling in the Pemex actions on the issue of sovereign immunity. Although public policy considerations and substantial authority certainly favor a finding that Pemex should not be allowed to avail itself of the doctrine of sovereign immunity, the ambiguities present in the current body of international law regarding sovereign immunity unfortunately permit a different result.

279. *Id.*
280. Setser, *The Immunities of the State and Government Economic Activities*, 24 LAW & CONTEMP. PROB. 290, 309-10 (1959).
281. 49 F. Supp. 564 (E.D. Tenn. 1942).
282. *Id.* at 566.
283. Congressional Research Service, *supra* note 271, at 13.
284. *Id.*

IV. Conclusion

The inadequacy of the compensation available to victims of transnational oil pollution under the international conventions and United States law developed in the wake of *Torrey Canyon* has become increasingly evident in recent times, particularly in light of the *Sedco 135* disaster. The provisions of the Civil Liability and Compensation Fund Conventions, while constituting an admirable first attempt at providing an international régime concerning oil pollution liability and compensation, are unrealistic by modern standards. For conventions which purport to offer a comprehensive solution to the problem of oil pollution, they do not apply to a surprisingly large number of situations, including damage caused by oil discharged from offshore installations. The recent blowout of the offshore drilling unit *Sedco 135* indicates the necessity for extension of the scope of the international conventions to cover not only spills caused by offshore installations, but all potential spill situations. Furthermore, the extensive damage caused by the *Amoco Cadiz* and *Sedco 135* spills demonstrates the need for considerable expansion of the limits of liability of the conventions.

United States statutory and common law provisions regarding liability and compensation for oil pollution damage contain even more deficiencies than do the international conventions. Although the Federal Water Pollution Control Act does cover spills caused by offshore drilling units such as the *Sedco 135*, it does not provide compensation for private individuals sustaining pollution damage. Furthermore, its limits of liability, while unaffected by the Limitation of Liability Act, are unrealistically low in light of the magnitude of the *Amoco Cadiz* and *Sedco 135* spills. Finally, in spite of the Act's expansive jurisdictional claims, there is a possibility that the Act will be construed so as to be inapplicable to pollution damage caused by offshore installations located outside the navigable waters of the United States and that, therefore, the United States and Texas governments will be unable to recover their clean-up costs and environmental damages in the *Sedco 135* spill.

Recovery under traditional tort theories, to which private pollution victims in the United States are almost exclusively limited, also has numerous shortcomings. The claimant's burden of proof in an action based on negligence, trespass, or nuisance is virtually impossible to meet, and, even if he manages to prevail, his recovery may be limited by the Limitation of Liability Act. The unfortunate deficiencies of traditional tort theories concerning pollution damage may mean that many of the private claimants in the *Sedco 135* actions will not be compensated at all, and that, of the over $355 million in tort claims which are compensable, only $300,000, the reported value of the *Sedco 135*, will actually be compensated.

At present, state statutes appear to offer the best protection for private pollution victims, generally providing for strict liability of vessel owners and a high limit of liability. However, enactment of state statutes regarding oil pollution poses some yet-unanswered Constitutional questions of conflict with federal legislation and intrusion upon maritime authority. In any case, Texas has not chose to adopt such a statute. Thus, although adoption of a Texas statute dealing with liability for oil pollution damage is a possibility that should certainly be given serious future consideration, state statutory law does not play a major role in the current *Sedco 135* actions.[285]

Finally, the Foreign Sovereign Immunities Act is a statutory enactment which colors all of the United States remedies, both statutory and common law, for transnational pollution damage. Under the terms of its provisions, there is a possibility that public and private pollution victims in the *Sedco 135* actions will be unable to maintain suit against Pemex, the Mexican national oil company in charge of drilling operations at the time of the blowout and resulting spill.

In light of the recent *Sedco 135* oil spill, the current national and international régimes regarding liability and compensation for oil pollution damage should be seriously reevaluated and revised. In particular, the international, national, and state statutory and conventional schemes should be broadened in scope to cover *all* potential spill situations, regardless of source, and to provide compensation to both public and private pollution victims in an amount which is realistic in view of the magnitude of recent spills.

Furthermore, it is unfortunate, and indeed inexcusable, that the Limitation of Liability Act and Foreign Sovereign Immunities Act should be allowed to serve as shields behind which the transnational pollutor can hide. The purpose of the "hopelessly anachronistic" Limitation of Liability Act is gone. The oil industry, in this age of societal dependance on oil, certainly no longer needs to be protected; on the contrary, it is the pollution victim who needs the protection of the laws. Therefore, the Limitation of Liability Act should either be abolished, as has been threatened for years, or revised so as not to permit a polluting "vessel" to invoke its benefits. Additionally the Foreign Sovereign Immunities Act, while basically good from the diplomatic point of view, should be revised and the meaning of such ambiguous phrases as

285. The only Texas statute involved in the *Sedco 135* actions is the Texas Water Code, *supra* note 16, which provides for the imposition of civil penalties for maritime pollution.

"commercial activity" clarified so as to include such obviously commercial activities as the exploration, production, and marketing of oil. In view of the length of time ordinarily involved in abolition or revision of a federal statutory enactment and the increasing frequency with which oil spills have been occurring, it is hoped that, in the meantime, the court in the *Sedco 135* actions will find these two troublesome statutes to be inapplicable in a case of transnational oil pollution and thus provide some measure of protection for the potential pollution victim.

Finally, with regard to the inadequacy of United States common law provisions concerning liability and compensation for oil pollution damage, there is little to do but wait and hope that the District Court for the Southern District of Texas will see fit to provide the much-needed precedent establishing the right of private pollution victims to recover adequate compensation under traditional maritime tort theories.

In conclusion, in light of the recent *Sedco 135* spill, the national and international régimes developed in the wake of *Torrey Canyon*, while recognizing the problem of transnational oil pollution and taking valuable formative steps toward the solution of that problem, have proven inadequate. The circumstances of the *Torrey Canyon* spill provided only a small inkling of the potential ramifications of the problem; the magnitude of the *Sedco 135* has demonstrated that the problem not only is more serious than anticipated but will certainly grow as the world becomes more dependent on oil. Thus it is imperative that the post-*Torrey Canyon* measures be reevaluated and revised to more adequately protect the potential pollution victim and his environment. It is no longer necessary to balance his interest with that of the oil industry; in view of the world's dependence on oil, the oil industry, particularly in its role as a potential pollutor, needs no protection at all.

*Ann Blackwood Crain**

* Attorney, Houston, Texas. B.A., 1974, Lamar University; M.A., 1976, University of Kentucky; J.D., 1980, University of Houston College of Law. Member of the *Journal*.