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Oil Pollution: Negotiation – An Alternative to Intervention?

On February 28, 1971, the 28,339-ton Liberian tanker *Wafra* ran aground on a reef 6 miles off Africa's southernmost tip, spilling oil over stretches of the Cape Agulha coastline. She was carrying 64,000 tons of oil from the Persian Gulf to the Caltex Refinery in Cape Town, South Africa. After leaking oil for a week and starting widespread pollution, the crippled $12 million ship was finally freed from the reef, towed 200 miles out to sea, bombed and destroyed on March 12 by the South African Air Force.[1]

South Africa was not the first state to be faced with taking protective measures on the high seas against a foreign vessel which threatened to pollute its coastal interests. Yet, the manner in which South Africa dealt with the situation may have a significant influence on the legal approach of states to the intervention problem in that it chose to avoid the legal problems of intervention by negotiating an agreement with the ship owners.[2] This agreement allocated costs of salvage, but more importantly, it conferred upon South Africa the decision-making authority over dis-

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[1]Johannesburg Star, Mar. 1, 1971, at 1, col. 1 (S. Africa); Wash. Post, Mar. 12, 1971, at C3, col. 3.

[2]The problem is characterized herein as one of "intervention" because it is referred to by that term in the 1969 Intervention Convention Relating to Intervention on the High Seas in Cases of Oil Pollution Casualties (*infra* note 9), and by most of the writings discussing that convention in particular and the problem in general. Nevertheless, unqualified characterization of the action as intervention may be misleading, because of the more customary international law usage associated with that term. Normally, the usage implies some interference against the personality of a state, or some threat to its territorial integrity, political independence or freedom of economic, social and cultural development. *See* United Nations Declaration on Inadmissibility of Intervention, G.A. Res. 2131, 20 U.N. GAOR Supp. 14, at 11, 12, U.N. Doc. A/6014 (1965). However, as used in this article the term has little vestige of its traditional usage, and is limited exclusively to describe an action by a state on the high seas against a foreign vessel which, following a maritime casualty, threatens its coastal interests with pollution of the sea by oil, and to take such measures as may be necessary to prevent or mitigate such pollution. While any such action cannot escape having economic and political effects, it is not accompanied by the intent to threaten the internal or external affairs of the flag state.

position of the vessel, which is the most critical factor in an intervention situation.

The right of intervention is that of a state's taking protective measures consistent with international law but *void* of consent. (Hence, consent and intervention are mutually exclusive and when a state removes or destroys a vessel *with* the consent of the owners there is no intervention.) While a state may lawfully intervene, such action is not only extreme, but extremely undesirable. This is because it is a unilateral decision and also because of the complex legal problems which inevitably arise from such action. Consequently, any reasonable alternative which makes intervention unnecessary deserves serious consideration. Negotiation then, becomes highly significant as a means of affixing decision-making authority by mutual agreement.

A Frequent Problem

The need for a consensual approach is further evident in view of the frequency with which the intervention problem may arise.[3] The past half-decade has recorded an impressive list of tanker disasters. In 1966 the *Anne Mildred Brovig* spilled oil into the North Sea off the coast of Germany.[4] The *Torrey Canyon* disaster struck Great Britain and France in 1967,[5] fueling enough worldwide alarm to sustain an irreversible campaign against marine pollution.

Just a year later, in San Juan Harbor, Puerto Rico, the United States had its first major encounter with oil pollution from the *Ocean Eagle*.[6] The

[3]For a study of major incidents of marine pollution by oil over the period 1959-1969, *see* IMCO, International Legal Conference on Marine Pollution Damage, Brussels, Nov. 29, 1969, Note by Secretariat on "Descriptions of Major Incidents of Marine Pollution by Oil," IMCO Doc. LEG/CONF/6 (Oct. 13, 1969). For listings of major oil spills, *see also Hearings on S. 7 & S. 544 Before Subcomm. on Air & Water Pollution of the Sen. Public Works Comm.*, 91st Cong., 1st Sess., ser. 91-2, at 142, 182, 422, 426, 1010, 1311, 1316 (1969).

[4]On February 20, 1966, a 25,454-gross ton Norwegian tanker, the *Anne Mildred Brovig*, with 39,000 tons of Iranian crude oil aboard collided with the British vessel *Pentland*. After grounding, the hull broke in two, spilling 125,000 barrels of oil into the North Sea off the coast of Germany. Two and one-half months were required for cleanup at a reported cost of $241,000. IMCO Doc. LEG/CONF/6, (Annex II), *supra* note 3, at 20.

[5]IMCO Doc. LEG/CONF/6 (Annex II), *supra* note 3, at 20.

[6]On March 3, 1968, the *Ocean Eagle*, a 12,065-gross ton tanker with 135,464 barrels of crude oil aboard, grounded and broke up while entering the harbor at San Juan, Puerto Rico. Approximately 83,400 barrels of oil were spilled, contaminating the beach area for 16 miles and the entire San Juan harbor. Two months were required for the cleanup at a cost of $2.5 million. *Hearings on H.R. 15906 and related bills Before Subcomm. on Rivers & Harbors of the House Comm. on Public Works*, 90th Cong., 2d Sess., ser. 90-28 at 296-307 (1968). A report on the spill may also be found in Cerames-Vivas, *Special Report to Office of Naval Research Oceanic Biology Programs on the Ocean Eagle Oil Spill*, in 1969 Hearings, *supra* note 3, at 1318.

World Glory[7] polluted the coast of South Africa three months later. In 1969 Canada contended with the *Arrow* off Nova Scotia. Heavy fog lifted from a black sludge in San Francisco Bay in January, 1971, after the *Arizona Standard* collided with her sister ship, the *Oregon Standard*.[8]

The Complexities of Intervention

Significantly, more than half of these tanker disasters occurred on the high seas. This raises unique legal questions whose resolution requires defining the proper roles of the coastal state, the flag state, and the shipping interests which may be affected substantially. In responding to these issues, it must be recognized that the legal principles governing intervention are, in their application, still in their infancy, whereas the body of law governing the high seas, with which they must find accommodation, is well established.

International law prohibits any state from subjecting any part of the high seas to its exclusive control, or from interfering with the exercise of freedom of navigation by ships sailing on the high seas under the flag of another state. Therefore, an exception to this general principle is required if a coastal state is to intervene lawfully to order removal or destruction of a polluting foreign vessel to protect its coastal interests.

The most concerted international effort to define the proper roles of the affected parties, and to characterize the right of intervention as an exception resulted in the 1969 International Convention Relating to Intervention on the High Seas in Cases of Oil Pollution Casualties.[9] In general, this Convention permits a coastal state to intervene against a foreign vessel on the high seas to prevent, mitigate or eliminate grave and

[7]The 28,323-gross ton tanker *World Glory* broke in two on June 13, 1968, during a severe storm off the coast of South Africa spilling 332,000 barrels of crude oil. Approximately 20 days were required for the cleanup at a cost of $420,000. *George Washington Univ., Program of Policy Studies in Science and Technology, Legal, Economic and Technical Aspects of Liability and Financial Responsibility as Related to Oil Pollution* 15-12 (draft Dec. 1970). South Africa also had major spills in 1968 from the *Esso Essen* and the *Andron*, costing nearly a half-million dollars in cleanup. 1969 Hearings, *supra* note 3, at 1318.

[8]The two Standard Oil (California) tankers collided in dense fog under Golden Gate Bridge and drifted helplessly into San Francisco Bay. More than half of the 480,000 gallons of oil poured into the bay, and soon coated beaches and wildlife sanctuaries for 50 miles along the California coast. *Oil on Troubled Waters, Time*, Feb. 1, 1971, at 61. Wash. Post, Jan. 19, 1971, at A1, col. 1. Five days after the *Arizona* accident, the *Esso Gettysburg* hit the rocks at the mouth of New Haven harbor, spreading 386,000 gallons of oil over three miles of Long Island Sound. Wash. Post, Jan. 24, 1971, at A6, col. 1.

[9]International Convention Relating to Intervention on the High Seas in Cases of Oil Pollution Casualties, *done at* Brussels Nov. 29, 1969, *Sen. Ex.* G, 91st Cong., 2d Sess. 9; 9 INT'L LEGAL MATERIALS 25 (1970); 64 AM. J. INT'L L. 471 (1970); 1 J. MAR. L. & COM. 367 (1970).

imminent danger to its coastal interests, which are threatened with pollution by oil. It applies to tankers which have suffered a maritime casualty which may reasonably be expected to result in major harmful consequences.

The Convention recognizes that at some point the balancing of interests of the tanker owners with those of the coastal state, may have to favor the state, and provides that once the criteria specified in the Convention are properly met a state may lawfully intervene. To prevent abuse, however, certain duties are imposed concomitant with the exercise of the intervention right.

Foremost are the duties of the intervening state to preserve living resources and to intervene in such a manner that its response is not disproportionate to that actually necessary to prevent or mitigate the pollution. If any of these duties are breached, adequate compensation must be made to the injured parties.

While not unreasonable, these duties do require considerable restraint by the intervening state. The possibility that it may act in derogation of these duties is not remote and the liabilities for their breach are considerable. Moreover, the non-consensual removal or destruction of the vessel is a most extreme undertaking, and while the Convention provides authority for coastal state intervention, this solution is the least preferable. The interests of all parties are better protected if intervention can be avoided.

It is not the intent of this article to analyze the characteristics of the intervention right, the text of the Intervention Convention, or the merits of the customary international law which it purports to codify. Rather, it is to encourage the international lawyer, who ultimately must deal with the complex issues raised by intervention, to seek viable alternatives which will minimize the opportunity for abuse of the intervention right and result in acceptable, equitable solutions for all parties concerned.

The *Wafra* Disaster

That realistic alternatives to intervention do exist is illustrated in the events surrounding the recent sinking by South Africa of the *Wafra*. Immediately after the tanker was grounded, oil pollution experts were rushed to the scene. They concluded that unless the vessel could be pulled free, the only solution to a major oil pollution threat to the Cape coast was the complete destruction of the vessel. This opinion was endorsed by representatives of the ship's owners, but they said that a decision of that magnitude would have to be taken by the South African Government.[10]

[10]Johannesburg Star, Mar. 1, 1971, at 1, col. 1.

Salvage efforts were begun with some prospect for success. Meanwhile, the Greek tanker *Amalthea* was racing to the scene to attempt to transfer some of the remaining 50,000 tons of oil from the *Wafra* to its tanks in an effort to increase buoyancy and afford the salvage tugs a better chance to pull her free.[11] On March 2, as salvage efforts showed little success, the American owner, Getty Oil Company, announced that it had given up all hope of saving the vessel and had abandoned salvage attempts. Moreover, the danger of an explosion became increasingly greater due to highly inflammable gases escaping from the cargo tanks. The vessel was considered a "giant bomb" which could explode at any moment.[12]

Negotiation Between the Government of South Africa and the Ship Owners

It was in the interest of the government to remove the ship, even if it subsequently became necessary to destroy it. If the ship could be salvaged by removing it from the reef, this was also in the interest of the owners. No salvage company would take the job on a "no cure–no pay" basis.[13] A contract guaranteeing a fixed remuneration not contingent on success was demanded by the salvor. The owners refused to incur such expense.

The government negotiated with the owners of the ship and cargo and, in a practical compromise to the problem, agreed that the government would hire the German tug, *Oceanic*, at a cost of $100,000 to pursue salvage efforts for 10 days. If salvage were successful, the ship and cargo would be retained by the owners. If not, the vessel would be destroyed, at sea if possible. In turn, the owners agreed to grant indemnity to the government, promising that whatever was done with the ship they would not institute actions for damages or compensation.[14]

After one week, pollution still continued and pressures for governmental action mounted. An editorial comment in the *Johannesburg Star* noted:

> The *Wafra* seems certain to cause a political storm that will do almost as much damage to the Nationalist Government as its polluting oil is doing to coastal waters and beaches. Already the clamour is growing that, not only has the Government been caught totally unprepared for a predictable oil tanker disaster, but that, now that one has occurred, it appears to have done very little to save the situation.[15]

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[11]Johannesburg Star, Mar. 8, 1971, at 1, col. 7.

[12]Johannesburg Star, Mar. 3, 1971, at 1, col. 1.

[13]The salvage contract in the *Torrey Canyon* was the usual "no cure–no pay" agreement in which the salvor is successful in obtaining remuneration only if he is successful in salving the ship. Success is a condition precedent to remuneration.

[14]Johannesburg Star, Mar. 6, 1971, at 1, col. 8.

[15]Johannesburg Star, Mar. 8, 1971, at 1, col. 6.

Finally, on March 9, the tanker was freed from the reef but was beyond effective salvage. The salvage captain was convinced that attempts to remove the oil to another vessel would be foolhardy because the air providing the temporary buoyancy for the ship was trapped under the oil; if the oil were removed the vessel would sink even more rapidly. Therefore, any attempt to remove the oil would probably result in the vessel sinking before any significant quantity was in fact removed.

The opinion of the salvage captain was unequivocal: saving the refloated tanker of the remainder of her cargo was out of the question, and the tanker must be sunk as soon as possible.[16] However, if the tanker sank before the oil was destroyed, the oil might still seep out. The only alternative was to try to remove the vessel to a point on the high seas where effects of pollution would be minimized, and then try to destroy the oil before the vessel sank. Accordingly, the *Wafra* was towed out to sea, attacked with missiles and depth charges, and finally, after three days, sent to the bottom.[17]

Appraisal

The single most important contribution which the *Wafra* disaster has disclosed is an alternative to intervention: a coastal state and the owners of the vessel and cargo realistically negotiating their differences to work out a mutually acceptable solution. While this consensual approach requires a state to expend some of its resources to reach a compromise position, it is doubtful that such costs, at least in a comparable situation, are disproportionate to the benefits received, especially in averting damage to coastal interests incurred while there is indecision, or in averting expenses which a state might incur if it subsequently became involved in extensive litigation to resolve these very issues.

Moreover, the approach provided a particularly pragmatic and appropriate solution in view of some of the potential questions which it mooted: (1) whether the vessel was in territorial waters or on the high seas (South Africa claims a 6-mile territorial sea);[18] (2) whether the facts warranted intervention; and (3) whether the towing of a ship 200 miles on the high seas, and then sinking her is within the lawful scope of the right of intervention.

Shipping interests should likewise consider negotiation as a realistic

[16]Johannesburg Star, Mar. 9, 1971, at 1, col. 7.

[17]Information provided the writer by Reuters Limited, 615 National Press Building, Washington, D.C. 20004 on Mar. 23, 1971.

[18]Article 2, Territorial Waters Act 1963, Government Gazette Extraordinary No. 87, July 12, 1963 at 2.

alternative. It has considerable practical appeal because it apportions some of the loss. This is especially important where the disaster occurs through no fault of the vessel. Furthermore, intervention only becomes a factor when other reasonable alternatives have failed. Hence, the risk of losing the ship is not appreciably greater than without such an agreement.

A state may argue, of course, that it need assume no additional expenses and that the loss should fall solely on the owners of the vessel and cargo, leaving them to protect themselves with adequate insurance. While this is a bona fide argument, if intervention can be eliminated by a reasonable compromise, a state may well find it to be in its best interests to seek negotiation. *A fortiori*, if a state offers to negotiate and its offer is refused, or a reasonable compromise cannot be reached, by having exhausted this alternative, its claim to intervene is considerably enhanced.

A second lesson to be learned from the *Wafra* disaster is that the traditional "no cure–no pay" salvage contract appears inappropriate in a maritime disaster where intervention is an issue because it may hinder efficacious decision-making. That contract requires successful salvage as a condition precedent to remuneration, and, in effect, places the salvor in the shoes of the owners in deciding how far to proceed with salvage efforts.

It thereby removes the owners, who usually have insurance on the vessel, one step farther from the decision-making process and compels the coastal state to deal with an additional participant, the salvor, who can only recover his costs if he succeeds. Though the coastal state shares with the owner the objective of successful salvage, it does not want to contend with a salvor who might insist on pursuing salvage when it no longer appears feasible, or when some other course of action becomes more appropriate.

The latter lesson was also evident in the *Torrey Canyon* disaster, where such a contract was made with the salvor. As salvage progressed, the time, expense, personal injury and even loss of life, all vested the salvor's interest so strongly in the vessel that his determination to proceed with salvage continued well beyond the time more objective observers deemed prudent.[19] The salvor's interests thus took on disproportionate significance and his rights to continue salvage became a major consideration for the British government.

By contrast, in the *Wafra* disaster the contract fixed the amount to be

[19]On March 26, 1967, eight days after the hull of the *Torrey Canyon* broke apart, opening formerly unruptured cargo tanks and pouring 50,000 tons of oil into the sea, the situation became hopeless. The salvage chief radioed his superiors in Holland that the *Torrey Canyon* had split in two and the stern was slowly sinking into deep water. "She must be considered a total loss," he reported. The salvor, however, elected to continue the salvage effort while the insurer simultaneously wrote the ship off as a "total constructive loss." Petrow, *In the Wake of Torrey Canyon* 104 (1968).

gained by the salvor, regardless of success. Thus it retained in the party which hired the salvor, in this case the government, the prerogative to continue or abandon salvage, without prejudice to the salvor. This permitted the government to evaluate the situation without opposition from the salvor and considerably enhanced the decision-making process.

The intervention problem as worked out in practice in the *Wafra* experience is illustrative of how all interests, both public and private, may have to make accommodations. In fact, the shipping interests, the insurers, the flag state and the coastal states all sustained a net loss in time and resources expended. However, because of these accommodations, when the decision to bomb was made, there was much less opposition to the decision, especially since the government had shared in the loss.

Because intervention is an extreme measure, it is incumbent on the international lawyer to probe continually for alternatives which will make intervention unnecessary or minimize its impact. The success of the owners of the *Wafra*, and the Government of South Africa in obtaining a negotiated agreement, is most promising and certainly should encourage exploration of this and other alternatives in future intervention situations.