Recent Developments Regarding the International Compensation Conventions Following the Erika Incident

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Introduction

Two international Conventions, the 1992 Civil Liability Convention and the 1992 Fund Convention govern compensation for pollution damage caused by oil spills from oil tankers. These Conventions were preceded by two earlier Conventions, the 1969 Civil Liability and the 1971 Fund Convention, and although these remain in existence, they are losing their importance and it is expected that the 1971 Fund Convention will cease to be in force during the summer of 2002 at the latest.

The 1992 Civil Liability Convention, which governs the liability of tanker owners, lays down the principle of strict liability for tanker owners through a system of compulsory liability insurance. The tanker owner is normally entitled to limit his liability to an amount linked to the tonnage of his tanker.

The 1992 Fund is supplementary to the 1992 Civil Liability Convention by providing compensation for pollution damage when the amount available under the Civil Liability Convention is inadequate.

Compensation is available under both Conventions for pollution damage, including the costs of reasonable preventive measures.

As at 31 January 2001, 64 nations had ratified the 1992 Fund Convention. The nations that are parties to the 1992 Fund Convention are listed in the Annex.

In view of the experience of the *Nakhodka* and the *Erika* incidents the question has been raised as to whether the 1992 Conventions should be reassessed in order to ensure that the international regime continues to meet the needs of society. This paper considers recent developments aimed at addressing some of the Conventions' shortcomings.

Main features of the 1992 Conventions

The 1992 Conventions apply to pollution damage (ie damage caused by contamination) suffered in the territory (including the territorial sea) and the exclusive economic zone (EEZ) or equivalent area of a nation Party to the respective Conventions.

Pollution damage is defined in the 1992 Conventions as "loss or damage caused outside the ship by contamination resulting from the escape or discharge of oil from the ship, wherever such escape or discharge may occur, provided that compensation for impairment of the environment other than loss of profit from such impairment shall be limited to costs of reasonable measures of reinstatement actually undertaken or to be undertaken". Pollution damage includes the costs of reasonable preventive measures. Such costs are recoverable even if no spill occurs, provided that there was a grave and imminent threat of pollution damage.

The 1992 Conventions apply to ships that actually carry oil in bulk as cargo, ie generally laden tankers, as well as to spills of bunker oil from unladen tankers in certain circumstances. The Conventions do not apply to spills of bunker oil from ships other than tankers.

The limits of the shipowner's liability under the 1992 Civil Liability Convention are:

(a) for a ship not exceeding 5 000 units of gross tonnage, 3 million Special Drawing Rights (US$4.0 million);
(b) for a ship with a tonnage between 5 000 and 140 000 units of tonnage, 3 million SDR (US$4.0 million) plus 420 SDR (US$559) for each additional unit of tonnage; and
(c) for a ship of 140 000 units of tonnage or over, 59.7 million SDR (US$80 million).

The compensation payable by the 1992 Fund in respect of an incident is limited to an aggregate amount of 135 million SDR (US$180 million), including the sum actually paid by the shipowner (or his insurer) under the 1992 Civil Liability Convention.

The 1992 Fund is financed by contributions levied on any entity which has received in one calendar year more than 150 000 tonnes of crude or heavy fuel oil (contributing oil) in a nation party to the 1992 Fund Convention.

The 1992 Fund has an Assembly, which is composed of representatives of all Member nations. The Assembly is the supreme organ governing the respective Fund, and it holds regular sessions once a year. Each Assembly elects an Executive Committee (composed of 15 Member nations) whose main function is to approve settlements of claims.

The 1992 Fund is operated by a Secretariat based in London with 26 staff members.

Incidents involving the 1992 Fund

So far the 1992 Fund has been involved in 10 incidents, but has only made relatively small compensation payments.

Two incidents involving the 1992 Fund, the *Nadhodka* (Japan, 1997) and the *Erika* (France, 1999) resulted in the total claims exceeding the maximum amount available for compensation (US$180 million). This has resulted in claimants receiving only partial payments of the amount of their losses or damage actually suffered.

***Nakhodka* incident**

The Russian tanker *Nakhodka* (13 159 GRT), carrying 19 000 tonnes of medium fuel oil, broke in two sections some 100 kilometres north east of the Oki islands (Japan), resulting in a spill of some 6 200 tonnes of oil. The stern section sank soon after the incident, with an estimated 10 000 tonnes of cargo on board. The upturned bow section, which may have contained up to 2 800 tonnes of cargo, drifted towards the coast and grounded on rocks some 200 metres from the shore, near the town of Mikuni in Fukui Prefecture. Following the grounding, a substantial quantity of oil was released, causing heavy contamination of the adjacent shoreline.

The stern section is lying at a depth of 2 500 metres, some 140 kilometres from the nearest coast, but is not considered to be a significant threat to coastal resources.

Claims for compensation
The total amount of compensation available under the 1992 Civil Liability Convention and the 1992 Fund Convention is ¥23 165 million (US$190 million). As at 31 January 2001, 458 claims totalling ¥35 128

million (US$309 million) had been received, and total payments made to claimants amounted to ¥14 352 million (US$113 million), including payments made by the shipowner and his insurer.

In view of the uncertainty as to the total amount of the claims arising out of the incident, the IOPC Funds' governing bodies decided in April 1997 that payments should be limited to 60% of the amount of the damage actually suffered by the respective claimants. This was increased to 70% in April 2000.

On the basis of the claims already settled and those outstanding as at 31 January 2001, the exposure of the Funds was estimated to be ¥27 780 million (US$228 million) and the decision was made to increase the level of payments to 80% of the amount of the damage actually suffered by individual claimants. Consequently, it is expected that the 1992 Fund will make additional payments totalling ¥2 000 million (US$17 million).

Erika incident

The Maltese tanker *Erika* (19 666 GT) broke in two in the Bay of Biscay, off the coast of Brittany, France spilling some 19 800 tonnes of heavy fuel oil. The sunken bow section contained some 6 400 tonnes of cargo and the stern section a further 4 700 tonnes. Operations to pump the remaining oil to the surface were carried out during the period June – September 2000.

Claims for compensation
The total amount of compensation available under the 1992 Civil Liability Convention and the 1992 Fund Convention is FFr1 212 million (US$175 million).

Total Fina, the owners of the cargo on board the *Erika,* undertook not to pursue claims relating to the costs of inspections and operations to remove the remaining oil from the two halves of the wreck against the 1992 Fund or the limitation fund relating to the *Erika* if and to the extent that the presentation of such claims would result in the total amount of the claims arising out of the incident exceeding the maximum amount of compensation available under the 1992 Conventions. Total Fina also made a corresponding undertaking in respect of the cost of the collection and disposal of oily waste generated from clean-up, the costs of its participation in clean-up up and the cost of a publicity campaign to restore the tourist image of the Atlantic coast. The French Government made a similar undertaking with respect to all the expenses incurred by the French State in combating the pollution and reducing the consequences of the incident, although these claims would rank before any claims by Total Fina if funds were to be available after all other claims had been paid in full.

Despite the decision of Total Fina and the French Government not to pursue their claims until all other claims have been paid in full, the total amount of the latter are still expected to exceed the maximum amount available under the 1992 Conventions. In such circumstances the 1992 Fund has to strike a balance between the importance of paying compensation as promptly as possible to victims and the need to avoid an over-payment situation.

As at 31 January 2001, 3 542 claims for compensation had been submitted for a total of FFr412 million (US$60 million). Some 2 090 of these claims totalling FFr184 million (US$27 million) had been assessed at a total of FFr123 million (US$18 million).

Claims for the costs of clean-up operations, other than costs incurred by the French Government and Total Fina, have been estimated by the 1992 Fund at FFr150 – 200 million (US$21 – 30 million) and claims in

the fishery sector have been estimated at FFr125 million (US$18 million). Studies by the French Ministry of Economy, Finance and Industry have estimated the total admissible claims in the tourism sector to be in the region of FFr1 200 million (US$208 million). On the basis of the above estimates the 1992 Fund would be able to make payments of 75% of the proven loss or damage suffered by individual claimants. However, there remain some significant uncertainties in the estimates and as a consequence the 1992 Fund Executive Committee decided in January 2001 to fix the level of payments at 60%.

Recent developments

Increase in the maximum amount of compensation available under the 1992 Conventions

The United Kingdom Government, supported by a number of other Governments, submitted a proposal to IMO to increase the limits in the 1992 Civil Liability Convention and the 1992 Fund Convention.

The 1992 Conventions stipulate three factors which the Legal Committee should take into account when considering an amendment proposal: the experience of incidents and in particular the amount of damage resulting there from, changes in the monetary values and, as regards the 1992 Civil Liability Convention, the effect of the proposed amendment on the cost of insurance. Under the provisions of the 1992 Conventions the increase may not exceed the present limits increased by 6% per year on a compound basis from 15 January 1993.

The Legal Committee adopted two Resolutions amending the limits laid down in the 1992 Conventions by 50.37%. As a result the maximum amount available for compensation under these Conventions for any one incident would be 203 million Special Drawing Rights (US$270 million). The amendments will enter into force on 1 November 2003 for all Contracting nations, unless prior to 1 May 2002 a quarter or more of the Contracting nations have communicated to IMO that they do not accept the amendments.

Revision of the 1992 Conventions

Following a proposal by the French delegation at the 1992 Fund Assembly's session in April 2000, the Assembly established a Working Group to examine the adequacy of the international compensation regime established by the 1992 Civil Liability Convention and the 1992 Fund Convention. The French delegation made the point that although the system had worked well on many occasions there were inadequacies in the system. The Working Group met on 6 July 2000 for a preliminary exchange of views concerning the need to improve the compensation regime and to draw up a list of issues that merited further consideration in order to ensure that the compensation system continues to meet the needs of society. The Working Group included *inter alia* the following issues in the list.

- Ranking of claims
- Uniform application of the Conventions
- Maximum compensation levels
- Weighting of contributions to the Fund according to the quality of ships used for the transport of oil
- Environmental damage

A number of other topics proposed by various nations were not considered by the Working Group due to lack of time, but will be considered in due course.

The Assembly of the 1992 Fund considered the Working Group's report at its October 2000 session. The Assembly instructed the Working Group to continue its work and to report to its October 2001 session.

European Commission proposal to establish a supplementary compensation fund for pollution damage in European waters

In December 2000, the Commission of the European Communities published a proposed Regulation on the establishment of a 'third-tier' fund, the COPE Fund, which would provide supplementary compensation for oil spills in European waters. The COPE Fund would be based on the same principles and rules as the current IOPC Fund system, but subject to a maximum of 1 000 million Euros (US$957 million), including the amount payable under the 1992 Civil Liability Convention and the 1992 Fund Convention, ie 135 million SDR (US$180 million).

The COPE Fund would only be activated when a spill occurs in European Union waters when the total claims exceeded, or threatened to exceed, the maximum amount of compensation available from the 1992 Fund. Victims of an oil spill would receive full compensation as soon as their claims had been approved by the 1992 Fund, so that the problems of pro-rating of claims would be avoided. The COPE Fund would be financed by European oil receivers according to procedures similar to those of contributions to the 1992 Fund.

The European Parliament and the Council of the European Union will consider the proposed Regulation during 2001.

The proposed Regulation is accompanied by an Explanatory Memorandum, which states that the European Commission examined the adequacy of the existing international system provided by the Civil Liability and Fund Conventions in the light of three criteria, namely:

a) It should provide prompt compensation to victims without having to rely on extensive and lengthy judicial procedures.
b) The maximum compensation limit should be set at a sufficient level to cover claims from any foreseeable disaster occurring as a result of an oil tanker incident.
c) The regime should contribute to discouraging tanker operators and cargo interests from transporting oil in anything other than tankers of impeccable quality.

The Memorandum states that the Commission has concluded that the current international system satisfies the first criterion, notwithstanding some important exceptions, but that it has major shortcomings with regard to the latter two criteria.

The Commission identified some important benefits of the existing system, which are instrumental in ensuring the prompt payment of compensation and/or the general functionality of the system, for incidents that may potentially involve a number of parties under different legal jurisdictions. The Commission noted that the mechanism for the financing of the 1992 Fund by cargo interests is relatively straightforward and that, although there is a problem with some States failing to notify quantities of received oil, the system has worked satisfactorily. It also noted that the vast majority of some 100 oil spill incidents dealt with by the old 1971 Fund and the current 1992 Fund were satisfactorily resolved in the sense that the procedures of assessing and paying claims were relatively smooth and that claimants had normally chosen to settle their claims directly with the Funds, out court, which indicated a considerable degree of acceptance of the assessment of claims made by the Funds.

However, the Commission observed that not all cases had been swift and straightforward and that most, if not all, oil spills that threatened to exceed the maximum compensation limit have encountered significant

delays in the payment of compensation as a result of the payment of approved claims being pro-rated due to uncertainty as to the final cost of the spill and the tendency of national courts to become involved in such cases.

The Commission considered such delays in the payment of compensation to be unacceptable but took the view that the delays were primarily due to insufficient limits of compensation rather than deficiencies inherent in the compensation procedures.

The Commission took the view that the 50% increase of the existing limits, providing a total of some 300 Euros (US$270 million), which will not come into effect until three years' time, was insufficient and that the amount should be set at 1 000 million Euros (US$957 million).

Conclusions

The international compensation regimes established under the Civil Liability and Fund Conventions are one of the most successful compensation schemes in existence over the years. Most compensation claims have been settled amicably as a result of negotiations.

Although the Conventions were revised in 1992, the main features of the regime were decided in the late sixties and early seventies. It is not surprising therefore that the contracting nations have found that the regime needs to be revisited for modifications in the light of experience, so as to enable the regime to adapt to the changing needs of society and to ensure the regime's survival by remaining attractive to nations.

The amendments that were adopted by the IMO Legal Committee in October 2000 are very limited, since they relate only to increases in the maximum amount of compensation available under the 1992 Conventions.

In the context of revisiting the regime it will be important to distinguish between issues which could be dealt with within the framework of the 1992 Conventions (eg by agreements between contracting nations, Fund Assembly Resolutions, clarification in national law) and issues where improvements can only be brought about by formal amendments to the Conventions through a Diplomatic Conference followed by ratification by nations. If it is decided to carry out a revision of the 1992 Conventions, it will be necessary to consider carefully which issues should be retained for inclusion in the revision, in order to make it possible to complete the work within a reasonable period of time.

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ANNEX

Nations Party to both the 1992 Protocol to the Civil Liability Convention and the 1992 Protocol to the Fund Convention
as at 31 January 2001

52 nations for which Fund Protocol is in force (and therefore Members of the 1992 Fund)		
Algeria	Germany	Oman
Australia	Greece	Panama
Bahamas	Grenada	Philippines
Bahrain	Iceland	Poland
Barbados	Ireland	Republic of Korea
Belgium	Italy	Seychelles
Belize	Jamaica	Singapore
Canada	Japan	Spain
China (Hong Kong Special Administrative Region)	Latvia	Sri Lanka
	Liberia	Sweden
Comoros	Malta	Tonga
Croatia	Marshall Islands	Tunisia
Cyprus	Maurutius	United Arab Emirates
Denmark	Mexico	United Kingdom
Dominican Republic	Monaco	Uruguay
Fiji	Netherlands	Vanuatu
Finland	New Zealand	Venezuela
France	Norway	

12 nations which have deposited instruments of accession, but for which the Fund Protocol does not enter into force until date indicated	
Kenya	2 February 2001
Trinidad & Tobago	6 March 2001
Russian Federation	20 March 2001
Georgia	18 April 2001
Antigua and Barbuda	14 June 2001
India	21 June 2001
Lithuania	27 June 2001
Slovenia	19 July 2001
Morocco	22 August 2001
Argentina	13 October 2001
Djibouti	8 January 2002
Papua New Guinea	23 January 2002