



# **Coastal State Intervention in Salvage Operations: Obligations and Liability Toward the Salvor**

**By:  
Susanne Storgårds**

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## TABLE OF CONTENTS

1 Introduction.....	4
1.1 Overview.....	4
1.2 Object and structure.....	6
2 The law of salvage.....	8
2.1 Introduction.....	8
2.2 The 1989 International Convention on Salvage.....	9
2.3 The remuneration of salvors.....	12
2.3.1 Remuneration under the 1989 Convention.....	12
2.3.1.1 Article 13.....	13
2.3.1.2 Article 14.....	13
2.3.2 Remuneration under SCOPIC.....	15
2.3.3 Remuneration under other regimes.....	17
3 Coastal state intervention in the event of a maritime incident threatening damage to the environment.....	20
3.1 Introduction.....	20
3.2 The coastal state's right of intervention.....	20
3.2.1 Intervention under the Intervention Convention.....	21
3.2.2 Intervention under UNCLOS.....	25
3.2.3 Intervention under the 1989 Convention.....	26
3.3 Coastal state liability for intervention and the compensation of salvors.....	28
3.3.1 Liability and compensation under the Intervention Convention.....	28
3.3.2 Liability and compensation under UNCLOS.....	30
3.3.3 Liability and compensation under the 1989 Convention.....	31
3.3.4 Liability and compensation under other regimes.....	32
4 Salvors and places of refuge.....	34
4.1 Introduction.....	34
4.2 The obligation to provide a place of refuge.....	35
4.3 Coastal state liability for the refusal of refuge.....	38
5 New developments.....	40
5.1 Introduction.....	40
5.2 The ISU proposal for environmental salvage awards.....	40
5.3 The CMI Draft Instrument on Places of Refuge.....	45

6 Conclusion.....47  
Bibliography.....49  
Annex I Revised Articles 1(d), 13, and 14 of the 1989 International Convention on Salvage  
as proposed by the International Salvage Union.....56  
Annex II CMI Draft Instrument on Places of Refuge 2008.....58

## 1 Introduction

### 1.1 Overview

Over the past decades, more and less serious maritime incidents have occurred throughout the world, damaging –or threatening to cause damage to– the marine and coastal environment. Names like the *Erika*, the *Castor*, and the *Prestige* readily spring to mind. In these and other cases, the salvage industry played –or could have played– a vital role in the prevention and minimization of damage. Salvors –generally professionals– are often the first to arrive on the scene of a maritime incident and can provide crucial aid to vessels in danger. Their importance is recognized not only in the salvage of property, but also as being “the first line of defen[s]e in protecting the environment”.<sup>1</sup> In 2011 alone, 496 331 tons of pollutants were salvaged.<sup>2</sup> The work of the salvage industry thus includes preventing and controlling pollution from damaged vessels and the salvage of valuable property composed of the vessel, its cargo and freight.

While the international regime under which salvage operations take place has been the subject of an evolution over the past thirty years, this evolution has not necessarily been adapted to the evolution occurring in other maritime domains, especially the law and practice concerning coastal states’ rights to protect their marine and coastal environment. While developments over the past four or five decades have increased the jurisdiction of coastal states over their maritime zones with regard to pollution prevention and other environmental concerns, the salvage regime has not witnessed developments of the same magnitude. Within the Law of the Sea, multilateral conventions such as the 1969 International Convention relating to Intervention on the High Seas in Cases of Oil Pollution Casualties (Intervention Convention) and its 1973 Protocol Relating to Intervention on the High Seas in Cases of Pollution by Substances Other than Oil (1973 Protocol) as well as the 1982 United Nations Convention on the Law of the Sea (UNCLOS) grant coastal states’ rights of intervention in response to maritime casualties. The protection of the environment as a primary concern was thus recognized over the years since the late 1960s and up to the present.

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<sup>1</sup> De la Rue, Colin and Anderson, Charles B. *Shipping and the Environment: Law and Practice*. 2nd edition. London, (Informa) 2009. p. 907.

<sup>2</sup> By members of the International Salvage Union (ISU). *ISU 2011 Pollution Prevention Survey News Release*. 2012. [http://www.marine-salvage.com/media\\_information/](http://www.marine-salvage.com/media_information/).

The salvage regime, however, although partially reformed by the adoption of the 1989 International Convention on Salvage (1989 Convention), was not reformed to take environmental concerns into account to the same extent as the regime on intervention had done. The salvage regime, although revised to consider “the increased concern for the protection of the environment”,<sup>3</sup> retained its traditional character in that salvors continued to be rewarded for services rendered to the vessel and cargo. The primary incentive for a salvor is, as it has always been, the traditional salvage award conferred on him in the event of a successful salvage of the vessel or its cargo. While his efforts in minimizing damage to the environment are to be taken into account in the fixing of the amount of his award, there is no separate award for his work in protecting the marine or coastal environment, although a special compensation for protecting the environment has been introduced. The main –though not the sole– incentive for a salvor thus remains the salvage of property, while the primary concern of the coastal state will naturally be the protection of its environment. The coastal state may wish to take measures against a vessel in order to protect its shoreline from the potential consequences of a maritime casualty involving oil or other hazardous substances, and these measures may not necessarily be compatible with the measures the salvor would suggest in order to save the vessel and cargo. While the authority of a coastal state to intervene is clearly embedded in international law, a respective right for a salvor to take measures necessary to enable him to earn a reward is not found in international salvage law. Rather, in certain cases, with the goal of protecting its environment, a coastal state may interfere with salvage operations in such a way that the vessel and cargo are lost and a potential salvage award is not earned or is significantly reduced. In this way, salvors bear the risk of a coastal state’s decisions.

The discrepancy between the rights of coastal states on the one hand and the interests and measures permitted of salvors on the other is at present the subject of discussion in maritime circles such as the International Salvage Union (ISU) and the Comité Maritime International (CMI). The idea of adapting the current salvage regime to correspond more closely with contemporary environmental concerns is currently under debate. Although there is no certainty that any changes to the salvage regime will come into effect, the subject matter is of great interest to the maritime community because it illustrates one of the conflicts between the various actors involved. It involves a close interrelationship between private and public law and illustrates the piecemeal character of

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<sup>3</sup> Preamble to the 1989 International Convention on Salvage.

the salvage regime in that the rules relating to salvage can be found in a variety of both public and private law instruments.

## 1.2 Object and structure

This thesis aims to examine the relationship between salvors and coastal states in the event of a maritime incident threatening, or believed to threaten, the coastal or marine environment. The point of interest is to know which, if any, rules govern the relationship between salvors and coastal states when they are not in a contractual relationship with one another. Relevant aspects of both the international salvage regime and the international rules on coastal state intervention will be discussed. A main focal point will be what, if any, compensation is owed to salvors for their efforts in preventing or minimizing damage to the environment. In particular, questions relating to coastal states' potential liability toward salvors will be examined. When a salvor fails to earn an award, and this failure is a result of a coastal state's interference, the question arises as to whether the salvor may take action against the coastal state. The duties and obligations, if any, owed by coastal states toward salvors will therefore be a main point of study.

In order to examine these questions thoroughly, the current salvage regime will first be presented. The ways in which salvors are rewarded for their efforts will be discussed briefly as will salvors' compensation under the current international regime. Next, the basic rules governing intervention by coastal states with regard to maritime incidents will be presented. Although coastal states have extensive rights of intervention, it is only the rights that have an impact on salvage operations that will be discussed in detail. Then, places of refuge, a subject closely linked to salvage operations of vessels in distress, will be discussed. Finally, new developments in the salvage regime will be examined.

For present purposes, the term "maritime casualty" is not given a precise legal definition.<sup>4</sup> The term's definition is not of importance, as it is not a maritime casualty as such that will be examined, but rather any incident where a vessel is in distress and threatens, or may potentially threaten, the marine or coastal environment. The cases that will be examined thus refer both to cases that fall within and outside the definition of a "maritime casualty" in the Intervention Convention. The term "vessel in distress," also this lacking a clear legal definition, may be deemed more appropriate. Within this study,

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<sup>4</sup> In contrast to, for example, the definition found in Article 2(1) of the Intervention Convention.

intervention is also loosely defined to include both instructions and orders toward the salvors and physical interference with the vessel. Intervention toward any party other than the salvor is outside the scope of this paper and will only be presented if needed to clarify intervention with regard to salvors.

Although in some states, public authorities perform salvage operations,<sup>5</sup> such “public authority salvage” will not be covered by this paper. The focus instead lies on the relationship between the coastal state and private salvors.

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<sup>5</sup> See *Brice on Maritime Law of Salvage*. Edited by John Reeder. London, (Sweet & Maxwell) 2003. p. 70-72 and Article 5 of the 1989 Convention.



## 2 The law of salvage

### 2.1 Introduction

Salvage is an ancient concept, and laws regulating this institution can be found in early legal systems such as the Rhodian maritime code.<sup>6</sup> Early versions of private-law contracts still used today, such as the Lloyd's Open Form (LOF), already existed in the late 19<sup>th</sup> century. However, the first unified international legal regime of salvage did not come into existence until 1910, when the 1910 International Convention for the Unification of Certain Rules of Law Respecting Assistance and Salvage at Sea (1910 Convention) was adopted.<sup>7</sup> Although the 1910 Salvage Convention and its 1967 Protocol are still in effect in some countries, in 1989 a new convention on salvage was adopted. The 1989 International Convention on Salvage (1989 Convention), which entered into force in 1996, will be discussed in section 2.2 below. In addition to the international conventions on salvage, there exist numerous private-law standard contracts on salvage. These contracts contain provisions which are agreed upon in advance by the parties to the salvage agreement. The most well-known and widely used standard form is the Lloyd's Open Form mentioned above.<sup>8</sup> LOF is used in approximately one-third of salvage operations.<sup>9</sup> There are, however, many other forms, such as the French standard form, Villeneuve. The idea governing the use of standard contracts was "that a widely accepted standard form of contract would be the best way to ensure the acceptance of a salvage agreement under adverse conditions".<sup>10</sup>

The concept of salvage is based on the idea that anyone who assists a vessel and aids in saving it or other maritime property is entitled to a reward for his efforts.<sup>11</sup> The amount of this reward varies, but is limited to a maximum amount of the value of the property saved. In order for salvage to be considered to have taken place, certain criteria must be fulfilled. Among these are danger, the voluntary nature of the services, and success.

In order for an operation to be considered as salvage, there must have existed a danger, although the concept of danger is not defined in the conventions. The danger may

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<sup>6</sup> Brice on *Maritime Law of Salvage*. *Opere citato*. p. 6.

<sup>7</sup> *Ibidem*. p. 5.

<sup>8</sup> Bonassies, Pierre and Scapel, Christian. *Traité de droit maritime*. 2nd edition. Paris (L.G.D.J.) 2010. p. 352.

<sup>9</sup> Busch, Todd. *Fair Reward for Protecting the Environment: the Salvor's Perspective*. 2010 <http://www.comitemaritime.org/Salvage-Convention-1989/0,2746,14632,00.html>. p. 1.

<sup>10</sup> Gold, Edgar. *Marine Salvage: Towards a New Regime*. In: *Journal of Maritime Law and Commerce*. Volume 20, No. 4 (1989). p. 488.

<sup>11</sup> *Ibidem*. p. 487.

be either real or perceived. The operations must also have been rendered on a voluntary basis. This means that there cannot have existed a previous contractual or legal duty for the person rendering salvage services to act.<sup>12</sup> Finally, in order to recover a salvage award, there must be some degree of success to the services rendered.<sup>13</sup> Although expressed in slightly different terms, these criteria are essentially retained in both the 1910 and 1989 Conventions.

Salvage law is often referred to as operating under a “no cure– no pay” regime. This expression is found in LOF and refers to the success of the salvage operations. If a salvor does not achieve success, he will not be entitled to a salvage award. Under “no cure– no pay”, even very difficult and costly salvage operations that are not beneficial to the maritime property do not receive remuneration. The regime of “no cure– no pay” was codified in Article 2 of the 1910 Convention, and it was considered to be a cornerstone of salvage law.

As will be discussed in the following section, events during the 20<sup>th</sup> century gave rise to new considerations that were to affect the salvage industry. These considerations were of an environmental nature and were the main force behind the adoption of the 1989 Convention.

## 2.2 The 1989 International Convention on Salvage

The 1960s and 1970s witnessed the development of larger, more advanced vessels, in particular oil tankers, as well as a proliferation of maritime casualties, causing severe damage to marine and coastal environments. As early as the *Torrey Canyon* incident in 1967, an environmental consciousness began to awaken among the public in various states. As concerns for the environment and its safeguarding from the hazards of shipping – especially from vessels carrying oil and other hazardous substances– increased, so did cries for a reformed salvage regime. Salvage was no longer only a private concern between the two parties to the salvage agreement and their insurers. Instead, a new third party interest, that of the coastal state, emerged.<sup>14</sup> The coastal state’s interests differed greatly from those of salvors, and environmental protection was the foremost of the former’s concerns.

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<sup>12</sup> *Brice on Maritime Law of Salvage. Op. cit.* p.1.

<sup>13</sup> In the 19th century, some civil law courts, especially French courts, did not include success as a prerequisite for a salvage award. However, as the 1910 and 1989 Salvage Conventions were essentially a codification of English and American salvage law, in which success was required, the criterion of success became obligatory. See Bonassies, Pierre and Scapel, Christian. *Traité de droit maritime. Op. cit.* p. 358.

<sup>14</sup> Redgwell, Catherine. *The Greening of Salvage Law.* In: *Marine Policy.* Volume 14. (1990) p. 144.

Coastal states began to interfere in the management of maritime incidents, such as in the case of the *Torrey Canyon* where the vessel was ordered out to sea to be bombed by the English authorities. “Passive interference”, such as the refusal to permit a damaged vessel access to its maritime zones was another, often used method by coastal states, exemplified in the *Atlantic Empress-Aegean Captain* collision of 1979.<sup>15</sup> In this particular case, salvage efforts were hindered by the refusal of several coastal states to give refuge to the damaged vessels.

In these and other cases, little consideration was given to the interests of the vessel and its cargo, and salvors, who were obliged to comply with coastal state instructions, inevitably met with limited success in terms of their earning salvage awards. The vessels, which were refused access to calmer waters within the maritime zones of coastal states where successful salvage operations could potentially take place, were instead sunk or otherwise destroyed. This phenomenon of “maritime lepers”, ships that were unwelcome in the waters of coastal states, resulted in the impossibility of salvors completing salvage operations successfully. The value of the vessel in question and often that of the cargo which could not be salvaged either –at least not in its entirety– was lost and the salvors earned a modest or no award.<sup>16</sup> The salvage operations were, however, not performed without expense to the salvors, as the cost of the crew, equipment, and similar expenses still had to be covered by the salvors. The unsuccessful or interrupted salvage operations thus resulted in financial losses for salvors. Gradually, they therefore became unwilling to accept salvage on badly damaged vessels or on vessels carrying cargo of little value.<sup>17</sup> Yet the fact of the matter was that salvage services were necessary in order to prevent damage to the marine environment. While the vessel and cargo were often lost, the marine environment benefited because the salvors were able to prevent –or at least minimize– damage to the environment resulting from pollution. The potential expense of clean-up operations of the marine and coastal environment were thus greatly reduced, or even completely avoided. Such clean-up costs would more often than not have been far greater than any salvage award which could have been earned. Coastal states were, therefore, benefiting from salvage operations, while salvors were operating at a loss. It was thus understandable that salvors were reluctant to accept salvage operations where they

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<sup>15</sup> *Ibid.*

<sup>16</sup> In the *Atlantic Empress-Aegean Captain* incident, the vessel was declared a constructive total loss, and the only award earned was based on the value of the portion of the cargo that was successfully salvaged.

<sup>17</sup> Gold, Edgar. *Marine Salvage: Towards a New Regime*. *Op. cit.* p. 491.

were unlikely to earn award. At the same time, the necessity of salvage in order to prevent pollution was recognized.

It was therefore acknowledged that changes to the salvage regime had to be brought about. It was recognized that salvors needed an incentive to accept salvage on vessels that were potential threats to the environment. These were the circumstances that led to the adoption of the 1989 Convention.

Although the need for reform of the salvage regime was generally acknowledged, there were divergent opinions on how this reform should be effected. It was the CMI, upon the initiative of the International Maritime Organization (IMO, then the IMCO), which prepared a draft of the convention that was later to become the 1989 Convention. One of the questions raised was whether remuneration for salvage services should to some extent be borne by the coastal state which benefited from the salvage operations.<sup>18</sup> During the drafting proceedings, two different views on the new salvage regime emerged. One of these was the view advocated by Professor Selvig, that of “‘liability salvage’: the notion that the salvor would be paid for preventing pollution and avoiding damage to the environment”.<sup>19</sup> This was closely related to “pure environmental salvage”, under which a separate salvage award would be granted for services that benefited the marine environment by preventing pollution damage.

The second view rejected liability salvage and instead included environmental considerations in the calculation of the salvage award. A salvor would not earn a separate award for preventing environmental damage; he would, however, be entitled to a safety net that would cover his salvage expenses even when salvage services were unsuccessful but when they did succeed in preventing or minimizing damage to the environment. Protection of the environment was to be an aspect of salvage, and to be taken into account when calculating the amount of the award, but there was not to be any distinct environmental salvage award. It was this second view that was adopted in the 1989 Convention. This was known as the “Montréal Compromise”. It has been stated that this compromise was “‘neither equitable nor logical’ but the best that could be reached to accommodate the various interests involved”.<sup>20</sup> In theory, all who benefited from salvage services were meant to contribute to the salvage award. However, only private shipping interests were considered to be actors who benefited from these services. Coastal states

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<sup>18</sup> *Brice on Maritime Law of Salvage. Op. cit.* p. 420.

<sup>19</sup> Redgwell, Catherine. *The Greening of Salvage Law. Op. cit.* p. 147.

<sup>20</sup> Gold, Edgar. *Marine Salvage: Towards a New Regime. Op. cit.* p. 499.

were not included among the concerned actors, although their interest in seeing salvage extend to the protection of the marine environment was arguably one of the strongest. This is, as shall be seen in the present work, one of the major discrepancies caused by the present salvage regime, and it is understandable that the issue of equity has, as shall be discussed in Chapter 4, been raised again recently by the ISU.

### 2.3 The remuneration of salvors

The 1989 Convention is not exhaustive of salvage law. States parties to the Convention may enact additional domestic laws on salvage, as long as these do not conflict with the Convention. Not all states are parties to the 1989 Convention, and even in states who are, shipowners and salvors often use standard contracts such as LOF in lieu of, or in addition to, the provisions of the Convention. In this respect, Article 6 of the 1989 Convention clearly states that the Convention “shall apply to any salvage operation *save to the extent that a contract otherwise provides expressly or by implication*”.<sup>21</sup> An overview of the remuneration available to salvors for their services must therefore, for present purposes, be examined not only under the Convention, but also under the most widely used standard agreements and other available regimes. The focus of this study is remuneration for damage to the environment, so this will be the main subject of the following sections.

#### 2.3.1 Remuneration under the 1989 Convention

The 1989 Convention lessened the harshness of the existing “no cure– no pay” system that had previously been operating. Although the system was not completely abolished, it was greatly softened in favor of providing an incentive for salvors to continue their work. In the 1989 Convention, the provisions on remuneration are found in Chapter III, entitled “Rights of salvors”. According to Article 12 of this chapter, “salvage operations which have had a useful result give right to a reward”. The same article, in its second paragraph, goes on to stipulate that no remuneration is due to the salvor “if the salvage operations have had no useful result”. This is an expression of the “no cure– no pay” rule. This provision is, however, modified by the clause “except as otherwise provided”, and it provides for exceptions both within and outside the Convention.

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<sup>21</sup> Emphasis added.

### 2.3.1.1 Article 13

While Article 12 of the 1989 Convention provides the salvor with a right to a reward, Article 13 enumerates the criteria that are to be taken into account in fixing this reward. The criteria are not listed in order of importance, and they include the salvaged value of the vessel and other property; the skill and efforts of the salvor in preventing or minimizing damage to the environment; the salvor's success, skill, efforts, and promptness; the danger involved; the risks run by the salvor, including risks of liability; the salvor's expenses; and the availability and state of readiness of the salvor's vessels and equipment. These criteria are essentially similar to those set out in the 1910 Convention.<sup>22</sup> A criterion which was not, however, included in the 1910 Convention was the criterion on the skill and efforts of the salvor in preventing damage to the environment.

The award under Article 13 is payable by the vessel and cargo interests combined, each in proportion to its salvaged values,<sup>23</sup> and the value of an award under Article 13 shall not exceed the salvaged value of the vessel and the other property.<sup>24</sup> Article 13 is an expression of the traditional salvage award which does not exceed the value of the vessel and property salvaged.

### 2.3.1.2 Article 14

Article 14 of the 1989 Convention was one of the revolutionary aspects of the new salvage regime. This article deals with "special compensation", a fundamental component of the Convention. Under Article 14, a salvor may be entitled to special compensation in certain circumstances. In order for the provisions of special compensation to be applicable, the salvor must first "satisfy the basic ingredients of Art. 14.1 so as to be entitled in principle to his expenses under Art. 14.3".<sup>25</sup> These basic ingredients entail that salvage operations must have taken place and that the vessel must have threatened damage to the environment by itself or by its cargo.<sup>26</sup> Damage to the environment is defined in Article 1(d) of the

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<sup>22</sup> De la Rue, Colin and Anderson, Charles B. *Shipping and the Environment: Law and Practice*. *Op. cit.* p. 555.

<sup>23</sup> 1989 Convention, Article 13(2).

<sup>24</sup> *Ibid.* Article 13(3).

<sup>25</sup> Justice Clarke in *Semco Salvage & Marine Pte Ltd v. Lancer Navigation Co. Ltd (The Nagasaki Spirit)* [1995].

<sup>26</sup> 1989 Convention, Article 14(1).

Convention as “substantial physical damage to human health or to marine life or resources in coastal or inland waters or areas adjacent thereto, caused by pollution, contamination, fire, explosion or similar major incidents”. This definition thus is limited not only by the characterization of the word “damage”, but also by this term’s geographical scope. The requirement of salvage operations means that the salvor cannot earn special compensation if he has not been engaged in salvage. Actual salvage operations must have been at the heart of his services. In order for the provisions on special compensation to become applicable, the salvor must have failed to earn an award under Article 13 of an equal or greater value than the special compensation to which he would otherwise be entitled under Article 14. If these requirements are fulfilled, the salvor is to be awarded special compensation in the amount of his expenses.

If the requirements in Article 14(1) are fulfilled, and the salvor also has prevented or minimized damage to the environment, his special compensation may be increased by up to 30% of the expenses he has incurred, or, if the tribunal fixing the amount of the compensation, considers it fair and just, by an even higher percentage.<sup>27</sup> The increase is under no circumstances to be greater than 100% of the expenses incurred by the salvor.<sup>28</sup> It is thus possible, although exceptional, for the salvor to recover an amount greater than his expenses if he has been successful in preventing or minimizing harm to the environment. It should nonetheless be noted that tribunals are generally prudent in their appreciation of special compensation, and that there has so far never been a case which increased the special compensation due under Article 14(2) to 100% of the salvor’s expenses.<sup>29</sup>

The above entails that the salvage award under Article 13 is to be the primary award for the salvor. Article 14 is used as a safety net. All of the criteria under Article 14(1) must be fulfilled for the special compensation to be considered, and this is the case even where the compensation is to be increased under Article 14(2). If a salvor has been negligent, and due to this negligence, failed to prevent or minimize damage to the environment, he may be deprived of the special compensation to which he would otherwise have been entitled, or of a part thereof.

The expenses which a salvor is entitled to recover under Article 14 are his “out-of-pocket expenses reasonably incurred [...] and a fair rate for equipment and

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<sup>27</sup> Article 14(2).

<sup>28</sup> *Ibid.*

<sup>29</sup> For salvage under LOF. See Bishop, Archie. *The Development of Environmental Salvage and Review of the Salvage Convention 1989*. 2012. p. 6.

personnel actually and reasonably used in the salvage operation”.<sup>30</sup> In the *Nagasaki Spirit* case,<sup>31</sup> it was held that expenses did not include an element of profit, although the judgment has been criticized on this point.<sup>32</sup>

Special compensation under Article 14 is to be borne by the shipowner, in contrast to the traditional salvage award under Articles 12 and 13, which is borne by the ship and cargo owners *pro rata*. In practice, ship and cargo insurers bear the actual expense.

Although the institution of special compensation as a safety net for salvors represented an evolution of the salvage regime, it should be noted that the requirement that salvage operations take place in order for the compensation to become applicable retains the element of salvage as an essential component of the system of remuneration. As discussed previously, environmental salvage awards were rejected during the discussions leading up to the adoption of the 1989 Convention, and the retention of salvage operations as a fundamental element for the reward is an expression of this decision. This entails that services which do not fulfill the requirements of salvage may not engender a reward, no matter how instrumental they are in preventing damage to the environment. Special compensation may only be considered if the operations performed were in fact undertaken in order to save the vessel or other maritime property. The primacy of the operations as salvage is thus emphasized.

### 2.3.2 Remuneration under SCOPIC

The special compensation regime of the 1989 Convention, although initially welcomed by the different actors of the maritime industry, eventually gave rise to growing dissatisfaction, particularly concerning its implementation and interpretation.<sup>33</sup> This dissatisfaction led to concerned actors, including the ISU and representatives of both protection and indemnity (P&I) and hull and cargo insurers, meeting in order to devise an alternative regime. This new regime was to:

define with greater certainty the circumstances in which salvors would be remunerated on terms other than “no cure, no pay”, and

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<sup>30</sup> Article 14(3).

<sup>31</sup> *Semco Salvage & Marine Pte Ltd v. Lancer Navigation Co. Ltd. Op.cit.*

<sup>32</sup> Bonassies, Pierre. *La fin de l'affaire du 'Nagasaki Spirit', une espérance déçue*. In: *Droit maritime français*. (1997) p. 571 and Bonassies, Pierre and Scapel, Christian. *Traité de droit maritime. Op. cit.* p. 364.

<sup>33</sup> De la Rue, Colin and Anderson, Charles B. *Shipping and the Environment: Law and Practice. Op. cit.* p. 568.



to simplify the assessment of such remuneration, whilst improving salvors' prospects of obtaining security and increasing the scope for other interested parties (in particular, the P&I Clubs) to control their exposure to the cost of those operations.<sup>34</sup>

The result was the Special Compensation Protection and Indemnity Clause, also known as SCOPIC. Although the more detailed provisions of this private-law standard form clause are beyond the scope of this work, a brief summary of SCOPIC will be given.

SCOPIC is a supplementary provision and may only be invoked for salvage operations which are contracted on Lloyd's Open Form. This means that for salvage which does not use LOF, SCOPIC cannot be applied. Although LOF is the most widely used standard agreement, a large percentage of salvage operations nevertheless fall outside of SCOPIC's scope of application, SCOPIC being applicable in only approximately 25% of all LOF cases.<sup>35</sup> SCOPIC can be explicitly incorporated into the main LOF agreement by agreement of both parties. Where the clause is incorporated into the agreement, it may at any time be invoked unilaterally by the salvor.<sup>36</sup> When this is done, the terms of SCOPIC override any contradictory terms of LOF or any other applicable law, and it is on the basis of SCOPIC that the salvor's remuneration is calculated.<sup>37</sup>

When incorporated or invoked, SCOPIC replaces the provisions on special compensation found in Article 14 of the 1989 Convention. However, the invocation of SCOPIC will generally not affect the salvor's right to a traditional salvage award under Article 13 of the Convention. Remuneration under SCOPIC takes the shape of periodically revised tariff rates for the salvor's expenses, as well as a standard bonus which will apply whether or not the salvor has succeeded in preventing pollution.<sup>38</sup> This differs from Article 14 of the Convention, under which an increment for expenses may, as has been discussed, only be applied when the salvor succeeds in preventing or minimizing damage to the environment. Under SCOPIC, as well as under Article 14, the benefit to the environment must have been conferred during salvage operations, that is to say under services intended to save property. SCOPIC, however, does not contain the limited geographical scope of damage that is found in the 1989 Convention. Under SCOPIC, a salvor may "earn

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<sup>34</sup> *Ibid.* p. 569.

<sup>35</sup> Busch, Todd. *Fair Reward for Protecting the Environment: the Salvor's Perspective*. *Op.cit.* p. 3.

<sup>36</sup> SCOPIC 2011. Clause 2.

<sup>37</sup> *Ibid.* Clause 1.

<sup>38</sup> *Ibid.* Clauses 5 and 5(iv).

remuneration no matter where the incident occurs, whether in the middle of the ocean or close to shore”.<sup>39</sup>

### 2.3.3 Remuneration under other regimes

Although the primary remuneration for salvage services aimed at the protection of the environment is contained in the salvage regime as expressed by the 1989 Convention and standard agreements such as SCOPIC, there are a few other potential methods of remuneration that merit brief consideration. One of these is the potential for a salvor to claim compensation under the International Convention on Civil Liability for Oil Pollution Damage of 1969, replaced by its 1992 Protocol (CLC), as well as the supplementary International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage (FUND). The other possibility is for remuneration to be claimed under the closely related 1996 International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances, as amended by a Protocol of 2010 (2010 HNS Convention), if this convention were to enter into force.<sup>40</sup> The HNS regime is largely similar to that of the CLC

The CLC regime establishes strict liability for pollution by persistent oil from oil tankers, and it channels liability to the shipowner. The shipowner will thus always be primarily liable, except in cases where damage is caused intentionally or through reckless conduct by certain actors who are otherwise excluded from liability.<sup>41</sup> The shipowner may however limit his liability for the damage, and once he has reached the liability limit, the IOPC Fund will pay remaining damages up to a much higher level of liability. Under the CLC and FUND regime, anyone may bring a claim for compensation, including individual persons or businesses.<sup>42</sup>

If a salvor did not earn a salvage award, he could still possibly recover his costs under the CLC regime or the 2010 HNS Convention. The rationale for this argument is that the salvor had taken “preventive measures”, which are defined as “any reasonable measures taken by any person after an incident has occurred to prevent or minimize

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<sup>39</sup> Hurst, Hugh. *CMI Colloquium Presentation*. 2010. p. 5. <http://www.comitemaritime.org/Salvage-Convention-1989/0.2746.14632.00.html>.

<sup>40</sup> As of July 31st, 2012, neither the HNS Convention nor the Protocol had entered into force.

<sup>41</sup> Article III(3).

<sup>42</sup> Rothwell, Donald R. and Stephens, Tim. *The International Law of the Sea*. Oxford, (Hart Publishing) 2010. p. 367.

pollution damage”.<sup>43</sup> Under the IOPC regime, salvage and preventive measures can be compensated if they pass the “primary purpose test”, which requires their primary purpose to be the prevention or minimization of *environmental* damage. While a claim under these regimes may be possible, generally, only claims for the *purpose* of preventing or minimizing pollution damage are accepted.<sup>44</sup> Salvage operations, whose primary purpose is the saving of property, will thus often –although not always–fall outside of this realm. Brice similarly contends that the possibility for a salvor to bring a claim under the CLC or Fund Convention seems unlikely.<sup>45</sup>

In so-called dual-purpose operations, where part of the operations do in fact have pollution prevention as their primary purpose, compensation may be earned for this part of the operation. This subject was discussed by the IOPC Fund Committee regarding the 1985 *Patmos* incident.<sup>46</sup> In such a case, the calculation of which part of the operation relates to pollution prevention and which to the salvage of property may be done arbitrarily, as was done in the 1991 *Agip Abruzzo* incident,<sup>47</sup> or it may attempt to distinguish precisely which operations relate to pollution and which to salvage and decide compensation based on the cost of the measures relating to pollution prevention.

Compensation under IOPC is limited to costs and a reasonable profit.<sup>48</sup> Under the IOPC Fund, compensation based on abstract or theoretical models is not accepted. There is also no payment of a salvage award. It stands to reason that compensation under the IOPC, although sometimes possible, is not the preferred choice of salvors. Still, the regime can be, and has been, used with regard to claims for salvage operations relating to the prevention and minimization of pollution.

The 2001 Convention on Civil Liability for Bunker Oil Pollution Damage (Bunkers Convention) deals with pollution damage from bunker oil spills. The Convention is in many ways similar to the CLC regime, although important differences exist. For present purposes, the difference to be highlighted is the absence of channeling provisions in the Bunkers Convention, and that the salvor as such is not protected from liability under this convention. Under the Bunkers Convention, the type of compensation that can be claimed by the salvor is the cost of preventive measures taken to minimize pollution

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<sup>43</sup> CLC, Article I(7). The corresponding provision is found in Article 1(7) of the 2010 HNS Convention.

<sup>44</sup> IOPC Fund Executive Committee. *Decision 000113*. 71 FUND/EXC. 16/4. par. 2.16.

<sup>45</sup> *Brice on Maritime Law of Salvage*. *Op. cit.* p. 449.

<sup>46</sup> IOPC Fund Executive Committee. *Decision 000108*. 71 FUND/EXC. 14/7. paras. 3.3.4-3.3.9.

<sup>47</sup> IOPC Fund Executive Committee. *Decision 000180*. 71 FUND/EXC. 30/4. paras. 4.12-4.14.

<sup>48</sup> *Sea Empress* incident. IOPC Fund Executive Committee. 71 FUND/EXC. 60/8. par. 3.1.4.

damage.<sup>49</sup> The existence of the Bunkers Convention would not preclude the salvor from claiming his costs for preventive measures from a coastal state because the Convention's lack of channeling provisions does not exclude coastal state liability.

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<sup>49</sup> Bunkers Convention. Article 2(a).

### 3 Coastal state intervention in the event of a maritime incident threatening damage to the environment

#### 3.1. Introduction

While salvors' rights are a crucial element in the event of a maritime incident threatening damage to the environment, the rights and obligations of a coastal state in relation to such an incident are equally important. A coastal state will want to protect its population and coastal and marine environment from potential maritime incidents involving oil, bunker fuel, or other hazardous substances, and such an interest is legitimate. As discussed previously, the rights a coastal state may exercise in protecting its environment from maritime casualties have been expanded over the past several decades as a reflection of the growing significance accorded to environmental concerns.

This chapter will examine the coastal state's right of intervention. It will focus on relevant provisions of the Intervention Convention and UNCLOS which prescribe this right. Limitations placed on the right of intervention will be discussed before examining the subject of compensation that may be available to salvors for measures taken by the coastal state in violation of its legal right of intervention. Although an overview of coastal state intervention will be provided, only those aspects of intervention that relate to salvors will be given more detailed review.

#### 3.2 The coastal state's right of intervention

Prior to the adoption of the Intervention Convention, the right for a coastal state to intervene in the event of a maritime incident was not part of customary law, if such an intervention took place beyond the territorial sea. It has been argued that had this right already existed in customary law, there would have been no need for the adoption of an international convention on intervention.<sup>50</sup> Instead, the right of intervention was emerging at the time of the *Torrey Canyon* incident, and has since developed into customary law.<sup>51</sup> Whether or not this view is correct, there is at present a conventional right of intervention,

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<sup>50</sup> Churchill, R. R. and Lowe, A.V. *The Law of the Sea*. 3rd edition. Manchester, (Manchester University Press) 1999. p. 355.

<sup>51</sup> *Ibid.*

found in the Intervention Convention, a convention that has been ratified by 87 states comprising over three quarters of the world's tonnage.<sup>52</sup>

### 3.2.1 Intervention under the Intervention Convention

Article 1 of the Intervention Convention accords coastal states the right to:

take measures on the high seas as may be necessary to prevent, mitigate or eliminate grave and imminent danger to their coastline or related interests from pollution of the sea by oil; following upon a maritime casualty or acts related to such a casualty, which may reasonably be expected to result in major harmful consequences.

This right of intervention has been extended to apply to substances other than oil by the 1973 Protocol. There has been discussion as to whether the Intervention Convention is applicable only in the high seas, or if the Convention's geographical domain includes the exclusive economic zone. The concept of the exclusive economic zone did not exist as customary law when the Intervention Convention and Protocol were adopted; and it has been suggested that the right of intervention that exists in the high seas should also *a fortiori* extend inwards to the exclusive economic zone.<sup>53</sup> The argument for this case is that a state's jurisdiction should not *decrease* when moving landward.

The Intervention Convention grants coastal states rights, but these must be exercised within certain limits. Firstly, the intervention must relate to a maritime casualty, which in Article II(1) is defined as "a collision of ships, stranding or other incident of navigation, or other occurrence on board a ship or external to it resulting in material damage or imminent threat of material damage to a ship or cargo". The mere danger of a maritime casualty occurring is not sufficient for intervention under this article.<sup>54</sup> This means that intervention against a ship which is in distress but does not fulfill the criteria for a maritime casualty does not fall under the Convention. This criterion thus limits the types of incidents to which the Convention applies.

In addition to the condition that a maritime casualty have occurred, the Intervention Convention further limits the possibility for intervention by requiring that the

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<sup>52</sup> As of July 31st, 2012.

<sup>53</sup> Falkanger, Aage Thor. *Maritime Casualties and Intervention: Coastal State Measures When Casualties Pose the Threat of Pollution*. Bergen, (Fagbokforlaget) 2011. p. 125-126. See also Churchill, R.R. and Lowe, A.V. *The Law of the sea. Op. cit.* p. 354.

<sup>54</sup> Falkanger, Aage Thor. *Maritime Casualties and Intervention: Coastal State Measures When Casualties Pose the Threat of Pollution. Op. cit.* p. 131.

coastal state's measures be proportionate to the actual or threatened damage.<sup>55</sup> The measures taken should likewise not go beyond what is reasonably necessary to prevent, mitigate, or eliminate the danger to the environment.<sup>56</sup>

The coastal state, before it intervenes, is further required to consult other affected states and notify any proposed measures to any person who has interests which can reasonably be affected by the intervention of the coastal state.<sup>57</sup> This limitation of consultation and notification may be waived in a situation of extreme urgency requiring measures to be taken immediately.<sup>58</sup>

The criterion of notification could be of importance in relation to salvors. Article III(b) states that any "persons physical or corporate" with interests that can be expected to be affected by the coastal state's intervention measures are to be notified. A salvor who is already engaged in a salvage operation certainly has interests in a coastal state intervention, especially as such an intervention may very well lead to the loss of a salvage award under Article 13 of the 1989 Convention. Although the salvor could potentially still earn special compensation under Article 14 or SCOPIC, this compensation will in the vast majority of cases be considerably lesser than the traditional award under Article 13. It is therefore reasonable to expect that a salvor undertaking salvage operations, in all cases but those of an extreme urgency which fall within the scope of Article III(d), should be notified by the coastal state under Article III(b) of the Intervention Convention.

The concept of notification is not easy to define, and it is not defined in the Convention itself. In interpreting notification using the ordinary meaning of the word, it is unlikely that the obligation to notify would involve an actual consultation with the person affected, in this case the salvor. It is even more unlikely that the affected salvor would need to consent to the measures proposed by the intervening state. According to Article III(b), the coastal state must take into account the views of the notified party. The expression "taking into account" is found in the same article and subsection as notification, and this placement suggests that notification does require, or at least *should* require, the taking into account of the views of the notified party. However, this probably does not mean that the intervening state must also negotiate with the salvor in deciding on the measures. In the end, the decision will lie with the coastal state. This has found some support in legal

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<sup>55</sup> Intervention Convention. Article V(1).

<sup>56</sup> Article V(2).

<sup>57</sup> Article III(a) and (b).

<sup>58</sup> Article III(c).

doctrine.<sup>59</sup> The author would venture to suggest that the intervening state's obligation to notify would, *in dubio mitius*, not imply much actual action on the part of the state, but rather only the relaying of information and the duty to hear the views of the salvor. It has even been suggested that the intervening state may in practice simply notify the flag state of the vessel in distress, and that the flag state in turn notify the private persons.<sup>60</sup> However, in the view of this author, this suggestion is contrary to the wording of Article III(b), and should accordingly be disregarded. Nevertheless, notification of the interested persons, though in itself an obligation under the Convention, does not imply that the person being notified has any actual right in the decision-making, other than the right of being notified and being heard.

In addition to the duty to consult, the intervening state's duty under Article V(2) may have an effect on salvors. This article provides that proportionate measures taken should "not go beyond what is reasonably necessary to achieve the end mentioned in Article I and shall cease as soon as that end has been achieved; they *shall not unnecessarily interfere with the rights and interests of the flag State, third states, and of any persons, physical or corporate, concerned*".<sup>61</sup> It can therefore be argued that the coastal state has a duty not to unnecessarily interfere with the rights and interests of the salvors involved in salvage operations of the vessel. These interests and rights would, as in the case of Article III(b) discussed previously, be the salvors' legitimate interest in completing a successful salvage and earning a salvage award under Article 13 of the 1989 Convention or under SCOPIC. It could certainly be held that this interest has been interfered with by the coastal state if the latter were to order the vessel to be towed out of its maritime zones, for instance, or to prohibit the salvors from transferring cargo from the stricken vessel. An order to this effect could impede the salvage operations and reduce the likelihood of their success. Another example of a salvor's interest is the possibility of a coastal state requiring that more complex and expensive methods be used than those which would have been used for a traditional salvage of ship and cargo.<sup>62</sup> This expense could, as has been shown above, lead to damages for salvors if the vessel and cargo were not salvaged and only special

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<sup>59</sup> Birnie, Patricia, Boyle, Alan, and Redgwell, Catherine. *International Law and the Environment*. 3rd edition. Oxford, (Oxford University Press) 2009. p. 428.

<sup>60</sup> Falkanger, Aage Thor. *Maritime Casualties and Intervention: Coastal State Measures When Casualties Pose the Threat of Pollution*. *Op. cit.* p. 178.

<sup>61</sup> Emphasis added.

<sup>62</sup> Busch, Todd. *Fair reward for salvage operations*. [2011]. <http://marine-salvage.com/environment/index.asp?page=fairrewardforsalvageoperations.htm>



compensation were earned. For a salvor, damage could even extend to the loss of expected profits.

Although the salvors' interests likely fall under the scope of Article V(2), the coastal state may still interfere with them, if this interference is necessary. The provision's wording is clear in that a coastal state shall not *unnecessarily* interfere; it follows that if the interference is necessary, it is also permitted. As was held by the International Court of Justice in the *Gabcikovo-Nagymaros* case, it is not the intervening state itself who may be the sole judge of what is necessary.<sup>63</sup> Although this case did not refer to the Intervention Convention, it did apply to the state of necessity generally and could arguably apply to the Intervention Convention as well. If this is so, the criteria used to judge necessity should be objective ones in order to ensure that the action taken is not arbitrary.

A measure is necessary if it is required in order to prevent, mitigate, or eliminate grave and imminent danger. These are the criteria listed in Article I to which Article V(2) refers. Further definition of the notion of necessity is not given in the Convention, so necessity will have to be evaluated on a case-by-case basis. However, in all cases the measures must be both reasonable and necessary. When measures taken by a state contradict those suggested by the salvor, the necessity of such measures could be questioned. A state may certainly justify them as necessary, but there generally exists a common interest between the coastal state and the salvor in the need to prevent damage to the environment. A salvor would therefore not normally be inclined to suggest measures that are contrary to this common interest. While the coastal state may argue that the salvor's interests are more of a commercial nature, this author argues that such an assertion cannot simply be presumed.

All measures, in addition to being necessary, must also be proportionate to the actual or threatened damage.<sup>64</sup> In determining what is proportionate, account should be taken, *inter alia*, of the likelihood of the measures being effective and the extent of the damage that may be caused by these measures.<sup>65</sup> With regard to salvors, these two provisions may be of importance. The measures proposed by coastal states, when they differ from those proposed by salvors, could turn out to be less effective in controlling pollution damage than those suggested by the salvors. This is certainly not always the case, but account must be taken of the fact that salvors are often professionals with more

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<sup>63</sup> *Gabcikovo-Nagymaros Project (Hungary/Slovakia)*, Judgment, I.C.J. Reports, 1997. par. 51.

<sup>64</sup> Article V(1).

<sup>65</sup> Article V(3)(b) and (c).

experience and expertise than that of coastal states.<sup>66</sup> Salvors, who are under a duty to prevent and minimize harm to the environment,<sup>67</sup> will be unlikely to suggest measures that will in fact cause more damage to the environment. A salvor who is negligent may in fact be deprived of all or part of his special compensation under Article 14 of the 1989 Convention.<sup>68</sup> In view of these provisions, and the professional experience of salvors, it may be assumed that a salvor's proposed measures are usually effective.

In evaluating whether or not a measure is proportionate, account is also to be taken of the extent of the damage which may occur. It is not enough only to consider the consequences for the intervening state. Other interests and subsequent damages are equally important. It has been suggested that “[t]he interest relied on [by the intervening state] must outweigh all other considerations, not merely from the point of view of the acting [s]tate but on a reasonable assessment of the competing interests, whether these are individual or collective”.<sup>69</sup> It could accordingly be argued that the absence of a salvage award caused by the measures taken by the intervening state in fact represents damage for the salvor. This was clearly not the primary damage originally envisaged by the drafters of the Intervention Convention, but this should not be an impediment to the application of the provision in relation to salvors' damage as well. Damage may in fact be caused to salvors, in the form of the loss of an award, or the profit element of expenses which is not covered by the 1989 Convention. The present author argues that there is no reason why such damage should not be considered in the evaluation of proportionality.

Even though an intervening state is limited in the measures it may take under the Intervention Convention, there appears to exist a high level of discretion of what these measures may be. As the obligations are not clearly defined in the Convention, one could imagine that a wide range of measures could be potentially acceptable. Although the measures are subject to the limitations discussed above, the lack of a concrete definition of these limitations may pave the way for a subjectively wide range of measures.

### 3.2.2 Intervention under UNCLOS

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<sup>66</sup> Falkanger, Aage Thor. *Maritime Casualties and Intervention: Coastal State Measures When Casualties Pose the Threat of Pollution*. *Op. cit.* p. 173.

<sup>67</sup> 1989 Salvage Convention. Article 8(1)(b).

<sup>68</sup> Article 14(6).

<sup>69</sup> Crawford cited in Falkanger, Aage Thor. *Maritime Casualties and Intervention: Coastal State Measures When Casualties Pose the Threat of Pollution*. *Op. cit.* p. 174.

Under UNCLOS, the right of coastal state intervention in the event of a maritime casualty is also mentioned. Article 221 does not in fact expressly accord a right of intervention in the event of a maritime casualty. The article does, however, restate the coastal state's right of intervention under customary and conventional international law:

Nothing in this Part shall prejudice the right of States, pursuant to international law, both customary and conventional, to take and enforce measures beyond the territorial sea proportionate to the actual or threatened damage to protect their coastline or related interests, including fishing, from pollution or threat of pollution following upon a maritime casualty or acts relating to such a casualty, which may reasonably be expected to result in major harmful consequences.

This provision guarantees already existing rights. These must be found in custom or in other conventions, such as the Intervention Convention. It is uncertain whether Article 221 only reaffirms existing rights or if it actually provides states another right of intervention. According to one view, the right of intervention is already presumed to exist.<sup>70</sup> Other authors hold that Article 221 gives coastal states wider powers than those that exist under the Intervention Convention.<sup>71</sup>

Article 221, like the Intervention Convention, requires the measures taken to be proportionate. This principle of proportionality is thus further highlighted by the reference in UNCLOS. Although notification is a requirement under UNCLOS Article 231, this article, unlike the Intervention Convention, does not require coastal states to notify private persons with affected interests. Only states are to be notified. In this sense, UNCLOS confers less conditions on the coastal state than the powers conferred by the Intervention Convention. In relation to salvors, the Intervention Convention can be seen as more favorable.

### 3.2.3 Intervention under the 1989 Convention

The 1989 Convention mentions the right of intervention. Although this convention is primarily related to private law, it does contain an important public-law provision on coastal states' rights. According to Article 9, the provisions in the 1989 Convention are not to:

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<sup>70</sup> Churchill, R. R. and Lowe, A.V. *The Law of the Sea. Op.cit.* p. 355.

<sup>71</sup> Molenaar, Erik Japp. *Coastal state jurisdiction over vessel-source pollution.* The Hague (Kluwer Law). 1998. p. 388.

affect the right of the coastal State concerned to take measures in accordance with generally recognized principles of international law to protect its coastline or related interests from pollution or the threat of pollution following upon a maritime casualty or acts relating to such a casualty which may reasonably be expected to result in major harmful consequences, including the right of a coastal State to give directions in relation to salvage operations.

This provision does not provide the coastal state with any new right of intervention, but it defines the 1989 Convention's relationship to coastal state intervention. Any rights of intervention that the coastal state already possesses and that are generally recognized will not be affected by the terms of the 1989 Convention. The right of intervention is thereby given priority.

Although the wording of Article 9 and Article 221 of UNCLOS is not identical, it is possible that the rights referred to in Article 9 are the rights conferred upon a state by UNCLOS Article 221. As was discussed earlier, it is uncertain whether these are new rights or already existing customary and conventional rights such as those under the Intervention Convention. It seems reasonable to assume that Article 9 of the 1989 Convention safeguards the rights of intervention under UNCLOS, those under the Intervention Convention, as well as any customary rights of intervention which may exist.

Article 11 of the 1989 Convention also contains a public-law provision relating to cooperation whereby the coastal state is required to "take into account" the need for cooperation among salvors, public authorities, and other interested parties. According to this article, the coastal state's obligation of cooperation includes both the objective of saving life and property and that of preventing damage to the environment. In heeding its duty of cooperation, environmental concerns are therefore not the only concerns the coastal state must consider. It cannot ignore property interests. The article is explicit in stating that the cooperation should ensure the "efficient and *successful* performance of salvage operations".<sup>72</sup> As has been discussed, salvage operations are primarily based on the saving of property, and it thus follows that the criterion of success must relate, at least partially, to the salvage of property.

Article 11 does not specify the content of the state's duty to cooperate. The obligation exists, but it, along with the other public-law provisions of the 1989 Convention,

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<sup>72</sup> Emphasis added.

has been characterized as “vague and equivocal”.<sup>73</sup> The precise nature of the obligation is not defined.

In the discussions leading up to the 1989 Convention, there had been calls to strengthen Article 11 by including in it an obligation for coastal states to allow vessels in distress access to their ports.<sup>74</sup> This suggestion was not retained, as the wish was to keep public-law obligations outside of the 1989 Convention, which was to deal mainly with private-law matters. So, while states do have a duty to cooperate, this duty is not expressed as strongly as it could have been.

### 3.3 Coastal state liability for intervention and the compensation of salvors

The right of intervention accorded to a coastal state by the conventions discussed above will logically entail a corresponding liability if the obligation were to be breached. Any action taken by the coastal state contrary to, or in excess of, its right should therefore bring about some sort of consequence. This section will examine the potential liability of a coastal state toward a salvor when intervention has resulted in damages for the latter.

#### 3.3.1 Liability and compensation under the Intervention Convention

The Intervention Convention does not contain any specific provision on payment of compensation to any party, including salvors.<sup>75</sup> What it does contain is Article VI which states that a party who takes measures in contravention of those permitted by the Convention is to pay compensation for damages for measures which exceed those reasonably necessary. The criterion of reasonableness and necessity is once again the decisive factor as is the criterion of damage caused by the measures. The obligation to pay compensation lies on the intervening state; who may be entitled to receive such compensation is another issue.

It has been argued that the right of compensation under Article VI belongs only to states.<sup>76</sup> One reason for this argument is that only states are parties to the Intervention Convention. Although most legal authors appear to share this view,

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<sup>73</sup> Mukherjee, Proshanto K. *Refuge and Salvage*. In: Aldo Chircop and Olof Linden (Eds.) *Places of Refuge for Ships: Emerging Environmental Concerns of a Maritime Custom*. Leiden, (Martinus Nijhoff) 2006. p. 278.

<sup>74</sup> *Ibid.*

<sup>75</sup> *Brice on Maritime Law of Salvage. Op. cit.* p. 452.

<sup>76</sup> Churchill, R. R. and Lowe, A.V. *The Law of the Sea. Op. cit.* p. 354.

Falkanger<sup>77</sup> brings up a valid argument according to which a claim could be forwarded by a private party, such as a salvor. Article VI of the equally authentic French version of the Intervention Convention does in fact imply that a claim against a coastal state can be brought by a private party who has suffered damage. The French text reads as follows:

Toute Partie à la Convention qui a pris des mesures en contravention avec les dispositions de la présente Convention, causant à *autrui* un préjudice, est tenue de *le* dédommager pour autant que les mesures dépassent ce qui est raisonnablement nécessaire pour parvenir aux fins mentionnées à l'article précédent.<sup>78</sup>

The use of the article “le” in reference to “autrui” suggests that it is precisely this “autrui” (“other”) who is to be compensated by the intervening coastal state. This would give the salvor who has suffered damage a direct claim against the coastal state.

Although this argument appears logical to this author, it would appear that Falkanger himself is in doubt over its legitimacy. He appears to take the view that it is in fact the flag state and not the private actor who will be able to claim against the coastal state.<sup>79</sup> This author would venture to argue that Falkanger’s initial reading of the French text is indeed correct and that it is at least *possible* to argue that a salvor may bring a claim for damages against a coastal state under Article VI.

It may even be argued that the English text grants a right of compensation to a private party. According to this version, a state party who causes damage to others is obliged to pay compensation. Nothing in this article excludes the right of these “others” to bring a claim. Had only states parties been intended, this could have been explicitly provided for in the text. An “other” could arguably be a salvor. It does, however, seem more plausible to argue that it is only the state who may bring a claim under a reading of the English text than under the French text. Many legal authors appear to take this view.<sup>80</sup>

It is, however, interesting to note that Brice, in discussing the possibility of a salvor (or a shipowner) recovering damages from the coastal state under the English Merchant Shipping Act of 1995, notes the similarities between Section 138 of this piece of national legislation and the Intervention Convention’s Article VI. Under Section 138, which echoes the criteria found in the Intervention Convention, a salvor may claim

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<sup>77</sup> Falkanger, Aage Thor. *Maritime Casualties and Intervention: Coastal State Measures When Casualties Pose the Threat of Pollution*. *Op. cit.* p. 186-188.

<sup>78</sup> Emphasis added.

<sup>79</sup> Falkanger, Aage Thor. *Maritime Casualties and Intervention: Coastal State Measures When Casualties Pose the Threat of Pollution*. *Op. cit.* p. 190.

<sup>80</sup> *Ibid.*

compensation for lost salvage remuneration, although such a claim would indeed be a rare occurrence.<sup>81</sup> The fact that the English law is understood in this way does not alter the interpretation to be given to Article VI of the Convention, although it is interesting to note the possibility, albeit rare, that has been found under a national legislation based on the Intervention Convention for a salvor to claim compensation.

Whichever may be the correct reading of Article VI, it is important to mention Article VII which provides for the rights of physical or corporate persons. According to this article, “[e]xcept as specifically provided, nothing in the present Convention shall prejudice any otherwise applicable right, duty, privilege or immunity or deprive any of the Parties or any interested physical or corporate person of any remedy otherwise applicable”. Although this may not grant the salvor a right to compensation under the Intervention Convention *per se*, it does serve to safeguard any right the salvor may have outside of the Convention. If the coastal state is found to have infringed the salvor’s right and caused him damage, he may be able to rely on national remedies in tort for compensation.

Article VI may or may not grant the coastal state a right of compensation; Article VII indisputably does not create any such right, although it does serve as reminder of the already existing rights a private actor may have. This should include any action a salvor possesses under the 1989 Convention or any other international regime.

The provisions on conciliation and arbitration found in the Intervention Convention’s Article VIII reserve these procedures for states parties to the Convention. These procedures are meant to determine whether or not measures taken by the intervening state are permissible. A private party may not benefit from these procedures except where a contracting state can bring proceedings on his behalf.<sup>82</sup> Therefore, whether or not a salvor has a *right* to compensation, the Convention is silent as to what action he may take. A right of action must thus be found in other international agreements or in national legislation.

### 3.3.2 Liability and compensation under UNCLOS

UNCLOS, as a framework convention, does not focus particularly on liability of coastal states. Liability to salvors is not discussed. Article 232 does impose state liability for

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<sup>81</sup> *Brice on Maritime Law of Salvage. Op. cit.* p. 456.

<sup>82</sup> De la Rue, Colin and Anderson, Charles B. *Shipping and the Environment: Law and Practice. Op. cit.* p. 903, footnote 85.

damages from enforcement measures taken by the state in the protection and preservation of the marine environment. According to this article, the coastal state will be liable if these measures “exceed those reasonably required in the light of available information”. The criterion of reasonableness is, like in the Intervention Convention, of carrying weight. The causal link between the measures and the damage is further highlighted.

During the drafting process of the Convention, a suggestion was put forth by the Soviet Union where Article 232 would explicitly provide for a right of compensation for “damage caused by measures exceeding those reasonably necessary”.<sup>83</sup> The reference to compensation was, however, not included in the final wording of the provision. Had it been retained, it may have served as a basis for a salvor’s claim.

Under Article 232, states are to provide recourse for such action in their courts. This is the principal obligation of the article.<sup>84</sup> A salvor’s action will thus necessarily take place in a national court, as the relevant dispute settlement mechanisms in UNCLOS are not available to private persons. The dispute settlement mechanisms in UNCLOS are reserved for states parties to the Convention, and in a few specific circumstances –which are not relevant to salvage– to private actors. Although states must provide recourse under Article 232, claims –if brought directly by salvors– will be before national courts and not under international dispute settlement mechanisms. The effectiveness of Article 232 is thus dependent on the individual state’s willingness and ability to provide for such recourse within its national legal system.

Article 304 safeguards the right of liability outside of UNCLOS. This Convention will not affect already existing rights as well as future rules on responsibility and liability to be developed.

### 3.3.3 Liability and compensation under the 1989 Convention

The 1989 Convention principally deals with the relationship between the shipowner and the cargo owner on the one hand and the salvor on the other. Liability of a coastal state is not expressly mentioned, as was the intention during the negotiations leading up to the adoption of the Convention. Yet, as has been shown, there exist a few provisions dealing with coastal states.

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<sup>83</sup> *United Nations Convention on the Law of the Sea: A Commentary. Vol. IV.* Edited by Myron H. Nordquist et al. Dordrecht (Martinus Nijhoff Publishers) 1991. p. 379.

<sup>84</sup> *Ibid.* p. 380.



One of these provisions, Article 11, deals with cooperation. The question of whether this article actually gives rise to any coastal state liability appears to be readily answerable. Article 11 regulates coastal state behavior in that the coastal state must cooperate with salvors. However, no right of action is granted against the coastal state under this article. This view follows from the text and is supported by literature as well.<sup>85</sup> Nowhere else in the Convention is any right of recourse mentioned. A salvor would thus have to rely on national legislation in order to forward a claim against the coastal state, and it is uncertain to what extent this type of action actually exists. Furthermore, few states have given effect to Article 11 under their national legislation.<sup>86</sup> Even so, a right of action does not follow from Article 11.

It seems that the only remedy a salvor possesses under the Convention itself is the one against the shipowner. It has been held that even when the coastal state is the instigator of action which frustrates the salvage contract, the only right to compensation a salvor will have will fall under the special compensation scheme of Article 14, compensation which is to be paid by the shipowner.<sup>87</sup> No real compensation exists under the 1989 Convention. It has been rather adroitly stated that “[u]nder the law of salvage, the financial risk for the authorities’ decisions lies with the salvor”.<sup>88</sup>

#### 3.3.4 Liability and compensation under other regimes

In respect of coastal state liability, the CLC and FUND Convention, as well as the 2010 HNS Convention, do not primarily serve as a regime under which a salvor may claim compensation. As has been outlined in section 2.3.3, these conventions serve to channel liability to the shipowner. The coastal state is, however, not one of the actors to which the channeling provisions apply, except when it is considered to be taking preventive measures.<sup>89</sup> Preventive measures must be reasonable and must be taken in order to prevent or minimize pollution damage.<sup>90</sup> If the measures taken by a coastal state are not reasonable or do not serve to prevent or minimize pollution damage, they will not be preventive

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<sup>85</sup> Mukherjee, Proshanto K. *Refuge and Salvage. Op. cit.* p. 293.

<sup>86</sup> Hetherington, Stuart. *Paper given at the United States Maritime Law Association- Hawaii Meeting.* [2011], p. 12-13. <http://www.comitemaritime.org/Salvage-Convention-1989/0.2746.14632.00.html>.

<sup>87</sup> *Brice on Maritime Law of Salvage. Op. cit.* p. 456.

<sup>88</sup> Røsæg, Erik and Ringbom, Henrik. *Liability and Compensation with Regard to Places of Refuge. Study No. EMSA/RES/001-2004. Draft Final Report.* (Scandinavian Institute of Maritime Law: University of Oslo) 2004, p. 28.

<sup>89</sup> CLC Article III(4)(c).

<sup>90</sup> Article I(7).

measures as defined by the CLC. The difficulty would lie in an appreciation of what constitutes a reasonable measure, and it is submitted that it should not be the coastal state's own subjective judgment that determines what is reasonable. If the measures are not considered to be preventive measures, the channeling provision in Article III(4)(c) will consequently not apply. In such a case, a salvor could potentially raise a claim against the coastal state, but such a claim would have to be brought under applicable national legislation, if there is any. As for any liability outside of strict liability provisions, a causal link must exist between the coastal state's measures and the damage caused to the salvor.

Were the measures to be defined as preventive measures, the channeling provisions would apply to the coastal state. Even when the channeling provisions do apply, they apply only to pollution damage and claims of compensation for preventive measures. Other damage falls outside of the scope of the CLC, as well as outside of the channeling provisions. Such claims would thus not be excluded.<sup>91</sup>

In contrast to the CLC and HNS regimes, the Bunkers Convention does not contain any channeling provisions. A coastal state is not directly liable under the Convention itself, but because of the absence of channeling provisions, there is nothing that would prohibit a claim from being brought against a coastal state on the basis of other law. In principle, the Bunkers Convention creates a possibility for competing claims. Claims could be brought "independently of the Convention against parties other than the shipowner".<sup>92</sup> This would include the coastal state. A salvor could therefore bring claims both in relation to the damage covered by the Bunkers Convention –most importantly, for preventive measures– and for other damage, and the Convention would not act to prohibit such a claim. It would also appear that the salvor could bring claims for amounts exceeding those which are recoverable from the shipowner.<sup>93</sup> It could be argued that such claims could be brought against the coastal state where its actions had caused damage to the salvor.

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<sup>91</sup> De la Rue, Colin and Anderson, Charles B. *Shipping and the Environment: Law and Practice*. *Op. cit.* p. 703.

<sup>92</sup> *Ibid.* p. 262.

<sup>93</sup> *Ibid.*

## 4 Salvors and places of refuge

### 4.1 Introduction

There are many ways in which a coastal state can exercise its powers of intervention; one of particular importance for salvors is the admittance or the refusal of a vessel to a place of refuge. The denial of a place of refuge by a coastal state is a measure of intervention that can easily result in negative consequences for the salvor. It may be due to this denial of refuge in sheltered waters that the salvor may be unable to successfully complete the salvage of the vessel and the cargo. Consequently, he may not earn a salvage award under Article 13 of the 1989 Convention, and he may have to rely on special compensation under Article 14 or SCOPIC, when the salvage is performed under LOF and this clause has been invoked. The award might subsequently be much lesser than that which could have been earned had the vessel and cargo been successfully salvaged. The question of places of refuge is thus intimately linked to salvage operations, and it is the reason that the present section will be devoted to places of refuge in relation to salvors.

There are numerous cases where salvors have been denied access to places of refuge and damage to the environment has consequently occurred. In certain situations, the damage to the environment would most likely not have occurred or would have been greatly reduced had a place of refuge been offered. A well-known example is that of the *Prestige*, where, in 2002, the vessel was refused access to sheltered waters and was ordered out to sea by the coastal state. The salvors were forced to comply, and the vessel broke up, causing considerable damage to the sea and coast. It has been widely acknowledged that had the vessel been admitted to a place of refuge, the ship and most of her cargo could have been salvaged and the amount of damage to the environment would have been greatly reduced.<sup>94</sup> It was even alleged that the Spanish government was negligent in its decision to deny refuge to the *Prestige* as well as in wrongfully impeding salvage operations, although this claim was dismissed by the United States District Court at which it was presented.<sup>95</sup> A few examples of earlier cases where refuge was denied include the *Christos Bitas* and the *Andros Patria* in 1978, the *Erika* in 1999, and the *Castor* in 2000. In the *Castor* incident, the fully-laden tanker was refused entry by several states, and salvors were thus forced to

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<sup>94</sup> Busch, Todd. *Fair reward for salvage operations*. *Op. cit.* p. 7.

<sup>95</sup> Baughen, Simon. *Maritime Pollution and State Liability*. In: Baris Soyer and Andrew Tettenborn (Eds.) *Pollution at Sea: Law and Liability*. (Informa) 2012. [Article in final proof stage, furnished by author]. p. 228.

tow the vessel around the Mediterranean for weeks, while seeking admission to sheltered waters in order to carry out cargo transfer and repair operations. This incident caused a great deal of concern and was one of the events leading up to the adoption by the IMO of its Guidelines on Places of Refuge for Ships in Need of Assistance in 2003 (IMO Guidelines), which will be examined further in this chapter.

While there have been several well-publicized cases where a coastal state's intervention in salvage operations has had a negative effect both on the salvor –with regard to his lost or reduced award– and on the environment, there have also been incidents in which refuge was granted to a vessel in distress, only to result in damage to the coastal state. In the *Kowloon Bridge* incident in 1986, the vessel –a bulk ore carrier– was granted access by the coastal state, only to wreck, spill bunker oil, and cause damage to the coastal environment.<sup>96</sup> This is an example testifying to the fact that it may be a great environmental risk for the coastal state to grant refuge to a vessel in distress. The debate over places of refuge, which has escalated in recent years, is a testament to the real concerns that both coastal states and the parties representing the vessel may have. As the fate of salvors is intimately linked with the interest of the vessel to be granted access to sheltered waters, the present chapter will focus on places of refuge. The obligation to accord refuge will be examined, as will the potential liability in regard to salvors of a coastal state for the denial of refuge under the present regime.

#### 4.2 The obligation to provide a place of refuge

Traditionally, in all parts of the world, a right of refuge for vessels in distress has existed.<sup>97</sup> This right was something of an exception to the general rule that there is no right of entry into port unless specific treaty provisions exist. The right of refuge was an unwritten customary norm supported by the entire international maritime community, and it consisted of “a complementary right of the ship and crew to self-preservation and a

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<sup>96</sup> Chircop, Aldo. *Ships in Distress, Environmental Threats to Coastal States, and Places of Refuge: New Directions for an Ancien Regime?* In: Aldo Chircop and Olof Linden (Eds.) *Places of Refuge for Ships: Emerging Environmental Concerns of a Maritime Custom*. Leiden, (Martinus Nijhoff) 2006. p. 215.

<sup>97</sup> Chircop, Aldo. *The Customary Law of Refuge for Ships in Distress*. In: Aldo Chircop and Olof Linden (Eds.) *Places of Refuge for Ships: Emerging Environmental Concerns of a Maritime Custom*. Leiden, (Martinus Nijhoff) 2006. p. 163.

responsibility on the part of the coastal authorities to assist them”.<sup>98</sup> This was even considered to be an obligation on the part of the state.

The obligation to provide refuge retained its importance throughout the centuries, and has only recently begun to be questioned in the emergence of environmental concerns and in response to incidents such as the *Torrey Canyon*. It is the coastal states’ concern for the environment that has led them to deny refuge to the aforementioned vessels in distress as well as in numerous other cases. The emergence of the environment as significant concern has served to question the customary right of refuge.

When human life is at risk, the right of refuge arguably persists. The primary concern is that of human safety, but it appears that environmental concerns have overtaken property interests in the vessel and its cargo. However, the question remains as to whether, barring concern for human life, coastal states are under the obligation to offer a place of refuge to a vessel in distress. Should this obligation exist, its positive influence on the potential success of salvage operations is not to be ignored.

Whether or not a coastal state has an obligation to provide refuge to a vessel in distress is unclear. While it appears that a state does not have a legal obligation to grant refuge, it would also appear that there is no actual right to refuse refuge either.<sup>99</sup> The right to refuse refuge is in any case not explicit.

An explicit right to deny refuge would indicate an emerging new custom differing from the previously existing custom of granting refuge. This new trend is found by studying state practice refusing access to places of refuge over the past few decades. In addition to practice, *opinio juris*, or the “psychological element attesting to the perception of an obligation” is needed in order for a customary right to exist.<sup>100</sup> This *opinio juris* may very well exist, although it is a difficult element to prove. While the right to refuge appears to have been eroded over the past few decades, at least when there are no humanitarian concerns, there appears to be a new movement toward the renewal of this right in certain circumstances.

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<sup>98</sup> Chircop, Aldo, Linden, Olof, and Nielsen, Detlef. *Characterising the Problem of Places of Refuge for Ships*. In: Aldo Chircop and Olof Linden (Eds.) *Places of Refuge for Ships: Emerging Environmental Concerns of a Maritime Custom*. Leiden, (Martinus Nijhoff) 2006. p. 4.

<sup>99</sup> Ringbom, Henrik. *You are Welcome, but...Places of Refuge and Environmental Liability and Compensation, With Particular Reference to the EU*. In: CMI Yearbook 2004. (2004) p. 210.

<sup>100</sup> Chircop, Aldo. *The Customary Law of Refuge for Ships in Distress*. *Op. cit.* p. 166.

The IMO Guidelines may give some guidance on this issue, although this instrument avoids “peremptory language, such as rights and obligations”.<sup>101</sup> These guidelines are to be applied on a case-by-case basis, and they do not impose a specific obligation on the coastal state, although they do serve to encourage access to places of refuge under certain conditions. The IMO Guidelines highlight the difference between saving human life and aiding vessels in distress. This is done by completely excluding assistance to human life from its domain of application and referring this to the 1979 International Convention on Maritime Search and Rescue Convention.<sup>102</sup> In addition, the IMO Guidelines serve to balance the environmental concerns of the coastal state and the interests of the vessel in distress. They list criteria that should be taken into consideration when granting or denying refuge.

The IMO Guidelines do not grant any actual right of refuge, and they explicitly state that there is no obligation for a coastal state to grant refuge.<sup>103</sup> The coastal state should, however, take into consideration all of the factors and risks and weigh these in a balanced manner.<sup>104</sup> It may also, in granting refuge, impose practical requirements on the vessel in order for access to be granted.<sup>105</sup>

An obligation to grant a place of refuge can thus not be based on the IMO Guidelines. If such an obligation does exist, it is to be found in conventional or customary law. Still, it could be argued that the position of the vessel in distress is somewhat strengthened by the IMO Guidelines. This new trend can be found in spirit of the IMO Guidelines, not in their actual content which does not oblige states to provide refuge, but rather in the fact that the Guidelines were actually adopted. The adoption of the Guidelines can be seen as a first step in counterbalancing the right of intervention of the coastal state and potentially paving the way for a reemergence of the right of refuge for vessels in distress. The recent international and regional discussions and in some cases, adoption of instruments on places of refuge, are to be seen as an effort to “clarify the role and responsibilities of all parties involved with a view to ensuring that ships in distress are handled in a manner which is most beneficial for maritime safety and the marine

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<sup>101</sup> Chircop, Aldo. *The IMO Guidelines on Places of Refuge for Ships in Need of Assistance*. In: Aldo Chircop and Olof Linden (Eds.) *Places of Refuge for Ships: Emerging Environmental Concerns of a Maritime Custom*. Leiden, (Martinus Nijhoff) 2006. p. 36.

<sup>102</sup> IMO Guidelines, 1.1.

<sup>103</sup> *Ibid.* 3.12.

<sup>104</sup> *Ibid.*

<sup>105</sup> *Ibid.* 3.13.

environment”.<sup>106</sup> The interests of both the vessel and the coastal state should be taken into account. This echoes the discussion of previous years on coastal states’ interests in relation to those of salvors.

Article 9 of the 1989 Convention expressly preserves the rights of states to intervene “in accordance with generally recognized principles of law”. Were these principles to include the right of refuge, this right would consequently have its place as a conventional right. Whether the right of refuge is included in the “generally recognized principles” is uncertain. Article 11 of the Convention does mention the admittance of vessels into ports as a measure which a coastal state may or may not take in relation to salvors, but the granting of a place of refuge could encompass more than just the admittance to port. Access to sheltered waters in the territorial sea is often all that is requested by the salvor. In either case, Article 11 only imposes an obligation of cooperation with regard to the admittance into port. It does not impose an obligation of actually *admitting* the vessel. It is also not certain that the provision in Article 11 can be seen as a generally recognized principle of law, in light of the number of states that have ratified the convention and Article 11’s vague formulation.

Given the above, it appears that there is no obligation for a coastal state to grant access to a place of refuge under international conventional law as it stands today. Whether the same is true under customary law is subject to discussion. The long-standing customary right of access to a place of refuge has at least in some states and in some cases been undermined,<sup>107</sup> and its status today is debatable.

#### 4.3 Coastal state liability for the refusal of refuge

Although the obligation to provide a place of refuge is at best questionable, the liability of a coastal state for the refusal of access to a place of refuge could arguably be invoked in certain situations. The refusal of access could be subject to general principles of international law such as proportionality and reasonableness. Liability could be argued if a coastal state were to deny access to a vessel in distress in violation of one of these principles. A salvor could be one of the potential claimants arguing that the denial of

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<sup>106</sup> Røsæg, Erik and Ringbom, Henrik. *Liability and Compensation with Regard to Places of Refuge*. *Op. cit.* p. 5-6.

<sup>107</sup> Under Irish law, in the *Toledo* case of 1995, the court held that a coastal state could “lawfully refuse refuge” if the harm to the coastal state’s interests potentially outweighed those of the vessel and cargo. It was held that the right of refuge was not absolute, and it was principally of a humanitarian, not an economic, nature. Cited in Baughen, Simon. *Maritime Pollution and State Liability*. *Op. cit.* p. 227.

refuge led to a lost or reduced salvage award. Nevertheless, liability under international law is far from certain.<sup>108</sup>

There is nothing in the existing liability system that suggests that a state is exempted from liability in place of refuge situations.<sup>109</sup> However, the basis of such liability would need to be found in relevant national legislation. The international conventions give little guidance. The 1989 Convention's Article 11 has already been discussed in relation to intervention. This provision explicitly refers to the "admittance of vessels in distress or the provision of facilities to salvors". The provision's wording only imposes an obligation of cooperation, not one of granting refuge, and it would seem improbable that any liability could be derived from this article in a case where the refusal of access caused damage to a salvor.

As to the IMO Guidelines, these explicitly exclude issues of liability and compensation for damage from their domain.<sup>110</sup> This is logical, as they do not actually impose an obligation on coastal states. A salvor could therefore not rely on the IMO Guidelines for a potential claim against a coastal state. The Guidelines could, however, be used to exemplify the concept of "reasonableness" in the decision taken by the coastal to accord or to deny refuge.

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<sup>108</sup> Shaw cited in Mukherjee, Proshanto K. *Refuge and Salvage. Op. cit.* p. 292.

<sup>109</sup> Ringbom, Henrik. *You are Welcome, but...Places of Refuge and Environmental Liability and Compensation, With Particular Reference to the EU. Op. cit.* p. 219.

<sup>110</sup> IMO Guidelines. 1.17.



## 5 New developments

### 5.1 Introduction

As long as the regime relating to salvage is to be pieced together from several distinct instruments and the relationship between all potential actors is not clarified, it would appear that developments must occur separately, within each particular instrument or dealing with one particular aspect of salvage law. Although both private and public actors have a role to play and legitimate interests to defend, at present, the salvage regime remains embodied in the principally private-law 1989 Convention, although important aspects relating to salvage are found elsewhere, such as in public-law instruments.

While the division within the salvage regime still exists and may continue to do so, there are currently stirrings both within and touching upon salvage law. One of these is the ISU's proposal to revise the 1989 Convention. If adopted, the proposal would reform the very essence of salvage law. Another proposal, which will be discussed in section 5.3, concerns places of refuge, and as such, is relevant to salvage without being limited to this subject. Both projects are advocated by the CMI, but as they touch upon sensitive issues relating to state sovereignty in the protection of territory, it is yet to be seen whether they will gain the necessary support from the states who ultimately will be the ones to adopt and ratify them.

### 5.2 The ISU proposal for environmental salvage awards

In 2007, the ISU, discontented with the limited possibilities of being rewarded for efforts to protect the marine environment, proposed an amendment to the salvage regime in the institution of an environmental salvage award. One of the reasons was the continually increasing focus on the environment in salvage operations. As pointed out by the legal advisor to the ISU, “[t]oday there is hardly a salvage event that is not driven by concern for the environment”.<sup>111</sup> Environmental concerns are second only to humanitarian concerns during salvage operations, and, in practice, they have priority over economic interests such

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<sup>111</sup> Bishop, Archie. *The Development of Environmental Salvage and Review of the Salvage Convention 1989*. *Op. cit.* p. 1.

as the salvage of vessel and other property.<sup>112</sup> In spite of this, salvors are only rewarded by the value of the property saved and not by the cost of the environmental damage that has been prevented by the salvage operations. The proposal by the ISU seeks to remedy this situation by amending relevant provisions of the 1989 Convention.

A main point of concern for the salvage industry is what it believes to be an inadequate reward for services rendered. According to the ISU, salvors, although partially rewarded by the 1989 Convention's Article 13, are often deprived of a reasonable reward because of the low value of the salvaged property. Cases arise where there exists a serious threat to the environment, but the amount of the award earned is low compared to the cost and effort expended by the salvors.<sup>113</sup> Environmental concerns are dominant in salvage operations, but they do not dominate in the calculation of salvage awards. This is further exemplified by the fact that the salvor has a legal obligation to "exercise due care to prevent or minimize damage to the environment".<sup>114</sup> This obligation is not necessarily counterbalanced by the salvage award earned.

The ISU proposal would amend Article 13 of the 1989 Convention by removing the criterion of a salvor's skill and effort in preventing or minimizing damage to the environment from the list of criteria to be considered in fixing the amount of the salvage award. Article 14 would be replaced by a new article establishing an environmental award. This new award would be an additional award, separate from the award under Article 13. The new Article 14 award could potentially be earned in all cases where a vessel, its cargo, or its bunkers threatened damage to the environment. The inclusion of bunkers exceeds the scope of the present Convention.

In order to obtain an environmental award, the salvor would not necessarily have to prevent damage to the environment, although any successful efforts to this effect would be a criterion in the fixing of the amount of the new award. The salvor could earn an environmental salvage award when there was a *threat* of damage to the environment. One of the new criteria to be taken into account in the determination of the amount of the award would be "the extent to which a salvor has prevented or minimi[z]ed damage to the environment and the resultant benefit conferred".<sup>115</sup> Included in such a benefit is the avoidance of liability by the shipowner, if save for the salvor's efforts, the owner would

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<sup>112</sup> Chircop, Aldo. *Ships in Distress, Environmental Threats to Coastal States, and Places of Refuge: New Directions for an Ancien Regime?* *Op. cit.* p. 216.

<sup>113</sup> Busch, Todd. *Fair Reward for Protecting the Environment: the Salvor's Perspective.* *Op. cit.* p. 1.

<sup>114</sup> 1989 Convention. Article 8(1)(b).

<sup>115</sup> Proposal for a revised 1989 Convention. Article 14(1)(c).

have been liable for the damage that the salvor prevented.<sup>116</sup> The previously discarded concept of liability salvage would in this way find its way into the new Convention.

According to the proposal, the amount recoverable would not be limited to the salvor's expenses. Similarly to the present regime, it would be the appropriate tribunal that would fix the amount of the award.

The proposal suggests revising Article 1(d) of the Convention to define "damage" as "significant" instead of "substantial", which is the Convention's present wording. Damage would also extend beyond its current geographically-restricted area of "coastal or inland waters or areas adjacent thereto".<sup>117</sup> The choice of replacing of the term "substantial" by the term "significant" appears to be directly linked to the interests of coastal states. The proposal states that even small amounts of oil could be regarded by a coastal state as a "significant" threat.<sup>118</sup> It would thus appear from this context that the threshold for the level of threat perceived by the coastal state should be expressed in the same terms as the definition of damage in the Convention. Although this is not explicitly stated, it could be seen as a mechanism to ensure that there will not be one level of gravity according to which coastal states may measure perceived threats and another, contrasting level to measure environmental damage in respect of which an environmental salvage award may be earned. Were a threat of damage to reach the level of seriousness at which a coastal state would take action in respect of salvage operations, the level of threat for which an environmental salvage award could be earned should logically not be any lesser. However, it must be added that the change of terminology in the proposal would not affect the terminology in other conventions under which a coastal state has a right of intervention.

There has also been discussion on whether or not any reference to places of refuge should be made under Article 11 of the Convention. Despite some support for the inclusion of provisions on places of refuge in the new proposal, in the end, this matter was left out of the proposal.<sup>119</sup>

The role of equity as a driving factor behind the ISU's proposal is a subject that deserves some consideration. It has long been felt by certain actors that it is

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<sup>116</sup> Bishop, Archie. *The Development of Environmental Salvage and Review of the Salvage Convention 1989*. *Op. cit.* p. 24.

<sup>117</sup> *Ibid.* p. 22.

<sup>118</sup> ISU Final Position Paper on Environmental Salvage Awards. [April 2012]. <http://www.marine-salvage.com/environmental/ISU%20Final%20Position%20Paper.pdf>. p. 8.

<sup>119</sup> Bishop, Archie. *The Development of Environmental Salvage and Review of the Salvage Convention 1989*. *Op. cit.* p. 30.

inequitable to ask a salvor to take into account factors such as the protection of the environment without receiving adequate compensation for doing so. The discontent in the salvage industry appears to stem from the discrepancy between what is asked of salvors and the award which they earn. As discussed above, the increasing jurisdiction of the coastal state and its powers of intervention in order to protect the environment are two factors which were not amply provided for in the 1989 Convention. As salvors respond to the demands of environmental interests, their remuneration is small in comparison to the costs which would have ensued had their efforts to protect the marine environment not been successful. It would appear that the salvage industry is concerned that its services, when these benefit the environment, are not being adequately rewarded. Its calls for regime change express what it deems to be an equitable reward for services rendered.

In this spirit, the ISU contacted the CMI and asked the latter to review the 1989 Convention. The CMI established an international working group with the object of reviewing the entire Convention. A colloquium on this subject was held in Buenos Aires in 2010, and a full report is to be made by the working group in October of the present year at a CMI Conference in Beijing. The subject matter is thus of primary importance, and the discussions at the conference could lead to a revised draft convention. Nevertheless, it must be stressed that not all actors are in favor of the proposal. P&I interests, as well as the International Chamber of Shipping (ICS), have expressed their support for retaining the present salvage regime.<sup>120</sup>

A main criticism of the new regime is the method under which an environmental salvage award is to be assessed. There has been concern that the evaluation of these awards would be hypothetical,<sup>121</sup> and that there is no possible way of determining what the damage to the environment *would have been* had not the environmental salvage efforts been successful. In this sense, a comparison with the IOPC Fund may be made, under which, as discussed in section 2.3.3, a theoretical or abstract model for assessing compensation may not be used. It is unclear whether or not an assessment of damage that has been prevented can be done in a scientifically precise manner. Whether or not this can be done, it must be stressed that elements of the 1989 Convention in its present form already cater to hypothetical assessments. Some of the criteria listed in the current Article 13 illustrate the hypothetical nature of assessments of salvage awards. Examples of such

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<sup>120</sup> See Khosla, Kiran. *Salvage Law: Is It Working? Does It Protect the Environment?* 2010 <http://www.comitemaritime.org/Salvage-Convention-1989/0.2746.14632.00.html>.

<sup>121</sup> *Position Paper by the ICS*. June 2012. <http://www.comitemaritime.org/Salvage-Convention-1989/0.2746.14632.00.html>. p. 5.

criteria are the skill and effort in Article 13(1)(b) and (e) and the nature of the danger in Article 13(1)(d). These elements could only with great difficulty be determined in a precise manner, and must by their very nature be arbitrarily assessed. In taking into account these criteria, some degree of arbitrariness must creep into the determination of the amount of the award. This would in general hold true of any damage that is not purely economic.

The above does not intend to signify that the concerns over the method of assessment of damage prevented are not justified. Certainly whenever compensation is to be determined, the precise extent of that which is to be compensated must be known. The author merely wishes to suggest that there are already elements of hypothesis in the existing salvage regime. It appears that it is only the considerable size of potential environmental salvage awards that gives pause to the proposal's critics.

Although some interest groups participating in the discussions leading up to the ISU's proposal originally took into account the role of coastal state interference in salvage operations in suggesting that those who order measures should be the ones to pay for them,<sup>122</sup> this view was not retained in the proposal. The relationship to coastal states is barely mentioned save for a reference to the environment as a primary concern of coastal states.<sup>123</sup> According to the proposal, any environmental salvage award would be paid by the shipowner.<sup>124</sup>

Although the proposal stays within the limits of a revision of the existing private-law convention and does not place any additional obligations on coastal states, it is not difficult to see that the role of coastal states' actions in salvage operations over the past few decades has at least played a small role in the proposal for the amendment of the salvage regime. While coastal states have legitimate interests in interfering with salvage operations, such interference often leads to inequitable results under the current salvage regime. Under the proposal, the coastal state is not expected to pay compensation for the measures it takes, and such an imposition on a coastal state could hardly be considered equitable either. However, the establishment of an environmental salvage award could be said to lessen the financial burden that is placed on the salvor who, in obeying the coastal state's instructions, does so at a detriment to his own interests under the current regime. While the ISU's proposal would not impose any obligations on states, it would have implications for the salvor in respect of his relationship to coastal state authorities.

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<sup>122</sup> Gooding, Nicholas. *Environmental Salvage: The Marine Property Underwriters' View*. 2010. <http://www.comitemaritime.org/Salvage-Convention-1989/0.2746.14632.00.html>. p. 9.

<sup>123</sup> *ISU Final Position Paper on Environmental Salvage Awards*. *Op. cit.* p. 3.

<sup>124</sup> Proposal for a Revised 1989 Convention. Article 14(4).

### 5.3 The CMI Draft Instrument on Places of Refuge

It has been suggested that a new international convention be created in which the issue of liability and compensation arising out of the admission or the refusal to admit a vessel in distress be clarified.<sup>125</sup> Such an instrument would clarify the criteria to be considered in taking a decision on access or denial of refuge.

Recently, the CMI drafted an instrument on places of refuge in the hope that it be transformed into an international convention or other instrument.<sup>126</sup> The draft was adopted by the CMI in 2008 and was submitted to the IMO Legal Committee for consideration in 2009. This draft convention, if adopted by the IMO and adopted and ratified by states, could be the clarification needed with regard to coastal states' obligations and liabilities in place of refuge situations.

One of the prime objectives of the draft is to emphasize the customary right of access to a place of refuge for a vessel in distress. This right is explicit in the instrument's preamble but it may be rebutted by the coastal state if it can show that refusing access was reasonable. Article 6 of the draft goes further than most existing international conventions by giving guidance as to how reasonableness shall be determined. The draft further proposes to give more weight to the IMO Guidelines in defining what is reasonable.<sup>127</sup>

The draft instrument has significant repercussions for salvors. In its preamble, the instrument clearly links salvage operations and places of refuge by stating that "the availability of places of refuge to ships in need of assistance significantly contributes [...] to the efficiency of salvage operations". The draft instrument is further to govern both the actions of states and of salvors, and would therefore be an instrument quite unlike the previously examined conventions in that it includes obligations for both actors.<sup>128</sup> The preamble goes even further in stating that the interests of both salvors and coastal states are to be balanced "in a fair and reasonable way". This would constitute a move away from the present regime where coastal states' interests have been given priority over salvage interests.

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<sup>125</sup> Baughen, Simon. *Maritime Pollution and State Liability*. *Op. cit.* p. 247.

<sup>126</sup> Report Submitted by the CMI to the IMO Legal Committee [April 2009], p. 1. <http://www.comitemaritime.org/Places-of-Refuge/0.2733.13332.00.html>.

<sup>127</sup> *Ibid.* p. 2.

<sup>128</sup> The IMO Guidelines include provisions for both salvors' and coastal states' actions. Nevertheless, these Guidelines do not impose actual obligations.

Under the draft instrument's Article 5, a coastal state will be held liable for damage caused by an unreasonable refusal of access to a place of refuge. This provision is particularly significant for salvors, as they are specifically mentioned. Article 5 explicitly provides for coastal state liability toward a salvor who has suffered damage due to the denial of a place of refuge. There is a reversal of the burden of proof, and it will be the coastal state who must show that it acted reasonably in refusing refuge.

The damage to a salvor includes, but is not limited to, "the salvor's inability to complete the salvage operations". The draft would thereby guarantee the salvor a right to compensation for damages if he did not earn an award due to the coastal state's refusal of refuge. This ties in neatly with the ISU's proposal for an environmental salvage award and would complement the latter in cases concerning places of refuge. Under the draft instrument, the coastal state would have to prove that the denial of refuge was justifiable. This accords with the presumption that the access to refuge is a customary right; a denial of such a right would have to be justified.

The draft instrument, being only a draft, may not be as precise in its terminology as a future convention might be. Even if it were adopted, the exact wording found in the draft may not be reproduced in its entirety in a potential convention. The possibility of changes both in wording and in content must be kept in mind when examining the draft.

Even so, the draft instrument is a step in the direction of creating a unified regime between coastal states and salvors. This regime would be limited in scope as it deals exclusively with place of refuge situations. Nevertheless it would be an attempt at clarifying liability in a situation that is far from uncommon and yet poorly regulated today. Private and public actors would no longer be separated into two different regimes, but unified in a common instrument that would deal with the interests of all concerned parties in the event of a vessel in distress requesting refuge of a coastal state. Nevertheless, it appears unlikely at present that the draft instrument will be adopted.<sup>129</sup> This could be a sign of the hesitancy of states to adopt instruments that limit their sovereignty with regard to the protection of their territory.

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<sup>129</sup> Baughen, Simon. *Maritime Pollution and State Liability*. *Op. cit.* p. 247.

## 6 Conclusion

The current developments in or relating to the salvage regime will not necessarily achieve their intended results. They may not lead to the adoption of a new convention either on salvage or on places of refuge. Yet the mere fact that these amendments are being developed suggests that the regime may not be completely satisfactory as it stands today.

The author finds it difficult to argue that an environmental salvage award should not be instituted. The discrepancy in the environmental work of salvors and their resultant compensation is too substantial to be ignored. Given considerations of equity, the creation of an environmental award should be a natural step in the evolution of the salvage regime. The difficulty rather lies in the form the award should take and in the interests who should have to pay for it. Placing the entire financial burden on the shipowner, and subsequently his insurers, could be too extreme a step. However, such considerations should not act as an impediment to the institution of an environmental salvage, but rather be resolved quickly, so as to bring a sense of justice to the balance of salvors' interests and environmental concerns.

The phenomenon of maritime lepers still exists. There is still a hesitancy – whether justified or not – to allow access to safe havens for vessels in distress. A contemporary example is the *MSC Flaminia*, a container vessel that suffered a fire and explosion in international waters on July 14<sup>th</sup> of this year, causing injury to several, and loss of life to three, members of the crew.<sup>130</sup> Salvage operations were undertaken, and though the fire was controlled, for weeks, no European state would grant the vessel refuge in its coastal waters until the vessel's flag state eventually allowed her entry into her waters on August 21<sup>st</sup> after weeks at sea. This example serves to illustrate the fact that maritime lepers are not only a phenomenon of the past. The draft instrument on places of refuge would, if it were adopted, serve as guide to which actions could or could not be taken by a coastal state in such situations. If the incident were handled improperly, the question of coastal state liability and compensation would arise. Conversely, if the coastal state acted in accordance with the new convention, it would escape such liability. In either case, the coastal state would gain clarity into what is expected of it with regard to refuge.

Whether or not the salvage regime is amended or the draft instrument comes into force, there still remains a desire for a more unified regime addressing the relationship

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<sup>130</sup> As of August 20th, 2012.



between private actors, such as salvors, and coastal states. It appears unlikely that such a regime will ever be created, in view of the unwillingness of states to include public-law provisions in the 1989 Convention as early as its original drafting. The absence of a unified regime does, however, mean that rules governing specific situations will have to be found in separate instruments, that there will be lacunae in the conventional law, and that, in some cases, recourse will have to be had to national law. For an issue as international as salvage, this would not necessarily be the optimal situation.

The survey above suggests that the relationship between coastal states and salvors as it stands today is scattered in a variety of different conventions and difficult to overview in substance. While plenty of goals and objectives exist, tangible obligations are rare, and it appears that in most cases, salvors have few options other than to obey the instructions of coastal states, regardless of their content. While coastal state intervention is not necessarily detrimental to the interests of salvors, it would, in this author's opinion, be desirable that in those cases that it is, salvors be safeguarded a measure to claim compensation from *someone* for the economic gains they have to forfeit in complying with instructions. How such a regime is to be achieved is anything but evident.

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## ANNEX I

Revised Articles 1(d), 13, and 14 of the 1989 International Convention on Salvage as proposed by the International Salvage Union

### **Revised Article 1(d):**

For the purpose of this Convention:

[...]

d) Damage to the environment means significant physical damage to human health or to marine life or resources caused by pollution, contamination, fire, explosion or similar major incidents.

### **Revised Article 13(1):**

The reward shall be fixed with a view to encouraging salvage operations, taking into account the following criteria without regard to the order in which they are presented below:

- (a) the salvaged value of the vessel and other property;
- (b) the measure of success obtained by the salvor;
- (c) the nature and degree of the danger;
- (d) the skill and efforts of the salvors in salvaging the vessel, other property and life;
- (e) the time used and expenses and losses incurred by the salvors;
- (f) the risk of liability and other risks run by the salvors or their equipment;
- (g) the promptness of the services rendered;
- (h) the availability and use of vessels or other equipment intended for salvage operations;
- (i) the state of readiness and efficiency of the salvor's equipment and the value thereof.
- (j) Any award under the revised Article 14.

### **Revised Article 13(4):**

For the avoidance of doubt no account shall be taken under this article of the skill and efforts of the salvor in preventing or minimizing damage to the environment.

### **Revised Article 14:**

14.1. If the salvor has carried out salvage operations in respect of a vessel which by itself, or its bunkers or its cargo, threatened damage to the environment he shall also be entitled to an environmental award, in addition to the reward to which he may be entitled under Article 13. The environmental award shall be fixed with a view to encouraging the prevention and minimization of damage to the environment whilst carrying out salvage operations, taking into account the following criteria without regard to the order in which they are presented below.

- (a) any reward made under the revised Article 13
- (b) the criteria set out in the revised Article 13.1(b) (c) (d) (e) (f) (g) (h) and (i)
- (c) the extent to which the salvor has prevented or minimized damage to the environment and the resultant benefit conferred.

14.2. Any award payable by the shipowner in respect of services to the environment, exclusive of any interest and recoverable legal costs that may be payable thereon, shall not exceed an amount equivalent to:

- (a) In respect of a vessel of 20,000 Gross Tons or less, “x” Special Drawing Rights.
- (b) For a vessel exceeding 20,000 Gross Tons, “x” Special Drawing Rights, plus “y” Special Drawing Rights for each ton in excess of 20,000, subject always to a maximum of “z” Special Drawing Rights.

14.3. For the avoidance of doubt, an environmental award shall be paid in addition to any liability the shipowner may have for damage caused to other parties.

14.4. Any environmental award shall be paid by the shipowners.

14.5. If the salvor has been negligent and has thereby failed to prevent or minimize damage to the environment, he may be deprived of the whole or part of any environmental award due under this article.

14.6. Nothing in this article shall affect any right of recourse on the part of the owner of the vessel.

Accessed at:

<http://www.marine-salvage.com/environmental/ISU%20Final%20Position%20Paper.pdf>

ANNEX II  
CMI Draft Instrument on Places of Refuge 2008

**PREAMBLE**

THE STATES PARTIES TO THE PRESENT INSTRUMENT

**CONSIDERING** that the availability of places of refuge to ships in need of assistance significantly contributes to the minimization of hazards to navigation, human life, ships, cargoes and the marine environment and to the efficiency of salvage operations,

**RECOGNISING** that the legal framework for the efficient management of situations involving ships in need of assistance and requiring a place of refuge should take into account the interests of all concerned parties,

**CONSCIOUS** of the fact that existing international conventions do not establish a comprehensive framework for legal liability arising out of circumstances in which a ship in need of assistance seeks a place of refuge and is refused, or is accepted, and damage ensues,

**NOTING** that the principle of customary international law that there is an absolute entitlement of a ship in need of assistance to a place of refuge has in recent times been questioned,

**BEARING IN MIND** the Guidelines on Places of Refuge for ships in need of assistance, adopted by IMO Resolution A949(23) and the IMO Guidelines on the control of ships in an emergency (adopted as IMO Circular MSC.1/Circ.1251),

**MINDFUL OF THE NEED** for an Instrument which seeks to establish a framework of legal obligations concerning the granting or refusing of access to a place of refuge to a ship in need of assistance,

**INTENDING** that this Instrument shall govern the actions of States, competent authorities, shipowners, salvors and others involved, where a ship seeks assistance; encourage adherence to international Conventions relating to the preservation of human life, property and the environment, and balance those interests in a fair and reasonable way; and shall be construed accordingly,

HAVE AGREED as follows:

**1. DEFINITIONS**

For the purposes of this Instrument:

(a) "ship" means a vessel of any type whatsoever and includes hydrofoil boats, air-cushion vehicles, submersibles, floating craft and floating platforms.

(b) "ship in need of assistance" means a ship in circumstances that could give rise to loss of the ship or its cargo or to an environmental or navigational hazard.

(c) "place of refuge" means a place where action can be taken in order to stabilise the condition of a ship in need of assistance, to minimize the hazards to navigation, or to protect human life, ships, cargoes or the environment.

(d) "competent authority" means a State and any organisations or persons which have the power to permit or refuse entry of a ship in need of assistance to a place of refuge.

(e) "assessment" means an objective analysis in relation to a ship in need of assistance requiring a place of refuge carried out in accordance with any applicable IMO guidelines or any other applicable regional agreements or standards.

(f) "ship owner" includes the registered owner or any other organization or person such as the manager or the bareboat charterer who has assumed the responsibility for operation of the ship from the owner of the ship and who, on assuming such responsibility, has agreed to take over all duties and responsibilities established under the International Safety Management Code, as amended.

(g) "registered owner" means the person or persons registered as the owner of the ship or, in the absence of registration, the person or persons owning the ship; however, in the case of a ship owned by a State and operated by a company, which in that State is registered as the operator of the ship, "registered owner" shall mean such company,

## **2. OBJECT AND PURPOSE**

The object and purpose of this Instrument is to establish:

(a) a legal framework for the efficient management of situations involving ships in need of assistance requiring a place of refuge and

(b) the responsibilities and obligations concerning the granting or refusing of access to a place of refuge.

## **3. LEGAL OBLIGATION TO GRANT ACCESS TO A PLACE OF REFUGE**

(a) Except as provided in Article 3 (b) any competent authority shall permit access to a place of refuge by a ship in need of assistance when requested.

### **OPTION 1**

[(b) The competent authority may deny access to a place of refuge by a ship in need of assistance when requested, following an assessment which on reasonable grounds establishes that the condition of the ship is such that it and/or its cargo is likely to pose a greater risk if permission to enter a place of refuge is granted than if such a request is

refused.

(c) The competent authority shall not deny access to a place of refuge by a ship in need of assistance when requested on the grounds that the shipowner fails to provide an insurance certificate, letter of guarantee or other financial security.]

#### OPTION 2

[(b) Notwithstanding Article 3 (a) a competent authority may, on reasonable grounds, deny access to a place of refuge by a ship in need of assistance when requested, following an assessment and having regard to the following factors:

(i) the issue of whether the condition of the ship is such that it and/or its cargo is likely to pose a greater risk if permission to enter a place of refuge is granted than if such a request is refused, and

(ii) the existence or availability of an insurance certificate, letter of guarantee or other financial security but the absence of an insurance certificate, letter of guarantee or other financial security, as referred to in Article 7, shall not relieve the competent authority from the obligation to carry out the assessment, and is not itself sufficient reason for a competent authority to refuse to grant access to a place of refuge by a ship in distress, and the requesting of such certificate, or letter of guarantee or other financial security shall not lead to a delay in accommodating a ship in need of assistance.]

#### OPTION 3

[(b) Notwithstanding Article 3 (a) the competent authority may deny access to a place of refuge by a ship in need of assistance when requested :

(i) following an assessment which on reasonable grounds establishes that the condition of the ship is such that it and/or its cargo is likely to pose a greater risk if permission to enter a place of refuge is granted than if such a request is refused or

(ii) on the grounds that the shipowner fails to provide an insurance certificate, or a letter of guarantee or other financial security in respect of such reasonably anticipated liabilities that it has identified in its assessment, but limited in accordance with Article 7.]

(d) If access is denied the competent authority shall use its best endeavours to identify a practical or lower risk alternative to granting access.

(e) The obligations imposed by this Article shall not prevent the competent authority from making any claim for salvage to which it may be entitled.

#### **4. IMMUNITY FROM LIABILITY WHERE ACCESS IS GRANTED REASONABLY**

Subject to the terms of this Instrument, if a competent authority reasonably grants access to

a place of refuge to a ship in need of assistance and loss or damage is caused to the ship, its cargo or other third parties or their property, the competent authority shall have no liability arising from its decision to grant access.

#### **5. LIABILITY TO ANOTHER STATE, A THIRD PARTY, THE SHIP OWNER OR SALVOR WHERE REFUSAL OF ACCESS IS UNREASONABLE**

If a competent authority refuses to grant access to a place of refuge to a ship in need of assistance and another State, the ship owner, the salvor, the cargo owner or any other party prove that it or they suffered loss or damage (including, in so far as the salvor is concerned, but not limited to, the salvors inability to complete the salvage operations) by reason of such refusal such competent authority shall be liable to compensate the other State, ship owner, salvor, cargo owner, or any other party, for the loss or damage occasioned to it or them, unless such competent authority is able to establish that it acted reasonably in refusing access pursuant to Article 3(b).

#### **6. REASONABLE CONDUCT**

For the purposes of ascertaining under Articles 3, 4 and 5 of this Instrument whether a State or competent authority has acted reasonably courts shall take into account all the circumstances which were known (or ought to have been known) to the competent authority at the relevant time, having regard, inter alia, to the assessment by the competent authority.

#### **7. GUARANTEES**

##### **OPTION I**

[(a) When agreeing to grant access to a place of refuge to a ship in need of assistance, the competent authority may request the ship owner to provide evidence of an insurance certificate, or a letter of guarantee by a member of the International Group of P&I Clubs, or other financial security from a recognised insurer, bank or financial institution in a reasonable amount in respect of such reasonably anticipated liabilities that it has identified from its assessment. Subject to the following paragraph of this Article, such letter of guarantee or other financial security shall not be required to exceed an amount calculated in accordance with the most recent version of Article 6(1)(b) of the Convention on Limitation of Liability for Maritime Claims, 1976 or the corresponding provision on limitation for claims other than passenger, loss of life or personal injury claims of any other international convention replacing the previously mentioned convention, in force on the date when the insurance certificate, or letter of guarantee or other financial security is first requested, whether or not the State in question is a party to that convention.

(b) Nothing in this Article shall prevent a competent authority from requiring the shipowner to provide a certificate or letter of guarantee under any other applicable International Convention other than this Instrument.]

#### OPTION 2

[(a) When agreeing to grant access to a place of refuge to a ship in need of assistance, the competent authority may request the ship owner to provide evidence of an insurance certificate, or a letter of guarantee by a member of the International Group of P&I Clubs, or other financial security from a recognised insurer, bank or financial institution in a reasonable amount in respect of such reasonably anticipated liabilities that it has identified from its assessment. Subject to paragraph (c) of this Article, such letter of guarantee or other financial security shall not be required to exceed an amount calculated in accordance with the most recent version of Article 6(1)(b) of the Convention on Limitation of Liability for Maritime Claims, 1976 or the corresponding provision on limitation for claims other than passenger, loss of life or personal injury claims of any other international convention replacing the previously mentioned convention, in force on the date when the insurance certificate, or letter of guarantee or other financial security is first requested, whether or not the State in question is a party to that convention.

(b) In cases where claims described in Article 2 paragraphs I (d) or (e) of the Convention on Limitation of Liability for Maritime Claims are not subject to limitation the reasonable amount shall be calculated in accordance with Article 7 (a), with the addition of such amount as is likely in total to compensate the competent authority in respect of such liabilities.

(c) Nothing in this Article shall prevent a competent authority from requiring the shipowner to provide a certificate or letter of guarantee under any other applicable International Convention other than this Instrument.]

#### OPTION 3

[(a) When agreeing to grant access to a place of refuge to a ship in need of assistance, the competent authority may request the ship owner to provide evidence of an insurance certificate, or a letter of guarantee by a member of the International Group of P&I Clubs, or other financial security from a recognised insurer, bank or financial institution in a reasonable amount in respect of such reasonably anticipated liabilities that it has identified from its assessment.

(b) Nothing in this Article shall prevent a competent authority from requiring the shipowner to provide a certificate or letter of guarantee under any applicable International

Convention other than this Instrument.]

#### **8. PLANS TO ACCOMMODATE SHIPS IN NEED OF ASSISTANCE**

States shall draw up plans to accommodate ships in need of assistance in appropriate places under their jurisdiction around their coasts and such plans shall contain the necessary arrangements and procedures to take into account operational and environmental constraints to ensure that ships in need of assistance may immediately go to a place of refuge, subject to authorisation by the competent authority, granted in accordance with Article 3. Such plans shall also contain arrangements for the provision of adequate means and facilities for assistance, salvage and pollution response.

#### **9. IDENTIFICATION OF COMPETENT AUTHORITY**

States shall designate the competent authority to whom a request from a ship in need of assistance for admission to a place of refuge appropriate to the size and condition of the ship in question should be made, and use all practicable means, including the good offices of States and organisations, to inform mariners of the identity and contact details of such competent authority.

Accessed at: <http://www.comitemaritime.org/Places-of-Refuge/0,2733,13332,00.html>.



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