

**CMI PLACES OF REFUGE QUESTIONNAIRE
RESPONSE OF
THE MARITIME LAW ASSOCIATION
OF THE UNITED STATES**

1. The Salvage Convention 1989

1.1. Has your country ratified the Salvage Convention 1989?

Answer 1.1. The International Convention on Salvage, 1989 was ratified by the U.S. (the U.S. Senate gave its advice and consent on October 29, 1991). The U.S. deposited an instrument of ratification with the IMO on March 27, 1992.

1.2 If so, has it adopted any legislation or regulation to give effect to Article 11?

Answer 1.2 No.

1.3 If so, please supply a copy, if possible with a translation into English or French.

Answer 1.3. Not applicable.

1.4 Has it designated any particular places as “Places of Refuge” or of similar nature?

Answer 1.4. No.

1.5 Are the existence and identity of such places made known to the public, or to the shipping community?

Answer 1.5. Not applicable.

2. The United Nations Convention on the Law of the Sea 1982 (“UNCLOS”)

2.1 Has your country ratified the UN Convention on the Law of the Sea?

Answer 2.1. The United States has not ratified the 1982 Convention on the Law of the Sea. However, by Presidential proclamation on March 10, 1983 (19 Weekly Comp. Pres. Doc. 383) President Reagan stated that the U.S. would act in a manner consistent with the Convention. Additionally the United States is still a party to the Convention on the Territorial Sea, 15 U.S.T. 1606, which covers innocent passage in Articles 14. and 15.

2.2 If so, has it adopted any legislation or regulation to give effect to Articles 17, 18 21 and 39(1)(c)?

Answer 2.2. Not applicable.

2.3 If so, please supply a copy, if possible with a translation into English or French.

Answer 2.3. Not applicable.

2.4 Does your law have provisions applicable to ships which are the victims of force majeure or distress, and their rights to seek shelter in a place of refuge in your waters? If so, please provide details.

Answer 2.4. While not directly applicable to ships, American legislation does deal with obstruction of the escape of individuals from a distressed vessel in 18 USCA §1658 (2000) (“Plunder of Distressed Vessel”) as follows:

(a) Whoever plunders, steals or destroys any money, goods, merchandise, or other effects from or belonging to any vessel in distress, or wrecked, lost, stranded, or cast away, upon the sea, or upon any reef, shoal, bank, or rocks of the sea, or in any other place within the admiralty and maritime jurisdiction of the United States, shall be fined under this title or imprisoned not more than ten years, or both.

(b) Whoever willfully obstructs the escape of any person endeavoring to save his life from such vessel, or the wreck thereof; or

Whoever holds out or shows any false light, or extinguishes any true light, within intent to bring any vessel sailing upon the sea into danger or distress or shipwreck –

Shall be imprisoned not less than ten years and may be imprisoned for life.

See also General Comments and Appendix below.

2.5 As regards protection of the marine environment from pollution, Articles 192 to 199 and 221 may be material to the subject matter of this questionnaire. In particular Article 195 provides: “In taking measures to prevent, reduce or control pollution of the marine environment, States shall so act so as not to transfer, directly or indirectly, damage or hazards from one area to another or transform

one type of pollution into another.” Has this principle been implemented in any of your legislation or regulations? If so please provide details.

Answer 2.5. This principle has not been directly implemented in any U.S. pollution response laws or regulations, at least with regard to the “hazards” presented by vessels leaking pollutants into the marine environment. Instead, U.S. law authorizes federal on-scene coordinators-the federal officials in charge of environmental responses-to “remove and, if necessary, destroy a vessel discharging or threatening to discharge, by whatever means available” in the case of a spill which “poses or may present a substantial threat to public health or welfare of the United States.” 40 CFR Part 300.322(b)(3). However, the intent of this provision is to eliminate the underlying environmental hazard rather than to transfer it to another “area.”

In addition, U.S. law indirectly bars the transfer of “damages” occurring as a result of an oil spill by requiring vessels immediately to implement pre-contracted spill containment and cleanup resources in order to prevent or mitigate the “transfer” or migration of environmental damages to another “area.”

2.4[sic] Has your country developed any contingency plan as referred to in Article 199?

Answer 2.4. Yes, the United States has promulgated the National Oil and Hazardous Substances Pollution Contingency Plan, 40 CFR Part 300 *et seq.* (“the National Contingency Plan”).

2.5[sic] If so, does this include provisions for the admission into a place of refuge of a vessel in distress which may threaten to cause pollution?

Answer 2.5. No. The National Contingency Plan vests federal on-scene coordinators in charge of pollution responses and clean-ups with considerable discretion with respect to the steps to be taken after an oil spill, but does not specifically address places of refuge for vessels in distress. The one specific reference to the disposition of vessels appears in Part 300.322(b)(3) of the National Contingency Plan, which authorizes on scene coordinators to “remove and, if necessary, destroy a vessel discharging, or threatening to discharge, by whatever means are available” in the event of a spill which “poses or may present a substantial threat to public health or welfare of the United States.”

2.6[sic] If so, please provide details.

Answer 2.6. See response to question 2.5 above.

3. The International Convention on Oil Pollution Preparedness, Response and Co-operation 1990 (“OPRC”)

3.1 Has your country ratified the OPRC Convention?

Answer 3.1. Yes. (Senate Treaty Doc. 102-11)

3.2 If so, has it adopted any legislation or regulation to give effect to its provisions summarised above?

Answer 3.2 Yes. Section 1906(b) of Title 33 USC of the U.S. Code gives effect to the reporting provisions set out in the ORPC Convention. In addition, the U.S. had adopted SOPEP regulations, 33 CFR 151.26, as called for in OPRC Article 3.

3.3 Has it adopted any Oil Pollution Response Contingency Plan?

Answer 3.3. Yes. As described above, the United States has adopted a National Contingency Plan, which establishes a national system for pollution preparedness and response and coordinates spill response among the hierarchy of available spill responders and the contingency plans currently in effect. In addition, the United States has mandated the issuance of area contingency plans which specify the spill response capabilities and spill response procedures to be followed regionally within the U.S. exclusive economic zone. Lastly, the United States requires tank vessels to maintain vessel response plans setting out spill prevention and response procedures that each vessel must implement in the event of an oil spill or threatened spill.

3.4 Has it reported any such contingency plans to the IMO (under Article 6).

Answer 3.4. Yes.

3.5 Do any of the contingency plans adopted in your country contain provisions dealing with the admission of a ship in distress which may pose a threat of pollution to a place of refuge in the internal or territorial waters of your country?

Answer 3.5 We are unaware of any provisions dealing with the admission of ships in distress which may pose a threat of pollution to a place of refuge in the internal or territorial waters of your country. Conversely, as noted above, the National Contingency Plan expressly authorizes on-scene coordinators to “remove and, if necessary, destroy a vessel discharging, or threatening to discharge, by whatever means are available” in the event of a spill which “poses or may present a substantial threat to public health or welfare of the United States.” See General Comments and Appendix below.

- 3.6 If so, does the plan contain details of any financial or other security to be required from the owners of the ship in question as a condition of entry to cover, for example, pollution damage or wreck removal? If so, please give details.

Answer 3.6 See response to question 3.5. and General Comments and Appendix below.

4. Casualty Experience

- 4.1 Have you had experience of a casualty in your country's territorial waters, EEZ or indeed internal waters in which a vessel needing salvage assistance in a place of refuge has been refused entry by your administration? If so please give details.

Answer 4.1 While no specific official records could be located, it appears that a request for force majeure entry into U.S. waters was denied on at least one occasion. In October 1980, while cruising in international waters of the Gulf of Alaska, the passenger vessel PRINSENDAM suffered a fire in its engine room. The fire quickly was out of control. In one of the most dramatic rescues in history, helicopters of the U.S. Coast Guard, U.S. Air Force, and Canadian Forces, along with the USCG cutters MELLON, BOUTWELL, and WOODRUSH and the tanker WILLIAMSBURGH rescued all 319 passengers and 205 crew. The PRINSENDAM was then taken under tow by a salvage tug. Due to the damage to the vessel, which was listing badly, and the severe weather, the owner sought permission to bring the vessel into the sheltered waters of the Inside Passage to effect temporary repairs and wait for the storm to abate. The Coast Guard denied permission. The PRINSENDAM sank soon afterwards. It is unlikely that approval of the request would have saved the vessel.

- 4.2 If possible please provide in particular details of the legal rules on which the administration based its refusal.

Answer 4.2 Particular details of the legal rules on which the U.S. Coast Guard based its apparent denial of entry regarding the PRINSENDAM are unknown, but your attention is invited to the General Comments below and the Appendix hereto.

- 4.3 Have you had experience of a casualty in your country's territorial waters, EEZ or indeed internal waters in which a vessel needing salvage assistance in a place of refuge has been permitted entry by your administration? If so please give details.

Answer 4.3 As with earlier questions, particular details are lacking regarding instances of when vessels in need of assistance have been permitted entry into U.S. waters in a force majeure situation. There is recall, though, of a number of

vessels, particularly small freighters and fishing vessels, seeking and obtaining entry. This was not uncommon when a large number of foreign fishing vessels were operating just outside the U.S. territorial sea. These vessels not infrequently sought and obtained permission to either enter a U.S. port or heave to in the lee of an island to avoid storms. Now that few foreign fishing vessels operate near the U.S. coast, such requests are less common.

- 4.4 In particular please specify any requirements which the owners or salvors had to satisfy in order to obtain permission for entry (for example tugs standing by, financial guarantees etc.)

Answer 4.4 In the situations discussed under item 4.3 above, owners and masters were generally required to report their entry into and departure from U.S. waters. Fishing vessels were required to stow their fishing gear during their presence in U.S. waters.

- 4.5 Was the permission, if granted, given for limited or unlimited time?

Answer 4.5 In all cases, permission to enter was granted only for so long as the force majeure situation continued.

General Comments:

No regulation promulgated by the U.S. Coast Guard specifically addresses the issues raised in the CMI Questionnaire. The Coast Guard, though, has promulgated regulations bearing on the general issue. A vessel in a hazardous condition (e.g., in distress) is required to comply with various conditions prior to entry into U.S. waters. The Coast Guard Captain of the Port (COTP), though, may waive any of those requirements upon finding that circumstances are such that application of those requirements is 'unnecessary or impractical for purposes of safety, environmental protection, or national security.' (33 CFR § 160.205). Further, while a Coast Guard District Commander or COTP has the authority to deny entry into U.S. waters of any vessel not in compliance with the provisions of the U.S. Port and Tanker Safety Act, that authority must be applied 'subject to recognized principles of international law.' (33 CFR § 160.107).

More specifically, foreign merchant vessels are prohibited from entering U.S. waters unless in compliance with the requirements of the ISM Code. An exception is allowed for vessel under force majeure. (33 CFR § 96.390(a)). Vessels under force majeure are exempted from certain provisions of the regulations implementing the Deepwater Port Act. (33 CFR §§ 150.317(c), 150.337, and 150.345). Vessels under force majeure are exempted from certain provisions of MARPOL. (33 CFR §§ 151.08(a) and 158.130(e)). Vessels under force majeure are exempt from general advance

notification requirements. (33 CFR § 160.201.(c)(4)).

A District Commander or COTP may prohibit a vessel from operating in the navigable waters of the United States if it is determined that the vessel's serious repair problems creates reason to believe that the vessel may be unsafe or pose a serious threat to the marine environment. (33 CFR § 160.113(a)). The District Commander or COTP, though, may allow provisional entry into the navigable waters of the United States or into any port or place under the jurisdiction of the United States, if the owner or operator proves to the satisfaction of the District Commander or COTP that the vessel is not unsafe or does not pose a threat to the marine environment and that such entry is necessary for the safety of the vessel or the persons on board. (33 CFR § 160.113(c)). This regulation implements the provision of the Ports and Waterways Safety Act relating to conditions for entry into ports of the United States (33 U.S.C. § 1228(b)).

More detailed guidance relating to force majeure is contained in the U.S. Coast Guard's Marine Safety Manual. The pertinent provisions from this internal agency manual are included as an Appendix to this submittal.

5. Other Legislation

Answer 5. Not applicable.

APPENDIX

U.S. COAST GUARD MARINE SAFETY MANUAL

Volume VI - Ports and Waterways Activities

Chapter 1 - Ports and Waterways Safety

F. Force Majeure

1. General. Force Majeure is a doctrine of international law which confers limited legal immunity upon vessels which are forced to seek refuge or repairs within the jurisdiction of another nation due to uncontrollable external forces or conditions. This limited immunity prohibits coastal state enforcement of its laws which were breached due to the vessel's entry under force majeure.
2. Definition. Emergency entry, or force majeure, is defined as an overwhelming force or condition of such severity that it threatens loss of the vessel, cargo or crew unless immediate corrective action is taken. Force majeure is based upon the historical premise in international law that, if a vessel is compelled to move into the waters of a foreign state by some uncontrollable external force, then the vessel should be excused from compliance with domestic laws which prohibit such entry.
3. Burden of Proof. The burden of proof that a vessel has a valid claim of force majeure rests with the vessel, its master and owner. A claim of force majeure is supported only by the existence of overwhelming conditions or forces of such magnitude (e.g., severe storm, fire, disablement, mutiny) that they threaten the loss of the vessel, crew, or cargo unless immediate action is taken. Conversely, an invalid claim of force majeure has no effect on the authority of the coastal state to take all appropriate law enforcement action against an entering vessel.
4. COTP Authority. Each Coast Guard COTP, and the District Commander, has the authority to verify and then accept or reject claims of force majeure for the purposes of enforcing applicable laws. Even if a vessel exhibits a valid force majeure claim, the COTP may nevertheless take action to remove a hazard to life or property under the authority of the Ports and Waterways Safety Act (33 USC 1221, et seq.). For example, in the event of fire, flooding, or collision damage which may affect the safety of a vessel or its cargo the COTP would ascertain the condition of the vessel, determine the existence of any hazard to the port, and make any COTP order consistent with the right of entry under force majeure and the protection of the port. The COTP may direct the vessel to a specific location and not to the port of their choice. However, once a force majeure claim has been validated, the Coast Guard alone is the Federal agency responsible for granting or denying vessel entry.