THE INTERNATIONAL COMPENSATION REGIME AND THE ACTIVITIES OF THE INTERNATIONAL OIL POLLUTION COMPENSATION FUNDS

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Introduction

Compensation for pollution damage caused by spills from oil tankers is governed by an international regime elaborated under the auspices of the International Maritime Organization (IMO). The framework for the regime was originally the 1969 International Convention on Civil Liability for Oil Pollution Damage (1969 Civil Liability Convention) and the 1971 International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage (1971 Fund Convention). These Conventions entered into force in 1975 and 1978 respectively.

This 'old' regime was amended in 1992 by two Protocols, and the amended Conventions are known as the 1992 Civil Liability Convention and the 1992 Fund Convention. The 1992 Conventions provide higher limits and an enhanced scope of application. The 1992 Conventions entered into force on 30 May 1996.

The Civil Liability Conventions govern the liability of shipowners for oil pollution damage. The Conventions lay down the principle of strict liability for shipowners and creates a system of compulsory liability insurance. The shipowner is normally entitled to limit his liability to an amount which is linked to the tonnage of his ship.

The 1992 Fund Convention, which is supplementary to the 1992 Civil Liability Convention, establishes a regime for compensating victims when the compensation under the applicable Civil Liability Convention is inadequate.

Each of the Fund Conventions established an intergovernmental organisation to administer the compensation regime created by the respective Fund Convention, the International Oil Pollution Compensation Funds 1971 and 1992 (IOPC Funds). The Organisations have their headquarters in London.

The 1971 Fund Convention ceased to be in force on 24 May 2002. This note therefore deals primarily with the 'new' regime, ie the 1992 Civil Liability Convention and the 1992 Fund Convention.

As at 31 January 2006, 113 States were Parties to the 1992 Civil Liability Convention, and 98 States were Parties to the 1992 Fund Convention.

A third tier of compensation in the form of a Supplementary Fund was established on 3 March 2005 by means of a Protocol adopted in 2003. So far 15 States have ratified the Protocol.

The States Parties to the 1992 Conventions and the Supplementary Fund Protocol are listed in the Annex.

The People's Republic of China is Party to the 1992 Civil Liability Convention and the 1992 Fund Convention. However, as regards the 1992 Fund Convention the People's Republic of China has made a reservation to the effect that the Convention only applies to the Hong Kong Special Administrative Region.

Information on the international compensation regime and the IOPC Funds is available on the Funds' web site at: **http://www.iopcfund.org**

The international compensation regime

Substantive provisions

Scope of application

The 1992 Conventions apply to pollution damage caused by spills of persistent oil from tankers and suffered in the territory (including the territorial sea) of a State Party to the respective Convention, or in the exclusive economic zone (EEZ) or equivalent area of such a State. 'Pollution damage' includes the cost of 'preventive measures', ie reasonable measures to prevent or minimise pollution damage, as well as loss or damage caused by preventive measures. Expenses incurred for preventive measures are

recoverable even when no spill occurs, provided there was a grave and imminent threat of pollution damage.

Damage caused by non-persistent oil is not covered by the Conventions. Spills of gasoline, light diesel oil, kerosene, etc, therefore do not fall within the scope of the Conventions.

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

Shipowner's liability

Under the 1992 Civil Liability Convention the owner of a tanker has strict liability (ie he is liable also in the absence of fault) for pollution damage caused by oil spilled from the tanker as a result of an incident. He is exempt from liability under the Convention only if he proves that:

(a) the damage resulted from an act of war, hostilities, civil war, insurrection or a grave natural disaster, or
(b) the damage was wholly caused by sabotage by a third party, or
(c) the damage was wholly caused by the negligence of public authorities in maintaining lights or other navigational aids.

Under certain conditions the shipowner is entitled to limit his liability to an amount which is linked to the tonnage of the vessel and which – after increases by some 50% with effect from 1 November 2003 – are as follows: [<1>]

(a) for a ship not exceeding 5 000 units of gross tonnage, 4 510 000 SDR (US$6.4 million);
(b) for a ship with a tonnage between 5 000 and 140 000 units of tonnage, 4 510 000 SDR (US$6.4 million) plus 631 SDR (US$899) for each additional unit of tonnage; and
(c) for a ship of 140 000 units of tonnage or over, 89 770 000 SDR (US$128 million).

Under the 1992 Civil Liability Convention, the shipowner is deprived of the right to limit his liability if it is proved that the pollution damage resulted from his personal act or omission, committed with the intent to cause such damage, or recklessly and with knowledge that such damage would probably result.

Compulsory insurance

The owner of a tanker carrying more than 2 000 tonnes of persistent oil as cargo is obliged to maintain insurance to cover his liability under the 1992 Civil Liability Convention. Tankers must carry a certificate on board attesting the insurance coverage. When entering or leaving a port or terminal installation of a State Party to the Convention, such a certificate is required also for ships flying the flag of a State which is not Party thereto.

Claims for pollution damage under the 1992 Civil Liability Convention may be brought directly against the insurer of the owner's liability for pollution damage.

Channelling of liability

Claims for pollution damage under the 1992 Civil Liability Convention can be made only against the registered owner of the ship concerned. This does not preclude victims from claiming compensation outside the Conventions from persons other than the owner. However, the Convention prohibits claims against the servants or agents of the shipowner as well as claims against the pilot, the charterer (including a bareboat charterer), manager or operator of the ship, or any person carrying out salvage operations or

[<1>] The unit of account in the Conventions in the Special Drawing Right (SDR) as defined by the International Monetary Fund. In this paper, the SDR has been converted into US dollars at the rate of exchange applicable on 23 November 2005, ie 1 SDR = US$1.42469.

taking preventive measures. These persons lose that protection if the damage resulted from their personal act or omission, committed with the intent to cause such damage, or recklessly and with knowledge that such damage would probably result.

The 1992 Fund's obligations

The 1992 Fund pays compensation to those suffering oil pollution damage in a State Party to the 1992 Fund Convention who do not obtain full compensation under the 1992 Civil Liability Convention in the following cases:

(a) the shipowner is exempt from liability under the 1992 Civil Liability Convention because he can invoke one of the exemptions under that Convention; or
(b) the shipowner is financially incapable of meeting his obligations under the 1992 Civil Liability Convention in full and his insurance is insufficient to satisfy the claims for compensation for pollution damage; or
(c) the damage exceeds the shipowner's liability under the 1992 Civil Liability Convention.

The 1992 Fund does not pay compensation if:

(a) the damage occurred in a State which was not a Member of the 1992 Fund; or
(b) the pollution damage resulted from an act of war, hostilities, civil war or insurrection or was caused by a spill from a warship; or
(c) the claimant cannot prove that the damage resulted from an incident involving one or more ships as defined in the 1992 Civil Liability Convention, ie a seagoing vessel or seaborne craft of any type whatsoever constructed or adapted for the carriage of oil in bulk as cargo.

The maximum amount payable by the 1992 Fund in respect of incidents occurring before 1 November 2003 is 135 million SDR (US$192 million), including the sum actually paid by the shipowner (or his insurer) under the 1992 Civil Liability Convention. This maximum amount was increased by some 50% to 203 million SDR (US$289 million) in respect of incidents occurring on or after that date.

Time bar

Claims for compensation under the 1992 Civil Liability and Fund Conventions are time-barred (extinguished) unless legal action is brought against the shipowner and his insurer and against the 1992 Fund within three years of the date when the damage occurred and in any event within six years of the date of the incident.

Jurisdiction and enforcement of judgements

The Courts in a State or States where the pollution damage occurs have exclusive jurisdiction over actions for compensation under the Conventions against the shipowner, his insurer and the IOPC Funds.

A judgement by a Court competent under the applicable Convention, which is enforceable in the State of origin and is in that State no longer subject to ordinary forms of review, shall be recognised and enforceable in the other Contracting States.

Organisation of the IOPC Funds

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

The Supplementary Fund has its own Assembly composed of representatives of its Member States.

During the winding up period the 1971 Fund is governed by an Administrative Council composed of all States which at any time were parties to the 1971 Fund Convention.

The 1992 Fund, the 1971 Fund and the Supplementary Fund have a joint Secretariat. The Secretariat is headed by a Director and has at present 27 staff members.

The Director has been granted extensive authority to approve claims for compensation.

Financing of the 1992 Fund

The 1992 Fund is financed by contributions levied on any person who has received in one calendar year more than 150 000 tonnes of crude oil and heavy fuel oil (contributing oil) in a State Party to the 1992 Fund Convention.

Basis of contributions

The levy of contributions is based on reports of oil receipts in respect of individual contributors. A State shall communicate every year to the 1992 Fund the name and address of any person in that State who is liable to contribute, as well as the quantity of contributing oil received by any such person. This applies whether the receiver of oil is a Government authority, a State-owned company or a private company. Except in the case of associated persons (subsidiaries and commonly controlled entities), only persons having received more than 150 000 tonnes of contributing oil in the relevant year should be reported.

Contributing oil is counted for contribution purposes each time it is received at ports or terminal installations in a Member State after carriage by sea. The term received refers to receipt into tankage or storage immediately after carriage by sea. The place of loading is irrelevant in this context; the oil may be imported from abroad, carried from another port in the same State or transported by ship from an off-shore production rig. Also oil received for transhipment to another port or received for further transport by pipeline is considered received for contribution purposes.

Payment of contributions

Annual contributions are levied by the 1992 Fund to meet the anticipated payments of compensation and administrative expenses during the coming year. Each contributor pays a specified amount per tonne of contributing oil received. The amount levied is decided each year by the Assembly.

The contributions are payable by the individual contributors directly to the 1992 Fund. A State is not responsible for the contributions levied on contributors in that State, unless it has voluntarily accepted such responsibility.

The Japanese oil industry is the major contributor to the 1992 Fund, paying 18% of the total contributions. The Italian oil industry is the second largest contributor paying 10%, followed by the oil industries in the Republic of Korea (8%), the Netherlands (8%), France (7%), India (7%), Canada (6%), United Kingdom (5%), Singapore (5%) and Spain (5%).

The total quantity of contributing oil received after sea transport in the Hong Kong Special Administrative Region in 2004 was 5 481 696 tonnes, which corresponds to some 0.4% of the total quantity received in all 1992 Fund Member States.

Payments made by the 1992 Fund in respect of claims for compensation for oil pollution damage may vary considerably from year to year, resulting in fluctuating levels of contributions.

Claims Settlement

Claims experience

Since their establishment, the 1971 and 1992 Funds have been involved in approximately 135 incidents and have made compensation payments totalling some US$900 million.

In the great majority of these incidents, all claims have been settled out of court. So far, court actions against the Funds have been taken in respect of only a handful of incidents. The cases involving the largest total payments so far are as follows:

Incident	***Payments to claimants***
Antonio Gramsci (Sweden, 1979)	US $16 million
Tanio (France, 1986)	US $32 million
Haven (Italy, 1991)	US $52 million
Aegean Sea (Spain, 1992)	US $59 million
Braer (United Kingdom, 1993)	US $81 million
Keumdong N^{o} 5 (Republic of Korea, 1993)	US $19 million
Sea Prince (Republic of Korea, 1995)	US $36 million
Yuil N^{o} 1 (Republic of Korea, 1995)	US$27 million
Sea Empress (United Kingdom, 1996)	US $54 million
Nakhodka (Japan, 1997)	US $190 million
Nissos Amorgos (Venezuela, 1997)	US $19 million
Erika (France, 1999)	US $120 million
Prestige (Spain, France, Portugal, 2002)	US $73 million

Erika **incident**

The *Erika* incident, which occurred in December 1999 off the French Atlantic coast, affected 400 kilometres of the French coastline. The incident has given rise to some 7 000 claims relating to clean-up operations and losses suffered in the fisheries, mariculture and tourism sectors. Approximately 95% of the claims have been assessed, and compensation totalling approximately US$99 million has been paid to 5 600 claimants.

A number of claimants have taken legal action against the shipowner, his insurer and the 1992 Fund in relation to claims which have been rejected or accepted by the 1992 Fund at an amount not acceptable to the claimants. So far the French Courts have rendered 55 judgements. In general the judgements have been very favourable to the 1992 Fund, in that in the majority of cases where the Fund had rejected claims as not admissible, the Courts have agreed with the Fund's position. In some cases the Courts have applied the Fund's admissibility criteria. In other cases the Courts have not applied these criteria but have taken them into account. In others the Courts have stated that the Fund's criteria are not binding on national courts but have reached the same result as the Fund by applying the requirement in French law that there should be a link of causation between the event and the damage. A Court of Appeal has held that although the Fund's criteria are not binding on national courts, they can nevertheless serve as a reference in determining whether the claimant has suffered a loss.

Prestige incident

The maximum amount available for compensation under the 1992 Civil Liability Convention and the 1992 Fund Convention in respect of the *Prestige* incident is US$192 million. The figures given in May 2003 by the Governments of the three States affected by the incident, Spain, France and Portugal, as to the damage caused indicated that the total amount of the damage could be as high as US$1 240 million. Under the 1992 Conventions, the Fund has to give all claimants equal treatment. If the total amount available is insufficient all payments have to be reduced proportionally. The Executive Committee therefore decided in May 2003 that the 1992 Fund's payments should be for the time being limited to 15% of the loss or damage actually suffered by each individual claimant as assessed by the 1992 Fund's experts. The Committee reconsidered the payment level several times but decided, as late as in June 2005, that the level of 15% should be maintained.

The Spanish Government has paid significant amounts in compensation to thousands of victims in the fisheries and mariculture sectors. The Government has also given other financial assistance in various forms to those affected by the incident. Also the French Government has made compensation payments to claimants in the fishery and shellfish harvesting sectors.

In December 2003 the 1992 Fund made an advance payment of US$69 million to the Spanish Government.

The level of the 1992 Fund's payments has in the past generally been determined on the basis of the total amount of claims already presented and possible future claims against the Fund, and not on the basis of the Fund's assessment of the admissible amounts. When the Executive Committee considered the matter in October 2005, it was clear on the basis of the figures presented by the Governments of the three States affected by the incident, that the level of payments would probably have to be maintained at 15% for several years, unless a new approach were to be taken.

The Director suggested that an alternative way of determining the Fund's level of payments would be to base it on an estimate of the final amount of the admissible claims against the Fund, established either as a result of agreements with the claimants or by final judgments of a competent court, which was unlikely to be exceeded.

In view of the magnitude of the *Prestige* incident and the exceptional circumstances surrounding it, the Executive Committee agreed to the Director's proposal to increase the level of payments from 15% to 30% of the actual losses suffered by claimants. The Committee also decided to apportion on a provisional basis the amount payable by the 1992 Fund, minus a reserve of 10%, amongst the three States affected by the incident. Both these decisions were subject to the provision of certain guarantees and undertakings by the States concerned so as to ensure that the Fund was protected against overpayment. In agreeing to the proposal, several delegations stressed that it should not be seen as a precedent for future incidents.

Admissibility of claims for compensation

General considerations

The 1992 Fund can pay compensation to a claimant only to the extent that his claim is justified and meets the criteria laid down in the 1992 Fund Convention. To this end, a claimant is required to prove his claim by producing explanatory notes, invoices, receipts and other documents to support the claim.

For a claim to be accepted by the 1992 Fund, it has to be proved that the claim is based on a real expense actually incurred or a loss actually suffered, that there was a link between the loss or expense and the incident and that any expense claimed for was made for reasonable purposes.

The IOPC Funds have acquired considerable experience with regard to the admissibility of claims. In connection with the settlement of claims they have developed certain principles as regards the meaning of the definition of 'pollution damage', which is specified as 'damage caused by contamination'.

The 1992 Fund considers each claim on the basis of its own merits, in the light of the particular circumstances of the case. Whilst criteria for the admissibility of claims have been adopted, a certain flexibility is nevertheless allowed, enabling the Fund to take into account new situations and new types of claims. Generally, the Fund follows a pragmatic approach, so as to facilitate out-of-court settlements.

Decisions on the admissibility of claims which are of general interest are reported in the IOPC Funds' Annual Report.

The 1992 Fund has published a Claims Manual (the most recent edition of which is dated April 2005) which contains general information on how claims should be presented and sets out the general criteria for the admissibility of various types of claims.

Property damage

Pollution incidents often result in damage to property: the oil may contaminate fishing boats, fishing gear, yachts, beaches, piers and embankments. The 1992 Fund accepts costs for cleaning polluted property. If the polluted property (eg fishing gear) cannot be cleaned, the Fund compensates the cost of replacement, subject to deduction for wear and tear. Measures taken to combat an oil spill may cause damage to roads, piers and embankments and thus necessitate repair work, and reasonable costs for such repairs are accepted by the Fund.

Clean-up operations on shore and at sea, and preventive measures

The 1992 Fund pays compensation for expenses incurred for clean-up operations at sea or on the shore. Operations at sea may relate to the deployment of vessels, the salaries of crew, the use of booms and the spraying of dispersants. In respect of onshore clean-up, the operations may result in major costs for personnel, equipment, absorbents etc.

Measures taken to prevent or minimise pollution damage ('preventive measures') are compensated by the 1992 Fund. Measures may have to be taken to prevent oil which has escaped from a ship from reaching the coast, eg by placing booms along the coast which is threatened. Dispersants may be used at sea to combat the oil. Costs for such operations are in principle considered as costs of preventive measures. It must be emphasised, however, that the definition only covers costs of *reasonable* measures.
Claims for preventive measures are assessed on the basis of objective criteria. The fact that a government or other public body decides to take certain measures does not in itself mean that the measures are reasonable for the purpose of the Conventions. The technical reasonableness is assessed on the basis of the facts available at the time of the decision to take the measures. However, those in charge of the operations should continually reappraise their decisions in the light of developments and further technical advice.

Claims for costs are not accepted when it could have been foreseen that the measures taken would be ineffective. On the other hand, the fact that the measures prove to be ineffective is not in itself a reason for rejection of a claim for the costs incurred. The costs incurred, and the relationship between those costs and the benefits derived or expected, should be reasonable. In the assessment, the 1992 Fund takes account of the particular circumstances of the incident.

Consequential loss and pure economic loss

The 1992 Fund accepts in principle claims relating to loss of earnings suffered by the owners or users of property which had been contaminated as a result of a spill (consequential loss). One example of consequential loss is a fisherman’s loss of income as a result of his nets becoming polluted.

An important group of claims comprises those relating to *pure economic loss*, ie loss of earnings sustained by persons whose property has not been polluted. A fisherman whose boat and nets have not been contaminated may be prevented from fishing because the area of the sea where he normally fishes is polluted and he cannot fish elsewhere. Similarly, a hotelier or restaurateur whose premises are close to a contaminated public beach may suffer loss of profit because the number of guests falls during the period of pollution.

Claims for pure economic loss are admissible only if they are for loss or damage caused by contamination. The starting point is the pollution, not the incident itself.

In order to qualify for compensation the basic criterion is that a sufficiently close link of causation exists between the contamination and the loss or damage sustained by the claimant. A claim is not admissible on the sole criterion that the loss or damage would not have occurred but for the oil spill in question. When considering whether the criterion of a sufficiently close link of causation is fulfilled, the following elements are taken into account:

- the geographic proximity between the claimant's activity and the contamination

- the degree to which a claimant is economically dependent on an affected resource
- the extent to which a claimant has alternative sources of supply or business opportunities
- the extent to which a claimant's business forms an integral part of the economic activity within the area affected by the spill

Account is also taken of the extent to which a claimant can mitigate his loss.

Environmental damage

In the 1992 Conventions "pollution damage" is defined as damage caused by contamination. The definition contains a proviso to the effect that compensation for impairment of the environment (other than loss of profit from such impairment) should be limited to costs of reasonable measures of reinstatement actually undertaken or to be undertaken.

The Funds have decided that in order for claims for the cost of measures to reinstate the marine environment to be admissible for compensation, the measures should fulfil the following criteria:

- the measures should be likely to accelerate significantly the natural process of recovery
- the measures should seek to prevent further damage as a result of the incident
- the measures should, as far as possible, not result in the degradation of other habitats or in adverse consequences for other natural or economic resources
- the measures should be technically feasible
- the costs of the measures should not be out of proportion to the extent and duration of the damage and the benefits likely to be achieved.

Compensation is paid only for reasonable measures of reinstatement actually undertaken or to be undertaken, and if the claimant has sustained an economic loss that can be quantified in monetary terms. The Fund will not entertain claims for environmental damage based on an abstract quantification calculated in accordance with theoretical models. It will also not pay damages of a punitive nature on the basis of the degree of fault of the wrong-doer.

Studies are sometimes required to establish the precise nature and extent of environmental damage caused by an oil spill and to determine whether or not reinstatement measures are necessary and feasible. Such studies will not be necessary after all spills and will normally be most appropriate in the case of major incidents where there is evidence of significant environmental damage.

The Fund may contribute to the cost of such studies provided that they concern damage which falls within the definition of *pollution damage* in the Conventions, including reasonable measures to reinstate a damaged environment. In order to be admissible for compensation it is essential that any such post-spill studies are likely to provide reliable and usable information. For this reason the studies must be carried out with professionalism, scientific rigour, objectivity and balance. This is most likely to be achieved if a committee or other mechanism is established within the affected Member State to design and co-ordinate any such studies, as well as reinstatement measures.

The scale of the studies should be in proportion to the extent of the contamination and the predictable effects. On the other hand, the mere fact that a post-spill study demonstrates that no significant long-term environmental damage has occurred or that no reinstatement measures are necessary, does not by itself exclude compensation for the costs of the study.

The 1992 Fund should be invited at an early stage to participate in the determination of whether or not a particular incident should be subject to a post-spill environmental study. If it is agreed that such a study is justified the Fund should then be given the opportunity of becoming involved in the planning and in establishing the terms of reference for the study. In this context the Fund can play an important role in helping to ensure any post-spill environmental study does not unnecessarily repeat what has been done elsewhere. The Fund can also assist in ensuring that appropriate techniques and experts are employed. It is essential that progress with the studies is monitored, and that the results are clearly and impartially

documented. This is not only important for the particular incident but also for the compilation of relevant data by the Fund for future cases.

It is also important to emphasise that participation of the Fund in the planning of environmental studies does not necessarily mean that any measures of reinstatement later proposed or undertaken will be considered admissible.

Uniform application of the Conventions

The 1971 and 1992 Fund Assemblies have expressed the opinion that a uniform interpretation of the definition of 'pollution damage' is essential for the functioning of the regime of compensation established by the Conventions. The IOPC Funds' position in this regard applies not only to questions of principle relating to the admissibility of claims but also to the assessment of the actual loss or damage where the claims do not give rise to any question of principle.

The importance of uniformity of application is obvious. It is important from the point of view of equity that claimants are treated in the same manner independent of the State where the damage was sustained. In addition, the oil industry in one Member State pays for the cost of clean-up operations incurred and economic losses suffered in other Member States. Unless a reasonably high degree of uniformity and consistency is achieved, there is a risk of great tensions arising between Member States and of the international compensation systems no longer being able to function properly.

It should be noted that the definition of 'pollution damage' is the same in the 1992 Civil Liability Convention and the 1992 Fund Convention. For this reason, the concept of 'pollution damage' should be interpreted in the same way independent of whether the claim is against the shipowner/his insurer under the 1992 Civil Liability Convention or against the shipowner/his insurer and the 1992 Fund under both 1992 Conventions. Similarly, the concept should also be interpreted in the same way by the national courts whether the claim under consideration is under only the 1992 Civil Liability Convention or under both 1992 Conventions.

Review of the adequacy of the international compensation regime

Increase in the limitation amounts available under the 1992 Conventions

When the 1992 Civil Liability and Fund Conventions were adopted, it was expected that the total amount available under these Conventions, at that time US$192 million, would be sufficient to compensate all victims in full, even in the most serious incidents. However, it became evident already in relation to the first major incident which occurred after the entry into force of the 1992 Conventions, namely the *Nakhodka* incident in Japan in 1997, that this was not the case. The inadequacy of that amount was demonstrated even more clearly in respect of the *Erika* incident in France in 1999. Because the 1992 Fund is obliged to ensure that all claimants are treated equally, it was necessary to limit (pro-rate) payments to claimants to a percentage of the agreed amount of their claims. In some cases, the delay in payment of part of the compensation caused financial hardship to victims, for example fishermen and small businesses in the tourist industry.

In the light of this experience, a number of States took the view that it was necessary to increase significantly the amount of compensation available. A first step to this effect was taken in 2000 when the Legal Committee of the International Maritime Organization (IMO) decided under a special procedure provided for in the Conventions (the "tacit amendment" procedure), to increase the limits contained in 1992 Civil Liability Convention and the 1992 Fund Convention by some 50%. The amendment to the 1992 Fund Convention brought the total amount available under the 1992 Conventions to US$289 million. The increases entered into force on 1 November 2003.

1992 Fund Working Group

Many States took the view, however, that the increase in the maximum compensation amount decided by the IMO Legal Committee was insufficient and the point was made that although the system had worked well in most cases, there were inadequacies in the system and it was therefore necessary to carry out a general review of the 1992 Conventions. For this reason the 1992 Fund Assembly established in 2000 a Working Group open to all Member States to examine the adequacy of the international compensation regime established by these Conventions.

Supplementary Fund

During the discussions in the Working Group it was decided to work towards the creation of an optional third tier of compensation and to prepare a draft Protocol providing for such a third tier by means of a Supplementary Fund. A Diplomatic Conference held under the auspices of the IMO in London in May 2003 adopted, after difficult negotiations, a Protocol creating such a Supplementary Compensation Fund. The Protocol entered into force on 3 March 2005.

The main elements of the Protocol are as follows:

- The Protocol established a new intergovernmental organisation, the International Oil Pollution Compensation Supplementary Fund, 2003.

- Any State which is Party to the 1992 Fund Convention may become Party to the Protocol and thereby become a Member of the Supplementary Fund.

- The Protocol applies to pollution damage in the territory, including the territorial sea, of a State which is a Party to the Protocol and in the exclusive economic zone (EEZ) or equivalent area of such a State.

- The total amount of compensation payable for any one incident is 750 million SDR (US$1 069 million), including the amount payable under the 1992 Civil Liability and Fund Conventions, 203 million SDR (US$289 million)).

- Annual contributions to the Supplementary Fund is to be made in respect of each Member State by any person who, in any calendar year, has received total quantities of oil exceeding 150 000 tonnes after sea transport in ports and terminal installations in that State. However, the contribution system for the Supplementary Fund differs from that of the 1992 Fund in that at least 1 million tonnes of contributing oil will be deemed to have been received each year in each Member State for the purpose of paying contributions.

- The Supplementary Fund only pays compensation for incidents which occur after the Protocol has entered into force for the affected State.

The 2003 Protocol will greatly improve the situation for victims in States becoming parties to it. In view of the very high amount available for compensation of pollution damage in these States, it should in practically all cases be possible to pay all established claims in full from the outset.

Sharing of the financial burden between shipowners and the oil industry

When the Working Group discussed whether amendments should be made to the provisions in the 1992 Civil Liability Convention regarding shipowners' liability and related issues, it became clear that there was a great divergence of opinion.

The oil industry maintained that the international compensation regime should ensure that persons suffering oil pollution damage were compensated promptly but also be consistent with the general objective to improve maritime safety and reduce the number of oil spills. The point was made that the Supplementary Fund financed permanently by oil receivers would distort the balance between the shipowners' and oil receivers' contributions to the regime since it was financed only by oil receivers.

The shipowners and their insurers took the view that the issues relating to shipowners' liability should not be reopened since to do so would be detrimental to the position of victims of oil pollution. It was suggested that the 1992 Conventions were intended to create an efficient compensation regime and had not been intended to ensure the quality of shipping or to punish the guilty party. It was emphasised that it was of paramount importance to maintain the equitable balance between the burdens imposed on the two industries involved, ie those of the shipping and cargo interests. They have argued that the voluntary increase of the limitation amount applicable to small ships referred to below would preserve that balance.

Consideration by the 1992 Fund Assembly in October 2005

In October 2005 the 1992 Fund Assembly considered the final report of the Working Group. The Working Group had continued to be divided on the question of whether the Conventions should be revised and had not been in a position to make a recommendation to the Assembly. It was therefore for the Assembly to make a decision on whether the revision should go ahead. Discussions that ensued reflected the continued division among Member States with one group supporting limited revision, and the other -- holding a slight majority -- being strongly against revision. The Assembly acknowledged that there was insufficient support to move forward with revision of the Conventions -- even if limited -- and therefore decided that the Working Group should be disbanded and that the revision of the Conventions should be removed from its agenda.

At the Assembly's March 2005 session, the International Group of P&I Clubs[<2>] indicated that it had decided to increase, on a voluntary basis, the limitation amount for small tankers by means of an agreement to be known as the Small Tankers Oil Pollution Indemnification Agreement (STOPIA). STOPIA, which applies to pollution damage in a State for which the Supplementary Fund Protocol is in force, is a contract between owners of small tankers. It applies to all ships insured by one of the P&I Clubs that are members of the International Group of such Clubs and reinsured through the Group's pooling arrangement. The agreement came into force on 3 March 2005, ie the date of the entry into force of the Supplementary Fund Protocol.

At the Assembly's October 2005 session, the International Group of P&I Clubs made another proposal, subject to the condition that the revision of the Conventions was not carried forward, whereby it would extend STOPIA to all States parties to the 1992 Civil Liability Convention as well as establish a second agreement to be known as the Tanker Oil Pollution Indemnification Agreement (TOPIA) through which the Clubs would indemnify the Supplementary Fund in respect 50% of the amounts paid in compensation by that Fund.

The Assembly instructed the Director to collaborate with the International Group of P&I Clubs (on behalf of the shipping industry) and the Oil Companies International Marine Forum (OCIMF) before the voluntary agreement package was submitted to the Assembly for consideration at its next session and provide technical and administrative advice with a view to consolidating the package and ensuring that it was legally enforceable.

Substandard transportation of oil

The Working Group considered several proposals for dealing with the substandard transportation of oil. The intention of these proposals was to provide disincentives to shipowners to use substandard ships by imposing higher limits of liability on such ships. Under one proposal, there would also be a liability on the cargo owner for pollution damage caused by such ships. Another proposal would deprive the shipowner of his right to limit his liability if the incident had resulted from structural defects of the ships (ie defects due to decay or lack of maintenance). No decision was taken on any of these proposals. Many States considered however that the issue of substandard shipping was not within the field of competence

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[<2>] Shipowners are normally insured for third party liabilities (including liability for oil pollution damage) in Protection and Indemnity Associations, so called P&I Clubs, which are mutual insurance associations owned by shipowners who are their members. Thirteen of these Clubs, which together insure some 95% of the world oil tanker fleet, form the International Group of P&I Clubs.

of the 1992 Fund but fell within the exclusive competence of the IMO and should be dealt with in the relevant IMO Conventions (SOLAS and MARPOL).

The 1992 Fund Assembly will decide in 2006 whether to establish a Working Group to consider what economic incentives could be introduced to promote quality shipping.

STOPIA 2006 and TOPIA 2006

As instructed by the Assembly, the Director held meetings in December 2005 and January 2006 with the International Group of P & I Clubs, acting on behalf of the shipping industry, and OCIMF, concerning the development of a voluntary package. As a result of these discussions, the International Group has developed a package consisting of a revised STOPIA, to be referred to as the Small Tanker Oil Pollution Indemnification Agreement (STOPIA) 2006, and the Tanker Oil Pollution Indemnification Agreement (TOPIA) 2006. STOPIA 2006 and TOPIA 2006 are contractually-binding agreements between shipowners conferring on the 1992 Fund and the Supplementary Fund respectively the right of enforcement.

STOPIA 2006 and TOPIA 2006 will be presented to the Assemblies of the 1992 Fund and the Supplementary Fund in late February 2006.

STOPIA 2006

STOPIA 2006, which will apply to pollution damage in States for which the 1992 Fund Convention is in force, is a contract between owners of small tankers to increase, on a voluntary basis, the limitation amount applicable to the tanker under the 1992 Civil Liability Convention. The contract will apply to all small tankers entered in one of the P&I Clubs which are members of the International Group and reinsured through the pooling arrangements of the International Group. Ships insured by an International Group Club but not covered by the pooling arrangement may agree with the Club concerned to be covered by STOPIA 2006. Certain Japanese coastal tankers have already agreed to be bound in this way. The effect of STOPIA 2006 will be that the maximum amount of compensation payable by owners of all ships of 29 548 gross tonnage or less would be 20 million SDR (£16.6 million). The 1992 Fund will not be a party to the agreement, but the agreement will confer legally enforceable rights on the 1992 Fund of indemnification from the shipowner involved.

The 1992 Fund will, in respect of ships covered by STOPIA 2006, continue to be liable to compensate claimants if and to the extent that the total amount of admissible claims exceeds the limitation amount applicable to the ship in question under the 1992 Civil Liability Convention. If the incident involves a ship to which STOPIA applies, the 1992 Fund will be entitled to indemnification by the shipowner of the difference between the shipowner's liability under the 1992 Civil Liability Convention and 20 million SDR.

The main substantive difference between the original STOPIA and STOPIA 2006 is that, whereas the original STOPIA only applied to pollution damage in Supplementary Fund Member States, STOPIA 2006 will apply also to pollution damage in all other 1992 Fund Member States.

TOPIA 2006

TOPIA 2006 applies to all tankers entered in one of the P&I Clubs which are members of the International Group and reinsured through the pooling arrangements of the International Group. Under TOPIA 2006, the owner of the ship involved in the incident will indemnify the Supplementary Fund for 50% of the compensation it pays under the Supplementary Fund Protocol for oil pollution in Supplementary Fund Member States. Ships insured by an International Group Club but not covered by the pooling arrangement may agree to be covered by TOPIA 2006. The Supplementary Fund will, in respect of incidents covered by TOPIA 2006, continue to be liable to compensate claimants as provided in the Supplementary Fund Protocol. If the incident involves a ship to which TOPIA 2006 applies, the Supplementary Fund will be entitled to indemnification by the shipowner of 50% of the compensation payment it had made to claimants.

Review

STOPIA 2006 and TOPIA 2006 provide that a review shall be carried out in 2016 of the experience of pollution damage claims during the period 2006 – 2016, and thereafter at five-yearly intervals, in consultation with representatives of oil receivers and the 1992 Fund and the Supplementary Fund, to establish the approximate proportions in which the overall cost of oil pollution claims under the international compensation system has been borne respectively by shipowners and by oil receivers since 20 February 2006 and consider the efficiency, operation

and performance of the agreements. The agreements also provide that, if the review reveals that either shipowners or oil receivers have borne a proportion exceeding 60% of the overall costs of such claims, measures shall be taken for the purpose of maintaining an approximately equal apportionment. Examples of such measures are given in the agreements.

Entry into force

STOPIA 2006 and TOPIA 2006 will apply to incidents occurring after noon GMT on 20 February 2006.

The agreements are to continue until the current international compensation system is materially and significantly changed. There are also provisions for the termination of the agreements in certain circumstances which may be expected to make them no longer workable.

Concluding remarks

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

When the 1971 Fund was set up in 1978 it had only 14 Member States. Over the years the number of 1992 Fund Member States has increased to 94. It is expected that a number of States will ratify the 1992 Protocols in the near future. It is interesting to note that many States which have ratified the 1992 Conventions in the last few years were not previously parties to the 1969 and 1971 Conventions. This increase in the number of Member States appears to indicate that the Governments have in general considered the international compensation regime to be working well. This explains why the regime based on the 1992 Conventions has served as a model for the creation of liability and compensation systems in other fields, such as the carriage of hazardous and noxious substances by sea.

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 States 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 States. Steps to that effect have been taken by the increases in the limits of liability and compensation which entered into force on 1 November 2003, by the adoption in May 2003 of the Protocol establishing a Supplementary Fund and by amendments to the Claims Manual in respect of the cost of post-spill studies and the costs of reinstatement of the polluted environment.

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ANNEX

States Parties to both the
1992 Civil Liability Convention and the
1992 Fund Convention

as at 25 November 2005
(and therefore Members of the 1992 Fund)

92 States for which the 1992 Fund Convention is in force		
Algeria	Germany	Papua New Guinea
Angola	Ghana	Philippines
Antigua and Barbuda	Greece	Poland
Argentina	Grenada	Portugal
Australia	Guinea	Qatar
Bahamas	Iceland	Republic of Korea
Bahrain	India	Russian Federation
Barbados	Ireland	Saint Lucia
Belgium	Israel	Saint Vincent and the Grenadines
Belize	Italy	Samoa
Brunei Darussalam	Jamaica	Seychelles
Cambodia	Japan	Sierra Leone
Cameroon	Kenya	Singapore
Canada	Latvia	Slovenia
Cape Verde	Liberia	South Africa
China (Hong Kong Special Administrative Region)	Lithuania	Spain
Colombia	Madagascar	Sri Lanka
Comoros	Malaysia	Sweden
Congo	Malta	Tonga
Croatia	Marshall Islands	Trinidad and Tobago
Cyprus	Mauritius	Tunisia
Denmark	Mexico	Tuvalu
Djibouti	Monaco	Turkey
Dominica	Morocco	United Arab Emirates
Dominican Republic	Mozambique	United Kingdom
Estonia	Namibia	United Republic of Tanzania
Fiji	Netherlands	Uruguay
Finland	New Zealand	Vanuatu
France	Nigeria	Venezuela
Gabon	Norway	
Georgia	Oman	
	Panama	

6 States which have deposited instruments of accession, but for which the 1992 Fund Convention does not enter into force until date indicated	
Saint Kitts and Nevis	2 March 2006
Maldives	20 May 2006
Albania	30 June 2006
Switzerland	10 October 2006
Bulgaria	18 November 2006
Luxembourg	21 November 2006

States Parties to the Supplementary Fund Protocol
as at 25 November 2005
(and therefore Members of the Supplementary Fund)

11 States Parties to the 2003 Supplementary Fund Protocol		
Denmark	Ireland	Portugal
Finland	Japan	Spain
France	Netherlands	Sweden
Germany	Norway	

2 States which have deposited instruments of accession but for which the Protocol does not enter into force until date indicated	
Italy	20 January 2006
Lithuania	22 February 2006

States Parties to the 1992 Civil Liability Convention
but not to the 1992 Fund Convention
as at 25 November 2005
(and therefore not Members of the 1992 Fund)

10 States for which the 1992 Civil Liability Convention is in force			
Azerbaijan	Egypt	Kuwait	Viet Nam
Chile	El Salvador	Romania	
China	Indonesia	Solomon Islands	

6 States which have deposited instruments of accession, but for which the 1992 Civil Liability Convention does not enter into force until date indicated	
Syrian Arab Republic	22 February 2006
Pakistan	2 March 2006
Lebanon	30 March 2006
Saudi Arabia	23 May 2006
Peru	1 September 2006
Moldova	11 October 2006

States Parties to the 1969 Civil Liability Convention
as at 25 November 2005

39 States Parties to the 1969 Civil Liability Convention		
Azerbaijan	Georgia	Maldives
Benin	Ghana	Mauritania
Brazil	Guatemala	Mongolia
Cambodia	Guyana	Nicaragua
Chile	Honduras	Peru
Costa Rica	Indonesia	Saint Kitts and Nevis
Côte d'Ivoire	Jordan	Sao Tomé and Principe
Dominican Republic	Kazakhstan	Saudi Arabia
Ecuador	Kuwait	Senegal
Egypt	Latvia	Serbia and Montenegro
El Salvador	Lebanon	Syrian Arab Republic
Equatorial Guinea	Libyan Arab Jamahiriya	United Arab Emirates
Gambia	Luxembourg	Yemen

3 States which have deposited instruments of denunciation which will take effect on date indicated	
Portugal	1 December 2005
Colombia	25 January 2006
Albania	30 June 2006

Note: the 1971 Fund Convention ceased to be in force on 24 May 2002