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What really is meant by a ‘Substantial Threat’ of Pollution? - an examination of the term’s meaning in the United States and elsewhere

Frank J. Gonynor

Senior Claims Advisor/Lawyer

Gard (North America) Inc.

40 Fulton Street, 16th Floor

New York, New York 10038

Erika Lindholm

Lawyer

Gard AS

P.O. Box 789 Stoa, 4809 Arendal

Norway

ABSTRACT 2017-392

The term ‘substantial threat’ appears in the statutory text of the US Oil Pollution Act of 1990 (OPA 90), and has played a key role as an important triggering mechanism for the operation of the Act in many prospective spill events. Yet this important term is not defined at all in the Act itself.

This paper examines the meaning of this term, looking at other sources of possible definition, including plain language/dictionary meaning, court cases, the decisions of the US National Pollution Funds Center, and other materials.

One way to define ‘substantial threat’ of pollution would be a situation where the risk of a spill is greater than the normal risk posed by a particular vessel in a particular place – but this paper will examine if that possible definition fits with the actual practice and experience

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of the term. In order to attempt to address that question, we will examine how the US Coast Guard has used this concept in cases in recent years.

The statutory concept of ‘threat’ is also used outside of the US, and the second full section of this paper continues with a discussion of how this concept exists in other countries as to their approach to possible spill events, and how that may differ from the US approach.

The conclusion from the examination of US and non-US terms is that the current ‘ad hoc’ use of the term, without a rigid meaning, is the best approach.

INTRODUCTION

An ounce of prevention is worth a pound of cure - Benjamin Franklin

It is almost axiomatic that the best result in combatting marine oil pollution is to prevent it from ever happening at all.

The shipping community and its government regulators, not only in the US, but throughout the world, have taken that concept and tried to make it the overriding reality, and have done so with much success. Statistics show that in the last 40 years or so, the number of reported marine oil pollution incidents has fallen significantly.

Current statistics reported by the International Tanker Pollution Federation (ITOPF) support the observation that the number of large spills, from 1970 to 2015, have subsided in numbers dramatically, with average spill quantities likewise also dropping with each decade.

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This is despite the fact that in that same time period, seaborne carriage of oil has increased, which one would presume would lead to more possibility of oil spillage.

The influence regimes such as OPA 90 and the CLC Convention have had on the reduction in the number of oil spills is difficult to determine. However, the efforts to clarify ship owners' legal liabilities prior to an oil spill have most likely contributed to the positive trend as the regimes have led to quicker responses and more efficient clean-ups. Also, additional factors of better ship design, improved ship management techniques, other additional new safety regulations, commercial vetting procedures by ship charterers, and higher crew training standards, likely have also positively impacted the rate of oil spill incidence.

DISCUSSION

So, the prevention of spills is the optimal solution to marine oil pollution. But the reality is that oil spills at sea still occur. Thus another industry/regulatory joint effort has been assembled to create and/or enhance the capability to remove spilled oil from the environment once it is discharged. Much time and money has been spent in the US and elsewhere in the creation of resources for oil spill response and cleaning, through various modalities and means, e.g. prevention of the spread of spills through containment booming, mechanical removal via skimming, use of the application of dispersant chemicals on oil slicks, the development of 'in situ' burning techniques in open water locations, and the evolution of techniques and machinery for picking up oil once it has made landfall.

But early on there was the recognition of the 'middle case', namely incidents where oil has not actually spilled from a vessel, but it is perceived that there is an extraordinary risk

that such a spillage may happen, due to natural or manmade factors, or both. The classic example is a ship that finds itself grounded in a place where either poor weather or a rocky seafloor, coupled perhaps with the inability to safely re-float the ship, meaning that there is then a distinct probability that an oil spill, of fuel and/or cargo, may occur.

Instead of simply standing by to wait and see what might happen, vessel response planning practices provide that in such instances, the government, the vessel interests, and even other stakeholders connected to the particular venue, have the obligation and/or the right and

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need to take action, to prepare for the possible likely spillage, before it actually happens.

Such actions would fall into two categories. The first are those actions that will attempt to prevent the ship from spilling oil, such as pumping oil within the ship to internal spaces as far as possible from the point where the hull is grounded, up to and including more active external salvage intervention techniques.

The second category of action would be to establish a response organization that will mobilize anti-pollution equipment and personnel, stationing them in such places as to effectively address spilled oil along its predicted trajectory of movement, ensuring that an abatement operation can be started without delay, as soon as, and if, the spill from the ship occurs. In this manner, the effectiveness of the eventual clean-up effort is enhanced by having in place the needed resources to immediately address the pollutant, avoiding the time of delay in getting to the location by taking such prior action. It also follows that by spending time to evaluate the possible spill and its potential impacts beforehand, this would allow time for the

formulation of more considered and efficient tactics to be implemented, hopefully resulting in a more effective clean-up effort, removal of the spilled oil more quickly and in a higher percentage of removal.

As will be seen, this concept of pre-emptive action is not only endorsed, but is mandated by laws regarding marine oil pollution. OPA 90, 33 United States Code Sections 2701-2751, recognizes that this type of threat situation calls for action.

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At section 2702, liability for oil spills attaches when there is a discharge of oil, or in a situation which "...poses the substantial threat of a discharge of oil, into or upon the navigable waters or adjoining shorelines or the exclusive economic zone, is liable for the removal costs and damages...".

Section 2701 of OPA 90 does not define either the words 'substantial' or 'threat' *per se*, either singly or the pair together as a phrase. There is mention of that phrase in other definitions, bolstering its importance in the statute. Definition (14), 'incident', includes "...substantial threat of discharge of oil". Definition (31), 'removal costs', includes "in any case in which there is a substantial threat of a discharge of oil, the costs to prevent, minimize, or mitigate oil pollution from such an incident".

The examination of the words 'substantial' and 'threat' should therefore be given their plain meaning, as no special meaning was assigned to them in the statute itself, as stated by the US Supreme Court in *FDIC v. Meyer*, 510 US 471,476(1994). According to the Oxford English Dictionary, 'substantial' has two applicable meanings, 'of considerable importance, size, or worth', and 'real or tangible rather than imaginary'. In that same dictionary, the word

‘threat’ means ‘a menace of bodily harm’, ‘a person or thing likely to cause damage or danger’ or ‘the possibility of trouble, danger, or ruin’. Fn. 2.

Taken together as a phrase or term, ‘substantial threat’ would thus seem to mean something that is not just a mere possibility, but instead a real chance that something will cause definite damage. This would be in contrast to a possible ‘risk’, which said word is only ‘a possibility of harm or damage’.

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In other words, every ship that carries oil aboard, either as cargo or fuel, in any setting or time, has the conceivable chance or possibility that the oil inside could somehow escape, though mechanical failure, human error, or Act of God, yet this is not a sufficient cause to trigger the operation of the vessel response obligations under OPA 90, or else there would be a perpetual and ever-present oil response operations surrounding every vessel at all times – an unsustainable and absurd level of action, and an unnecessary commitment of valuable and costly resources.

Instead, the view has been that there must be an occurrence that is a potentially causative factor of a pollution, above the normal operating parameters and conditions of a vessel. This is alluded to in some federal agency materials on this issue. The National Pollution Funds Center (NPFC), an agency of the US Coast Guard established by OPA 90 to administer the Oil Spill Liability Trust Fund, which is a source of money for spill clean-up and damage claims in certain situations (see 33 USC sections 2712-5), discusses this in their ‘Glossary’ of terms for administering the Fund, where it is stated that a “substantial threat of a discharge - not all oil incidents result in oil actually spilling; a threat of a discharge refers to

situations in which most likely oil will spill unless someone tries to stop it. OPA allows you to submit claims for these situations as well.” Fn 3.

In that definition, the NPFC removes the actual word ‘substantial’ from the definition, in as much as it is then defining it for the reader using some other words, namely “...situations in which most likely oil will spill unless someone tries to stop it.” It can be seen that the NPFC chooses to use the descriptor term ‘most likely’, meaning a situation, according to Oxford English dictionary, that ‘well might happen’, and is ‘probable’. It also introduces the notion that the threat must be of a type that is one where human intervention is called for in the

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situation, alluding to a possible remedy, but also that if it does not require someone to act, then it is too remote and unlikely and thus does not fall within the ambit of the definition.

This places upon the definition of the term ‘substantial threat’ two aspects – a practical one, in that it only applies to situations where it is likely or probable that an oil spillage may occur, and then also with a facet of uncertainty, in that whether something is likely or probable is a subjective term, that can vary from person-to-person and in time and place. While that allows for human judgment to tailor its use to each particular situation, it also opens the possibility for dispute between parties as to whether this triggering term has been properly applied to a given set of facts.

This is in stark contrast to actual spill incidents, where the physical presence of oil outside of the vessel that contained it is a clean and tangible signal that OPA 90, and the vessel response plans engendered by same, should then operate in earnest. Yet the ill-defined line of action/inaction offered by the term ‘substantial threat’ must be used, because the

potential gains of early, proactive actions to address a potential spill can offer a significant chance of lessening a spill's impact and its presence in the environment, and reduce the damages that such spilled oil might wrought on the local ecosystems it touches.

How have US authorities and courts dealt in the past with situations that they view as 'substantial threats', which assists in determining the real and practical meaning of that term?

Courts seems to be favourable in identifying and taking action in the 'substantial threat' situations, and this includes monitoring ('watching and waiting') by the US Coast Guard during such episodes, with the costs associated for the same to be paid by the vessel interests [*US v. Hyundai Merchant Marine Co.*, 175 F.3d 1187(9th Cir. 1999)].

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The USCG can then take action when they believe the risk of pollution needs preventive intervention, and again be paid by vessel interests for costs associated with same [*Alabama State Docks v. Compania Antares de Nav.*, 1999 AMC 309(U.S.D.C.-S.D. Al. 1998)].

This is particularly supported when the USCG ascertains that there is "...an immediate and substantial threat of discharge of oil." [*emphasis added - US v. Mare Island Sales, LLC*, 2008 US Dist. LEXIS 85339 (E.D. Calif. 2008)].

Courts have evaluated the concept of 'threat' not only by the situation of the position of the vessel, but also its location relative to another source of oil spillage, e.g. oil pipeline, its proximity to an area of particular ecological importance, e.g. tidal wetland or national wildlife refuge, and the propensity for conditions to deteriorate in the short term. [*US v. Brothers Enterprises, Inc.*, case no. 1:13-cv-00017, USDC- ED Texas – 2015].

US government agencies, such as the US Fish and Wildlife Service, evaluate such cases in the same way, when asking for funds to restore an area damaged by a grounding of a vessel, such as in ‘Restoration Plan for the Goodrich Barge Grounding, Delta National Wildlife Refuge, Plaquemine Parish, Louisiana, prepared in January, 2014.

Government agencies also tend to look at ‘substantial threats’ in the longer term, regarding vessels that were sunk many years ago, containing oil as fuel or cargo, and now are being evaluated as to the risk posed. If this risk is at the level of a ‘substantial threat’ or imminence a subsea oil retrieval operation, removing the oil from the sunken wreck, is justified. Such operations can be quite costly, and due to the long intervening time period, there may not be an extant vessel owner to pay such costs (in such cases, application might be made

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to the USCG National Pollution Funds Center, for payment from the Oil Spill Liability Trust fund, intended for situations of defunct vessel owners). Fn. 4.

So, while it is apparent that the concept of ‘substantial threat’, as seen within the context of OPA 90, is a useful and necessary, but also an imprecise term, it may be instructive to see how other nations have likewise considered or used this same notion.

Comparative analysis – The CLC Convention

An international cooperation was started in the 1950s in order to prevent marine oil pollution and there has been a constant development in the field since the 1950s with global and regional conventions in order to protect the marine environment from oil pollution. Fn.5. After the *TORREY CAN YON* incident in 1967 (Fn. 6.), it was identified that there was a need

to create an international system on how to regulate liability and compensation after a major pollution incident, and later the same year the International Maritime Organization (IMO) started the process of regulating the area. The work resulted in the International Convention on Civil Liability for Oil Pollution Damage from 1969 (CLC Convention 1969) and the 1971 Fund Convention. Fn 7.

The purpose of the CLC Convention is to ensure that adequate compensation is available to persons who suffer oil pollution damage resulting from maritime casualties involving tankers. Fn. 8. The conventions were revised during the 1980s as it was considered that the limits of liability were too low.

The US was part of the international convention that was held in London in 1984 when the two new conventions were approved. However, the 1984 Protocols were too controversial and due to the *EXXON VALDEZ* in Alaska in 1989, it became politically impossible to ratify the

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protocols. An independent national legislation which was stricter than the CLC and Fund Convention was preferred and the OPA 90 was enacted. After it became clear that US would not ratify the Conventions, a diplomatic conference was organised in 1992 where the 1984-versions were amended for the Conventions to be able to be ratified without the US. Fn.5, p.23.

To date, 34 Member States have ratified the 1969 CLC and 134 Member States have ratified the current 1992 CLC. Fn.9. Thus, different legal regimes will be the basis for pollution liability within the CLC Contracting States. Above, we have discussed the concept of 'substantial threat of pollution damage' according to OPA 90. The wording 'substantial threat' cannot be found in neither the 1969 CLC nor in the 1992 CLC text. In contrast, the

CLC defines what constitutes an 'incident' which would trigger the Convention. Subsequently, the term 'grave and imminent threat of pollution' was added to 1992 CLC. The phrase 'grave and imminent threat of pollution damage' is subjective and it is likely that different Contracting States would interpret the term differently. Nonetheless, an attempt of analysing what would constitute an 'imminent and grave threat' will be carried out below.

Scope of CLC - liability of the shipowner

The texts of the 1969 and 1992 CLC differ to some extent but both apply to oil pollution damage caused in the territory (including the territorial sea) of a contracting state (Article II). It can be noted that 1992 CLC extends the scope of application to the exclusive economic zone of a Contracting State (or similar area if not established by the state).

The registered shipowner is liable for "pollution damages caused by the ship as a result of the incident" as defined in Art III.1 of the Convention. The term 'pollution damage' means

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a loss or damage outside the vessel which has been caused by contamination of oil (Art.I.6).

The Conventions also includes a definition of 'preventive measures' but the wording is slightly in the 1969 and the 1992 Conventions. In Art. II (b) of CLC 1992, the text was altered to state "to preventive measures, whenever taken, to prevent or minimize such damage" [emphasis added]. Thus, the shipowner is liable for actual pollution damages and in general and all qualified damage claims are accepted. Fn.10. Claims for preventive measures and oil recovery operations when there has been actual pollution damage shall be compensated by shipowners. However, in practice, the assessment and qualification of the

damage to the marine environment can be problematic. Depending on whether the national legislation provides a legal right to claim for marine environment damage and provided that the claimant can show that an assessable economic loss has been suffered, such claims can be compensated, otherwise not. Environmental damage claims for non-economic loss are only recoverable to the extent that they relate to reasonable measures. See Fn.10, p.568. Thus, preventive measures are generally to be compensated by shipowner, if they are a consequence of an 'incident'.

Incident

In the majority of cases where oil has accidentally escaped or been discharged from a ship causing pollution damage, there is no controversy that an 'incident' has occurred.

Fn.11. Reasonable costs for preventive measures are also recoverable, as long as they have been incurred after the incident happened according to Article I.6 and I.7 of 1992 CLC.

However, it can be discussed if there has been an 'incident' in the event there has not been any pollution damage. What happens with recovery claims for preventive measures taken to

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mitigate potential pollution damage, if the actions taken are so successful that there is no oil spill?

Under the 1969 CLC, one could argue that the incident only occurred when and if there was an actual escape of or discharge of oil. The definition of the term 'incident' was debated in connection to the *TARPENBEK* (1979) collision. The tanker *TARPENBEK*, loaded with about 1,600 tons of different lubricating oil, collided with *SIR GERAINTE* off Selsey Bill in thick fog, off the south coast of the United Kingdom. Fn.12. The *TARPENBEK* capsized

three days after the incident but the cargo tanks were not damaged and there were only some light diesel fuel from the damaged fuel tanks spilled into the sea. The oil was dispersed by detergents. The vessel was towed to the Isle of Wight and most of the cargo was pumped out of the vessel in a lengthy and tricky operation, however, no formal claim had been received for pollution damage by the end of 1979.¹ Shipowners funded the operation and the costs were in excess of the ship's 1969 CLC limitation fund, so the P&I insurer brought the matter to the IOPC Fund. During the negotiations, it was discussed whether or not the *TARPENBEK* case constituted an 'incident' or not under the 1969 CLC. This matter was settled in 1986 (Fn. 13), so there is no court ruling determining if the event constituted an 'incident' but the case highlighted that the definition of 'incident' could work in an unsatisfactory way and needed to be clarified. Fn.14.

Interestingly, when the new CLC Convention entered into force in 1992, the definition of 'incident' as specified in Article I.8 had been slightly altered. An 'incident' is now defined as “any occurrence, or series of occurrences having the same origin, which caused pollution

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damage or creates a grave and imminent threat of causing such damage” (new wording in bold). Thus, it seems that the scope has been widened so that the 1992 CLC Convention also

¹ International Oil Pollution Compensation Fund, Report on the activities of the International Oil Pollution Compensation Fund during 1978 and 1979, page 3.
http://www.iopcfunds.org/uploads/tx_iopcpublishations/1978_1979_ANNUAL_REPORT.pdf

includes reasonable measures taken in order to prevent pollution damage, if there was simply a 'grave and imminent threat' of such event to occur. The question is consequently, when is there a 'grave and imminent threat'?

Grave and imminent threat

The tanker *SANTA ANNA* grounded on rocks off the south coast of Devon, UK in 1998 and this event was later agreed to be defined as an 'incident' in accordance with CLC 92. Fn. 11, p.94. Even if the tanker was in ballast, it still contained about 270 tonnes of heavy fuel oil and 10 tonnes of diesel oil in the bunker tanks when she grounded. As a consequence of the grounding, several of the cargo tanks were damaged. Luckily, the vessel was successfully refloated and there was no escape of oil from the vessel. The UK authorities sought to recover their costs for pollution combat equipment and surveillance aircrafts that had been mobilized in order to respond to potential escape of persistent oil from the vessel. This situation was accepted to have been a 'grave and imminent threat' of pollution damage by the shipowner, insurer and the 1992 Fund and the claims were reimbursed. Fn. 15.

Another example of an incident, where no persistent oil was spilled but the 1992 Fund considered that there was a 'grave and imminent threat of pollution damage', was in the *MILAD I* incident in 1998. The tanker was off the coast of Bahrain, carrying 1,500 tonnes of mixed diesel and crude oil and had developed a crack in its hull. Fn.16. Six days after the USCG had stopped the vessel, they reported that the crack had increased to three meters. Fn.17. A salvage tug was

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mobilized to standby for emergency repairs but the vessel was moved to a more central location in the Persian Gulf, where the oil was discharged without any oil spill and need for emergency repairs. Fn. 18. The 1992 Fund concluded that in this particular situation, in light of the critical condition of the vessel and the current wind conditions, the requirements for 'grave and imminent threat of causing pollution damage' had been fulfilled. The 1992 Fund also concluded that it had been a reasonable preventive measure to send the repair team even if no repairs actually had been undertaken by them.

In these cases, the 1992 Fund concluded that there had been a 'grave and imminent threat of pollution damage'. However, all matters were evaluated *in situ*, taking into account the particular facts of the case, where the vessel was situated, if there was a danger that persistent oil would leak in the sea and if the preventive measure taken had been reasonable or not. The IOPC Fund has created a claims manual to set out procedures for when claims are admissible and can be compensated. Fn.19. Courts have nonetheless exclusive jurisdiction to decide regarding compensation in the state where the 'pollution damage' has occurred, and have the right to interpret the CLC/FUND regime according to their national legal system. Fn. 19, page.578. Courts are not legally bound to follow the FUND criteria, but courts regularly tend to implement the same principles.

Exclusive jurisdiction by the Contracting States might therefore lead to variations in the understanding of when there is an imminent and grave threat of pollution damage. First of all, the Contracting States could have either monist or dualist legal systems, influencing how the national laws are drafted. Monist countries usually gives direct effect of international

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conventions in their original text, where dualist countries implement legislation by trying to make the convention text compatible with national legal concepts and procedures. This could lead to some variations in the meaning of terms, even if those were unintended by the drafter. Secondly, imprecise terminology allows national courts to interpret phrases such as 'imminent' and 'grave' in different courts, even within the same country, so there can definitely be variations between Contracting States. The third aspect, which can create variations, is if courts are being influenced by policy considerations. As an example, Japan has implemented the 1992 CLC but the term 'grave and imminent threat of pollution' is not used in the Act. However, Article 2 (vi) (b) will most likely cover the same situation. Article 2 (vi)(b) has the following wording; *“(b) A cost that is required for the reasonable measures taken to prevent or alleviate the damage after an event causing the damage of item (a) occurred and damage incurred as a result of taking those measures.”* Fn. 20.

Thus, in contrast to OPA 90, where only US law and jurisprudence is applicable, the interpretation of 'incident' and 'grave and imminent threat of pollution damage' could be interpreted with great variations within the CLC Countries.

CONCLUSION:

Perhaps the term 'threat' must remain without a specific definition, as the facts of each incident are so unique and specific, that they must remain within the discretion of the applicable decision maker. Under the US system, this places perhaps too much burden on the shipowner, who must decide whether or not to activate the vessel response plan via the Qualified Individual, an expensive exercise for something that might have a less than even chance of

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developing into an actual oil spill, but if this is not done and an actual spill does occur, the adverse results of inaction could be disastrous.

Regarding the CLC countries, one has to accept that there will be great variations of how 'imminent and grave threat of pollution damage' will be interpreted according to a national court. Firstly, there are not many court cases that have evaluated this phrase and every single incident will have to be evaluated based on the place where it occurred, the likelihood for actual discharge of oil. It is not very likely that two completely identical situations will occur in two different Contracting States and it will therefore always be up to the courts' discretion to determine if they consider that the incident was serious enough to allow the claims for preventive measures to be compensated. There are nonetheless room to discuss these topics on an international conference and perhaps strive to lay down more specified guidelines on describing such phrases in more detail that could be used for national courts so that a more harmonized system could be in place as the intention of international conventions implemented by the **IMO** is to create a harmonized practise around the world.

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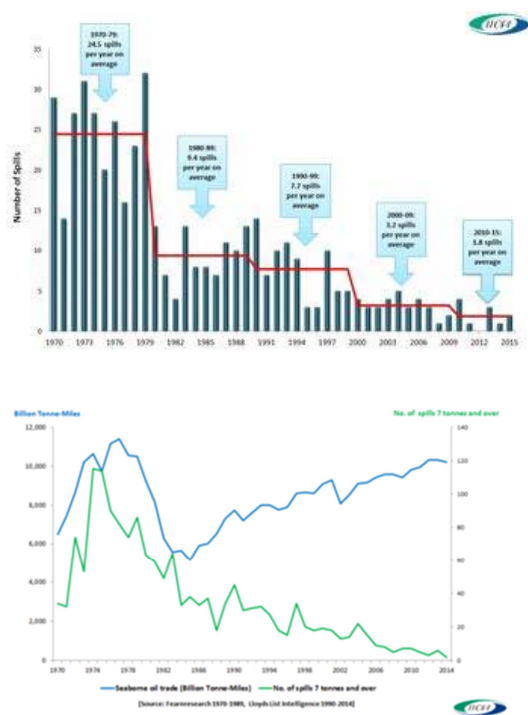
<http://www.ushistory.org/franklin/philadelphia/fire.htm>

For the February 4, 1735 issue of The Pennsylvania Gazette, Franklin sent an anonymous letter to his own newspaper entitled Protection of Towns from Fire. Writing as an "old citizen" he admonished:

“In the first Place, as an Ounce of Prevention is worth a Pound of Cure...”

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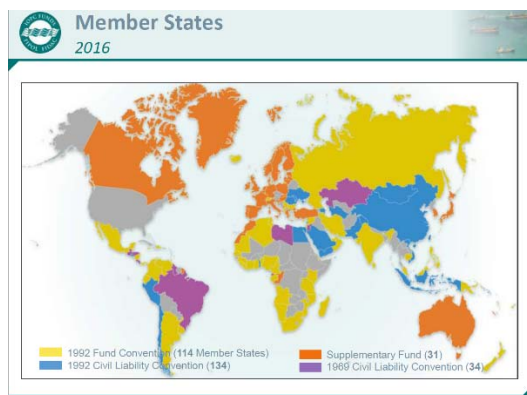
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