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**WORLD MARITIME UNIVERSITY**  
Malmö, Sweden

**The New International Regime of Liability and Compensation  
for Oil Pollution Damage: Status and Trends**

By

**WANG Hanling**  
P.R. China

A dissertation submitted to the World Maritime University in partial  
fulfilment of the requirements for the award of the degree of

**MASTER OF SCIENCE**

In

**MARITIME ADMINISTRATION AND ENVIRONMENT PROTECTION**

2000

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WANG Hanling  
August, 2000  
Malmö, Sweden

## **Abstract**

The new international legal regime of liability and compensation for oil pollution damage under the 1992 Conventions mainly consists of one definition, two tiers of compensation scheme and three principles. Firstly, one definition—pollution damage. This definition is the basis of criteria of determining the admissibility of claims under both CLC and Fund Convention. Secondly, two tiers: the shipowners' liability under CLC and the supplementary IOPC Fund. Strict liability, higher liability limits and compulsory insurance form the basic principles of the regime.

Recent developments in pollution compensation systems have two-sided effects on the new regime. On one hand, termination of the voluntary industry compensation schemes and compulsory denunciation of the 1969 and 1971 Conventions have strengthened and promoted the uniformity and universality of the new regime. On the other hand, the adoption and implementation of the OPA in the US has dramatically eroded the universality of the international regime. While the inconsistency of legislation and practice of some Member States of the CLC and Fund Conventions may have some negative affects on the implementation of the international regime it may also contribute to its gradual improvement. The recent proposal to increase the limits of the maximum compensation amounts available under the 1992 Conventions shows the inadequacy in the new regime and the necessity for improvement. The HNS Convention is a succession and development of the pollution liability and compensation regime. Its successful implementation in the future may have a reaction effect on the oil pollution regime and promote its further development.

Although the new regime has played an important role in marine environmental protection it has some deficiencies and needs to be improved. From a long-term point of view, improvement or reform of the regime should be emphasized on the following major aspects: to reform the contribution and compensation system of the Fund with a view to re-apportioning various interests involved; to revise the definition of pollution damage in the 1992 Conventions in order to re-define the scope and criteria of compensation; to use successful experiences of pollution liability and compensation systems for reference in the reform of the oil pollution regime; to create a third tier of compensation scheme to supplement the existing international system.

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## Abbreviations

1969/1992 CLC	1969/1992 the International Convention on Civil Liability for Oil Pollution Damage
1971/ 1992 Fund Convention	International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage
1971 Fund	1971 International Oil Pollution Compensation Fund
1992 Fund	1992 International Oil Pollution Compensation Fund
CERCLA	The Comprehensive Environmental Response, Compensation and Liability Act
CRISTAL	Contract Regarding a Supplement to Tanker Liability for Oil Pollution
HNS Convention	The International Convention Relating to Liability for the Carriage of Hazardous and Noxious Substances at Sea , 3 May 1996
IOPC Fund	International Oil Pollution Compensation Fund
IMO	International Maritime Organization
OSLTF	Oil Spill Liability Trust Fund of the US
OPA	The Oil Pollution Act of the US, 1990
TOVALOP	Tanker Owners Voluntary Agreement concerning Liability for Oil Pollution
WQIA	The Water QualityImprovement Act 1970 of the US

## Chapter One Introduction

In IMO history, almost every resolution followed from a maritime casualty. The international regime of liability and compensation for oil pollution damage is not an exception, it resulted from the Torrey Canyon incident and was pushed forward by a series of oil pollution incidents. The Torrey Canyon was a Liberian super-tanker which grounded off the southwest coast of England in March 1967. Some 80,000 tonnes of crude oil was spread along the British and French coast, causing pollution in a 200-mile arc. The oil was released subsequent to the initial grounding, and then again after the vessel had been bombed on orders of the British government after a decision that no other way was left to deal with the unsalvageable wreck. The accident caused the largest single oil spill in maritime history up to that time. A number of claims for pollution compensation were made by affected industries and persons. The question of rewarding for the expenses incurred by the public Authority in cleaning up of the pollution was also raised. Damage claims in Great Britain amounted to GBP 6 million and to FRF 40 million in France. In the absence of an effective compensation system, most of these claims could not be settled.<sup>1</sup> In order to obtain compensation for their losses and expenses, the victims had to resort to arrest of the owner's other assets, her sister-ship.<sup>2</sup>

This accident raised some questions in both international public law<sup>3</sup> and international private law. In international private law it raised the question of pollution damage compensation. Prior to this historical disaster, there was no

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<sup>1</sup>Gold, E.(1997). Gard handbook on marine pollution. Norway(2<sup>nd</sup> edition., pp. 31-32): Assuranceforeningen Gard.

<sup>2</sup> Gouilloud, M. (1993).The future of the compensation system as established by international convention. In Rue, C.M. (eds.), Liability for damage to the marine environment(p.83). London: Lloyd's of London Press LTD.

<sup>3</sup> In international public law, the Torrey Canyon disaster revealed certain doubts with regard to the powers of states in respect of incidents on the high seas. In particular, questions were raised as to the extent to which a coastal state could take measures to protect its territory from pollution where a casualty threatened that state with oil pollution, especially if the measures necessary were made likely to affect the interests of foreign shipowner, cargo owners and even flag states. In November 1969 , the International Convention relating to Intervention on

international law to protect those who suffered damage as a result of oil pollution. Where an accident occurred outside a state's jurisdiction, international law was powerless to address the questions of liability and compensation. In general, national law systems had the same approach, through ordinary civil law, to pollution damage, based on the subjective fault of the party causing damage and not the objective of the consequences of the act. However, an oil pollution incident may have taken place without the shipowner being at fault, in which case the victims were deprived of a legal remedy. Together with uncertainty regarding jurisdiction and exequatur of decisions, this resulted in flagrant injustice for the victims of pollution.<sup>4</sup>

All in all, this incident quickly exposed a host of legal problems relating to compensation for oil pollution. It was evident that traditional legal principles were inadequate to deal with the consequences of pollution from ships, and that a new international system governing liability and compensation for oil pollution from ships was urgently needed. Against this background, the international community began to develop relevant international conventions.

In November 1969, the International Convention on Civil Liability for Oil Pollution Damage (1969 CLC) was adopted in Brussels. It governs the liability of shipowners for oil pollution damage resulting from spills of persistent oil from laden tankers. Under this convention, the shipowner is permitted to limit liability for any one incident to an aggregate amount of 2,000 Francs, for each ton of the ship's tonnage. However, the aggregate amount shall not in any event exceed 210 million Francs. The 1969 CLC entered into force in 1975. This convention constitutes the first tier of compensation for oil pollution damage. The second tier of compensation scheme--the 1971 International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage (1971 Fund Convention or FC) was adopted in Brussels on 18 December 1971. The main purpose of the 1971 Fund is to pay supplemental compensation to those who suffer oil pollution damage in a State Party to the 1971 Fund Convention and do not obtain full compensation under the

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High Seas in Cases of Oil Pollution Casualties was consequently adopted to deal with this problem.

<sup>4</sup> Wu, C. (1996). *Pollution from the carriage of oil by sea: liability and compensation*(p. 2). London: Kluwer law international

1969 CLC. Consequently, only CLC Member States can become members of the Fund. The 1971 Fund provides a basic maximum compensation amount of 450 million gold Francs,<sup>5</sup> which under special circumstances, in cases where the damage exceeds this limit, may be increased to a maximum compensation amount to 900 million Francs. These amounts include amounts which have been paid under CLC. The International Oil Pollution Compensation Fund 1971 (IOPC Fund 1971 or 1971 Fund) was set up under the 1971 Fund Convention when the latter entered into force as of 16 October 1978.

The Amoco Cadiz incident<sup>6</sup> which happened in March 1978 proved that the limitation amounts in both the 1969 CLC and 1971 Fund Conventions were inadequate to compensate for pollution damage. Since the adoption of the CLC in 1969, inflation had led to an erosion of the limitation amounts to such an extent that they could not provide sufficient compensation for damage caused in connection with a major spill. Another important conclusion that could be drawn in light of the Amoco Cadiz was that it would be desirable to introduce a mechanism for a more speedy up-dating of the limitation amounts than through a full diplomatic conference.<sup>7</sup> The Tanio incident<sup>8</sup> which took place in March 1980 further strengthened the justification for revision of the CLC and Fund Conventions. This led to the adoption of the 1984 Protocols to the CLC and Fund Conventions.

The major revisions in the 1984 Protocols included the definition of pollution damage, the extension of the geographic scope of application to cover damage in the EEZ, simple procedures for up-dating the limitation amounts and limitation of liability, etc. The limit of liability under CLC was raised from 133 to 420 SDRs per unit of tonnage, and the overall limit boosted from 14 to 59.7 million SDRs. The

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<sup>5</sup> In 1979 the IOPC Fund Assembly increased the basic maximum to 675 million Francs.

<sup>6</sup> On 16 March 1978, the VLCC Amoco Cadiz, carrying 220,000 tons of crude oil from the Persian Gulf to Rotterdam, foundered at Brittany coast and her entire cargo escaped, polluting 180 miles of coastline in one of the most important tourist and fishing regions in France. The incident led to complex litigation in Chicago which finally came to a conclusion in January 1992 with an award of some US\$ 61 million plus interests.

<sup>7</sup> Goransson, M.(1993). The 1984 and 1992 protocols to the civil liability convention, 1969 and the fund convention, 1971. In Rue, C.M.D(Eds.), *Liability for damage to the marine environment*(p. 72). London: Lloyd's of London Press LTD.

<sup>8</sup> On 7 March 1980, the Malagasy tanker Tanio broke up in heavy weather off the Brittany coast and spilt some 13,500 tons of her cargo of fuel oil, polluted over 125 miles of shoreline.

limit in the Fund Convention was 135 million SDRs, together with scope for extension to 200 million SDRs. This mainly reflected the position of the US. However, the US still did not ratify the Protocols.

The Exxon Valdez incident<sup>9</sup> which happened in March 1989 marked a new era in oil pollution legislation. It pushed the US into opting for a unilateral and radical stance.<sup>10</sup> In August 1990, the Oil Pollution Act (OPA) was adopted by the US Congress and became the new law governing liability and compensation for marine oil pollution damage. The adoption of the OPA meant that the US would not ratify the 1984 Protocols. The Protocols never entered into force without the participation of the US and became no more than historical records.

In order to “rescue” the 1969 CLC and 1971 Fund Conventions, IMO adopted two new Protocols in 1992 to amend these two Conventions. These Protocols are known as the 1992 International Convention on Civil Liability for Oil Pollution Damage (1992 CLC) and the 1992 International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage (1992 Fund Convention or 1992 FC). The 1992 Conventions entered into force on 30 May 1996. The 1992 CLC governs the liability of shipowners for oil pollution damage. The Convention lays 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 CLC, establishes a regime for compensating victims when the compensation under the applicable CLC is inadequate. The International Oil Pollution Compensation Fund 1992 (IOPC Fund 1992 or 1992 Fund) was set up under the 1992 Fund Convention. The Organisation has its headquarters in London. It is a worldwide intergovernmental organisation established for the purpose of administering the regime of compensation created by

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<sup>9</sup> On March 24, 1989, the US-flag tanker Exxon Valdez went aground in Prince William Sound, Alaska, spilling more than 11 million gallons of crude oil and polluting more than 1000 miles of the Alaska coastline. The area surrounding the incident was one of the richest fishing grounds in North America. The spill posed threats to the delicate food chain that supports Prince William Sound’s commercial fishing industry. Also in danger were ten million migratory shore birds and waterfowl, hundreds of sea otters, dozens of other species, such as harbor porpoises and sea lions, and several varieties of whales. The spill was the largest in U.S. history. Retrieved July 25, 2000 from the World Wide Web: <http://www.epa.gov/oilspill/exxon.htm>.

<sup>10</sup> Wu C.(1996). Pollution from the carriage of oil by sea: Liability and compensation(p.3). London: Kluwer Law International.

the 1992 Fund Convention. By becoming a Party to the 1992 Fund Convention, a State becomes a Member of the 1992 Fund.

From 16 May 1998, Parties to the 1992 Protocols ceased to be Parties to the 1971 Fund Convention due to a mechanism for compulsory denunciation of the “old” regime established in the 1992 Protocols. As of 1 July, 2000, the number of the State Parties to the 1971 Fund Convention is 30, among which 11 states have deposited instruments of denunciation.<sup>11</sup> For the time being two Funds (the 1971 Fund and the 1992 Fund) are in operation, since there are some states which have not yet acceded to the 1992 Fund Protocol which is intended to replace completely the 1971 regime. As of 31 May, 2000, 60 States were Parties to the 1992 CLC;<sup>12</sup> 44 States were Parties to the 1992 Fund Convention, and another 15 States have deposited instruments of accession.<sup>13</sup>

Since the 1969 CLC and the 1971 Fund Convention have been denounced by a number of States and will lose importance, this thesis mainly discusses the “new regime”, i.e. the 1992 CLC and the 1992 Fund Convention. The discussion will focus on the status and trends of the new regime. Comparison will be mainly used to reveal the distinctions between different legal systems.

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<sup>11</sup> <http://www.iopcfund.org/gennote.htm>, 10 July, 2000.

<sup>12</sup> <http://www.imo.org/imo/convent/summary.htm>, 10 July, 2000

## **Chapter Two The New International Legal Framework of Liability and Compensation for Oil Pollution Damage**

In structure, as with the “old regime”, the new international regime of liability and compensation for oil pollution damage consists of two tiers of compensation schemes. The first tier is the shipowner’s liability under the 1992 CLC. The Second tier is the 1992 Fund which is financed by the cargo owners and supplementary to the first tier.

### **1. The First Tier: The 1992 CLC—The Shipowner Pays**

#### **1.1 The Objectives of the 1992 CLC**

According to the preamble of the 1992 CLC, the main aim of the CLC is to ensure that adequate compensation is available to persons who suffer damage caused by pollution resulting from the escape or discharge of oil from ships. The CLC only provides the shipowner’s one-sided liability for oil pollution damage. Once a State becomes a party to the CLC, it enjoys the right to compensation for oil pollution damage, which is guaranteed by strict liability and compulsory insurance of the shipowner. In this sense, “ the CLC found favour amongst states as it basically provided ‘free’ environmental insurance.” It is considered to be almost negligent for any coastal state not to have accepted this Convention. <sup>14</sup>On the other hand, the CLC also protects the oil shipping industry by providing limitation of liability for the shipowners. These are the unspoken words behind the Convention. Another objective

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<sup>13</sup> <http://www.iopcfund.org/gennote.htm>, 10 July, 2000.

<sup>14</sup> Gold, E.(1997). Gard handbook on marine pollution ( 2<sup>nd</sup> edition, p.223). Norway: Assuranceforeningen Gard.

of the CLC is to unify international rules and procedures for determining questions of liability and providing adequate compensation in such cases.<sup>15</sup>

## 1.2 Scope of Application

Article 2 of the 1992 CLC provides the scope of application of the Convention:

“ This convention shall apply exclusively :

(a) to pollution damage caused:

(i) in the territory , including the territory sea, of a Contracting state, and

(ii) in the exclusive economic zone of a Contracting state, established in accordance with international law , or, if a Contracting state has not established such a zone, in an area beyond and adjacent to the territory sea of that State determined by that State in accordance with international law and extending not more than 200 nautical miles from the baselines from which the breadth of its territorial sea is measured;

(b) to preventive measures, wherever taken, to prevent or minimize such damage.”

According to the above provision, the 1992 CLC covers pollution damage suffered in the territory, territorial sea or exclusive economic zone (EEZ) or equivalent area of a State Party to the Convention. The flag State of the tanker and the nationality of the shipowner are irrelevant for determining the scope of application.

“Pollution damage” is defined in the 1992 CLC as “(a) loss or damage caused outside the ship by contamination resulting from the escape or discharge of oil from the ship, wherever such escape or discharge may occur, provided that compensation for impairment of the environment other than loss of profit from such impairment shall be limited to costs of reasonable measures of reinstatement actually undertaken or to be undertaken; (b) the costs of preventive measures and further loss or damage caused

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<sup>15</sup> The last paragraph of the preamble of the 1992 CLC.

by preventive measures.”<sup>16</sup> In summary, it is loss or damage caused by contamination.

For environmental damage (other than loss of profit from impairment of the environment) compensation is restricted, however, to costs actually incurred or to be incurred for reasonable measures to recover the contaminated environment. The notion of pollution damage includes measures, wherever taken, to prevent or minimise pollution damage in the territory, territorial sea or EEZ of a State Party to the Convention. These measures are so-called *preventive measures*. Expenses incurred for reasonable preventive measures are recoverable even when no spill of oil occurs, provided that there was a *grave and imminent* threat of pollution damage. Since compensation is also payable for the cost of reasonable measures to prevent or minimise pollution damage in the above-mentioned areas of a State Party to the Convention in question, wherever these measures are taken, if a response on the high seas to an oil spill succeeds in preventing or reducing pollution damage within the territorial sea or exclusive economic zone of such a State, the response would in principle qualify for compensation.<sup>17</sup>

Under article 1.1 of the 1992 CLC, a “Ship” means any sea-going vessel or seaborne craft of any type whatsoever constructed or adapted for the carriage of oil in bulk as cargo, provided that a ship capable of carrying oil and other cargoes shall be regarded as a ship only when it is actually carrying oil in bulk as cargo and during any voyage following such carriage unless it is proved that it has no residues of such carriage of oil in bulk aboard. According to this definition, the Convention covers incidents in which persistent oil has escaped or has been discharged from a sea-going vessel constructed or adapted to carry oil in bulk as cargo (normally a tanker). The Convention covers not only spills of bunker oil from laden tankers but also spills of persistent oil (including bunker oil) from unladen tankers (but not dry cargo ships). It applies thus to both laden and unladen tankers .

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<sup>16</sup> Article 1.6 of 1992 CLC.

<sup>17</sup> IOPC Fund 1992. ( June 1998). International oil pollution compensation fund 1992: Claims Manual( p. 5). London: Author.

In October 1998, the 1992 Fund Assembly established an intersessional Working Group to study two issues relating to the definition of “ ship” laid down in the 1992 CLC and 1992 Fund Conventions, namely

- 1) the circumstances in which an unladen tanker would fall within the definition of “ship”; and
- 2) whether, and if so to what extent, the 1992 Conventions applied to offshore craft, namely floating storage units (FSUs) and floating production, storage and offloading units (FPSOs).

As to the first issue, the Working Group drew the following conclusions :

- 1) the word “oil” in the proviso in Article 1.1 of the 1992 Civil Liability Convention means persistent hydrocarbon mineral oil, as defined in Article 1.5 of the Convention;
- 2) the expression “ other cargo” in the proviso should not be interpreted to mean non-persistent oils as well as bulk solid cargoes;
- 3) as a consequence the proviso in Article 1.1 should apply to all tankers and not only to ore/bulk/oil ship (OBOs);
- 4) the expression “any voyage” should be interpreted literally and not be restricted to the first ballast voyage after the carriage of a cargo of persistent oil;
- 5) a tanker which had carried a cargo of persistent oil would fall outside the definition if it was proven that it had no residues of such carriage on board; and
- 6) the burden of proof that there were no residues of a previous carriage of a persistent oil cargo should normally fall on the shipowner.

The delegations of Australia, Canada, the Netherlands and the UK expressed the view that:

- 1) a dedicated oil tanker ( i.e. a tanker capable of carrying persistent oil and non-persistent oil) is always a “ship” for the purposes of the 1992 CLC; and
- 2) the proviso in the definition of “ ship” applies only to vessels and craft capable of carrying oil, including non-persistent oil, and other cargoes.<sup>18</sup>

Some delegations disagreed with the conclusions of the Working Group. This issue

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<sup>18</sup> IOPC Fund 1992. International oil pollution compensation funds: Annual report 1999 (p. 35) . London: Author.

will be further discussed by the Assembly.

Conclusions on the second issue are as follows:

- 1) Offshore craft should be regarded as “ships” under the 1992 Conventions only when they carry oil as cargo on a voyage to or from a port or terminal outside the oil field in which they normally operate.
- 2) Offshore craft fall outside the scope of the 1992 Conventions when they leave an offshore oil field for operational reasons or simply to avoid bad weather.<sup>19</sup>

The Assembly decided to endorse these conclusions. The Assembly emphasized that in any event the decision as to whether the 1992 Conventions apply to a specified incident would be taken in the light of the particular circumstances of that case. It was noted that the issue could be reconsidered if new information were to come to light.<sup>20</sup>

As to the types of oil covered, the Convention applies to spills of *persistent* oil, for example crude oil, fuel oil, heavy diesel oil and lubricating oil.<sup>21</sup> Damages caused by spills of non-persistent oil, such as gasoline, light diesel oil and kerosene, etc, do not fall within the scope of the Convention, and therefore are not compensated under the Conventions.

The term *persistent* is used to describe those oils which, because of their chemical composition, are usually slow to dissipate naturally when spilled into the marine environment and are therefore likely to spread and require cleaning up. Non-persistent oils tend to evaporate quickly when spilled and do not require cleaning up. Neither persistence nor non-persistence is defined in the Conventions. However, under guidelines developed by the 1971 Fund, an oil is considered non-persistent if at the time of shipment at least 50% of the hydrocarbon fractions, by volume, distill at a temperature of 340°C (645°F), and at least 95% of the hydrocarbon fractions, by volume, distill at a temperature of 370°C (700°F), when tested in accordance with the American Society for Testing and Materials’ Method D86/78 or any subsequent

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<sup>19</sup> IOPC Fund 1992. International oil pollution compensation funds: Annual report 1999 (p. 34) . London: Author.

<sup>20</sup> IOPC Fund 1992. International oil pollution compensation funds: Annual report 1999 (p. 35) . London: Author.

<sup>21</sup> Article 1.5 of 1992 CLC.

revision thereof.<sup>22</sup>

### 1.3 Strict Liability

The CLC abandoned the traditional concept of liability on fault, and instead imposed on shipowners a strict liability for oil pollution damage. The owner of a tanker has strict liability (i.e. 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 1992 CLC only if he proves that:

- (a) the damage resulted from an act of war, 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.<sup>23</sup>

There is a fourth exemption from liability in Article 3.3:

“ If the owner proves that the pollution damage resulted wholly or partially either from an act or omission done with intent to cause damage by the person who suffered the damage or from the negligence of that person, the owner may be exonerated wholly or partially from his liability to such person.”

The introduction of strict liability was only adopted after protracted and delicate negotiations at the Diplomatic Conference. Replacing a fault liability by a strict liability may not seem such a revolutionary change today, but in 1969, in the fairly conservative world of maritime law, it represented a major innovation, and contributed to a considerable strengthening of the position of victims of oil pollution.<sup>24</sup>

### 1.4 Limitation of liability

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<sup>22</sup> IOPC Fund 1992. (June 1998). International oil pollution compensation fund 1992: Claims Manual (p.6) London: Author.

<sup>23</sup> Article 3.2 of 1992 CLC.

<sup>24</sup> Jacobsson, M. ( 1993). The international conventions on liability and compensation for oil pollution damage and the activities of the international oil pollution compensation fund. In Rue, C.M.D(Eds).Liability for damage

Limitation of shipowner's liability means that a shipowner can limit his liability to persons suffering loss or damage through negligent navigation or management of his ship. The owner of the negligent ship need not necessarily compensate fully those who have suffered; usually he can limit his liability according to the size of his ship.<sup>25</sup> Obviously, the purpose of this rule is to support and protect the shipping industry.

From a historical perspective, the doctrine of limitation was articulated as early as 1625 by Grotius, and limitation of liability in civil law jurisdiction can be traced as far back as the eleventh century.<sup>26</sup> In maritime history, there have been two main systems of limitation in use internationally. The old system fixed the limit of liability according to the value of the ship. It favored the old ships. If the ship sank the limit would be next to nothing. The modern system is based on the tonnage of the ship. In this respect, three international conventions have been adopted. The first one, the 1924 Convention on the limitation of Shipowner's Liability, did not receive widespread acceptance. In 1957, the general question of limitation of liability for maritime claims was dealt with at an international conference, before IMO first met, which led to the adoption of the second limitation Convention, namely the International Convention Relating to the limitation of the liability of Owners of Seagoing Ships. Although this Convention has over 50 parties, a number of major maritime countries such as the USA and Greece did not ratify it. As a final attempt to achieve uniformity, in 1976 IMCO (now IMO) adopted the third limitation Convention – the Convention on Limitation of Liability for Maritime Claims which entered into force in December 1986. For State Parties, it has replaced the 1957 Convention.

The rule of limitation of liability was introduced into the international system of oil

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to the marine environment(p. 41). London: Lloyd's of London Press LTD.

<sup>25</sup> Gaskell, N.J.J. Debattista. C. & Swatton, R.J.(Eds. 1996). Chorley & Giles' Shipping Law( 8<sup>th</sup> Edition. P. 394). London: Pitman Publishing.

<sup>26</sup> Gauci, G. (1997).Oil pollution at sea: Civil liability and compensation for damage(p. 152). England: John Wiley & Sons.

pollution compensation in 1969. Article 5 of the 1969 CLC Convention provides the limitation of liability. 1992 CLC reserves this system but makes substantial revisions.

Under article 5 of the 1992 CLC, the shipowner is entitled to limit his liability under certain conditions. The limits are:

- (a) for a ship not exceeding 5,000 units of gross tonnage, 3 million Special Drawing Rights (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\$4.1million) plus 420 SDR (US\$579) for each additional unit of tonnage; and
- (c) for a ship of 140,000 units of tonnage or over, 59.7 million SDR (US\$82 million).

There is a simplified procedure under the 1992 Civil Liability Convention for increasing these limits: upon the request of at least one quarter of the Contracting States and adopted by a two-thirds majority of the Legal Committee.<sup>27</sup>

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, the shipowner is deprived of the right to limit his liability.<sup>28</sup>

Article 12 of 1992 CLC provides: "This Convention shall supersede any International Conventions in force or open for signature, ratification or accession at the date on which the Convention is open for signature, but only to the extent that such Conventions would be in conflict with it; however, nothing in this article shall affect the obligations of Contracting States arising under such International Conventions." In respect of the system of limitation of liability, it is necessary to clarify the relation between the 1992 CLC and the two other maritime conventions on limitation of liability.

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<sup>27</sup> Article 15 of 1992 CLC.

1) The CLC and the 1976 Convention on Limitation of Liability for Maritime Claims. Article 3 (b) of the 1976 Convention provides that the Convention shall not apply to “claims for oil pollution damage within the meaning of the International Convention on Civil Liability for Oil Pollution Damage, dated 29 November 1969 or of any amendment or protocol thereto which is in force.” This means that claims for oil pollution damage within the meaning of the 1969/1992 CLC are excluded from the limitation system of the 1976 Convention. Since “oil” in the CLC only covers *persistent* oil,<sup>29</sup> in cases where the claims for pollution damage relates to such damage caused by *non-persistent* oil, the shipowner may be entitled to limit liability in terms of the 1976 Convention. However, the wording of article 3(b) of the 1976 Convention when referring to pollution may, in other circumstances, give rise to some doubt. Article 1.5 of the 1969 CLC defines pollution damage as “loss or damage caused outside the ship carrying oil by contamination resulting from the escape or discharge of oil from the ship, wherever such escape or discharge may occur and includes the costs of preventive measures and further loss or damage caused by preventive measures”. The meaning of pollution damage within the 1969 CLC would also comprise damage in respect of which a claim is not pursued within 1969 CLC, but sought, for instance, through one of the common law torts against ,e.g., a salvor performing operations without the owner’s agreement; this could mean that, in the case of an action for oil pollution damage pursued in terms of one of the common law torts, in these circumstances, there would be no applicable limit of liability. Some English national laws, such as Part 2 of Schedule 4 of the Merchant Shipping Act 1979 and Section 4 of Part 2 of Schedule 7 of the Merchant Shipping Act 1995 set out provisions to avoid the above results, consequently, the ordinary limitation of the Limitation Convention would be applicable.

The possibility of any simultaneous application of the CLC and the 1976 Convention is excluded by the provision of article 3 of the latter as mentioned above. But it is still possible that both CLC and 1976 Convention could apply to a single incident,

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<sup>28</sup> Article 5.2 of 1992 CLC.

e.g. in the case of a collision which causes an oil spill. In this situation, recovery in terms of CLC would be made in respect of pollution damage from the tanker-owner who in turn may claim by way of recourse or indemnity from the ship which caused the collision. The latter may not be a claim for pollution damage and, therefore, the shipowner would be unlimitedly liable for that which the tanker-owner paid since claims for CLC oil pollution damage are excluded by article 3 of the 1976 Convention .<sup>30</sup>

Another distinction between the 1969/1992 CLC and the 1976 Convention is that the former gives the right to limit liability to the “owner”<sup>31</sup> while the latter gives a similar right to shipowners and salvors, and the term “ shipowner ” is therein expansively defined to include owner, charterer, manager and operator “ of a seagoing ship” .<sup>32</sup>

2) CLC and the 1957 International Convention Relating to the limitation of the liability of Owners of Seagoing Ships. As mentioned above, the scope of application of the 1992 CLC covers pollution damage suffered in the territory, territorial sea or exclusive economic zone (EEZ) or equivalent area of a State Party irrespective of the flag State of the tanker and the nationality of the shipowner. In cases where the polluted State is party to both the CLC and the 1957 Convention, but the flag State of the polluter is party to the 1957 Convention alone, with regard to the limitation of liability, CLC will not apply. In such a case, the shipowner is liable under CLC, but his liability is limited to 1,000 francs per tonne under the 1957 Convention.

### 1.5 Channelling of liability

Under article 3 of the 1992 CLC, claims for pollution damage can be made only against the registered owner of the tanker concerned. This does not preclude victims from claiming compensation outside this Convention from persons other than the

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<sup>29</sup> Article 1.5 of 1992 CLC.

<sup>30</sup> Gauci, G. (1997). Oil pollution at sea: Civil liability and compensation for damage ( pp. 161-162). New York: John Wiley & Sons.

<sup>31</sup> Article 1.3 of 1992 CLC.

<sup>32</sup> Article 1 of the Convention on Limitation of liability for Maritime Claims, 1976.

owner. However, the Convention prohibits claims against the servants or agents of the owner, members of the crew, the pilot, the charterer (including bareboat charterer), manager or operator of the ship, or any person carrying out salvage operations or preventive measures. The owner is entitled to take recourse action against third parties in accordance with national law.

## 1.6 Compulsory insurance

The idea of making insurance compulsory for tanker owners in order to cover their liability for pollution damage was quite revolutionary at the time of the 1969 Convention negotiations. This matter caused fierce controversy between two groups of States. Germany, Greece, Norway and the Netherlands, etc. strongly objected to compulsory insurance mainly for the following reasons: 1) the high cost of compulsory insurance on a world scale covering large risks and requiring reinsurance through several insurers; 2) the lack of capacity in the insurance market and difficulties in defining conditions and premiums; 3) the difficulties for governments in checking the validity of this insurance; 4) the discrimination that could result from compulsory insurance in that damage other than pollution damage does not require such insurance. Conversely, The US, France and some other countries were insistent that compulsory insurance was necessary: if this principle was not embodied in the Convention, there would be no Convention at all. Compulsory insurance was an integral part of the whole system in that it was an essential measure supplementing the idea of strict liability which was envisaged.<sup>33</sup> The idea of compulsory insurance finally prevailed in the controversy and a relevant provision was accepted in the 1969 CLC. Article 7.1 reads: "The owner of a ship registered in a Contracting State and carrying more than 2,000 tons of oil in bulk as cargo shall be required to maintain insurance or other financial security, such as the guarantee of a bank or a certificate delivered by an international compensation fund in the sums fixed by applying the limits of liability prescribed in Article V, paragraph 1 to cover his liability for

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<sup>33</sup> Wu, C. (1996). Pollution from the carriage of oil by sea: Liability and compensation(pp. 66-67). London:

pollution damage under this Convention.”

The 1992 CLC completely reserves this provision. According to this provision, 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. The insertion of term “in bulk as cargo” is very important. It requires that the cargo of oil carried on the ship must amount to 2,000 tonnes so that ships containing large bunkers are not obliged to take out insurance. In addition to insurance, other forms of financial security such as a bank guarantee or a certificate issued by an international compensation fund are also valid.

The validity of the above mentioned insurance or other forms of financial security has to be verified and approved by the appropriate authority of a Contracting state. Upon determining the validity of this insurance or financial security, the Authority shall issue a certificate attesting to it. The certificate must contain the following particulars:

- (a) name of ship and port of registration;
- (b) name and principal place of business of owner;
- (c) type of security;
- (d) name and principal place of business of insurer or other person giving security and, where appropriate, place of business where the insurance or security is established;
- (e) period of validity of certificate which shall not be longer than the period of validity of the insurance or other security.

The certificate shall be in the official language or languages of the issuing State. If the language used is neither English nor French, the text shall include a translation into one of these languages.<sup>34</sup> Tankers must carry the certificate on board attesting to the insurance coverage. Meanwhile, a copy of this certificate shall be deposited with the authorities who keep the record of the ship’s registry or, if the ship is not registered in a Contracting state, with the authorities of the State issuing or certifying

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Kluwer Law International.  
<sup>34</sup> Article 7.3 of 1992 CLC.

the certificate.<sup>35</sup> Certificates issued by a Contracting State are recognised by the other Contracting States and have the same force as those issued by them. Nevertheless, a Contracting State may request consultation with the State of registry should it believe that the insurer or guarantor named in the certificate is not financially capable of meeting the obligations imposed by the Convention.<sup>36</sup> Any sums of money provided by insurance or other financial security is available exclusively for the satisfaction of admissible claims under the Convention.<sup>37</sup> When entering or leaving a port or terminal installation of a State Party to the 1992 CLC, such a certificate is required also for ships flying the flag of a State which is not Party to the 1992 CLC.<sup>38</sup>

Claims for pollution damage under the 1992 CLC may be brought directly against the insurer or other person providing financial security for the owner's liability for pollution damage.<sup>39</sup> All in all, the introduction of compulsory insurance and of a right of direct action against the insurer was an important modification of traditional maritime law.<sup>40</sup>

## 1.7 Competence of courts

Actions for compensation under the 1992 CLC 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.<sup>41</sup>

## 2. The Second Tier: The 1992 Fund—The Cargo Owner Pays

### 2.1 The Philosophy of the Fund Convention

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<sup>35</sup> Article 7.4 of 1992 CLC.

<sup>36</sup> Article 7.7 of 1992 CLC.

<sup>37</sup> Article 7.9 of 1992 CLC.

<sup>38</sup> Article 7.11 of 1992 CLC.

<sup>39</sup> Article 7.8 of 1992 CLC.

<sup>40</sup> Jacobsson, M. (1993). The international conventions on liability and compensation for oil pollution damage and the activities of the international oil pollution compensation fund. In Rue, C.M. D (Eds). (1993). Liability for damage to the marine environment (p.41). London: Lloyd's of London Press.

<sup>41</sup> Article 9 of 1992 CLC.

The Fund Convention is a natural progression from the CLC. The necessity of the establishment of the Fund can be viewed from the following aspects: 1) The amount of the compensation provided under the CLC is not sufficient. The 1969 CLC sets a ceiling of liability at 14 million SDR (US\$ 19 million) which is far from enough to meet the amount of compensation claims in case of serious pollution. 2) The CLC puts too heavy a burden on the shipowners of Contracting States which would threaten their business and place them at a disadvantage in relation to other shipowners. 3) The necessity to shift the burden of compensation to the oil industry. The oil industry is the main beneficiary of the carriage of oil by sea, but CLC only chooses the shipowner as the liable party on the basis of strict liability. This is unfair to the shipowner. Therefore, it is reasonable to shift some of the burden of compensation onto the oil industry. These ideas led to the conclusion of the Fund Convention which is founded on two main principles: 1) the victims should receive adequate compensation by virtue of a regime based on strict liability; 2) the fund should, in principle, exonerate the shipowner from the additional financial obligation imposed on him by the CLC. It should be noted that the Fund Convention does not address the liability but the obligations of compensation. These obligations are assumed by the oil cargo owners, namely the oil companies. Therefore, the objectives of the Fund Convention, together with CLC, can be summarized as follows : 1) to provide adequate compensation for the victims of pollution; 2) to make a fair apportionment of liability and compensation between shipowners and cargo owners.

## 2.2 Supplementary compensation

According to article 4 of the 1992 Fund Convention, 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 CLC in the following cases:

- (a) the shipowner is exempt from liability under the 1992 CLC 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 CLC 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 CLC.<sup>42</sup>

The 1992 Fund does not pay compensation if:

- (a) the damage occurred in a State which was not a member of the 1992 Fund;<sup>43</sup> or
- (b) the pollution damage resulted from an act of war 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 (i.e. a sea-going vessel or seaborne craft of any type whatsoever constructed or adapted for the carriage of oil in bulk as cargo).<sup>44</sup>

### 2.3 Limit of compensation

The maximum amount payable by the 1992 Fund in respect of an incident is 135 million SDR (US\$181 million), including the sum actually paid by the shipowner (or his insurer) under the 1992 CLC.<sup>45</sup> Similar to the CLC, there is a simplified procedure under the 1992 Fund Convention for increasing the amount payable by the 1992 Fund: upon the request of at least one quarter of the Contracting States and adopted by a two-thirds majority of the Legal Committee.<sup>46</sup>

### 2.4 Competence of Courts

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

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<sup>42</sup> Article 4.1 of 1992 Fund Convention.

<sup>43</sup> According to article 3(a) of 1992 Fund Convention.

<sup>44</sup> Article 4.2 of 1992 Fund Convention.

<sup>45</sup> Article 4.4 of 1992 Fund Convention.

<sup>46</sup> Article 33 of 1992 Fund Convention.

territory, territorial sea or EEZ of which damage was caused.

## 2.5 Organisation of the 1992 Fund

The 1992 Fund has an Assembly, which is composed of representatives of all Member States. The Assembly is the supreme organ governing the 1992 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 1992 Fund shares a Secretariat with the 1971 Fund.

## 2.6 Financing of the 1992 Fund

The 1992 Fund is financed by contributions made by individual oil receivers in State Parties to the 1992 Fund Convention.

1) Basis of Contributions. The levy of contributions is based on the quantity of oil received by individual contributors. The receiver of oil can be a Government authority, a State-owned company or a private company. Only persons having received more than 150, 000 tonnes of crude oil and heavy fuel oil (contributing oil) in the relevant year should make contributions. 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 to another port in the same State or transported by ship from an offshore production rig. Also oil received for transshipment to another port or received for further transport by pipeline is considered "received" for contribution purposes.

2) Level of Contributions. Annual Contributions are levied by the Fund to meet the anticipated payments of compensation and administrative expenses during the coming year. The amount levied is decided by the Assembly each year. Levels of contributions fluctuate because the amount of compensation paid by the Fund varies

considerably from year to year.

3) Payment of Contributions. The contributions are payable by the individual contributors directly to the Fund. A State has an obligation to report to the Fund the oil receivers and the quantity of oil received, but is not responsible for the contributions levied on contributors in that State, unless it has voluntarily accepted such responsibility.<sup>47</sup>

Contribution is the first important issue of the Fund system. It is also the major concern for a state to decide whether or not to accede to the Fund Convention. Obviously, contributions may become a heavy burden for some countries, especially the developing countries. Indeed, the misgivings about contributions have prevented some countries from participating in the Fund Convention. Besides this striking and sensitive issue, the implicit or potential imbalance between contribution and compensation may cause some problems. Under the Fund regime, the calculation of the amount of contribution is solely based on the quantity of contributing oil received by the contributor. This uniform rule applies to all Member States without exception. It means that the standard for contribution is the same. Outwardly, this seems to be fair to all Member States. But, actually, it may create unfairness among Member States because the levels for compensation are different among States.

1) Inequality between developed and developing countries. In a similar scale of oil spill, costs of clean-up operation and loss of earnings usually differ in different countries, especially between developing countries and developed countries. Normally, the costs incurred by the developed countries are much higher than those by the developing countries. For example, in 1986 and 1987, to clean up 15 tonnes of spilled oil, it cost about \$ 345,333 in Japan, but in Algeria it only cost about \$ 109,529.<sup>48</sup> Consequently, developed countries can obtain a much higher amount of compensation. They get more not because they contribute more but because they spend more!

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<sup>47</sup> <http://www.iopcfund.org>, July, 2000.

<sup>48</sup> IOPC Fund 1992. (1999). International oil pollution compensation funds: Annual report 1999(pp. 156-157).

London: Author.

2) Inequality among Member States with different safety records. From 1979 to 1999, among the 110 incidents handled by the 71 and 92 Funds 47 happened in Japan, accounting for 42.7%, 14 in Republic of Korea, accounting for 12.7%. By contrast, none happened in the Netherlands, Australia or Norway, Spain and Singapore had one case each, Germany had 3, France and Canada had 4 each.<sup>49</sup> Under the Fund regime, there is no mechanism to reward the good or fine the bad, every Member State makes a contribution based on the same criterion, i.e. the tonnage of oil received. (This issue will be further discussed in Section 5 of Chapter Four)

3) Inequality between different legal systems. Due to deficiencies of the definition of pollution damage in the Convention and the diversity between legal systems, the criteria for admissibility of claims differ among the Member States, particularly on the issue of environmental damage. “ The consequence is that countries which do not recognize the concept of compensable damage to the marine environment are nevertheless forced to contribute to the compensation of claimants in those countries which do recognize such damage as compensable.”<sup>50</sup> (This issue will be further discussed in Section 4 of Chapter Four).

4) Some countries take free rides. The 1992 Fund only levies those persons receiving 150,000 tonnes of contributing oil in a year. Some countries may never make a contribution because the quantity of oil received in these countries is too small to meet the contributing limit. Since the 1992 Fund does not require an initial contribution like the 1971 Fund, what these countries need to “contribute” is only a piece of paper—the document of ratification or accession to the Fund Convention. Once they become parties to the Fund Convention, they have the same rights to compensation as other contributing Member States.

Among these deficiencies in the contribution and compensation system of the Fund, in theory, the most significant one is the inequality between developing and developed countries because it affects the interests of the majority of States. In order to make the Fund fair to all Member States, it is necessary to reform the contribution

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<sup>49</sup> IOPC Fund 1992. (1999). International oil pollution compensation funds: Annual report 1999(pp. 152-171). London: Author.

and compensation system. The core of the reform is to balance the relation between contribution and compensation, namely, proportion compensation to contribution. The criteria for contribution are not solely based on the tonnage of oil received but also take into account certain economic indices of each State. Correspondingly, the criteria for compensation are not solely based on how much you have lost but also how much you have paid.

### **3. Admissibility of Claims for Compensation**

#### 3.1 Claim policy and general criteria

The 1992 Fund only accepts those claims which fall within the definitions of *pollution damage* and *preventive measures* provided in the 1992 Conventions. The 1971 and 1992 Fund Assemblies have expressed the opinion that a uniform interpretation of the definitions is essential for the functioning of the system of compensation established by the Conventions.

With regard to the admissibility of claims, the 1971 Fund has acquired considerable experience. It has developed certain principles as regards the meaning of “Pollution damage”. 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 CLC, 1971 Fund Convention and the 1992 Protocols. The Report of the Working Group has been endorsed by the Assembly of the 1971 Fund. The Assembly of the 1992 Fund has also adopted a Resolution to the effect that this Report shall form the basis of its policy on the criteria for the admissibility of claims. Consequently, the policy on the admissibility of claims for compensation has been established.

The following general criteria apply to all claims:

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<sup>50</sup> Brodecki, Z. (1985). New definition of pollution damage. *Lloyd's Maritime and Commercial Law*, 3, 382.

- any expense/loss must actually have been incurred;
- any expense must relate to measures which are deemed reasonable and justifiable;
- a claimant's expense/loss or damage is admissible only if, and to the extent that, it can be considered to be caused by contamination;
- there must be a link of causation between the expense/loss or damage covered by the claim and the contamination caused by the spill;
- a claimant is entitled to compensation only if he has suffered a quantifiable economic loss;
- a claimant has to prove the amount of his loss or damage by producing appropriate documents or other evidence.<sup>51</sup>

According to these criteria, a claim is admissible only to the extent that the amount of the loss or damage is actually demonstrated. Nevertheless, presentation of proof is flexible to some extent, in line with the particular circumstances of the claimant, industry or country concerned. But the evidence provided must be sufficient to make it possible for the Fund to fix the amount of the actual loss or damage.

Each claim has its own particular characteristics and must be dealt with on the basis of its own merits. Therefore, the criteria adopted by the 1992 Fund allow for a certain degree of flexibility.<sup>52</sup>

## **3.2 Admissible claims**

### **3.2.1 Costs of Preventive Measures**

As mentioned above, according to article 1.7 of 1992 CLC, preventive measures means any measures taken by any person after an incident has occurred to prevent or minimize pollution damage. Claims for the costs of preventive measures are accepted

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<sup>51</sup> IOPC Fund 1992. ( June 1998). International oil pollution compensation fund 1992: Claims manual( pp. 15-16). London: Author.

<sup>52</sup> IOPC Fund 1992. ( June 1998). International oil pollution compensation fund 1992: Claims manual( p. 15).

by the 1992 Fund. As the 1992 Conventions cover only preventive measures but not general precautionary measures or salvage, it is necessary to distinguish these concepts.

1) Distinction between general precautionary measures and preventive measures. The moment at which the measure is taken is the critical point to distinguish a preventive measure from a general precautionary measure against an oil pollution incident. Generally, response operations performed *before* the occurrence of an incident are always precautionary measures, those performed *after* the incident are preventive measures.<sup>53</sup>

2) Distinction between salvage and preventive measures.

Salvage operations may in some cases include an element of preventive measures. The objective of the activities is the key element to distinguish preventive measures from salvage operations. Salvage 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 salvaging the hull and cargo, they shall be excluded from the scope of preventive measures, and the costs incurred are not admissible under the 1992 Conventions. If the activities are undertaken for the purpose of both preventing pollution and salvaging 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.<sup>54</sup>

The existence of a grave and imminent threat of pollution damage is another important element which needs to be considered in distinguishing preventive

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London: Author.

<sup>53</sup> Wu, C. (1996). Pollution from the carriage of oil by sea: Liability and compensation (p. 279). London: Kluwer Law International.

<sup>54</sup> IOPC Fund 1992. ( June 1998). International oil pollution compensation fund 1992: Claims manual (pp. 17-18). London: Author.

measures from general precautionary measures and salvage operations.

Clean-up operations on shore and at sea would in most cases be considered as preventive measures, namely measures to prevent or minimise *pollution damage*. The costs incurred in these activities mainly include loss and damage caused by clean-up measures and costs of personnel and equipment.

Claims for the costs of reasonable measures taken to combat the oil at sea, to defend sensitive resources and to clean shorelines and coastal installations are admissible. For example, if clean-up measures cause damage to embankments, piers and roads, the costs of the resulting necessary repairs are compensated. However, costs of improvements rather than repairs are not accepted.

Claims for the costs of measures to prevent or minimise pollution damage are assessed on the basis of objective criteria. The measures taken shall be reasonable. Technical reasonableness is assessed on the basis of the facts available at the time of the decision to take the measures.

Costs of measures which could have been foreseen to be ineffective at the time when they were adopted are not compensated. However, an ineffective measure is not necessarily rejected by the Fund. The criterion for assessment lies on that whether or not the ineffectiveness of the measures taken could have been reasonably foreseen. Moreover, the costs incurred, and the proportion of these costs to the benefits derived or expected, should be reasonable.

The costs of cleaning and repairing equipment and of replacing materials consumed in the clean-up operations are compensated. If the equipment used was purchased for a particular spill, deductions are made for the residual value when the amount of compensation is assessed. As to the materials or equipment which are routinely maintained, compensation is only paid for a reasonable part of the purchase price of the materials and equipment actually used.

The costs of use of permanently employed personnel, vessels, vehicles and other equipment by public authorities in clean-up operations are divided into two types: additional costs and fixed costs.

*Additional costs* are the expenses suffered by the authorities solely as a result of the incident and which would not have been incurred had the incident and related operations not taken place. Reasonable additional costs are accepted by the 1992 Fund.

*Fixed costs* are the costs which would have arisen for the authorities concerned even if the incident had not occurred, such as normal salaries for permanently employed personnel and capital costs of vessels owned by the authorities. The 1992 Fund accepts a reasonable proportion of fixed costs, provided that these costs correspond closely to the clean-up period and do not include remote overhead charges.

Other costs of clean-up operations may include costs for disposing of the collected oil and cost of studies. Reasonable costs for disposing of collected materials are compensated. However, if a claimant has earned extra income from the sale of recovered oil, these proceeds would be deducted from the amount of compensation to be paid. Expenses for studies are admissible only if the studies are carried out as a direct consequence of a particular oil spill, and as a part of the oil spill response or to quantify the loss or damage incurred. Studies of a general or purely scientific character are not paid by the Fund.<sup>55</sup>

In addition, it should be noted that loss of life or personal injury in the clean up operations should be compensated by the Fund.

### 3.2.2 Property Damage and Loss of Earnings

An oil pollution incident may cause three types of economic loss: physical property damage, economic loss due to the non-use of the contaminated assets, loss of earning related to impairment of the environment.

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<sup>55</sup> IOPC Fund 1992. ( June 1998). International oil pollution compensation fund 1992: Claims manual (pp. 16-

1 ) Physical property damage. According to article 1.6 (b) of 1992 CLC, pollution damage includes “ further loss or damage caused by preventive measures”. This can be interpreted to include physical property damage as well as physical damage to persons. Therefore, as mentioned above, claims for the pecuniary expenses related to the clean-up of oiled property, for example, cost of cleaning or repairing property such as boats, yachts and fishing gear which have been contaminated or damaged are accepted. If it is impossible for the property to be cleaned or repaired, then replacement costs are accepted, though with a reduction for wear and tear.<sup>56</sup>

2) Economic loss due to the non-use of the contaminated assets. The Fund accepts in principle claims for loss of earnings suffered by the owners or users of property contaminated as a result of a spill. This is so-called *consequential loss*. One example of consequential loss is a fisherman’s loss of income as a result of his vessels or nets being contaminated by oil.

3) loss of earning related to impairment of the environment. When an oil pollution incident happens, persons whose property has not been polluted may also sustain loss of earnings. 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 can not 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. This is so-called *pure economic loss*. Under article 1.6 (a) of 1992 CLC, the definition of pollution damage includes the terms “loss of profit from impairment of the environment”. This means that loss of earning or revenue due to contamination of the environment is recoverable. However, 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.

To qualify for compensation for pure economic loss, there must be a reasonable

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19). London: Author.

<sup>56</sup> IOPC Fund 1992. ( June 1998). International oil pollution compensation fund 1992: Claims manual( p. 18). London: Author.

degree of proximity between the contamination and the loss or damage sustained by the claimant. A claim is not admissible for the *sole* reason that the loss or damage would not have occurred had the oil spill not happened. 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 was economically dependent on an affected resource;
- the extent to which a claimant had alternative sources of supply or business opportunities;
- the extent to which a claimant's business formed an integral part of the economic activity within the area affected by the spill.

In addition, the extent to which a claimant was able to mitigate his loss should also be taken into account.

As regards the tourism sector, the Fund makes a distinction between (a) claimants who sell goods or services directly to tourists and whose businesses are directly affected by a reduction in visitors to the area affected by an oil spill, and (b) those who provide goods or services to other businesses in the tourist industry, but not directly to tourists. The Fund considers that in this second category there is generally not a sufficient degree of proximity between the contamination and the losses allegedly suffered by claimants. Claims of this type will therefore normally not be admissible in principle.

In the practice of IOPC Fund in respect of compensation for loss of earnings resulting from a pollution incident, the most frequently adopted criterion is that only those persons whose revenues depend directly on activities connected with the coast or the sea affected by pollution may receive compensation. This is considered to be one of the most effective and fair criteria.<sup>57</sup>

The assessment of a claim for pure economic loss is based on the actual financial

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<sup>57</sup> Wu, C. (1996). Pollution from the carriage of oil by sea: Liability and compensation(p. 322). London: Kluwer

results of the individual claimant for appropriate periods during the years before the incident. The assessment is not based on budgeted figures. The Fund takes into account the particular circumstances of the claimant and considers any evidence presented. The criterion is whether the claimant's business as a whole has suffered economic loss as a result of the contamination. Any saved overheads or other normal expenses not incurred as a result of the incident should be subtracted from the loss suffered by the claimant, for both consequential loss and pure economic loss.

Measures to prevent pure economic loss also fall within the scope of preventive measures. Claims for the cost of this kind of measures 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.

The criterion of *reasonableness* is assessed in the light of the particular circumstances of the case, taking into account the interests involved. The assessment is made on the basis of the facts known at the time that the measures are taken. As for marketing campaigns, measures of too general a nature are not accepted. The Fund does not normally accept claims for measures to prevent pure economic loss until they have been carried out.<sup>58</sup>

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Law International.

<sup>58</sup> IOPC Fund 1992. ( June 1998). International oil pollution compensation fund 1992: Claims manual( pp. 21-24). London: Author.

### 3.2.3 Environmental Damage

“Environmental damage” or “damage to environment” includes not only environmental damage in its true sense, but also restoration costs which derived from this type of damage. According to the definition of pollution damage in the 1992 Conventions, compensation for impairment of the environment is limited to costs of reasonable reinstatement measures actually undertaken or to be undertaken. Claims for impairment of the environment are accepted only if the claimant has sustained an economic loss which can be quantified in monetary terms. As with the 1971 Fund’s interpretation of the term *pollution damage*, the assessment of compensation to be paid by the Fund is not to be made on the basis of an abstract quantification of damage calculated in accordance with theoretical models. Compensation for impairment of the environment is payable only for costs incurred for reasonable measures to reinstate the contaminated environment.

Costs for measures taken to reinstate the marine environment after an oil spill may be accepted by the Fund under certain conditions. To be admissible for compensation, such measures should fulfil the following criteria:

- the cost of the measures should be reasonable;
- the cost of the measures should not be disproportionate to the results achieved or the results which could reasonably be expected;
- the measures should be appropriate and offer a reasonable prospect of success.

The measures should be reasonable from an objective point of view in the light of the information available when the specific measures are taken. In most cases a major oil spill will not cause permanent damage to the environment, as the marine environment has a great potential for natural recovery. There are also limits to what man can actually do in taking measures to improve on the natural process. Compensation is paid only for measures actually undertaken or to be undertaken.

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Post-spill environmental studies are sometimes carried out to establish the precise nature and extent of the pollution damage caused by an oil spill and/or the need for reinstatement measures. The Fund may contribute to the reasonable cost of such studies, provided that the studies concern damage which falls within the definition of *pollution damage*, including reasonable measures to reinstate the environment.<sup>59</sup>

#### **4. Comparison between the “Old” Regime and the “New” Regime**

Since the 1992 Conventions are Amendments to the 1969 CLC and 1971 Fund Convention, the frameworks as well as the main features of these two sets of conventions are basically the same. Actually many of the provisions as well as the wordings are the same. However, there are still significant differences between the “old” and the “new” regime.

##### 1) Scope of application.

a) The geographical scope of application. The application of the 1969 CLC and 1971 Fund Convention is limited to pollution damage suffered in the territory (including the territorial sea) of a State Party to the respective Convention. However, the 1992 Conventions extend this geographical scope to the exclusive economic zone or equivalent area of a State Party.

b) The definition of “pollution damage”. “Pollution damage” is defined in the 1969 CLC as loss or damage caused by contamination, without any reference to reinstatement of the contaminated environment. The definitions of “pollution damage” in the 1992 Conventions have the same basic wordings as that of the 1969 CLC, but with the addition of a phrase to clarify that, for environmental damage ( other than loss of profit from impairment of the environment), compensation is

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<sup>59</sup> IOPC Fund 1992. ( June 1998). International oil pollution compensation fund 1992: Claims manual (pp. 26-28). London: Author.

limited to costs incurred for reasonable measures actually undertaken or to be undertaken to reinstate the contaminated environment.

The 1969 CLC and 1971 Fund Convention apply only to damage caused, or measures taken after an incident has occurred in which oil has escaped or been discharged. The Conventions therefore do not apply to pure threat removal measures, i.e. preventive measures which are so successful that there is no actual spill of oil from the tanker involved. However, the 1992 Conventions extend this scope to cover preventive measures even though no actual spill of oil occurs, provided that there was a grave and imminent threat of pollution damage.

c) The type of ships. The 1969 CLC and 1971 Convention apply only to ships which are actually carrying oil in bulk as cargo, i.e. normally laden tankers. Spills from tankers during ballast voyages are therefore not covered. The 1992 Conventions applies 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

2) Limitation of the shipowner's liability. Under the 1969 CLC, the limits of the shipowner's liability are 133 Special Drawing Rights (SDR) (US\$183) per ton of the ship's tonnage or 14 million SDR(US\$19 million), whichever is the lower. There is no simplified procedure for increasing the maximum amount payable under the 1969 CLC. Compared with the above-mentioned limits of the shipowner's liability under 1992 CLC, the limits under the 1969 CLC are obviously much lower. Moreover, there is a simplified procedure under the 1992 CLC for increasing these limits.

Under the 1969 CLC, the shipowner may be deprived of the right to limit his liability if a claimant proves that the incident occurred as a result of the personal fault (the "actual fault or privity") of the owner. Under the 1992 CLC, 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.

3) Channelling of liability. Claims for pollution damage under both 1969 and 1992 CLC Conventions can be made only against the registered owner of the tanker concerned. This does not preclude victims from claiming compensation outside the Convention from persons other than the owner. However, the 1969 CLC prohibits claims against the servants or agents of the shipowner. The 1992 CLC prohibits not only claims against the servants or agents of the shipowner, 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. Under both Conventions, the owner is entitled to take recourse action against third parties in accordance with national law.

4) Maximum amount of compensation. The maximum amount of compensation payable by the 1971 Fund per incident is limited to 60 million SDR (US\$83 million), including the sum actually paid by the shipowner (or his insurer) under the 1969 CLC, while under 1992 CLC the amount is increased to 135 million SDR ( US\$ 186). There is a simplified procedure for increasing these limits under the 1992 Fund Convention.

5) Indemnification of the shipowner. Under certain conditions, the 1971 Fund indemnifies the shipowner for part of his liability pursuant to the 1969 CLC. There are no corresponding provisions in the 1992 CLC.

6) Financing. The 1971 Fund and the 1992 Fund are financed in the same way. However, there is a capping mechanism under the 1992 Fund while the 1971 Fund has no such cap. In addition to annual contributions, however, unlike the 1992 Fund, the 1971 Fund levies initial contributions which are payable when a State becomes a Member of the 1971 Fund.<sup>60</sup>

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<sup>60</sup> IOPC Fund 1992. International oil pollution compensation funds: Annual report 1999(p.12). London: Author.

The above comparison shows that the new regime differs from the old regime mainly in that it provides a wider scope of application and higher limits of liability and compensation.

In summary, the international legal framework of liability and compensation for oil pollution damage under the 1992 Conventions can be boiled down to one definition, two tiers and three principles. Firstly, the definition—pollution damage. This definition is the basis of the criteria for determining the admissibility of claims under both the CLC and the Fund Convention. Secondly, two tiers. For a single objective—to provide adequate compensation for oil pollution damage, two tiers of compensation mechanisms are set up under the 1992 Conventions. The first tier is the shipowner's liability under the 1992 CLC. The second tier is the 1992 Fund. Claims for oil pollution damage compensation go first to the shipowner, if the shipowner cannot provide adequate compensation, the Fund shall make complementary compensation; if the shipowner is entitled to be exonerated from paying compensation, the Fund is responsible for the whole compensation. One of the major implications of this two-tier structure is that it apportions the financial burden between the oil transport industry on one hand and oil cargo interests on the other. Lastly, three principles or pillars: strict liability, higher liability limits and compulsory insurance. 1) The CLC has moved away from the traditional tortious concept of liability based on fault or negligence and imposes strict liability for pollution damage on shipowners, with only limited exceptions. 2) As with traditional maritime law, the CLC offers the shipowner limitation of liability. This is the most important principle in the CLC. Compared with the 1969 CLC, the 1992 CLC substantially raises the liability limits. 3) The CLC introduces a system of compulsory insurance which requires the owner of a tanker carrying more than 2,000 tonnes of persistent oil to cover his pollution liabilities. As a result the claimants can bring a direct action against the insurer.

### **Chapter Three Trends in the International Regime of Liability and Compensation for Oil Pollution Damage**

The last decade has witnessed the dramatic developments in the international regime for oil pollution liability and compensation. In the process of development, namely, from its drafting, adoption, entry into force to implementation, this regime was affected by many intrinsic and extrinsic elements. By analyzing these elements, not only can we see more clearly the track of the development of the regime, but also can roughly foresee its trends into the future. These elements are mainly termination of the voluntary industry schemes, compulsory denunciation of the 1969/1971 Conventions, adoption and implementation of the Oil Pollution Act of the USA, inconsistencies between legislation and practice of some Member States of the CLC and Fund Conventions and the Convention regime, the proposal to increase the limits of compensation and the adoption of the International Convention Relating to Liability for the Carriage of Hazardous and Noxious Substances at Sea (HNS Convention). These will be discussed in turn.

#### **1. Termination of the Voluntary Industry Schemes**

In response to the Torrey Canyon incident, the oil and shipping industries also actively designed their own schemes at the same time as the 1969 CLC and the 1971 Fund Convention were negotiated. As a result, two voluntary industry schemes were adopted. They were known as the Tanker Owners Voluntary Agreement concerning Liability for Oil Pollution (TOVALOP) and the Contract Regarding a Supplement to Tanker Liability for Oil Pollution (CRISTAL). They corresponded to the CLC and Fund Conventions. The purpose of these industry schemes was to provide voluntary payment of compensation to victims of oil pollution who could not obtain adequate legal remedies in States which had not ratified the CLC and Fund Conventions. The benefits derived from these schemes are comparable to those available under the CLC and Fund Conventions. Both TOVALOP and CRISTAL were intended to be interim solutions and to remain in operation only until the CLC and Fund Conventions had worldwide application. By the mid-1990s support for the international Conventions was widespread. There were concerns that the continued existence of the voluntary agreements could act as a disincentive to States which had not yet become Parties to these Protocols. Some governments treated ratification of the international Conventions as a lower priority. On the other hand, it was believed that the relevance of the interim TOVALOP and CRISTAL agreements had eroded over the years as more States had become Parties to the 1969 CLC and the 1971 Fund Convention. In November 1995 the industries concerned decided that the voluntary agreements would not be renewed when their terms ended on 20 February 1997. Consequently, victims of oil pollution damage are no longer able to receive any compensation from the voluntary industry schemes for incidents which occurred after 20 February 1997.

The decision to discontinue TOVALOP and CRISTAL reflected the rapid growth in the acceptance by maritime States of the international conventions which offer significant advantages over the voluntary agreements for those claiming compensation for oil pollution damage. The termination of the schemes resulted in a reduction in the available compensation; there is also now a lack of cover in certain cases for which compensation was originally available under the schemes, and is

available now under the 1992 Conventions, but is not provided for in the 1969 CLC and 1971 Fund Convention. These include cases involving the costs of preventive measures, and spills from tankers in ballast. For those States where national laws do not provide adequate oil pollution compensation and where the voluntary schemes had long been the only effective vehicle for responding to claims, it should be considered a matter of urgency for these States to join the international system in order to fill a serious gap.<sup>61</sup> All in all, the termination of the voluntary schemes will further strengthen the Convention regime.

## **2. Compulsory denunciation of the 1969 and 1971 Conventions**

The 1971 Fund Convention provides that it will cease to be in force on the date when the number of Contracting States falls below three. The 1992 Fund Convention also provides a mechanism for the compulsory denunciation of the 1969 CLC and the 1971 Fund Convention. More specifically, the 1992 fund Convention provides that the latter conventions would be denounced when the total quantity of contributing oil received in States which were Parties to the 1992 Fund Convention, or which had deposited instruments of ratification of the Convention, reached 750 million tonnes.<sup>62</sup> When the Netherlands deposited an instrument of accession to the 1992 Fund Convention on 15 November 1996, the requirements for compulsory denunciation were fulfilled. As a result, the 22 States which had deposited instruments of ratification, acceptance, approval or accession in respect of the 1992 Fund Convention (whether or not the Convention was in force for the State in question) were obliged to deposit instruments of denunciation of the 1969 and 1971 Conventions by 15 May 1997. These denunciations took effect on 15 May 1998. As of 16 May 1998 these States belonged only to the new regime.

Following the denunciation of the 1971 Fund Convention by many States, the

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<sup>61</sup> Rue, C. D.L. (1996). TOVALOP and CRISTAL-a purpose fulfilled. *The International Journal of Shipping Law*, 12, 295.

<sup>62</sup> Article 31 of 1992 Fund Convention .

quantity of contributing oil received in the remaining Members of the 1971 Fund had been reduced from 1,200 million tonnes to 250 million tonnes by the end of 1999. By January 2001, this quantity will have fallen to some 95 million tonnes.<sup>63</sup> This reduction in the contribution base could result in a significantly increased cost for the oil industry in those States which are Parties to the original Conventions, since the financial burden would be spread among fewer contributors. At present over 20 Member States have no contributors because no entities in those States receive more than 150,000 tonnes of contributing oil in a calendar year.<sup>64</sup> As long as the 1971 Fund remains in existence, it may attract additional liabilities arising out of new incidents in 1971 Fund Member States. The 1971 Fund will probably face a situation in which an incident occurs and it has an obligation to pay compensation, but where there are no contributors in any of the remaining Member States. In this situation, the claims for compensation made by the remaining Member States of 1971 Fund would be difficult to recover.

The reduction in the Member States of 1971 Fund also creates operational problems for the Fund. In April 1998 the 1971 Fund Assembly addressed the problems which would arise for the 1971 Fund if, with the falling membership, the Assembly were unable to achieve a quorum (more than half of the Member States). There was particular concern that certain functions of the Assembly, such as adopting the budget, fixing annual contributions, setting claims and electing a legal representative (i.e. the director), could not be carried out. The Assembly therefore adopted a resolution—in the interests of victims of pollution damage—setting out certain measures which would enable the compensation system established under the 1971 Fund Convention to continue to function. Despite these extra efforts on the part of the Secretariat, the 1971 Fund Assembly did not achieve a quorum for its session in October 1998, since only 18 of the 52 Member States were present at the required

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<sup>63</sup> IOPC Fund 1992. (1999). International oil pollution compensation funds: Annual report 1999(p. 22). London: Author.

<sup>63</sup> Jacobsson, M.( 6 September 1999). The International Regime of Compensation for Oil Pollution Damage—Experiences and Future Challenges( unpublished handouts). Beijing, China.

time. As a result, the items on the agenda of the Assembly were dealt with by the 1971 Fund's Executive Committee. In October 1999, the Executive Committee was also not able to achieve a quorum since only 17 of the 45 Member States were present at the required time. Again, the items on the agenda of the Assembly had to be dealt with by the Executive Committee of the 1971 Fund. By October 2000, it will be impossible for the Committee to achieve a quorum. A newly created body called the Administrative Council will then become the governing body of the 1971 Fund.<sup>65</sup> The Administrative Council will have no quorum requirement. Decisions of the Administrative Council will be taken by a majority of both 1971 Fund Member States and former 1971 Fund Member States, but former Member States will have the right to vote only in respect of issues relating to incidents which occurred while they were Members.<sup>66</sup>

As the 1992 Conventions provide a wider scope of application and much higher limits of compensation than the 1969 and 1971 Conventions, there are no advantages for a State which has acceded to the 1992 Conventions in remaining a Member of the 1971 Fund. The "old" regime will therefore continue to lose its importance. It is expected that a number of other States which are Members of the 1971 Fund will also soon deposit instruments of accession to the 1992 Conventions, and denounce the 1969 and 1971 Conventions. In summary, the denunciation of the 1969 and 1971 Conventions will greatly contribute to the uniformity and universality of the international regime of oil pollution liability and compensation.

### **3. The OPA remains to be a major obstacle to the universality of the international regime of liability and compensation for oil pollution damage**

#### 3.1 Introduction

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<sup>65</sup> <http://www.iopecfund.org/oct99news.htm>

<sup>66</sup> Jacobsson, M. (6 September 1999). The International Regime of Compensation for Oil Pollution Damage—Experiences and Future Challenges (unpublished handout).

It is well known that the Oil Pollution Act (OPA) of 1990 has blocked the US from ratifying the CLC and Fund Convention. The OPA took the US 15 years to prepare while controversy on the ratification of the 1969 CLC and 1971 Fund Convention lasted for 20 years. The final response was not given until 1990 when the OPA was adopted. This section will try to analyze the framework of liability and compensation system under the OPA and examine the differences between the OPA and the international regime as well as the affect of the OPA on the international regime.

In the US, the immediate opposition to the international conventions on oil pollution liability and compensation came from two sources: Firstly, the environmental movement was categorically opposed to anything but total and unlimited liability. The CLC was considered to offer lower limits of liability than the Water Quality Improvement Act 1970 (WQIA) of the US; the ceiling of liability under the CLC did not favour the pollution claimants. This was considered to be consistent with the “polluter pays” principle, but ignored the realities of the shipping industry and its insurance market. Secondly, some U.S. states, especially the coastal states feared that these conventions, once accepted, would take precedence over state laws and preempt the rights of states to take their own action against polluting shipowners.<sup>67</sup> Mainly because of this combination of environmentalist and state rights advocates in the U.S. eventually rejected the international system. The Exxon Valdez incident was used by the opponents of the international regime as an example of the inadequacy of the amount of compensation set by the 1984 Protocols. The maximum amount of compensation under the 1984 Protocols was only \$60 million, but the amount of compensation paid by the Exxon group was several billion US dollars. In August 1990, some 15 months after the Exxon Valdez incident, the OPA was adopted as the new law governing liability and compensation for marine oil pollution damage in the US.

The OPA contains nine Titles. For the purpose of this thesis only Title 1 (Oil

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<sup>67</sup> Gold, E. (1997). *Gard handbook on marine pollution* (second edition. P. 147). Norway: Assuranceforeningen Gard.

Pollution Liability and Compensation ) and Title 2 ( Confirming amendments) are discussed here.<sup>68</sup>

### 3.2 Scope of application of the OPA

The OPA applies to any vessel or facility which discharges oil, or poses a substantial threat to do so, into or upon the navigable waters of the United States, adjoining shorelines, or the exclusive economic zone, which extends up to 200 miles from the baseline.

“Oil” is defined broadly to include petroleum, fuel oil, sludge, oil refuse and oily waste, but does not include hazardous substances as defined under the U.S. Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), so as to avoid any overlap between the OPA and CERCLA. Obviously, the broad definition of oil does not distinguish between crude oil and other oil products, while the CLC only covers persistent oil.

“Ship” is defined as “ every description of watercraft or other artificial contrivance used, or capable of being used, as means of transportation on water other than a public vessel.”<sup>69</sup> The OPA thus applies to any type of ship including both tankers and non-tankers, except state-owned vessels. This definition is broader than that of the international conventions.

Recoverable damages under the OPA can be generally divided into two main types: removal costs and damages. Specifically, they can be categorized as follows:

- all removal costs ( which, in the case of a threatened spill, include the costs of preventing or minimizing such an incident);
- all damage to natural resources ( including reasonable costs of damage assessment);

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<sup>68</sup> The other Titles are:3:International Oil Pollution Prevention and Removal; 4: Prevention and Removal;5: Prince William Sound Provisions;6 :Miscellaneous;7:Oil Pollution Research and Development Program;8 :Trans-Alaska Pipeline System;9 :Amendments to the Oil Spill Liability Trust Fund.

<sup>69</sup> OPA '90§1001(37).

- all damage to real or personal property ( including economic loss);
- all loss of “ subsistence ”use of natural resources for food, shelter and the necessities of life—the loss is recoverable by anyone who uses those resources , whether or not he owns them;
- loss of revenue ( including taxes);
- loss of profits and earning capacity; and
- the additional costs of providing public services during or after removal activities.<sup>70</sup>

This scope of liability for damage is also larger than that of the international regime. For example, loss of taxes, purely environmental damage, etc. are not recoverable under the 1992 Conventions.

The geographical scope of the OPA is the same as that of the 1992 Conventions, i.e. it covers the entire range from inland waters to the exclusive economic zone.

### 3.3 Responsible Party<sup>71</sup>

As mentioned above, the existing international regime channels pollution liability as much as possible to a single person, the shipowner. By contrast, two types of persons may be directly liable under the OPA:

- 1) The shipowner and the operator. The OPA imposes joint and several strict liability upon each “ responsible party”. The term “ responsible party ” under the OPA includes owners, operators, and demise( bareboat ) charterers of vessels, owners and operators of “ facilities” ( i.e. on or offshore facilities ) and pipelines, and licensees of deep water ports. It does not include time or voyage charterers or cargo owners. But in some U.S. states cargo owners and charterers may be held liable for oil pollution damage in addition to, or in substitution for, shipowners.
- 2) The third party whose action is found to be the sole cause of the incident. In a case where the responsible party proves that the oil spill or threat of a spill was

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<sup>70</sup> OPA’90§1002;33 USC §2702; Gold, E. ( 1997). Gard handbook on marine pollution ( Second edition. P. 155). Norway: Assuranceforeningen Gard.

wholly and exclusively caused by an act or omission (or an act or omission combined with a case of force majeure or an act of war) on the part of a third party, that third party is considered to be the responsible party for the purpose of determining liability.<sup>72</sup> The liability of the third party is strict in nature. This again makes the OPA depart from the international regime under which the third party is only liable if he is at fault. It should be noted that the third party does not include the employees and agents of the responsible party of the discharging vessel, and any person who has a contractual relationship with the latter. Therefore, a time or voyage charterer is excluded. In addition, shipbuilders and shiprepairers are also excluded.<sup>73</sup>

### 3.4 Defences to Strict Liability<sup>74</sup>

The OPA provides responsible parties with very narrow complete defences. Such a party must demonstrate by a preponderance of the evidence that the discharge and resulting damage were caused solely by

- 1) an act of God; or
- 2) an act of war; or
- 3) an act or omission of a third party; or
- 4) any combination of the above circumstances.<sup>75</sup>

In the third case, namely, when the act of a third party is the sole cause of the incident, it is necessary for the owner or the operator of the discharging ship to prove that he exercised due care with respect to the oil and took precautions against foreseeable acts or omissions of the third party and foreseeable consequences of those acts or omissions.<sup>76</sup>

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<sup>71</sup> OPA'90 §1001 (32)

<sup>72</sup> OPA' 90 §1002 (d).

<sup>73</sup> Wu, C. (1996). *Pollution from the carriage of oil by sea: Liability and compensation*(p. 237). London: Kluwer Law International.

<sup>74</sup> OPA' 90 §1003.

<sup>75</sup> OPA' 90 §1003 (a) .

<sup>76</sup> OPA' 90 §1003 (a) (3).

The above defences are not available if the responsible party has omitted or refused:

- 1) to report the incident if he was aware of the incident or ought to have been aware of it;
- 2) to provide all reasonable cooperation requested by the competent authorities in the oil removal operation; or
- 3) without sufficient reason, to comply with the national contingency plan.<sup>77</sup>

Compared with the international system, the conditions of exoneration from liability under the OPA are much more stringent. The OPA establishes a liability which could be described as “quasi-absolute”.<sup>78</sup> It is closer to being absolute than strict, because the conditions of exoneration are unlikely to be satisfied. The responsible party does not benefit much from the exoneration clause. Another departure of the OPA from the international regime, with respect to the defences to strict liability, is that it removes negligence on the part of the government in the maintenance of navigational aids as a case for exoneration from liability. As mentioned above, government negligence can be invoked as a cause for the shipowner to relieve his liability.

### 3.5 Limitation of Liability<sup>79</sup>

The OPA provides for limitation of liability for owners and operators of vessels provided that certain requirements are met. The limits are as follows:

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Tank vessels over 3,000 gross tons	The greater of USD 1,200 per gross ton or USD 10 million
Tank vessels of 3,000 gross tons or less	The greater of USD 1,200 per gross ton or USD 2 million

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<sup>77</sup> OPA' 90 §1003 (c).

<sup>78</sup> Wu, C. (1996). Pollution from the carriage of oil by sea: Liability and compensation(p. 239). London: Kluwer Law International.

<sup>79</sup> OPA'90 §1004 .

Vessels carrying cargo from an Outer Continental Shelf facility	As above, plus unlimited costs
Other vessels	The greater of USD 600 per gross ton or USD 500,000
Offshore facilities ( except deepwater ports)	USD 75 million plus unlimited removal costs
Onshore facilities (including deepwater ports)	USD 62 million ( The US government can reduce the limit to USD 8 million for onshore facilities and to USD 50 million for deepwater ports

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The US President is given the authority to adjust the limitation amount every three years to reflect inflation.

With regard to limitation of liability, the OPA differs from the international regime on the following main points:

- 1) The OPA sets out a minimum liability while the international regime accepts a traditional maximum liability.
- 2) The limitation amount under the OPA is much higher than that of the international regime.

Section 1004(c) of the OPA provides details as to when the right to limit of liability is lost.

1. The incident was proximately caused by: (A) gross negligence or wilful misconduct of, or (B) the violation of an applicable Federal safety, construction, or operating regulation by, the responsible party, an agent or employee of the

responsible party, or a person acting pursuant to a contractual relationship with the responsible party (except where the sole contractual arrangement arises in connection with carriage by a common carrier by rail).

2. The responsible party fails or refuses (A) to report the incident as required by law and the responsible party knows or has reason to know of the incident; (B) to provide all reasonable cooperation and assistance requested by a responsible official in connection with removal activities; or (C) without sufficient cause to comply with an order issued under subsection (c) or (e) of section 311 of the Federal Water Pollution Control Act (33 U.S.C. 1321),...

The last three items are instances where there may possibly be no link of causation between the pollution damage and the actions giving rise to the forfeiture of the right to limit liability.

From the above provisions we can see that the OPA provides a set of very stringent conditions of limitation of liability. By contrast, only paragraph 1(A) is similar to that of the 1992 CLC. Under the above stringent provisions of the OPA, the responsible party may find it very difficult to defend his right to limit liability.

As to limitation of liability, another important feature of the OPA is that it allows state laws to provide unlimited liability. This will be further discussed in Section 3.11 below.

### 3.6 Evidence of Financial Responsibility<sup>80</sup>

Section 1016 of the OPA provides that the responsible party for the following vessels shall establish and maintain evidence of Financial Responsibility:

- 1) any vessel over 300 gross tons ( except a non-self-propelled vessel that does not carry oil as cargo or fuel) using any place subject to the jurisdiction of the US; or
- 2) any vessel using the waters of the exclusive economic zone to transship or lighter oil destined for a place subject to the jurisdiction of the US.

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<sup>80</sup> OPA' 90 §1016 .

The amount required is the total of the owner's potential limit under the OPA (in respect of the largest vessel owned or operated by the responsible party) plus the limit applicable under the Comprehensive Environmental Response, Compensation and Liability Act ( CERCLA).<sup>81</sup>

Failure to provide the necessary evidence may result in assessment of a civil penalty, denial of entry, detention or seizure and forfeiture of the ship.<sup>82</sup>

As to the requirement for evidence of financial responsibility, the major difference between the international regime and the OPA is that, the former only applies to tankers carrying more than 2,000 tonnes of persistent oil as cargo while the latter applies to the above mentioned ships, including dry cargo ships. Moreover, the amount required by the OPA is much higher than that of the international regime.

### 3.7 Oil Spill Liability Trust Fund ( OSLTF)<sup>83</sup>

The OPA establishes a compensation fund to supplement the liability of the responsible party by abolishing the funds established under earlier pollution legislation<sup>84</sup> and consolidating them into the Oil Spill Liability Trust Fund (OSLTF).<sup>85</sup>

The financial sources of the OSLTF are as follows:

- 1) Taxes on crude oil received by US refiners or on oil products imported, consumed or deposited in the US; <sup>86</sup>
- 2) Transfer of the funds created by earlier pollution legislation;<sup>87</sup>
- 3) The responsible party's reimbursement for the costs incurred by the authorities or an Indian tribe in damage assessment and restoration of damaged natural

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<sup>81</sup> Gold, E. ( 1997). Gard handbook on marine pollution ( Second edition. P. 159 ). Norway: Assuranceforeningen Gard.

<sup>82</sup> OPA' 90 §1016(b) .

<sup>83</sup> OPA' 90 §1012;1013;1015.

<sup>84</sup> Deepwater Port Act; Federal Water Pollution Act; Outer Continental Shelf Land Act; Trans-Alaska Pipeline Authorisation Act,etc.

<sup>85</sup> OSLTF was established in 1986 and consolidated in section 4611 and 9509 of the Internal Revenue Code.

<sup>86</sup> 26 U.S.C., I.R.C. §4611(a),(c).

<sup>87</sup> OPA' 90 §9001(a) (4),(5),(6),(7).

resources;<sup>88</sup>

4) Money recovered by OSLTF by way of subrogation;<sup>89</sup>

5) The penalties paid in applying the earlier laws.<sup>90</sup>

In summary, there are three major contributors: taxpayer, responsible party and administrative process. In contrast to these multi-sources, the IOPC Fund has only one single contributor: the oil industry.

The OSLTF comes into operation when the liability of the responsible party has been denied or is insufficient to satisfy all the admissible claims for compensation.<sup>91</sup> Its resources are available for the payment of various claims and expenses incurred in connection with discharges of oil, including:

- 1) payment of removal costs incurred by federal and state authorities, including the costs of monitoring removal actions determined by the President to be consistent with the National Contingency Plan both by Federal and state authorities;
- 2) payment of costs incurred by federal, state or Indian tribe trustees in carrying out their damage assessment functions, in the assessing the natural resources damages, and in development of plans for restoration, rehabilitation, replacement or acquisition of equivalent damaged resources;
- 3) payment of removal costs, as well as the claims for compensation resulting from a spill or threat of an oil spill originating from a foreign offshore facility;
- 4) payment for uncompensated removal costs or uncompensated damages;
- 5) payment for certain governmental administrative, operational and personnel costs incurred under the OPA;<sup>92</sup>

If the responsible party can put forward a case exonerating him from his liability or can take advantage of his right to limit his liability, he may make a claim for compensation from the OSLTF for the costs paid by him. In the latter case, the sum

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<sup>88</sup> OPA' 90 §1006(f) ; §9001(a)(2).

<sup>89</sup> OPA' 90 §9001(3).

<sup>90</sup> Deepwater Port Act; Section 311 of Federal Water Pollution Act; Section 207 of Trans-Alaska Pipeline Authorisation Act; OPA' 90 §9001(8).

<sup>91</sup> OPA' 90 §1012(a) (4).

which exceeds the limit of his liability may be recovered.

The maximum amount of compensation to be paid by the OSLTF for one incident cannot exceed \$1 billion and, within this overall limit, the payment for contaminated natural resources is limited to \$ 500 million per incident. However, the OPA does not make clear whether these figures include the sum paid by the responsible party. The lack of precision means logically that the ceiling of \$1 billion does not include the first level of compensation.<sup>93</sup>In the case of the IOPC Fund , its ceiling of compensation includes the amount actually paid by the shipowner.

It should be noted that this \$1 billion ceiling is only a relative ceiling. According to section 9509 (e) of the Internal Revenue Code, when \$1 billion is not sufficient to compensate for all damages, these will not be reduced pro rata, but will be reimbursed in full sooner or later, simply by following the order in which they were presented to the OSLTF.<sup>94</sup> In contrast with this flexibility, IOPC Fund sets a fixed ceiling that cannot be exceeded in any event.

### 3.8 The OSLTF's Exoneration from Compensation<sup>95</sup>

Under the OPA, the condition for the OSLTF to be exonerated from compensation is very strict. It can not be exonerated even if in those cases that normally lead to exoneration of liability, such as an act of war, act of God, or the action of a third party. It is also obliged to compensate in cases of pollution from an unknown source.<sup>96</sup>The only exception for the OSLTF to be exonerated from compensating a particular claimant is that the incident, removal costs, or damages are caused by the gross negligence or wilful misconduct of that claimant.<sup>97</sup> By contrast, the IOPC Fund can be exonerated from its obligation to compensate for pollution damage in the event of

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<sup>92</sup> OPA' 90 §1012(a).

<sup>93</sup> Wu, C. (1996). *Pollution from the carriage of oil by sea: Liability and compensation*(p.248). London: Kluwer Law International.

<sup>94</sup> Wu, C. (1996). *Pollution from the carriage of oil by sea: Liability and compensation*(p.248). London: Kluwer Law International.

<sup>95</sup> OPA' 90 §1012(b).

<sup>96</sup> Wu, C. (1996). *Pollution from the carriage of oil by sea: Liability and compensation*(p.249). London: Kluwer Law International.

an act of war, or in cases of pollution damage caused by an unknown source.

### 3.9 OSLTF's right of subrogation<sup>98</sup>

The OPA confers on the OSLTF an extensive right of subrogation. Having paid compensation to any claimant for removal costs or damages, OSLTF will acquire by subrogation all rights, claims, and causes of action that the claimant has under any other law against the responsible party.<sup>99</sup> Any compensation paid by the OSLTF to any claimant may be recovered from the responsible party, guarantor or any other person who is liable.<sup>100</sup>

The right of subrogation of the OSLTF under the OPA is broader than that of the IOPC Fund. According to Article 9 of the 1992 Fund Convention, the IOPC Fund normally acquires by subrogation the rights of the compensated person against the owner or his guarantor under the following conditions: 1) where no liability for the damage arises under 1992 CLC; 2) where the owner is financial incapable; 3) where the damage exceeds the owner's liability under 1992 CLC, although the Fund also has the right of recourse or subrogation against persons other than the owner or guarantor.

### 3.10 OSLTF's Claim Procedure<sup>101</sup>

With certain exceptions, claims for removal costs or damages must first be presented to the responsible party or guarantor. If the responsible party or guarantor denies the claim or fails to settle within 90 days, the claimant may elect either to commence an action in court or to present the claim to the OSLTF.<sup>102</sup> Claims that exceed the limits of liability, or are not fully compensated by the responsible party, may also be

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<sup>97</sup> OPA' 90 §1012(b).

<sup>98</sup> OPA' 90 §1015.

<sup>99</sup> OPA' 90 §1012(f), 1015(a).

<sup>100</sup> OPA' 90 §1015(b).

<sup>101</sup> OPA' 90 §1013.

presented to the OSLTF.<sup>103</sup>

In the following exceptional cases, claims may be presented directly to the OSLTF:

- 1) by claimants, if the responsible party denies liability, or if the pollution originates from a state-owned ship, or if the pollution source is unknown;
  - 2) by the responsible party who benefits from a cause of exoneration from liability or his right of limitation;
  - 3) by the Governor of a State for the costs of removal incurred by his State;
  - 4) by US claimants, if the discharge originates from a foreign oil platform.
- However, if a claim is outstanding before the court against the responsible party, it cannot be settled by the OSLTF.<sup>104</sup>

Prescriptions for various kinds of claims are set out by the OPA.

### 3.11 The Relationship Between OPA and State Laws<sup>105</sup>

As a comprehensive federal law covering all matters concerning oil pollution, the OPA has replaced the relevant provisions in the pre-existing federal laws, such as the Federal Water Pollution Control Act, the Deepwater Port Act, the Outer Continental Shelf Act, the Trans-Alaska Pipeline Authorisation Act, the Limitation of Liability Act 1851, etc. However, the OPA has failed to take precedence over state laws.<sup>106</sup>

1) States have the right to impose stricter liability. Section 1018 (a) (1) of the OPA provides that nothing in the OPA shall be interpreted as pre-empting any State from imposing any additional liability or requirements, or affect any State's right to determine the amount of fine or penalty with respect to oil pollution. This means the OPA grants States the right to impose additional liability beyond that imposed in the OPA. The OPA just sets minimum criteria and allows state laws to prescribe more

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<sup>102</sup> OPA' 90 §1013(c).

<sup>103</sup> OPA' 90 §1013(d).

<sup>104</sup> OPA' 90 §1013(b) (1)(2).

<sup>105</sup> OPA' 90 §1018.

<sup>106</sup> In the United States, the State laws traditionally are not pre-empted by federal laws. Under Article 6 of the US Constitution, federal laws automatically prevail over state laws when their provisions conflict, unless the federal law expressly stipulates that it does not prevail over the state laws.

severe regulations. Presently, at least 20 coastal states provide unlimited liability in their laws.<sup>107</sup> The limit of liability imposed in the OPA is of little relevance when a claimant is allowed to utilize a State statute imposing unlimited liability. The 24 coastal states also impose a broad range of penalties in connection with a wide variety of violations. The criminal and civil penalties imposed by these states may potentially be even greater than those imposed under the OPA.<sup>108</sup>

2) Under Section 1008(b) of the OPA, States have the right to establish their own compensation funds, which may co-exist with the OSLTF. This may cause confusion: on one hand, the contributors may be obliged to finance two funds; on the other hand, the two funds may be used by claimants for the same case at the same time. No provision in the OPA prohibits the double use of a state fund and the OSLTF. Although the OPA prohibits the double use of the OSLTF for the same type of damage it remains silent on the matter of concomitant use of state funds and the OSLTF. Therefore, it is possible to use several funds for the same type of damage.<sup>109</sup>

3) States may demand certificates of financial responsibility. Section 1019 of the OPA provides that a State may enforce, on the navigable waters of the State, the requirements for evidences for financial responsibility under Section 1016. Viewed from the legislative history of the OPA, this provision can be interpreted as allowing the States to impose additional requirements or set higher levels with regard to financial responsibility.<sup>110</sup>

It should be noted that the jurisdiction of state laws extends only to the territorial sea.

4) State courts have jurisdiction.

Under the Admiralty Jurisdiction Extension Act 1948, oil spill pollution in the waters of the US is a maritime offence, falling within maritime jurisdiction. However, the OPA extends jurisdiction to the state courts. Under Section 1017(b) and (c) of the

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<sup>107</sup> Wu, C. (1996). Pollution from the carriage of oil by sea: Liability and compensation(p.257). London: Kluwer Law International.

<sup>108</sup> Gold, E. ( 1997). Gard handbook on marine pollution ( Second edition. P. 158 ). Norway: Assuranceforeningen Gard.

<sup>109</sup> Wu, C. (1996). Pollution from the carriage of oil by sea: Liability and compensation(pp. 257-258). London: Kluwer Law International.

<sup>110</sup> Wu, C. (1996). Pollution from the carriage of oil by sea: Liability and compensation(pp. 258-259). London: Kluwer Law International.

OPA, district courts shall have exclusive jurisdiction over all controversies arising under the OPA, without regard to the citizenship of the parties or the amount involved in the controversy. A State trial court of competent jurisdiction over claims for removal costs or damages may consider claims under the OPA or state laws and any final judgement of such court shall be recognized, valid and enforceable. Accordingly, the competent state courts have the equivalent right to jurisdiction as the federal courts. Claims may be submitted to either the federal courts or state courts.

### 3.12 Repercussions of the OPA on the International Oil Pollution Compensation Regime

The adoption of the OPA meant that the US would not ratify the 1984 Protocols to the 1969 CLC and 1971 Fund Convention because of many differences between the two regimes, especially on the limits of liability and compensation. As a major oil consuming country, the US was consuming 25 percent of the oil of the world and annually importing 400 million tons of oil at the time when the OPA was adopted. According to the quantity of oil received in the US, if the US had become a party to the Conventions, it would have shared 25 per cent of the IOPC Fund contributions.<sup>111</sup> Conversely, without the participation of the US, the financial burdens on the Member States would be very heavy. Such misgivings prevented some states including Japan from ratifying the 1984 Protocols. The number of the States of ratification and the required quantity of contributing oil of these States did not meet the minimum requirement for the entry into force of the 1984 Protocols. The Protocols were destined to fail without the participation of the US.

The enforcement of the OPA also led to the decline of the voluntary system TOVALOP and CRISTAL in the US because the amount of compensation under the

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<sup>111</sup> Wu, C. (1996). Pollution from the carriage of oil by sea: Liability and compensation (pp. 262-263). London: Kluwer Law International.

terms of the former was much higher than that of the latter, the claimant could no longer benefit from the voluntary system.

The differences between the OPA and the regimes of other countries which are Parties to the CLC and Fund Conventions may also create complications in the case of transfrontier spills. Take the Canadian regime as an example. It mainly consists of the Canadian Shipping Act and the Ship-Source Oil Pollution Fund which are based on, and aimed at implementing, the international regime. It differs significantly from the OPA in many major aspects, including the scope of application, the liable party, the basis of liability, rules governing limitation of liability, the notion of removal costs and damages, the amount of compensation, evidence of financial responsibility, oil pollution compensation fund, etc.

Up to now, there has not been any major transfrontier oil spill testing the application of these two different regimes to the same incident. However, this possibility still exists. If such an incident happens, some difficulties in dealing with the case can be foreseen. For example, the shipowner must respond in both jurisdictions. This may defeat an essential purpose of the limitation of liability, namely that all claims in respect of one incident should be consolidated against one limitation fund.<sup>112</sup> More significantly, the OPA offers a greater amount of compensation than does the Canada Shipping Act. The coverage is also different. This may force Canada to seek accommodation with the US. However, any such accommodation may be incompatible with Canadian participation in the international scheme. This example serves to illustrate the problems caused by the inconsistency in the oil pollution compensation regimes.

All in all, the OPA differs from the international regime in many aspects. Among these differences, the most significant one is probably the system of limitation of liability which is considered to be one of the pillars of the oil pollution liability and compensation. The OPA has actually led to the provision of unlimited liability in

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<sup>112</sup> Popp, A.H.E. (1993). A North American perspective on liability and compensation for oil pollution caused by ships. In Rue, C. M. (eds.). *Liability for damage to the marine environment* (p. 126). London: Lloyd's of London Press LTD.

many state laws in the US. This has vigorously impacts upon the system of limitation of liability of the international regime of oil pollution liability and compensation, and, to some extent has strengthened the questioning of the justification of the latter. “ It is hoped that the American Oil Pollution Act of 1990 turns out to be the statute which sounded the death-knell for maritime limitation of liability.”<sup>113</sup>

#### **4. Inconsistency of legislation and Practice of Some Member States with the International Regime**

If the OPA constitutes a major extrinsic obstacle to the universality of the international conventions, then the departure of legislation and practice of some Member States of the CLC and Fund Conventions may be considered as the intrinsic disintegration of the international regime. This intrinsic disintegration is mainly caused by the vagueness in the definition of pollution damage in the CLC and Fund Conventions and diversity of national legal systems.

1) The system of compensation for loss of earnings differs between civil law and common law. Normally, a civil law system does not distinguish between physical damage or damage to property and loss of earnings. The general principles of civil liability law indiscriminately apply to loss of earnings and any other damage. In French law, all types of damage are fully recoverable provided that they are established and there is a direct relationship between cause and effect. In ruling on a claim for compensation for loss of earnings, the French courts only take account of elements of causation common to all types of damages. Loss of earnings is recoverable provided that it is a direct and certain consequence of an act for which the defendant is liable.<sup>114</sup> By contrast, in common law, under the doctrine of parasitic financial loss, purely pecuniary loss is not compensable in itself unless it is

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<sup>113</sup> Gauci, G. (1995). Limitation of liability in maritime law: an anachronism? *Marine Policy*, Vol.19, No.1, 74.

<sup>114</sup> Wu, C. (1996). *Pollution from the carriage of oil by sea: Liability and compensation* (p. 318). London: Kluwer Law International.

a direct result of physical damage. Therefore, loss of earnings may be compensated only if it is connected with physical damage. The definitions of pollution damage in the 1969 CLC and 1971 Fund Convention do not mention whether loss of earnings is a category of recoverable damage. Therefore, the above mentioned difference between civil law and common law has not been harmonized. This, in theory, may lead to unfair results between civil law Member States and common law Member States, namely, loss of earnings due to oil contamination of environment in civil law countries is recoverable, while in common law countries it is not. In order to remedy this defect, the 1992 Conventions revise the definition of pollution damage by including the following terms: “loss of profit from impairment of the environment”. Thus, loss of earnings resulting from environmental contamination is compensable in Member States of both civil law and common law. However, the Conventions still fail to define the scope of compensation for loss of earnings. This may lead to different legislation and practice among Member States in respect of the criteria of admissibility of this kind of claims.

2) Purely environmental damage is compensated in some Member States. As mentioned above, under the 1992 Conventions, compensation for impairment of the environment is limited to costs of reasonable measures of reinstatement actually undertaken or to be undertaken, and does not include purely environmental damage. In the 1980 Antonio Gramsci case, countering the claim of the USSR for compensation for purely environmental damage which is not economically quantifiable, the IOPC Fund Assembly unanimously adopted a resolution excluding explicitly claims for compensation for this type of damage made on the basis of an abstract quantification of damage calculated in accordance with theoretical models. Therefore, there is no doubt that under the 1992 Conventions, diminution in value of the environment due to oil pollution is not compensable, only the costs of restoration are recoverable. However, contrary to the international regime, some Member States accept claims for the compensation for purely environmental damage. This has been revealed in several cases, such as the second Antonio Gramsci case( Finland and USSR as claimants, 1987), the Patmos case( Italy as claimant, 1985) and the Haven

case (Italy as claimant, 1991). In these cases, the governments of Finland, USSR and Italy as claimants, all claimed for compensation for environmental damage. Under the opposition of the IOPC Fund, only Finland retracted its claim, USSR and Italy won the law suits in their local courts. It should be noted that in the Haven case, although the IOPC Fund lodged opposition in respect of a number of claims, including an environmental damage claim the court awarded the Italian government a large amount of compensation for environmental damage.<sup>115</sup> The problems exposed in these cases are two-fold: on one hand, the definitions of pollution damage in the CLC and Fund Conventions which are the basis of criteria for admissibility of claims are not clearly and strictly defined and leave much room for the discretion of national courts, on the other hand, the increasing awareness of environmental protection requires for compensation for purely environmental damage. The conscience of environmental protection has been stirred and strengthened by a series of pollution incidents in North America and Europe in the recent decades. “ The consideration given to the protection of the marine environment has encouraged some European countries to consider compensation for environmental damage, either by way of case-law or through legislation.”<sup>116</sup> The above mentioned cases expose the disparity between the attitudes of the courts in some Member States and that of the IOPC Fund on the issue of admissibility of environmental damage. To compensate for purely environmental damage seems to be a new trend that cannot be resisted. “ This tendency is overwhelmingly in connection with economic witness today, and perhaps will be even more so in the future.”<sup>117</sup> To persist in future in rejecting claims for purely environmental damage would risk compromising the aim of achieving a uniform international compensation regime. The international Convention regime must, in future, follow suit in order to survive.<sup>118</sup> However, it should be pointed out that this actually is not a legal issue, but a political choice. As it was well put by the

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<sup>115</sup> IOPC Fund 1992. (1999). International oil pollution compensation funds: Annual report 1999( p.45). London: Author.

<sup>116</sup> Wu C.(1996). Pollution from the carriage of oil by sea: Liability and compensation (pp. 370- 371). London: Kluwer Law International.

<sup>117</sup> Wu C.(1996). Pollution from the carriage of oil by sea: Liability and compensation (p. 371). London: Kluwer Law International.

<sup>118</sup> Wu C.(1996). Pollution from the carriage of oil by sea: Liability and compensation (p. 338). London: Kluwer

director of the IOPC Funds Mr. Jacobsson: “ Very often the question is made why the IOPC Funds are not prepare to accept certain types of claims. In my view this is an incorrect question. The real question is: how far are the Governments of Member States willing to put an economic burden on their oil industry. This is a political question which was answered by the Diplomatic Conferences which adopted the Conventions. ...Under the 1992 Conventions there is only a limited amount available for the payment of compensation. If the 1992 Fund were to accept claims with only an indirect connection to an oil spill or claims for general damage to the ecosystem, that could result in more directly affected victims not being able to receive full compensation.”<sup>119</sup> In short, the scope of compensation is constrained by the limited resources of the Fund; any enlargement of the scope of compensation means either more shares in the total compensation amounts available and consequently less compensation for individual victims or adding more burdens on the contributors. This touches the relation between contribution and compensation. However, the history of CLC and Fund Conventions shows that the scope of the definition of pollution damage as well as the scope of compensation has being constantly enlarged. This trend can not seem to stop since the definition is still far from perfect. Moreover, the gradual increase of the environmental awareness worldwide also strongly supports and promotes this trend.

## **5. Probable increase of the maximum compensation amounts available under the 1992 Conventions**

Recently, UK government, supported by a number of other governments, submitted a proposal to IMO to increase the limits in the 1992 CLC and Fund Conventions.<sup>120</sup>

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Law International.

<sup>119</sup> Jacobson, M.( June 6, 2000). The international regime of compensation for oil pollution damage and the policy of the IOPC Funds as to the admissibility of claims. Unpublished lecture handouts(p.14), World Maritime University, Malmo, Sweden.

<sup>120</sup> Jacobson, M.( June 6, 2000). The international regime of compensation for oil pollution damage and the policy of the IOPC Funds as to the admissibility of claims. Unpublished lecture handouts(p. 13), World Maritime

This issue, among others, has been preliminarily discussed by an Intersessional Working Group of the IOPC Fund in July, 2000. This matter will be considered by the IMO Legal Committee in October, 2000.<sup>121</sup> The requirement of UK and other developed countries for increasing compensation amounts, on one hand, reflects the insufficiency of the remedy provided by the international regime, particularly in developed countries, on the other hand, it also mirrors the unbalanced development between developed and developing countries. A review of the history of the CLC and Fund Conventions shows that the attempt of raising the compensation amounts was always one of the major inducements which eventually led to the revision of the Conventions, and the agitators were always developed countries. France played a major role in the creation of the 1984 Protocols. The U.S. did not accept the Protocols mainly because it complained that the amounts of compensation provided by the protocols were still not sufficient, which then led to the adoption of the 1992 Protocols. The fact that the compensation amounts available under the international regime are insufficient, especially in developed countries is above reproach. In fact, in some recent cases involving the 1971 and 1992 Funds, the total amount of the claims greatly exceeded the amount of compensation payable under the Conventions.<sup>122</sup> Inflation and constantly increase of clean-up costs require corresponding adjustment of the compensation limits. However, if we only simply raise the limits of compensation amounts, the problems do not seem to be fully resolved. The compensation limits resulted from the compromise of the diplomatic conferences will never satisfy some countries. That is why the U.S. said good-bye to the international regime, on the other hand, some developing countries may wish to join the Conventions but fell misgivings about the heavy burdens of contributions. Therefore, change of the limits of compensation amounts is only a matter of expediency. It may temporarily cure the symptoms, not the disease. Worse still, it

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University, Malmo, Sweden.

<sup>121</sup> 1992 Fund Meetings: July 2000 Executive Committee and Working Group - In brief.( 2000, July 11). Retrieved July 25,2000 from the World Wide Web: [http:// www.iopcfund.org/july00news.htm](http://www.iopcfund.org/july00news.htm).

<sup>122</sup> Jacobson, M.( June 6, 2000). The international regime of compensation for oil pollution damage and the policy of the IOPC Funds as to the admissibility of claims. Unpublished lecture handouts(p.14), World Maritime University, Malmo, Sweden.

may aggravate the existing inequality between developed and developing Member States. As mentioned above, compensations for developed countries and developing countries are unequal, which actually favors the former. Consequently, increase of limits of compensation amounts may further favor developed countries, and conversely, make the burdens of developing countries heavier. It should be noted that disagreement on the limits of compensation amounts has become a major reason for the U.S. to reject the international regime. In order to avoid further disintegration of the international regime, it is necessary for the international community to seek for an equilibrium point among different interests. This, again, speaks for the necessity of reforming the contribution and compensation system of the IOPC Fund. The insufficiency of compensation provided by the international regime also shows the need for creating a third tier of compensation mechanism in national or regional level. At national level, the existing national funds in some countries, such as Canada, Germany and Sweden, etc. have proved to be plausible and deserve disseminating. At regional level, regional oil pollution compensation funds can be created in some areas which either share the same waters, such as the Baltic and the Mediterranean regions, or are relatively homogeneous in economy, politics, ethics and environmental policy, such as the European Union.

## **6. HNS Convention –reform of the international system of pollution liability and compensation**

The International Convention Relating to Liability for the Carriage of Hazardous and Noxious Substances at Sea ( HNS Convention ) was adopted by IMO on 3 May 1996. This new convention can be deemed to be a sister convention of the CLC and Fund Conventions since it deals with liability compensation for damage caused by spills at sea of hazardous and noxious substances other than oil, and fills in a gap in the latter. The HNS Convention was developed on the basis of the CLC and Fund

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Conventions. Actually, the provisions of the former are modelled closely on those of the latter. From form to content, the HNS Convention can be considered as a succession and development of the CLC and Fund Conventions. This can be seen by making a comparison between some major aspects of these conventions.

1) The structure of the conventions. The CLC and Fund Conventions adopt a two-tier regime but separate it into two different conventions while the HNS Convention adopts this two-tier regime but combines these two tiers into one single convention. The separation of the CLC and Fund Convention has caused a problem where a State may join the CLC and enjoy the limitation of liability but stay away from the Fund Convention and have no obligation to make contributions. In order to overcome this shortcoming, the HNS Convention amalgamates the two tiers into one single instrument. Consequently, a State Party has to accept the two tiers as a whole.

2) Scope of application. These conventions all apply to damage caused in the territory, including the territorial sea, of a State Party and its exclusive economic zone, and to preventive measures wherever taken. However, the HNS Convention differs from the CLC and Fund Conventions over the definition of damage. First of all, the HNS Convention explicitly provides that damage covers loss of life and personal injury. The claims in respect of death and personal injury shall have priority over other claims up to two-thirds of the total fund. By contrast, the CLC and Fund Conventions have no such provisions. Secondly, in different areas the HNS Convention applies to different types of damages: in a territory including the territorial sea: any damage; in the exclusive economic zone: damage by contamination of the environment; outside the territory, including territorial sea: damage other than damage by contamination of the environment;<sup>123</sup>

3) Channelling of Liability. As with the CLC, the HNS Convention provides that liabilities shall all be channelled towards the owner, and prohibits any action against the owner's servants, agents, crew members, pilots, charterers, salvors, etc.<sup>124</sup> It should be noted that the definition of "shipowner" or "owner" has been defined variously in different conventions. In this respect, the latest international legislation--

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<sup>123</sup> Articles 1(6) and 3 of HNS Convention; articles 1(6) and 2 of 1992 CLC.

the draft Bunkers Convention defines “shipowner” in a way that is similar to the 1976 Convention on Limitation of Liability for Maritime Claims; namely, it identifies a small group of responsible persons as the shipowner, including the owner, charterer, manager and operator of a sea going ship.<sup>125</sup>

4) Strict liability. Both the HNS Convention and the CLC provide strict liability. However, besides the three defences which are the same as those of CLC, namely, acts of wars, wilful acts of third parties, negligence of government, the HNS Convention provides a fourth defence where the shipowner can establish that the damage was wholly or partly caused by a failure of the shipper to furnish information concerning the hazardous and noxious nature of the cargo, or where the shippers’ failure has led the owner not to obtain appropriate insurance cover in respect of HNS risks.<sup>126</sup>

5) Limitation of liability is one of the major, common characteristics of these conventions. The difference lies in the amounts of limitation. Generally, the amounts of limitation in the HNS Convention are much higher than those provided by CLC.<sup>127</sup>

6) Compulsory insurance. The HNS Convention follows the compulsory insurance system of the CLC. Indeed, most of the wording is the same. The only exception is that the amounts insured, which depend on the amounts of limitation of liability, are different.

7) Contributions to the Funds. As with the IOPC Fund, the HNS Fund is meant to be about the equitable sharing of financial responsibility between shipowners and cargo interests. Many provisions in these two Funds are similar, such as the function of supplementary compensation, the conditions or reasons for compensation, the reporting system, subrogation and recourse, the competence of the courts, amendment of compensation limits, organization and administration, etc. However,

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<sup>124</sup> Article 7.5 of HNS Convention. Article 3.4 of 1992 CLC.

<sup>125</sup> Article 1 of both conventions.

<sup>126</sup> Article 7.2 (d) of HNS Convention.

<sup>127</sup> According to articles 9 and 14 (5) of HNS Convention, the limitation of the first tier are as follows: 1) for a ship not exceeding 2,000 units of tonnage: 10 million SDRs; 2) for a ship with a tonnage in excess of 2,000 units of tonnage, the following amount in addition to the small ship minimum: for a ship between 2,001 and 50,000 units of tonnage: 1,500 SDRs per unit of tonnage, i.e. the limit for a ship of 50,000 tons will be 82 million SDRs; for a ship between 50,001 and 100,000 units of tonnage: 360 SDRs per unit of tonnage, i.e. the limit for a ship of 100,000 tons will be 100 million SDRs; for a ship exceeding 100,000 units of tonnage: 100 million SDRs, this is

the HNS Fund differs greatly from the IOPC Fund over the means of contribution. As mentioned above, the basis of contributions to the IOPC Fund is the quantity of contributing oil received by the contributor, and payment is made into a single account. By contrast, collections under the HNS Convention will be made on a post-event basis, and types of cargo will be placed in separate accounts for purposes of assessing their rate of contribution. The HNS Fund will consist of a general account into which most contributions will go but there will be separate accounts for oil (other than CLC oil), liquified natural gas (LNG) and liquified petroleum gas (LPG). As to the general account, receivers of HNS cargo will only become eligible to make contributions if they have, in the preceding calendar year, received an aggregate quantity of HNS cargo exceeding 20,000 tonnes. The equivalent thresholds under the oil account and LPG account are also 20,000 tonnes. In the case of LNG there is no threshold. The amount of contribution to the general account is to be calculated by reference to the HNS points system provided in Appendix 2 of the Convention. The general account shall be available to compensate damage caused by hazardous and noxious substances covered by that account. A separate account will be available to compensate damage caused by a hazardous and noxious substance covered by that account. It should be noted that in the early stage of the drafting of this contribution scheme it was always contemplated that the scheme would act as one fund with all HNS cargo contributing to a formula. However, certain market sectors, such as LNG, protested that their obligation to contribute should reflect their excellent safety and environmental record.<sup>128</sup> This idea led to the creation of separate accounts. The IOPC Fund has no such kind of encouraging mechanism. Perhaps the idea that contribution should be related to safety record can be applied to the IOPC Fund. A separate scheme may not necessarily fit the IOPC Fund, but, to some extent, differences in the amounts of contributions could be made between those Member States which have poor safety records, such as Japan and the Republic of Korea, and those maintain

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the maximum for the first tier. The maximum amount of the second tier is 250 million SDRs.

<sup>128</sup> Griggs, P (1996). Extending the frontiers of liability-the proposed Hazardous Noxious Substances Convention and its effect on ship, cargo and insurance interests. *Lloyd's Maritime and Commercial Law Quarterly*, 2, 153.

good safety records, such as the Netherlands, Australia and Norway.<sup>129</sup>

From the above comparison and analysis, we can see that the HNS Convention actually has benefited from the long term experiences of the CLC and IOPC Fund and substantially revised the international system of pollution liability and compensation. This is the latest development of the system. However, four years have past and there is no country that has yet ratified the HNS Convention so far.<sup>130</sup> The future of this reformed system still needs some time to test.

In summary, recent developments in pollution liability and compensation systems have had two-sided effect on the international oil pollution liability and compensation regime. On one hand, termination of the voluntary industry compensation schemes TOVALOP and CRISTAL, and winding up of the 1969/1971 Conventions, have strengthened and promoted the uniformity and universality of the regime under the 1992 Conventions. On the other hand, the adoption and implementation of the OPA in the US constitutes a major obstacle to the universality of the international regime. However, the OPA is advanced in several aspects from which we can draw certain lessons. In addition, while the inconsistency of legislation and practice of some Member States of the CLC and Fund Conventions may have some negative affects on the implementation of the international regime it may also contribute to its gradual improvement. The request for increase of the limits of the maximum compensation amounts available under the 1992 Conventions shows the inadequacy in the regime and the necessity for reforming of the contribution and compensation system of the Fund and creating a third tier of compensation mechanism. The HNS Convention applies the oil pollution regime to other hazardous and noxious substances. It sums up the experience of the CLC and IOPC Funds and

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<sup>129</sup> IOPC Funds (1999). Annexes 21 and 22: Summary of incidents of 1971 and 1992 Funds. In Annual reports ( pp.152-171). London: Author.

<sup>130</sup> Article 46 of HNS Convention provides that the Convention will enter into force 18 months after the date on which the following conditions are fulfilled: (a) at least 12 States, including four States each with not less than 2 million units of gross tonnage, have expressed their consent to be bound by it, and (b) the Secretary-General is satisfied that those persons in such States who would be liable to contribute to the HNS Fund have received during the preceding year a total quantity of at least 40 million tonnes of cargo contributing to the general

can be regarded as the succession and development of latter. Its successful implementation in the future may have a reaction effect on the oil pollution regime and promote its further development.

## Chapter Four Conclusion

The international regime of liability and compensation for oil pollution damage was generated and developed out of a series of oil pollution incidents. Its goal has been to respond to one of the major problems in the maritime world, and indeed, during its near 30 years of experience, it has made a major contribution to marine environmental protection. Besides those cases settled under the CLC, up to 1999, the 1971 Fund has dealt with 101 cases, and the 1992 Fund has handled 9 cases.<sup>131</sup> It is fair to say that both the oil industry and affected interests have benefited from this regime. If there had not been such a system, the gap between claims caused by oil spills and the available compensation would have grown even wider, the public reaction to spills would have become even stronger, to a point where this gap would have become unbearable.<sup>132</sup>

While this regime has many advantages it is far from perfect. The aim of the regime is to apportion liability and balance the various interests involved. However, it does not seem that this goal has been fully achieved. "No one is truly satisfied; the victims of pollution are not fully compensated in catastrophic cases, and the liable parties feel the financial burdens are too onerous."<sup>133</sup> On the other hand, although the regime

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account.

<sup>131</sup> IOPC Fund 1992. (1999). International oil pollution compensation funds: Annual report 1999(pp. 152-171). London: Author.

<sup>132</sup> Gouilloud, M. R.( 1993). The future of the compensation system as established by international convention. In Rue, C. M. (eds.). Liability for damage to the marine environment. London: Lloyd's of London Press LTD.

<sup>133</sup> Wu C.(1996). Pollution from the carriage of oil by sea: Liability and compensation(p.396). London: Kluwer Law International.

has been widely accepted the U.S. has turned its back on it, and a number of States have not joined it. These indicate that the new regime still has some deficiencies and needs to be improved. In fact, inadequacies and improvement of the system have recently become a major subject under discussion at the 1992 Fund Assembly. A Working Group of the Fund has been set up to examine these issues. Subjects discussed included ways of speeding up payments to victims, the ranking of claims, increase of the maximum amount of compensation and the uniform application of the Conventions in Member States.<sup>134</sup>

In my opinion, improvement of the regime should be consistent with its trends. In general, the oil pollution liability and compensation regime has been trending towards a better protection for the marine environment and for victims of oil pollution, behind which is the gradual increase of environmental awareness. The signs of this trend are strict liability and compulsory insurance of the shipowner, wider scope and higher limits of compensation under the 1992 conventions as well as the provision of unlimited liability for oil pollution damage and a gradual extension in the scope of compensation, especially the inclusion of compensation for purely environmental damage in some national legislation and practice. In order to adjust to these trends, the international regime needs to be correspondingly improved. From a long-term point of view, improvement of the regime should be emphasized on the following several major aspects.

First of all, as the contribution and compensation system of the Fund, to some extent, has become a main source of some major problems of the regime, such as inequality among the Member States of the Fund, insufficient compensation for pollution damages and even the obstacle to its universality, etc., the most important thing of the improvement of the regime should be to reform this system with a view to re-apportioning various interests of the parties concerned. The core of the reform should be to proportion compensation to contribution.

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<sup>134</sup> 1992 Fund Meetings: July 2000 Executive Committee and Working Group -- In brief.( 2000, July 11). Retrieved July 25,2000 from the World Wide Web: [http:// www.iopcfund.org/july00news.htm](http://www.iopcfund.org/july00news.htm).

Secondly, revise the definition of pollution damage provided in the 1992 Conventions in opportune time, and consequently re-define the scope of compensation and the criteria of admissibility of claims, aiming to reflect the developments of the pollution compensation system and further harmonize national legislation and practice in different legal systems.

Thirdly, the HNS Convention represents an advance in an on-going process of improvement and reform of international conventions on pollution liability and compensation. Some of its initiatives, such as the combination of two tiers of compensation schemes into one single convention and its contribution system, etc., if proves to be successful, can be used for reference in the reform of the CLC and Fund Conventions in the future. In addition, any other useful experiences of pollution liability and compensation systems should also be introduced into the oil pollution regime.

Fourthly, the existing international compensation scheme has proved to be insufficient to remedy all the damages in major oil spills, a third tier of compensation scheme is desired as a supplement to the international system. The third tier of compensation could be drawn from national or regional funds, or insurance.

Last but not least, reform or improvement of the regime should be made before another Torrey Canyon incident occurs, In this respect, the regime itself needs preventive measures.

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