INTRODUCTION

IN RECENT YEARS little progress seems to have been made towards fulfilling the mandate of Principle 22 of the 1972 United Nations Conference on the Human Environment to develop further the international law regarding liability and compensation for transnational pollution or other environmental damage.¹ There are numerous examples of recent international environmental conventions in which the only reference to the international liability of states is in the form of a virtually unchanged restatement of the formula adopted in Principle 22.² In some documents such as the ECE Convention on Long-Range Transboundary Air Pollution, even that oblique reference to the principle of states' international accountability for transnational damage was considered to be inopportune:

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the standard formula was dropped altogether. Pertinent resolutions of international or private organizations in general have made little contribution towards clarification of the exact contours of the principle of liability. Other internationally relevant practice has been similarly disappointing.

Unquestionably, today there is in international practice at least one strong undercurrent towards less rather than more explicitness of the international legal consequences of states' failure to prevent the occurrence of transnational environmental damage; the notion of a state's liability as an international legal duty to make reparation for the infliction of transnational environmental harm is progressively being de-emphasized. Noting this development, some commentators like Alexander Kiss have begun to talk of "soft responsibility," claiming that "les relations internationales contemporaines préfèrent en général la negociation à la mise en oeuvre de la responsabilité internationale."

The perception of a diminished relevance of the traditional concept of the international liability of states as a non-negotiable legal duty to make reparation for transnationally inflicted harm may


4 See, e.g., Principle 12, para. 2, of the Principles of Conduct in the Field of the Environment for the Guidance of States in the Conservation and Harmonious Utilization of Natural Resources Shared by Two or More States, U.N. Doc. UNEP/IG.7/3, 6 (1977), text in 17 Int'l Leg. Mat. 1091 (1978); Resolution 26, para. 1(f), adopted at the XXI Conference of the Inter-American Bar Assoc., held in San Juan, P.R., Aug. 25-31, 1979, in 12 Lawyer of the Americas 145-46 (1980); and European Council of Environmental Law, Project for a Resolution on the Improvement of Compensation of Victims of Oil Spills, Rev. 2 (1982).


6 Of course, the International Law Commission's work on state responsibility and on international liability for injurious consequences arising from acts not prohibited by international law sets a strong counterpoint to the otherwise largely negative international practice. Its work is being referred to throughout this article.


8 "Liability" here is to be understood to imply an international obligation to redress the transnational environmental damage, in particular to pay compensation. It thus encompasses both the notion of liability as a secondary
also be fostered by other factors. Thus, with the increase in the creation of transnational environmental risks by private persons, detailed international liability and compensation schemes that channel liability to the private actor have been or are being put into place. The circumstances in which the controlling state’s international liability might be invoked appears correspondingly reduced. Add to this the well-known criticism of the cumbersomeness of the diplomatic claims procedure as well as the fact that international standards for the protection of the transnational environment are progressively being codified, and the issue of state liability may seem to be of well-nigh negligible importance.

Appearances, however, are deceptive. Relegating the concept of state liability to the sidelines or side-stepping it completely is a serious mistake. For, at least insofar as accidental transnational pollution is concerned, the concept remains a cornerstone in any international legal regime for the protection of the environment. Thus, without anticipating the detailed analysis which is to follow, it should be noted at the outset that the international legislative response to the fact that activities carried on by private individuals increasingly pose significant hazards for the marine environment, has not rendered moot the issue of state liability. As states have deemed it necessary to extend control over these land-based, off-shore, or shipping activities, state involvement has grown commensurately with the increase in the scope and frequency of potentially


9 For details, see infra notes 79-83.

10 I.e., the state in whose territory or under whose jurisdiction the injurious activity is carried on. For further discussion of the notion, see text infra at n. 100.

injurious private sector activities.\(^\text{12}\) State involvement, in turn, bears directly on the prevention of the realization of the transnational pollution risk.\(^\text{13}\) If prevention is indeed to be considered the “best environmental policy,” as Kiss correctly suggests,\(^\text{14}\) the concept of state liability, rather than being subject to easy dismissal as an ineffective incentive,\(^\text{15}\) would have to be emphasized as a key element in the prevention of accidental transnational environmental harm.

By the same token the discernible trend towards internationally negotiated allocation of transnational losses has to be recognized as an undesirable development. It should not be accepted with equanimity, let alone be specifically promoted. For if any reasonable internalization of the costs of the transnationally hazardous activity is to be achieved between victim and polluting states, insistence on state liability as a legal concept with a non-negotiable basic content is essential. Internalization of costs is, of course, a precondition for avoidance of a distortion of the conditions under which nationally produced goods and services compete in the international marketplace\(^\text{16}\) and thus serves as a goal that is generally subscribed to.\(^\text{17}\)

Finally, the concept of states’ international liability must be deemed central to any marine pollution regime in a more funda-

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\(^\text{12}\) This is true despite periodically occurring anachronistic attempts at reestablishing social decision-making through more or less unbridled market forces. For one such recent attempt, see statement of the U.S. delegation to the Nairobi Conference on the Human Environment: “U.S. Tells Ecology Parley to Trust Free Enterprise,” \textit{N.Y. Times}, May 12, 1982, at 8, col. 1.

\(^\text{13}\) For details, see text \textit{infra} at nn. 59-60.

\(^\text{14}\) \textit{Supra} note 7, at 522.

\(^\text{15}\) \textit{Ibid}.

\(^\text{16}\) Only knowledge of the certainty of having to bear the costs of transnational pollution will force states into making a proper cost-benefit analysis of transnationally polluting national activities and thereby will ensure that overall marginal activities will be terminated rather than carried on at the cost of the international community at large.

mental sense: it helps bring into sharper focus rights and corresponding obligations of states with regard to the use of the marine environment. Or, as Professor Brownlie would say, it puts a hard edge on legal rights and duties.\textsuperscript{18} To the extent that clarity of the latter is desirable, the notion of states' international accountability itself will have to be elucidated.

On the basis of these preliminary considerations, it should be evident that an inquiry into the notion of state liability for marine pollution is worthwhile and indeed necessary. The ever expanding scope of coastal state jurisdiction and its implication for increasing international conflict over marine pollution\textsuperscript{19} makes this analysis particularly advisable. Its purpose here, however, will be a limited one. There will be no discussion of the procedural aspects of states' international accountability;\textsuperscript{20} nor of exactly how state liability interfaces with a regime that channels liability to the private actor. For, while it is readily admitted that the "private law" approach is eminently reasonable, there is no need to re-examine issues that have already been discussed elsewhere.\textsuperscript{21} Rather, the purpose of this article is to delineate the controlling state's basic accountability under international law, with the main focus on situations of accidental transnational pollution. For it is only upon a clear understanding of the central role that the concept of state liability invariably plays in any system of transnational accident law, that a regime that would be optimal in terms both of prevention of and compensation for transnational marine pollution damage can be devised.


\textsuperscript{19} In other words, the potential realm of an \textit{actio popularis} would be correspondingly reduced. For a pertinent overview of the feasibility of an \textit{actio popularis} for the protection of the environment beyond national jurisdiction, see, e.g., Picone, "Obblighi reciproci ed obblighi \textit{erga omnes} degli stati nel campo della protezione internazionale dell'ambiente marino dall'ingiunamento," in \textit{Diritto Internazionale e Protezione dell'Ambiente Macino} 87-93 (V. Starghe, ed., 1983).

\textsuperscript{20} For some positive thoughts on that, see instead Lang, "Haftung und Verantwortlichkeit im internationalen Umweltschutz," in \textit{Ius Humanitatis} (Festschrift f. A. Verdross) 517, at 522-23 (Miehslser, Mock, Simma, & Tammel, eds., 1980).

\textsuperscript{21} For an extensive discussion, see Handl, "State Liability for Accidental Transnational Environmental Damage," 74 Am. J. Int'l L. 525, at 560-64 (1980).
INTERNATIONAL LIABILITY FOR NON-ACCIDENTAL MARINE POLLUTION

There is no need here to dwell at length on the issue of state liability for non-accidental marine pollution. Any intentional discharge of pollutants into the marine environment, provided it is not already regulated by specific conduct-related norms, is subject to the requirement that the polluting activity not interfere significantly with other states' use of the seas. This fundamental limitation applies to state activities not only on the high seas but also in the territorial sea and the exclusive economic zone. On the one hand, it is the outflow of the principles of the freedom of the high seas and, on the other, the internationally non-injurious use by a state of territory or resources under its jurisdiction or control.

This general customary international legal obligation already reflected in the due regard clause of Article 2 of the 1958 High Seas Convention and reiterated in Principles 7 and 21 of the Stockholm Declaration on the Human Environment, has found more detailed expression in various provisions of the Draft Convention on the Law of the Sea. Non-accidental pollution of the marine environment as defined above runs counter to this well-established duty if it produces significantly detrimental effects for other states. The

22 The notion of intentional or non-accidental pollution as used in this article refers to pollution that is the result of an activity that is either known to cause or assumed to cause with substantial certainty some detrimental effects. The typical situation will be the case where state authorities know or must be presumed to know of on-going transnational pollution and do nothing to stop it.

23 Such as, in particular, specific discharge standards. For further discussion, see, e.g., Contini & Sand, "Methods to Expedite Environmental Protection: International Ecostandards," 66 Am. J. Int'l L. 37 (1972).

24 Thus to the extent that utilizations of an internationally shared environment are in general interdependent, it follows that in their use of such environment states are under an obligation to take into account the interests of potentially affected other states and to seek a mutual accommodation on the basis of equality: See, e.g., Lake Lanoux case, 24 I.L.R. 101, at 139.

25 As to its affirmation in international judicial or arbitral decisions, see ibid.; the Trail Smelter case, 3 U.N.R.I.A.A. 1911, at 1965; and the Corfu Channel case, [1949] I.C.J. Rep. 4, at 22.


27 Stockholm Declaration, supra note 1.


Liability for Marine Pollution

acting state's international liability will accordingly be engaged for conduct that is internationally wrongful because it results in transnational consequences which in the case under consideration must be deemed to exceed the threshold of mutual tolerance that states have to live with as a natural condition of their physical coexistence.

Conceptually, a state's international liability for such intentional conduct is a straightforward proposition. In practice, however, a finding of liability under customary international legal standards may well founder on the difficulties in arriving at a judgment on whether and, if so to what extent, the acting state's conduct amounts to a crossing of this dividing line. Unless the transnationally injurious impact speaks for itself, as it were, the international legal significance of transnational pollution effects, if not their very existence, is likely to be at issue. Thus, an acting state's claim to be entitled to carry out, say, radioactive waste dumping operations in an enclosed area on the grounds that this activity does not cause any legally significant transnational consequences, typically will be challenged by the victim state alleging unduly harmful effects along its shorelines or within its maritime zones or upon natural resources under its jurisdiction. In such a situation any prima facie inference as to the acting state's liability would have to be preceded by an authoritative initial delimitation of the respective parties' rights and concomitant obligations.

While states have increasingly resorted to conventional stipulations to circumscribe more specifically prohibited state conduct in the marine environment, principally in order to minimize the risks

30 A case in point is the international controversy over atmospheric nuclear tests carried out by France in the South Pacific area. Thus France denied categorically that any foreign populations or the environment beyond French overseas territories were at risk as a result of its tests; see, e.g., letter dated Feb. 7, 1973, from the French ambassador in Canberra to the Australian Prime Minister, Annex 10 to the Australian Application, in Nuclear Tests cases, I.C.J. Pleadings (vol. 1), 28, at 29.

31 An international conflict situation of this sort seems to have arisen between Great Britain and Ireland over the dumping by Britain of low-level radioactive waste into the Irish Sea. For some background information, see R. Shinn, The International Politics of Marine Pollution Control 30 (1974); and BNA, Int'l Env. Rep., Current Report 552 (1983).

32 Note in this context the adoption at the Feb. 1983 meeting of the signatories of the 1972 London Dumping Convention, supra note 2, of a non-binding resolution calling for the suspension of ocean dumping of any radioactive wastes: ibid., 119. However, state practice remains divided as regards ocean disposal of low-level nuclear wastes.
of transnational pollution, this has also had the intended side-effect of making derogations from international pollution prevention obligations easier to verify. The lengthening series of conventions on various aspects of marine pollution, contrary to what has been claimed only recently,\(^\text{33}\) does not suggest that states fail to recognize a duty to prevent significant marine pollution under a prior duty of customary international law. Rather it testifies to the well-appreciated need to flesh out and expand upon the fundamental customary obligation with a view to rendering it more readily effective. This progressive legislative mapping of international obligations, however, has not always brought about the requisite specificity concerning the crucial “point of intersection of harm and wrong.”\(^\text{34}\)

In general, the limits of a state’s responsibility for the preservation of the marine environment tend to remain ambiguous because of overly broad or imprecise formulations used in the conventions concerned.\(^\text{35}\) Thus, the establishment of liability upon the proof of conduct contrary to a treaty obligation often remains an arduous task. In the absence of clear indicia, in the form of specific conduct-related provisions, the ascertainment of liability may still necessitate an ex post facto assessment of the international wrongfulness \textit{vel non} of given state conduct. In such a contextual examination,\(^\text{36}\) the issues of “damage,”\(^\text{37}\) international fact-finding,\(^\text{38}\) and third-party


Exceptionally, with the addition of technical annexes and the proscription of certain classes of polluting activities, some conventions do provide clear normative guidance, at least as to some primary rules of state responsibility.

\(^{36}\) For further details on this multiple-factor, balancing of interests test, see, e.g., Handl, \textit{supra} note 29, at 187-92.


\(^{38}\) As to the importance of an internationally agreed upon fact-finding machinery, see, e.g., intervention of Professor Cohen in debate on “The Environment: International Rights and Duties,” [1980] Am. Soc. Int’l L. Proc. 233, at 248; Bilder, “Settlement of Disputes in the Field of International Law of
Liability for Marine Pollution

decision-making\(^*\) will play crucial roles in rendering operative the
notion that states are internationally liable for significant damage
caused to the environment beyond their jurisdiction or control.

Nevertheless, as the movement towards enacting "primary rules"
of state responsibility for the preservation of the marine environ-
ment gathers pace,\(^0\) and these rules become more refined,\(^1\) a state's
liability for intentional marine pollution progressively will become
less the practical problem it appears to be now. With the focus of
state practice on reinforcing preventive obligations,\(^2\) international
disputes over marine pollution can be expected to shift increasingly
from the remedial to the anticipatory stage.\(^3\) Thus, the issue of
the Environment," 144 Recueil des Cours 139, at 222 (1975). As to a recent
affirmation of the cardinal importance of fact-finding in such situations, see
Quentin-Baxter, Third Report on International Liability for Injurious Con-
sequences Arising Out of Acts not Prohibited by International Law, U.N.

\(^{39}\) See, e.g., Utton, "International Water Quality Law," 13 Natural Res. J.
282, at 299 (1973); and generally, Bilder, \textit{supra} note 38, at 227-30; and
Lang, \textit{supra} note 20, at 531.

\(^{40}\) Note in this context the "regional seas" approach sponsored by UNEP, the
latest example of which is the Convention for the Protection and Develop-
ment of the Marine and Coastal Environment of the Wider Caribbean
Region, \textit{supra} note 2.

\(^{41}\) Cf. in particular the work by the OECD, and the standard-setting by the
European Economic Community, and in particular the IMO.

\(^{42}\) As to the existence of an established body of customary international law
regarding prevention of transnational pollution, see generally Handl, "The

\(^{43}\) That prevention is better than cure, particularly in the area of environmental
protection, is fairly obvious. See, e.g., para. 10 of the Nairobi Declaration
(1982), text in 21 Int'l Leg. Mat. 676 (1982). Differences of opinion exist
as to how best to promote prevention.

For reservations as to the desirability of a general shift towards conduct-
related environmental standards, see, e.g., Cummins et al., "Oil Tanker
Pollution Control: Design Criteria vs. Effective Liability Assessment," 7 J.
Maritime L. and Comm. 169, at 171 (1975-76). The authors point to the
possibility that in certain circumstances preventive guidelines, in particular
technology-oriented standards, may not be the least expensive pollution pre-
vention strategy available. While this point is well taken, the suggested alter-
native, namely deterrence exclusively through an effective system of liability,
as a general proposition, is an unpersuasive strategy in light of the notorious
difficulties in internalizing the real costs of the injurious activity in any
situation of pollution. Obviously, only a mix of preventive controls and
deterrence measures is most likely to produce the best results in terms of
minimizing the costs of pollution prevention and of pollution damage.
liability for transnational damage not only may be easier to decide against the background of well-established international preventive obligations incumbent on the acting state, but also may not be reached altogether because of a successful resolution of the dispute at the preventive stage.

INTERNATIONAL LIABILITY FOR ACCIDENTAL MARINE POLLUTION

A much greater theoretical challenge is the question of when a state's international liability may be said to be engaged in consequence of an accidental pollution of the seas. Despite extensive discussion, this issue has remained a source of some confusion among international lawyers. Differences in terminology apart, one major reason for this state of affairs is the frequently encountered misconception of the scope of the primary rule of state responsibility embodied in Principle 21 of the Stockholm Declaration. Couched in wide terms, namely as the obligation to ensure that no extraterritorial environmental damage is caused, this rule might be taken to imply that a state becomes internationally liable simply upon the occurrence of significant transnational pollution damage. A more careful analysis, however, makes it evident that, as a general proposition, the notion of state liability based on pure causality is without foundation in present international law.

Not only do the records of the Stockholm Conference fail to provide support for such a view, but also international practice, both prior and subsequent to the adoption of the Declaration, clearly proves the contrary. A state's international liability for accidental transnational pollution damage in general continues to be contingent upon the act of the state causing the damage being wrongful under international law. To be sure, any inquiry into whether a state might be internationally liable for accidental pollution will first focus on the transnational effects. An affirmative finding as to

44 “States have... the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or areas beyond the limits of national jurisdiction”: supra note 4.

45 For a clear repudiation of such a view based on Principle 21, see, e.g., de Arechaga, “International Law in the Past Third of a Century,” 159 Recueil des Cours 1, at 272 (1976); and Dupuy, “International Liability of States for Damage Caused by Transfrontier Pollution,” in OECD, Legal Aspects of Transfrontier Pollution 345, at 367 (1977).

46 For a detailed review, see Handl, supra note 21, at 535-40; and note ALI, Restatement, Foreign Relations Law of the United States (Revised), Tent. Draft No. 4, ss. 601(1) and 611(2) (1983).
their “significance” will warrant the conclusion that an infringement of another state’s right is involved. But contrary to cases of non-accidental pollution where such a finding will coincide with a finding of liability for the injury caused, a state’s liability for accidental damage will, as a general rule, turn on an additional element. Liability will depend on proof that the state’s lack of due care or due diligence brought about the transnationally injurious event.

In other words, the state’s failure to prevent the injury will be evaluated against a standard of conduct which, in the light of the circumstances, the state could reasonably have been expected to adopt. Thus the state’s knowledge of the risk of transnational damage, or its means of knowledge thereof, and its opportunity to act in avoidance of the transnational injury represent essential elements in any finding that the conduct in question was violative of an international obligation incumbent upon the acting state and, hence, engages the latter’s liability. \(^{47}\)

This conduct-oriented approach has been criticized as being retrogressive in the sense of detracting from what some have come to regard as an already well-established trend towards strict or absolute state liability for transnational environmental damage. \(^{48}\)

\(^{47}\) Note in particular the ILC’s commentary to Art. 23 (Breach of an international obligation to prevent a given event) of the Draft Articles on State Responsibility, [1978] YB ILC (vol. II, pt. 2) 82-83, para. 6: “In assuming obligations of this kind, States are not underwriting some kind of insurance cover for contracting States against the occurrence, whatever the conditions, of events of the kind contemplated. . . . Only when the event has occurred because the State has failed to prevent it by its conduct, and when the State is shown to have been capable of preventing it by different conduct, can the result required by the obligation be said to have been achieved. . . . The State can obviously be required only to act in such a way that the possibility of the event is obstructed, i.e., to frustrate its occurrence as far as lies within its power.” And see Ago, Eighth Report on State Responsibility, U.N. Doc. A/CN.4/307, 4, para. 3 (1978): “[N]either the occurrence of the event without there having been any negligence on the part of the State organs nor such negligence without the occurrence of any event in itself constitutes a breach of the international obligation.”

Despite these clear references to liability as the consequence of a violation of a contextually determined due diligence standard, one commentator recently arrived at the stunning conclusion that Art. 23 reflects a standard of liability based on pure causality: Zemanek, “Schuld- und Erfolgshaftung im Entwurf der Völkerrechtskommission über Staatenverantwortlichkeit,” in Festchrift für Rudolf Bindschedler 315, at 331 (E. Diez et al., eds., 1980).

\(^{48}\) For such a view of international practice, see in particular, Goldie, “Development of an International Environmental Law — An Appraisal,” in Law, Institutions and the Global Environment 104, at 131 (L. Hargrove, ed., 1972); J. Schneider, World Public Order of the Environment: Towards an
sence of this criticism is that the emphasis on “due diligence” as the yardstick for determining liability runs counter to the result-oriented approach reflected inter alia in such international decisions as the Corfu Channel case. A state’s international liability, it is argued, is being determined through the examination of the alleged violation of another state’s right and not through inquiry into the reasonableness of the acting state’s conduct.\footnote{Statement by the Canadian delegation on State Responsibility in Cases of Transfrontier Pollution, OECD Doc. ENV/TFP/78-5, at 5-6 (1978).}

But this argument is untenable in light of the very legal precedents which are being adduced in its support. Take, for example, the Corfu Channel case. In that decision, the Court upon establishing Albania’s obligation to avert harm by verifying that Albania had knowledge of the existence of the minefield and of the approaching British convoy inquired specifically into whether Albania had also been capable of discharging this obligation. It thereby indicated that Albania’s failure to utilize the existing opportunity to do so was the liability-determining element.\footnote{The Corfu Channel case (Merits), [1949] I.C.J. Rep. 4, at 22-23.} Thus, the decision reflects a standard of liability for negligence and clearly rejects the thesis that mere accidental invasion of another state’s rights would automatically render the acting state liable.\footnote{This should already be obvious from the formulation used by the Court in laying down the basic rule, namely “every State’s obligation not to allow knowingly its territory to be used contrary to the rights of others”: \textit{ibid.}, 22 (emphasis added).} However, it should be emphasized that the decision equally clearly rejects the idea that state liability presupposes “culpa” on the part of the individual whose conduct is imputed to the state.\footnote{See, e.g., de Arechaga, “International Responsibility,” in \textit{Manual of Public International Law} 531, at 537 (M. Sørensen, ed., 1968).}

If this “objective responsibility”\footnote{Sometimes this is also referred to as “liability based on fault” with “fault” merely denoting conduct of the state which is violative of an international obligation and not referring to the individual agent’s culpability as the latter in general will be immaterial as to whether a state has fallen short of the internationally required standard of conduct. See Art. 3 of the Draft Articles on State Responsibility and the Commission’s commentary thereto: \textit{Report of the ILC on the Work of Its Twenty-Fifth Sess.,} in [1973] \textit{YB ILC} 163-67 (1979); Stein, “Legal Problems and Institutional Aspects of Transfrontier Pollution,” in \textit{OECD, Problems in Transfrontier Pollution} 285, at 290 (1974). Cf. also J. Kolosov, \textit{Obwietstwiennost’ w miedzunarodnom prawie} 16-17, 21 (1975).} can be posited as the general
standard governing a state's international accountability for transnational environmental damage, strict liability, that is, liability in the absence of wrongfulness on the part of the acting state, is its exceptional counterpart.

Non-negligent accidental losses pose a particular problem in any system of loss allocation in which “fault” traditionally is a key allocative criterion. The international legal system is no exception in this respect. That transnational loss caused by innocent state conduct should be left to lie with the equally innocent victim state has struck many as an untenable legal principle. And it is certainly true that the law is not indifferent to the occurrence of substantial harm to the rights of others even though the injurious conduct may be blameless. But acknowledging this fact is one thing; suggesting that accidental transnational losses as a class be shifted as a matter of law to the acting state irrespective of the latter’s blameworthiness is quite another. While in many cases sound policy reasons may call for such a shift, in some situations it may be without intrinsic merit and possibly even offend fundamental tenets of fairness.

The question thus raised is: in which circumstances and upon what basis will accidental transnational loss be reallocated to the innocent state in whose territory or under whose jurisdiction the event causing the injury originated? The answer can be stated unambiguously: where a recognizably significant transnational risk is

54 See, e.g., Statement of the Canadian delegation, supra note 49: “A State exercising ‘due diligence’ could still interfere with the rights of another State. This is a position which Canada cannot support as nations must be responsible for damage caused by their polluting activities and this duty should not be relaxed through the adoption of so elastic a concept as ‘due diligence’.”


56 For details, see text infra at nn. 94-95. In this context cf. moreover R. Keeton & J. O'Connell, Basic Protection of the Traffic Victim 242 (1965): “Underlying the whole body of tort law is an awareness that the need for compensation alone is not a sufficient basis for an award. When a plaintiff receives a defendant’s payment in satisfaction of a judgment obtained in court, loss is not compensated in the sense that it is somehow made to disappear. It is only shifted...”
created but cannot be eliminated by reasonable care, the realization of harm typical of the risk will engage the state’s international liability. While the constraints of space do not allow a detailed discussion of the various legal parameters bearing on this issue, a few explanatory comments nevertheless are necessary.

The proposition that strict liability depends on a state’s knowledge or presumed knowledge of the transnational risk it is creating, can be justified by reference to those goals that, it is generally agreed, inspire any system of accident law, namely the minimization of the costs of accidents (the efficiency criterion) and the idea of justice or fairness.

The former objective would be served by shifting the loss to the innocent acting state which, in view of its knowledge (or presumed knowledge) of the hazard created, must be deemed to be the “better cost-avoider”; the acting state is considered to be in a better position to decide whether or not the benefits of the activity are likely to outweigh its potential costs.

To the extent, then, that the acting state could expect to have to shoulder the burden of the accidental transnational loss under a system of strict liability, marginally useful hazardous activities might not be carried on at all, while the carrying on of others is likely to be subjected to more elaborate safety measures. In short, the prospect of strict liability may provide a powerful incentive for the prevention of accidents. Similarly, from a compensation viewpoint, the acting state’s more intimate knowledge of the risk involved would generally make it easier for it to make advance arrangements in order to be able to meet adequately the potential transnational liabilities.

57 For a full development of the argument, see instead G. Handl, Transnational Risk Creation and International Law (forthcoming).


59 For further details, see, e.g., Calabresi and Hirschoff, “Toward a Test for Strict Liability in Torts,” 81 Yale L.J. 1055, at 1060-61 (1972).

60 By the same token, limitation of liability to harm typical of the risk created assures that the acting state will be held accountable only for damage with respect to which it must be deemed the better cost-avoider. Cf. in this context Calabresi and Hirschoff, supra note 59, at 1066.

61 It is true, of course, that where acting states comply with their international obligations of “prior information and consultation,” the victim state would share in the knowledge of the risk created. But both quantity and quality of the information thus supplied must realistically be expected to be less than that which will be available to the acting state.
Finally, strict liability can be defended also on the grounds of fairness. The acting state’s conduct while bestowing benefits on the national community carries substantial potential penalties for the risk-exposed foreign nations. The state’s duty to render compensation in the event that the risk should materialize consequently presents itself as a precondition for the international acceptability of such state conduct. The duty to redress any harm typical of the risk created thus flows from that balance of international rights and obligations embodied in the fundamental notion of the sovereign equality of states the potential disturbance of which the acting state was willing to countenance.

The critical element on which a state’s strict international liability may be said to turn is, it should be reiterated, the creation of a recognizably significant transnational risk. When risk is properly understood to be the product of probability of an injurious event and the consequences of this event, the latter present themselves as the key ingredient of the notion of “significant risk.” For a strict liability regime for transnational accidents is plausible only when the magnitude of potential damage associated with a given accident renders the risk-bearing activity a matter of international concern.62

It is, in other words, the threat of exceptionally grave consequences coupled with a low probability of their happening, and not, vice versa, a high probability coupled with projected minor consequences, that renders a risk “significant” for the purposes of the present discussion.63

That current international law affords a basis for shifting non-negligent accidental losses arising from such significantly hazardous activities cannot be denied. Various treaty regimes already provide


“It does not imply that the activity is ultra-hazardous in the sense that there is a high degree of probability that the hazard will materialize, but rather that the consequences in the exceptional and perhaps quite improbable event of the hazard materializing may be so far-reaching that special rules concerning liability for such consequences are necessary if serious injuries and hardship are to be avoided.”

63 If, by contrast, exceptionally severe consequences were to materialize on a continuous basis, i.e., the probability of their occurrence would be, mathematically speaking one, the accident-prone activity would be banned outright. Indeed, any unavoidably high probability of occurrence of a given accident would presumably render the risk-bearing activity unlawful as long as the consequences remained above the threshold of international legal significance. As to the latter, see text supra at n. 29.
for strict or absolute liability for damage owing to accidents involving certain hazardous activities. And there exists a fledgling extra-conventional state practice reflecting international acceptance of strict liability in cases of transnational damage owing to the miscarriage of recognizably dangerous activities. For the moment, the evidence of state practice is insufficient to suggest a foundation in customary international law of a strict liability approach to transnationally hazardous activities in general. But the applicability of a strict liability principle to the above qualified transnational losses finds a different, broader justification. To begin with, all major domestic legal systems in one way or the other provide for strict liability regimes for “sources of increased danger” or “abnormally dangerous activities.” Consequently, the notion that the creation of a transnational risk should entail a strict standard of international accountability in the event that typical harm materializes transnationally is expressive of a general principle of law. As such it must be considered a clear indication of universally shared expect-


65 For details of a review, see, e.g., Handl, supra note 21, at 543-48.

66 As to the fallacy of approaching the international law-making process by exclusive concentration on the “sources” listed in Art. 38 of the Statute of the International Court of Justice, see McDougal & Reisman, “The Prescribing Function in World Constitutive Process: How International Law is Made,” 6 Yale Studies in World Public Order 249 (1980).

tations about the requisite balancing of costs and benefits of a transnationally hazardous activity.

Fundamental objections to "general principles of law" are frequently raised by international lawyers from socialist states. Here, suffice it to say that the imposition of strict liability in the above circumstances is essential to secure a fair international distribution of costs and benefits of a given lawful state activity. It is a step that finds its ultimate justification in the sovereign equality of states and thereby is one whose legitimacy few commentators should seriously be willing to call into doubt. In any event, as Dr. Jenks noted, "international law is not a limited body of specific rules, but a body of living principles and developing precedent growing with the needs of international society. Those who accept such a view of international law generally will find no difficulty in accepting the concept of a general liability in international law for ultra-hazardous activities."

The major issue, it will be recalled, is whether, in view of the existence of states with widely diverging socio-economic systems, "there can be normative principles common to socialist law and to bourgeois law": G. Tunkin, Theory of International Law 199 (1974). To be applicable on the international legal plane, "general principles," according to this view, must have been recognized by states through treaty or by way of their evolution into an international custom: ibid., 202. Specifically, for a rejection of a general principle of strict liability applicable to transnational risk-creation, see, e.g., Steinert, "Verantwortlichkeit und Haftung im Völkerrecht," 30 Wiss. Zeitung d. Humboldt-Univ. Berlin, Ges.-Sprachw. R. #1, 23 (1981); and cf. Ushakov, in the ILC debates on Quentin-Baxter's Third Report, U.N. Doc. A/CON.4/SR 1739, 18 (1982).

Such fundamental principles of international law as the sovereign equality of states have long been recognized as one of the "sources of international law." See, e.g., D. Levin, Osnovnye problemy sovremennogo mezhdunarodnogo prava 100 (1958), cited in G. Tunkin, supra note 68, at 196. For a less hostile attitude towards general principles of law as an indication of policy and principle to be followed on the international legal plane, see, e.g., G. Herczegh, General Principles of Law and the International Legal Order 123-24 (1969). And note that as regards the specific issue here under discussion, some commentators from socialist countries have affirmed the existence in general international law of a principle of strict liability for transnationally hazardous activities: see, e.g., Kolosov, supra note 48. Others have strongly emphasized the need for a strict liability approach in the face of increasing transnational risk-creation. See Kwiatkowska-Czechowska, supra note 35, at 164; and Mazov, "Liability for the Harmful Consequences of Lawful Activities," 8 Sovetskoe Gosudarstvo i Pravo 116 (1979).

Acceptance of such a principle of strict liability is increasingly in evidence. The persuasiveness of a principle of this sort is also testified to by the insistence within the General Assembly on the elaboration by the International Law Commission of draft articles on international liability for injurious consequences arising out of acts not prohibited by international law; by the strength of the feeling within the Commission itself that an engagement in a trans-nationally hazardous activity should entail the acting state's strict liability for loss or injury sustained; and at least indirectly also by the Draft Convention of the Law of the Sea, which represents an undeniably significant touchstone for the specific issue here under discussion.

None of the pertinent provisions of the Convention appears, it is true, to envisage a state's strict liability for accidental damage to the marine environment. While it would surely be impossible to pass off strict liability as the general standard for marine pollution under the Convention, there is nothing in the evolution of the final text to suggest that strict liability might not play an exceptional role within the conventional framework. Paragraph 1 of Article 235 — the basic responsibility and liability article of the part specifically dealing with marine pollution — is rather illuminating in this respect: "States are responsible for the fulfilment of their international duties, including their responsibilities for environment protection, and are responsible for the fulfilment of the obligations resulting from those duties, including the prohibition of activities that are prohibited for the purpose of the protection of the marine environment.

71 Apart from the instances of international practice referred to (see supra note 21), acceptance of the principle is also finding increasing reflection in the literature. See, e.g., Kelson, supra note 67, at 243; Hardie, supra note 67, at 237; Cahier, "Le problème de la responsabilité pour risque en droit international," in International Relations in a Changing World 411, at 427-28 (1977); Politi, "Miniere d'uranio nelle Alpi Marittime, inquinamento transfrontaliero e tutela internazionale dell'ambiente," Riv. Diritto Internazionale Privato e Processuale No. 3, 541, at 574 (1981); Marin Lopez, "Aspectos actuales de la responsabilidad internacional," in Estudios de Derecho Internacional (Homenaje a Prof. Mieja de la Muela) 815, at 835-36 (1977); G. Tesouro, "L'inquinamento marino nel diritto internazionale 179-80 (1971); Randelzhofer and Simma, "Das Kernkraftwerk an der Grenze," in Festschrift f. Friedrich Berber 389, at 428-30 (Blumenwitz and Randelzhofer, eds., 1973); J. Schneider, supra note 48, at 163-67 and Stein, supra note 48, at 290. For additional references, see Handl, supra note 21, 552, n. 125; and supra notes 69-70.

72 See GA Res. 3071 (XXVIII), 3315 (XXIX), 3495 (XXX) and 31/97.


74 Cf. Art. 130, 235, 263, 304, and 22 of Annex III, all of which deal with responsibility and liability; only Art. 235, 263(3), and 304 very specifically address liability for marine pollution: Draft Convention, supra note 28.
obligations concerning the protection and preservation of the marine environment. They shall be liable in accordance with international law.”

The mere reference to “liability in accordance with international law,” that is, avoidance of direct linkage of liability and violation of the obligations mentioned in the preceding sentence, contrasts sharply with an earlier version of the same article. Thus, Article 236, paragraph 1, of the Informal Composite Negotiating Text had provided for states’ liability “in accordance with international law for damage attributable to them resulting from violations of... obligations [concerning the protection and preservation of the marine environment].” Eventual restatement of this key liability provision in language that is neutral as regards the source of a state’s international liability is highly significant, for it hints at a prevailing perception among the drafters of a need to accommodate as well those cases in which a state’s international liability for marine pollution does not arise in consequence of internationally wrongful conduct. Indeed, the change in the wording of what is now Article 235 was a compromise solution prompted by an amendment, proposed by Arab countries, that would have provided for strict state liability in the event of damage to the marine environment.


As to the fact that a state cannot be said to have automatically committed a violation of such an obligation upon the occurrence pure and simple of transnational environmental damage, see text supra at n. 51. In other words, the wording of Art. 236, para. 1, must be deemed to be a reference to liability for harm resulting from internationally wrongful conduct.

76 As to the initial strict liability proposal by Morocco and Egypt, see statement of the Moroccan delegate at the 32nd meeting of the 3rd Committee, in UNCLOS-III, 6 Official Records 108, para. 21 (1977).

As to the change in response to the Arab countries’ formula, see debates during the 40th meeting of the 3rd Committee, UNCLOS-III, 11 Official Records, 69-73 (1979).

77 See Informal Suggestion by Bahrain, Democratic Yemen, Egypt, etc., Doc. MP/18, in UNCLOS-III, 10 Official Records 111-12 (1978). While the proposal stipulated the state’s strict accountability, claims for compensation were to be handled in accordance with international or private law depending on whether acta sure imperii or gestionis were involved. As to the basic point of departure being strict state liability, see also statement of the Turkish delegate supporting the Arab countries’ proposal: 31st meeting of the 3rd Comm., in UNCLOS-III, 9 Official Records 160, para. 30 (1978).
If, against this background,\textsuperscript{78} it is obvious that special allowance was made at the Conference on the Law of the Sea for applicability of the principle of strict liability, it follows by necessary implication that nothing in the Draft Convention can be taken to militate against the invocation of that concept as a general principle of law.

A state's international liability in general, then, can be said to be engaged even in the absence of wrongfulness of its conduct, provided that the accidental damage to the transnational marine environment is (1) the result of a realization of a recognizably significant risk of harm, and (2) typical of the risk that the state created in its territory or under its jurisdiction. Risks falling into this category would seem to include but not be limited to those for which the so-called "private law liability conventions" establish a strict liability regime. For, if there is an evidently growing international consensus to hold the private actor strictly liable in the context of such activities as the bulk carriage by sea of oil,\textsuperscript{79} offshore drilling operations,\textsuperscript{80} the sea transportation of nuclear\textsuperscript{81} as well as other hazardous and noxious materials,\textsuperscript{82} and the operation of coastal or offshore nuclear power plants,\textsuperscript{83} it would be difficult to maintain that states might not be held internationally to an equally strict standard of accountability.\textsuperscript{84}

After all, the policy reasons for imposing strict

\textsuperscript{78} Note in this context also the disclaimer made in Art. 304 of the "general provisions" clause: "The provisions of this Convention regarding responsibility and liability for damage are without prejudice to the application of existing rules and the development of further rules regarding responsibility and liability under international law."

\textsuperscript{79} See the 1969 Civil Liability Convention, supra note 64.


\textsuperscript{81} See 1971 Convention Relating to Civil Liability in the Field of Maritime Carriage of Nuclear Materials, supra note 64.


\textsuperscript{83} See the nuclear liability conventions, the 1960 Paris, and the 1963 Vienna Conventions, supra note 64.

\textsuperscript{84} To begin with, the international liability of a state might be brought into issue where the state itself is the operator/actor and irrespective of whether
liability on the private operator vis-à-vis the individual transnational victims have equally compelling force on an international level, that is, between victim and acting states when damage is due to a transnationally hazardous activity.

The question thus left to be answered is whether in circumstances other than the ones previously identified non-negligent accidental transnational maritime pollution might not require compensation as a matter of law. The conduct-oriented process of establishing liability, that is the exclusive emphasis on the notion of “special danger” as the vehicle for shifting loss from the victim has not gone unchallenged. There are those like Professor Cahier who take what merely looks like a result-oriented approach to the issue of loss allocation. By noting that any accidental occurrence of “dommage d’une gravité telle qu’il dépasse les frontières d’un Etat est la preuve même d’un risque exceptionnel,” Cahier makes transnational risk-creation the decisive criterion after all.85 In other words, knowledge of the risk and willingness to expose other states to it are implicitly in issue because it is on the basis of these factors and intrinsically related policy considerations, such as prevention and reparation, that the loss will be shifted.

A truly different approach, however, has been taken by Professor Quentin-Baxter, the International Law Commission’s Special Rapporteur on “international liability for injurious consequences arising out of acts not prohibited by international law.” Particularly his second and third reports on the topic86 present a challenging invitation to rethink the fundamental premises for loss allocation in the


86 Second Report, supra note 34; Third Report, supra note 38.
international legal system. After some apparent initial hesitation, he now fully acknowledges the intrinsic merits of the notion of “special danger” as a loss shifting device in situations in which the acting state’s conduct is free of blame. He thus gives recognition to the key role of foreseeability of harm typical of a given activity, not in the sense that it be occasioned as a consequence of a particular way in which the activity is carried on, but as a statistical probability, albeit a very low one, which reasonable care cannot eliminate. The imposition of strict liability in such a case is, as noted, the outcome, inter alia, of the judgment that the fair balance of rights and obligations among states is being disturbed and must be re-established. This balancing of interests test, eminently useful as it is in the context of discussing the basis of liability for statistically foreseeable transnational harm associated with a given state activity, is now being extended to provide the only rationale for loss shifting in those cases in which the transnational injury was truly unforeseeable. In the final analysis, Quentin-Baxter argues, “when a loss or injury has occurred that nobody foresaw . . . there is a commitment, in the nature of strict liability, to make good the loss.”

For, as he contends, in “these ‘hard luck’ cases . . . which fall outside the sphere of foreseeability” it would be neither just nor necessary to let the loss lie where it fell.

Extension of the balancing of interests test to unforeseeable accidents for the purpose of inquiry into whether or not the acting state should be considered liable is unobjectionable. Non-foreseeability of the occurrence of transnational harm indeed cannot be an automatic bar to recovery by the victim state. But using the test in the sense of a mere reference to the underlying objective of an equitable

87 To this effect, see, e.g., Second Report, Add. I, supra note 34, 7, fn 86.
88 See Third Report, supra note 38, 11-12, para. 20-21.
89 See, e.g., ibid., 13, para. 23. Note in this context that “foreseeability” relates to “typicality of harm” rather than to the causal chain. For details on this crucial distinction, see Handl, International Obligations of Prevention: Legal Consequences of Force Majeure or Fortuitous Event (forthcoming).
90 As to the pertinent notion of risk, namely as a severe consequences/low probability event, see supra notes 62-63.
91 Third Report, supra note 38, at 19, para. 41.
92 Ibid., 15, para. 29: “[T]hen such a case it is at least unlikely that the distribution of costs and benefits will do less than vindicate the claim of the affected State to receive full reparation in respect of loss or injury suffered by an innocent victim.”
balance of rights and obligations among states as a rationale for the inevitability of loss shifting when parties fail to agree among themselves on loss adjustment, is another matter. For what this implies is that ultimately, when the chips are down, any significant transnational loss must be deemed as upsetting the balance of interests. In the end, strict liability simply would be contingent upon the occurrence of unforeseeable transnational injury. If in some sections of his report the rapporteur appears to come close to espousing such a radical viewpoint, it is one that must not escape close scrutiny.

It is difficult to see how in every instance of transnational injury that could not possibly have been foreseen even as a remote statistical probability justice and expediency would be served by shifting a loss to the innocent state whose implication in the occurrence of the accident might be extremely tenuous. For example, where extraordinary natural phenomena accounted for an unforeseeable causal connection between a state’s activity and the occurrence of transnational harm that is atypical of any of the risks that could reasonably have been identified as being associated with the activity, shifting the loss does not make any sense from the point of view of prevention; and, as regards reparation, there is no inherent value in reallocating the loss, as lack of foresight will not have allowed the “acting state” to anticipate the occurrence of this sort of transnational liability. Moreover, given the attenuated causal relationship, the persuasiveness of shifting loss as being consonant with an equitable distribution of loss and benefits is, relative to situations where loss is statistically foreseeable, reduced rather than enhanced as Quentin-Baxter suggests.  

If in such a situation the victim state, say a developed country, were in a better position to assume the loss than the acting state, a developing country, neither fairness nor expediency would seem to dictate a shifting of loss.

It should be evident, then, that unforeseeable transnational damage to the marine environment cannot be claimed to engage the acting state’s liability as a matter of law simply upon its occurrence.

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93 In fairness it has to be pointed out that while the preceding quotations do support this inference, the schematic outline appended to the Report seems to indicate the rapporteur’s true position: only a contextual analysis could determine whether and to what extent truly foreseeable loss could be shifted to the innocent acting state as a matter of law. See Section 4 of the Schematic Outline, ibid., 26-27.

94 Ibid., 15, para. 29.
Indeed, there is no evidence of any, even incipient, state practice of this sort. Neither is there a domestic analogy that would lend support to such a radical proposition. Whether liability would be incurred would depend principally on the outcome of negotiations among the parties. Liability might consequently be established on an ex post facto basis by determining that in the circumstances of the case under examination the loss concerned amounted to a disturbance of the fair balance of interests among the states involved. By contrast, recognizably transnationally hazardous activities are a priori and in the abstract found to be a threat to that balance and consequently will subject the acting state to strict liability upon the occurrence of harm typical of the risk created. While in the former situation the occurrence of damage, it is probably correct to say, will merely activate a legal duty for the acting state to enter into negotiations with a view to readjusting the loss inflicted, in the latter situation it will trigger a non-negotiable international obligation to redress the injury caused.

INTERNATIONAL LIABILITY FOR MARINE POLLUTION FROM ACTS OF PRIVATE PERSONS

Today it must be considered a truism that states in general are not liable for the transnationally injurious conduct of private individuals. Thus, perhaps in a majority of cases of transnational pollution damage resulting from activities undertaken by such persons, a state’s liability will, as noted before, be engaged only to the extent

95 In all those cases in which compensation payments were made upon the occurrence of transnational accidental damage despite the absence of allegations that the causal state conduct had been wrongful, the harm sustained was typical of the risk created, i.e., was “foreseeable.”


that the occurrence of transnational damage is causally related to the state's violation of an international obligation. This conclusion, however, does not apply when the transnational damage is the consequence of an accident involving a recognizably hazardous activity carried on by private individuals. The crucial difference is the state's actual or presumed control over, or express or implicit authorization, of the risk-bearing private activity. This point of view is being argued forcefully by an increasing number of students of the issue. Elsewhere it has been established at some length that there exist significant international legal indicia pointing to direct state liability for the miscarriage of transnationally hazardous private activities. For this reason it suffices here merely to summarize the reasons in favour of the strict liability of the controlling or authorizing state. First, states must be deemed directly implicated in the realization of a transnational risk as private control over the recognizably hazardous activity concerned is or at least should have been subordinated to the state's authorization or supervision. Second, from the viewpoint of compensation a state's international accountability makes sense in view of the possibility that the private actor's assets or other potentially available financial resources might not be sufficient to defray the full costs of the degradation of the trans-

99 See text supra at nn. 21-26; and see also the Janina murder case, reviewed in Ago, supra note 98, at 94-98.

100 To this effect, see also Kelson, supra note 67, at 234; Kwiatkowska-Czechowska, supra note 35, at 170; and Treves, "Les tendances récentes du droit conventionnel de la responsabilité et le nouveau droit de la mer," 21 Annuaire Français DI 765, at 781 (1975).


For recognition of the fundamental need for such a strict liability standard, see Lay, "Pollution from Offshore Oil Wells," in New Directions in the Law of the Sea (vol. III) 103, at 104 (R. Churchill et al., eds., 1973); and statement by the Soviet delegate in the LOS debates, 4th meeting of the Third Committee, UNCED-III, 2 Official Records 320, para. 55 (1974).
Third, and finally, considerations of fairness add additional weight to the preceding two policy arguments. As the state must be presumed to benefit from the activity which recognizably carries a significant risk of damage to the transnational environment, it also should be made accountable internationally when an accident produces such transnational effects.

If this can be posited as the “better view,” it is one that is not universally accepted. There are critical voices that insist on attributability of the transnational damage from private conduct to the authorizing state even though evidence from the work of the International Law Commission would seem to leave little doubt as to the fact that no such requirement arises where the damage is the consequence of the materialization of the transnational risk created.

In this context, note the problem of so-called single ship or single plant companies and the well-taken caveat regarding the sufficiency in general of pollution insurance funds. “On notera tout d’abord que qui dit fonds, dit plafond. Toute assurance, toute fonds d’indemnisation comporte des limites au-delà desquelles la victime est abandonné à elle-même”: R. Rodière and M. Remond-Gouilloud, La mer: droits des hommes ou proie des etats?, 121 (1980); see further Treves, supra note 100.

For what must be considered to be a purposefully naive view on the existence of direct and indirect benefits from private activities, see ILC’s discussion of the Third Report, statement by Balanda, U.N. Doc. A/CN.4/SR. 1739, 14 (1982): “The beneficiaries of the activity would certainly be the persons carrying it out, so that one could not speak of interests of the State in whose territory the activity was carried out.” For a proper perspective, see instead J. Gros, Sep. Op, in Barcelona Traction, Light and Power Company, Limited, Judgment, [1970] I.C.J. Rep. 3, 268, at 269: “[T]he economic world today exhibits phenomena of State intervention in responsibility for the economic activity of the subject within the national territory or abroad which are so frequent and thoroughgoing that the separation of the interest of the individual from that of the State no longer corresponds to reality.”

There is no need here to pursue the issue of whether states might be liable internationally at the same time as the private actor is being subjected to transnational litigation. For some thoughts on this issue, particularly in the context of the “private law conventions,” see, e.g., Handl, supra note 21, at 560-64.

Jenks, supra note 62, at 178.


Note in particular the ILC’s Commentary on Article 11 of the Draft Articles on State Responsibility, Report of the International Law Commission on the
A more pertinent objection could be grounded in the fact that in certain circumstances the element of control or of authorization may be so attenuated as no longer to provide a reasonable basis for holding the state internationally liable. In other words, there are situations in which neither of the principal policy objectives of prevention and reparation might be served by imposing strict liability on the state. This would be the case, for example, where owing to circumstances beyond its control the state exercises merely nominal control over the activity. Similarly, holding the state strictly accountable under international law would be without merit where initial state authorization of the activity must be deemed unrelated to the eventual risk created by the private actor and the state could not have reasonably been expected to extend its control in the face of subsequent risk creation.

Of the many variations on that theme, it is flag state liability for vessel-source pollution which is of particular interest here. A state’s direct implication in the occurrence of transnational loss is apparent in the event of accidental marine pollution from hazardous land-based sources or from dangerous offshore operations; states are presumed to exercise control over private activities within their territory or their offshore areas. By contrast, vessels, because of their...
mobility, are frequently only tenuously linked to the state whose flag they fly.\textsuperscript{112} To be sure, this problem is most pronounced in cases involving flags-of-convenience vessels.\textsuperscript{113} This factor, however, cannot be a bar to the flag-state's liability unless it is specifically found to negate the previously identified policy reasons for imposing strict liability on the state. For the general rule is that the "state's obligation to control vessels under its registry is in principle [not] different from the obligation to control its territory."\textsuperscript{114} Thus, the bulk carriage of oil by sea or the use of nuclear power for vessel propulsion should give rise to the state's strict international liability in the event of accidental typical damage for the same reasons as would transnationally hazardous activities carried on within the state's land or maritime borders. Upon registry of an oil tanker or a nuclear-powered vessel, the flag-state authorities are well aware that they authorize the creation of a significant transnational risk.

There are, however, those situations in which flag state liability for accidental damage from hazardous private shipping activities is not justified. A case in point is an accident involving a general purpose freighter which subsequent to registration has been used for, say, transporting between ports of third countries hazardous or toxic substances in packaged form.\textsuperscript{115} The eventual hazardous use\textsuperscript{116}

\textsuperscript{112} To this effect, see also the debates within the ILC, summarized in \textit{Draft Report of the ILC, Add. 1, supra} note 73, at 2, para. 36.

\textsuperscript{113} For the fact that flag-of-convenience vessels rarely call on ports in the state of registry, see, e.g., Lowe, "The Enforcement of Marine Pollution Regulations," \textit{12 San Diego L. Rev.} 624, at 633 (1975).


\textsuperscript{115} By contrast, the maritime carriage of bulk dangerous substances in special tanks or cargo spaces that are a structural part of the ship may be an activity the risks of which flag-state authorities should have been aware of upon registering the vessel or upon authorizing subsequent structural changes. As to basic flag-state responsibility for the design, construction, and equipment of vessels, see Art. 5 of the 1958 Geneva Convention on the High Seas, \textit{supra} note 26; and Art. 94, para. 3 and 4, of the Draft Convention on the Law of the Sea, \textit{supra} note 28; Regulation 5 of Annex I of the 1973 International Convention for the Prevention of Pollution from Ships, text in \textit{12 Int'l Leg. Mat.} 1319, at 1341 (1973); and Regulation 6 of the 1960 SOLAS Convention, \textit{16 U.S.T.} 187, T.I.A.S. No. 5780. As to the link of structural design and designated use as a bulk chemical substance carrier, note, e.g.,
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113 to which the freighter is being put was not specifically envisaged by the flag-state authorities at the time of registration. Nor can it be maintained that the state authorities had control over the freighter’s subsequent utilization. Consequently, holding that state liable in the event of a spill of toxic chemicals would appear indefensible in the light of the previous policy considerations.\textsuperscript{117}

The other type of situation in which a flag-state’s international liability might not be invokable is one in which the flag state merely exercises nominal control over the private hazardous shipping activity while another state exercises effective control in the sense that the latter bears directly on the occurrence of the injurious accident.\textsuperscript{118} A pertinent illustration of this point is the case of the \textit{Cavtat}.\textsuperscript{119}

\textsuperscript{116} As to the risks associated with transportation of hazardous substances in packaged form, see the conclusion by an informal working group of technical experts, Annex I to \textit{Report of the Legal Committee on the Work of Its Thirty-Ninth Sess.}, IMCO Doc. LEG XXXIX/5, 3, para. 5 (1979): “[T]he group agreed in principle that some substances in packaged form might cause in some circumstances catastrophic damage.” See further Note by the Italian delegation which addresses the same issue, IMCO Doc. LEG XLIII/2/3 (1980): “[N]ot to regulate internationally the responsibility deriving from the carriage of hazardous substances in packages would mean — on the one hand — to ignore that this type of carriage is nowadays prevailing and, on the other hand, to underrate the fact that the most dangerous situations are actually those connected with the carriage of harmful substances in packaged form.” On the trade in hazardous and noxious substances in general, see IMCO Doc. LEG 47/3/6, 1-3 (1982).

\textsuperscript{117} This should not, however, rule out the possibility that apart from the vessel owner or shipper — the two parties to which liability is being channelled under the Draft Hazardous and Noxious Substances Convention: see Art. 3 and 7 of the Draft Convention, IMCO Doc. LEG 47/7, Annex 2 (1982) — either the importing state or the exporting state might not have to shoulder at least part of the financial burden of compensating transnational pollution victims. For pertinent criteria for assessing such countries’ implication in the realization of the risk, see text \textit{supra} at nn. 57-61.

\textsuperscript{118} For an extensive discussion of the notion of “effective control” in a situation of overlapping jurisdictions, see Handl, \textit{supra} note 21, at 531-35; and “Etudes des mesures internationales les plus aptes à prévenir la pollution des milieux maritimes,” 53 Ann. Institut Droit International (vol. II) 255, at 278-87 (1969).

\textsuperscript{119} For a detailed account of that case, see Fabbri (Minister of Merchant Marine), \textit{Senato}, VII Leg., 29\textsuperscript{a} sess., resoconto somm. 9-13 (1976); Sand, “The Role of Domestic Procedures in Transnational Environmental Disputes,” in \textit{OECD, Legal Aspects, supra} note 45, 146, at 197; and Rousseau, “Chronique des faits internationaux,” 80 RGDIP 1238 (1976).
When this Yugoslav freighter went down in the strait of Otranto, none of its highly toxic cargo of lead derivatives appears to have been released into the sea. Had a subsequent corrosion of the containers resulted in a significant contamination of the transnational environment, international liability on the part of both Italy, as the coastal state within whose territorial waters the wreck had come to lie, and Yugoslavia as the flag-state, seemingly might have been at issue as Professor Florio has suggested. Upon closer examination, however, it is obvious that in a situation of this sort flag-state control over the sunk vessel is purely nominal. Its jurisdiction yields to that of the coastal state which must be deemed to exercise control over the wreck. In other words, Italy’s rather than Yugoslavia’s international liability might have been at issue vis-à-vis third countries.

When these limits of the principle of strict flag-state liability are properly acknowledged, it should be evident that the state’s inter-

\footnote{Apart from diplomatic contacts with Yugoslavia, the wreck prompted also the intervention of the Albanian ambassador to Italy, who expressed his government’s concern about a possible threat to Albania: Fabbri Report, supra note 119, at 12-13.}

\footnote{Florio, “Un caso di grave pericolo d’inquinamento marino,” 63 Rivista Diritto Internazionale 374, at 385 (1980). It should be emphasized that reference here is to Yugoslavia’s liability \textit{qua} state, i.e., its international liability.}

\footnote{Moreover, it should be noted that the \textit{Cavtat} was not a bulk chemical substance carrier (see also Note of the Italian delegation, supra note 116). Yugoslavia’s accountability as the registering state authorizing a private hazardous shipping activity would consequently not have been in issue. As to the relevance in this context of the registration of the vessel as a bulk hazardous substance carrier as against a general cargo ship, see supra note 115.}

\footnote{To this effect, see also von Münch, “Schiffwracks: Völkerrechtliche Probleme,” 20 Archiv d. Völkerrechts 183, at 196-98 (1982).}

\footnote{Even if, however, the \textit{Cavtat} had been registered as a special bulk carrier, Yugoslavia’s international liability might not have been invokeable. In other words, the mere fact that the flag-state might have been deemed to have authorized, upon registration, a transnationally hazardous shipping activity should not have made any difference. For the cause of any catastrophic marine pollution owing to corrosion of the ship’s containers would have been the controlling state’s, i.e., Italy’s inaction over the years rather than Yugoslavia’s initial risk-creation. It is true that the crucial element of foreseeability of harm by which the risk-creating state’s strict liability would be determined relates to “typicality of harm” and not the causal sequence of the occurrence of harm. But it cannot be extended to cover circumstances in which the initiative for preventive action has passed from the acting state, because control over the hazardous activity, in this case vessel, has passed on to another state.}
national accountability, perhaps on a basis subsidiary to that of the private operator's liability, makes sense. The fundamental point of departure for the imposition of strict liability for transnationally injurious consequences associated with hazardous activities is, after all, the state's "control" over the activity; it is this control which puts the state into the position of the "better accident cost-avoider."

There is continued and strong international support for flag-state enforcement jurisdiction with regard to design, construction, and equipment standards and the seaworthiness of the vessel in general. Accordingly, flag-states must be deemed to continue to exercise this liability-determining control in many of the circumstances in which transnationally hazardous shipping activities of private persons might accidentally cause a significant pollution of the marine environment. Therefore, it would be difficult to justify singling out such vessel-source pollution as a special case in which the flag-state could incur liability only upon proof that it had broken an international obligation.

CONCLUSIONS

If the preceding analysis has shown that the issue of a state's international liability for marine pollution is of ever-decreasing importance in the context of non-accidental pollution cases, it should have repudiated equally clearly the thesis that the issue might be moot altogether. There is a discernible and justified need for clarity of the concept of a state's international liability for damage caused by accidental marine pollution. Transnationally risk-bearing activities are increasingly being carried on by private parties whose potential transnational liabilities are to an ever-growing extent regulated through specific private law conventions. Nevertheless, states continue to play a crucial role with regard to prevention of and compensation for accidental damage even within the framework of such conventions.

The state's international accountability can be summarized as follows: (1) in general, states will be liable internationally for acci-

\[125\] For further discussion, see Handl, supra note 21, at 560-64; Statement by the Canadian delegation, supra note 49, at 7, para. 18; and Politi, supra note 71, at 578-79.

\[126\] See, e.g., the confirmation of basic flag-state enforcement jurisdiction in Art. 94(3) and (4), and 217(1), (2), and (3) of the Draft Convention, supra note 28.

\[127\] See supra note 84.
dental pollution only if they can be shown to have violated an international obligation causally related to the occurrence of the transnational harm; (2) exceptionally, where states engage in activities that carry a recognizably significant risk of transnational harm, they will be held strictly liable if harm typical of the risk created materializes; (3) existence of such a concept of strict liability in present international law is not just arguable as a general principle of law but as a fundamental tenet of the sovereign equality of states; \( ^{128} \) (4) it is a concept that might be brought into play by hazardous activities undertaken not only by the state itself but also by private persons, provided the state expressly or implicitly authorized the activities concerned or exercised or must be presumed to have exercised control over them; and finally (5) as the state's strict liability is a function of the effectiveness of its control, in the sense that "control" bears directly on the occurrence of the accident, states will not be internationally accountable when state control over the risk-bearing private activity is significantly attenuated.

\(^{128}\) See text supra at n. 69.

Sommaire

La responsabilité internationale des États pour la pollution marine

La présente étude a pour but de mettre en lumière, dans le cadre de la pollution marine, la responsabilité des États en tant que concept de base du régime de droit international pour la protection de l'environnement. Il est particulièrement nécessaire d'exposer le fondement de ce concept dans le cas de pollution accidentelle aux fins de clarifier les droits et devoirs de l'État pollueur et de l'État victime. Les États ne seront généralement pas responsables pour les dommages causés par la pollution au-delà de leurs frontières à moins que le préjudice ne soit le résultat de la violation d'une obligation internationale de l'État pollueur. Exceptionnellement, la responsabilité internationale de l'État pourra être engagée sans aucune violation d'une obligation internationale dans les situations où une activité exercée dans les limites de la compétence de l'État ou sous son contrôle entraînera un risque substantiel de dommage accidentel à l'environnement transfrontière et où cette activité donnera lieu à un dommage typique du risque créé. Dans ces circonstances, la responsabilité de l'État pourra donc être la conséquence des activités poursuivies tant par l'État lui-même que par des personnes privées.
Une telle conception de la responsabilité internationale de l'État est non seulement justifiée comme principe général du droit, mais elle est aussi reconnue par la coutume internationale. En particulier, elle se conforme aux dispositions sur la responsabilité des États de la nouvelle Convention des Nations Unies sur le droit de mer. Quant au dommage accidentel causé par les activités dangereuses dans l'environnement marin, il est vrai que la responsabilité de l'État du pavillon, même en l'absence d'un manquement au droit international, n'a été invoquée que rarement. Mais il faut également le reconnaître, du moins sur une base suppletive, pour des raisons fondamentales, notamment la nécessité d'un raffermissement des efforts pour la prévention de la pollution marine et d'une garantie de l'indemnisation des victimes de tels accidents.