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# IMCO: An Environmentalist's Perspective

Eldon V. C. Greenberg\*

## I. INTRODUCTION

**T**HE AGE of the "oilberg," true to the warnings of Noel Mostert, may well be upon us.

In the last year, major oil tanker accidents have occurred with a disconcerting regularity. In August 1974, the 206,000 deadweight ton *Metula* ran aground in the Straits of Magellan, ultimately spilling more than 50,000 tons of oil into the sea. Five months later, another "supertanker," the *Showa Maru*, carrying 237,000 tons of crude oil from the Arabian Gulf to Japan, struck a reef in the Straits of Malacca, spilling approximately 4,500 tons of oil. Later that month, the 88,000 deadweight ton tanker *Jakob Maersk* ran aground off the coast of Portugal, and all of its cargo either spilled into the water or burned in the subsequent fire, resulting in the largest cargo loss since the *Torrey Canyon*. All told, in the years 1969-1973, more than 3,000 tanker accidents occurred worldwide, resulting in more than 450 polluting incidents and in a total loss of more than 7 million barrels of oil.<sup>1</sup>

The frequency of tanker accidents has been coupled with the growth of the total amount of oil discharged into the oceans from normal tanker operations. The National Oceanic and Atmospheric Administration, after surveying the Atlantic Ocean off the coast of the United States, has reported that "oil globules . . . in massive proportions infect nearly 700,000 square miles of blue water from Cape Cod to the Caribbean Sea."<sup>2</sup> Scientists at the Bermuda Biological Station for Research have estimated that, at any one time, at least 700,000 tons of pelagic tar are floating in the oceans, and that estimate might easily be low by a factor of three.<sup>3</sup>

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<sup>1</sup> Card, Ponce & Snider, *Tank Ship Accidents and Resulting Oil Outflows, 1969-1973*, in ENVIRONMENTAL PROTECTION AGENCY, AMERICAN PETROLEUM INSTITUTE, UNITED STATES COAST GUARD, 1975 CONFERENCE ON THE PREVENTION AND CONTROL OF OIL POLLUTION 205 (1975).

<sup>2</sup> Fish Larvae Found in Environment Contaminated with Oil and Plastic (Mar Map Red Flag Report No. 1, Jan. 18, 1973).

<sup>3</sup> J. BUTLER, B. MORRIS & J. SASS, PELAGIC TAR FROM BERMUDA AND THE SARGASSO SEA 97-99 (1973).

Summing up the current state of knowledge, the National Academy of Sciences has stated:

Tar masses are appearing in increased quantity in formerly unpolluted areas such as the East Coast of Africa, the beaches of Southern France, and many islands in both the Indian and Atlantic Oceans. . . . [M]ost of these materials originate from tanker washings and bilge discharges, rather than diffused sources of petroleum input or seeps.<sup>4</sup>

More than 1½ billion tons of oil a year are currently transported by tanker, and of that total, probably more than 2 million tons are ultimately lost in the oceans.<sup>5</sup> Just how much this traffic, with its attendant pollution, will grow in the next 10 or 15 years, given the vagaries of international politics and the will of the OPEC nations, is unclear. But it will almost certainly grow. And it is for international solutions to the troubling environmental problems posed by this growth that one looks to the Intergovernmental Maritime Consultative Organization (IMCO). It is the purpose of this paper to explore the structure, history and some current activities of IMCO in an effort to evaluate whether IMCO is capable of providing such solutions.

## II. IMCO: GENERAL BACKGROUND

IMCO is the specialized agency of the United Nations charged with responsibility in the area of maritime affairs. The Convention creating IMCO was drawn up at a United Nations Maritime Conference held in Geneva from February 19 to March 6, 1948, and came into force on March 17, 1958.<sup>6</sup> Article 1 of the IMCO Convention provides that the purposes of the organization are as follows:

- (a) To provide machinery for co-operation among Governments in the field of governmental regulation and practices relating to technical matters of all kinds affecting shipping engaged in international trade, and to encourage the general adoption of the highest practicable standards in matters concerning maritime safety and efficiency of navigation;
- (b) To encourage the removal of discriminatory action and

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<sup>4</sup> NATIONAL ACADEMY OF SCIENCES, *PETROLEUM IN THE MARINE ENVIRONMENT* 105 (1975).

<sup>5</sup> *Id.* at 6-10.

<sup>6</sup> Convention on the Intergovernmental Maritime Consultative Organization, done March 6, 1948, [1958] 1 U.S.T. 621, T.I.A.S. No. 4044, 289 U.N.T.S. 48, as amended, Sept. 15, 1964, [1967] 2 U.S.T. 1299, T.I.A.S. No. 6285, 607 U.N.T.S. 276, Sept. 28, 1965, [1968] 4 U.S.T. 4855, T.I.A.S. No. 6490, 649 U.N.T.S. 334 (hereinafter cited as IMCO Convention).

unnecessary restrictions by Governments affecting shipping engaged in international trade so as to promote the availability of shipping services to the commerce of the world without discrimination; assistance and encouragement given by a Government for the development of its national shipping and for purposes of security does not in itself constitute discrimination, provided that such assistance and encouragement is not based on measures designed to restrict the freedom of shipping of all flags to take part in international trade;

(c) To provide for the consideration by the Organization of matters concerning unfair restrictive practices by shipping concerns in accordance with Part II;

(d) To provide for the consideration by the Organization of any matters concerning shipping that may be referred to it by any organ or specialized agency of the United Nations;

(e) To provide for the exchange of information among Governments on matters under consideration by the Organization.

Article 2 of the IMCO Convention specifically provides, "The function of the Organization shall be consultative and advisory." IMCO, in other words, is "neither a legislative body as such nor a regulatory agency"<sup>7</sup> and its functions are necessarily limited. While it can make *recommendations* to governments, it has no power, absent delegation by specific treaty provision, to implement such recommendations on its own.

Despite the fact that there is no mention in the IMCO Convention of "pollution," IMCO has been the dominant international agency in the area of vessel source pollution. It has been given coordinating responsibility under a number of significant conventions relating to control of pollution at sea. These include:

(a) The International Convention for the Prevention of Pollution of the Sea by Oil, 1954 (the "1954 Oil Pollution Convention");<sup>8</sup> (b) The International Convention Relating to Intervention on the High Seas in Case of Oil Pollution Casualties, 1969 (the "Intervention Convention");<sup>9</sup> (c) The International Convention on Civil Liability for Oil Pollution Damage, 1969 (the "Liability Convention");<sup>10</sup> (d) The International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, 1971 (the "Fund Conven-

<sup>7</sup> O'Connell, *Reflections on Brussels: IMCO and the 1969 Pollution Conventions*, 3 CORNELL INT'L L. J. 161, 162, (1970).

<sup>8</sup> *Opened for signature*, May 12, 1954, [1961] 1 U.S.T. 2989, T.I.A.S. No. 4900, 327 U.N.T.S. 3 (*entered into force* for the United States Dec. 8, 1961), *as amended*, April 11, 1962, [1966] 2 U.S.T. 1523, T.I.A.S. No. 6109, 600 U.N.T.S. 332.

<sup>9</sup> *Done* Nov. 29, 1969; 9 INT'L LEGAL MATERIALS 25 (1970).

<sup>10</sup> *Done* Nov. 29, 1969; 9 INT'L LEGAL MATERIALS 45 (1970).

tion”);<sup>11</sup> and (e) The International Convention for the Prevention of Pollution from Ships, 1973 (the “1973 Ship Pollution Convention”).<sup>12</sup>

Further, IMCO has over the years developed and submitted recommendations and other guidelines to governments relating to the prevention of marine pollution from ships.<sup>13</sup>

IMCO has been subject to sharp criticism from the environmental community. International standards promulgated under its auspices have been challenged as inadequate, and IMCO itself has been challenged as an “agency that is dominated by the shipping industry and that has always adopted the lowest common denominator,”<sup>14</sup> as “an organization [which was] established essentially to meet the needs of the major maritime interests of the world and remains considerably influenced by them,”<sup>15</sup> and as “[an organization with] undue susceptibility to the influence of predominately maritime interests.”<sup>16</sup>

To some extent these criticisms are misdirected. If one examines the achievements of IMCO, especially over the last half dozen years, it is remarkable to note the number of agreements which have been successfully negotiated under its auspices. Yet until the spring of 1975 not a single agreement negotiated since 1966 had yet come into force.<sup>17</sup> Many of the marine pollution problems which we suffer from today are, therefore, more appropriately ascribed to the nations of the world which have delayed bringing these agreements into force, rather than to IMCO itself as a forum for achieving agreement.

Much of the criticism of IMCO, however, is well-founded. Its very structure has been unsuited for dealing in an appropriately vigorous fashion with marine pollution issues, and the history of its activities has been far from satisfactory. Further, despite recent structural changes, its responsiveness still appears limited.

<sup>11</sup> Done Dec. 18, 1971; 11 INT'L LEGAL MATERIALS 284 (1972).

<sup>12</sup> Done Nov. 2, 1973; I.M.C.O. Doc. MP/CONF/WP.35 (Nov. 2, 1973); 12 INT'L LEGAL MATERIALS 1319 (1973).

<sup>13</sup> IMCO, THE ACTIVITIES OF THE INTERGOVERNMENTAL MARITIME CONSULTATIVE ORGANIZATION IN RELATION TO SHIPPING AND RELATED MARITIME MATTERS (1974) (hereinafter cited as IMCO ACTIVITIES).

<sup>14</sup> Frank, *The Law at Sea*, N.Y. Times, May 18, 1975, (Magazine), at 14, 63.

<sup>15</sup> R. HALLMAN, TOWARDS AN ENVIRONMENTALLY SOUND LAW OF THE SEA 49 (1974).

<sup>16</sup> Sandbrook & Yurchyshyn, *Marine Pollution from Vessels*, in CRITICAL ENVIRONMENTAL ISSUES ON THE LAW OF THE SEA 19, 26 (Stein ed. 1975).

<sup>17</sup> IMCO ACTIVITIES at annex 2.

### III. THE STRUCTURE OF IMCO: A MARITIME BIAS

Structure has been IMCO's basic problem from its inception. As noted above, the IMCO Convention does not establish environmental protection as one of the organization's purposes. Without a strong mandate in this area, it is perhaps questionable whether IMCO can ever become the driving force behind efforts to protect the marine environment. While establishment of a separate Marine Environment Protection Committee (MEPC) within IMCO in November, 1973, with a mandate to "execute and coordinate all activities of the Organization relating to the prevention and control of pollution of the marine environment from ships,"<sup>18</sup> was plainly a step in the right direction, more institutionalization of pollution prevention goals is clearly needed.<sup>19</sup>

The difficulties engendered by the absence of an explicit environmental purpose in IMCO's mandate have been compounded by the membership and voting scheme established under the IMCO Convention, which has permitted the domination of the organization by maritime and shipping interests. IMCO has three principal organs: the Assembly, the Council, and the Maritime Safety Committee (the "MSC").<sup>20</sup> The Assembly is the "supreme governing body" of IMCO and normally meets only once every two years; the Council supervises the execution of the work program and performs the functions of the governing body between sessions of the Assembly; and the MSC is responsible for the technical work of IMCO.<sup>21</sup> All three organs make decisions based on majority voting. However, only the Assembly is composed of all members of IMCO.<sup>22</sup> The Council and the MSC, IMCO's major operating organs, have much more limited membership. The Council consists of 16 members, composed as follows: six from nations "with the largest interest in providing international shipping services"; six from nations "with the largest interest in

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<sup>18</sup> IMCO Assembly Resolution A.297 (VIII) (Nov. 23, 1973). See generally section IV entitled THE HISTORY OF IMCO: TOO LITTLE, TOO LATE, *infra*.

<sup>19</sup> This need has, indeed, been recognized by the members of IMCO themselves, and a proposal was adopted at the ninth regular session of the Assembly of the organization held November 3-14, 1975, to amend the IMCO Convention to include "prevention of pollution from ships" within its statement of purposes.

<sup>20</sup> IMCO Convention, Article 12.

<sup>21</sup> IMCO ACTIVITIES at 7-8.

<sup>22</sup> IMCO, it should be noted, is open to membership by all member states of the United Nations and by other states in accordance with the provisions of Articles 5-11 of the IMCO Convention. At the end of 1975, IMCO had 91 full members.

international seaborne trade"; and six from nations "which have special interest in maritime transport or navigation . . . [which] will ensure the representation of all major geographic areas of the world."<sup>23</sup> The MSC consists of 16 members, composed as follows: eight from nations "elected from among the ten largest ship-owning states" and eight from nations "having an important interest in maritime safety [such as an interest] . . . in the supply of large numbers of crews. . . ."<sup>24</sup> Clearly then, the major maritime interests have been in a position to exert very substantial control over IMCO's actions, and it is easy to see how economic self-interest may outweigh the interest in protection of the environment in IMCO's decision-making.<sup>25</sup>

Recently, there has been a movement toward change within the structure of IMCO. In recognition of the fact that there was an imbalance of interests on marine pollution issues crucial to all states, proposals have been made, and have now been accepted by the Assembly, to expand the membership of both the Council and the MSC.<sup>26</sup> At the eighth session of the Assembly, held in November 1973, a resolution was adopted pursuant to which an Ad Hoc Working Group, open to all members of IMCO was convened with a mandate "to study any proposed amendments to the IMCO Convention concerning the size and composition of the Council and the Maritime Safety Committee and any consequential related amendments."<sup>27</sup> The Ad Hoc Working Group met in February 1974, and formulated proposals for amendments to the Articles of the IMCO Convention concerning the size and

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<sup>23</sup> IMCO Convention, art. 17. Originally the Council consisted of 16 members with six members from each of the first two categories. Article 17 was amended in 1964, *supra* note 6, to expand Council membership to 18 and to add the third membership category.

<sup>24</sup> IMCO Convention, art. 28. The MSC consisted of 14 members prior to a 1965 amendment, *supra* note 6.

<sup>25</sup> The influence of the maritime powers has additionally been reflected in international agreements negotiated under the auspices of IMCO. For example, the 1973 Ship Pollution Convention will not come into force by its own terms, until ratified by "not less than 15 states, the combined merchant fleets of which constitute not less than 50 percent of the gross tonnage of the world's merchant shipping. . . ." International Convention for the Prevention of Pollution from Ships, 1973, art. 15, para. 1. Similarly, any amendment to that Convention is not deemed to have been accepted unless it is ratified by "two-thirds of the Parties, the combined merchant fleets of which constitute not less than 50 percent of the gross tonnage of the world's merchant fleet." *Id.* art. 16, para. 2(f)(i).

<sup>26</sup> IMCO Assembly Resolution A.314 (VIII) (November 23, 1973).

<sup>27</sup> For a description of its work, see generally the Report of the Ad Hoc Working Group on Assembly Resolution A.314 (VIII), WGAI/3 (Feb. 12, 1974).

composition of the Council and MSC. Thirty-seven countries, including a variety of developing countries, participated in this effort.

The proposals of the Working Group were adopted by the Assembly at its fifth extraordinary session on October 17, 1974.<sup>28</sup> These proposals, which will come into force upon ratification by two-thirds of IMCO's members, expand the size of the Council from 18 to 24 members and change its composition as follows: six members will come from "states with the largest interest in providing international shipping services"; six members will come from "states with the largest interest in international seaborne trade"; and 12 members will come from other states which "have special interests in maritime transport or navigation, and whose election to the Council would ensure the representation of all major geographic areas of the world." Further, they would eliminate the restricted composition of the MSC: as amended, the IMCO Convention would merely read, "the Maritime Safety Committee shall consist of all the members." These amendments, of course, still leave the maritime states in substantial control of the Council and in a position to block progressive reforms. Thus, the practical effect of such changes, if adopted, may be imperceptible, and it is far too early to tell whether the next few years will see a shift in IMCO towards a more balanced approach to the marine pollution problem.

#### IV. THE HISTORY OF IMCO: TOO LITTLE, TOO LATE

If the composition of the Council and the MSC has raised questions in the past as to the orientation of IMCO, its history, especially over the first years of its operations, bears out a mixed appraisal of its accomplishments. The IMCO Convention came into force on March 17, 1958, and the first session of the Assembly of IMCO was held in London from January 6 to January 19, 1959. For the next 10 years, however, IMCO accomplished little in the way of protection of the marine environment.<sup>29</sup> From 1959 through 1969, only one formal IMCO conference was devoted exclusively to the issue of pollution. This was the conference convened at London in April 1962, to adopt amendments to the 1954 Oil Pollution Convention. The amendments agreed upon, however, represented only marginal improvement in the regulation of

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<sup>28</sup> IMCO Assembly Resolution A.315 (ES.V) (Oct. 17, 1974).

<sup>29</sup> For a history of the early years of IMCO, see generally Johnson, *IMCO: The First Four Years (1959-1962)*, 12 INT'L & COMP. L. Q. 31 (1963).



oil tanker traffic. Their main achievements were merely to extend the application of the 1954 Oil Pollution Convention to ships of a lesser gross tonnage and to extend the zones in which the discharge of persistent oil was prohibited.<sup>30</sup>

The years 1969 through 1973 saw a flurry of activity at IMCO. Spurred by the *Torrey Canyon* incident in March 1967, and the entry onto the world scene of "supertankers" after the closure of the Suez Canal in June of 1967, the international community negotiated, under the auspices of IMCO, a spate of agreements, including: amendments in 1969 and 1971 to the 1954 Oil Pollution Convention; the 1973 Ship Pollution Convention; the Intervention Convention; the Liability Convention; and the Fund Convention. The IMCO Assembly, moreover, went on record at the beginning of the decade as seeking to develop a program to reduce radically vessel source pollution. In 1971, the seventh regular session of the Assembly decided upon the institutional goal, to be effectuated by the International Conference on Marine Pollution of 1973, of:

the achievement, by 1975 if possible but certainly by the end of the decade, of the complete elimination of the willful and intentional pollution of the seas by oil and noxious substances other than oil, and a minimization of accidental spills.<sup>31</sup>

Because the agreements negotiated over the past half dozen years are either not yet in force or have only recently come into force, it is clearly too early to assess fully the impact of IMCO's initiatives in the marine pollution area. Yet some tentative conclusions may be drawn, and these conclusions are not wholly positive.

The 1969 and 1971 amendments to the 1954 Oil Pollution Convention may be taken as examples of the timidity of IMCO's efforts. These amendments merely codify existing industry practice as far as operational discharges and tank sizes, respectively, are concerned. The 1969 amendments essentially mandate continued use of "load on top" procedure to reduce the effluent content of ballast discharges — a tank cleaning and loading technique followed on some 75 percent of existing tonnage at the time the amendments were adopted.<sup>32</sup> Further, they permit the discharge

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<sup>30</sup> See Amendments to the 1954 Oil Pollution Convention, adopted April 11, 1962, [1966] 2 U.S.T. 1523, T.I.A.S. No. 6109, 600 U.N.T.S. 332. For a discussion of such amendments see Johnson, *supra* note 30, at 51-55.

<sup>31</sup> IMCO Assembly Resolution A.237 (VII) (Oct. 12, 1971).

<sup>32</sup> See Porricelli, Keith and Storch, *Tankers and the Ecology*, (paper presented

of up to one fifteen-thousandth of a tanker's cargo per voyage. Consequently, a 300,000 deadweight ton (dwt) tanker may discharge almost 20 tons of oil per voyage. Thus, they do little to bring about a significant decrease in the amounts of oil discharged into the ocean as a result of normal tanker operations. Similarly, the 1971 amendments represent virtually no improvement over current practice. The agreed upon tank size limitations are at the top of the scale of what is now incorporated on "supertankers." These limitations allow 141,519 barrels to be contained in any single wing tank and 314,487 barrels to be contained in any center tank. Obviously, the complete loss of cargo from a single tank meeting these size limitations would be environmentally disastrous.

Even at the time that the 1969 and 1971 amendments were agreed upon, it was obvious that something more was required, and thus the IMCO Assembly, on October 21, 1969, decided:

to convene, in 1973, an international conference on marine pollution for the purpose of preparing a suitable international agreement for placing restraints on the contamination of the sea, land and air by ships, vessels, and other equipment operating in the marine environment.<sup>33</sup>

Almost 4 years of preparatory work were devoted to this conference, at which the 1973 Ship Pollution Convention was negotiated. There were high hopes for its outcome. At the opening of the conference, on October 8, 1973, Russell E. Train, chairman of the United States Delegation, underscored the importance of the conference's tasks and the necessity of bringing marine pollution under control:

Among the challenges to mankind, few are more critical than the need to protect the marine environment. All nations have a major stake in the continued healthy functioning of the natural systems of the oceans. Preserving the marine organisms upon which much of our global oxygen balance depends, the protection of both deepwater and coastal fisheries, safeguarding the estuarine areas upon which the generation of much marine life depends, the protection of beaches and shoreline areas for recreation and growing world tourism — these are vital concerns of all countries.

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The international community has determined, in major re-

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at the annual meeting of the Society of Naval Architects and Marine Engineers (Nov., 1971).

<sup>33</sup> IMCO Assembly Resolution A.176 (VI) (Oct. 21, 1969).

cent forums and pronouncements, that pollution of the seas from vessel discharges must be prevented, and in particular, that intentional oil pollution must be terminated during this decade. We meet today to carry out those resolves.

It is vitally important that we do so. Our coastal populations and resources have already suffered the consequences of vessel pollution incidents, and the dramatic increase of sea-borne commerce in hazardous substances . . . could ultimately upset the healthy functioning of the natural systems of the oceans. Although that ultimate environmental catastrophe is not yet upon us, we must nevertheless proceed with a genuine sense of urgency.<sup>34</sup>

It is questionable whether the 1973 Ship Pollution Convention comes near to fulfilling Chairman Train's hopes. Although the Convention does extend international regulation to white or "non-persistent" as well as black oils, require oil discharge monitoring and control equipment on new and existing tankers, and provide that new, large oil tankers be constructed with segregated ballast tanks in order to prevent operational pollution, its achievements are limited as far as oil pollution is concerned. The discharge standards agreed upon are basically those of the 1969 amendments and the tank size limitations agreed upon are basically those of the 1971 amendments. Segregated ballast, although found by the United States to be feasible on tankers as small as 20,000 dwt,<sup>35</sup> is only mandated for vessels larger than 70,000 dwt, and there is no provision that segregated ballast be achieved through incorporation of a double bottom — a feature which would go a long way toward eliminating outflows due to groundings. Likewise, there are no provisions relating to maneuverability or stopping ability of tankers, although improvements in this area are desperately needed to reduce the risk of tanker accidents. Finally, the failure to require retrofit of segregated ballast capacity, as well as other design features, virtually assures that the design and construction requirements of the Convention will be dead letters. A tanker construction boom in the years 1970 through 1974 has resulted in a glut of tankers on the market, and few new tankers, particularly supertankers, are

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<sup>34</sup> Statement of the Hon. Russell E. Train, chairman, United States Delegation to the 1973 Marine Pollution Conference, London, 8 October 1973.

<sup>35</sup> See U.S. Coast Guard, Reports on Parts 1 and 2 of Study I, Segregated Ballast Tankers (June 1972 and Feb. 1973); U.S. Coast Guard, Draft Environmental Impact Statement on the International Convention for the Prevention of Pollution from Ships 50 (N.T.I.S. Order No. EIS 73-1391-D, filed Sep. 4, 1973).

going to be contracted for over the next 10 years.<sup>36</sup> As one commentator has stated:

Though the 1973 Convention may bring about a considerable reduction in the discharge of oil and other harmful substances from ships, economic and technological factors have prevented the imposition of regulations that would totally eliminate vessel generated pollution. Thus the 1973 Convention fails to meet the 1971 IMCO Assembly's stated objectives of achieving by 1975 if possible, and certainly by the end of the decade, the complete elimination of the willful and intentional pollution of the sea by oil and noxious substances other than oil, and the minimization of accidental spills.<sup>37</sup>

## V. HOPES FOR THE FUTURE: TWO RECENT CASE HISTORIES

Despite the shortcomings of the 1973 Ship Pollution Convention, there can be no question but that IMCO has become more responsive to the needs of the environment over the past half dozen years. But is it responsive enough? How much have things really changed? What can one expect from IMCO in the future? Although any predictions of this nature are necessarily speculative, two recent case histories, one involving substantive regulation, and one involving procedural reform, indicate that one's hopes for the future must be tempered by a recognition of the frailties of the organization.

### A. *Gas Inerting Systems: The Difficulty of Going Beyond the Lowest Common Denominator*

The difficulties in achieving meaningful substantive agreement even on relatively simple issues is well exemplified by a recent IMCO Assembly Resolution regarding gas inerting systems.<sup>38</sup>

Explosions aboard partially loaded tank vessels present a seri-

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<sup>36</sup> As set forth in a speech delivered by W.H. Mueller of Exxon Corporation at the Sea Trade Conference in London on March 18, 1975, existing tonnage of medium size tankers and supertankers already exceeds both current and forecasted requirements of the next ten years. Mr. Mueller's figures show a projected tonnage surplus for 1975 of approximately 55 million dwts increasing to about 130 million dwt by 1977 on the basis of current orders. Even if not a single new order is placed — and there seems to be little incentive to place such an order at this time — substantial excess capacity will exist through 1985. Thus, it is unlikely that design and construction requirements applying to new tankers only will have much impact.

<sup>37</sup> Note, *No Dumping in this Ocean: Nearing the End of Ship Generated Pollution*, 7 N.Y.U.J. OF INT'L LAW AND POLITICS 545, 547 (1974).

<sup>38</sup> IMCO Assembly Resolution A.271 (VIII) (Nov. 20, 1973).

ous threat to the marine environment. United States Coast Guard statistics indicate that during the period 1969-1972, tanker explosions resulted in a total outflow of over 90,000 tons of oil — approximately 11 percent of the total outflow from tankers due to casualties of all types.<sup>39</sup> If the amount of oxygen in a cargo tank is reduced below a threshold concentration, then combustion is impossible. This reduction can be accomplished by filling cargo tanks with an inert gas. A gas inerting system, which involves installation of equipment to cool, wash and deliver flue gases from the boiler to cargo tanks,<sup>40</sup> “virtually eliminates the possibility of an explosive mixture being formed by cargo vapors” and thus virtually eliminates this source of pollution.<sup>41</sup>

Gas inerting systems were first introduced by a United States oil company in 1925, and systems similar to those now in use were developed by Sun Oil Company of Philadelphia in 1932.<sup>42</sup> At least one major oil company made a decision as early as 1963 to fit all new crude oil vessels with inerting gas systems. In 1968, that company began ordering product carriers fitted with such systems.<sup>43</sup> A series of disastrous explosions which occurred during the period 1969-1971 in non-inerted vessels, including the 208,000 dwt *Mactra*, the 206,000 dwt *Marpessa* and the 219,000 dwt *King Haakon VIII*, underscored the necessity of mandating the incorporation of gas inerting systems both for safety and pollution control. Indeed, at the beginning of 1973, it was recommended to the United Kingdom's Department of Trade and Industry that all supertankers, both those being constructed and those already in service, be fitted with inert gas systems,<sup>44</sup> furthermore, in mid-1973, the Federal Maritime Administration in the United States moved independently to require gas inerting systems on all subsidized U.S. flag oil tankers larger than 100,000 dwt.<sup>45</sup>

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<sup>39</sup> DEPT. OF TRANSPORTATION, U.S. COAST GUARD, DRAFT ENVIRONMENTAL IMPACT STATEMENT: PROPOSED REGULATIONS TO IMPLEMENT THE PORTS AND WATERWAYS SAFETY ACT OF 1972, Table B2, at 32 (June 1974).

<sup>40</sup> For a discussion of gas inerting systems, see generally Day, Platt, et al., *The Development and Operation of an Inert Gas System for Oil Tankers*, (paper presented to the Royal Institution of Naval Architects, 1971) [hereinafter cited as “Day”]; Porricelli, Keith and Storch, note 32 *supra*.

<sup>41</sup> FEDERAL MARITIME ADMINISTRATION, FINAL ENVIRONMENTAL IMPACT STATEMENT ON TANKER CONSTRUCTION PROGRAM VI-69 (N.T.I.S. Rep. No. EIS 730725-F, filed May 30, 1973).

<sup>42</sup> Day, *supra* note 40, at 3.

<sup>43</sup> *Id.* at 4.

<sup>44</sup> Journal of Commerce, Feb. 2, 1973, at 8.

<sup>45</sup> Federal Maritime Administration, Final Opinion and Order of Maritime

IMCO did not take the lead in promoting a gas inerting system requirement and, indeed, did not take action until 1973, in part in response to pressure from its member states which were already in the process of taking unilateral actions. At the eighth session of the Assembly in November, 1973, however, a resolution was adopted calling upon member states to put into effect certain draft recommendations made by the Subcommittee on Fire Protection of the Maritime Safety Council concerning fire safety measures for tankers and combination carriers.<sup>46</sup> In particular, the IMCO Assembly Resolution calls upon member states to require incorporation of gas inerting systems on crude oil tankers of 100,000 dwt or more and crude oil combination carriers of 50,000 dwt or more that have keels already laid or that are at a comparable stage of construction on or after July 1, 1974.

Three basic points can be made about IMCO's action, each of which underscores the difficulty in relying upon IMCO for providing solutions to marine pollution problems.

First, the IMCO action came not as a progressive reform but as a somewhat tardy recognition of a need long perceived by others. When the IMCO Assembly adopted Resolution A.271, gas inerting systems, pioneered over 40 years earlier, were already widely accepted, and indeed, after the accidents of the late 60's and early 70's, most major oil companies had moved independently to put such systems at least on their larger vessels. IMCO action, therefore, represented once again merely the issuance of an international stamp of approval, designed to some extent to eliminate any competitive disadvantage suffered by owners of inerted vessels, to an already widespread industry practice.

Second, the IMCO action itself has numerous deficiencies and in effect, represents a "lowest common denominator" compromise. The gas inerting system requirement proposed applies only to larger vessels, although casualty data indicate that explosion potential is at least as great among vessels below 100,000 dwt as it is among larger vessels.<sup>47</sup> The gas inerting system requirement proposed applies only to crude oil carriers, although explosion potential equally exists for carriers of refined products and, as noted above, petroleum companies have installed such systems on product carriers in the past to reduce explosion risks. The gas

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Subsidy Board, MarAd Tanker Construction Program, Docket No. A-75 (Aug. 30, 1973).

<sup>46</sup> IMCO Assembly Resolution A.271 (VIII) (Nov. 20, 1973).

<sup>47</sup> See, e.g., Porricelli, Keith and Storch, *supra* note 32.

inerting system requirement proposed applies only to new vessels, although, as noted above, there may be very few new vessels built over the next 10 years. The gas inerting system requirement proposed does not specify inert gas quality, although inert gas quality may be a significant factor in reducing corrosion rates and thus ultimately reducing the risk of structural failure, one of the leading causes of accidental spillage.<sup>48</sup>

Third, even with all its limitations, there is no assurance that an Assembly resolution containing a "recommendation" to member governments will be implemented. Liberia, by far the most significant nation in terms of total tonnage, has informed IMCO that it cannot implement the resolution by the recommended date, while the United Kingdom and the Netherlands have also advised IMCO that they cannot establish a standard application to ships that have keels already laid or that are at a comparable stage of construction after July 1, 1974.<sup>49</sup> In the United States, the Coast Guard did not adopt regulations implementing the recommendation until January 1976, and the application date ultimately chosen was January 1, 1975, rather than July 1, 1974.<sup>50</sup> These delays indicate again that because IMCO does not have the power to promulgate enforceable regulations, even its best efforts to combat marine pollution may ultimately be frustrated.

### B. *The MEPC: A Legacy of Inertia*

If the history of the gas inerting system requirement reveals the limited nature of some of IMCO's substantive accomplishments, so do the first 2 years of the MEPC's existence reveal how the traditional bias and inertia of the organization may undercut some of IMCO's touted procedural reforms.

Perhaps the most significant structural initiative within IMCO during the last several years has been the creation of the MEPC. The MEPC is responsible for coordinating and administering IMCO's activities regarding the prevention and control of marine pollution from ships — activities previously within the jurisdiction of the MSC — and its membership is open to all members of the organization, not just maritime powers. It has been argued by

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<sup>48</sup> In the period 1969-1972, structural failures resulted in the outflow of almost 300,000 tons of oil or approximately 37 percent of the total accidental spillage. DEP'T OF TRANSPORTATION, U.S. COAST GUARD, *supra* note 39, at 32, table B-2.

<sup>49</sup> M.S.C. XXII/5 (Jan. 15, 1975); M.S.C. XXII/5/Add. 1 (Feb. 25, 1975).

<sup>50</sup> See Tank Vessel Regulations, Structural Fire Protection Requirements, 41 Fed. Reg. 3838 (1976).

some, as Robert Hallman has reported, that creation of the MEPC "blunts all prior criticism of IMCO as a tool of maritime interests and unrepresentative of the international community as a whole."<sup>51</sup> Yet the reality of MEPC is not equal to the expectations aroused at its creation.

The MEPC was first formally proposed in a speech by the Honorable Russell E. Train before the Council of IMCO on June 5, 1973. In that speech, Mr. Train laid out a proposal for the creation within the organizational structure of IMCO of a "new permanent body to exercise its environmental responsibilities." As Chairman Train foresaw it, that new committee would "coordinate and administer all IMCO activities concerning marine pollution." It would "exercise the authority conferred on the Organization to adopt and revise regulations under international conventions for the prevention and control of vessel source pollution." Further, it would "consider on a continuing basis all related matters pertaining to pollution of the sea . . . disseminate scientific technical and economic information concerning ocean pollution and its control . . . [and] advise member states, particularly developing countries, on technical matters and provide practical information, recommendations and guidelines. . . ." concerning the effects of and means for preventing or mitigating marine pollution. Creation of the MEPC would, in Chairman Train's words, ensure that IMCO would "play a coordinated, efficient and dynamic role for the protection and improvement of the environment."

The establishment of MEPC itself, at the eighth session of the Assembly in November 1973, corresponds roughly with Chairman Train's proposal.<sup>52</sup> IMCO Assembly Resolution A.297 establishes the MEPC with the following Terms of Reference:<sup>53</sup>

To assist IMCO in its consultation with other bodies within the United Nations system, especially the United Nations Environment Programme, and with other international organizations and expert bodies in the field of marine pollution, and to coordinate and administer, in consultation as appropriate with other bodies of IMCO, the activities of the Organization concerning the prevention and control of marine pollution from ships and in particular:

(a) To perform such functions as are or may be conferred upon the Organization under international conventions for the

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<sup>51</sup> R. HALLMAN, *supra* note 15, at 48.

<sup>52</sup> Speech by the Honorable Russell E. Train before the Council of IMCO on June 5, 1973.

<sup>53</sup> IMCO Assembly Resolution A.297 (VIII) (Nov. 23, 1973).



prevention and control of pollution from ships, particularly with respect to the adoption or amendment of regulations or other provisions, as provided for in such conventions;

(b) To consider appropriate measures to facilitate the enforcement of the Conventions referred to in paragraph (a) above;

(c) To provide for the acquisition and dissemination of scientific, technical and any other practical information on the prevention and control of marine pollution from ships to States, particularly developing countries, and, where appropriate, to make recommendations and to develop guidelines;

(d) To promote cooperation with regional organizations concerned with the prevention of marine pollution from ships;

(e) To consider and take appropriate action with respect to any other matters falling within the scope of the Organization which would contribute to the prevention and control of marine pollution from ships including cooperation on environmental matters with other international organizations.

The MEPC, as originally conceived, was meant to be an engine for reform within IMCO. Yet more than 2 years have passed since its creation, and it has done little to justify that initial conception. In that 2-year span it has only met four times — in March 1974; November 1974; June 1975; and October, 1975 — and, to date, it can only list a single significant accomplishment: the acceptance of a list of hazardous substances to be annexed to a Protocol negotiated in 1973, extending the scope of the Intervention Convention to substances other than black oils. It has taken no positive action with regard to two matters of urgent importance to the implementation of the 1973 Ship Pollution Convention: the development of means to ensure the provision and maintenance of adequate reception facilities in ports,<sup>54</sup> and the development of performance standards for oil discharge monitoring and control equipment.<sup>55</sup> The inability of states to meet these provisions of the Convention may well be major stumbling blocks to its acceptance, and any delay by the MEPC almost surely delays the ratification process. Moreover, even assuming the Convention did enter into force, until MEPC takes action with regard to reception facilities and discharge monitoring, the effect of the Convention would be severely limited.

MEPC seems to be functioning as an elaborate postponement mechanism. Many of the items referred from MEPC I to MEPC II were carried over to MEPC III, and many of the items referred from MEPC II to MEPC III were carried over to MEPC IV and

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<sup>54</sup> 1973 Ship Pollution Convention, *supra* note 12, Annex I, Regulation 12.

<sup>55</sup> *Id.* reg. 16.

have again been carried over to MEPC (scheduled to be held in May 1976). The snail's pace of previous international activity to combat marine pollution seems, in other words, to be characterizing MEPC as well.

A significant test of MEPC's ability to seize the marine pollution initiative may now be emerging. At its third session, held in June 1974, MEPC took note of a proposal, submitted through the Executive Director of the United Nations Environment Programme (not, it might be noted, through its own members or staff) that IMCO initiate international action towards converting idle tanker capacity into segregated ballast on existing tankers.<sup>56</sup> Incorporation of a segregated ballast system is the method best suited to achieve the complete elimination of operational pollution,<sup>57</sup> and such a proposal, if adopted, would go a long way toward meeting IMCO's own stated pollution prevention goals. Indeed, if not adopted, the intent of the international community, as evidenced in the 1973 Ship Pollution Convention, to shift to a segregated ballast standard for larger tankers may well be completely frustrated. Further, imposition of such a requirement would have the economic and political advantage of reducing the need for large, expensive reception facilities for dirty ballast, thereby perhaps facilitating acceptance of the 1973 Ship Pollution Convention, and providing needed business for both tanker owners and operators with idled tonnage and for shipyards which are no longer getting new orders.

At the third session of the MEPC, some delegations expressed interest, in principle, in the proposal to require retrofit for segregated ballast capacity. But action was not taken which would permit a rapid determination on this matter. All that was done was to request the International Chamber of Shipping and the Oil Companies International Marine Forum to consider the suggestion and report to MEPC on their findings by the end of 1975.<sup>58</sup> These two organizations are, of course, industry trade associations, which are unlikely to support any suggestion unless it is clearly in their own economic self-interest. MEPC, in other words, may be following the pattern of inertia set by other IMCO organs in the past: relying on industry to define the scope and content of its inquiries and only promoting or adopting marine pollution initiatives if they are acceptable to and indeed often already accepted

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<sup>56</sup> See Report of the Marine Environment Protection Comm. on Its Third Session, MEPC III/18, at 96-101 (July 7, 1975).

<sup>57</sup> See Note 35 *supra*.

<sup>58</sup> See Report of the Marine Environment Protection Committee on its Third Session, MEPC III/18, ¶ 96-101 (July 7, 1975).

by industry. Whether MEPC will take the lead in pushing this significant environmental proposal thus remains uncertain.

## VI. CONCLUSION

The adequacy of IMCO as the international mechanism for combatting marine pollution is yet to be demonstrated. IMCO can, of course, be no more effective than its member nations desire or permit it to be, and commercial maritime interests seem likely to continue to play the most powerful role in its deliberations. What is necessary, therefore, beyond the current structural reforms, is a shift in political consciousness in both maritime and non-maritime states, and a recognition that it is in the interest of all nations to act quickly and forcefully in order to meet the goals which the IMCO Assembly itself adopted in 1971: the complete elimination of operational pollution and the minimization of accidental pollution by the end of this decade. If such a shift does not occur then, in the foreseeable future, much greater reliance may have to be placed on unilateral state action, rather than multilateral agreement, to achieve environmentally desirable goals.

Every day that passes without affirmative action increases the risk that, sooner rather than later, the limits of the assimilative capacity of the oceans will be reached. The National Academy of Sciences has concluded:

A basic question that remains unanswered is "At what level of petroleum hydrocarbon input into the ocean might we find irreversible damage occurring?" The sea is an enormously complex system about which our knowledge is very imperfect. The ocean may be able to accommodate petroleum hydrocarbon inputs far above those occurring today. On the other hand, the damage level may be with an order of magnitude of present inputs to the sea. Unless we come closer to answering this basic question, it seems wisest to continue our efforts in the international control of inputs and to push forward research to reduce our current level of uncertainty.<sup>59</sup>

Whether the international community, acting through IMCO, will properly heed this warning remains to be seen.

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<sup>59</sup> See NATIONAL ACADEMY OF SCIENCES, *supra* note 4, at 107.