THE INTERNATIONAL REGIME ON LIABILITY AND COMPENSATION FOR SHIP-SOURCE OIL POLLUTION DAMAGE: RECENT DEVELOPMENTS

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CMI Colloquium 2006
Cape Town, South Africa
13-17 February 2006

1. Introduction

The international regime of compensation for damage caused by oil pollution from tankers is based on two international Conventions adopted in 1992 under the auspices of the International Maritime Organization (IMO), a specialised agency of the United Nations. These Conventions are the 1992 Civil Liability Convention and the 1992 Fund Convention. The International Oil Pollution Compensation Fund 1992 (1992 Fund) established under the 1992 Fund Convention follows an earlier Fund created under the 1971 Fund Convention, which still exists but is in the process of being wound up[<1>]. A Protocol establishing an International Oil Pollution Compensation Supplementary Fund (Supplementary Fund) entered into force on 3 March 2005.

The treaty instruments have been implemented into the national law of the States which have become parties to them.

The 1992 Civil Liability Convention 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 limitation amount is 4.51 million Special Drawing Rights (SDR[<2>]) (£3.7 million) for ships not exceeding 5 000 units of gross tonnage, increasing on a linear scale as a function of the tonnage to 89.77 million SDR (£73 million) for ships of 140 000 units of gross tonnage or over.

The 1992 Fund compensates victims of oil pollution when the compensation from the shipowner/his insurer under the Civil Liability Convention is inadequate. The 1992 Fund is a worldwide intergovernmental organisation established for the purpose of administering the regime of compensation created by the 1992 Fund Convention. By becoming Party to the 1992 Fund Convention, a State becomes a Member of the 1992 Fund. States which are parties to the Supplementary Fund Protocol are Members of the Supplementary Fund.

As at 31 January 2006, 113 States had ratified the 1992 Civil Liability Convention, and 98 States had ratified the 1992 Fund Convention. The Supplementary Fund Protocol had been ratified by 15 States. The States Parties are listed in the Annex.

The 1992 Fund has an Assembly, which is composed of representatives of all Member States. The Assembly elects an Executive Committee comprising 15 Member States. The main function of this Committee is to approve settlements of claims. The Supplementary Fund has only an Assembly composed of all States members of that Fund. During the winding-up, the 1971 Fund is governed by an Administrative Council. The Funds' Secretariat, located in London (United Kingdom), is headed by a Director.

2. Maximum amount of compensation available for compensation

The maximum amount payable by the 1992 Fund in respect of a particular incident is 203 million Special Drawing Rights (SDR) (US$ 290 million), including the sum actually paid by the shipowner (or his insurer) under the 1992 Civil Liability Convention.

The Supplementary Fund will have available an amount of 547 million SDR (US$790 million), in addition to the amount of 203 million SDR (US$290 million) available in the 1992 Fund. As a result, the total

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<1> The 1971 Fund, the 1992 Fund and the Supplementary Fund are normally referred to as “the IOPC Funds”

<2> The unit of account in the Conventions is the Special Drawing Right (SDR) as defined by the International Monetary Fund . In this paper, the SDR has been converted into Euros at the rate of exchange applicable on 31 January 2006, ie 1 SDR = US$1.4454

amount available for compensation for each incident for pollution damage in the States which are Members of the Supplementary Fund will be 750 million SDR (US$1 080 million).

3. Incidents involving the IOPC Funds

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

In the great majority of these incidents, all claims have been settled out of court. So far, court actions against the Funds have been taken in respect of only a handful of incidents. However, the *Erika* incident (France, 1999), which gave rise to 6 900 compensation claims, has resulted in a large number of court actions against the Fund, and most of these actions are still pending. It is expected that also the *Prestige* incident (Spain, 2002) will give rise to a number of court actions.

The cases involving the Funds resulting in the largest total payments so far are as follows:

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

4. Financing of the 1992 Fund

The 1992 Fund is financed by contributions levied on any person who has received during the preceding calendar year more than 150 000 tonnes of crude oil or heavy fuel-oil (contributing oil) in a Member State after sea transport. The Member States are not responsible for the payments of contributions unless they have voluntarily accepted such responsibility.

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

The Supplementary Fund's contribution system is similar to that of the 1992 Fund.

5. Review of the adequacy of the International Compensation Regime

Increase in the limitation amounts available under the 1992 Conventions

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

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

1992 Fund Working Group

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

Supplementary Fund

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

The main elements of the Protocol are as follows:

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

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

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

- The total amount of compensation payable for any one incident is 750 million SDR (US$1 080 million), including the amount payable under the 1992 Civil Liability and Fund Conventions, 203 million SDR (US$290 million).
- Annual contributions to the Supplementary Fund is to be made in respect of each Member State by any person who, in any calendar year, has received total quantities of oil exceeding 150 000 tonnes after sea

transport in ports and terminal installations in that State. The contribution system for the Supplementary Fund differs from that of the 1992 Fund in that where the aggregate quantity of contributing oil received in a Member State in a given calendar year is less than 1 million tonnes, that Member State shall assume the obligations that would be incumbent on any person who would be liable to contribute to the Supplementary Fund in respect of oil received in that State in so far as no liable person exists for the aggregate quantity of oil received. That means that the Member State would be liable to pay contributions for a quantity of contributing oil corresponding to the difference between 1 million tonnes and the aggregate quantity of actual contributing oil receipts reported in respect of that State.

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

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

Sharing of the financial burden between shipowners and the oil industry

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

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

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

Consideration by the 1992 Fund Assembly in October 2005

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

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

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

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

Substandard transportation of oil

The Working Group considered several proposals for dealing with the substandard transportation of oil. The intention of these proposals was to provide disincentives to shipowners to use substandard ships by imposing higher limits of liability on such ships. Under one proposal, there would also be a liability on the cargo owner for pollution damage caused by such ships. Another proposal would deprive the shipowner of his right to limit his liability if the incident had resulted from structural defects of the ships (ie defects due to decay or lack of maintenance). No decision was taken on any of these proposals. Many States considered however that the issue of substandard shipping was not within the field of competence of the 1992 Fund but fell within the exclusive competence of the IMO and should be dealt with in the relevant IMO Conventions (SOLAS and MARPOL).

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

6. STOPIA 2006 and TOPIA 2006

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

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

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

STOPIA 2006

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

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

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

TOPIA 2006

TOPIA 2006 applies to all tankers entered in one of the P&I Clubs which are members of the International Group and reinsured through the pooling arrangements of the International Group. Under TOPIA 2006, the owner of the ship involved in the incident will indemnify the Supplementary Fund for 50% of the compensation it pays under the Supplementary Fund Protocol for oil pollution in Supplementary Fund Member States.

The Supplementary Fund will, in respect of incidents covered by TOPIA 2006, continue to be liable to compensate claimants as provided in the Supplementary Fund Protocol. If the incident involves a ship to which TOPIA 2006 applies, the Supplementary Fund will be entitled to indemnification by the shipowner of 50% of the compensation payment it had made to claimants.

Review

STOPIA 2006 and TOPIA 2006 provide that a review shall be carried out in 2016 of the experience of pollution damage claims during the period 2006 – 2016, and thereafter at five-yearly intervals, in consultation with representatives of oil receivers and the 1992 Fund and the Supplementary Fund, to establish the approximate proportions in which the overall cost of oil pollution claims under the international compensation system has been borne respectively by shipowners and by oil receivers since 20 February 2006 and consider the efficiency, operation and performance of the agreements. The agreements also provide that, if the review reveals that either shipowners or oil receivers have borne a proportion exceeding 60% of the overall costs of such claims, measures shall be taken for the purpose of maintaining an approximately equal apportionment. Examples of such measures are given in the agreements.

Entry into force

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

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

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ANNEX

States Parties to both the
1992 Civil Liability Convention and the
1992 Fund Convention
as at 31 January 2006
(and therefore Members of the 1992 Fund)

92 States for which 1992 Fund Convention is in force

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

6 States which have deposited instruments of accession, but for which the 1992 Fund Convention does not enter into force until date indicated

Saint Kitts and Nevis	2 March 2006
Maldives	20 May 2006
Albania	30 June 2006
Switzerland	10 October 2006
Bulgaria	18 November 2006
Luxembourg	21 November 2006

States Parties to the Supplementary Fund Protocol
as at 31 January 2006
(*and therefore Members of the Supplementary Fund*)

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

3 States which have deposited instruments of accession but for which the Protocol does not enter into force until date indicated	
Belgium	4 February 2006
Lithuania	22 February 2006
Barbados	6 March 2006

States Parties to the Civil Liability Convention
but not to the 1992 Fund Convention
as at 31 January 2006
(and therefore not Members of the 1992 Fund)

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

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

States Parties to the 1969 Civil Liability Convention
as at 31 January 2006

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

2 States which have deposited an instrument of denunciation which will take effect on date indicated	
Albania	30 June 2006
Luxembourg	21 November 2006

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