THE INTERNATIONAL COMPENSATION REGIME; EXPERIENCES OF SOME MAJOR INCIDENTS; THE ONGOING REVIEW OF THE 1992 INTERNATIONAL CONVENTIONS

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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 20 January 2003, 91 States were Parties to the 1992 Civil Liability Convention, and 84 States were Parties to the 1992 Fund Convention.

The States Parties to the 1969 and 1992 Conventions are listed in the Annex.

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 1969 and 1971 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. Under the 1992 Conventions, however, the geographical scope is wider, with the cover extended to pollution damage caused in the exclusive zone (EEZ) or equivalent area of a State Party. 'Pollution damage' includes the cost of 'preventive measures', ie measures to prevent or minimise 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 1969 Civil Liability Convention and the 1971 Fund Convention apply only to measures taken after oil has escaped or been discharged. These Conventions therefore do not apply to pure threat removal measures, ie preventive measures which are so successful that there is no actual spill of oil from the tanker involved. Under the 1992 Conventions, however, expenses incurred for preventive measures are

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

The 1969 and 1971 Conventions apply only to ships which actually carry oil in bulk as cargo, ie generally laden tankers. Spills from tankers during ballast voyages are therefore not covered by these Conventions. The 1992 Conventions apply also to spills of bunker oil from unladen tankers in certain circumstances. Neither the 1969/1971 Conventions nor the 1992 Conventions apply to spills of bunker oil from ships other than tankers (ie dry cargo ships).

Shipowner's liability

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 Civil Liability Conventions 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. The limit of the shipowner's liability under the 1969 Civil Liability Convention is the lower of 133 Special Drawing Rights (SDR)[<1>] (US$181) per ton of the ship's tonnage or 14 million SDR (US$19 million). Under the 1992 Civil Liability Convention, the limits are:

(a) for a ship not exceeding 5 000 units of gross tonnage, 3 million SDR (US$4.1 million);
(b) for a ship with a tonnage between 5 000 and 140 000 units of tonnage, 3 million SDR (US$4.1 million) plus 420 SDR (US$571) for each additional unit of tonnage; and
(c) for a ship of 140 000 units of tonnage or over, 59.7 million SDR (US$81.2 million).

There is a simplified procedure under the 1992 Civil Liability Convention for increasing these limits.

Under the 1969 Civil Liability Convention, the shipowner is deprived of the right to limit his liability if the incident occurred as a result of the owner's personal fault ('actual fault or privity'). Under the 1992 Convention, however, the shipowner is deprived of this right only if it is proved that the pollution damage resulted from the shipowner's personal act or omission, committed with the intent to cause such damage, or recklessly and with knowledge that such damage would probably result.

Channeling of liability

Claims for pollution damage under the Civil Liability Conventions 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 1969 Civil Liability Convention prohibits claims against the servants or agents of the shipowner. The 1992 Civil Liability Convention prohibits not only claims against the servants or agents of the owner, but also claims against the pilot, the charterer (including a bareboat charterer), manager or operator of the ship, or any person carrying out salvage operations or taking preventive measures.

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 applicable Civil Liability Convention. Tankers must carry a

<1> The unit of account in the Conventions is the Special Drawing Right (SDR) as defined by the International Monetary Fund. In this note, the SDR has been converted into US dollars at the rate of exchange applicable on 15 January 2003, ie 1 SDR = US$1.36036.

certificate on board attesting the insurance coverage. When entering or leaving a port or terminal installation of a State Party to the 1969 or 1992 Civil Liability Convention, such a certificate is required also for ships flying the flag of a State which is not Party to that Convention.

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

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 compensation payable by the 1971 Fund in respect of an incident was limited to an aggregate amount of 60 million SDR (US$81.6 million), including the sum actually paid by the shipowner (or his insurer) under the 1969 Civil Liability Convention. The maximum amount payable by the 1992 Fund in respect of an incident is 135 million SDR (US$183.7 million), including the sum actually paid by the shipowner (or his insurer) under the 1992 Civil Liability Convention.

The 1992 Fund Convention provides a simplified procedure for increasing the maximum amount payable by the 1992 Fund.

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.

Jurisdiction and enforcement of judgements

Actions for compensation under the 1992 Civil Liability Convention against the shipowner or his insurer may only be brought before the Courts of the State Party to that Convention in the territory, territorial sea or EEZ of which damage was caused.

Actions for compensation under the 1992 Fund Convention against the 1992 Fund may only be brought before the Courts of the State Party to that Convention in the territory, territorial sea or EEZ of which damage was caused.

The 1992 Conventions also contain special provisions relating to the recognition and enforcement of judgements.

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.

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 and the 1971 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.

The Assembly has introduced a system of deferred invoicing. Under this system, the Assembly fixes the total amount to be levied in contributions for a given calendar year but may decide that only a specific lower amount should be invoiced for payment by 1 March in the following year, the remaining amount, or part thereof, to be invoiced later if it should prove necessary.

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 20% of the total contributions. The Italian oil industry is the second largest contributor paying 11%, followed by the oil industries in the Republic of Korea, the Netherlands, France, United Kingdom, Singapore, Spain, Canada, Germany, Australia and Norway.

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.

The following table sets out the contributions levied by the 1992 Fund during the period 1996-2002.

Annual contributions	**Date due**	**Total contribution £**	**Contribution per tonne £**	**Contribution per million tonnes £**
1996	1.2.97	4 000 000	0.0110440	11 044
	1.9.97	10 000 000	0.0188066	18 807
1997	1.2.98	9 500 000	0.0114295	11 430
	Maximum deferred levy	*30 000 000*	*(No deferred levy made)*	-
1998	1.2.99	28 200 000	0.0400684	40 068
	1.9.99	9 000 000	0.0134974	13 497
1999	Credit: 1.3.00	-3 700 000	-0.0056367	-5 637
	1.9.00	53 000 000	0.0552651	55 265
2000	1.3.01	49 500 000	0.0545770	54 577
	Maximum deferred levy	43 000 000	*(No deferred levy made)*	-
2001	1.3.02	41 000 000	0.0428439	42 844
	Maximum deferred levy	21 000 000	*(No deferred levy made)*	18 815
2002	1.3.02	31 000 000	0.0274518	27 452
	No deferred levy			

The following table sets out the contributions levied by the 1971 Fund during the period 1990-2002.

Annual Contributions	Due date	Total contribution £	Contribution per tonne £	Contribution per million tonnes £
Initial Contributions			0.0027896	2 790
1990		500 000	0.0005563	556
1991		26 700 000	0.0287013	28 701
1992		10 950 000	0.0116210	11 621
1993		78 000 000	0.0785397	78 540
1994		40 000 000	0.0389400	38 940
1995		43 000 000	0.0391209	39 121
1996	Due 1.2.97: Due 1.9.97:	18 000 000 37 800 000	0.0150285 0.0306697	15 029 30 670
1997	Due 1.2.98: *Maximum deferred levy*	32 200 000 *27 000 000*	0.0264108 *(No deferred levy made)*	26 411
1998	Due 1.2.99: *Maximum deferred levy*	9 200 000 *17 500 000*	0.0085939 *(No deferred levy made)*	8 594
1999	Due 1.3.00: *Maximum deferred levy*	3 800 000 *2 000 000*	0.0025039 *(No deferred levy made)*	2 504
2000	Due 1.3.01 *Maximum deferred levy*	0 *25 000 000*	0 *(No deferred levy made)*	0
2001	Due 1.3.02 Maximum deferred levy	0 24 200 000	0 *(No deferred levy made)*	0
2002	Due 1.3.03 Maximum deferred levy	0 21 000 000	0	

Termination of the 1971 Fund Convention

After the entry into force of the 1992 Conventions in 1996, the 1969 Civil Liability Convention and the 1971 Fund Convention were denounced by a number of Member States. As more States joined the 1992 Fund and ceased to be Members of the 1971 Fund, the 'old' regime lost its importance.

Under Article 43.1 in its original version, the 1971 Fund Convention would have ceased to be in force when the number of Member States fell below three. Although many States had denounced the 1971 Fund Convention, it was unlikely that the number of Member States would fall below three in the foreseeable future. For this reason a Diplomatic Conference, held in September 2000, adopted a Protocol under which the 1971 Fund Convention would cease to be in force on the date on which the number of Member States fell below 25, or 12 months following the date on which the Assembly (or any other body acting on its behalf) noted that the total quantity of contributing oil received in the remaining Member States had fallen below 100 million tonnes.

Due to a number of recent denunciations of the 1971 Fund Convention, the Convention ceased to be in force on 24 May 2002 when the number of Member States fell below 25. The Convention does not apply to incidents occurring after that date. However, the 1971 Fund will continue to pay compensation for claims arising from incidents which occurred when the 1971 Fund Convention was in force. Once all such claims have been paid, the 1971 Fund will be wound up. It is expected that the winding-up procedure will take several years.

Claims Settlement

Claims experience

Since its establishment in 1978, the 1971 Fund has been involved in some 108 incidents. The 1971 Fund has paid some US$500 million in compensation. So far the 1992 Fund has been involved in 16 incidents and has made compensation payments totalling over US$120 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 seven incidents.

The cases involving the largest total payments so far are the *Aegean Sea* (Spain), *Braer* and *Sea Empress* (United Kingdom), *Nadhodka* (Japan) and *Erika* (France) incidents, where US$47 million, US$72 million, US$48 million, US$171 million and US$41 million respectively have been paid to claimants.

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, that there was a link between the expense and the incident and that the expense 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'. In 1994 a Working Group of the 1971 Fund examined in depth the criteria for the admissibility of claims for compensation within the scope of the 1969 Civil Liability Convention, the 1971 Fund Convention and the 1992 Protocols. The Report of the Working Group was endorsed by the Assembly of the 1971 Fund. The Assembly of the 1992 Fund has adopted a Resolution to the effect that this Report shall form the basis of its policy on the criteria for the admissibility of claims.

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, since 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.

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 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.

Claims for measures to prevent or minimise pollution damage 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.

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.

Salvage operations may in some cases include an element of preventive measures. Such operations can be considered as *preventive measures* only if the primary purpose is to prevent *pollution damage*. If the operations have another purpose, such as salving hull and cargo, the costs incurred are not admissible under the 1992 Conventions. If the activities are undertaken for the purpose of both preventing pollution

and salving the ship and cargo, but it is not possible to establish with any certainty the primary purpose of the operations, the costs are apportioned between pollution prevention and other activities. The assessment of compensation for activities which are considered to be *preventive measures* is not made on the basis of the criteria applied for assessing salvage awards; the compensation is limited to costs, including a reasonable element of profit.

Fixed costs

Claims submitted by public authorities for carrying out clean-up operations and preventive measures often include elements covering costs which would have arisen even if the incident had not occurred (eg normal salaries for permanently employed personnel). Such fixed-costs are distinguished from additional costs, ie costs incurred solely as a result of the incident which would not have arisen otherwise (eg payments for overtime).

The 1992 Fund's position is that a reasonable proportion of fixed costs should be admissible, provided that such costs correspond closely to the clean-up period in question and do not include remote overhead charges.

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 reasonable degree of proximity 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 reasonable proximity 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.

Measures to prevent pure economic loss

Claims for the cost of measures to prevent pure economic loss may be admissible if they fulfil the following requirements:

- the cost of the proposed measures is reasonable
- the cost of the measures is not disproportionate to the further damage or loss which they are intended to mitigate
- the measures are appropriate and offer a reasonable prospect of being successful

?? in the case of a marketing campaign, the measures relate to actual targeted markets.

To be admissible, the costs should relate to measures to prevent or minimise losses which, if sustained, would qualify for compensation under the Conventions. Claims for the cost of marketing campaigns or similar activities are accepted only if the activities undertaken are in addition to measures normally carried out for this purpose. In other words, compensation is granted only for the additional costs resulting from the need to counteract the negative effects of the pollution.

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.

Damage to the marine environment cannot be easily assessed in monetary terms, as the marine environment does not have a direct market value. In recent years models have been elaborated in many countries for the assessment of damage to the marine environment. It is submitted that any assessment of ecological damage to the marine environment in monetary terms would require sweeping assumptions regarding relationships between different components of the environment and economic values. Any calculation of the damage suffered in monetary terms would by necessity be arbitrary. For this reason, the 1992 Fund has taken the position that it would be inappropriate to admit claims for compensating damage to unexploited natural resources which have no owner.

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.

The assessment should be made on the basis of the information available when the specific reinstatement measures are to be undertaken.

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 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.

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

In October 2000, the Legal Committee of IMO adopted two resolutions increasing the limits contained in 1992 Civil Liability Convention and the 1992 Fund Convention by some 50.37%. The amendments will enter into force on 1 November 2003.

The increased limits of the shipowner's liability would be as follows:

a) for a ship not exceeding 5 000 units of gross tonnage, 4 510 000 SDR (US$6.1 million);

b) for a ship with a tonnage between 5000 and 140 000 units of tonnage, 4510 000 SDR (US$6.1 million) plus 631 SDR (US$858) for each additional unit of tonnage; and

c) for a ship of 140 000 units of tonnage or over, 89 770 000 SDR (US$122.1 million).

The amendment to the 1992 Fund Convention would bring the total amount available under the 1992 Conventions to 203 million SDR (US$276 million).

Review of the adequacy of the international compensation regime

In April 2000, the 1992 Fund 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 point was made that although the system had worked well on many occasions there were inadequacies in the system.

Maximum level of compensation

During the discussions in the Working Group a number of Member States maintained that in order for the international compensation system to retain credibility, the maximum compensation levels should be sufficiently high to ensure full compensation to victims even in the most serious oil spill incidents. Other States, however, did not see the need to increase the maximum level of compensation over and above the increases adopted within the IMO in October 2000 which would bring the total amount available to 203 million SDR (US$276 million) from 1 November 2003.

In light of this difference in views, the Working Group considered a proposal to establish an optional third tier of compensation by means of a Protocol creating a Supplementary Compensation Fund, which would provide additional compensation over and above the compensation available under the 1992 Civil Liability Convention and the 1992 Fund Convention.

A number of States expressed their support for the proposed Supplementary Fund. It was emphasised that such a supplementary scheme should preferably be set up on a global rather than a regional basis. Several States stated that, although they were not interested in joining the proposed supplementary scheme, they supported the proposed scheme or did not oppose its creation.

The delegations representing shipping, insurance and oil interests supported the Supplementary Fund scheme in principle. It was emphasised, however, that it was important to preserve the sharing of the burden of compensating oil spills between shipping and oil interests.

The International Group of P & I Clubs informed the 1992 Fund that the P & I Clubs, with the support of shipowners, were developing a proposal for a voluntary increase in the limit of liability for small ships under the 1992 Civil Liability Convention which would apply only in the States which ratified the proposed Supplementary Fund Protocol. Although the precise level of the increase has not yet been decided, it is expected that the limit for small ships will be increased from 4.5 million SDR (US$6 million) to about of 20 million SDR (US$27 million).

In October 2001 the 1992 Fund Assembly adopted the draft Protocol on the establishment of a Supplementary Fund prepared by the Working Group with some modifications.

The Supplementary Fund will only pay compensation for pollution damage in States Parties to the proposed Protocol. In view of the difficulties from a treaty law point of view which would arise if the third tier were to contain a layer financed by the shipowners, the third tier would be financed only by oil receivers and only by the receivers in the States which became Parties to the Protocol. To ensure its optional and distinct character, the Supplementary Fund would be a separate legal entity.

The draft Protocol will be considered by a Diplomatic Conference to be held in May 2003 under the auspices of IMO.

Shipowners' liability and related issues

When in April/May 2002 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.

Representatives of shipowners and their insurers took the view that 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 further suggested that any amendments to the provisions relating to shipowners' liability would give rise to serious treaty law problems. 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. An analysis of oil spills which had occurred in the period 1990-1999 showed that the present regime had resulted in an equitable sharing of burden between these two interests. They maintained that the proposal by the shipping industry to increase, on a voluntary basis, the limitation amount applicable to small ships to around 20 million SDR (US$27 million) would preserve this balance and that the matter should be re-examined in the light of experience three to five years after the entry into force of the proposed Protocol establishing a Supplementary Fund.

Representatives of 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. It was emphasised that it was the sole responsibility of the shipowner to maintain a safe and seaworthy ship. It was suggested that the latter objective might be compromised by the establishment of the Supplementary Fund, in so far

as it was funded only by oil receivers. In addition, the point was made that a Supplementary Fund financed permanently by oil receivers would only distort the balance between the shipowners' and oil receivers' contributions to the regime. It was the oil industry's view that such a Supplementary Fund would also shield low quality shipowners from the consequences of their actions and would therefore not provide any incentive to improve the quality of their ships or the standards of their operations. In order to preserve the balance, it was suggested that this could be achieved either by an increase in the shipowner's limitation amount or by shipowners' participation in the third tier compensation provided by the Supplementary Fund.

Several Member States considered that after the increases in the limits of the shipowners' liability adopted by the IMO Legal Committee in October 2000 there was no need to amend the provisions in the 1992 Civil Liability Convention relating to shipowners' liability. A number of other Member States expressed the view that it was premature to consider any amendments relating to shipowners' liability and that it would therefore be appropriate to defer consideration of this issue until experience had been gained from the effects of the increased limits adopted by the IMO Legal Committee and the operation of the proposed Supplementary Fund.

On the other hand, a number of other Member States took the view that it was necessary to examine at an early stage issues relating to shipowners' liability. The point was made that the international compensation regime was over 30 years old and that it was imperative to adapt the regime to today's needs. Several Member States stated that voluntary increases in the limits of liability were not sufficient.

It was generally recognised that amendments to the provisions in the 1992 Civil Liability Convention relating to shipowners' liability would give rise to difficult treaty law issues. The point was made, however, that those difficulties should not prevent in-depth consideration of the issues relating to shipowners' liability. It was stated that if there was a need to amend these provisions, solutions had to be found to any treaty law problems that might arise.

The issues relating to shipowners' liability will be considered at the Working Group's next meeting to be held in early February 2003.

Environmental damage and environmental studies

In 2001 the Working Group considered a proposal to introduce the concept of compensation for environmental damage as a violation of collective property whereby compensation would be available to the Member nation on the basis of international rights under other Conventions to which it was a Party, the amount of compensation to be based on the conclusions of environmental impact studies conducted in accordance with procedures adopted by the 1992 Fund. The Working Group also examined a proposal to change the 1992 Fund's policy as regards environmental damage to the effect that compensation would no longer be limited to cases where the claimant had suffered economic loss and to allow compensation to be calculated through theoretical models.

These proposals were not accepted since it was considered that they went beyond the present definition of 'pollution damage' in the 1992 Conventions. It was agreed that an examination should be made of what could be achieved within the present definition of 'pollution damage' as regards the admissibility of claims for reinstatement of the environment and for cost of environmental impact studies. There was also support for considering the issue of environmental damage in depth in the longer term.

In April/May 2002 the Working Group considered the criteria to be applied as regards the admissibility of claims for costs of post-spill environmental studies and for costs of measures of reinstatement of the polluted environment. The Working Group prepared a revised text of the relevant section of the Claims Manual. The revised text was approved by the Assembly at its October 2002 session. The purpose of the revised text is to clarify the criteria to be applied in respect of such claims, within the legal framework of the definition of "pollution damage" in the 1992 Conventions.

Other issues

The Working Group has also considered other issues such as the possibility of developing alternative dispute settlement procedures, like mediation, the possible ranking of claims within the Conventions and uniform application of the Conventions, and the discussions on these issues will continue.

Concluding remarks

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.

The advantages for a State of being a Member of the 1992 Fund can be summarised as follows. If a pollution incident occurs involving a tanker, compensation is available to governments or other authorities which have incurred costs for clean-up operations or preventive measures and to private bodies or individuals who have suffered damage as a result of the pollution. For example, fishermen whose nets have become polluted are entitled to compensation, and compensation for loss of income is payable to fishermen and to hoteliers at seaside resorts. This is independent of the flag of the tanker, the ownership of the oil or the place where the incident occurred, provided that the damage is suffered within a 1992 Fund Member State.

During the period 1978-1996, ie until the 1992 Convention entered into force, the number of 1971 Fund Member States increased from 14 to 76. In the years since entry into force of the 1992 Protocols, the number of 1992 Fund Member States has increased from nine to 74, with 10 more States joining within the next 12 months. It is expected that a large 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 reasonably well.

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.

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Annex

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

as at 20 January 2003

74 States for which Fund Protocol is in force
(and therefore Members of the 1992 Fund)

Algeria		
Angola		
Antigua and Barbuda	Georgia	Philippines
Argentina	Germany	Poland
Australia	Greece	Portugal
Bahamas	Grenada	Qatar
Bahrain	Iceland	Republic of Korea
Barbados	India	Russian Federation
Belgium	Ireland	Saint Vincent and the Grenadines
Belize	Italy	Seychelles
Cambodia	Jamaica	Sierra Leone
Cameroon	Japan	Singapore
Canada	Kenya	Slovenia
China (Hong Kong Special Administrative Region)	Latvia	Spain
	Liberia	Sri Lanka
	Lithuania	Sweden
Colombia	Malta	Tonga
Comoros	Marshall Islands	Trinidad and Tobago
Croatia	Mauritius	Tunisia
Cyprus	Mexico	Turkey
Denmark	Monaco	United Arab Emirates
Djibouti	Morocco	United Kingdom
Dominica	Netherlands	Uruguay
Dominican Republic	New Zealand	Vanuatu
Fiji	Norway	Venezuela
Finland	Oman	
France	Panama	
	Papua New Guinea	

10 States which have deposited instruments of accession, but for which the Fund Protocol does not enter into force until date indicated

Brunei Darussalam	31 January 2003
Samoa	1 February 2003
Mozambique	26 April 2003
Madagascar	21 May 2003
Nigeria	24 May 2003
Gabon	31 May 2003
Congo	7 August 2003
Guinea	2 October 2003
Tanzania	19 November 2003
Namibia	18 December 2003

States Parties to the

1992 Protocol to the Civil Liability Convention
but not to the 1992 Protocol to the Fund Convention

as at 20 January 2003

(and therefore not Members of the 1992 Fund)

6 States for which Protocol to Civil Liability Convention is in force			
China	Egypt	El Salvador	Indonesia
Romania	Switzerland		
1 State which has deposited instruments of accession, but for which the Protocol to the Civil Liability Convention does not enter into force until date indicated			
Chile			29 May 2003

States Parties to the 1969 Civil Liability Convention

as at 20 January 2003

49 States Parties to the 1969 Civil Liability Convention		
		Nigeria
Albania	Gambia	Peru
Benin	Georgia	Portugal
Brazil	Ghana	Qatar
Brunei Darussalam	Guatemala	Saint Kitts and Nevis
Cambodia	Guyana	Saint Vincent and the
Cameroon	Honduras	Grenadines
Chile	Indonesia	São Tomé and Principe
Colombia	Kazakhstan	Saudi Arabia
Costa Rica	Kuwait	Senegal
Côte d'Ivoire	Latvia	South Africa
Dominican Republic	Lebanon	Syrian Arab Republic
Ecuador	Luxembourg	Tuvalu
Egypt	Malaysia	United Arab Emirates
El Salvador	Maldives	Yemen
Equatorial Guinea	Mauritania	Yugoslavia
Estonia	Mozambique	
Gabon	Nicaragua	

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