LEGAL ASPECTS OF THE 1973 MARINE POLLUTION CONVENTION: COMMENTS AND REFLECTIONS

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INTRODUCTION

At the outset, I must emphasize that this paper is, as the full title indicates, a composite of comments and reflections on the legal aspects of the International Convention for the Prevention of Pollution from Ships, 1973. It is no more than that. It does not aspire to be a scholarly work nor is it designed to be a practical guide for lawyers unacquainted with the convention. Rather, this paper contains an unofficial, somewhat personal view of the convention and the negotiations which led to its adoption by an international conference. While my view is that of a participant in both preparatory sessions and the conference itself, time and practical constraints must limit its expression. This paper is for nonlawyers, especially those who have no intimate knowledge of the convention's provisions. Thus, it is geared for the majority in attendance at this API/EPA/USCG conference.

I intend with this paper to illuminate the convention's legal aspects through sampling the reach and the features of the convention's provisions. A comprehensive treatment of legal aspects would, of course, consume many pages, require a plethora of footnotes, and could only be prepared after painstaking research. But even if such a paper were prepared, any conclusions beyond identifying and defining the issues would be in most respects premature. The 1973 convention is a lengthy, complex, highly technical, somewhat innovative legal instrument. Its provisions, viewed against the backdrop of existing international law and prospective developments in law of the sea, raise a multitude of questions which only time, study, unilateral determinations, and multilateral negotiations can answer.

William O. Gray of Exxon Corporation, in his excellent conference paper, The 1973 IMCO convention: A tanker operator's viewpoint, has addressed the convention in broad terms, devoting special attention to its technical requirements as applicable to oil tankers. Mr. Gray's paper illustrates how the convention intertwines the legal aspects—e.g., enforcement, inspection, port entry—with construction and equipment standards. My paper may be characterized as viewing the same object—the convention—from another angle through a set of differently polarized optics. Thus, the two papers are complementary, and a student of the convention should read both, as well as any number of other articles which are now emerging in a wide range of publications.

What's in a name. The International Convention for the Prevention of Pollution from Ships, 1973, is sometimes termed the 1973 IMCO convention and sometimes the 1973 marine pollution convention. Neither term is precisely correct. As to the first, the international conference which elaborated and adopted the convention was plenipotentiary (thus sovereign) in nature, convened at the invitation of the Intergovernmental Maritime Consultative Organization (IMCO) but by no means limited in attendance to those governments which were members of IMCO. (Membership in IMCO is open to any member of the UN but only eighty-odd states to date have found it sufficiently in their interests to become IMCO members and pay the dues which thereby accrue.) And as to the second short title often given the convention, the 1973 marine pollution convention (a title I myself prefer, however imprecise it may be), the inclusion of "1973" makes it workable. There are, after all, a number of conventions developed during recent years which qualify as "marine pollution" conventions. These other conventions constitute most of the other parts of what may be considered a comprehensive scheme for attacking the marine pollution problem in all its aspects. And what is missing from this scheme is under development now; i.e., (1) those provisions of the law of the sea convention which will apply to marine pollution and (2) amendments to the 1973 convention which are already contemplated to fill the gaps which necessarily arose in the convention, as adopted, from time and resource constraints.

A family of conventions. Prior to the marine pollution conference in October 1973, a number of conventions were developed under IMCO auspices which are constituent pieces of the comprehensive international scheme for controlling marine pollution. The 1969 intervention convention would authorize a state to intervene in cases of marine casualties on the high seas involving oil if that state's coastlines or related interests are endangered. The 1969 civil liability convention would assign strict liability to the owner of a vessel carrying oil, limiting his total liability for a single incident to $14 million, unless the incident giving rise to liability is the result of "actual fault or privity of the owner," in which case liability is unlimited. The 1971 compensation fund convention would create an international fund, financed through contributions levied on states which import oil, to provide "compensation for pollution damage to the extent the protection afforded by the Liability Convention is inadequate." The 1972 ocean dumping convention, adopted by a conference convened at the invitation of the United Kingdom, *not* IMCO, prohibits or closely regulates the deliberate disposal at sea of certain dangerous or potentially dangerous substances. The 1973 marine pollution convention, as previously indicated, fits into this mosaic of developing international law which addresses marine pollution, as will specific provisions of the law of the sea convention now under development by a series of international conferences under auspices of the UN General Assembly. Whether this mosaic will become a well-proportioned and rational whole, with concisely fitted rather than overlapping or conflicting component parts, remains to be seen. Clearly, this family of conventions (hopefully a family in which disparate interests can be satisfied) represents a framework of international law which must be taken into consideration if the legal aspects of the 1973 convention are to be understood.

Preparation and adoption

In contemplating the legal aspects of the 1973 convention, another essential factor merits attention; i.e., the set of mechanisms by which the convention was elaborated and adopted. The preparatory work was accomplished by several constituent bodies of IMCO, including the Maritime Safety Committee (MSC) and its subcommittees (particularly the Marine Pollution Subcommittee and the Subcommittee on Ship Design and Equipment) and the Legal Committee. This was painstaking work over a period of more than three years, involving preparation of a series of draft conventions (each succeeding the previous one) and a number of technical studies designed to serve as the basis for enlightened technical decisions. The fifth and final draft convention, buttressed by nine studies, served as the basic working document for the 1973 conference itself. The MSC technical subcommittees attempted to resolve the technical questions to the maximum possible degree and, together with the Legal Committee through an iterative process of referral and response, also developed draft articles and regulations dealing with the convention's legal aspects. The draft convention placed before the conference contained many alternative provisions, identified hundreds of issues which only the conference could resolve, and included many footnotes which contained minority views advanced during the preparatory work. Yet, the basic outlines of the convention were distinct and were unaltered by the conference in developing the convention in final form. The draft convention consisted of the articles, which would establish the rights and general obligations of contracting states, and a set of five technical annexes containing regulations which would implement specific standards, requirements, and prohibitions for the several types of pollutants addressed. But for the concentrated, well-focused preparatory work in IMCO fora, the 1973 conference could not have completed its work in the alloted four weeks in October and November 1973.

Nonetheless, the character of the conference itself did pose significant problems in achieving a meaningful product. The IMCO preparatory sessions had approached the convention as an integrated whole, attempting to fit the technical infrastructure to the implementing mechanisms and envelope of rights and obligations necessitated by treaty law. But, at the conference, three committees were formed to deal with the several parts of the convention, one committee for the articles, two committees for the technical annexes. While the committees dealing with the technical annexes were well manned by those who had participated in IMCO preparatory sessions, the committee dealing with articles was comprised largely of delegates who had little intimate knowledge of the preparatory work but who, in many instances, had previously been engaged in law of the sea (LOS) negotiations and anticipated further delicate and concentrated LOS negotiations after the marine pollution conference had passed into history. Thus, the articles and annexes contained in the draft convention, carefully balanced and integrated through months of laborious preparatory work, were approached on two different bases. While the annexes were tackled in an effort to resolve issues but not to tamper with the basic regulatory framework, the articles were considered as mere recommendations–a point of departure. No proposal, however divergent from the pattern offered by the draft articles or however inconsistent with the draft annexes, was considered inappropriate. In essence, a new set of builders were prepared to demolish the framework of articles already erected and take their chances on erecting an entirely new legal structure from scratch in the time alloted.

As the conference progressed, the constraints of time and the collective view that a convention was both desirable and achievable seemed to convince the committee on articles that starting from scratch was neither productive nor practical. Yet, while the pattern of the draft articles was thereafter followed, disparities developed between article provisions and technical regulations which were never entirely mended. Thus, in considering legal aspects of the convention, some anomalies and some vagaries may be understood only when taking account of the organizational mechanisms employed by the conference itself, as contrasted to the integrated, purposeful approach adopted in the IMCO preparatory sessions.

The 1954 convention. Finally, by way of background, the inadequacies of the International Convention for the Prevention of Pollution of the Sea by Oil, 1954, as amended (presently and prospectively), were a major focus of those determined to develop a convention which would represent real progress in protecting the marine environment. In simplistic terms, experience with the 1954 convention, even taking into account the 1969 and 1971 amendments which are yet to come into force, suggested a number of major shortcomings. (See Mr. Gray's paper for a description of these amendments.) These shortcomings included insufficiently stringent discharge standards, failure to specify measures to prevent discharges nominally prohibited, inadequate authority to inspect ships in port, and enforcement power vested only in the flag state. These and other shortcomings of the 1954 convention were the basis for many proposals which, taken together, were designed to make the 1973 convention strong, comprehensive, and enforceable law which would significantly impact upon the marine pollution problem. That the 1954 convention was inadequate, given ultimate coming into force of the 1969 and 1971 amendments, was by no means accepted by all delegations to the preparatory sessions, but the ensuing debate led to structuring of the draft convention so as to refine the issues and to present conflicting views with clarity in order to facilitate conference decisions. (See table 1 of Mr. Gray's article for a comparison of the 1954 convention, as amended in 1962, with the 1973 convention.)

Jurisdiction–refer and refrain

Two aspects of jurisdiction arise from the convention as issues to be resolved. One aspect, "the nature and extent of States' rights over the sea," was specifically referred to the law of the sea conference for resolution. The second aspect, applicability of the convention in internal waters, was not settled at the conference. In fact, it was not explicitly addressed.

Early in the preparatory work, the issue of "States' rights over the sea" was identified as properly left to resolution by a plenipotentiary conference, either the 1973 marine pollution conference or the conference developing a comprehensive convention on the law of the sea. As a consequence, the draft convention contained terms designed to be neutral in thrust, while in each instance an indication was provided that the issue was unsettled. The conference itself elected to adopt language neutral in character (e.g., within, under, or in "its jurisdiction" rather than use of terms such as "territorial sea," "patrimonial sea," etc.) which would be adaptable for use either under existing international law or under an evolution in international law which would be made manifest in a new law of the sea convention. To remove all doubt, the conference adopted an article provision (article 9, paragraph 2) specifically declaring that nothing in the 1973 convention "shall prejudice the codification and development of the law of the sea by the United Nations Conference on Law of the Sea" nor the "present and future claims and legal views of any State concerning the law of the sea and the nature and extent of coastal and flag State jurisdiction." Finally, the conference adopted Resolution 23 which declares that "the decision of the present Conference reflects a clear intention" to leave the question of "the nature and extent of States' rights over the sea" to the LOS conference.

It seems fair to observe that the above-described decisions mean that the 1973 convention is subject to substantial change *ex post facto* as to its application and effectiveness, and this without amending a word of the convention as adopted in November 1973. Commenting further on this aspect is beyond the scope of this paper. Students of the 1973 convention, however, are urged to follow closely the Law of the Sea negotiations as they evolve in the field of marine pollution.

The second jurisdictional aspect deserving of attention here is the applicability of the convention to the internal waters of a state. On this issue the conference refrained from a determination except for certain specific provisions pertaining to ports. One can speculate on the reasons. Perhaps some delegations saw no need to raise such an issue because they presumed that others shared their view. Perhaps others, mindful of the issue and understanding its implications, preferred to avoid debate, leaving any difficulty which might arise to unilateral resolution in consonance with accepted principles of international law. Suffice it to say that whatever the reasons, other

considerations at the conference precluded a resolution of the "geographic scope of the Convention" (as the issue has been termed in some quarters) and that arguments are available to support either a narrow or a broad application of convention provisions. It is reasonable to predict that the subject will be addressed within and among governments as the acceptance (ratification) process evolves in prospective contracting states.

Violations

The 1973 convention prohibits discharges containing pollutants in amounts exceeding prescribed limits and requires record keeping (e.g., an "oil record book") which can be used to demonstrate whether or not discharge limitations were met. Additionally, the convention contains comprehensive regulations prescribing construction and equipment standards and operating procedures designed to prevent prohibited discharges. Such regulations are a step beyond the 1954 convention, which prescribes only discharge limitations and record keeping. At the 1973 conference, however, *sanctions* were the issue; what should constitute a violation subject to penalty? Ultimately, after debate, the conference decided that all violations of convention requirements should be prohibited and subject to penalties severe enough to discourage such violations. The convention leaves to each contracting state the establishment through national legislation of penalty schedules which will meet the test of "adequate in severity to discourage violations." In an effort to encourage reasonable comparability of penalty schedules among states, the conference adopted a requirement that states submit annually to IMCO a statistical report "of penalties actually imposed for infringement" of convention requirements. Through this device, some measure of uniformity in penalties for comparable violations should be achieved.

In reflecting on this provision of the convention, one may wonder why *any* debate should occur; how could a regulatory scheme be expected to work without sanctions coupled to failures to meet requirements? Yet, some delegations at the conference argued strongly that *only* violation of discharge limitations should be subject to penalty, a concept even weaker than that of the 1954 convention, which at least made failure to meet record keeping requirements subject to penalty. In other words, these delegations were prepared to accept any number of requirements buttressed only by a moral obligation to comply, but they drew the line at penalties except in the realm of discharge limitations. Fortunately, such a view did not prevail, and for those requirements the convention imposes, contracting states will be obligated to enact a schedule of penalties to encourage compliance.

Authority to inspect

A notable weakness of the 1954 convention is the absence of a provision authorizing a state to inspect foreign vessels in its ports for compliance with convention requirements. The 1973 convention includes provisions which would enable a state to inspect foreign ships within its ports, although such authority seems carefully circumscribed. For instance, "Any such inspection shall be limited to verifying that there is on board a valid certificate, unless these are *clear grounds for believing* that the condition of the ship or its equipment *does not correspond substantially with the particulars* of that certificate" (emphasis supplied). The legal import of "clear grounds" in this context may be determined only through a laborious series of cases, if at all. In common law terms, "clear grounds" seems to lie somewhere between "the reasonable man" and "clear and convincing proof"; just where on the spectrum, if a spectrum exists, remains to be determined. How noncommon-law states will construe "clear grounds" and whether some reasonably consistent international practice will evolve under such a standard are questions which, at present, can evoke only speculation.

A companion provision to that described above states that a ship "may, in any port or offshore terminal of a Party, be subject to inspection by officers appointed or authorized by that Party for the purpose of verifying whether the ship has discharged any harmful substances in violation" of the regulations. The juxtaposition of this provision and that discussed just previously provokes some confusion; does the second provision open doors which the first provision purported to close? Verifying whether or not a ship has made prohibited discharges might require a far more searching inspection than that necessary to verify the presence of a valid certificate on board, and the former has no "clear grounds" limitation.

Whatever the authority to inspect, a sanction against "undue delay" is contained in a companion article. If "unduly detained or delayed," a ship "shall be entitled to compensation for any loss or damage suffered." Perhaps this provision will serve to discourage abuse of inspection authority, as it was no doubt designed to do. Yet doubt arises. Would not the same state which allegedly unduly detains a ship provide the forum where compensation claims would be litigated? Assuredly there are alternatives to this, but given the likely circumstances, forum shopping becomes difficult.

Flag state enforcement

A criticism often leveled at the 1954 convention was its limitation of enforcement powers to the flag state where an alleged violation occurred on the high seas, a limitation which demonstrably promoted ineffectiveness in the view of many parties to that convention. In the preparatory sessions for the 1973 conference, a number of proposals were advanced to avoid this debilitating feature in the new convention. Chief among these was a "port state enforcement" scheme, which would authorize a state into whose ports a ship entered to institute proceedings against the ship or master for violation of convention requirements, no matter where the violation had occurred. The port state would be expected to notify the flag state of its prosecution, but the flag state would have no right to preempt with its own proceedings.

At the conference, majority opposition to the port-state enforcement concept became evident during debate. While some delegations expressed alarm at such an innovative, even revolutionary, principle, most opponents seemed to base their opposition upon the prejudicial effect which adoption of the port-state concept by the 1973 conference would have on law of the sea negotiations downstream. In effect, such an action would foreclose a negotiating option at the LOS conference. Whatever the basis, the conference rejected port-state enforcement for the 1973 convention, adopting instead a flag-state enforcement scheme somewhat strengthened over that contained in the 1954 convention. Given the LOS-related reasons probably responsible for the decision, however, it is possible that a port-state formula may ultimately be utilized to enhance 1973 convention enforcement.

Other aspects

Many other legal aspects of the 1973 convention merit consideration. Among these are the dispute settlement machinery, the provisions for bringing the convention into force and amending it, denial of entry into port, and application of the convention to ships of noncontracting states. But, as announced in the introduction to this paper, my purpose has been to illuminate through sampling. To proceed further, it would appear, would provide a surfeit of samples and obscure the conclusions which now can fairly be drawn.

CONCLUSION

The 1973 marine pollution convention is a legal instrument with great potential to curb the pollution of the oceans which continues to occur under existing international law. It seems technically sound, though not without flaws, and appears legally sufficient, in some aspects even surpassing mere sufficiency. Given a patient, workmanlike attitude on the part of its advocates in seeking solutions to unresolved problems and provided developments in law of the sea do not impair its strengths, the 1973 convention should serve well its intended purpose. But in all its aspects, technical and scientific, legal and administrative, problems abound. Efforts to solve those problems are well under way in IMCO and among governments, unilaterally and bilaterally. The most apparent of these efforts are dedicated to solving problems arising from the technical aspects of the convention. But if this paper has achieved its purpose, it will be

evident that legal aspects, too, give rise to many uncertainties, much interpretive flexibility, and latently crippling debilities. Unless governments address these aspects in a spirit of compromise and with a sense of purpose, the 1973 convention may prove to be little more than a multilateral promise of improvement in the condition of man and his environment.