

John Edward Vere Hunt

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A thesis, submitted in partial fulfilment of the requirements for the degree of Master of Laws in Maritime Law, at the University of Natal, entitled:

'A comparative analysis of the Civil Liability and Fund Conventions, TOVALOP and CRISTAL, the U.S. Federal Oil Pollution Act and U.S. State Legislation, as legal mechanisms regulating compensation for tanker-source oil pollution damage as of February, 1994.'

ABSTRACT

The purpose of this thesis is to explain and evaluate the law concerning compensation for tanker-source oil pollution damage under three different liability regimes:

(a) the International Convention on Civil Liability for Oil Pollution Damage, 1969 and the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, 1971 including the Protocols of 1976, 1984 and 1992 to these Conventions.

(b) the Tanker Owners Voluntary Agreement concerning Liability for Oil Pollution (TOVALOP) and the Contract Regarding a Supplement to Tanker Liability for Oil Pollution (CRISTAL) as at the 20th February, 1994.

(c) the United States Oil Pollution Act of 1990 and U.S. State Legislation.

In this context the thesis explains *inter alia* the evolution of law from fault to no-fault liability and from limited to increasingly limitless liability. The thesis examines the notion of damage eligible for compensation, for example, ecological and pure economic damage. Conclusions are reached as to the role increasingly stringent liability provisions may have on the quality of the tanker-process. The impact that the U.S. Oil Pollution Act 1990, and associated U.S. state legislation may have on the international pollution regimes covered by the various international Conventions and associated voluntary agreements is also discussed.

PREFACE

Except where I have specifically indicated to the contrary the written material herein is entirely my own original work. Furthermore, it has not been submitted in part, or in whole, to any other University in South Africa or elsewhere. The research towards and writing of this thesis were mostly carried out in Durban but three months research and writing also took place in London, Toronto and New York.

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In London I undertook research at the Institute of Petroleum, the Middle Temple Library, the International Maritime Organisation and the Institute for Advanced Legal Studies; in New York, at the New York University Law Library and Columbia University Law Library and in Toronto at the Bora Laskin Law Library, which is part of the University of Toronto. I am grateful to the staff of these institutions for their co-operation and assistance and convey a special note of appreciation to Professor James L. Hoover, the Law Librarian at Columbia University.

I attended two conferences in an observer capacity. The first was the Annual Session of the Assembly and Executive Committee of the International Oil Pollution Compensation Fund which was held at the Headquarters of the International Maritime Organization in London during 6-9 October, 1992. I am indebted to Jerry H. Edmond, a Director of the U.K. P&I Club and representative of the International Group of P&I Clubs at the Conference, for approaching Måns Jacobsson the Director of the IOPC Fund on my behalf, thereby facilitating my attendance. Many thanks to David Dickinson of Unicorn Shipping Company who took great trouble to

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While in New York I was invited by the Chairman of the Marine Ecology Committee Thomas J. Wagner of the New Orleans law firm *Wagner, Bagot & Gleason* to attend a series of Committee Meetings held by the American Maritime Law Association. I greatly appreciated being afforded this opportunity. Many thanks to the New York law firm *LeBoeuf, Lamb, Leiby & McRae* for their hospitality extended to me at the Marine Ecology Committee Meeting, and likewise to the firm of *Cadwalader, Wickersham & Taft* the hosts of the Committee Meeting on the Transportation of Hazardous Substances.

Through interviews, conducted in London and New York, with people involved in the shipping, oil and insurance industry I was able to attain a rare insight into the dynamics of oil exploration and extraction, the transportation of crude oil by sea and the marketing of the refined product. In this way I was better able to gauge the effect that increased liability levels for oil pollution has had on the industry as a whole and formulate ideas as to possible developments which may be expected to occur within this field in the foreseeable future. The following people were tremendously helpful in this regard and very generous in sharing both their time and thoughts: Jerry H. Edmond; Måns Jacobsson; John M. Noble, Chairman of Murry Fenton and Associates; Tosh Moller, Senior Technical Advisor to the International Tanker Owners Pollution Federation; John A. Hawkes, President of Cristal Limited, Robert Seward of the Britannia P&I Club; Peter D. Powell of BP Insurance London, David A. Turner of BP Solicitors Department London; Charlotte Grezo, BP Corp Health Safety and Environment BP London and Michael J. Donges, Manager Legal and Public Relations BP Shipping Harlo. A special note of gratitude to David A. Hatton of BP (SA) for introducing me to the above

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John E.V. Hunt
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LIST OF ABBREVIATIONS

AIOC	Amoco International Oil Co.
ASTM	American standard test method
bb1	Barrels (one barrel is equivalent to 159 litres or 42 U.S. gallons and approximately 7.4 barrels is the equivalent of one tonne of crude oil)
BIMCO	Baltic and International Marine Council
BP	British Petroleum
CLC	Civil Liability Convention
CLI	Compulsory liability insurance
CMI	Comité Maritime International
COFR	Certificates of Financial Responsibility
CWA	Clean Water Act
DM	Deutch Marks
dwt	Deadweight tonnes
EEZ	Exclusive Economic Zone
EPA	Environmental Protection Agency
EQB	Environmental Quality Board
FFr	French Francs
FWPCA	Federal Water Pollution Control Act

grt	Gross registered ton
gt	Gross ton
ICC	International Chamber of Commerce
ICS	International Chamber of Shipping
IMCO	Intergovernmental Maritime Consultative Organization
IMF	International Monetary Fund
IMO	International Maritime Organization
INTERTANKO	International Association of Independent Tanker Owners
IOPC Fund	International Oil Pollution Compensation Fund
ISU	International Salvage Union
ITIA	International Tanker Indemnity Association
ITOPF	International Tanker Owners Pollution Federation
IWC	International Whaling Commission
LIIt	Italian Lire
LLMC 1976	Convention on Limitation of Liability for Maritime Claims
LOF 1980	Lloyd's Standard Form of Salvage Agreement (Lloyd's Open Form 1980)
LOF 1990	Lloyd's Standard Form of Salvage Agreement

(Lloyd's Open Form 1990)

MARPOL 73-78	International Convention for the Prevention of Pollution from Ships 1973, and its Protocol 1978 which came into force on 2nd October, 1983
mdwt	million deadweight tons
MEPC	Marine Environment Protection Committee
MODU	Mobile Offshore Drilling Units
NCP	National Contingency Plan
NOK	Norwegian Krona
OBO	Ore/Bulk/Oil carrier
OCIMF	Oil Companies International Marine Forum
OCS	Outer Continental Shelf
OPA	Oil Pollution Act 1990
OPOL	Offshore Pollution Liability Agreement
OSLTF	Oil Spill Liability Trust Fund
ppm	Parts per million
Rbls	Roubles
Samarec	Saudi Arabian oil refining and marketing company
SDR	Special Drawing Right
SKr	Swedish Krone

SOLAS	Safety of Life at Sea, 1974/1978/1983
TS	TOVALOP Supplement
UAE	United Arab Emirates
U.K.	United Kingdom
ULCC	Ultra large crude carrier
UNCLOS III	Third United Nations Conference on the Law of the Sea 1982
UNOCAL	Union Oil Company of California
U.S.	United States
VLCC	Very large crude carrier

CHAPTER 1

Introduction

This work undertakes an analysis of the three dominant liability determining-mechanisms governing tanker-source oil pollution liability. The aim is to explain the operation of each system, the relevant legal evolution of these instruments and to compare and evaluate their relative strengths and weaknesses. The influence that each system exerts on the others will also be discussed.

This work is divided into five Parts which are discussed in turn immediately below.

Part One, consisting of a single chapter, encompasses a conceptual introduction to tanker-source oil pollution regulation. It defines certain distinct but inter-connected concepts relevant to this work. This Chapter also provides an historical analysis of the law governing oil pollution liability prior to the application of the international Conventions and voluntary agreements which are covered in Part Two and Part Three respectively. The historical analysis largely entails an examination of the legal implications of two early tanker-source oil pollution incidents. The relevant incidents are, firstly, the *Inverpool* spill, which happened in England in 1950, and, secondly, the *Torrey Canyon* oil pollution disaster which occurred in the English Channel in 1967. The *Torrey Canyon* spill exposed the inadequacy of the laws facilitating the recovery of oil pollution damage and directly precipitated the development of the legal instruments which are analysed in Parts Two and Part Three.

Part Two deals with the two-tier compensation arrangement brought about by the 1969 International Convention on Civil Liability for Oil Pollution Damage (the Civil Liability Convention), and, the 1971 International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage (the

Fund Convention). Part Two also includes a discussion of the revision of these Conventions by the Protocols of 1984, the substance of which has subsequently been further revised and incorporated into the 1992 Protocols. This two-tier arrangement is referred to as the 'international approach' because the ultimate purpose of these Conventions is to be incorporated in all states across the globe. This status has not, however, yet been achieved.

Part Three constitutes an analysis of the two-tier voluntary compensation agreements brought about by the tanker and oil industries. These instruments are the Tanker Owners Voluntary Agreement concerning Liability for Oil Pollution (TOVALOP), and, the Contract Regarding a Supplement to Tanker Liability for Oil Pollution (CRISTAL), as at 20th February, 1994. These two agreements will hereinafter be referred to as the 'voluntary agreements'.

Part Four concerns liability and compensation arrangements for tanker-source oil pollution in the United States, as regulated under the Oil Pollution Act of 1990 and applicable state legislation within the United States. The existence of certain U.S. state legislation exposing the actual cargo owner to direct liability for tanker-source oil pollution damage and the possible impact of such provisions will also be discussed.

Part Five, the final chapter, covers recommendations and conclusions. Important concepts which are of mutual concern to the oil pollution liability regimes mentioned in Parts Two, Three and Four will be discussed. The wide approach adopted facilitates an over-arching statement of policy which is explained and substantiated within the context of the three main areas mentioned immediately above.

In most instances, primary compensation for oil spills from tankers is provided by shipowners, while supplementary compensation may be provided by cargo owners. First-phase

liability for tanker-source oil pollution damage has been borne traditionally by the owners of tankers. This is so under the Civil Liability Convention, and the TOVALOP voluntary agreement. Only once the ceilings of limited liability set for tankers owners (through either the Civil Liability Convention or TOVALOP) have been reached, and exceeded, may oil importers become liable. This may occur through limits set by the Fund Convention or under the CRISTAL voluntary agreement.

The manner in which this liability is apportioned between tanker owners and cargo owners will be explained through an analysis of the provisions of the instruments covered which govern the liability of tanker owners and operators, oil-importers and their respective insurers, for the damage caused by oil spills from tankers. An assessment will be made of the effectiveness (or ineffectiveness) of the various 'compensatory regimes' in providing compensation for oil pollution victims. Close attention will be given to an analysis of the effectiveness of these legal regimes as a form of pressure brought to bear on those interest-groups who are in a position to reduce the risks of the transportation process.

. A degree of co-operation already exists between tanker owners and oil importers in the matter of compensating claims for oil pollution. But, a considerable area of conflict remains between oil importer and oil carrier interests as to how liability ought to be apportioned. This zone of contention between oil importer and oil carrier interests has been made more complex by the U.S. Oil Pollution Act of 1990. This Act exposes tanker owners to primary, and potentially unlimited liability, for oil pollution damage occurring in the United States. It has also been criticised widely for letting oil importers escape direct liability. However, the Act does propose the establishment of a billion dollar trust fund (the Oil Spill Liability Trust Fund) which is made up from a tax on all oil imports into the United States by sea.

Oil pollution liability can be managed in a way such as to preserve the *status quo* or it can be used as a dynamic mechanism to bring about change. Elements of both conflict and co-operation exist between the proponents of the International Liability Conventions, essentially states contracting to the Conventions, and the oil importation and transportation industries to which the Conventions apply. The multi-partite industry, in response, has attempted to preempt and mitigate this 'external' assumption of control by the implementation of the voluntary compensation schemes - TOVALOP and CRISTAL. The voluntary schemes may be seen either as supplementary to the Conventions, or as alternatives or rivals to the Conventions. The oil industry supports the Conventions because the presence of the Conventions, together with the voluntary compensation regimes, serve as disincentives for coastal states to enact unilateral, possibly draconian, domestic oil pollution legislation.

On the other hand, the existence of the voluntary schemes works against the uniform implementation of the Conventions. Governments, and claimants, in states which have not contracted to the Conventions, may be satisfied by the level of compensation available under TOVALOP and CRISTAL. Thus, they may have no inclination to participate in either the Civil Liability or Fund Conventions.

An important part of this work contains an analysis of the impact of the Oil Pollution Act of 1990, and associated U.S. State legislation, on the pollution regimes covered by the International Conventions and the parallel voluntary agreements. The Oil Pollution Act of 1990 diminishes the possibility of the shipowner or other responsible parties being able to limit liability, expands upon the kinds of damage recoverable and encapsulates the principle that states may enact or retain additional laws relating to oil pollution damage, even where these laws may conflict with, or exceed the provisions of the U.S. Oil Pollution Act. Within the United States, some conflict exists between Federal and State authorities over which entity

exerts control over oil pollution clean-up operations and the issues of associated damage and compensation. It is necessary to briefly review the most innovative of the state law provisions because in the same way that the U.S. Oil Pollution Act may exert influence on the future application and success of the Civil Liability and Fund Conventions and the continued application of the voluntary agreements, so to can emerging legal trends in certain U.S. state legislation exert influence over U.S. Federal oil pollution laws and the law adopted in the field of oil pollution by other states.

The adoption of the U.S. Oil Pollution Act was also significant because it scuppered any chance of the 1984 Protocols to the Civil Liability and Fund Conventions entering into force in their original forms. This resulted in the development of the 1992 Protocols to the Civil Liability and Fund Conventions. Certainly, a large degree of *de facto* conflict exists between the proponents of the "international approach" and the United States. The United States favours the development of domestic oil pollution legislation in preference to the international Conventions. Whether or not the goal of an internationally acceptable system of liability and compensation can be achieved through the international Conventions is presently a moot question.

Nonetheless, tanker-source oil pollution is a world-wide problem which needs to be thoroughly understood so that solutions can be devised, and speedily implemented, to avert further environmental damage. A recent rash of oil pollution incidents has drawn attention to a decline in tanker standards over the past decade. Clearly, unless an effective plan is formulated, and implemented, to improve the quality of the tanker-transportation system, a further degeneration in the international tanker-fleet may be predicted. Inaction, or ineffective action, may result in further damage being done to the environment and a detrimental impact on human activities.

This work attempts, also, to articulate certain legal solutions

to the problem of oil pollution from tankers. It is argued that the oil companies must be induced to hire only good quality tanker tonnage. More accurately, they must be provided with a disincentive to charter sub-standard tonnage. This will be achieved by levelling direct liability for tanker-source oil pollution damage at the cargo owner as well as the shipowner. It is argued that civil liability, and the threat thereof, can be utilized as a powerful tool to bring about higher standards of tanker operation, and thereby mitigate the incidence of pollution. The possibility exists that a significant improvement in the quality of tankers will be brought about if strict, unlimited liability for oil pollution damage is placed upon the actual cargo owner involved in the spill, together with the tanker owner. This is presently the legal position in the following U.S. states; Alaska, California, Hawaii, Maryland, North Carolina, Oregon and Washington. Thus, through an analysis of certain U.S. State legislation a new policy or legal norm is proposed for the assessment of liability for oil spills from tankers carrying oil in bulk at sea. A common course of action is proposed which if adopted and pursued by governments will be advantageous to shipowners, shippers of oil, the environment, the public, and, will furthermore, expedite the transportation of oil at sea.

Oil pollution from tankers is by no means a recent problem; however, this problem has become critical in recent years due to the increased public and governmental awareness of the degradation of the environment. The integrity of the environment is finally becoming a factor to be reckoned with.

It will be shown that the tanker and oil industry has incrementally become subjected to increasingly stringent liability laws as a direct result of the advent of environmental concerns. The present work depicts the growing importance of environmental considerations for the shipping and petroleum industries. This impact should not be overlooked because the lessons learned from experience of tanker-source oil pollution

can be applied to other aspects of the shipping and petroleum industries and by analogy to all industries facing similar problems.

CHAPTER 2

Methodology

2.1 Introduction

Consciously or unconsciously almost all human endeavour is governed to a greater or lesser extent by "methodology". This term describes the body of methods employed in any particular branch of activity to achieve specific objectives. The present work is organized according to the "comparative methodology", which is frequently utilised by researchers and commentators in many disciplines, including law.

The purpose of this chapter is to explain the comparative method in relation to the particular subject of this work. With this objective in mind, three inter-connected questions will be considered. What is the comparative method, how is it used in this particular context and, to what end is it employed?

2.2 Comparative methodology

In essence the comparative methodology applied to legal research contrasts one legal system with other such systems. Contrasted with the study of a single legal system, the comparative approach leads to a more holistic understanding of the subject. Clearly, the comparative approach is a superior methodology and its relevance becomes almost indispensable where the different legal systems studied exert significant influence upon one another. Where this is so an analysis of just one system to the exclusion of the others runs the risk of leaving the reader, and the writer, with an incomplete understanding of the subject. The writer's recommendations and conclusions drawn from an inappropriately narrow study of a complex subject may be premised upon a limited, or even incomplete, frame of reference. In this work an attempt has been made to avoid such short-comings by adopting a broad comparative analysis of three dominant legal

systems governing tanker-source oil pollution liability. Further, an attempt is made to understand and respond to a whole set of global trends concerning the question of oil pollution, rather than simply focusing on problems in particular countries or regions.

To recapitulate, the three legal systems are: the international Conventions, the voluntary agreements and U.S. Federal and State law controlling oil pollution liability in the United States. An obvious point is that these systems cannot effectively be compared and contrasted without also being described. Accordingly, the provisions and operation of the various systems are discussed in detail. In this way the evaluative and descriptive features of this study are both of importance.

Greater emphasis is placed on the analysis of the international Conventions than is accorded to the other two systems dealt with. In the view of the present writer this approach is justified because in principle the international Conventions represent in principle a legal ideal, of great importance, which it is hoped will serve as an precedent to the international community of nations.

The use of the comparative methodology in the present work is not confined only to an analysis of the provisions of the studied legal systems in force at present. This would be unsatisfactory as it would limit the scope of the work by precluding an analysis of previous developments in the legal systems studied and exclude an analysis of important developments which have modified those legal systems but which have not, as yet, achieved the status of law. In this way the comparative methodology is utilized to draw attention to, and analyse, significant epochs in the historical development and evolution of the different legal systems studied. Thus, this work includes an examination of legal developments in respect of the 1992 Protocols to the Civil Liability and Fund Conventions which have not as yet come into force. To do otherwise would detract from the investigative integrity of the

study. Laws do not evolve in isolation, the law in existence at present is in most instances shaped by the law which predated it. In the same way the law of the future will tend to evolve out of the laws of the past and the present. Accordingly, for a comparative study to be effective it must include an analysis of the past and the present in order to identify emerging legal trends and thereby anticipate the possible character of future laws governing tanker-source oil pollution liability.

2.3 Comparative methodology and evaluation of policy

The most important decision to be made before the comparative legal study is embarked upon is the choice of legal systems to be compared. The subjects of comparison should ideally be linked by sufficient common factors to permit constructive comparison. The comparison of different but related legal systems which have evolved in response to the same problem enables the researcher to formulate an understanding of the policy considerations influencing the development of each system over the passage of time and in the face of changing circumstances. Through comparison and evaluation of the different policies inherent within the legal systems compared, the researcher is then placed in a favourable position from which new policy considerations can be identified and articulated.

The identification and evaluation of policy is one of the concerns of this work. This is so because policy considerations determine law. However, policy considerations need not always relate specifically to law. Often non-secular bodies adopt and implement policy which is not backed by the authority of state and law.¹ For example, the policy articulated by the tanker and oil industries through the voluntary agreements essentially falls within a non-secular category of policy making. By contrast, policy articulated and enforced through the international Conventions, as incorporated into the municipal legislation of

¹Enright *Studying Law* 4th ed (1991) at 248.

nation states, and, U.S. Federal and State legislation, is sanctioned by the authority of law.

This is not to say that the policies articulated by the industry agreements are less relevant than those which enjoy the backing of law and it must be recognized that the policies expounded by the international Conventions and U.S. legislation are also strongly influenced by the business interests involved. In fact these interests are an important part of the bundle of interests which must be considered before a policy debate can properly ensue.

Because the evaluation of policy is one of the prime objectives of the comparative methodology it is proper that methodology and policy are considered together. The evaluation of policy entails an inquiry into the purpose of the law and the manner in which the law attempts to attain that purpose.² Specific problems arise in the evaluation of policy within the context of the legal systems chosen for investigation in this work. It is necessary to identify those difficulties and describe the methods used to overcome them.³

Enright suggests that policy may be articulated, through the medium of law, by either common law or statute, but that most policy is in fact implemented by statute.⁴

Within the context of the legal systems studied here, this general statement requires qualification. The only statute law examined in detail in this work is the U.S. Oil Pollution Act of 1990 and U.S. state legislation. Although the Civil Liability and Fund Conventions become statute law upon being ratified by states and incorporated into the municipal legislation of such states,

²Enright, *op cit*, at 247.

³The reader may note that the analysis of the problems discussed below is not exhaustive.

⁴Enright, *op cit*, 247.

they are not examined as adopted into the legislation of any single sovereign state. The approach adopted in respect of these instruments is to analyse the provisions of the actual Conventions rather than municipal statute law. This is in keeping with the international approach adopted in this work as opposed to a parochial perspective. Furthermore, the voluntary agreements are not legislative instruments, and, as such, are not statute law. Notwithstanding this important conceptual distinction; certain important aspects of these agreements are regulated by law, and, as such, in this work they are considered to be a "legal system".

The control of tanker-source oil pollution liability under the international Conventions and the voluntary agreements is marked by a policy in terms of which disputes are settled, wherever possible, without litigation. Accordingly, an investigation of the provisions of these agreements, as opposed to an examination of case law, affords greater opportunities for the evaluation of policy. Due to the fairly brief period of time that the U.S. Oil Pollution Act of 1990 has been in effect there is, regrettably, a paucity of case law interpreting the policy of that potentially important legislative instrument.

The objective of all critical analysis of legal systems is to suggest a new policy where and if the analysis reveals that a change in policy is necessary. The first stage in policy making is the identification or perception of a particular problem or some undesirable feature prevalent within the field of research undertaken. The next step is a desire to solve the problem or change the situation leading to that problem; calling in turn, for detailed research into the field in which the problem arises. The broad comparative approach adopted here best facilitates the evaluative process leading to the formulation of new policy. The strength and utility of the comparative legal method is that it allows the researcher to make informed judgment that one situation is better or more desirable than another and to suggest the most effective methods through which to bring about the

preferable option.⁵

In conclusion, it must be recognised that the determination of policy is essentially a subjective process. Every commentator's evaluation of policy is influenced by his particular viewpoint. Therefore, it is important that the commentator understands the subject at hand thoroughly, considers the works of previous commentators in the same or related fields and the concerns articulated by various interest groups involved. In this way, where the commentator evaluates policy, he does so in a balanced way from an informed and considered perspective.

⁵Enright, *op cit*, pp149-152.

CHAPTER 3

Introductory conceptual and historical analysis

3.1 Introduction

The objectives of this Chapter are two-fold. Firstly, certain important concepts are defined with the intention of facilitating a clear understanding of the subjects analysed in the remainder of this work. Secondly, an attempt is made to illustrate how, before the development of the special tanker-source compensation mechanisms, claimants had experienced great difficulty in recovering the full extent of their damage. Such difficulties, which became apparent in the *Torrey Canyon* case, precipitated increased public, governmental and industry emphasis upon the provision of adequate compensation for tanker-source oil pollution damage. In this way, the wreck of the *Torrey Canyon* is significant in that it provided the motivation for the Civil Liability and Fund Conventions as well as the voluntary agreements.

3.2 Preliminary distinctions

It is appropriate at the outset of this work to explain certain distinctions between various important concepts fundamental to a broad understanding of the subject at hand.

3.2.1 Preventive / Compensation legislation

Since the formation in 1958 of the Intergovernmental Maritime Consultative Organization (IMCO), which from 1976 became known as the International Maritime Organization (IMO), several international conventions relating to pollution prevention have been developed. Individual states are encouraged to become party to these instruments and in this way the provisions contained in the conventions may become incorporated into the domestic legislation of the party states. The most commonly referred-to example within the category of preventive conventions is MARPOL

73/78.¹ This Convention provides detailed regulations for the design and construction of oil tankers and the circumstances in which the discharge of oil or ballast water is prohibited. It does not, however, impose liabilities on polluting ships other than by way of fines for non-compliance with its provisions.²

By contrast, compensation legislation can be described as the body of statutory, enacted rules governing the settlement of claims for loss and damage caused by oil pollution.

3.2.2 Conventions / Agreements

3.2.2.1 International Conventions

Two international conventions; namely, the 1969 International Convention on Civil Liability for Oil Pollution Damage (Civil Liability Convention) and the 1971 International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage (Fund Convention) govern liability and compensation for damage caused by oil pollution from tankers. It is important to note that these instruments operate only in states which have elected to become party to the conventions.

The 1969 Civil Liability Convention governs the liability of shipowners for oil pollution damage and imposes the principle of strict liability for shipowners. It also stipulates that shipowners must maintain compulsory liability insurance which guarantees the existence of a limited fund from which claims can be made against shipowners causing pollution in member states.

The 1971 Fund Convention established the International Oil

¹ The International Convention for the Prevention of Pollution from Ships 1973, and its Protocol 1978 which came into force on 2nd October 1983.

²For an analysis of MARPOL 73/78 see Brubaker *Marine Pollution and International Law Principles and Practice* 1st ed. (1993) pp 122-129.

Pollution Compensation Fund (IOPC Fund) which is made up of monetary contributions from oil importers in member states. The function of the IOPC Fund is to provide supplementary compensation to claimants who have suffered oil pollution damage in Fund Member States but have not obtained full compensation in terms of the limited compensation available under the Civil Liability Convention. Although the tanker and oil importing industries which are directly affected by these conventions were consulted when the conventions were developed, the regimes essentially were forced upon both arms of the industry by the governments of contracting states. It must be emphasised that these conventions are not applicable world-wide but apply only in the territory of party states. Furthermore, not all states party to the Civil Liability Convention are party to the Fund Convention.

3.2.2.2 Voluntary agreements

Broadly there are two voluntary agreements; the Tanker Owners Voluntary Agreement concerning Liability for Oil Pollution, (TOVALOP), and, the Contract Regarding a Supplement to Tanker Liability for Oil Pollution, (CRISTAL). TOVALOP came into effect on 6th October, 1969, and has since then periodically undergone amendment including the very important TOVALOP Supplement (TS) which came into effect on the 20th February, 1987. CRISTAL has been in force since the 1st April, 1971. Like the TOVALOP Agreement, the CRISTAL Contract has been amended from time to time. By contrast the Civil Liability Convention entered into force on the 19th June, 1975, and the Fund Convention on the 16th October, 1978.

The two voluntary schemes were originally developed at the independent initiative of the tanker, and oil importing industries, to provide an "acceptable" interim compensation system until the time that the Conventions could provide satisfactory compensation. Significantly, the voluntary regimes continue to provide compensation to victims of oil pollution

damage in states which have not contracted to the Civil Liability or Fund Conventions and in certain circumstances even provide additional relief where the Conventions apply. ✓

In effect the voluntary regimes complement the framework of compensation implemented through the Civil Liability and Fund Conventions. Accordingly, the voluntary regimes closely resemble the two tiered system of compensation adopted by the Conventions. In general TOVALOP corresponds to the Civil Liability Convention, and CRISTAL corresponds to the Fund Convention.

3.2.3 Civil / Criminal penalties

Most states impose criminal liability for negligent discharges of oil but no standard approach exists, either to fines or the circumstances in which such fines should be imposed. By contrast, civil liability is the quantum of compensation that is assessed against parties responsible for oil pollution damage. The Civil Liability Convention and the Fund Convention are conventions in the field of private civil law adopted by various states for the purpose of providing compensation to various victims of pollution damage in those territories. By contrast the U.S. Federal Oil Pollution Act of 1990 simultaneously regulates the civil liability and the imposition of criminal sanctions for oil pollution damage.

3.2.4 Tankers / other ships

As yet there is no internationally agreed system of liability for oil spills from dry cargo ships but most coastal states impose liabilities on such vessels under municipal legislation. As described above, various compensation regimes have been developed pertaining to oil tankers. In many ways these regimes are unique and in order to understand the concepts behind such instruments it is necessary to trace their history over the last twenty seven years including the circumstances leading up to the development of those instruments.

3.2.5 Operational / traumatic spills

Operational discharges of oil into the sea include the discharge of oil and water mixtures from ballast tanks or oil discharged during tank cleaning operations. Operational discharges, which are usually intentional, account for a high percentage of the total oil pollution from ships. In most instances operational discharges cause low intensity pollution and as such do not usually give rise to claims for oil pollution damage. Traumatic or accidental oil spills often lead to large amounts of oil escaping into the sea and wide-spread pollution. As a result, claims for oil pollution damage can be considerable. In light of the above observation it is natural that this work will, in the main, focus on compensation arrangements for traumatic oil spills.

3.3 The beginnings of oil pollution regulation

This analysis deals, firstly, with attempts by governments prior to 1969 to control the problem of tanker-source oil pollution and, secondly, the difficulties which confronted claimants attempting to recover damages from shipowners in the *Inverpool* and *Torrey Canyon* cases.

3.3.1 Initial intergovernmental responses to oil pollution

After the Second World War there were calls for control over marine oil pollution in the face of a world wide explosion in the demand for oil.³ The increased demand for oil had also resulted in problems in supply and tanker shortages. For example, in early 1948 the tanker shortage was exacerbated after several tankers broke in half while at sea and the U.S. Coast Guard ordered 288

³Yergin *The Prize* (1991) at 410 makes the following observation:

'In 1945, 26 million cars were in service in the United States, by 1950 this figure had risen to 40 million. Gasoline consumption in the United States was 42 percent higher in 1950 than they had been in 1945.'

tankers laid up for emergency reinforcing.⁴

As greater quantities of oil were being transported by sea in increasingly large tankers⁵ this increased the risk of serious oil pollution. Those responsible for the transport of oil in tankers realized that international co-operation was required if such incidents as described above were to be prevented. In 1948, the United Nations established the Intergovernmental Maritime Consultative Organization (IMCO). This arm of the United Nations was established by the Convention on the Intergovernmental Maritime Consultative Organization, dated the 6th March, 1948.⁶ The task of IMCO was to facilitate co-operation among countries in the field of shipping safety, including the prevention and control of maritime pollution from ships and other craft.⁷ The first international convention to limit marine pollution was the 1954 International Convention for the Prevention of Pollution of the Sea by Oil.⁸ The 1954 Convention's primary concern is with the deliberate discharge of oil in the course of tank-cleaning operations at sea and does not address the problem of oil pollution caused by maritime casualties.⁹

3.3.2 The Inverpool spill

In 1956 there occurred the English case of *Esso Petroleum Co.*

⁴Yergin, *op cit* 410.

⁵For a brief analysis of the evolution of tankers which culminated in the development of the supertanker see Annexure One.

⁶This Convention came into force in 1958 and IMCO officially came into existence.

⁷See Article 1 of the IMCO Convention.

⁸This Convention came into force in 1958 after ratification by 11 states.

⁹Articles III.2 and VIII.

Ltd. v. Southport Corporation.¹⁰ On the 3rd December, 1950, a 680 gross ton estuarial oil tanker called the *Inverpool* was proceeding into the River Ribble in North West England when the vessel struck a revetment wall and stranded. The master of the *Inverpool* deliberately jettisoned about 400 tons of heavy cargo oil into the Ribble estuary. This action was ostensibly in order to lighten, refloat and thereby prevent the vessel from breaking up. The discharged oil was carried to shore by the action of the wind and tide onto the premises of Southport Corporation, which was put to considerable expense in cleaning their premises of oil and sought to recover their expenses from the owners and master of the *Inverpool*.¹¹ The pollution damage which occurred and the unsuccessful attempts by claimants to recover clean up costs revealed a serious gap in the English common law's ability to provide a remedy for this unprecedented type of damage.

Common law consists of a country's laws built up from customs and usages which have been accepted by its courts and as such given the force of law. Under the common law of England as it then was, it proved extremely difficult to establish the tortious liability of shipowners for this type of damage. One writer suggests that '... the law which worked so well with contracts and insurance had little flexibility to meet new concerns about pollution.'¹² This view is difficult to refute when the law associated with the shipowners right to limit liability is considered in relation to the 1967 *Torrey Canyon* accident. It was clear that many legal doctrines had evolved in an age that lacked any conception of the supertanker and its consequences. They were, to that extent, inadequate for contemporary needs.

¹⁰*Esso Petroleum Co. Ltd. v. Southport Corporation*, [1956] A.C. 218, [1956] 2 W.L.R. 81, [1955] 3 All E.R. 864 H.L., [1955] 2 Lloyd's Rep. 655 H.L.

¹¹*Esso Petroleum Co. Ltd. v. Southport Corporation* [1956] AC 218, 220.

¹²White-Harvey 'Black Tide at the Convergence of Admiralty and Environmental Law' (1991) 1 *Journal of Environmental Law and Practice* 259 at 261.

In the case at hand, it was necessary for the Southport Corporation to proceed under the English common law of tort because at that time the only English legislation on the subject of oil pollution was the Oil in Navigable Waters Act, 1922, which applied to criminal matters only and therefore had no direct bearing on the question of liability.¹³ Accordingly the Southport Corporation proceeded against the shipowners and the master in an action based on trespass, nuisance and negligence. Generally speaking, as a cause of action under English common law, trespass was available only to occupiers of land where there has been some direct, physical interference with property. The weight of authority would seem to support the view that the interference must be direct. Where the interference is consequential then nuisance, which is a wider remedy than trespass, is the appropriate cause of action.¹⁴ In the court of first instance Devlin J, as he then was, favoured a wide interpretation of the notion of directness and held that the Southport Corporation had a good cause of action in trespass or nuisance, subject, however, to certain special defences.¹⁵ The difficulty in successfully invoking trespass and nuisance is that these remedies are subject to special defences, the first of which is the so-called 'traffic rule'. Devlin J. began by pointing out that under the 'traffic rule':

'... it is well established that persons whose property adjoins the highway cannot complain of damage done by persons using the highway unless it is done negligently: *Goodwyn (Goodwin) v. Cheveley*,¹⁶ *Tillet v. Ward*¹⁷ and

¹³*Esso Petroleum Co. Ltd. v. Southport Corporation* [1956] AC 218, 227.

¹⁴*Abecassis & Jarashow, Oil Pollution from Ships: International, United Kingdom and United States Law and Practice* 2nd ed. (1985) 358.

¹⁵*Esso Petroleum Co. Ltd. v. Southport Corporation*, [1956] A.C. 218 at 225.

¹⁶(1859) 28 L.J.Ex. 298.

*Gayler & Pope Ltd. v. B. Davies & Son Ltd.*¹⁸

Devlin J. then drew an analogy between traffic on land and traffic at sea, citing two *obiter dicta* of Lord Blackburn in support of this view. In *Fletcher v. Rylands*¹⁹ Blackburn J. said:

'Traffic on the highways, whether by land or sea, cannot be conducted without exposing those whose persons or property are near it to some inevitable risk; and that being so, those who go on the highway, or have their property adjacent to it, may well be held to do so subject to their taking upon themselves the risk of injury from that inevitable danger.'

Blackburn J. then went on to say that such persons could not recover '... without proof of want of care or skill occasioning the accident.'

In a subsequent decision in *River Wear Commissioners v. Adamson*²⁰ Lord Blackburn said:

'My Lords, the common law is, I think, as follows:- property adjoining to a spot on which the public have a right to carry on traffic is liable to be injured by that traffic. In this respect there is no difference between a shop, the railings or windows of which may be broken by the carriage on the road, and the pier adjoining to a harbour or a navigable river or the sea, which is liable to be injured by a ship. In either case the owner of the injured property must bear his own loss, unless he can establish

¹⁷(1882) 10 Q.B.D. 17.

¹⁸[1924] 2 K.B. 75; 40 T.L.R. 591.

¹⁹(1866) L.R. 1 Ex. 265 at 286.

²⁰(1877) 2 App. Cas. 743 at 767.

that some other person is in fault, and liable to make it good.'

The analogy between traffic on land and traffic at sea was accepted by Morris L.J.²¹ and Lord Tucker.²² Furthermore the owners of the *Inverpool* were able to invoke the defence of necessity in that the discharge of oil was justified to save life. The answer to either the 'traffic rule' or the defence of necessity was if the Southport Corporation could establish that the predicament in which the ship found herself was due to her own negligence.²³ Accordingly, the success of the action brought by the Southport Corporation depended on their ability to establish negligence. A claimant was required to prove that the shipowner or the master had caused the oil spill negligently, that the shipowner or the master owed a duty of care to the claimant, which he had failed to discharge, and that such failure was linked causally to the resulting damage. The burden of proof was on the plaintiff (the Southport Corporation) to establish negligence. The plaintiffs' efforts had all been directed at showing that the Master of the *Inverpool* had been negligent but the trial judge, Devlin J. held the plaintiff had not proved their case. Therefore Devlin J. concluded that the shipowners were not negligent as alleged in the statement of claim and that Southport Corporation was not entitled to succeed either in trespass, nuisance or negligence. Although the Court of Appeal set aside the decision of Devlin J. and found in favour of the Southport Corporation, the House of Lords reversed the decision of the Court of Appeal in favour of the reasoning of Devlin J. In this way the law in England was established that coastal landowners had to accept inevitable hazards from marine traffic, including oil pollution, and could not sustain an action without proof of fault.

²¹[1954] 2 Q.B. 182 at pp. 203-204.

²²[1956] A.C. 218 at pp. 244-245.

²³*Esso Petroleum Co. Ltd. v. Southport Corporation*, [1956] A.C. 218 at 228.

This construction in English common law was endorsed in *The Wagon Mound*.²⁴ This judgement arose from an appeal from the Supreme Court of New South Wales to the Privy Council. The Privy Council had to determine liability for damage caused by fire to the respondent's wharf. The facts were as follows:

'While an oil-burning vessel, of which the appellants were the charterers, was taking in bunkering oil in Sydney Harbour a large quantity of the oil was, through the carelessness of the appellants' servants, allowed to spill into the harbour. During that and the following day the escaped furnace oil was carried by wind and tide beneath a wharf owned by the respondents, shipbuilders and ship repairers, at which was lying a vessel which they were refitting, and for which purpose their employees were using electric and oxyacetylene welding equipment. Some cotton waste or rag on a piece of debris floating on the oil underneath the wharf was set on fire by molten metal falling from the wharf, and the flames from the cotton waste or rag set the floating oil afire either directly or by first setting fire to a wooden pile coated with oil and thereafter a conflagration developed which seriously damaged the wharf and equipment on it.'²⁵

Viscount Simons stated that:

'It is no doubt, proper when considering tortious liability for negligence to analyse its elements and to say that the plaintiff must prove a duty owed to him by the defendant, a breach of that duty by the defendant, and consequential damage.'²⁶

²⁴*Overseas Tankship (U.K.) Ltd. v. Morts Dock & Engineering Co. Ltd. (The Wagon Mound)* [1961] A.C. 388 (P.C.), hereinafter *The Wagon Mound*.

²⁵*The Wagon Mound* [1961] A.C. 388 (P.C.) at 389.

²⁶*The Wagon Mound* [1961] A.C. 388 (P.C.) at 425.

As to whether or not the damage was the direct result of the escape of oil the Privy Council applied the foreseeability test. Viscount Simonds declared that '... the essential factor in determining liability is whether the damage is of such a kind as the reasonable man should have foreseen.'²⁷ This question was determined on what the engineer of *The Wagon Mound* could foresee as likely to result from the bunker spillage. Accordingly the appellants were not held liable for the damage as it was determined that they could not reasonably have been expected to have known that the oil would catch fire.²⁸ By contrast in *The Wagon Mound (No.2)*²⁹ a ship damaged by the same fire was successful in its claim for damages because the plaintiff was able to show that the fire was foreseeable as officers on board *The Wagon Mound* had testified that they believed that the oil could be ignited, although with some difficulty.

Nonetheless certain developments in English common law before the *Torrey Canyon* accident had occurred illustrate the beginning of an evolution away from the traditional fault oriented rule. In *Rylands v. Fletcher*³⁰ the House of Lords held a person 'strictly liable' for damage caused by the escape of harmful materials from an 'extra-hazardous activity.' M'Gonigle and Zacher argue that:

'Considering the damage caused by massive releases of crude oil, it was reasonable that the transportation of such oil should be considered such an extrahazardous activity.'³¹

The correctness of this view can only be established by actual litigation. Nevertheless this untested hypothesis is of

²⁷*The Wagon Mound* [1961] A.C. 388 (P.C.) at 426.

²⁸*The Wagon Mound* [1961] A.C. 388 (P.C.) at 389.

²⁹*Overseas Tankship (U.K.) Ltd. v. The Miller Steamship Co. Pty. (The Wagon Mound (No.2))* [1967] 1 A.C. 617.

³⁰(1968) L.R. 3 (H.L.) 330.

³¹M'Gonigle & Zacher *Pollution, Politics and International Law: Tankers at Sea* (1979) 151.

considerable importance in respect of vessels transporting hazardous or noxious cargoes in jurisdictions applying English law where the provisions of the Civil Liability and Fund Conventions and the voluntary compensation are not applicable. This may be the case in a variety of circumstances, the most obvious being where the spill emanates from a vessel which is not a tanker. Where the Conventions or other statutory provisions do not apply, claimants in such countries may be required to invoke the English common law which may include the above argument.³²

The common law remains of considerable importance because spills from vessels other than tankers can give rise to large claims. For example, the discharges of bunker oil from the *Kowloon Bridge* incident in Ireland and the incident involving the bulk carrier *Mercantil Maricah* gave rise to clean-up costs estimated at US\$2,9 million.³³ In 1989 the Brazilian bulk carrier *Mercantil Maricah* spilled hundreds of tonnes of fuel oil into the inshore waters of Sognefjord north of the Norwegian port of Bergen.³⁴ In January 1992 the ore carrier *Arisan*, which was in a very poor condition, went aground on the island of Runde which is a noted breeding ground for seabirds off mid-Norway. The Norwegian Government spent almost NOK50 million responding to this incident. In this instance it was clear who was responsible for the incident and because the shipowner had adequate liability insurance the Norwegian Government was able to recover most of their clean-up costs.³⁵

In relation to oil pollution claims arising from the

³²Where the common law applies in the United Kingdom, the cost of reasonable preventive measures taken against persistent oil pollution from ships is recoverable in terms of s. 15 of the Merchant Shipping (Oil Pollution) Act 1971.

³³*Lloyd's List* 4.11.89.

³⁴'The thick black line' *New Scientist* vol.137 No.1858 30 January 1993 at 24.

³⁵L.H. Halvorsen 'Norway tightens green controls' June 1993 *Statoil* at 14-15.

transportation of oil, the Torrey Canyon accident and the subsequent development of the two liability Conventions and the voluntary compensation regimes diminished the relative importance of the common law. However, the ordinary rules of remoteness and causation of damage must always be invoked to determine the scope of compensation available under the conventions and the voluntary regimes because a wide variety of harm may conceivably be attributed to oil pollution.³⁶

3.3.3 Watershed 'Torrey Canyon' spill

It was only in the wake of the Torrey Canyon disaster that an international effort was made to develop certain mechanisms which would facilitate more equitable compensation following oil pollution accidents. The Torrey Canyon, which ran aground some distance out to sea off the southwest coast of England on 18th March, 1967, was the first tanker accident to 'sensationalize' through the media the harmful effects of oil pollution in the eyes of the world. The inability of the legal process to bring about equitable compensation to those who suffered damage in the ensuing oil spill also became apparent.

'In every respect whether scientific, ecological or legal, the Torrey Canyon disaster caught the maritime world completely unprepared. ... Damage claims in Great Britain amounted to 6,000,000 pounds and 40,000,000 francs in France. Most of these claims found no settlement.'³⁷

The position of the wreck was not within British Territorial

³⁶Gibson 'Oil Pollution and Common Law' [1979] *Lloyd's Maritime and Commercial LQ* 498 at 499.

³⁷Gold *Handbook on Marine Pollution* (Norway: Assurance - Foreningen GARD, 1985) 24; For a full account of the demise of the Torrey Canyon, see Keeton 'The lessons of the Torrey Canyon: English law aspects' (1968) 21 *Current Legal Problems* pp.94-112 and Brown 'The lessons of the Torrey Canyon: international law aspects' (1968) 21 *Current Legal Problems* pp.113-116.

Waters but on the High Seas, also referred to as International Waters. Under international treaty law, a coastal state could only intervene with certainty where an accident had occurred within its territorial waters as this portion of surrounding sea was deemed to be an area of full coastal state sovereignty, subject to the right of innocent passage and standard rules of reasonable conduct.³⁸ A further precept of international law maintained that while on international waters ships possess the same sovereign status and protection as the state in which the vessel is registered.³⁹ Article of the 1958 Geneva Convention of the High Seas articulated the principle that: ✓

'The High seas being open to all nations, no State may validly purport to subject any part of them to its sovereignty. Freedom of the high seas is exercised ... by all States.'

Therefore the ability of coastal states to legally interfere with the sovereignty of vessels upon international waters was far from clear under international treaty law.⁴⁰

Customary international law presented another way through which the legality of the right to intervene on the high seas in cases of threatened oil pollution could be established. Considerable authority exists which gives credence to the view that the right to intervention where it is absolutely necessary to do so, was well established in international customary law. The *locus classicus* on the subject is the United States Supreme Court decision in *Church v. Hubbard* where Chief Justice Marshall held that the seizure of an illegal trading ship on the high seas was a legitimate exercise of a sovereign state's right to use the

³⁸Geneva Convention on the Territorial Sea and Contiguous Zone, Article 1.1 and 17.

³⁹M'Gonigle & Zacher, *op cit*, pp 144-147.

⁴⁰M'Gonigle & Zacher, *op cit*, 148; Abecassis & Jarashow, *op cit*, pp.119-120 para.6-13.

means necessary for its protection.⁴¹ The most authoritative commentators agree that intervention, as in the case of the *Torrey Canyon*, was justified under international common law as the danger posed was imminent, the rights or interests threatened were substantial and the measures taken were proportionate to the threat.⁴² It would also seem that this right would extend to cases where the threatened danger is brought about by the force of nature.⁴³ Therefore the bombing of the Liberian registered *Torrey Canyon* by the Royal Air Force in an attempt to burn the oil remaining in her tanks almost certainly did not constitute an act of international "piracy" as was suggested at the time.

Clearly, coastal states required certainty in respect of their right to legally intervene where a marine casualty, beyond their territorial limits, nonetheless threatens the well-being of that state. This right of intervention was subsequently provided for by the International Convention Relating to the Intervention on the High Seas in Cases of Oil Pollution Casualties, 1969.⁴⁴ The

⁴¹*Church v. Hubbard* (1804) 6 U.S. (2 Crank) 187, pp 234-235.

⁴²M'Gonigle & Zacher, *op cit*, 148-149 citing Goldie 'Principles of Responsibility in International Law' *Hearings*, Subcommittee on Air and Water Pollution of the United States Senate Committee on Public Works, 91st Congress, 2nd Session, July 21 and 22, 1970, p.99 and also O'Connell 'Reflections on Brussels, IMCO, and the 1969 Pollution Conventions' (1970) 3 *Cornell International Law Journal* 1; Abecassis & Jarashow, *op cit*, pp.116-118 especially at para.6-09 citing Oppenheim *International Law* (1955) 8th ed. 298.

⁴³*Ibid.* L. Oppenheim *International Law* (1955) 8th ed. 298, fn. 3.

⁴⁴International Convention Relating to the Intervention on the High Seas in Cases of Oil Pollution Casualties, done at Brussels 29 November, 1969. The Convention entered into force on 6th May, 1975. Significantly the United States which seldom elects to ratify international maritime conventions did ratify the Intervention Convention. The Convention entered into force for the United States on 6 May, 1975, 26 U.S.T. 765, T.I.A.S. No.8068 see Paulsen 'Why the United States should ratify the 1984 Protocols to the International Conventions on Civil Liability for Oil Pollution Damage (1969) and the Establishment of an International Fund for Compensation for

essence of this Convention is encapsulated in Article I.1 which provides that:

'Parties to the present Convention may take such measures on the high seas as may be necessary to prevent, mitigate or eliminate grave and imminent danger to their coastline or related interests from pollution or threat of pollution of the sea by oil, following upon a maritime casualty, which may be expected to result in major harmful consequences.'

The above provision closely reflects the criteria for intervention which had previously been determined by international customary law. Clearly, the Intervention Convention requires a relatively severe threat of damage to the environment.⁴⁵ Intervention is justified only where a 'grave and imminent danger' is posed 'which may be expected to result in major harmful consequences'. Significantly, the Convention permits states to undertake pure threat removal measures where a danger is posed but no oil has in fact yet been discharged. A 'maritime casualty' for the purpose of the Intervention Convention is defined as 'a collision of ships, stranding or other incident of navigation, or other occurrence on board a ship or external to it resulting in material damage or imminent threat to a ship or cargo.'⁴⁶ The Convention is of considerable importance because it added certainty to the right of intervention and clarified the circumstances under which such intervention was justifiable. A feature of the Intervention Convention which must not be overlooked and which is significant in the context of liability for oil pollution is that where measures are taken in contravention of the provisions of the

Oil Pollution Damage (1971)' (1984/85) 20 *The Forum* 164 at 164-165.

⁴⁵Springer *The International Law of Pollution: Protecting the Global Environment in a World of Sovereign States* (1983) 71.

⁴⁶Intervention Convention, Article II.1.

Convention the coastal state is obliged to pay the injured party compensation for damage caused by such actions.⁴⁷ This would be the case where unreasonable or excessive action is taken which is not justifiable in the circumstances.

The 1969 Civil Liability and 1971 Fund Conventions which will later be discussed in detail were devised shortly after the Intervention Convention. The International Convention for the Prevention of Pollution from Ships, 1973, and the International Convention on Safety of Life at Sea, 1974 were also implemented largely as a result of the *Torrey Canyon* incident.

With hindsight, the final destruction of the *Torrey Canyon* by the British Government in an attempt to mitigate pollution damage, was probably counter productive, in that it allowed significant amounts of oil which may have remained in the tanks of the stricken tanker to escape into the sea. Furthermore, despite the accuracy of the bombing, it is believed only a small proportion of the oil was in fact burned away. The possibility therefore existed that the tanker owner might have been able to contend that the damage caused by the spill had been exacerbated by what some had considered to be the illegal intervention of the U.K. Government in ordering the bombing of the *Torrey Canyon*.⁴⁸

3.3.3.1 Problems exacting liability

Not only were claimants in the *Torrey Canyon* case faced with the task of establishing *locus standi*; which is the legal capacity, or standing, to bring an action, but they also had to establish

⁴⁷Intervention Convention, Article VI.

⁴⁸It must be borne in mind that the aerial bombing of the *Torrey Canyon* was not the only attempt undertaken to mitigate the harmful effects caused by the wreck. Salvage operations were undertaken almost immediately after the grounding but enjoyed no success. In the course of one such salvage operation a salvor lost his life when a cloud of gas on the *Torrey Canyon* exploded.

jurisdiction,⁴⁹ and ascertain the correct party against which to bring the action. At the time of the stranding, the registered owner of the *Torrey Canyon* was Barracuda Tanker Corporation, but the ship was under a twenty year time charter to the Union Oil Company of California (UNOCAL). Barracuda Tanker Corporation was a wholly owned subsidiary of UNOCAL. The crude oil she was carrying had been shipped by British Petroleum Trading, Ltd. under a voyage charter from UNOCAL, with freight payable at destination.⁵⁰ A voyage charter describes a contractual arrangement whereby a ship is leased to the charterer for the duration of a single voyage. The shipowner provides the crew and supervises the operation of that ship while it transports the cargo for the charterer to a specified destination. This arrangement is roughly analogous to the hire of a taxi to go from one place to another. Although many different meanings are sometimes attributed to the term 'freight' it is generally understood to refer to the price charged for the successful transportation of goods by a ship from one place to another.⁵¹

3.3.3.2 Action *in rem*

Under general maritime law the negligent discharge of oil from a ship is a maritime tort for which the ship is liable *in rem* and her owner *in personam* for damage caused. The Government of the United Kingdom firstly proceeded against the Barracuda Tanker Corporation by way of the action *in rem*. This is a procedure, unique to maritime law, whereby claimants, upon showing good cause, are sometimes able to have the offending vessel, or a

⁴⁹As the wreck giving rise to the pollution was on international waters, this presented uncertainty as to whether jurisdiction could be established in the countries where the damage was done; France and England.

⁵⁰A summary of the charter and corporate (real and dummy) arrangement under which the *Torrey Canyon* was operating at the time of the accident, is contained in *Gilmore & Black, The Law of Admiralty* 2nd ed. (1975) 841-42.

⁵¹*Stroud's Judicial Dictionary* 5th ed. Vol.2 D-H (1972) at 1111.

'sister-ship' of the offending vessel arrested to obtain prejudgment security. 'Sister-ships', which are sometimes referred to as 'associated ships', are vessels effectively owned by the same company or corporation as the offending vessel. The owners of the arrested vessel are required to lodge sufficient security to guarantee or cover the claims brought against them to effect the arrested vessel's release. If the owners are unable to provide satisfactory security, or decline to do so, the ship usually remains under arrest until the conclusion of the action, and may be sold to satisfy any claims which succeed against it. Such recalcitrance is unusual and in most instances the owner, or the vessel's Protection & Indemnity Club (P&I Club), provide prejudgment security and effect the vessel's release.

The action *in rem* offers another advantage to claimants. Where the claim is against a foreign defendant, which is often the case, the action *in rem* enables claimants to circumvent difficulties associated with establishing jurisdiction in a foreign forum or attempting to obtain a foreign defendant's submission to the jurisdiction where the damage was done. All that is required is that the guilty ship or a 'sister ship' of that ship be arrested.⁵²

The *Torrey Canyon* was a total loss and as such could not be arrested; however, two sister ships, the *Lake Palourde* and the *Sansinena* could be arrested. Four months after the accident, the *Lake Palourde* was arrested in Singapore by the U.K. Government. The arrest continued until the shipowner had deposited £3 million security to meet the United Kingdom claims against the *Torrey Canyon*.⁵³ Nine months later, in April 1968, the *Lake Palourde* was again arrested, this time in Rotterdam by the French

⁵²Staniland 'Towards a New Right and Remedy for Marine Pollution' (1989) 1 *Marine Policy Reports* 151 at 152.

⁵³Barker 'Hazardous goods at sea' (1992) 16 *Marine Policy* 306 pp.317-318.

Government to attain security for French claims.⁵⁴ Unfortunately the *Sansinena* was destined to perpetuate the ill fated legacy of her sister the *Torrey Canyon* when in December 1976 she was totally destroyed by an explosion and fire in Los Angeles harbour. Nine people lost their lives in this particular accident.⁵⁵

3.3.3.3 Limited liability

The admiralty action in rem provides powerful (and, it may also be said, unique) advantages for claimants against shipowners. On the other hand, certain principles of admiralty law had evolved to protect shipowners. The most powerful of these protective measures were the laws which insulated shipowners from the consequences of unlimited liability. In the United States at the time of the *Torrey Canyon* incident a shipowner was entitled to invoke his right to limit his liability to an amount not exceeding his interest in the vessel at the conclusion of the casualty voyage and any freight then pending. Because very high claims stemmed from the stranding of the *Torrey Canyon* the owners naturally attempted to invoke the protection afforded to them by the right to limit. At the time of the *Torrey Canyon* incident the shipowner was able to limit liability under maritime law, provided that the loss, damage or injury was sustained without the privity or knowledge of the owner. The rationale behind the philosophy of limitation in maritime law was to encourage the development of the shipping industry by assuring that the maritime entrepreneur's risks would not exceed the amount of his investment. In this way the development of a merchant navy would be encouraged. It has been noted that the right to limit liability in United States admiralty law in terms of the 1851 Limitation Act⁵⁶ '... was intended to promote investment in the

⁵⁴M'Gonigle & Zacher, *op cit*, 150.

⁵⁵M'Gonigle & Zacher, *op cit*, pp126-128.

⁵⁶Act of March 3, 1851; 9 Stat. 635; 46 USC § 181-189 (1988).

American shipping industry by making the American industry competitive with that of Great Britain.'⁵⁷

3.3.3.4 Limited liability: the 'Torrey Canyon' case

The United Kingdom and France followed the provisions of the 1957 Convention on Limitation of Liability (1957 Brussels Convention).⁵⁸ The Brussels Convention required the owner of a vessel to maintain a fund not in excess of 1,000 gold francs, roughly equivalent to US\$67 per adjusted gross ton of the vessel causing the damage.⁵⁹ On this basis, the limitation of liability for the *Torrey Canyon* amounted to approximately US\$4,75 million.⁶⁰ Clearly the application of the 1957 Brussels Convention was unsatisfactory in the case of the *Torrey Canyon* because it provided inappropriate levels of compensation. This is because the Convention was primarily designed to adjust costs between shipowner and cargo owner in the event of damage to goods carried at sea and did not anticipate compensation to third parties suffering massive losses due to a major oil spill.⁶¹

The 1957 Brussels Convention provided that any damages in excess

⁵⁷*In re: The Glacier Bay* 448 AMC per Charles Wiggins, Ct.J. at 450 see further *Just v. Chambers*, 312 U.S. 382, 385, 1941 AMC 430, 432 (1941); *University of Tex. Medical Branch v. United States*, 1977 AMC 2607, 2628-29, 557 F.2d 438, 454 (5 Cir. 1977), cert. denied, 439 U.S. 820, 1979 AMC 2019 (1978).

⁵⁸International Convention relating to the Limitation of the Liability of Owners of Sea-going Ships, 10 October, 1957, reprinted in *Benedict on Admiralty* Vol.3 (7th Rev. ed., 1983) 5.11 or 1957 A.M.C. 1972. Significantly for claimants in the *Torrey Canyon* litigation the United States never signed this convention.

⁵⁹International Convention relating to the Limitation of the Liability of Owners of Sea-going Ships 1957, Article 3.1 (a).

⁶⁰M'Gonigle & Zacher, *op cit*, 153.

⁶¹Rosenthal & Raper 'Amoco Cadiz and Limitation of Liability for Oil Spill Pollution: Domestic and International Solutions' (1985) 5 *Virginia Journal of Natural Resources Law* 259 at 278.

of that liability cap are borne by the damaged parties.⁶² However, the owner will not be able to limit liability where it is found that the '... occurrence giving rise to the claim resulted from the actual fault or privity of the owner ...'.⁶³ The interpretation of the phrase 'actual fault or privity' is fundamental to the outcome of limitation proceedings. As long ago as 1894 under s 503 of the Merchant Shipping Act 1894, up until the 1st December, 1986, the 'actual fault or privity' test had applied in England where shipowners invoked their right to limitation.⁶⁴ In 1958 the Merchant Shipping (Liability of Shipowners and Others) Act 1958 followed and enlarged upon the 1957 Brussels Convention and amended s 503 to the Merchant Shipping Act of 1894 but the 'actual fault or privity' test remained the same. However, the Convention on Limitation of Liability for Maritime Claims (LLMC 1976) done at London, on the 19th November, 1976, entered into force on the 1st December, 1986. The United Kingdom had ratified LLMC 1976 on the 31st January, 1980. Accordingly, as of entering force, the LLMC 1976 brought into application a revised test for owners limitation in the United Kingdom. The revised test makes it easier for the shipowner to successfully invoke the right to limit and was also incorporated into the 1984 and 1992 Protocols to the 1969 Civil Liability Convention. Nevertheless the construction of the former 'actual fault or privity' test continues to be of crucial importance in oil pollution cases as it remains the relevant test for limitation under the 1969 Civil Liability Convention.

An important aspect of the present application of this test by the English courts within a corporate structure is that fault or

⁶²*Id.*

⁶³International Convention relating to the Limitation of the Liability of owners of Sea-going Ships, 10 October, 1957 Article I.1, *reprinted in Benedict on Admiralty* (7th Rev. ed., 1983) 5.11 or 1957 A.M.C. 1972.

⁶⁴Browne 'Oil Pollution Damage Compensation under the Civil Liability Convention 1969' in McLean (ed) *Compensation for Damage: An International Perspective* (1993) pp.137-164 at 144.

privity need not attach to the owner himself for it to be legally imputed to him. On the other hand the fault of anyone in the employ of the shipowning company shall not necessarily suffice. In the words of Buckley L.J. in *Asiatic Petroleum Co. Ltd. v. Lennards Carrying Co. Ltd.*:⁶⁵

'... the words "actual fault or privity" in my judgement infer something personal to the owner, something blameworthy in him as distinguished from constructive fault or privity such as the fault or privity of his servants or agents. But the words "actual fault" are not confined to affirmative or positive acts by way of fault. If the owner be guilty of an act or omission to do something which he ought to have done, he is no less guilty of an actual fault than if the act had been one of commission. To avail himself of the statutory defence, he must shew that he himself is not blameworthy for having either done or omitted to do something or been privy to something. It is not necessary to shew knowledge. If he has means of knowledge which he ought to have used and does not avail himself of them, his omission so to do may be a fault, and, if so, it is an actual fault and he cannot claim the protection of the section ...'⁶⁶

In the case of a corporation, some person (or persons), being the equivalent of the owner has to be found at fault. In English law one has to look to the 'alter ego' or the 'directing mind and will' of the company such as a person on the Board of Directors or in senior management of the company.⁶⁷

The registered owner of the *Torrey Canyon*, Barracuda Tanker Corporation, and the original charterer, UNOCAL, jointly

⁶⁵ [1914] 1 K.B. 419.

⁶⁶ [1914] K.B. 419 at 432.

⁶⁷ *Lennards Carrying Co. Ltd. v. Asiatic Petroleum Co. Ltd.* [1915] A.C. 705, 713, 715.

instituted limitation of liability proceedings in the United States.⁶⁸ This application focused on the question as to whether UNOCAL (the charterer of the *Torrey Canyon*) could in any way be construed as an owner or demise charterer of the *Torrey Canyon*. This was important because, as noted earlier, in the United States under the 1851 Limitation of Liability Act,⁶⁹ owners were then entitled to limit their liability to the value of the ship and cargo after the accident and freight then pending, unless there is a finding of either negligence by the shipowner or of negligent acts performed 'with[in] the privity or knowledge of such owner.'⁷⁰ This protection is also extended to demise charterers.⁷¹ In the case of a demise charter (sometimes referred to as a bareboat charter) the owner yields complete control of the ship to the charterer. The charterer is effectively put in the same position as the owner of a ship and must procure the goods and services necessary to man, victual and navigate the ship.⁷²

It was established that Barracuda Tanker Corporation, as owner of the tanker, was entitled to limit liability under the United States Limitation of Liability Act to US\$48, which was the value of a single lifeboat salvaged from the wreck. This finding in favour of Barracuda Tanker Corporation applied in the

⁶⁸*In the matter of Barracuda Tanker Co., as owner of the "S.S. Torrey Canyon", and Union Oil Co. of California, for exoneration from or limitation of liability.* 1968 A.M.C. 1711 reported also at 281 F. Supp. 228 (S.N.D.Y. 1968).

⁶⁹Act of March 3, 1851; 9 Stat. 635; 46 USC § 181-189 (1988) since the passing of the Oil Pollution Act on 18th August, 1991 the 1851 Act no longer applies to claims for oil pollution damage. In non-oil pollution claims the 1851 Act still applies in principle.

⁷⁰46 USC app. § 183 (a) (1988).

⁷¹46 USC app. § 186 (1988) extends the right of limitation to 'the charterer of any vessel, in case he shall man, victual, and navigate such vessel at his own expense, or by his own procurement.'

⁷²1968 A.M.C. 1714.

jurisdiction of the United States. Government claimants of France and the United Kingdom, who had previously taken action against Barracuda Tanker Corporation in separate proceedings instituted in Singapore, the Netherlands and Bermuda, did not contest this decision regarding Barracuda Tanker Corporation.

However the presiding judge Metzner D.J. concluded, also, that UNOCAL, the original charterer, probably would be entitled to limit its liability. The judge considered well founded precedent which favoured a broad interpretation of the term "owner" in section 183 of the 1851 Act.⁷³ Benedict summarises the United States authorities by saying that ownership '... inheres in the party or group by whom, or for whom, the legal title is held.'⁷⁴ For this reason Metzner D.J. concluded that, although UNOCAL was not a demise charterer of the *Torrey Canyon* and could not limit liability on that basis, nevertheless, he opined, if the Government claims were to be successful in holding UNOCAL accountable, it would probably be because UNOCAL was the "owner" of the vessel. Upon this reasoning Judge Metzner concluded that he was unable to reach a decision on UNOCAL's right to claim limitation until the exact foundation of the Government claims against UNOCAL was established by trial.⁷⁵

Judge Metzner also held that 'freight then pending' could not form the basis of a limitation fund against UNOCAL from which

⁷³*Fink v. Paladini*, 279 U.S. 59, 1929 A.M.C. 327 (1929); *Standard Oil Co. of New Jersey v. Southern Pacific Co.*, 268 U.S. 146, 1925 A.M.C. 779 (1925); *Admiral Towing Co. v. Woolen*, 1961 A.M.C. 2333, 290 F.(2d) 641, 645 (9 Cir., 1961); *Austerberry v United States*, 1948 A.M.C. 1682, 169 F.(2d) 583, 593 (6 Cir., 1948); *In re Trojan*, 1959 A.M.C. 201, 167 F.Supp. 576 (N.D. Cal., 1958); *In re Petition of Colonial Trust Co.*, 1955 A.M.C. 1290, 124 F.Supp. 73 (D. Conn., 1954); *Milwaukee*, 1931 A.M.C. 412, 48 F.(2d) 842 (E.D. Wis., 1931). These cases have held such diverse parties as shareholders, mortgagees, prior vendors, life tenants, trustees and government agencies operating privately owned ships in wartime to be "owners" entitled to limit liability.

⁷⁴*Benedict on Admiralty* Vol. 3 (7th Rev. ed., 1983) 5.29.

⁷⁵1969 A.M.C. 1716.

claims could be made. This was because the charter party agreement between Union Oil and the sub-charterer (BP Trading Ltd.) stipulated that freight became due only upon the completion of the voyage. In 1886 in *The City of Norwhich*⁷⁶ the U.S. Supreme Court had interpreted 'freight then pending' as meaning the amount of gross freight actually earned on the casualty voyage.⁷⁷ In this instance the casualty clearly prevented any freight from passing on to UNOCAL and thereby to the limitation fund.⁷⁸

On interlocutory appeal, to the Second Circuit⁷⁹ it was held that the trial judge had erred in precluding the prosecution of claims against UNOCAL. The Appeal Court held that at the time of the disaster UNOCAL was not an owner or a demise charterer of the *Torrey Canyon* but was in fact a time charterer.⁸⁰ This was significant because under the Limitation of Liability Act of 1851 a time charterer is not entitled to evoke the protection of limitation. It was held that Judge Metzner had erred in concluding that UNOCAL might be found to be an "owner" within section 183 and that UNOCAL's liability could be predicated only upon its status as an "owner".⁸¹

This finding conveyed an ominous message to the large companies owning oil tankers through subsidiaries. The holding of the court meant that a parent corporation (UNOCAL) of the ship's registered

⁷⁶118 U.S. 468 (1886).

⁷⁷*Id.* at 493-95.

⁷⁸1968 A.M.C. 1711.

⁷⁹*Complaint of Barracuda Tanker Co., as owner of the "S/T Torrey Canyon", and Union Oil Company of California for exoneration from or limitation of liability v. The United Kingdom of Great Britain and Northern Ireland, The Republic of France, and The States of Guernsey*, 1969 A.M.C. 1442 reported also at 409 F.(2d) 1013.

⁸⁰1969 A.M.C. 1445.

⁸¹1969 A.M.C. 1442.

owner (Barracuda Tanker Co.) was not deemed an "owner" under 1851 Act and was therefore subject to liability without limitation. This message was to become even more evident in the context of the *Amoco Cadiz* litigation which occurred much later. Gilmore and Black make the following observation:

'It is difficult to disagree with the contention that Union (UNOCAL) was, in truth, the owner of the *Torrey Canyon*. ... On the other hand, the limitation ideal is widely regarded as unfair, unjust, and anachronistic. Once it is accepted that the Limitation Act of 1851 is to be restrictively rather than broadly construed, the Second Circuit's opinion in the *Torrey Canyon* proceedings points the way to imposing unlimited liability on large corporations which, for their own corporate purposes, choose to describe themselves as "time charterers" rather than as "owners" of their fleets.'⁸²

Furthermore, the Court noted that the nature of the U.K. and French Government claims were unrelated to the navigation of the *Torrey Canyon*. It was held that the foundation of the Government claim was that their damage was the result of UNOCAL's participation in the original designing and manufacturing of the *Torrey Canyon* in 1958, and the vessels enlargement in 1965.⁸³ This train of argument was necessary because any claim founded on the basis that UNOCAL was actually in 'ownership' or 'control' of the *Torrey Canyon* would probably have allowed UNOCAL to assert limitation. However, the official investigation into the stranding of the *Torrey Canyon* found:

'Upon all the evidence, including the testimony of the witnesses, Certificates issued by Lloyd's Register of Shipping and other documents, the Board concludes that

⁸²G. Gilmore and C. Black *The Law of Admiralty* 2nd ed. (1975) § 10-10 at 843.

⁸³1969 A.M.C. 1445.

*there was no mechanical failure or defect aboard the Torrey Canyon of any kind which could have in any way contributed to this casualty. So far as is relevant, the vessel and her equipment were at all times in perfect condition and functioning properly. In the Board's opinion this casualty was caused by human error alone.'*⁸⁴

In the context of the above finding the Government claim that UNOCAL had been at fault during the construction and enlargement of the *Torrey Canyon* is put to some doubt. Nevertheless the Appeal Court held that because the claim against UNOCAL was connected only incidentally with the navigation of the *Torrey Canyon* such claims were not subject to limitation.⁸⁵

The maritime law principle that shipowners are permitted to limit liability was the focus of strong criticism throughout the appeal judgment. In conclusion, Bonsal D.J. referred to Mr. Justice Black dissenting in *Maryland Casualty Co. vs. Cushing*.⁸⁶

'Judicial expansion of the Limited Liability Act at this date seems especially inappropriate. Many of the conditions in the shipping industry which induced the 1851 Congress to pass the Act no longer prevail. And later Congresses, when they wished to aid shipping, provided subsidies paid out of the public treasury rather than subsidies paid by injured persons.'

⁸⁷

In their admiralty treatise, Gilmore and Black note that the Limitation Act "has been attacked by many and defended by almost

⁸⁴In the Matter of the Stranding of the Steamship *Torrey Canyon*, on March 18, 1967, 1967 A.M.C. 569 at 576.

⁸⁵1969 A.M.C. 1442, 1446.

⁸⁶347 U.S. 409, 437; 1954 A.M.C. 837, 859 (1954).

⁸⁷1969 A.M.C. 1442 at 1446.

none" and further note that:⁸⁸

'The holding in the limitation cases which have been decided since the mid-1950's have, with few exceptions, been adverse to the petitioning shipowner. [T]he argument that the Limitation of Liability Act has served its time and should be repealed has become commonplace ... [The Limitation Act,] passed in an era before the corporation had become the standard form of business organization and before present forms of insurance protection ... were available, shows increasing signs of economic obsolescence.'

In the final analysis, the claims arising out of the wreck of the *Torrey Canyon*, which are estimated to have been in the nature of US\$15 million, were settled for US\$3 million.⁸⁹ The critical obstacle to the successful prosecution of claims arising from the *Torrey Canyon* incident was not establishing fault or negligence but overcoming the overly protective laws guarding shipowners right to limit liability.

The official investigation into the stranding of the *Torrey Canyon*, conducted by Americans, at the request of the Liberian government, found that the stranding was solely due to a high order of negligence on the part of the master.⁹⁰ This led one commentator to note that '[a]s a Liberian Board of Investigation had found that the sole cause of the casualty ... was the master's error of navigation ... had the United States law been applicable, [this] would have been a classic case for limitation.' His reason for making this observation is because he assumes it unlikely that the master's negligence would have

⁸⁸Gilmore & Black *The Law of Admiralty* § 10-4(a) 2nd ed. (1975).

⁸⁹Abecassis & Jarashow, *op cit*, 435.

⁹⁰The findings of the official investigation into the stranding of the *Torrey Canyon* are contained in 1967 A.M.C. 569.

been construed as due to negligence within the 'privity or knowledge of the shipowner'.⁹¹ One may recall that Bonsal D.J. had unequivocally held that UNOCAL could not invoke the right to limit because it was a time charterer and not an owner or a demise charterer.

Even if at some later point in the judicial process it had been determined that UNOCAL was in truth an "owner" it would have been open to the claimants to attempt to break the owners right to limit. The same rule would have applied to Barracuda Tanker Corporation. It is worth emphasizing once more that in terms of the 1851 Limitation of Liability Act the shipowner remains vicariously liable for the faults of his employees but that he may be entitled to limit this liability, depending on whether or not he personally falls foul of the particular standard of fault. The rationale behind this procedure is that it would be against public policy to permit a "guilty" shipowner to claim the privilege of limitation where he had been guilty of personal fault.⁹² It is important to understand the meaning given to the phrase 'privity or knowledge' by the U.S. Courts. To cut to the nub of this vast subject it had been held, prior to the *Torrey Canyon* litigation, that shipowners must properly staff, equip, and maintain vessels to ensure their seaworthiness.⁹³ Therefore, to conclude that the master of the *Torrey Canyon* was solely to blame is an inference which seems not to have taken the entirety of circumstances into account. Captain Rugiati was clearly not in good health; he was suffering from tuberculosis, and nervous exhaustion. Furthermore, he had been on the *Torrey Canyon* for 366 days without leave. Whether he should have been permitted to

⁹¹Bartlett 'In Re Oil Spill By the Amoco Cadiz-Choice of Law and a Pierced Corporate Veil Defeat the 1969 Civil Liability Convention' (1985) 10 *The Maritime Lawyer* 1 at 6.

⁹²Gaskell 'The Amoco Cadiz: (I) Liability Issues' (1985) 3 *Journal of Energy and Natural Resources Law* 167 at 182.

⁹³See, for example, *In re Kinsman Transit Co.*, 338 F.2d 708, 715-16 (2d. Cir. 1964), cert. denied sub nom. and *Continental Grain Co. v. Buffalo*, 380 U.S. 944 (1965).

command one of the worlds largest sea-going vessels under such circumstances is certainly questionable in itself. It is important to note that since the 18th August, 1990, the 1851 Limitation Act is no longer applicable to oil pollution claims in the United States.

The above rules requiring personal fault of the shipowner must be critically compared to ordinary principles of tort where the owner would be vicariously liable for the negligence of his employees and servants when they operate within the course and scope of their employment. Limitation, in its form at the time of the *Torrey Canyon* incident, may be described as a somewhat out-moded principle of maritime tort which was particularly onerous to claimants in significant oil pollution cases. In many cases, the tanker often was a valueless wreck with no freight pending. Breaking the owner's right to limit through proof of privity or knowledge on the part of the owner also proved a difficult task for claimants. The outcome of the *Torrey Canyon* litigation did not bode well for coastal states and the revision of existing laws appeared necessary.

3.5 Conclusion

This Chapter essentially provides the background in terms of which the main body of work can unfold. The analysis and differentiation between certain fundamental concepts was necessary in order to clarify and define the scope of this study against the wider context. The historical analysis has highlighted the various difficulties which faced claimants attempting to recover damage sustained by way of tanker-source oil pollution. *Inter alia*, problems were encountered in establishing jurisdiction, title to sue and in overcoming the rules protecting the shipowner from unlimited liability. This analysis therefore facilitates a discussion of how and why attempts were made subsequent to the *Torrey Canyon* incident to remedy these very real inadequacies on the law.

CHAPTER 4

The 1969 Civil Liability Convention

4.1 Origins of the "International Approach"

At the time of the *Torrey Canyon* spill the existing International Convention for the Prevention of Pollution of the Sea by Oil of 1954, as amended, dealt primarily with the intentional discharge of oil wastes from ships rather than compensation issues, and as such provided little assistance to dispute-resolution. As a result, it became clear to those involved that an attempt to provide a uniform, equitable and enforceable framework for oil pollution compensation was a matter of some urgency. The challenge was taken up by two broad interest groups, representatives of governments concerned with the issue of oil pollution, and those bodies influential in the development of policy for tanker owners and oil importers. Two parallel responses resulted: which may be referred to as the 'Inter-governmental response' and the 'Industry Response'.

4.2 Inter-governmental response: An overview

Liability for oil pollution is normally dealt with under the law. As has already been illustrated there are, however, two areas of difficulty in dealing with oil pollution from tankers. Firstly, it may not be clear what law applied to the incident - the law of the ship's flag, that of the place where the spill occurred, that of the place where the damage is caused or that of the place where jurisdiction can be established. In certain circumstances following a maritime casualty all these laws may differ. Secondly, it is a basic concept of maritime law that a shipowner can limit the amount of his liability, usually to a sum related to the size of the ship involved.

Accordingly, Governments began to consider means of ensuring that adequate compensation would be readily available for victims of

oil pollution by developing a uniform regime for liability and increasing the limits that then applied. This ultimately led to the passing of the International Convention on Civil Liability for Oil Pollution Damage in December 1969 (referred to as the Civil Liability Convention). Meanwhile, the oil industry had evolved the Tanker Owners Voluntary Agreement concerning Liability for Oil Pollution (TOVALOP).

At the time of passing the Civil Liability Convention a Resolution was passed that a further International Convention should be prepared to relieve the tanker owner of part of the financial burden imposed by the Civil Liability Convention and to ensure that full compensation would be available to victims of oil pollution. There were two consequences - the oil industry prepared the Contract Regarding an Interim Supplement to Tanker Liability for Oil Pollution (CRISTAL) to cover the period before any such Convention came into force, and in December 1971, the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution was passed (referred to as the Fund Convention).

Briefly the purpose of the Civil Liability Convention is to provide swift compensation to private parties or governments of a contracting state where a discharge of persistent oil from a laden tanker causes harm within a contracting state. The Fund Convention provides supplemental coverage in contracting states to the Fund Convention and the Civil Liability Convention where compensation under the Civil Liability Convention is insufficient or is not provided for under that Convention. Compensation under the Civil Liability Convention is borne by the tanker owner while under the Fund Convention compensation is paid by the International Oil Pollution Compensation Fund which receives contributions from oil importers in states contracting to the Fund Convention. The major benefit of the Civil Liability and the Fund Conventions is that the flag State of the tanker and the nationality of the shipowner is irrelevant for determining the application of the Conventions.

4.3 Introduction to the 1969 Civil Liability Convention

After almost three years had elapsed since the *Torrey Canyon* disaster, an International Legal Conference was convened in Brussels by the Inter-Governmental Maritime Consultative Organization (IMCO) to consider two draft conventions on the subject of marine oil pollution.¹ The draft conventions were the International Convention Relating to Intervention on the High Seas in Cases of Oil Pollution Casualties, which has already been alluded to,² and the International Convention on Civil Liability for Oil Pollution Damage. The Comité Maritime International (CMI),³ had drafted a Convention pertaining to Oil Pollution Liability seven months prior to IMCO's Brussels Conference. The CMI draft was subsequently revised by IMCO's Legal Committee and presented to diplomatic representatives of 48 countries at the Brussels Conference.⁴ The preparatory work leading up to the Conference and the Conference itself were almost certainly

¹The Inter-Governmental Maritime Consultative Organization (IMCO) is now called the International Maritime Organization (IMO). IMO, headquartered in London, is a branch of the United Nations and is the primary forum through which attempts are made at an international level to resolve environmental problems associated with marine transport.

²See pp.27-31 of this work.

³The International Maritime Committee (CMI), formed in 1897 and domiciled in Belgium, is an international organization of Maritime Law Associations of various nations, representing all aspects of maritime law. The object of the CMI is to 'contribute by all appropriate means and activities to the unification of maritime and commercial law, maritime customs, usages and practices.' See Paulsen 'Why the United States should ratify the 1984 Protocols to the International Conventions on Civil Liability for Oil Pollution Damage (1969) and the Establishment of an International Fund for Compensation for Oil Pollution Damage (1971)' (1984/85) 20 *The Forum* 164 Appendix A at 177.

⁴Healy 'The International Convention on Civil Liability for Oil Pollution Damage, 1969' (1970) 1 *Journal of Maritime Law and Commerce* 317.

brought about by the *Torrey Canyon* experience.⁵

The International Convention on Civil Liability for Oil Pollution Damage (hereafter referred to as the Civil Liability Convention) was signed in Brussels on the 29th November, 1969. The states party to the Convention composed the following preamble to the convention as a statement of intent:

*'Conscious of the dangers of pollution posed by the worldwide maritime carriage of oil in bulk,
Convinced of the need 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,
Desiring to adopt uniform international rules and procedures for determining questions of liability and providing adequate compensation in such cases,
Agreed (to the 1969 Civil Liability Convention).'*

The convention was the first attempt by the international community, in co-operation with tanker owners, to develop a mechanism, which, if embraced by sufficient coastal state governments, would provide a uniform method of compensation for oil pollution occurring in those countries. It is submitted that the implementation of a global regime of this nature is a desirable ideal. The tanker industry has an obvious international character and, therefore, international regulation, as opposed to regional regulation, is appropriate. The Civil Liability Convention governs the liability of shipowners for oil pollution damage and encapsulates the principle of strict but limited liability for shipowners. In most circumstances the shipowner

⁵*Official Records of the International Conference on Liability and Compensation for Damage in Connexion with the Carriage of Certain Substances by Sea, 1984 and the International Conference on the Revision of the 1969 Civil Liability Convention and the 1971 Fund Convention, 1992, vol.4 at 149 (hereinafter referred to as the Official Records).*

will be entitled to limit his liability to an amount which is linked to the tonnage of his ship. The Convention also creates a system of compulsory liability insurance.

At this stage cargo owners had managed to avoid any legally imposed financial responsibility for oil pollution damage caused by the spillage of oil cargoes transported at sea. Significantly, however, at the 1969 Conference the focus of attention began to turn towards the oil industry as a possible source of compensation to meet the needs of oil pollution victims. Certain States expressed the view that oil cargo interests should be made to participate in the compensation regime.⁶ The delegation from the Netherlands, a state with significant oil company interests, made the following statement on this important issue.

'It may be argued that the risk created by massive transportation of oil in bulk is not, in the first place, created by the carriers, but by technical developments in transportation made primarily in the interests of the oil industry as a whole. This "industrial risk" should be borne by the oil industry rather than by the carrier.'

These and other such arguments provided the basis for the 1971 Fund Convention. It is the inherently hazardous character of crude oil compared to other marine cargoes that necessitated the development of the two-tier compensation regime, which was then unique in maritime law, whereby shipowners and cargo owners would share the burden of oil pollution liability. In this Chapter the complex legal and institutional provisions of the 1969 Civil Liability Convention are discussed. The analysis of this instrument therefore prepares the pathway towards a consideration of the second tier Fund Convention which is undertaken in the next chapter.

⁶*Official Records* vol.2 at 79 citing the *Official Records of the International Legal Conference on Marine Pollution Damage*, 1969 (pages 84, 439-440, 537, 624, 633).

⁷*Official Records*, vol.2 at 79.

4.4 Entry into force requirements

It is the norm that maritime conventions come into force either upon ratification by a certain number of maritime nations or when a certain "floor" of tonnage, registered in states ratifying the convention is met. It is not unusual for the coming into force provisions to require a combination of these two criteria. Furthermore, upon the entering into force requirements being met an additional, specified time period must elapse before the convention finally comes into force.

Due to such pre-conditions valuable time can pass before a convention enters into force. In order to circumvent this delay, or the so called "lead" period, states sometimes choose to preempt the entry into force of conventions in their domestic statute law. The United Kingdom did so in relation to the Civil Liability Convention by enacting the Merchant Shipping (Oil Pollution) Act 1971, and in relation to the Fund Convention by means of the Merchant Shipping Act 1974.⁶ This often lengthy "lead" period is significant when comparison is made between the relative strengths and weaknesses of the international conventions and the voluntary pollution regimes. The tanker and oil industry are more decisive and flexible than the international community of governments where the development of instruments governing oil pollution compensation is concerned.

Once a state has ratified a convention and the convention enters into force, the state is obliged to enact domestic legislation based upon the convention. However, it is not necessary for the domestic legislative instrument to incorporate the precise text of the convention. Accordingly it is not unusual for the terms

⁶The 1971 International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage (Fund Convention), is supplementary to the Civil Liability Convention, and establishes a regime for compensating victims when the compensation under the Civil Liability Convention is inadequate. The Fund Convention entered into force in 1975.

of a convention to be tailored to suit the particular requirements of the enacting state when the convention is incorporated into its domestic legislation.⁹ Therefore, the precise legal position pertaining to a particular oil pollution incident, whether resolved under the Civil Liability Convention or the Fund Convention, may depend on the local legislation rather than the original convention texts.

Article XV of the Civil Liability Convention governs the coming into force provisions of the Convention:

- '1. The present Convention shall enter into force on the ninetieth day following the date on which the Governments of eight States including five States each with not less than 1,000,000 gross tons of tanker tonnage have either signed it without reservation as to ratification, acceptance or approval or have deposited instruments of ratification, acceptance, approval or accession with the Secretary-General of the Organization.
2. For each State which subsequently ratifies, accepts, approves or accedes to it the present convention shall come into force on the ninetieth day after deposit by such State of the appropriate instrument.'

The coming into force provisions of the Civil Liability Convention are fairly normal for international conventions of a maritime nature except for the unusually short ninety day period which must elapse after the initial requirements have been met before the Convention comes into force, and the special hybrid relationship devised between the number of ratifying states and tonnage requirements. Upon these requirements being met the Civil Liability Convention entered into force on 19th June, 1975.

⁹As to the enactment of maritime law conventions in English law, see Gaskell 'The Interpretation of Maritime Conventions at Common Law' in Gardiner (ed) *United Kingdom Law in the 1990s* 10 (1990) pp.218-40.

4.5 Scope of application

Like most legal instruments, the definitions of essential concepts governing the Civil Liability Convention have far-reaching implications for all the parties potentially involved in oil spills. For instance, the amount of compensation a victim of oil pollution receives not only depends on the limits applicable but also upon whether the loss or damage was sustained in an area covered by the Civil Liability Convention, whether the Convention covers the type of ship from which the oil emanated and whether the type of oil causing the pollution will be considered as "oil" for the purpose of the Convention.

The Civil Liability Convention applies to oil pollution damage resulting from spills of "persistent oil" from laden tankers. This is determined by Article III.1 which, subject to certain limited defences, provides that:

' ... the owner of a ship at the time of an incident, or where the incident consists of a series of occurrences at the time of the first such occurrence, shall be liable for any pollution damage caused by oil which has escaped or been discharged from the ship as a result of the incident.'

Therefore, where no oil has escaped from a ship no claims under the Civil Liability Convention arise. Consequently, pure threat removal measures are not compensable.

4.5.1 Persistent oil spills

For the purpose of Article III.1 and the Convention as a whole, oil is defined as any persistent oil such as crude oil, fuel oil, heavy diesel oil, lubricating oil and whale oil, whether carried on board a ship as cargo or in the bunkers of such ship.¹⁰ This

¹⁰Civil Liability Convention, Article I.5.

includes all persistent oil including bitumen,¹¹ asphalt¹² and waste oil.¹³ Pollution damage caused by non-persistent petroleum-based substances such as gas oil, gasoline, automotive/light diesel oil, kerosene/paraffin oil, white spirit and similar products are not covered by either the Civil Liability or Fund Convention. Clearly, non-persistent oil can cause pollution damage. In this regard it is worth noting that when Norway incorporated the Civil Liability Convention into its domestic legislation it chose to extend the principle of strict liability to encompass damage caused by non-persistent oil.¹⁴ Experts are sometimes required to determine whether an oil is persistent or not.¹⁵ Non-hydrocarbon oil, such as silicon oil, is not encompassed within the ambit of the definition.

Whale oil was expressly included in the definition of 'oil' at the request of the Japanese because it had the same viscosity and persistence as heavy oil and was carried in bulk.¹⁶ In the mid-1960s, commercial whaling was widespread, even though quotas had already been established for certain species. In 1964, for example, the worldwide hunt used highly efficient factory ships and harpoons to kill 63,001 whales. By 1985, quotas set by the International Whaling Commission (IWC) had gradually reduced the kill to 6,600. Finally, in 1986, seafaring nations agreed to a

¹¹*IOPC Fund Annual Report* 1986, section 9.16 at 27 citing the *Qued Gueterini* bitumen spill in port of Algiers, Algeria, 18 December 1986.

¹²*IOPC Fund Annual Report* 1990, section 12.2 at 42-43 citing the *Nancy Orr Gaucher* asphalt spill in Hamilton Harbour, Ontario (Canada) on 25 July 1989.

¹³*IOPC Fund Annual Report* 1990, section 12.2 at 45-48 citing the *Volgoneft 263* waste oil spill off the Swedish coast on 14 May 1990.

¹⁴*Official Records*, vol.2 at 346 para. 59.

¹⁵*Official Records*, vol.2 at 341 para.29.

¹⁶*Abecassis & Jarashow Oil Pollution from Ships: International, United Kingdom and United States Law and Practice* 2nd ed. (1985) 197 fn.8.

worldwide prohibition on commercial whaling. In May of 1993 the IWC voted 18/6 to extend the ban on whaling for another year. Since the current ban came into effect, Japan, Iceland and Norway have led a campaign to allow some whaling. Japan and Norway have also continued to use an exemption in the IWC rules that permits killing whales for scientific purposes.¹⁷ The Fund Convention covers only persistent hydrocarbon oils; accordingly, the IOPC Fund will not pay compensation for pollution damage caused by whale oil. Clearly the whale oil provision is of little consequence, however, it serves as a sad reminder of humanity's ruthless exploitation of wildlife for short term commercial gain.

4.5.2 Ships carrying oil as cargo

For the purpose of the Civil Liability Convention, '[a] "ship" means any sea-going vessel and any seaborne craft of any type whatsoever, actually carrying oil in bulk as cargo.'¹⁸ As such the Civil Liability Convention applies only to ships which actually carry oil in bulk, for example, normally laden tankers. Pollution damage caused by spills from the bunkers of tankers during ballast voyages is not covered by the Convention, nor are spills of bunker oil from ships other than tankers. Passenger and dry cargo vessels are thus excluded, except in cases where at the time of the incident oil in bulk is being carried as cargo. Where this is the position the Civil Liability and Fund Conventions will also apply to the escape or discharge of bunker oil.¹⁹ Similarly, where pollution damage is caused from the bunkers of a tanker while that tanker is laden normally with a cargo of persistent oil, that damage will be included within the ambit of

¹⁷Chisholm 'Prince of the tides' June 14, 1993 *Maclean's* 50-52.

¹⁸Civil Liability Convention, Article I.1.

¹⁹Healy, *op cit*, 318.

the Civil Liability Convention.²⁰

Residues of persistent cargo oil which is discharged at sea while a ship is on a ballast voyage will not fall within the ambit of the definition of oil because such oil is not actually being carried in bulk as cargo.²¹ Abecassis and Jarashow et al suggest that damage caused by the escape or discharge of persistent oil from the slops or bilges of a ship laden with a bulk cargo of persistent oil should be encompassed within the Civil Liability and Fund Conventions.²² As residues are not carried in bunkers, this view would be supported only if persistent oil in slops or bilges could be described as 'carried on board the vessel as cargo'. The word, cargo, analogous to goods, would seem to imply something of value, to be delivered, therefore the position adopted by the learned commentators may be difficult to support.

Pollution damage caused by combination carriers also known as Ore/Bulk/Oil (OBO) carriers is included where such vessels are transporting persistent oil in bulk as cargo.²³ But where an OBO

²⁰*IOPC Fund Annual Report 1990*, section 12.2 at 49 citing the *Rio Orinoco* where the Civil Liability and Fund Conventions applied to a spill of 30-40 tonnes of heavy fuel although none of the cargo of asphalt escaped. This incident occurred on 16th October 1990, in the Gulf of St Lawrence, causing pollution damage to the south coast of Anticosti Island which is the territory of Canada. Canada was party to both liability Conventions at the time of this incident.

²¹*IOPC Fund Annual Report 1991*, section 12.2 at 36 where in the context of the alleged spill of residual oil from the *Tolmiros* it was concluded that residual oil (slops) not intended to be discharged to the owner/receiver was neither 'cargo' nor 'carried as cargo' in the ordinary sense of the words or as these words should be construed for the purpose of the Civil Liability or Fund Conventions.

²²Abecassis & Jarashow, *op cit* 196 para.10-11.

²³*IOPC Fund Annual Report 1992*, section 12.2 at 73. While approaching La Coruña harbour in Spain the Greek OBO carrier *Aegean Sea* with a cargo of approximately 80,000 tonnes of crude oil ran aground. Extensive pollution damage occurred. It was accepted that this cargo met the requirements of both compensation conventions.

carrier has changed from an oil cargo to an ore cargo and has retained oil residues on board in a slop tank, pollution damage caused by a subsequent escape of oil from the slop tank or bunker tanks will not be covered.²⁴ Pollution damage caused by sea-going barges, whether propelled (towed or pushed) or self-propelled, carrying persistent oil in bulk will certainly be covered.²⁵

Difficulties arises where pollution damage is caused from a discharge of persistent oil from tankers which are being used to store oil in bulk. Abecassis and Jarashow et al suggest that this source of oil pollution falls outside the application of the Civil Liability and Fund Conventions because such oil cannot properly be described as constituting cargo. They suggest that cargo must mean 'something which is on board for the purpose of being moved by that ship ... rather than something which is on board for the purpose of being stored prior to movement by another ship.'²⁶ In support of this view it may be added that even if the meaning of the phrase 'actually carrying oil in bulk as cargo' is held to include oil stored on a ship, it is suggested from the preamble to the Civil Liability and Fund Conventions that these regimes were intended to cover only the transport of oil and not storage. The preamble refers to 'the dangers of pollution posed by the worldwide maritime carriage of oil in bulk.' Unlike the words 'cargo' and 'carrying' which may be broadly construed the word 'carriage' perhaps suggests the conveying or transportation of oil. At this juncture it is elucidating to consider a definition proposed by the Delegation from the Government of Poland at the 1984 Conference, in terms of which the notion "carriage by sea" was defined to mean:

²⁴Abecassis & Jarashow, *op cit* 195 para.10-08.

²⁵*IOPC Fund Annual Report* 1991, section 12.2 at 52 citing the application of the compensation conventions to the spill of a bulk cargo of heavy fuel oil from the sea-going barge *Vistabella* in the Caribbean on 7 March, 1991.

²⁶Abecassis & Jarashow, *op cit*, 196 para.10-09.

' ... the displacement operation of the hazardous substances between the point of loading on the ship and the point of discharging therefrom; it comprises also the period from the time when hazardous substances enter on board ship on loading, to the time they cease to be present on board ship on discharge.'²⁷

It would seem that this definition would encompass pollution damage caused by tankers used for the storage of oil.

It must therefore be conceded that this is an open question at present, which may reasonably be interpreted in favour of either view. The particular circumstances and the intention of the cargo owner may be persuasive. The present writer adheres to the view that, in principle, storage tankers should be encompassed within the ambit of the Convention.

It is suggested by the present writer that the view put forward by Abecassis and Jarashow *et al* is unnecessarily restrictive and that damage caused by spills from storage tankers should be admissible under the Civil Liability Convention. Where persistent oil is stored on board a tanker with the intention of transshipping that oil to another tanker such oil should rightly be considered cargo carried at sea. It is artificial to assert that a load of bulk oil contained in a tanker is not a cargo because the tanker is not in motion. Such an interpretation is not in keeping with the purpose of the Civil Liability Convention which is to compensate victims of pollution damage caused by spills of persistent oil from tankers. It should be noted that the CRISTAL contract covers spills from oil in storage tankers

For the Civil Liability Convention to apply, the pollution must stem from a discharge of persistent oil from a laden tanker. The Civil Liability Convention would not therefore cover a spill from a ruptured pipeline loading to a tanker at an offshore terminal.

²⁷*Official Records*, vol.1 at 321 para.2.

This is because the oil would not at that point be on the tanker and the offshore terminal and pipeline will not qualify as a 'ship' for the purpose of the Civil Liability Convention.²⁸ However, where a normally laden tanker is transferring oil to another ship or an offshore terminal and a spill occurs, the Civil Liability and the Fund Conventions will in principle be applicable to pollution damage.

The 'ship' must be a sea-going vessel or capable of travelling on the sea. warships and other state-owned or state-operated ships used for the time being on non-commercial government service are excluded from the provisions of the Civil liability Convention.²⁹ State-owned ships used for normal commercial purposes are, however, subject to the Convention.

4.5.5 Geographical application

The location where the pollution damage is caused is crucial to the question of whether compensation will be available under the Civil Liability and Fund Conventions. This is because both conventions apply only in party states. Furthermore, many states are party to the Civil Liability Convention but are not party to the Fund Convention.³⁰ By choosing not to participate in the Fund Convention such states are rejecting a large and certain source of compensation which can be particularly important in the

²⁸For an analysis of the Offshore Pollution Liability Agreement (OPOL) which may provide compensation in such circumstances see Annexure Two.

²⁹Civil Liability Convention, Article XI.1.

³⁰As at the 31 March 1993 the following States were Party to the Civil Liability Convention but not to the Fund Convention. Australia, Belgium, Brazil, Chile, China, Columbia, Dominican Republic, Ecuador, Egypt, Guatemala, Lebanon, New Zealand, Panama, Peru, Saint Vincent and the Granadines, Senegal, Singapore, South Africa, Switzerland, Yemen Arab Republic. citing; *IOPC Fund General Information on Liability and Compensation for Oil Pollution Damage* February 1992, Annex at 21. *IOPC Fund Annual Report 1992*, section 2 at 8-9.

event of major oil spills. The reason for doing so is usually financial and involves the estimation and assumption of risk. Risk, in this context, means, the expected net cost of ratification, considering all possible costs and benefits, weighted against the probability of an oil spill occurring. Certain states may consider, because of a low historical incidence of dangerous oil spills in their territory, that claims exceeding the limits under the Civil Liability Convention are not likely to arise. Also, they may think that joining the Fund Convention would in effect mean that they would have to fund other party states with higher incidences of oil pollution. Until recently this had been the position adopted by the Australian Transport Advisory Council.³¹ However, Australia and certain other states are expected to adopt the Fund Convention in the near future.³²

Article II of the Civil Liability Convention governs the specific geographical application:

'This Convention shall apply exclusively to pollution damage caused on the territory including the territorial sea of a Contracting State and to preventive measures taken to prevent or minimize such damage.'

Neither the Civil Liability or Fund Conventions define the meaning of 'the territorial sea'. The interpretation of this term, and the extent of the area it encompasses has not been constant and it is now wider than it had been in 1969. Traditionally it was three nautical miles. It is now generally accepted, and is the case under Article 3 of the 1982 Law of the Sea Convention, that coastal states may claim 12 nautical miles

³¹Springall 'P&I Insurance and Oil Pollution' (1988) 6 *Journal of Energy and Natural Resources Law* 25 at 34.

³²Legislation implementing the Fund Convention is in an advanced stage in Australia, Belgium, Brazil, Chile, Colombia, Malaysia, Panama, Saudi Arabia and Senegal. citing *IOPC Fund Annual Report 1992*, section 2 at 9.

(22 km) from the baseline as the physical extent of their territorial sea.³³ The Civil Liability and Fund Conventions apply also to pollution damage caused in the internal waters of party states. Internal waters are waters landward of the baseline including; estuaries, river mouths, rivers, lakes, canals, harbours and ports. Pollution damage caused in the territory of the party state is also included.

It is not necessary that an incident at sea giving rise to pollution damage under the Civil Liability Convention actually occurs within the territorial sea or internal waters of a party state. An "incident" means any occurrence, or series of occurrences having the same origin, which causes pollution damage.³⁴ Accordingly, where persistent oil is discharged outside the territorial sea but pollution damage is nevertheless caused in the territorial waters or in the territory of a party state such damage will be compensable.

Of course, pollution damage can occur outside the limits of the territorial sea; and the Civil Liability and the Fund Convention will not generally apply in such cases. Any damage done to natural resources, fishing equipment or other property such as ships and off-shore installations, will not be covered in these non-territorial areas. However, the costs of preventive measures which are undertaken beyond territorial waters are compensable where such measures are reasonable and taken to prevent the threat of pollution damage anticipated in the territorial seas or in the territory of a party state. This approach is consistent with, and complements, the rights conferred upon coastal states by the 1969 Intervention Convention, which permit such states to undertake preventive measures on the high seas.

When, it may then be asked, will preventive measures taken beyond

³³Fields & Glazewski 'Marine Systems' in Fuggle & Rabie (eds) *Environmental Management in South Africa* (1992) at 327.

³⁴Civil Liability Convention, Article I.8.

the territorial sea in an attempt to minimize pollution damage within the territorial sea be reasonable? Obviously, the further seaward from the extent of the territorial sea that the preventive activities are carried out the greater difficulty the claimant may experience in establishing the reasonableness of his claim.³⁵ In this regard, the argument is frequently made that oil spills significant distances out at sea are better left to disperse naturally and that such spills cause insignificant damage to the marine environment. It is also argued that unnecessary attempts to combat such spills can result in very high claims for preventive measures which may prejudice the likelihood of *bona fide* oil pollution victims recovering the full extent of their damage.³⁶

It must be emphasised that the word 'exclusively' in Article II means that the Civil Liability Convention shall provide compensation only for pollution damage in that specific geographical area and does not mean that the Convention is the exclusive remedy for oil pollution claimants in party states.³⁷ It will be seen how further remedies are available against other parties to which liability may attach and how actions may be initiated in jurisdictions other than the *loci delicti*.

4.6 Pollution liability under the Civil Liability Convention

4.6.1 Introduction

Most claims for oil pollution damage under the provisions of the Civil Liability Convention are settled out of court by the relevant P&I Club. The quantum and nature of these settlements are strictly confidential and information is not made available

³⁵Official Records, vol.2 at 368 para.43.

³⁶Official Records, vol.2 at 362 para.8 and at 363 para.9.

³⁷Bartlett 'In Re Oil Spill By the Amoco Cadiz-Choice of Law and a Pierced Corporate Veil Defeat the 1969 Civil Liability Convention' (1985) 10 *The Maritime Lawyer* 1 at 10

to the public. Consequently, there is dearth of information as to the interpretation of the definition of "pollution damage" and related definitions contained in the Civil Liability Convention.³⁸ Furthermore, details concerning claims settled under TOVALOP, TOVALOP Supplement and CRISTAL are also not made public.³⁹ By contrast, all settlements made by the IOPC Fund are made public through the *IOPC Fund Annual Reports*. As such settlements supplement those under the Civil Liability Convention, and as the Civil Liability and Fund Conventions share the same definitions of 'pollution damage', 'preventive measures' and 'incident',⁴⁰ the *IOPC Fund Annual Reports* provide an important source of information for the assessment of claims under both conventions. Clause 6 of the IOPC Fund's Memorandum of Understanding with the International Group of P&I Clubs concluded on 5th November, 1980 states that:

'... the Clubs and the IOPC Fund will exchange views and will consult with one another when an incident occurs so that the term "pollution damage" which has the same definition in the Civil Liability Convention and the Fund Convention, receives the same interpretation by the Clubs and by the IOPC Fund.'⁴¹ (emphasis provided by the present writer)

In this regard, referring to the Memorandum of Understanding, R.H

³⁸Jacobsson & Trotz 'The Definition of Pollution Damage in the 1984 Protocols to the 1969 Civil Liability Convention and the 1971 Fund Convention' (1986) 17 *Journal of Maritime Law and Commerce* 467 at 470; Browne 'Oil Pollution Damage Compensation under the Civil Liability Convention 1969' in McLean (ed) *Compensation for Damage: An International Perspective* (1993) pp.137-164 at 149.

³⁹Becker 'Acronyms and Compensation for Oil Pollution Damage from Tankers' (1983) 18 *Texas International Law Journal* 475 at 478.

⁴⁰Fund Convention, Article 1.2.

⁴¹The text of this Memorandum of Understanding is contained in the *IOPC Fund Annual Report* 1980, Annex II.

Ganten, who was the first Director of the IOPC Fund, makes the following important statement:

'The IOPC Fund co-operates very closely with the shipowner's insurer when dealing with a claim for pollution damage. This co-operation ensures that there will be no conflicting decisions as to the justification of a claim under the CLC (Civil Liability Convention) and the Fund Convention.'⁴²

Abecassis and Jarashow note that '... because of the IOPC Fund's policy of reaching agreement with claimants without recourse to the courts whenever possible, the practice of the IOPC Fund on what items are admissible is crucial. Clause 6 of the Memorandum of Understanding makes this practice even more important, for it affects the practice of the insurers belonging to the International Group of P&I Clubs.'⁴³ The definitions governing the determination of pollution damage are identical in both Conventions. Also the Conventions were developed to serve the same purposes. Therefore, in the absence of compelling reasons to the contrary, both Conventions should naturally be based on the same approach.

Accordingly, a better understanding of the notion of pollution damage will be reached after the reader has been introduced to the provisions of the Fund Convention and an analysis of the actual claims practice of the IOPC Fund. Notwithstanding this observation, a preliminary analysis of the notion of "pollution damage" under the Civil Liability Convention is necessary even at this early juncture.

4.6.2 Pollution damage defined

⁴²Ganten 'The International Oil Pollution Compensation Fund' (1984) vol.4 No.12 *Environmental Policy and Law* 5 at 7.

⁴³Abecassis & Jarashow, *op cit*, 274-75 para.11-53.

Within the specified geographical area the type of pollution damage claimable under the Civil Liability Convention is determined by the following definition:

'"Pollution damage" means 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.'⁴⁴

The Civil Liability Convention applies only to loss or damage caused by contamination and preventive measures taken after oil has actually been discharged. Damage to property caused by oil pollution clearly falls within the notion of 'pollution damage'. The conventions also apply to consequential loss suffered by owners or users of property or resources that has been contaminated or damaged. Claims for personal injury and death will also be included. Further, 'pollution damage' includes the cost of 'preventive measures' which are any reasonable measures taken, after an incident has occurred, to prevent or minimize pollution damage.⁴⁵ Government and private cleanup operations are compensable as long as the measures are reasonable. Preventive operations undertaken after oil has escaped into the sea are also compensable. These would include salvage operations with the primary purpose of preventing pollution and the use of oil dispersants. This is a very important point and will be further amplified in the analysis of the admissibility of claims for pollution damage under the Fund Convention.

The Civil Liability Convention does not apply to so-called 'pure threat removal measures' which are either preventive measures so successful that there is no actual spillage of oil from the ship involved or where preventive measures are taken but the feared

⁴⁴Civil Liability Convention, Article I.6.

⁴⁵Civil Liability Convention, Article I.7.

oil spill simply does not eventuate. The non-application of the conventions in such cases is because no oil has actually escaped from the ship.

'The definition of "pollution damage" in the Conventions is not very clear.'⁴⁶ This 'lack of clarity' was partly intentional. The authors of the Civil Liability and Fund Conventions intended to provide a flexible definition of a general nature. The exact interpretation and delimitation of the notion of 'pollution damage' was largely left to the discretion of courts of the *lex fori*.⁴⁷ Local courts will interpret the definition according to their national legal traditions and the general principles of the law of tort which apply in the particular jurisdiction. Wide divergencies of interpretation occur in different jurisdictions and a uniform meaning of 'pollution damage' may in truth be unobtainable. Indeed the desirability of a uniform definition has been questioned.⁴⁸ The notion of 'pollution damage' is a constantly evolving concept and in the sphere of admiralty law is as yet in an embryonic state of development. While admiralty law is acknowledged as one of the oldest legal disciplines, in contrast, environmental law in general and marine environmental law in particular, which began developing only during the 1960s, has a much shorter history and a different emphasis.⁴⁹ A flexible definition has the benefit of permitting courts the degree of latitude required to develop and adapt the scope of this concept and thereby meet the differing economic, social, technological, moral and environmental needs of the international community. This consideration was acknowledged at the 1992 International Diplomatic Conference on the Revision of the 1969

⁴⁶*IOPC Fund Annual Report 1988*, section 13.4 (a) at 58.

⁴⁷Brodecki 'New definition of pollution damage' [1985] 3 *Lloyd's Maritime and Commercial LQ* 382 at 382.

⁴⁸Brodecki, *op cit*, 383.

⁴⁹White-Harvey 'Black Tide at the Convergence of Admiralty and Environmental Law' (1991) 1 *Journal of Environmental Law and Practice* 259 at 260.

Civil Liability Convention and the 1971 Fund Convention in the Presidential Address delivered by Dr L.M. Singhvi when he expressed the view that; '... law should ideally be a product of the conciliation of competing interests and a balancing of conflicting pulls and pressures.'⁵⁰ A situation must be avoided where the laws of liability and compensation are fixed within an inelastic and unyielding framework, as such laws are the very 'tools of social engineering' and need to evolve.⁵¹ For this reason many of the interpretations of certain concepts must not be taken as cast in stone but should preferably be seen as tentative or provisional starting points from which the outer limits of such concepts may be explored. However, it is conceded that a non-uniform definition of pollution damage can raise problems in respect of the Fund Convention. Such issues will be better developed once the Fund Convention and the operation of the IOPC Fund have been discussed in more detail.

4.7 Strict Liability

Strict liability, also referred to as 'no-fault' liability, results in a pre-designated responsible party becoming legally bound to provide compensation in the event of damage occurring from a particular pre-identified type of activity regardless as to fault on the part of the responsible party.

4.7.1 Who bears strict liability

Under the Civil Liability Convention the owner of a tanker is said to be strictly liable for pollution damage. An "Owner" is described as 'any individual or persons registered as the owner of the ship or, in the absence of registration, the person or persons owning the ship.'⁵² The system whereby liability is

⁵⁰*Official Records*, vol.4 at 153.

⁵¹Brown 'The lessons of the Torrey Canyon: international law aspects' (1968) 21 *Current Legal Problems* 113 at 116.

⁵²Civil Liability Convention, Article I.3.

strictly channelled to the registered owner has generally worked well because the owner is easily identifiable and is required to establish that he is adequately insured as a precondition to being permitted to trade with member states of the Civil Liability Convention.

At the 1969 Conference the U.S.S.R. raised a specific problem concerning ships in socialist countries. In socialist countries the position was that the shipping fleet was owned by the State but operated by shipping companies which constituted individual corporate bodies. The U.S.S.R. wanted the shipping companies, not the State, to be held liable under the Convention. To accommodate this view a proviso was attached to the definition of an owner which provides that: '... in the case of a ship owned by a State and operated by a company which in that State is registered as the ship's operator, "owner" shall mean such company.'⁵³ In such situations it was agreed by the delegates that claimants would still have recourse to the State which was the beneficial owner of the ship.⁵⁴ The beneficial owner may be described as the party which ultimately benefits from the operation of the ship. This proviso is considerably less important in the light of the dissolution of the U.S.S.R. on the 26th December, 1991, and what seem to be a resurgent market oriented economy in most formerly socialist states. Nevertheless, numerous state owned tankers and general cargo ships remain in operation world-wide.

4.7.2 The nature of strict liability

Within the context of oil pollution liability it is often stated that strict liability means that the owner will be liable in the absence of fault. This is not a particularly precise description of the position for the purpose of the Civil Liability Convention. The concepts of 'fault' and 'strict liability'

⁵³Civil Liability Convention, Article I.3.

⁵⁴Gaskell (A) 'The Amoco Cadiz: (I) Liability Issues' (1985) 3 *Journal of Energy and Natural Resources Law* 167 at 191.

require more detailed elaboration.

As a general statement, liability based on fault requires specific mental elements, ranging from intention to mere inadvertence. Different forms of 'intention' may be required to satisfy the element of fault in relation to different types of tortious or delictual conduct. For example, some torts or delicts demand malice, others mere knowledge or recklessness in relation to certain circumstances. Furthermore, inadvertence or negligence may be measured according to a subjective or objective standard. In the same way, the legal term 'strict liability' is capable of supporting various different meanings. Absolute liability is strict liability in the purest form and excludes all defences. If absolute liability applied to oil spills from tankers no causal connection would be required between the person held liable and the damaging event. The fact that an oil spillage occurred from a tanker and damage resulted would automatically imply the liability of the thereby responsible party. Other degrees of strict liability fit in between the standard of absolute liability and liability based on fault.⁵⁵ The position under the Civil Liability Convention is that the tanker owner has been forced to assume a form of strict liability. This form of liability is not absolute liability because the tanker owner is permitted to invoke certain defences. The tanker owner may also limit his liability to a determinable amount where he is able to establish that the incident leading to the pollution damage occurred without his actual fault or privity. Loosely speaking, the tanker owner is permitted to limit his liability under the Civil Liability Convention in exchange for accepting limited liability for oil pollution damage without the claimant being required to establish the fault of the owner. Claimants have only to show that damage occurred within a party state, which was caused by a spill from a particular vessel. The claimant does not have to show fault on the part of the owner, charterer or servants or agents of the owner. This is in keeping with the

⁵⁵Englard *The Philosophy of Tort Law* (1993) pp.21-27.

primary objective of the Civil Liability Convention which is not to attribute blame but rather to establish a reliable legal mechanism providing compensation to victims of oil pollution damage.

At the 1969 Civil Liability Convention Conference, in Brussels, three broad positions were adopted by the delegates on the question of strict liability. These different viewpoints were largely determined by the dominant vested interest of the country of origin.

Firstly, certain coastal states with environmental interests, together with a significant number of developing nations with negligible shipping interests favoured strict liability. Canada headed this contingent, together with the United States, France, Germany and Italy. These states took the position that strict liability imposed on the shipowner would suffice without the implementation of joint liability for oil interests. Proponents of this position were often significant tanker owners (but at the same time major oil importers) who were loath to impose an additional burden on the expense of oil imports.

Secondly, other coastal states supported the implementation of strict or absolute liability with shipowners and cargo interests jointly liable for pollution damage. At the time, this was considered a radical position, but subsequently certain individual states of the United States have chosen to adopt legislation which goes even further than this 'radical' proposal. Thus, Alaska, California, Hawaii, Maryland, North Carolina, Oregon and Washington impose strict liability on both vessels and cargo-owner and the right to limit liability for oil pollution in those states is not available.⁵⁶ It is suggested, here, that despite the protestations of the oil interest lobby groups this approach will increasingly become more universally accepted.

⁵⁶See generally *Benedict on Admiralty* Chapter IX 'Marine Oil Pollution' (W.T Miller and J.G. Braunreuther Rev. ed., 1992) § 113 State Pollution Laws.

Thirdly, most shipowning countries supported the traditional shipowner fault based liability. At that time, the four largest shipowning countries; Liberia, the United Kingdom, Japan and Norway opposed any change from the traditional scheme. Some large shipping states wanted to maintain the shipowners' customary liabilities but attach additional pollution liability to the cargo owners. These states included Belgium, Greece, India, Denmark, Finland, Switzerland and Sweden. The majority of European maritime states opposed the imposition of strict liability on the shipowner without, at the same time, the oil interests bearing at least a portion of this liability.⁵⁷

4.7.3 Absolute defences

Before discussing the provisions which allow the shipowner to limit his liability under the Civil Liability Convention it is appropriate to explain the limited criteria, which, if successfully invoked, will exonerate the shipowner and his insurer from liability. These criteria constitute a departure from pure 'no-fault' liability or absolute liability.

4.7.3.1 Introduction

As mentioned above, at the Civil Liability Convention Conference certain states were against strict liability in its purest form. A compromise, proposed by the delegation of the United Kingdom, saw the incorporation of traditional exceptions to the principle of strict liability. The specific exemptions from the principle of strict liability were incorporated into the Civil Liability Convention as a practical matter because in 1969 the risks

⁵⁷M'Gonigle & Zacher *Pollution, Politics, and International Law: Tankers at Sea* (1979) 170; Rosenthal & Raper 'Amoco Cadiz and Limitation of Liability for Oil Spill Pollution: Domestic and International Solutions' (1985) 5 *Virginia Journal of Natural Resources Law* 259 at 280.

covered by these exceptions were uninsurable.⁵⁸ Therefore, it was argued that had these risks not been excluded from the compensation regime, tanker owners would not have been able to obtain the requisite liability insurance. Without such insurance the system of compensation would have been unworkable.

Certainly the implementation of an additional, separate liability limit specifically to meet the risks of oil pollution damage over and above the normal risks of the marine venture would inevitably increase the exposure of the insurance market. Considerable emphasis was placed on accommodating the professed commercial limitations of the marine insurance infrastructure. However, not all states placed such a high premium on the concerns of the insurance market as did the United Kingdom. The United States, for instance, adopted the position that the Convention should be drafted in the interests of the victims of oil pollution and that the substance of the Convention should not be dictated by a small group of insurers. The United States delegation seemed to assume that marine insurers would be able to adapt to whatever new provisions were adopted.⁵⁹

As a result of the U.K. compromise the principle of strict liability applies except where the limited absolute defences contained in Article III.2 are invoked successfully by the tanker owner. These limited defences can be described as *force majeure*

⁵⁸Abecassis & Jarashow, *op cit*, 204 also at 205 the same authors, quoting from LEG/CONF/C.2/WP.35, OR 596, note that the Delegation from the United Kingdom '... made it clear that insurance was available on the London market if, but only if, those exceptions to liability were adopted.'

⁵⁹M'Gonigle & Zacher, *op cit*, 171. It is noteworthy that the present position adopted by the United States concerning certificates of financial responsibility required under § 1016 of the Oil Pollution Act 1990 has not changed very much from that expressed in 1969. The United States continues to demand a high degree of cover from largely European based maritime insurers.

type exceptions such as war, terrorism, other acts of God⁶⁰ and Governmental failure to maintain navigational aids. Generally the grounds for exemption are very limited, and the owner is liable for pollution damage in almost all incidents. Clearly any combination of the exceptions, dealt with below, may be invoked by the tanker owner.

4.7.3.2 Hostilities and irresistible natural phenomena

Article III.2 (a) of the Civil Liability Convention provides that:

'No liability for pollution damage shall attach to the owner if he proves that the damage:

(a) resulted from an act of war, hostilities, civil war, insurrection or a natural phenomenon of an exceptional, inevitable and irresistible character.'

On the 10th August, 1987, the Panamanian registered tanker *Texaco Caribbean* (270,015 deadweight tons) fully laden with a cargo of Iranian crude oil struck a mine off Fujariah in the United Arab Emirates (UAE), spilling 7,500 tonnes of oil. At the time of this incident the UAE was party to both the Civil Liability and Fund Conventions.⁶¹ The spilled oil dispersed into the sea without causing quantifiable damage. Nevertheless, a situation had arisen which could possibly have caused significant pollution damage to the UAE coastline and losses incurred by way of preventive

⁶⁰Abecassis & Jarashow, *op cit*, at 205 note that the exception referred to in the Civil Liability Convention Article III.2 (a), which refers to oil pollution damage caused by an irresistible natural phenomena, is more limited than the traditional defence of an act of God. An 'act of God' may be described as an event that is the result of natural forces and which arises without human intervention.

⁶¹The United Arab Emirates had acceded to both the 1969 Civil Liability Convention and the 1971 Fund Convention on 15 December, 1983.

measures.⁶² Such damage would have been attributed to war, which is specifically excluded from the Convention. It must be appreciated that where damage results from one of the exceptions this does not mean the shipowner is exempt from liability. All this means is that the Civil Liability Convention will not apply. The owners liability will be settled under other applicable law and in most cases will be covered by P&I insurance or war risks insurance.

For the second part of the defence to be successfully invoked the tanker owner bears the burden of proving that the natural phenomenon was exceptional and irresistible. Abecassis and Jarashow *et al* are of the view that the exception would not seem to include hurricanes because although a hurricane may be described as an exceptional natural phenomenon it is not irresistible as modern tankers are designed to navigate hurricanes.⁶³ The owner must also prove that it was inevitable that the natural phenomena had the effect on the tanker that it did. Therefore, by implication, where the owner could have avoided the exceptional and irresistible natural phenomena by alternative action or by exercising caution he may not be able to invoke this defence. It has been suggested that for the exception to apply, the tanker owner must show that in no circumstances could anyone have avoided the accident.⁶⁴ This suggestion may well be correct in respect of the defence of 'a natural phenomena of an exceptional, inevitable and irresistible character' but the same submission is more tenuous in respect of the first part of the exception ie: the act of war provision.

From the point of view of shipowners the utility of the above defence may not be as limited as the commentators above suggest.

⁶²Browne, *op cit*, 152-153.

⁶³Abecassis & Jarashow, *op cit* 205 para.10-37.

⁶⁴Forster 'Civil Liability of Shipowners for Oil Pollution' 23 (1973) *J.B.L.* 26; cited by Abecassis & Jarashow, *op cit*, 205 fn.28.

Michael Bundock notes that under English maritime law an 'irresistible' circumstance has been held to be a situation which the defendant could not have prevented through the exercise of reasonable precautions⁶⁵ and an 'inevitable' event is one which could not possibly have been prevented by ordinary care, caution and maritime skill.⁶⁶ The learned commentator furthermore notes that the test for both standards of conduct is subjective.⁶⁷ Therefore it is possible that a hurricane would satisfy the stipulated conditions because although modern tankers may be designed to navigate such conditions a less modern tanker or other oil carrying ship, such as a barge, may not. It must be recognised that the interpretation of the provisions of the Civil Liability Convention lies with the courts of the party state where the damage was sustained. Therefore, in most instances, English maritime law will not be applicable.

4.7.3.3 Intent of third parties

The tanker owner will also escape liability where he is able to prove that the pollution damage:

'(b) was wholly caused by an act or omission done with intent to cause damage by a third party.'⁶⁸

The inclusion of the word 'wholly' effectively prevents the tanker owner from escaping liability under the Civil Liability Convention where the third party takes action or omits to take action after an initial casualty. In this way governments are not prejudiced where they deliberately damage an already damaged

⁶⁵*Nugent v. Smith* (1876) 3 Asp MLC 198, 205.

⁶⁶*The Virgil* (1843) 2 Wm Rob 201, 205.

⁶⁷Bundock *Solicitors Journal* 5 February 1993 at 97.

⁶⁸Civil Liability Convention, Article III.2 (b).

tanker in order to prevent pollution damage from occurring.⁶⁹ Also it could be argued that even where a government agency deliberately damages a tanker and that action is the whole cause of the pollution damage which ensues, the shipowner may not be able to invoke the exception if the government agency acted without the 'intent' to cause damage. For example the government agency may have acted in a reasonable fashion under the circumstances to prevent oil pollution from occurring. Generally this exception envisages situations where, for instance, vandals, arsonists, pirates or even perhaps extreme environmentalists deliberately damage a tanker and oil pollution results.

The following case constitutes an example of a dispute where the Article III.2 (b) exception was unsuccessfully raised by the shipowner. The facts of this case are that on the 18th December, 1986, the *Oued Gueterini*, an Algerian tanker of 1,576 grt. was unloading bitumen at the port of Algiers when a quantity of bitumen escaped into the harbour. Fortunately no pollution damage was caused in the actual harbour but about 15 tonnes of bitumen did, however, enter the sea-water intake of a nearby power station. This caused the temporary shut-down of the power station while certain contaminated equipment was cleaned. The owner suffered a financial loss as a result of this closure and incurred expenses in cleaning the contaminated equipment.

At the time of this incident Algeria was party to both the Civil Liability and Fund Conventions.⁷⁰ Accordingly, owners of the power station sought to recover their losses in the Court of Algiers against the shipowner's P&I Insurer and the IOPC Fund as is provided for under the Civil Liability and Fund Conventions

⁶⁹Abecassis & Jarashow, *op cit*, at 205 cite the example of the government intervention in the case of the *Torrey Canyon* in 1967 and the *Amoco Cadiz* in 1979 to illustrate this potentially problematic issue.

⁷⁰Algeria had acceded to the 1969 Civil Liability Convention on 14 June, 1974 and the 1971 Fund Convention on 2 June, 1975.

respectively.⁷¹ During these legal proceedings the P&I Club argued that the shipowner should be exonerated from liability in accordance with Article III.2 (b) of the Civil Liability Convention. In support of this contention it was argued that the damage complained of was wholly caused by an act or omission done with intent to cause damage by a third party. It was argued that the third party fault of the operator of the oil terminal, where the unloading of the bitumen took place, justified the exoneration of the shipowner. The grounds given in support of this submission were that the terminal operator had continued to discharge oil despite the danger posed to the power station by the close proximity of the terminal to the water intake ducts of the power station. Furthermore, the Club maintained that this hazard was well established because similar incidents had occurred in the past.

The IOPC Fund rejected this defence on the ground that the circumstances at hand could not be considered as being encompassed by Article III.2 (b). On the facts available it would seem likely that the requisite elements of third party 'intent' and 'whole causation' were not in fact present. As such, the refusal of the IOPC Fund to permit the exemption to be invoked by the shipowner seems justified under the circumstances. The futility of the Club position was apparently recognised by the Club itself because it subsequently ceased to rely on this exception.⁷²

4.7.3.4 Faulty government navigational aids

Governments and shipowners share a moral and economic interest in maintaining safe standards of navigation, and, as such, governments owe a duty to shipowners and seafarers to maintain accurate navigational aids. Accordingly, it would be unreasonable to hold the shipowner liable where an accident was caused by the

⁷¹*IOPC Fund Annual Report 1989*, section 12.2 at 22.

⁷²*IOPC Fund Annual Report 1989*, section 12.2 at 22.

negligent or wrongful act of a government in the exercise of this duty. With these considerations in mind a third class of exception was decided upon at the 1969 Conference.⁷³

This exception applies where oil pollution damage is '... wholly caused by the negligence or other wrongful act of any Government or other authority responsible for the maintenance of lights or other navigational aids in the exercise of that function.'⁷⁴ The scope of this exception is narrow and once again the qualification 'wholly' severely curtails its potential application. Clearly, the sole cause of the damage must be due to the either negligence or wrongfulness of the Government or other authority before the exception can apply. While the exception is frequently invoked by shipowners it rarely succeeds as some conduct on the part of the ship usually contributes in some degree to the accident.⁷⁵ It has also been suggested that ship navigators should not rely exclusively on navigational aids.⁷⁶ If this argument is accepted then it would be rare for the exception ever to be invoked. In addition the onus of proof lies with the owner.

Notwithstanding these difficulties the exception was invoked successfully by the owners of the Soviet tanker the *Tsesis* against claims for pollution damage by the Swedish government. In October 1977, while proceeding northwards, under the control of a pilot, in the Landsort-Södertälje fairway, the *Tsesis* struck a submerged shoal. As a result of running aground on the shoal the *Tsesis's* bottom was severely damaged, oil leaked into the sea and pollution damage ensued. The National Swedish Administration of Shipping and Navigation knew of the shoal but had neglected

⁷³*Official Records*, vol.2 at 427 para.76.

⁷⁴Civil Liability Convention, Article III.2 (c).

⁷⁵*Official Records*, vol.2 at 424 para.59.

⁷⁶*Official Records*, vol.2 at 424 para.56.

to indicate its presence in the charts for the area."⁷⁷

Sweden had through the 1973 Oil Liability Act (1973: 1198) preempted the coming into force of the Civil Liability Convention by adopting the provisions of that Convention into its domestic legislation.⁷⁸ The Swedish Oil Liability Act of 1973 provides that the owner shall be free from liability where he can show that the damage 'was wholly caused by the fault or neglect of any Swedish or foreign authority in the fulfilment of a duty to maintain lights or other aids of navigation.'⁷⁹ The owner of the *Tsesis* claimed in this case to be exonerated from oil pollution liability because of the failure of the Swedish Government to properly maintain the charts on which the tanker relied to navigate safely. The owner alleged that this was the whole cause of the accident and subsequent pollution damage. The foundation of this plea was that hydrographical detail on such charts was included within the meaning of 'other navigational aids.' The Swedish Supreme court held that the conduct of the *Tsesis* had been unobjectionable and imposed civil liability wholly on the Swedish State. This conclusion was reached on the basis that the exception for 'negligence in maintenance of lights and other aids to navigation' was applicable to hydrographical surveying for the purpose of producing new charts. The State's negligence constituted the surveyor's failure to report the presence of the shoal.⁸⁰

In another case, that of the *Jose Marti*, the shipowner was not as fortunate. Here on the 7th January, 1981, while navigating a narrow channel under compulsory pilotage on the east coast of

⁷⁷Tiberg 'Oil Pollution of the sea and the Swedish "Tsesis" decision' *Lloyd's Maritime and Commercial LQ* (1984) 218 at 218-219; Abecassis & Jarashow, *op cit*, 205-206.

⁷⁸Tiberg, *op cit*, 218. Sweden only subsequently ratified the Civil Liability Convention on 17 March, 1975 and the Convention came into force on 19 June, 1975.

⁷⁹Tiberg, *op cit*, 218.

⁸⁰Tiberg, *op cit*, 220.

Sweden the 27,706 grt. Soviet tanker *Jose Marti* ran aground on an unmarked rock. As a result of this accident about 1,000 tonnes⁸¹ of cargo oil escaped from the tanker, causing oil pollution damage in the Stockholm Archipelago.⁸² The owner of the *Jose Marti* claimed to be exonerated, on grounds similar to those successfully invoked in the *Tsesis* case, in that the accident was wholly caused by the negligence of the Swedish Government in the maintenance of navigational aids.⁸³

In the alternative the owner pleaded that if the court did not exonerate him from liability on his first argument he should nevertheless be exonerated from liability to the Swedish Government claims, or that such compensation should be reduced, because the Swedish Government had negligently failed to maintain navigational aids which had contributed to the accident and resulting pollution damage. This alternative plea was founded on Article III.3 of the Civil Liability Convention which provides that:

'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.'

Both the owner's primary and alternative arguments were rejected by the Court of Appeal in Stockholm which determined that the accident was caused wholly by the negligence of the owner in that the pilot of the tanker had been at fault. Although the use of the pilot had been compulsory and had been supplied by the

⁸¹A tonne is a metric measure of weight. One tonne equals 1000 kilograms (Kg) and is approximately 2205 lbs. One tonne of crude oil is equivalent to about 7.4 barrels.

⁸²Abecassis & Jarashow, *op cit*, 206 para.10-39.

⁸³Civil Liability Convention, Article III.2 (c).

Swedish Government a well established principle of maritime law holds that once such a pilot operates on behalf of a ship he becomes a part of the ships crew and as such the shipowner is held responsible for his actions.⁸⁴ The Court of Appeal rejected the argument advanced by the owner of the *Jose Marti* that he should be exonerated from liability because the pilot should be construed as being included in the notion of a 'navigational aid'. Contrary to the court *a quo*, the Court of Appeal held that the owner had not proved any negligence on the part of the Swedish Government in the maintenance of navigational aids or any negligence by any public official. Accordingly, this Court determined that the owner of the *Jose Marti* would bear full responsibility for the Swedish Government's pollution damage caused by the accident. Leave to appeal to the Supreme Court against this judgement was refused.⁸⁵

The ambit of the Article III.3 defence is further qualified by the use of the words 'may be' as opposed to 'shall be'. Due to this choice of wording, a court is permitted to exercise certain latitude in favour of the State.

This construction in favour of coastal governments is illustrated by the reasoning of the court *a quo* in the *Jose Marti* case. The court *a quo* determined that there was a certain degree of negligence on the part of the Swedish authorities in the maintenance of navigational aids and that this negligence had contributed to the accident. However, this negligence was

⁸⁴The preferable view is that the 'pilotage exoneration' is dependant upon the 'character of the act of pilotage'. In normal circumstances, such as those which applied in the *Jose Marti* case, where the pilot was subject to the control of the ship's master no grounds for 'pilotage exoneration' exist. Whereas, for example, in the Panama Canal, where the pilot assumes full responsibility for navigation 'pilotage exoneration' could be invoked. see; *Official Records*, vol.2 at 151 para.7.

⁸⁵The account of the *Jose Marti* accident and litigation is taken from the *IOPC Fund Annual Report 1987*, section 9.3 pp 16-17.

considered relatively minor. For this reason, the court *a quo* did not reduce the compensation to the Swedish Government on the grounds of contributory negligence, but awarded the Swedish Government full compensation for the pollution damage.⁸⁶

From the facts of the *Jose Marti* case it is evident that some overlap may arise between the application of Article III.2 and III.3. The situation can arise where substantial claims under the Civil Liability Convention originate from the costs of clean-up and preventive measures incurred by a coastal government which is also responsible for the accuracy of navigational aids in the area concerned.⁸⁷ Thus where the shipowner fails to successfully invoke the total exoneration under Article III.2 he may still be permitted to reduce his liability under Article III.3. The difference between the two provisions is that while Article III.2 exonerates the shipowner from all claims under the Convention the Article III.3 defence is limited in scope as against claims made by the party who contributed to the resulting damage and as such is aimed mainly at government controlled preventive measures.

Although Article III.3 of the Civil Liability Convention, together with the absolute exceptions to liability contained in Article III.2, make inroads into the principle of strict liability, these provisions were incorporated into the Civil Liability Convention in fairness to tanker owners. These exceptions also recognise that some accidents at sea may in truth be unavoidable.

It has been suggested that the application of Article III.2 can lead to delays in the procedure for compensating claimants under the Civil Liability Convention. Clearly, before any money may be paid to any claimant, including governmental claimants, it must first be established whether the owner is exonerated under the

⁸⁶*IOPC Fund Annual Report 1987*, section 9.3 at 17.

⁸⁷*Official Records*, vol.2 at 427 para.77.

provision of Article III.2.⁸⁸

4.8 Limitation of liability

The underlying principle of tort dictates that when one party negligently causes damage to another the negligent party will be required to compensate the injured party's loss. In maritime law and other areas of law this principle does not apply in all instances where damage is caused negligently.⁸⁹ Where certain conditions prevail the owners of vessels which cause damage may only be held accountable up to certain financial limits which are determined in relation to the tonnage of the vessel.⁹⁰ This practice is referred to as the "shipowner's right to limit" and is relevant to many kinds of maritime claims. In most circumstances the privilege applies in some or other form to claims for ship-source oil pollution damage.

When a shipowner is confronted with potentially large claims he will attempt to assert his right to limit liability in the court where claims have been levelled against him. If he is successful in asserting this right he will be entitled to establish a limitation fund within that court. The amount constituted by this fund may not always be sufficient to meet all successful claims brought against it. Where this is so the competing claims are settled against the limitation fund according to their comparable ranking, which is determined according to the law of the state

⁸⁸*Official Records*, vol.2 at 427 para.75.

⁸⁹The concept of limited liability is by no means unique to maritime law. The most wide-spread example of limited liability is the protection afforded to businessmen operating through limited liability corporations.

⁹⁰Article 4 of the 1976 Convention on Limitation of Liability for Maritime Claims provides that:

'A person liable shall not be entitled to limit his liability if it is proved that the loss resulted from his personal act or omission, committed with the intent to cause such loss, or recklessly and with knowledge that such loss would probably result.'

where the action is heard. Where the liability limits under the Civil Liability and Fund Conventions or the limits set by the voluntary compensation regimes of TOVALOP and CRISTAL have been exceeded, competing claims are reduced proportionally and ranking does not apply.

Where oil pollution damage occurs other claims will normally also arise against the shipowner. Such claims may include damage to another vessel, where, for example, oil pollution results from a ship-to-ship collision. Claims for loss of life or injury to crew and third parties, cargo claims, salvage claims and claims for wreck removal, frequently exist concurrently with oil pollution claims. The advantage afforded to claimants under the compensation Conventions and voluntary compensation regimes is that where the limits have been exceeded under those instruments claimants are not required to compete with claims for non-pollution damage because these instruments are pollution-specific and do not provide compensation for claims which are not directly related to pollution damage.

Shipowners argue that the right to limit liability is a prerequisite for the maintenance and continued development of an efficient fleet of ocean-going vessels. This argument is based on the premise that shipping is such a costly enterprise attended by such a high risk of prohibitive liability that without the protection of limited liability investors would be disinclined to become engaged in the industry. It is further argued that as shipping plays an essential role in the global distribution of raw materials and manufactured goods a balance needs to be struck between the compensation awarded to successful claimants and the policy requirement of allowing shipowners to limit their liability to an amount which is readily insurable at a reasonable premium. In this way it is arguable that investment in the shipping industry is assisted by allowing shipowners to obtain insurance commensurate with limited exposure thus mitigating the high risks involved in operating ships.

There is considerable truth to both assertions made by the shipowners' argument described above. Initial capital investments required to construct ocean-going vessels are considerable.⁹¹ Returns on such investment are relatively slow and subject to greater fluctuation and uncertainty compared with other fields of investment. Such fluctuation can be unpredictable and sudden.⁹² Furthermore, running and maintenance costs are high and ships depreciate in value rapidly. Not only do potential investors have to contend with these immediate disincentives for investment in the shipping industry but because ships are often the instruments of serious damage investors may also be disinclined to assume these potential risks. Examples of such risks include cargo claims, collision claims, claims for loss of life and injury, wreck removal, pollution claims and other maritime disasters. In modern times the potential for catastrophe claims has increased as more dangerous cargoes are being carried at sea.⁹³ Where the shipowner is denied the right to limit liability, such claims could make severe inroads into P&I Club reserves and conceivably upset the entire system of marine insurance.

It cannot be denied that shipping has a commanding role in the viability of international trade and that shipping also has considerable strategic importance. Oil tankers exemplify the strategic importance of shipping more than any other area of the shipping industry. History has proved this point on many occasions. The transportation of oil and fuel at sea and the control of oil supplies was crucial to the result of both the

⁹¹'Rising demand sparks burst of tanker order' July 30, 1990, *Oil & Gas Journal* 23 at 24.

⁹²'Never up for long' *Petroleum Economist* August 1991 at 15.

⁹³Barker 'Hazardous goods at sea' (1992) vol.16 No.4 *Marine Policy* 306 at 307; Coghlin 'Shipowner's Liabilities Fifty Years On' (1991) 22 *Journal of Maritime Law and Commerce* 415 at 417-8.

First and Second World Wars.⁹⁴ The importance of oil and the ability to transport oil from various sources by sea has also been illustrated in more recent times. This was the case during the 1956 Suez Canal Crisis,⁹⁵ the 1967 Arab oil embargo which was brought about by the Six Day War,⁹⁶ and the 1974 oil crisis triggered by the Yom Kippur War.⁹⁷

⁹⁴Samson *The Seven Sisters* (1975) pp.81-83; Yergin *The Prize* (1991) pp.176-177, 358, 362, 374-375, 410.

⁹⁵Yergin, *op cit*, pp.496-497:

'In all the agitated discussion in 1956 about the Suez Canal as the jugular, one point had not been given much attention: If the canal and the Middle Eastern pipelines were vulnerable, there was a safer alternative - the route around the Cape of Good Hope. To be economical and practical that route would require much larger tankers, capable of carrying a great deal more oil. ... Not only would they prove to be eminently economical, they would also provide the requisite security. Thus supertankers, along with the decline of the British influence and prestige and the ascendancy of Gamal Abdel Nasser, were among the consequences of the Suez Crisis.'

⁹⁶Yergin, *op cit*, pp.556-557:

'The closure of the Suez Canal and the Mediterranean pipelines meant, as in 1956, much longer journeys around the Cape of Good Hope and thus resulted in a mad scramble for tankers. ... Yet the requirements of much-longer voyages could be more easily met than was expected owing to the development of "supertankers", an innovation spurned by the 1956 Suez Crisis.'

Further, at 558 the same author writes:

'The U.S. Department of the Interior, in its report on the management of the crisis, drew two lessons: *the importance of diversifying sources of supply and of maintaining a large, flexible tanker fleet.*' (emphasis provided by the present writer).

⁹⁷See Yergin, *op cit*, pp.519-525 generally and specifically at 621 where that author writes:

'In such circumstance, the only logical response was on of "equal suffering" and "equal misery". That is, the companies would try to allocate the same percentage of cutbacks from total supplies to all countries by moving both Arab and non-Arab oil around the world. They had already gained some experience in how to organize a

In conclusion, the true nature of the right to limit liability in the context of maritime law is perhaps most aptly described by Lord Denning MR in *The Bramley Moore*:⁹⁸

'... limitation is not a matter of justice. It is a rule of public policy which has its origin in history and its justification in convenience.'⁹⁹

In terms of Article V.1 of the Civil Liability Convention, as amended by the 1976 Jamaica Protocol, the shipowner is entitled to limit his liability to 133 Special Drawing Rights (SDR) (US\$186) per ton of the ship's tonnage or 14 million SDR (US\$19.5 million), whichever is the smaller amount.¹⁰⁰

The shipowner loses the right to limit liability and will face liability for all proven oil pollution damage caused by a spill, where it is established that the incident occurred as a result

sharing system during the embargo that accompanied the 1967 war. But the scale and the risks in 1973 were much, much larger.'

Samson, *op cit*, also comments on this prorationing of limited supplies between the consumer nations at pp.260-265 and at 261 writes:

'The companies [multinational oil companies] were able to perform this controversial task through the intricate computer systems by which they regulated the movements of their tankers and cargoes throughout the world.'

⁹⁸*Alexandra Towing Co. Ltd v Miller and Egret & others (The Bramley Moore)* [1964] PD 200 cited by Brusser 'The Existence and Extent of a Carrier's Right to Limitation of Liability in Collisions involving Negligence' (1982) *Acta Juridica* 51 at 56.

⁹⁹At 220.

¹⁰⁰The amounts given in dollars above were calculated on the basis of the exchange at 30 January, 1992 (US\$1.39921 = 1 SDR); Dow Jones News Serv., January 1992. These amounts may vary in relation to fluctuations in exchange rates. For example, as at 4th September, 1992, 133 SDR was equal to about US\$197.54 which amounted to a total limit under the Civil Liability Convention of about US\$20.8 million, the equivalent of 14 million SDR.

of the 'actual fault or privity' of the shipowner.¹⁰¹ This topic has been discussed in some detail under English and United States admiralty law in association with the *Torrey Canyon* limitation proceedings. The wording of this crucially important provision does not explicitly settle the question of whether the burden of proof lies with the owner or the claimant.

4.8.1 Limitation tonnage

For limitation purposes the vessel's tonnage is calculated in accordance with a formula contained in Article V.10 of the Civil Liability Convention.

'... the ship's tonnage shall be the net tonnage of the ship with the addition of the amount deducted from the gross tonnage on account of engine room space for the purpose of ascertaining the net tonnage.'

The net tonnage of a ship is not a measure of weight but represents the cubic capacity of the ship, excluding engine room space.¹⁰² However, for the purpose of calculating the ship's 'limitation tonnage' under the Civil Liability and Fund Conventions the tonnage of the engine room is added to the net tonnage. The definition of goes on to provide that:

'In the case of a ship which cannot be measured in accordance with the normal rules of tonnage measurement, the ship's tonnage shall be deemed to be 40 per cent of the weight in tons (of 2240 lbs)¹⁰³ of oil which the ship is

¹⁰¹Civil Liability Convention, Article V.2.

¹⁰²100 cubic feet of enclosed space is equal to one gross registered ton.

¹⁰³This weight refers to the 'long ton' (equivalent to 1.016 metric tons) and must not be confused with the American 'short ton' which is equal to 2,000 lbs (equivalent to 0.907 metric tons). The metric ton is a wholly different measurement of weight and is measured in kilograms (1 pound = 0.454 kg).

capable of carrying.'¹⁰⁴

The basis of this rule is that the 'limitation tonnage' is recognised as constituting approximately 40 per cent of the deadweight tonnage of a tanker. The deadweight tonnage is the difference between light and load displacement and generally reflects the cargo carrying tonnage of a tanker.¹⁰⁵

4.8.2 Evolution of the 'unit of account'

The 'unit of account' initially used to determine the amount of money for which the tanker owner and the IOPC Fund would be liable under the 1969 Civil Liability and 1971 Fund Convention was originally expressed in the Poincaré Franc, otherwise known as the Gold Franc, consisting of 65,5 milligrams of gold of millesimal fineness 900.¹⁰⁶

After the development of the 1976 Protocols to the 1969 Civil Liability and 1971 Fund Conventions,¹⁰⁷ the 'unit of account' was expressed in the Special Drawing Right (SDR) as formulated by the International Monetary Fund (IMF).¹⁰⁸ One SDR was then equal to 15 Poincaré Francs.¹⁰⁹ The IMF determines the value of the SDR once every five years in terms of a 'basket' of 16

¹⁰⁴Civil Liability Convention, Article V.10.

¹⁰⁵M'Gonigle & Zacher, *op cit*, 153.

¹⁰⁶Civil Liability Convention, Article V.9 and the Fund Convention, Article 1.4.

¹⁰⁷Protocol to the 1969 Convention on Civil Liability for Oil Pollution Damage, signed at London, 19 November, 1976; entered into force 8 April, 1981. Protocol to the 1971 International Convention on the Establishment of an International fund for Compensation for Oil Pollution Damage; signed at London, 19 November, 1976; not yet in force.

¹⁰⁸This is in terms of Article II of the 1976 Protocol to the 1969 Civil Liability Convention and Article II of the 1976 Protocol to the 1971 Fund Convention.

¹⁰⁹IOPC Fund Annual Report 1988, section 13.1 (d) at 53.

currencies. The official value of the SDR is given in five currencies, the U.S. Dollar, British Pound, French Frank, German Mark and Japanese Yen. The SDR can be converted into any other national currency by referring to the comparative market exchange rate of that currency. This procedure enables the value of the SDR to fluctuate in relation to any one currency. For example any decline in the British Pound, relative to the other four official currencies will increase the British Pound value of the SDR.¹¹⁰ The SDR is to be converted into the national currency of the State in which the shipowner's limitation fund is constituted, on the basis of the value of that currency by reference to the SDR value on the date of the constitution of the limitation fund.¹¹¹

The 1976 Protocol to the Civil Liability Convention entered into force in 1981 but has been ratified by only a limited number of States. The 1976 Protocol to the Fund Convention has not yet (as of October 1994) come into force. This state of affairs has caused considerable difficulty concerning the uniform calculation of limits under the Civil Liability and Fund Conventions. In 1978, the IOPC Fund Assembly adopted an interpretation of the provisions in the Fund Convention dealing with Poincaré Francs in terms of which the amount expressed in francs shall be converted into SDRs on the basis that fifteen francs are equal to one SDR.¹¹² The number of SDRs thus found shall be converted into national currency in accordance with the method of

¹¹⁰For a thorough analysis of the creation and allocation of the SDR by the IMF see Folsom et al. *International Business Transactions* 2nd ed. (1991) at 803-805; cited by Smith 'An analysis of the Oil Pollution Act of 1990 and the 1984 Protocols on Civil Liability for Pollution Damage' (1991) 14 *Houston Journal of International Law* 115 at 131 fn.112.

¹¹¹1976 Protocol to the Civil Liability Convention, Article II (2).

¹¹²Resolution No.1 (a) - Unit of Account (November 1978); cited *IOPC Fund Statistics* 1 October 1992 at 8.

evaluation applied by the IMF.¹¹³

The cause célèbre associated with the above provisions arose out of the destruction of the *Haven* off Italy on the 11th April, 1991. The 109,977 grt. Cypriot tanker *Haven* caught fire and exploded while lying at anchor seven miles off Genoa. The tanker, which was carrying approximately 144,000 tonnes of crude oil broke into three and sank. Pollution damage was sustained in Italy, France and Monaco which are all party states to the Civil Liability and Fund Conventions.¹¹⁴ It has been reported that preliminary indications show that the cause of this accident was due to an over pressuring of a cargo tank during the transfer of oil from one tank to another. This resulted in structural failure an explosion and subsequently the total loss of the ship.¹¹⁵

Despite the existence of many theories attempting to explain the cause of the accident the Italian Panel of Enquiry for the region of Liguria (one of the various territorial entities which sustained pollution damage) was unable to establish the cause. The Enquiry did, however, conclude that the shipowner '... had been guilty of gross negligence for not having ensured the efficiency of certain essential equipment before allowing the ship to return to commercial operation, for not having ordered the ship to stop sailing in view of certain technical problems which had arisen and for not having informed the classification society of the fact that one inert gas generator was out of order.'¹¹⁶

The *Haven*, formerly *Amoco Milford Haven*, was on her maiden voyage

¹¹³Resolution No.1 (b) - Unit of Account (November 1978); cited *IOPC Fund Statistics* 1 October 1992 at 8.

¹¹⁴*IOPC Fund Annual Report* 1992, section 12.2 at 59.

¹¹⁵Gray 'Prevention of Pollution' at 8 contained in *Oil Pollution Claims, Liability & Environmental Concerns* International Business Communications Ltd. Conference Documentation 3-4 November, 1992 London.

¹¹⁶*IOPC Fund Annual Report* 1993, section 12.2 at 36.

following a two year refit in Singapore. Built in 1973, she was coincidentally a sister ship to the now infamous *Amoco Cadiz* which was wrecked off northern France in 1978, causing the worst maritime pollution incident experienced in North West Europe. In that case 1.6 million barrels (bbl) of oil spilled along the coast of Brittany.¹¹⁷

During the *Haven* limitation proceedings, disagreement arose as to the method to be used for converting the maximum amount payable under the IOPC Fund (900 million [gold] francs) into Italian Lire (Lit). The IOPC Fund anticipated that the conversion would be made on the basis of the SDR. Certain claimants adopted a different view, maintaining that the conversion should be made according to the free market price of gold and that the SDR methodology should not apply because the 1976 Protocol to the Fund Convention (which replaced the [gold] franc with the SDR) had not entered into force.¹¹⁸

In March 1992, the judge presiding over the limitation proceedings decided this question in favour of the claimants for oil pollution damage. He held that the maximum amount payable by the IOPC Fund should be calculated by the application of the free market value of gold and not in relation to the SDR. This resulted in the assessment of an artificially high limitation fund, which together with the amount paid by the shipowner under the Civil Liability Convention was set at Lit771,397,947,400 (£350 million). If the more internationally accepted conversion procedure (as suggested by the IOPC Fund based on the value of the SDR) had been applied, a limit of Lit102,864,000,000 (£47 million) would have been derived. This amounts to a very considerable difference (approximately £303 million). As would be expected, the IOPC Fund lodged opposition to this decision.¹¹⁹ The appeal court upheld the decision of the court

¹¹⁷*Oil & Gas Journal* April 22 (1991) at 40.

¹¹⁸*IOPC Fund Annual Report* 1992, section 12.2 at 70.

¹¹⁹*IOPC Fund Annual Report* 1992, section 12.2 at 71.

of first instance.¹²⁰

The IOPC Fund has also appealed against this judgment.¹²¹ If this finding is upheld the IOPC Fund will be placed in a very difficult position because it will conceivably be forced to bear a far greater ceiling of liability than was intended by the authors of the Fund Convention and those states which became party to the Convention. The balance of liability apportioned between shipowners and cargo owners under the Civil Liability and Fund Conventions, respectively, will have been significantly realigned in favour of the shipowner. Nonetheless the Italian claimants will still be required to prove the quantum of their respective claims. If such a precedent were set it could then be that the system of compensation provided for by the IOPC Fund would not continue to function. Major receivers of oil such as Japan and the Netherlands would be reluctant to continue contributing to the IOPC Fund where such a high ceiling of liability is permitted. It is even questionable whether certain states (particularly Japan) would be prepared to contribute in this specific instance. The impact of the high limits would be exacerbated even further if "damage to the environment" became widely accepted as a permissible claim for pollution damage under the Civil Liability and Fund Conventions.

A discontinuation of the IOPC Fund would force Party States to enact unilateral domestic legislation providing for compensation of oil pollution damage and rely on the voluntary compensation regimes of TOVALOP, TOVALOP Supplement and CRISTAL. Considering the disruptive consequences that would almost certainly result it would be surprising if the decision of the court of first instance is upheld to final appeal. The possibility of an out of court negotiated settlement has been raised.¹²² Although the probability of a settlement would seem unlikely it would not be

¹²⁰*IOPC Fund Annual Report 1993*, section 12.2 at 43.

¹²¹*IOPC Fund Annual Report 1993*, section 12.2 at 44.

¹²²*IOPC Fund Annual 1993*, section 12.2 at 44.

impossible. Certainly, in a dispute of this size and complexity an out of court settlement would be a considerable achievement for all parties involved.

4.9 The 'limitation fund'

The shipowner's right to limit, the historical development of this right and the rationale for this rule has already been discussed in some detail in this chapter and also in relation to the litigation surrounding the *Torrey Canyon* incident. At this point it is necessary to discuss limitation procedure in relation to the special requirements of the Civil Liability Convention.

4.9.1 Establishing a limitation fund

When a tanker causes oil pollution damage in the territory of a state party to the Civil Liability Convention, what most often occurs is that the shipowner attempts to establish a 'limitation fund' which is an amount of money equal to the limited liability assessed against the vessel causing the spill. In terms of Article V.3 of the Civil Liability Convention the shipowner is required to wait until a claim is brought against him before he is permitted to constitute a limitation fund which must also be established in the state where the action is brought. This will be the contracting state where the 'pollution damage' was sustained.¹²³ The Civil Liability Convention also provides that once claims have been brought against the shipowner the constitution of the fund is mandatory if the owner is to invoke the protection of limited liability.¹²⁴ This is contrary to the usual legal position under the 1957 or 1976 Limitation of Liability for Maritime Claims Conventions in terms of which the

¹²³Civil Liability Convention, Article IX.1. This is the exclusive jurisdiction clause which ensures that the only courts which are competent are those of the state where the pollution damage had occurred. Clearly, the *lex loci delicti* is the natural forum for the resolution of disputes.

¹²⁴Civil Liability Convention, Article V.3.

constitution of a limitation fund is not a precondition to claiming limitation.

Claimants may seek to challenge the shipowner's right to limit liability and it is generally accepted that under the Civil Liability Convention the burden of showing absence of personal fault is on the shipowner.¹²⁵ Under certain conditions, to be described later, the IOPC Fund may also challenge the shipowner's right to limit.¹²⁶ The rules requiring the establishment of the fund are clearly to the advantage of oil pollution claimants as the fund provides a certain source from which claims can be paid.

4.9.2 Protection afforded to the shipowner

Where the shipowner has successfully asserted his right to limit he may not be held liable for oil pollution damage, as defined in the Civil Liability Convention, in excess of the amount in the limitation fund. Furthermore, where an owner has established a limitation fund claimants are barred from exercising any right, or prosecuting any claim, against any other assets of the owner.¹²⁷ Any ship or other property belonging to the shipowner which may have been arrested or attached or any security lodged to avoid such arrest shall be released.¹²⁸ These provisions apply only if the claimant has access to the Court administering the limitation fund and the fund is actually available in respect of his claim.¹²⁹

4.9.3 Required form of payment and interest

¹²⁵Gaskell (B) 'The Amoco Cadiz: (II) Limitation and Legal Implications (1985) 3 *Journal of Energy and Natural Resources Law* 225 at 235 fn.81.

¹²⁶IOPC Fund Annual Report 1991, section 12.2 at 62 this was so in the *Haven* case.

¹²⁷Civil Liability Convention, Article VI.1 (a).

¹²⁸Civil Liability Convention, Article VI.1 (a).

¹²⁹Civil Liability Convention, Article VI.2.

The Civil Liability Convention by Article V.3 regulates the formulation of the shipowner's limitation fund:

' ... The fund can be constituted either by depositing the sum or by producing a bank guarantee or other guarantee, acceptable under the legislation of the Contracting State where the fund is constituted, and considered to be adequate by the Court or other competent authority.'

The limitation fund is usually established by the shipowner's P&I insurer by means of a letter of guarantee in lieu of constituting a fund. For example, in the *Haven* case the limitation fund was established by the P&I insurer by means of a letter of guarantee. However, in that case the IOPC Fund opposed acceptance by the Court of a bank guarantee as a limitation fund because no interest accrues on a bank guarantee. The IOPC Fund argued that where the limitation amount had been paid in cash, it would have been invested by the Court and would have earned interest to the benefit of third parties and the IOPC Fund. In a decision rendered in March, 1992, the judge in charge of the limitation proceedings held that the bank guarantee should also cover interest on the limitation amount. The judge further held that the interest should accrue to the benefit of the victims of oil pollution and not to the IOPC Fund. The shipowner and the P&I Club opposed this decision on the ground that under Article V.1 of the Civil Liability Convention, the aggregate amount of the shipowner's liability shall in no event exceed 14 million SDR.¹³⁰ This argument is difficult to support.

Clearly, interest on the limitation fund accrues to claimants only in relation to the amounts actually awarded to successful claimants. Therefore, if the whole limitation fund is awarded to claimants all interest which accrues to that limitation fund will be awarded to such claimants. This is equitable because in lengthy cases the interest awarded is intended to provide relief

¹³⁰IOPC Fund Annual Report 1992, section 12.2 at 63.

to claimants against the depreciation in the value of the original limitation amount through inflation. This can be a significant factor considering the long delays frequently experienced between the establishment of the limitation fund and final settlement. Usually any amount left in the limitation fund and interest on this amount will be returned to the shipowners or his P&I Club at the close of litigation allowing for certain expenditures made by the court.

4.9.4 Interest and other costs

The Civil Liability Convention does not stipulate any rules relating to the distribution of interest from the limitation fund. Therefore whether interest accrues to the victim or the party establishing the limitation fund, or not, will be decided by the law of the court where the limitation fund is formed. For example, under Danish¹³¹ and Swedish¹³² law an extra amount is to be added to the limitation fund to cover interest and costs. German,¹³³ English and Italian law allow for the recovery of interest. The Court may appoint a liquidator of the limitation fund to invest the amounts deposited. Such was the case in the limitation proceedings in the Court in Brest following the wreck of the *Tanio* which broke in two on 7th March, 1980, while trying to negotiating heavy weather conditions off the French coast.¹³⁴ In this case the Civil Liability Fund had almost doubled due to the accumulation of interest.¹³⁵

4.9.5 Distribution of the fund

¹³¹*IOPC Fund Annual Report 1987*, section 9.7 at 22 the *Jan Denmark*, 2 August 1985.

¹³²*IOPC Fund Annual Report 1987*, section 9.12 at 29 the *Tunktank 5*.

¹³³*IOPC Fund Annual Report 1987*, section 9.9 at 24 the *Brady Maria*.

¹³⁴*IOPC Fund Annual Report 1987*, section 9.2 at 11.

¹³⁵*Official Records*, vol.2 at 500 para.59.

After the limitation fund has been constituted in accordance with Article V of the Civil Liability Convention, the Courts of the State in which the fund is constituted are exclusively competent to determine all matters relating to the apportionment and distribution of the fund.¹³⁶ Significantly:

'Claims in respect of expenses reasonably incurred or sacrifices reasonably made by the owner voluntarily to prevent or minimize pollution damage shall rank equally with other claims against the fund.'¹³⁷

Although the shipowner's P&I Club is not an 'owner', when they act on behalf of the actual owner they will be entitled to claim against the limitation fund as an owner. For example, in the *Tanio* case, claims for compensation were submitted by nearly 100 claimants. The shipowner's P&I insurer claimed for the costs of surveying the sunken fore-section of the *Tanio* and for the expense of provisionally sealing holes in the sunken wreck.¹³⁸

The word 'incur' has been defined to mean 'to have liabilities cast upon one by act or operation of law'.¹³⁹ It has been noted that situations where there has been an actual expenditure and situations where an obligation exists in term of which such expenditure must be made in the future are both covered by the word.¹⁴⁰ Therefore, where a shipowner voluntarily allows his ship to be salvaged it is possible that an enhanced salvage award (under Article 13.1 (b) of the 1989 International Convention on Salvage which is payable by the shipowner to a salvor for preventing or minimizing pollution damage or for merely attempting to do so) could be recovered by such shipowner from

¹³⁶Civil Liability Convention, Article IX.3.

¹³⁷Civil Liability Convention, Article V.8.

¹³⁸*IOPC Fund Annual Report 1988*, Section 12.2 at 26.

¹³⁹*Black's Law Dictionary* 5th ed. (1979).

¹⁴⁰Paulsen, *op cit*, at 179.

a limitation fund established for the purpose of the Civil Liability Convention. If this is actually the case, and the limits of the Civil Liability Convention are exceeded, victims of oil pollution would in effect be contributing to the enhanced salvage award.

If the total extent of successful claims exceeds the limitation fund, each claim suffers a *pro rata* abatement.¹⁴¹ One of the possible drawbacks of this system is that where many claims compete against the limitation fund the court is unable to determine the amount due to be paid to each claimant until the aggregate or combined amount of all claims had been established which can result in delayed payment of compensation. On the other hand, the limitation fund constitutes a guarantee for victims and has the advantage of offering a separate fund to claim against in the case of the bankruptcy of the shipowner.

4.9.6 Waiver of the duty to establish a fund

Although the Fund Convention requires the shipowner to establish a limitation fund in order to claim against the IOPC Fund, this requirement may be waived in certain special circumstances. In the cases of the *Shinkai Maru No.3*¹⁴² and the *Hato Maru No.2*¹⁴³, considering the disproportionately high legal costs that would have been incurred in establishing the limitation fund compared with the low limitation amount under the Civil Liability Convention, the Executive Committee of the IOPC Fund decided, as an exception, to waive the requirement to establish the limitation fund. In the above mentioned cases the limitation funds under the Civil Liability Convention were relatively low

¹⁴¹Civil Liability Convention, Article V.4.

¹⁴²IOPC Fund Annual Report 1988, section 13.5 at 68. The *Shinkai Maru No.3* incident occurred on the 21st June, 1983, in the Japanese port of Ichikawa.

¹⁴³IOPC Fund Annual Report 1991, section 12.2 at 44. The *Hato Maru No.2* incident occurred on the 27th July, 1990, in the Japanese port of Kobe.

because the vessels were small coastal tankers. Limits under the Civil Liability Convention are linked to the limitation tonnage of the tanker from which the spill occurs, subject to an upper ceiling. The operation of small coastal tankers is particularly pronounced off the Japanese coast.

At the 1984 Conference to revise the 1969 Civil Liability Convention the International Group of P&I Associations argued that because the requirements of compulsory liability insurance under the Civil Liability Convention and the secondary source of compensation available from the IOPC Fund there was no need for additional security by requiring the shipowner to establish a limitation fund as a precondition for being able to claim the privilege of limitation.¹⁴⁴ This argument did not, however, prevail.

4.10 Compulsory liability insurance (CLI)

The centre-pin of the system of compensation brought about by the Civil Liability Convention is that shipowners maintain financial capability to meet their obligations under the Convention. This is ensured by requiring compulsory liability insurance. The practical importance and utility of Article VII of the Civil Liability Convention which governs the question of CLI can not be over emphasised and it may even be argued that had this system proved unworkable the entire system of compensation provided by the Civil liability Convention could have been undermined.

4.10.1 When CLI is required

The Civil Liability Convention stipulates that an owner maintain insurance or other financial security in respect of any ship which is registered in a Contracting State and carries 2,000 tons or more of persistent oil in bulk as cargo. This insurance must satisfy the Civil Liability Convention limits applicable to the

¹⁴⁴Official Records, vol.2 at 56.

particular vessel.¹⁴⁵

4.10.2 Problems raised by small tankers

In certain circumstances the stipulation of the 2,000 ton cut-in point as an imperative for the maintenance of pollution liability insurance under the Civil Liability Convention can lead to inequitable results. This is because cargoes of persistent oil even though less than 2,000 tons can nevertheless cause considerable pollution damage. For example, on the 24th August, 1987, while off Dubai in the United Arab Emirates, the Panamanian coastal tanker *Akari* of 1,345 grt. experienced a switchboard fire. The vessel lost electrical power and the use of her main engines and began to take on water. In an attempt to save the *Akari* she was towed by tug towards the port of Jebel Ali, but because the ship at that point posed a pollution hazard she was refused permission to enter port. Listing badly, the *Akari* was towed along the coast and subsequently beached. Approximately 1,000 tonnes of heavy fuel oil escaped polluting 30-40 kilometres of the coast before the *Akari* was refloated and her cargo transferred to another vessel. Considerable pollution damage was sustained by the United Arab Emirates.¹⁴⁶

Although Panama is party to the Civil Liability Convention,¹⁴⁷ at the time of the incident the *Akari* was carrying only 1,899 tonnes of oil in bulk as cargo and was therefore not required to maintain insurance in accordance with the Civil Liability Convention. Although the *Akari* was not required to maintain compulsory liability insurance she was still subject to the provisions of the Civil Liability Convention. However, the owner of the *Akari* was a single-ship company incorporated in Liberia

¹⁴⁵Civil Liability Convention, Article VII.1.

¹⁴⁶*IOPC Fund Annual Report* 1991, section 12.2 at 31-32.

¹⁴⁷Panama ratified the Civil Liability Convention on the 7th January, 1976. Panama has not however ratified the Fund Convention.

which had no assets besides the *Akari* which had been sold as scrap. The owner was therefore financially incapable of meeting his obligations under the Civil Liability Convention and was unable to establish a limitation fund.¹⁴⁸ This is an apt illustration of the way in which a 'single ship' or 'brass plate' company can frustrate the ability of claimants to pursue damage claims.

The inequity of this case was further compounded in that grounds existed which suggested that the *Akari* was unseaworthy at the time of the incident. If this had been proved, the shipowner may well have been deprived of the right to limit his liability under the Civil Liability Convention. However, this was of limited importance here, as the shipowner had no assets against which to proceed.¹⁴⁹

4.10.3 Contracting State duties and CLI certification

A Contracting State shall not permit a ship in its registry or operating under its flag, to which this Article applies, to trade unless a CLI certificate has been issued.¹⁵⁰ Furthermore, ships flying the flags of non-participating States are required to be in possession of such certificates of insurance when entering or leaving a port or terminal installation of a State Party to the Civil Liability Convention.¹⁵¹ Clearly the latter provision was inserted so that Party State ship owners are not placed at an unfair competitive disadvantage to ships of non-participating states. This provision also ensures that all ships carrying oil in bulk visiting Party States which would be subjected to the terms of the Civil Liability Convention are able to meet its liability provisions. The certificate must comply with certain

¹⁴⁸*IOPC Fund Annual Report* 1991, section 12.2 at 32.

¹⁴⁹*IOPC Fund Annual Report* 1990, section 12.2 at 32.

¹⁵⁰Civil Liability Convention, Article VII.10.

¹⁵¹Civil Liability Convention, Article VII.11.

substantive and formal requirements and must be carried on board the vessel as evidence of coverage.¹⁵² The purpose of this rule is to enable the Contracting State to make sure that ships are properly insured.

The certificate shall be either 'issued' or 'certified' by the competent authority of the State of the ship's registry.¹⁵³ The State of registry also determines the conditions of issue and validity of the certificate.¹⁵⁴ These powers were conferred on the State of the ship's registry because such State exercises control of the ships registered in its register and is in the best position to make the trading of the ship conditional on certificates being issued.¹⁵⁵

Clearly, the State of the ship's registry may not be a State contracting to the Civil Liability Convention. Consequently, contracting States can perform one of two functions: either 'issue' or 'certify' certificates. The duality of functions is necessary to meet the different needs of shipowners in different situations. For instance, a certificate could not be 'issued' by a Contracting State to a ship which was not registered in that State since this would fail to satisfy Article VII.2 as the certificate was not 'issued' by the competent authority where the ship was registered. Also, a certificate 'issued' by a non-contracting State to a ship registered in that state are of no use and may not be accepted for the purpose of the Civil Liability Convention until a Contracting State had 'certified' such certificate.

To further expedite the system of CLI certificates 'issued' or 'certified' under the authority of a Contracting State are to be

¹⁵²Civil Liability Convention, Article VII.2-7.

¹⁵³Civil Liability Convention, Article VII.2.

¹⁵⁴Civil Liability Convention, Article VII.6.

¹⁵⁵FUND/A.15/21, paragraph 6, page 2.

accepted by other Contracting States and regarded by them as having the same force as certificates issued or certified by themselves.¹⁵⁶ The use of the peremptory 'shall' indicates an obligation to do so. It has been noted if a discretion had been conferred upon Contracting States to decide whether to 'issue' or 'certify' a certificate the possibility exists that *de facto* international trade barriers could have developed. Thus a State must not refuse to 'issue' or 'certify' a certificate unless reasonable grounds to do so exist.¹⁵⁷ It has been reported that practical difficulties and confusion were frequently uncounted during the early application of the Civil Liability Convention certification provisions.¹⁵⁸ It would seem that these difficulties have been overcome.

4.10.4 Bareboat charterers and CLI

The "State of the ship's registry" means (in relation to registered ships) the State of registration of the ship, and in relation to unregistered ships the State whose flag the ship is flying.¹⁵⁹ At its 66th session, held in March 1992, the Legal Committee of the International Maritime Organization (IMO) considered whether in certain cases of bareboat charter the actual owner or the bareboat charterer should be considered as the registered owner for the purpose of the provisions of the Civil Liability Convention.¹⁶⁰ This issue had not been addressed at the 1969 Diplomatic Conference which adopted the Civil Liability Convention, since the practice of bareboat charter was virtually unknown at the time.¹⁶¹ In the case of bareboat charter the original nationality of the ship is temporarily

¹⁵⁶Civil Liability Convention, Article VII.7.

¹⁵⁷*Official Records*, vol.2 at 592 para.70.

¹⁵⁸*Official Records*, vol.2 at 456 para.9.

¹⁵⁹Civil Liability Convention, Article I.4.

¹⁶⁰FUND/A.15/21, paragraph 1, page 1.

¹⁶¹FUND/A.15/21, paragraph 5, page 2.

suspended and the ship is registered in the register of the bareboat charterer's State. Where this occurs the actual shipowner must surrender the original certificate of insurance and obtain a new one from the State where his ship is temporarily registered.¹⁶²

4.10.5 CLI and P&I Clubs

Compulsory liability insurance is usually obtained through an owner's P&I Club or from a mutual fund specially set up for the purpose - the International Tanker Indemnity Association (ITIA). The ITIA was established in 1969 by members of the U.S. oil industry operating tanker fleets following the *Torrey Canyon* incident. In August 1989 the ITIA Chairman cautioned that the ITIA members were considering closure in the face of a huge surplus of worldwide capacity in the marine protection and indemnity markets and in the face of the wide variety of cover available to tanker owners worldwide.¹⁶³ This excess capacity obtainable at reasonable rates did not last and the continuation of special tanker owners' mutual Club providing cover for the voluntary clean-up costs of the owner could well be called for.¹⁶⁴

State owned ships may satisfy the requirements relating to compulsory liability insurance under the Civil Liability Convention by providing evidence of a State guarantee.¹⁶⁵ For example, the *Volgoneft 263* which caused pollution damage to the Swedish coastline due to a collision with another vessel on the 14th May, 1990, was owned by a USSR shipping company. The vessel did not have any P&I insurance but was covered by a State guarantee, in accordance with Article VII.12 of the Civil

¹⁶²FUND/A.15/21, annex F 143.

¹⁶³*Lloyd's List* August 21, 1989.

¹⁶⁴For a description of the evolution of the ITIA see M'Gonigle & Zacher, *op cit*, 159.

¹⁶⁵Civil Liability Convention, Article VII.12.

Liability Convention.¹⁶⁶

4.10.6 Direct action against insurers

The Civil Liability Convention provides a right of direct action against the insurer. The right of direct action against insurers also applies to P&I insurance policies even though P&I insurance is indemnity insurance. In principle, as indemnity insurers, P&I Clubs do not consent to direct liability and claimants are required to proceed against the shipowner in the first instance. Only once the shipowner has paid successful claims will he in turn be indemnified by the P&I Club.¹⁶⁷ A high incidence of claims against P&I Association membership has resulted in this rule being adhered to with increasing strictness. Under the Civil Liability Convention the insurer has the same defences as the shipowner except that the insurer may not invoke the bankruptcy or winding-up of the shipowner to avoid liability. The insurer cannot avail himself of any defences under the policy of insurance other than the wilful misconduct of the assured. Wilful misconduct in this context would be equivalent to the wilful performance of the act which causes the pollution damage; an example would be where the owner of a tanker scuttles his vessel. Here the insurers will be able to avoid liability, as the law will permit no man to take advantage of his own wrong.¹⁶⁸ While the shipowner may lose his right to limit liability because the pollution damage resulted from his actual fault or privity, the insurer's limits of liability, to the amount guaranteed by the certificate of financial responsibility, is unbreakable.¹⁶⁹

¹⁶⁶IOPC Fund Annual Report 1991, section 12.2 at 43.

¹⁶⁷K. Mitchell 'Direct recovery from P&I associations, *The Fanti; The Padre Island*' [1987] *Lloyd's Maritime and Commercial LQ* 406.

¹⁶⁸*Thompson v Hopper* (1858) EB&E 1038. For a general description of the principles and case authority pertaining to the interpretation of 'wilful misconduct' in marine insurance law see *Ivamy Marine Insurance* 4th ed. (1985) pp 232-247.

¹⁶⁹Civil Liability Convention, Article VII.8.

In the *Akari* case certain important conceptual problems were raised relating to the right of direct action against the insurer. It will be recalled that the shipowner had no assets and therefore could not, without P&I support, establish a limitation fund. Furthermore, the *Akari* was not required to be in possession of a certificate of compulsory liability insurance because she was not carrying a cargo of 2,000 tons or more of persistent oil. The *Akari*'s P&I Club maintained that the *Akari* did not possess P&I cover for liability incurred by way of oil pollution damage. The Club further argued that the right of direct action against the insurer under Article VII.8 of the Civil Liability Convention did not apply in this case because the ship was carrying less than 2,000 tons of oil. In other words the P&I Club adopted the position that the right of direct action against any insurer under the Civil Liability Convention was dependant upon the actual existence of a Civil Liability Convention certificate of financial responsibility. This argument was not accepted by the IOPC Fund Director who maintained that a right of direct action against the Club as the shipowner's liability insurer did exist. This important conceptual problem was not resolved as the P&I Club and the IOPC Fund agreed to settle out-of-court. The Club offered to make an *ex gratia* payment of US\$160,000 (£82,900) to the IOPC Fund, recognising its potential liabilities to third parties but without any admission on this issue. The IOPC Fund accepted this *ex gratia* payment without conceding the validity of the Club's contention that no right of direct action existed. The IOPC Fund was also required to give an undertaking not to pursue any claims against the owner of the *Akari* or against the Club and to hold the owner and the Club harmless for any claims for compensation for pollution damage arising out of the incident.¹⁷⁰ This incident also highlights the way in which P&I Clubs steadfastly adhere to the notion of indemnity insurance.

4.10.7 Conclusions on CLI

¹⁷⁰IOPC Fund Annual Report 1990, section 12.2 at 32-34.

The development of enforceable financial responsibility certification for oil tankers, together with the right of direct action against insurers did much towards improving the claimant's chances of attaining compensation, because a certain fund of money was made available against which claims could be made. Prior to the Civil Liability Convention it had been extremely difficult to establish a claim against shipowners. If one succeeded it was then necessary to enforce the judgement, usually in a foreign jurisdiction, and the owner often did not have sufficient assets to satisfy the claims. Many ships are owned by 'brass plate' or 'single-ship' companies which have no assets other than the ship.

4.11 Channelling of liability to the registered owner

The Civil Liability Convention was designed to facilitate compensation regardless of fault and was intended to be in the best interests of victims. In this regard, it has been suggested that the purpose of the Civil Liability Convention is not to apportion blame but rather to ensure that the victims of tanker source oil pollution receive efficient, effective and certain compensation, and, that claimants would not benefit from a system under which several parties were jointly and severally liable. As such, it was considered more effective to impute liability solely to the shipowner.¹⁷¹ As a general statement of policy the above views are accurate, however, it must also be borne in mind that the aim of the Convention was not only to provide compensation but also to protect the marine environment. By protecting certain parties involved in the carriage of oil from direct liability it is possible that those parties will not be encouraged to adopt responsible attitudes towards the safety of operational standards. For example, if a cargo owner is immune from direct liability what incentive is there to compel him to charter a good quality tanker when he can charter a lower and even a poor quality tanker at a less expensive rate.

¹⁷¹*Official Records*, vol.2 at 415 para.42.

4.11.1 Liability of the registered owner

Claims for 'pollution damage' under the Civil Liability Convention may be made only against the registered owner of the ship.¹⁷² Where the registered owner is proceeded against under the Civil Liability Convention, which will be the case in States Party to the Convention, then the provisions of the Convention govern all 'pollution damage' claims brought against the registered owner.¹⁷³ Therefore, claims for 'pollution damage' allowed by the Civil Liability Convention may not be made against the registered owner in terms of the Convention and at the same time under the provisions of other laws. This exclusionary rule would presumably be enforced in contracting states by the upholding of an application to strike out an action for 'pollution damage' brought against the registered owner where such claims are not in accordance with the Civil Liability Convention.¹⁷⁴ An owner who is not the registered owner will probably not be afforded the right to limit liability under the Convention.

Even where, for instance, the registered owner's right to limit has been broken, through proof that the incident was a result of actual fault or privity of the owner, the Civil Liability Convention provisions relating to 'pollution damage', will still apply. Accordingly, claims for pure threat removal measures may remain inadmissible under the laws of the *lex fori*.

It has been seen, however, in the case of the *Amoco Cadiz* that victims of oil 'pollution damage' in states contracting to the Civil Liability Convention may successfully circumvent the exclusionary rule by initiating proceedings in a non-contracting

¹⁷²Civil Liability Convention, Article III.1.

¹⁷³Civil Liability Convention, Article III.4.

¹⁷⁴Gaskell (A) (1985), *op cit* 186.

state whose laws do not afford the same protection to the owner.¹⁷⁵ This observation will be further amplified during a discussion of the litigation surrounding the wreck of the *Amoco Cadiz*.

4.11.2 Servants and agents immunity

Subject to the exception below, victims of pollution damage in states party to the Civil Liability Convention are not precluded from claiming compensation under any other law from persons other than the registered owner. The exception, Article III.4 of the Civil Liability Convention, explicitly stipulates that:

' ... No claim for pollution damage under this Convention or otherwise may be made against the servants or agents of the owner.'

The effect of this provision is that no Civil Liability Convention claim for 'pollution damage' may be brought against a servant or agent of the the registered owner. Furthermore, no non-Civil Liability Convention claim for 'pollution damage' as defined in that Convention may be brought against such servant or agent under general principles of law.¹⁷⁶ General principles of law may be taken to include the common law governing tort, nuisance and trespass, civil law codes and other statutory law.

The Civil Liability Convention does not define the terms 'servants' or 'agents'; therefore, the determination of what kinds of individuals or legal bodies fall within this group will be left to the courts of the *lex fori*.¹⁷⁷ The master, crew and ships' managers would almost certainly be included. Whether bareboat charterers, ship designers, builders and repairers,

¹⁷⁵Abecassis & Jarashow, *op cit*, 201 para.10-24.

¹⁷⁶Abecassis & Jarashow, *op cit*, 201.

¹⁷⁷For an analysis of the interpretation of these terms under English law see Gaskell (A) (1985), *op cit*, 186-87.

classification societies and salvors will be construed as 'servants' or 'agents' is uncertain. The view has been put forward that the channelling provisions should not be constructed in such a way as to extend the rights to limitation of liability to parties unconnected with the actual navigation of the ship. In accordance with this view it has been argued that the builder of an unseaworthy ship should not be encompassed within the ambit of the phrase 'servants or agents of the owner'. If this reasoning is accepted then ship designers, repairers and classification societies will also be excluded.¹⁷⁸

Abecassis and Jarashow point out that certain contracting states have expressly excluded certain types of operators from liability under the Civil Liability Convention through the incorporation of special provisions in their municipal legislation.¹⁷⁹ This has been done in respect of charterers and salvors in certain states. They also suggest that any servant or agent of the registered owner may contractually agree to accept liability for 'pollution damage'.¹⁸⁰ On this point it must be the case that where such servant or owner does accept liability for pollution damage the actual owner will nevertheless remain primarily liable under the provisions of the Civil Liability Convention.

The objective behind channelling of liability is to clarify who is actually liable, and at the same time afford some protection to the wide range of parties involved in maritime endeavour relating to the transportation of oil at sea. This procedure also goes some way towards obviating the need for overlapping insurance coverage which would be required under a regime where a wide range of potentially responsible parties are identified.¹⁸¹ Channelling also reduces the possibility of

¹⁷⁸*Official Records*, vol.1 at 157 para.7.

¹⁷⁹Abecassis & Jarashow, *op cit*, 202 para 10-27.

¹⁸⁰Abecassis & Jarashow, *op cit*, 201 para.10-25.

¹⁸¹*Official Records*, vol.1 at 152 para.1; 154 para.10 and 155 para.13.

excessive litigation which often works to the detriment of victims.

The notion of liability channelling was essentially a creature of international law which sometimes conflicted with national law.¹⁸² By way of illustration, at the 1984 Conference, the concept of channelling was described as a principle 'alien' to Canadian common and legislative law,¹⁸³ and, that being so, it would 'raise difficulties' for that country.¹⁸⁴ The delegation from the United States pointed out that the concept of channelling was 'unusual' in the jurisprudential history of that country.¹⁸⁵ The channelling provisions constitute an example of the unique, exceptional and innovative character of some of the developments contained in the Civil Liability Convention which have thereby found their way into national legal systems. As such, it is difficult to refute the idea that the Civil Liability Convention, together with the Fund Convention, serve to facilitate the evolution of private liability laws and environmental law in nation states.

4.11.3 Actions outside the Convention

To recapitulate, nothing in the Civil Liability Convention prevents actions by oil pollution victims, including the IOPC Fund, against parties other than the owner or his servants or agents. Therefore, it is clear that the present system of channelling does not limit actions exhaustively to claims against the owner since separate actions outside the Civil Liability Convention are possible against a wide range of potentially responsible parties. At the 1984 Conference it was noted that claims outside the Civil Liability Convention did not cause great

¹⁸²*Official Records*, vol.1 at 153 para.4.

¹⁸³*Official Records*, vol.2 at 416 para.49.

¹⁸⁴*Official Records*, vol.2 at 619 para.75.

¹⁸⁵*Official Records*, vol.2 at 434 para.30.

difficulty in practice because in the majority of cases it was easier to proceed against the owner under the Convention in order to obtain the benefit of the owner's compulsory liability insurance.¹⁸⁶ The 'no-fault' liability of the owner under the Convention will also serve as an incentive to claim against the owner in the first instance. Nothing, however, prevents claimants proceeding against the owner under the Convention and then proceeding against parties which are not protected by the channelling provisions to recover any outstanding damage claims.

A case which aptly illustrates the extent to which victims may proceed against parties other than the registered owner and his servants and agents is the *Tanio*. It must be recognised from the outset that the *Tanio* case may be classified as an exception in so far as the application of the Civil Liability and Fund Conventions are concerned. This case will now be discussed.

On the 7th March, 1980, the *Tanio*, a tanker of 18,048 grt. registered in Madagascar, broke in half while navigating heavy weather conditions off the coast of Brittany, France. Regretfully, the master and seven other crew members lost their lives in the incident.

At the time of the incident the *Tanio* was carrying 26,000 tonnes of No.6 fuel oil in bulk as cargo.¹⁸⁷ About 13,500 tonnes of this oil escaped into the sea and over 200 kilometres of the Brittany coast was polluted. The Channel Islands were also affected. The stern section, containing about 7,500 tonnes of cargo oil did not sink and was towed to the port of Le Havre. The bow section, together with about 5,000 tonnes of cargo oil remaining in its tanks, sank to a depth of 90 metres. The oil contained in the sunken bow section was pumped out to prevent further pollution during operations which lasted 16 months. The

¹⁸⁶*Official Records*, vol.2 at 55.

¹⁸⁷No.6 fuel oil is classified as persistent oil for the purposes of the Civil Liability and Fund Conventions.

claims for 'pollution damage' exceeded the limits of the Civil Liability Convention and the Fund Convention.¹⁸⁸ The shipowner's liability limit under the Civil Liability Convention amounted to FFfr11,833,717.79 (£1.2 million) which was paid by the U.K. P&I Club.¹⁸⁹

In 1983 the French Government in joint pleadings with the IOPC Fund took legal action in the Court of Brest, France. In addition, twenty-nine local authorities in France and some 50 private claimants also proceeded against the same defendants. These claimants first proceeded against the registered shipowner, **La société Locafrance International Leasing** (Locafrance), under the terms of the Civil Liability Convention. They submitted that Locafrance had failed to put the *Tanio* in a seaworthy and navigable state. They alleged that the failure of the owner to organise a proper mechanism of control of the quality of the extensive repairs carried out by a shipyard in 1979 constituted a personal fault¹⁹⁰ on the part of the owner, who was therefore not entitled to limit his liability under Article V.2 of the Civil Liability Convention.¹⁹¹

The above claimants also proceeded against six parties other than the registered owner. These claims were made independent from the provisions of the Civil Liability Convention. The respondents are each dealt with in turn below.

La société Industrie Navale Meccaniche Assini

¹⁸⁸*IOPC Fund Annual Report 1988*, section 12.2 at 25-28.

¹⁸⁹*IOPC Fund Annual Report 1988*, section 12.2 at 28.

¹⁹⁰Article XXI of the Civil Liability Convention provides that '... [the] Convention is established in a single copy in the English and French languages, both texts being equally authentic.' The French text of Article V.2 uses the term '*faute personnelle*' (personal fault) as opposed to the English equivalent 'actual fault or privity'.

¹⁹¹*IOPC Fund Annual Report 1987*, section 9.2 at 13 and *IOPC Fund Annual Report 1988*, section 12.2 at 28-29.

Legal action was taken against the Italian shipyard that repaired the *Tanio* in 1979 on the allegation that the shipyard had not carried out the repairs in a proper manner.¹⁹²

La Société Française des Transports Pétroliers

The company responsible for the control of the repairs carried out on the *Tanio* in 1979 and the technical management of the vessel at the time of the incident. It was alleged that they had not exercised due diligence in the supervision of the repair work at the shipyard and in checking the results thereof.¹⁹³

La société Guardiola Shipping Corporation

The bareboat charterer of the *Tanio* at the time of the incident. Claimants submitted that they had failed to supervise the execution of the repair work properly. In addition the charterer had an obligation to put the ship in a seaworthy condition.¹⁹⁴

La compagnie Malgache de Transports Pétroliers

The company having sub-bareboat chartered the vessel and being responsible for the management of the *Tanio* at the time of the incident. It was alleged that in their being responsible for the operations of the *Tanio* they had an obligation to ensure that the crew was competent and properly trained. It was further alleged that they had failed to ensure that the Master of the *Tanio* was properly instructed concerning cargo distribution.¹⁹⁵

Le Bureau Véritas

The Classification society responsible for monitoring the repairs to the *Tanio* in 1979. It was alleged that they had not fulfilled their obligation to check the quality of the repair work at the

¹⁹²*IOPC Fund Annual Report 1987*, section 9.2 at 13-14.

¹⁹³*Ibid.*

¹⁹⁴*Ibid.*

¹⁹⁵*Ibid.*

shipyard properly.¹⁹⁶

The United Kingdom Mutual Steamship Assurance Association (Bermuda) Limited.

The U.K. P&I Club was sued in its capacity as the insurers of the civil liability of the charterer and sub-charterer.¹⁹⁷

The Court ordered an investigation into the cause of the incident which concluded that the initial fracture which broke the *Tanio* originated in the vicinity of frame 131 in wing tank No.6. It concluded that there were three contributing causes for this fracture. Firstly, insufficient reduction in speed to allow for bad weather. Secondly, defective cargo loading at the time of the incident and on previous voyages and, thirdly, defective reconstruction and replacement of the bottom structure in wing tank No.6 by the Italian shipbuilding company.¹⁹⁸

The merits of these actions taken outside the Civil Liability Convention would not be tested by the Court because an out of court settlement was agreed upon. This settlement was agreed to on 15th December, 1987. Locafrance (the registered owner) and the U.K. P&I Club paid, on behalf of all defendants, a total amount of US\$50 million to the IOPC Fund and the French State, less the shipowner's limitation amount under the Civil Liability Convention, FFfr11,833,717.79 (US\$1,931,089.71).¹⁹⁹

Regarding the *Tanio* case it may be argued that the channelling provisions in the Civil Liability Convention as it presently applies are not sufficiently broad to protect the wide range of potentially responsible parties from being held liable for pollution damage outside the provisions of the Convention. This

¹⁹⁶*Ibid.*

¹⁹⁷*Ibid.*

¹⁹⁸*Ibid.* at 14.

¹⁹⁹*Ibid.* at 15.

is certainly the view held by the oil company and ship owning lobbies.

In conclusion, the astute observation has been made that the most effective way to achieve channelling, and thereby prevent claims being brought outside the Conventions with the resulting erosion of the credibility of these instruments, is to ensure that the Civil Liability and Fund Conventions together provide possible claimants with comprehensive compensation without undue delays.²⁰⁰ The Conventions must meet the legitimate expectations of claimants. Problems arise where states ratify the Civil Liability Convention but not the Fund Convention. In such circumstances when large damage cases occur claimants may be forced seek supplementary compensation outside the Convention, against, for example, the bareboat charterer or the ship operator, in place of being able to obtain such supplementary compensation from the IOPC Fund under the provisions of the Fund Convention. In such cases the application of the voluntary compensation agreements (i.e. TOVALOP and CRISTAL) may then form part of the broader 'package of tools' managing tanker-source oil pollution liability which may serve as a further incentive encouraging claimants to resist resorting to alternative ways of obtaining full recovery. These observations give credence to the argument that the purpose of the Civil Liability and Fund Conventions, together with the voluntary compensation agreements, are rather to manage liability in the potentially explosive issue of oil pollution damage as opposed to being mechanisms for determining blame.

4.12 The registered owners right of recourse

It has already been pointed out that one of the primary reasons for the channelling of claims to the registered owner was to avoid the need for overlapping insurance by the wide range of potentially responsible parties associated with the operation of

²⁰⁰*Official Records*, vol.2 at 443 para.6.

tankers. However, the Civil Liability Convention expressly permits the owner to take recourse action against any third parties in accordance with national law.²⁰¹ For example, the owners of a ship damaged in a collision can sue the owners of the colliding ship at fault in respect of payments made under the Civil Liability Convention for pollution damage and the ordinary rules of contributory negligence apply. It is further submitted that the owner is even permitted to sue his own servants or agents in the same way. Although the existence of this provision is fair, it does, however, expose certain inconsistencies in the argument that the channelling provisions diminish the need for overlapping insurance coverage. It can be argued that although parties, other than the registered owner are not directly liable under the Civil Liability Convention such parties may ultimately become liable for this damage by way of the owner's recourse action. Such potentially responsible parties may also, therefore, be forced to take out liability insurance in order to guard against possible losses incurred in this way.

The operation of this principle, which ensures that liability may ultimately rest with the blameworthy party, even where the no-fault principle of the Civil Liability Convention applies, is illustrated through the facts of three oil pollution incidents. These incidents are discussed below.

Brady Maria/Waylink

On the 3rd January, 1986, a Panamanian tanker of 996 grt. the *Brady Maria* was proceeding up the River Elbe carrying a cargo of 2,000 tonnes of heavy fuel oil. The *Waylink* a dry cargo ship of 3,453 grt. registered in Gibraltar, which was proceeding down the river, turned across the river and collided with the *Brady Maria*. Approximately 200 tonnes of cargo oil escaped from the *Brady Maria* into the river as a result of the collision.²⁰² Extensive

²⁰¹Civil Liability Convention, Article III.5.

²⁰²IOPC Fund Annual Report 1988, section 12.2 at 38.

pollution damage was caused in the internal waters and territory of Germany.²⁰³

The official investigation into the cause of the incident showed that the pilot of the *Waylink* was mainly to blame for the collision, since he gave a wrong order to the helmsman of the *Waylink*, causing the vessel to cross the course of the on-coming *Brady Maria*. The owners of the *Waylink* established a modest limitation fund in the District Court of Hamburg of DM440,185 (£140,000).²⁰⁴ Claims for a proportional indemnity of the amount paid for pollution damage and other damage incurred by the owners of the *Brady Maria* were made against this fund.

Agip Abruzzo/Moby Prince

On the 10th April, 1991, while lying at anchor two miles off the Italian port of Livorno, the 84,544 grt. Italian tanker *Agip Abruzzo* was struck at night by the Italian car ferry *Moby Prince*. It was reported that dense fog had reduced visibility to a few yards.²⁰⁵ Both vessels caught fire and, sadly, 143 people on board the ferry lost their lives. The *Agip Abruzzo* was carrying about 80,000 tonnes of Italian light crude oil and as a result of the collision about 2,000 tonnes of this oil escaped. Considerable pollution damage was caused in the territorial sea and territory of Italy.²⁰⁶

It has been suggested that the collision was caused by the negligence of the crew of the *Moby Prince*.²⁰⁷ If this proves to be the case the owners of the *Agip Abruzzo* will be able to

²⁰³Germany ratified the 1969 Civil Liability Convention on 20 May 1975 and the 1971 Civil Liability Convention on 30 December, 1976.

²⁰⁴*IOPC Fund Annual Report* 1988, section 12.2 at 39.

²⁰⁵*Daily Telegraph* 12 April, 1991 at 1.

²⁰⁶*IOPC Fund Annual Report* 1992, section 12.2 at 54-55.

²⁰⁷*IOPC Fund Annual Report* 1992, section 12.2 at 58.

recover a proportion of their pollution liability under the Civil Liability Convention. Such claims against the *Moby Prince's* limitation fund would necessarily compete with other claims such as the *Agip Abruzzo's* hull underwriters and cargo interests.²⁰⁸

Amoco Cadiz/Astilleros Espanoles SA

A shipowner who is liable to pay oil pollution claims caused by the negligent design or construction of his vessel may recover an amount from the negligent shipbuilder in proportion to the extent that such negligence contributed to the incident and subsequent damage.

For example, the United States Court of Appeals, Seventh Circuit, ruled on the 24th January, 1992,²⁰⁹ that Amoco International Oil Company and its various subsidiaries (Amoco) pay US\$204 million in pollution damage caused by the oil spill from the 230,000 deadweight ton *Amoco Cadiz* off the French coast in 1978. It was also held that Amoco must pay an additional amount to Shell Oil Co., the owner of the spilled oil.

This was an appeal from the ruling made in August of 1990 by Federal Judge Charles R. Norgle of the U.S. District Court for the Northern District of Illinois (Eastern Division) who then had held that Amoco pay US\$155 million in damages to French interests and Shell Oil. Judge Norgle further determined that the yard which had built the *Amoco Cadiz*, Spanish company Astilleros Espanoles SA, was also liable for the failure of the ship's steering gear and her subsequent grounding due to defects in her design and construction. The Appeal Court upheld the trial judgement, holding that Amoco could attempt to recover some of the costs from the tanker's Spanish shipbuilders Astilleros Espanoles SA but that Amoco must accept full primary liability.

²⁰⁸ IOPC Fund Annual Report 1992, section 12.2 at 59.

²⁰⁹ *In the matter of the 'Amoco Cadiz' off the coast of France on March 16, 1978*, 913 A.M.C. 1992.

Clearly, the shipowner's rights of recourse under the Civil Liability Convention are significant and must not be discounted by other potentially responsible parties.

4.13 Jurisdiction

Actions for compensation of 'pollution damage' under the Civil Liability Convention may only be brought before the Courts of the State Party to the Convention in whose territory or territorial sea such damage is sustained. This is determined by Article IX.1 of that Convention which states that:

'Where an incident has caused pollution damage in the territory including the territorial sea of one or more Contracting States, or preventive measures have been taken to prevent or minimize pollution damage in such territory including the territorial sea, actions for compensation may only be brought in Courts of any such Contracting State or States. ...'

Because the Civil Liability Convention only facilitates claims for compensation against the registered shipowner and is designed to regulate this liability it is reasonable to interpret the phrase 'actions for compensation' as meaning 'actions for compensation under this Convention'.²¹⁰ Accordingly, Article IX.1 does not mean that all claims for oil pollution compensation brought by anyone against anyone must be brought in the Courts of the state where the pollution damage was sustained. Claims for oil pollution damage arising outside the ambit of the Civil Liability Convention, for instance, against a party who is not the registered owner or a servant or agent of the registered owner, would not necessarily be subject to this jurisdiction.

Furthermore, where the registered owner is domiciled in a non-contracting state it may be possible for claimants to circumvent

²¹⁰Abecassis & Jarashow, *op cit*, 220 para.10-86; Gaskell (A) (1985), *op cit*, 182.

the provisions of the Civil Liability Convention by proceeding in the jurisdiction of that non-contracting state. French claimants successfully by-passed the application of the Civil Liability Convention in the French jurisdiction by proceeding against the registered owners and the actual owners of the *Amoco Cadiz* in the United States. Clearly, claims related and unrelated to oil pollution even though arising out of the same incident may be brought in another jurisdiction provided that the rules relating to Conflict of Laws in that jurisdiction permit.²¹¹

4.13.1 Sovereign Immunity

It has been pointed out that state-owned ships may raise Sovereign Immunity as a defence in proceedings under the Civil Liability Convention. However, their ability to raise this defence in most West European jurisdictions will be limited by the European Convention on State Immunity (enacted in the U.K. by the State Immunity Act 1978) which provides *inter alia* that no state ship will enjoy immunity if, at the time when the cause of action arose, it was being used for commercial purposes.²¹² However, the Civil Liability Convention does not apply to warships or other ships owned or operated by a State and used, for the time being, only on Governmental, non-commercial service.²¹³ The Convention further stipulates:

'With respect to ships owned by a Contracting State and used for commercial purposes, each State shall be subject to suit in the jurisdictions set forth in Article IX and shall waive all defences based on its status as a sovereign State.'²¹⁴

²¹¹Browne, *op cit*, 148.

²¹²Browne, *op cit*, 148.

²¹³Civil Liability Convention, Article XI.1.

²¹⁴Civil Liability Convention, Article XI.2.

Each Contracting State shall ensure that its Courts possess the necessary jurisdiction to entertain such actions for compensation.²¹⁵ On a strict construction of Article X.1, the Courts of the Contracting State where the damage was sustained must entertain actions for pollution damage within the meaning of the Convention. If this rule were strictly adhered to, inefficiency in the settlement process and greater legal expenses could result. In the case of the *Haven*, where pollution damage was done in the territorial sea and territory of three adjacent contracting states; Italy, France and Monaco, all claims are being brought against a single fund established by the *Haven's* owners in Genoa, Italy.²¹⁶

The provisions in the Civil Liability Convention providing for the *lex loci delicti* to be the jurisdiction, confer significant advantages on victims of oil pollution damage. Claimants may claim through the local lawyers of his choice, legal costs can be kept lower than would be the case where actions are brought in a foreign jurisdiction and jurisdiction can not be thwarted on grounds of '*forum non conveniens*'.

Except in cases of fraud,²¹⁷ or where the defendant was not given reasonable notice and a fair opportunity to present his case, final judgments of a court having jurisdiction are enforceable in other contracting states.²¹⁸

4.14 Limitation of Actions

Rights to compensation under the Civil Liability Convention are extinguished unless suit is commenced within three years of the date when the damage occurred, but in no case may an action be

²¹⁵Civil Liability Convention, Article IX.2.

²¹⁶*IOPC Fund Annual Report* 1992, section 12.2 at 63.

²¹⁷Civil Liability Convention, Article X.1.

²¹⁸Civil Liability Convention, Article X.2.

brought after six years from the date of the incident which caused the damage.²¹⁹

4.15 Conclusion to the Civil Liability Convention

The Civil Liability Convention was a special dispensation which evolved out of a particular problem and, as such, it was not known how it would be received by the international community. The Convention imposed completely new liabilities and, in 1969, when it was developed there were fears that the insurance market would not have the capacity to guarantee the additional liabilities it introduced. Accordingly, a cautious approach was adopted and these liabilities were relatively narrowly defined.

Nonetheless, the implementation of the Convention greatly improved the procedure whereby claims for tanker-source oil pollution damage could be pursued. Through channelling strict liability to the registered shipowner claimants had an easily identifiable and certain party against which to proceed. By forcing registered tanker-owners to maintain compulsory liability insurance the rights of claimants could not be thwarted where an owner became insolvent or where the ship was operated by a single ship company. Their rights were further safe-guarded through the Civil Liability Convention limitation fund which did not have to be shared with non-oil pollution claimants and the right of direct action against insurers of such liability. In the next chapter it will be seen how the rights of oil pollution victims would be further provided for through the 1971 Fund Convention in terms of which oil importers would be required to contribute towards the costs of oil pollution damage.

²¹⁹Civil Liability Convention, Article VIII.

CHAPTER 5

The 1971 Fund Convention

5.1 Introduction

At the 1969 Brussels Conference, certain delegates felt that the limits set by the Civil Liability Convention were inadequate to provide full compensation to the victims of a major oil spill. The Belgium delegation submitted a proposal that the oil industry should shoulder additional liability by way of an international compensation fund which would be funded by levies on companies importing oil after transport by sea.¹ Although this proposal was considered too 'radical' at the 1969 Conference to attract large support the deliberations of an *ad hoc* working group, meeting throughout the 1969 Conference, which considered the Belgium proposal would eventually constitute the foundations for the 1971 Fund Convention.² The delegates at the 1969 Conference decided to adopt a resolution, submitted by the delegations of Denmark, Finland and Sweden, requesting IMCO to convene an International Legal Conference, not later than 1971, to consider an International Compensation Fund. It was envisaged that this Fund would compensate oil pollution claimants on the basis of strict liability, and relieve shipowners of the additional financial burden, in excess of shipowners' traditional liability under the common law and statute, that had been imposed on them by the provisions of Civil Liability Convention.³

The Inter-Governmental Maritime Consultative Organization (IMCO) subsequently decided that a supplementary layer of compensation

¹M'Gonigle & Zacher *Pollution, Politics, and International Law: Tankers at Sea* (1979) 172.

²M'Gonigle & Zacher, *op cit*, 182.

³Healy 'The International Convention on Civil Liability for Oil Pollution Damage, 1969' (1970) 1 *Journal of Maritime Law and Commerce* 317 at 322.

should be made available over and above that provided by the shipowner. It was felt that this supplementary layer of compensation, would, as planned, be provided for by the oil cargo interests. To this end, a second Diplomatic Conference was convened, once again in Brussels, during December 1971 which considered a draft compensation scheme based upon the establishment of an International Fund. The Conference led to the adoption of a Convention providing second-tier Compensation over and above the Civil Liability Convention, this was the International Fund for the Compensation of Oil Pollution Damage (hereafter referred to as the 1971 Fund Convention). The unique character and operation of the Fund Convention is considered in this Chapter.

5.2 The premise for the Fund Convention

The preamble to the Fund Convention articulates, *inter alia*, the following point of departure.

' ... the economic consequences of oil pollution damage resulting from the escape or discharge of oil carried in bulk at sea by ships should not exclusively be borne by the shipping industry but should in part be borne by cargo interests, ... '

The justification for this approach was that the oil cargo interests profited from the trade undertaken by the tanker owners and to a large extent the potential hazards posed by tanker source oil pollution relate to the noxious nature of the cargo.

5.2.1 The impact of the 1971 Convention

It is evident from the preamble to the Fund Convention that the two-fold function of that Convention are: firstly, to provide supplementary compensation to victims of oil pollution damage in Contracting States who it was feared may not be able to obtain full compensation for such damage under the Civil Liability

Convention alone,⁴ and, secondly, to indemnify shipowners for a portion of the increased liability that was imposed upon them under the Civil Liability Convention.⁵

The Fund Convention was thus a constructive attempt to determine a satisfactory balance between the conflicting interests of the three parties involved in the development, implementation, operation and application of the Conventions. Most importantly the victims of tanker-source oil pollution received greater and more certain compensation.

Shipowners were indemnified, in part, for what they saw were unfair liabilities imposed upon them at the earlier 1969 Conference. Under the 1957 Limitation of liability for Maritime Claims Convention the shipowner's liability for damage was limited per incident to a maximum of 1,000 gold francs per ton of ship's tonnage. The 1969 Civil Liability Convention doubled this amount to 2,000 gold francs per ton. M'Gonigle and Zacher note that '... the draft articles [of the Fund Convention prepared by IMCO's Legal Committee] provided that the shipowner's liability would be reduced right back to its original limit of 1,000 [gold] francs per ton ... '.⁶ Unfortunately for tanker owners, their liability limits did not in fact return to their former levels during the deliberations of the 1971 Conference. Under the 1971 Fund Convention, the shipowner's liability was effectively 'rolled back' to approximately 1,500 gold francs per ton through a procedure whereby the IOPC Fund indemnified the shipowner for approximately one half of the additional liability imposed upon shipowners by the 1969 Civil Liability Convention. Cargo interests succeeded in persuading the delegates at the 1971 Conference that to relieve shipowners of their entire additional

⁴This purpose is also expressed in Article 2.1 (a) of the Fund Convention.

⁵As is further articulated by Article 2 of the Fund Convention.

⁶M'Gonigle & Zacher, *op cit*, 187.

liability would be inappropriate. They argued that tanker interests had already voluntarily agreed to carry such additional limits under TOVALOP.⁷ This development aptly shows how prior development of industry voluntary compensation agreements exert profound influences upon the subsequent inter-governmental agreements. The indemnification of the shipowner will be dealt with in greater detail at a later stage of the analysis of the provisions of the Fund Convention.

Owners of oil cargoes were forced to assume indirect responsibility for oil pollution damage where previously they had managed to avoid this legal obligation. To a large extent, however, the oil companies had reason to be pleased with the manner in which the legal dispensation had evolved because it was the shipowner who remained primarily responsible for tanker-source oil pollution damage. The supplemental character of the compensation provided by the shippers of oil through the Fund Convention is often emphasised by the oil industry. Clearly, it is in the best interests of this group to remain as far removed from the problem of oil pollution as possible. Arrangements foisting primary liability upon the oil industry have, however, been suggested. For example, the CMI has on occasion favoured the channelling of primary liability for oil pollution damage towards an international oil industry fund which in turn would have had a right of recourse against negligent shipowners.⁸ It is also important, from the point of view of the oil industry, for individual owners of oil cargoes to avoid becoming directly involved in oil spill compensation wherever possible.

5.2.2 Entry into force requirements and denunciation

The 1971 Fund Convention was designed to enter into force after ratification by at least eight States, provided that the States which have become parties to the Convention have received during

⁷*Official Records*, vol.2 at 81.

⁸*Official Records*, Vol.2 at 92.

the preceding calendar year a total quantity of at least 750 million tons of contributing oil.⁹

Membership of the Civil Liability Convention is open to states without restriction. The Fund Convention, in contrast, is designed to supplement compensation available under the Civil Liability Convention, accordingly, only states which have become party to the Civil Liability Convention may be party to the Fund Convention.¹⁰ Furthermore, the Fund Convention could not enter into force before the Civil Liability Convention.¹¹ Accordingly, where a State party to both Conventions, denounces the Civil Liability Convention such action constitutes an automatic denunciation of the Fund Convention.¹²

A denunciation of the Fund Convention takes effect one year after that State has deposited an instrument of denunciation with the Secretary-General of IMO¹³ and oil receivers in a Contracting State which has denounced the Fund Convention are obliged to pay contributions to Major Claims Funds in respect of any incident which occurred before the denunciation takes effect.¹⁴

5.2.3 Structure of the IOPC Fund

By becoming party to the Fund Convention a state also becomes a member of the International Oil Pollution Compensation Fund (IOPC Fund) which is a worldwide inter-governmental organisation, headquartered in London, established for the purpose of administering the regime of compensation created by the Fund Convention. The IOPC Fund is established as a legal entity in

⁹Fund Convention, Article 40.1.

¹⁰Fund Convention, Article 37.4.

¹¹Fund Convention, Article 40.2.

¹²Fund Convention, Article 41.4.

¹³Fund Convention, Article 41.3.

¹⁴Fund Convention, Article 41.5.

Fund Convention States capable of assuming rights and obligations and of being a party in legal proceedings before courts of such States.¹⁵

The IOPC Fund consists of an Assembly, an Executive Committee and a Secretariat. The Assembly, which is composed of representatives of the governments of all member states, is the supreme organ governing the IOPC Fund and holds regular sessions once a year. The Executive Committee is elected by the Assembly and is composed of 15 Member States. Its main function is to consider and approve settlement of major claims against the IOPC Fund where the IOPC Fund Director (hereinafter referred to as 'the Director')¹⁶ is not authorised to make such settlement. The Secretariat, which also has its headquarters in London, is headed by the Director, and has a staff of ten.¹⁷

At the time of the establishment of the IOPC Fund, the Assembly decided that the organisation should have a small Secretariat and that it should use outside experts for the fulfilment of tasks which could not be carried out by the permanent staff members. Consultants, such as lawyers, surveyors and other technical experts, are used by the IOPC Fund, mainly in connection with incidents in which the Fund has been involved.¹⁸

¹⁵Fund Convention, Article 2.2.

¹⁶Fund Convention, Article 2.2 provides that:

'Each Contracting State shall recognize the Director of the Fund as the legal representative of the Fund.'

There have been only two Directors during the existence of the IOPC Fund. At its 1st session, in November 1978, the Assembly appointed Dr Reinhard H. Ganten of the Federal Republic of Germany as Director from the 16th December, 1978. The present Director is Mr Måns Jacobsson of Sweden. Mr Jacobsson was appointed by the Assembly in October, 1984, and has held the post of Director from the 1st January, 1985, see *IOPC Fund Annual Report 1988*, section 8 at 17.

¹⁷*IOPC Fund Annual Report 1993*, section 7 at 11.

¹⁸*IOPC Fund Annual Report 1988*, section 7 at 18.

5.2.4 Supplementary/complementary compensation

The IOPC Fund pays compensation in respect of oil pollution damage in a Contracting State where any claimant has been unable to obtain full and adequate compensation under the Civil Liability Convention for one of three reasons. In the case of the first two categories of situations the IOPC Fund plays a role which is complementary to that of the Civil Liability Convention and in the third situation the role of the IOPC Fund is definitely supplementary.

The first situation is where no liability for pollution damage arises under the Civil Liability Convention.¹⁹ This would be, for example, where an incident occurs and the ship-owner successfully invokes one of the exemptions or absolute defences under the Civil Liability Convention. Here the role of the IOPC Fund will be to provide primary compensation. The second situation is where the owner is financially incapable of meeting his obligations and rights of direct action against the insurer have been exhausted.²⁰ A case in point is that of the *Akari* where the ship had no compulsory liability insurance because it was carrying under 2,000 tonnes of oil in bulk as cargo at the time of the incident and the shipowner had no assets other than the *Akari*, which was sold as scrap. In this situation the IOPC Fund provided primary compensation.²¹

Finally, the IOPC Fund will pay compensation where the damage exceeds the shipowner's liability as limited under the Civil Liability Convention.²² The experience of the IOPC Fund has shown that most incidents in which the IOPC Fund is required to provide supplementary compensation fall within the last-mentioned

¹⁹Fund Convention, Article 4.1 (a).

²⁰Fund Convention, Article 4.1 (b).

²¹*IOPC Fund Annual Report 1990*, section 12.2 at pp 30-34.

²²Fund Convention, Article 4.1 (c).

category.²³ The overwhelming application of the IOPC Fund in the third type of situation is in accordance with the philosophy of the two-tier system whereby the actual tanker owner is responsible for primary compensation while the oil industry, as a group, is responsible for the upper tier in the case of large scale spills. The oil industry obviously feels it is important to support and maintain the primary/supplementary organisation of the international regime.²⁴

5.3 IOPC Fund's defences to liability

As is the position of the shipowner under the Civil Liability Convention the IOPC Fund may also invoke the protection of limited defences under the provisions of the Fund Convention. Although these defences are similar to those available to the shipowner under the Civil Liability Convention certain important differences also exist.

5.3.1 Absolute exceptions

The IOPC Fund is relieved of its obligation to pay compensation if it proves that the pollution damage resulted from an act of war, hostilities, civil war or insurrection or was caused by a spill from a warship or other State-owned or operated ship being used at the time of the incident only on Government, non-commercial service.²⁵ The same exceptions may be invoked by the registered shipowner under the Civil Liability Convention.

In contrast to the Civil Liability Convention, however, the Fund Convention permits the IOPC Fund to pay claims where the pollution damage results from a natural phenomenon of an

²³*IOPC Fund General Information on Liability And Compensation for Oil Pollution Damage* February 1992, section 3.2 at 5.

²⁴*Official Records*, vol.2 at 103.

²⁵Fund Convention, Article 4.2 (a).

irresistible character. However, in such event the upper limit of the IOPC Fund applies.²⁶ This is significant because if a natural disaster occurs more than one oil pollution incident could take place. For example, a number of oil tankers could be wrecked during a severe hurricane. In such circumstances claimants against the IOPC Fund are precluded from arguing that each incident resulting from the natural phenomenon should be afforded a separate limit. The same protection is not, however, afforded to shipowners under the Civil Liability Convention and if a number of tankers were wrecked in one 'incident' the better view is that each tanker would have to pay liability under the Convention up to his applicable limit. The IOPC Fund, by contrast, would treat all the damage caused by all the tanker cargoes in all Fund Convention States as one incident.

5.3.2 Where the claimant causes damage

Where the incident was wholly caused by the negligence or other wrongful act of any Government or other authority responsible for the maintenance of lights or other navigational aid the IOPC Fund is not automatically exempt. This exception (in contrast to the Civil Liability Convention) is not included in the Fund Convention. In this way oil importers are forced to conform to a more narrow form of strict liability under the Fund Convention than shipowners bear under the Civil Liability Convention. In this respect the IOPC Fund's liability is closer to the test of absolute liability than that of the shipowner under the Civil Liability Convention.

The IOPC Fund will, however, not provide compensation to the extent that pollution damage was caused by the negligence or intentional act or omission of the claimant. This provision specifically does not apply to preventive measures undertaken by the shipowner.²⁷

²⁶Fund Convention, Article 4.4 (b).

²⁷Fund Convention, Article 4.3.

The *Shinkai Maru No.3* incident, which occurred in Japan, on the 21st June, 1983, was the result of the negligence of the master of the tanker, who was also the registered owner of the vessel. Under these circumstances the IOPC Fund had to adopt a position as to whether or not the owner/master should be entitled to limit his liability under the Civil Liability Convention. In this instance it would seem that the owner would have had considerable difficulty disproving 'actual fault or privity' because the owner was also the negligent master. The IOPC Fund Executive Committee decided, however, that the owner/master should be entitled to limit his liability since the negligent act was committed in his capacity as master of the vessel not as owner.²⁸

The IOPC Fund also had to consider whether or not the owner/master could recover his expenses from the IOPC Fund for undertaking voluntary measures to minimise pollution damage. Under Article 4.3 of the Fund Convention, the IOPC Fund may be wholly or partially exonerated of its obligation to pay compensation to a person who suffered pollution damage, if the damage was caused by the negligence of that person. In this case the IOPC Fund Executive Committee interpreting Article 4.3 decided that the claim for expenses voluntarily incurred by the owner/master for the taking of preventive measures would be accepted by the IOPC Fund.²⁹

5.3.3 Unidentified sources of pollution

The IOPC Fund has no obligation to pay compensation if the claimant cannot prove that the damage resulted from an incident involving one or more specific or named ships. Spills from an unidentified source are therefore not covered by the Fund Convention.³⁰ In October, 1993, the Assembly of the IOPC Fund expressed the considered opinion that: '... the claimant could

²⁸*IOPC Fund Annual Report 1988*, section 13.5 at 68-69.

²⁹*IOPC Fund Annual Report 1988*, section 13.5 at 69.

³⁰Fund Convention, Article 4.2 (b).

not discharge the burden of proof imposed upon him by the Fund Convention solely by proving that there was a strong likelihood that the damage was caused by a ship as defined [in that Convention] or that the damage could not have been caused other than by such a ship.'³¹ Clearly, also, no tanker owner will be liable under the Civil Liability Convention unless it is proved that a spill emanated from his ship (or his ship and another ship in the case of collision).

M'Gonigle and Zacher note that the question of the envisaged fund's liability for pollution damage caused by unidentified spills 'was of tremendous significance' at the 1971 Conference. These commentators further note that if the fund had been made liable for unidentified spills it would have been forced to 'internalize all the identifiable environmental costs of its operations'.³² It is noteworthy that the U.S. was in favour of the fund having to bear the cost of unidentified spills. However, the U.S. proposal to delete the exception was narrowly defeated. Shipowner interests were 'wary of the precedent of anyone being liable for such damage'.³³ This debate illustrates how the oil industry sought to protect itself from being too closely associated with the conduct of the oil shipping industry. It also shows how the U.S. even at this early stage was beginning to show that it was unsatisfied with the narrowness of certain provisions which were eventually incorporated in the Fund Convention.

An incident which aptly illustrates the difficulties facing claimants in cases of unidentified spills is that of the *Tolmiros*. In August 1990 the Swedish Government instituted legal proceedings in the Court of Gothenburg seeking compensation for pollution damage from the owners of the 48,914 grt. Greek

³¹*IOPC Fund Annual Report 1993*, section 12.2 at 56.

³²M'Gonigle & Zacher, *op cit*, 185.

³³M'Gonigle & Zacher, *op cit*, pp.185-187.

registered tanker the *Tolmiros* and the vessels P&I insurer.³⁴ The owner of the *Tolmiros* and the P&I Club refused to concede any liability for the damage caused by the presence of oil on the ocean, maintaining that the oil in question had not in fact emanated from the *Tolmiros*. In support of their case they drew the Court's attention to the fact that an investigation undertaken by Greek authorities at the request of the Swedish Government had acquitted the *Tolmiros* of the allegation of having caused the spill. They also pointed out that the master and the chief engineer who were prosecuted in Greece for pollution offenses had been acquitted of these allegations in September of 1991. The IOPC Fund took the view that the documentation presented by the Swedish Government did not exclude sources other than the *Tolmiros* and in the Court proceedings the primary argument adopted by the IOPC Fund was that the oil in question did not emanate from the *Tolmiros*.³⁵

In December 1991, the Swedish Government withdrew its action against the shipowner and his P&I insurer. The Swedish Government stated that further investigations into the winds and currents at the time of the spill had shown that it was not possible to prove that the oil which polluted the coast actually emanated from the *Tolmiros*.³⁶ It may be noted that the texts of both the Civil Liability and Fund Conventions impose a very heavy burden of proof on the claimant.

As a postscript to this incident, the shipowner, its P&I insurer and the IOPC Fund claimed compensation from the Swedish Government for the costs incurred in defending this matter. In July, 1992, the Court of Gothenberg issued a decision awarding costs plus interest to the shipowner, its P&I insurer and the

³⁴Sweden ratified both the Civil Liability Convention and the Fund Convention on the 17th March, 1975.

³⁵IOPC Fund Annual Report 1992, section 12.2 at 39-40.

³⁶IOPC Fund Annual Report 1992, section 12.2 at 40.

IOPC Fund.³⁷ By the same token, in appropriate circumstances victims of oil pollution damage must also be able to recover their legal costs under the Civil Liability and Fund Conventions from the shipowner and the IOPC Fund.

If the IOPC Fund were required to accept claims for oil pollution damage caused from unidentified sources it could result in oil importers becoming potentially responsible for oil pollution damage from sources other than tankers, such as drilling rigs, underwater pipelines, other ships, natural seepage and land-based sources. Therefore, in principle the strict policy adopted by the IOPC Fund on this issue is appropriate.

5.4 Geographical scope of application

The geographical scope of the Fund Convention is identical to the Civil Liability Convention in that it applies exclusively to pollution damage caused on the territory including the territorial sea of a Contracting State, and to preventive measures taken to prevent or minimize such damage.³⁸

5.5 Essential definitions

The terms "Ship", "Person", "Oil", "Pollution Damage", "Preventive Measures", "Incident" and "Organization" have the same meaning in the Fund Convention as in the Civil Liability Convention, provided that for the purpose of the Fund Convention 'oil' shall be confined to 'persistent hydrocarbon mineral oils'. Pollution damage caused by whale oil is therefore outside the ambit of the Fund Convention. This is appropriate because there is no reason why importers of hydrocarbon oil should contribute to compensation for damage caused by the whaling industry.

5.6 Limit of compensation available

³⁷*IOPC Fund Annual Report 1992*, section 12.2 at 40.

³⁸Fund Convention, Article 3.1.

The original text of the Fund Convention provided for an aggregate amount of compensation of 450 million Poincaré francs which are also known as gold francs. This amount includes the sum actually paid by the shipowner, or his insurer under the Civil Liability Convention.³⁹ The 1971 Protocol to the Fund Convention, which has not yet entered into force, replaced the amount of '450 million francs' with the equivalent figure of 30 million units of account (SDRs).⁴⁰

For the Fund Convention to provide effective compensation to victims of oil pollution over any length of time, the Convention had to incorporate a means by which the amounts of 450 million francs or 30 million SDRs could be increased in step with inflation, scale of damages and an evolving and more comprehensive interpretation of the definition of admissible damage. This was achieved through Article 4.6 which provides a flexible mechanism for changing the limits set by Article 4.4 (a).

Article 4.6 provides that:

'The Assembly of the Fund may, having regard to the experience of incidents which have occurred and in particular the amounts of damage resulting there from and to changes in the monetary values, decide that the amount of 450 million francs referred to in paragraph 4, subparagraphs (a) and (b), shall be changed; provided, however that this amount shall in no case exceed 900 million francs⁴¹ or be lower than 450 million francs. The changed

³⁹Fund Convention, Article 4.4 (a).

⁴⁰This was done in terms of Article III of the 1976 Protocol to the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, 1971.

⁴¹In terms of Article III of the 1976 Protocol to the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, 1971 the term '900 million francs' is replaced by '60 million

amount shall apply to incidents which occur after the date of the decision effecting the change.'

Since the inception of the IOPC Fund the Assembly has increased the aggregate levels of compensation available. For incidents occurring after the 30th November, 1987, the maximum aggregate compensation payable by the IOPC Fund is 900 million francs or 60 million units of account (SDR).⁴² Therefore, the maximum ceiling of compensation permissible under Article 4.6 of the 1971 Fund Convention was attained in 1987.⁴³ For further compensation to become available, it will be necessary for the 1992 Protocols to the Civil liability Convention and the Fund Convention to come into force. The 1992 Protocols largely incorporate the provisions of the 1984 Protocols.

The IOPC Fund has been in operation for seventeen years and since its establishment in October, 1978, up until the close of the 1993 year, it has been involved in the settlement of claims for pollution damage arising out of sixty-eight incidents.

units of account or 900 million monetary units'.

⁴²At its 2nd session, the IOPC Fund's Assembly decided to increase the aggregate amount of compensation payable by the IOPC Fund in respect of any one incident to 675 million (gold) francs (corresponding to 45 million SDR) for incidents occurring after the 20th April, 1979. At its 9th session, the IOPC Fund's Assembly decided to increase the aggregate amount of compensation payable by the IOPC Fund in respect of any one incident to 787,500,000 (gold) francs (corresponding to 52 million SDR) for incidents which occurred after the 30th November, 1986, and further to 900 million (gold) francs (corresponding to 60 million SDR) for incidents occurring after the 30th November, 1987. See *IOPC Fund Statistics* 1 October 1992, at 5 and *IOPC Fund Annual Report* 1988, section 13.1 (a) at 51.

⁴³The aggregate amount of 60 million SDR is the equivalent of US\$84 million based on the exchange at 30th January, 1992 (US\$1.39921 = 1 SDR).

The incidents in which the IOPC Fund has been involved have been distributed over the years as shown in the table below:⁴⁴

Year	Number	Year	Number
1979	4	1986	4
1980	5	1987	6
1981	3	1988	5
1982	4	1989	6
1983	3	1990	8
1984	2	1991	6
1985	4	1992	2
		1993	6

However, the IOPC Fund was only required to make payments for sixty-three of those incidents, thirty-five of which occurred in Japan, twenty-two in Europe, one in Algeria, one in the Caribbean, one in Canada and one in the Persian Gulf and two in the Republic of Korea.⁴⁵ Only two incidents: the *Tanio* in France during 1980 and the *Haven* in Italy during 1991, have given rise to claims in excess of the limit of compensation that applied to the incident. In all other incidents, the total amount of the claims has been well below the amount of compensation available.

The total amount of compensation and indemnification paid by the IOPC Fund as at the 31st December, 1992, was £51 million,⁴⁶ which had increased to £67 million by the close of 1993.⁴⁷ The fairly modest amounts paid out by the IOPC Fund since its inception indicate the extent of the potential problem raised by the decision of the Italian Court in Genoa in the *Haven* limitation proceedings. Here the Court ruled that according to the free market value of gold the IOPC Fund's potential liability

⁴⁴The statistics contained in this table are derived from the *IOPC Fund Annual Report 1993*, Annex XII Summary of Incidents (31 December 1993) pp 93-104; which is reproduced at Annex Two in this work.

⁴⁵*IOPC Fund Annual Report*, section 12.1 at 22.

⁴⁶*IOPC Fund Annual Report 1992*, section 12.1 at 32.

⁴⁷*IOPC Fund Annual Report*, 1993, section 12.1 at 22.

arising out of that incident was to be set at an unprecedented limit of £346 million.

The case involving the largest payments was the *Tanio*,⁴⁸ where the IOPC Fund paid FF222 million⁴⁹ to claimants. In the *Haven*⁵⁰ incident, the aggregate amount of the claims greatly exceeds the maximum amount payable under the Civil Liability Convention and the Fund Convention. Despite the serious nature of the *Tanio* incident it has been reported that the *Haven* incident is the most serious case in which the IOPC Fund has been involved. The incident caused extensive pollution damage in Italy, France and Monaco, and, as at 31st December, 1992, some 1350 claims for compensation have been submitted to the IOPC Fund for a total amount corresponding to approximately £715 million.⁵¹ It is possible that claims and clean-up costs from the *Aegean Sea*⁵² and the *Braer*,⁵³ which caused pollution damage to the coasts of Spain and the Shetland islands respectively, may also exceed the ceiling of compensation provided for under the Civil Liability and Fund Conventions. If this proves to be the case, new impetus may be given to the ongoing, and major question of how responsibility for oil pollution damage should be apportioned between shipowners and cargo owners.

5.6.1 Pro rata reduction

As is the case under the Civil Liability Convention, where the total amount of claims established against the IOPC Fund exceeds the limits available, all successful claims are reduced

⁴⁸This tanker accident which caused considerable pollution damage to the French coastline occurred in March 1980.

⁴⁹The equivalent to US\$40 million.

⁵⁰The *Haven* exploded off the coast of Italy in 1991.

⁵¹*IOPC Fund Annual Report* 1992, section 12.1 at 32-33.

⁵²This incident occurred on the 3rd December, 1992.

⁵³This incident occurred on the 5th January, 1993.

proportionally.⁵⁴ A case which illustrates the partition of the funds available under the Civil Liability and Fund Convention amongst the successful claimants is that of the *Tanio*.

In the case of the *Tanio*, claims for compensation were submitted by the French Government, local authorities, private persons and the shipowner's insurer. The final amount agreed to by the IOPC Fund Director was approximately FFr348 million (£37 million).⁵⁵

In terms of the Fund Convention at that point in time the aggregate amount of compensation payable by the IOPC Fund in respect of this incident was 675 million (gold) francs less the sum actually paid under the Civil Liability Convention. The shipowner's liability under the Civil Liability Convention was FFr11,833,717.79 (£1.2 million). The shipowner's P&I insurer established the limitation fund in April 1980 by paying this amount to the Court in Brest. The limitation fund was earning interest at the market rate until the 1st March, 1988, and the amount of interest earned was FFr10,979,189. After a small amount had been paid from the limitation fund in respect of fees and costs, the aggregate amount available for payment to claimants was FFr22,605,357 (£2.1 million).⁵⁶ The Fund Convention does not specify the date on which the amount of 675 million (gold) francs should be converted into the applicable national currency. In this case it was agreed that the method of conversion provided for in the IOPC Fund's Internal Regulations should be applied (ie that 15 [gold] francs are equal to 1 SDR)⁵⁷ and that the relevant date was the day of the constitution of the limitation Fund.⁵⁸ In keeping with this procedure the amount of 675 million (gold) francs converted to FFr244,746,000. After subtracting the

⁵⁴Fund Convention, Article 4.5.

⁵⁵*IOPC Fund Annual Report* 1988, section 12.2 at 26.

⁵⁶*IOPC Fund Annual Report* 1988, section 12.2 at 27.

⁵⁷Internal Regulations of the IOPC Fund, Regulation 2 (a).

⁵⁸Internal Regulations of the IOPC Fund, Regulation 2 (b).

shipowners limitation fund from this amount, the amount of compensation due from the IOPC Fund was FFr222,140,643.⁵⁹

Bearing in mind that the IOPC Fund Director had reached agreement on the quantum of accepted claims (amounting to approximately FFr348 million) the compensation available under the Civil Liability and Fund Conventions (FFr244,746,000) was insufficient to meet all successful claims. Consequently, all successful claims were reduced proportionally. The claimants received payments from the IOPC Fund corresponding to 63.85 per cent of the amount of their respective claims as accepted by the Fund. In addition, the payments from the shipowner's limitation fund represented 6.46 per cent of the established claims. Therefore the regime of compensation created by the Civil Liability and the Fund Conventions provided each claimant compensation corresponding to approximately 70.3 per cent of his successful claim.⁶⁰ This case is by no means typical of those falling under the Civil Liability and Fund Conventions. As the *Tanio* case was a very large claim the IOPC Fund was required to pay out an unusually large proportion of the total liability.

In the aftermath of the *Braer* spill, which occurred in the Shetland islands on the 5th January, 1993, the Government of the United Kingdom which was estimated to have claims for clean-up and preventive measures in the region of £2.6 million elected not to compete with other claimants for the purpose of obtaining compensation.⁶¹ This is an unusual approach for governments to adopt.

5.7 Shipowners' indemnification by the Fund

This function of the IOPC Fund demonstrates how the Fund operates not only as a mechanism to compensate victims of oil pollution

⁵⁹*IOPC Fund Annual Report* 1988, section 12.2 at 27-28.

⁶⁰*IOPC Fund Annual Report* 1988, section 12.2 at 28.

⁶¹*Official Records* 1993, section 12.2 at 64.

damage but also as a device to manage the financial stresses which exist between the oil shipper and oil carrier in connection with tanker-source oil pollution liability

Subject to certain conditions, which will be explained, the IOPC Fund will repay to the shipowner a part of his total amount of liability incurred under the Civil Liability Convention.⁶² The maximum indemnification payable by the IOPC Fund to the shipowner under Article 5.1 of the Fund Convention, as amended by the 1976 Protocol thereto, is 33 SDR (US\$46)⁶³ for each ton of the ship's tonnage for ships up to 83,333 tons. In respect of ships over that tonnage, the indemnification payable on each ton of the ship's tonnage increases until a maximum of 5,667,000 SDR (US\$7.9 million)⁶⁴ is reached for ships of 105 000 tons. These amounts generally work out to about 25 per cent of the shipowner's liability under the Civil Liability Convention. In situations, however, where very large ships cause oil pollution damage, the indemnification paid by the IOPC Fund can exceed 25 per cent of the shipowner's sum liability (ranging up to 40 per cent.) Where the IOPC Fund provides indemnification, the shipowner is assumed to have ceded those rights to the Fund, accordingly, the Fund will, in principle, be able to recover its loss by way of recourse actions against any third party from which the shipowner could recover except the servants and agents of the owner.⁶⁵

Significantly, in the *Haven* case the Italian Court in Genoa ruled that while the Civil Liability Convention determines liability limits in terms of the SDR the Fund Convention will continue to utilize the Gold Franc, and consequently the free market price of gold, as the appropriate unit of measurement. Concerning the assessment of the amount of indemnification due to the shipowner

⁶²Fund Convention, Article 5.1.

⁶³Calculated on the basis of the rate of exchange at the 30th January, 1992 (US\$1.39921 = 1 SDR)

⁶⁴*Ibid.*

⁶⁵Fund Convention, Article 9.2.

under Article 5.1 of the Fund Convention the question then arose as to whether the Gold Franc or the SDR was to be utilised. Clearly, except where compelling reasons exist to the contrary the approach adopted in both the Fund Convention and the Civil Liability Convention should be the same. It is therefore implicit and logical that the indemnification due to the shipowner from the IOPC Fund should be calculated by using the same unit of measurement which is used to calculate the shipowner's liability under the Civil Liability Convention i.e. the SDR. To do otherwise, it is argued, would result in a skewed relationship between the portion of liability to be borne by the shipowner, under the Civil Liability Convention, and, oil companies, through contributions to the IOPC Fund made in accordance with the Fund Convention.

In the *Haven* case the Italian Court in Genoa had to consider the appropriate measurement to be utilized to calculate the amount of indemnification due to the owner of the *Haven*. Certainly, it is difficult to justify the argument that the limit of the Fund Convention should be assessed in terms of the Gold Franc and then to assert that the indemnification should be calculated in terms of the SDR as this would be an inconsistent approach. Nevertheless, the Italian Court of three judges in Genoa ruled that the assessment of indemnification under Article 5.1 of the Fund Convention would utilize a percentage calculation which in the end ensures that the IOPC Fund shall pay indemnification to the shipowner on the basis that 15 Gold Francs in the Fund Convention would be the equivalent of one SDR in the Civil Liability Convention.⁶⁶

In principle, the IOPC Fund may still be required to provide "roll-back relief" to the shipowner under circumstances where the shipowner's right to limit liability under the Civil Liability Convention has been broken. However, the IOPC Fund will not indemnify the shipowner where certain pre-conditions are not

⁶⁶*IOPC Fund Annual Report 1993*, section 12.2 at 43-44.

fulfilled or where the shipowner fails to meet specific standards of operation. Three general situations are relevant in this regard. These exceptions relate only to the IOPC Fund's right not to indemnify the the shipowner. The IOPC Fund is still obliged to compensate claimants where the requirements of the Fund Convention are met. (X)

5.7.1 Tankers registered in Fund party states

The shipowner or guarantor will only be indemnified by the IOPC Fund where his ship is registered in, or is flying the flag of, a State which has contracted to the Fund Convention.⁶⁷ "State of the ship's registry" means in relation to registered ships the State of registration of the ship, and in relation to unregistered ships the State whose flag the ship is flying.⁶⁸

The case of the *Globe Asimi* illustrates how the indemnification of the shipowner by the IOPC Fund operates. On the 22nd November, 1981, the tanker *Globe Asimi* ran aground and broke up near the port of Klaipeda which was at that time in the USSR. Several thousand tonnes of heavy fuel oil spilled into the port and subsequently drifted out to sea. Claims for compensation for pollution damage in the USSR totalling Rbls813 million (£745 million) were made against the shipowner. The major part of this amount related to environmental damage. At the time of the incident, the USSR was party to the Civil Liability Convention but not to the Fund Convention. As such, no pollution damage was sustained in any Fund Member State and the IOPC Fund was not called upon to pay any compensation. Nevertheless, because the *Globe Asimi* was registered in Gibraltar, (which is encompassed within the territory of the United Kingdom, a Party State to the Fund Convention) and the damage in this case was sustained in a State Party to the Civil Liability Convention, the IOPC Fund paid indemnification to the shipowner in the amount of Rbls337,581

⁶⁷Fund Convention, Article 3.2.

⁶⁸Civil Liability Convention, Article I.4.

(£326,509) in terms of the Fund Convention, Article 3.2.⁶⁹

At the 1984 Conference to revise the Civil Liability and Fund Conventions it was noted that a number of States were party to the Civil Liability Convention but not the Fund Convention. As a consequence of this phenomenon it was observed that in many instances '... shipowners were not benefiting from the relief envisaged under the Fund Convention.'⁷⁰

5.7.2 Wilful misconduct of the owner

The IOPC Fund is also relieved of its obligation to pay indemnification to the shipowner if it proves that the damage resulted from wilful misconduct on the part of the shipowner himself.⁷¹

Where the IOPC Fund is able to prove wilful misconduct on the part of the shipowner himself, it will be very likely that the shipowner will have lost his right to limit his liability under the Civil Liability Convention. This is because wilful misconduct is a higher standard of fault than is the test for breaking the shipowners right to limit under the Civil Liability Convention, which is 'actual fault or privity' on the part of the owner. Therefore, in such circumstances the shipowner will be liable for all the damage caused by the oil pollution incident, in other words, unlimited liability. The IOPC Fund will still pay compensation but has a right of recourse against the shipowner.

Where the IOPC Fund is able to prove wilful misconduct by the owner it is likely that the ships oil pollution insurer will do likewise. As wilful misconduct on the part of the shipowner is the single ground upon which the insurer is able to refute liability, then not only will the shipowner be subject to

⁶⁹*IOPC Fund Annual Report* 1988, section 13.5 at 67-68.

⁷⁰*Official Records*, vol.1 at 163 para.10.

⁷¹Fund Convention, Article 5.1.

unlimited liability but he will also have lost his oil pollution cover. This development could hold serious consequences for the shipowner and in many instances would gravely retard the prospects of claimants' successfully seeking compensation. Once again, subject to its right of recourse, the IOPC Fund will still provide compensation. In this way, the IOPC Fund constitutes an important 'safety-net' for victims of oil pollution damage.

5.7.3 Non-compliance with specified instruments

Under Article 5.3 of the Fund Convention the IOPC Fund may be wholly or partially exonerated from indemnifying the shipowner or the shipowner's guarantor. Under this exclusionary provision, the shipowner or guarantor will lose his right to "roll-back relief" where the IOPC Fund is able to prove two things. Firstly, as a result of the actual fault or privity of the owner, the polluting ship did not comply with the provisions relating to safety and operating standards encapsulated in certain international instruments.⁷² Secondly, that the incident or the damage was caused wholly or partially by the ship's non-compliance with these provisions.⁷³ Shipowners must abide by the provisions of the listed instruments even where the Contracting State in which the ship was registered, or whose flag it was flying, is not a party to the relevant instrument.

As mentioned above, the IOPC Fund may still be required to provide "roll-back relief" to the shipowner under circumstances where the shipowner's right to limit liability under the Civil Liability Convention has been broken. However, where the shipowner has lost his right to limit liability through fault or privity, and the nature of this fault also relates to the non-compliance with the instruments listed in Article 5.3 (a) of the Fund Convention, it is likely that the owner will lose his right

⁷²These instruments are listed in The Fund Convention, Article 5.3 (a).

⁷³Fund Convention, Article 5.3 (b).

to obtain "roll-back relief". This is in keeping with one of the aims behind "roll-back relief", which is to encourage shipowners, by means of indirect financial inducement, to make their ships conform to the requirements of the instruments mentioned in Article 5.3 (a). In this way it was hoped that the risk of pollution incidents would be reduced. The main aim of "roll-back relief" was to realign, in favour of the shipowner, the proportional distribution of the costs of oil pollution damage as paid by the tanker industry and the oil industry under the Civil Liability and Fund Conventions respectively.⁷⁴

Article 5.4 of the Fund Convention provides a procedure for the replacement of the instruments specified in Article 5.3 (a). These instruments may, under certain conditions, be replaced by new instruments if so decided by the IOPC Fund Assembly. Upon the entry into force of a new Convention designed to replace, in whole or in part, any of the instruments specified in Article 5.3 (a) the Assembly may decide that the new Convention will replace such instrument or part thereof for the purpose of Article 5.3. It is also stipulated that a 6 month period of notice must be given prior to the date from which such a replacement will take effect. At any time during the period of notice, any Member State of the Fund Convention may declare to the director of the IOPC Fund that it does not accept such replacement. Where this occurs, the decision of the Assembly shall have no effect in respect of a ship registered in, or flying the flag of, that state at the time of the incident.

In October 1985, at its 8th session, the Assembly decided to interpret Article 5.4 so as to allow the inclusion in the list of instruments contained in Article 5.3 (a) not only new conventions but also amendments adopted by a tacit amendment procedure, provided that such amendments were significant for the purpose of the prevention of oil pollution.⁷⁵ For a brief

⁷⁴*IOPC Fund Annual Report 1988*, section 13.1 (b) at 52.

⁷⁵See documents FUND/A.8/12 and FUND/A.8/15, para.15.1.

analysis of the tacit amendment procedure and the ammended list of instruments which the shipowner must comply with if he is to receive "roll-back relief" from the IOPC Fund refer to Annexure Three.

5.7.4 Summary and conclusions on indemnification

The indemnification of the shipowner, by the IOPC Fund, was origionally conceived as a procedure through which the tanker owner would be relieved of the new and additional liabilities that he was forced to assume under the liability provisions of the Civil Liability Convention. It was origionally intended that no pre-conditions would have to be met before indemnification would take place. The outcome of the 1971 Conference saw, not only indemnification becoming conditional on compliance with certain instruments governing maritime safety, but also, the amount of indemnification finally agreed on was not as great as shipowner interests had hoped for. This outcome was, however, satisfactory to oil interests, as oil importers were not required to pay as much indemnification as was anticipated and also foresaw opportunities for reducing or avoiding indemnification to less responsible tanker owners. Environmentalist interests were also pleased with the outcome because perhaps overly optimistically, they hoped that the imposition of conditions would act as an incentive to increase the standard of tanker operation.⁷⁶ That a shipowner may lose the benefits of being indemnified for a portion of his liability under the Civil Liability Convention is not in truth likely to be a significant incentive to abide with the provisions of the listed instruments. The main reason why tanker standards have dropped is not because tanker owners want to run low-quality tanker fleets but because they can not afford to do otherwise given current tanker-freight market. Somehow the tanker industry must be made less competitive and freight rates must increase. This will provide tanker owners with the financial ability to improve quality. For this reason

⁷⁶M'Gonigle & Zacher, *op cit*, 189.

environmentalist need not be unduly perturbed that the 1984 Protocol to the Fund Convention discontinued the practice of shipowner indemnification. No "roll-back" relief is due to the shipowner under the provisions of the 1992 Protocol to the Fund Convention.

5.8 Financing the IOPC Fund

A large proportion of oil pollution damage is compensated by way of the IOPC Fund under the institutional⁷⁷ and substantive provisions of the 1971 Fund Convention. It is therefore important to explain the unique procedures involved in bringing about this source of compensation. As the quantum of damages resulting from incidents involving oil pollution damage escalates it may be predicted that the role played by the IOPC Fund in facilitating compensation will become more pronounced relative to that of the shipowner. Therefore, it may reasonably be expected that this particular institution, as a means of promoting compensation will become increasingly more significant.

The payments of compensation and indemnification as well as the administrative and operating expenses of the IOPC Fund are financed by contributions levied on any person who has received (in one calendar year) more than 150,000 tons of "contributing oil" in a State Party to the Fund Convention after carriage by sea.⁷⁸ In this context a "person" means any individual or partnership or any private or public body, whether corporate or not, including a State or any of its constituent subdivisions.⁷⁹

⁷⁷The use of the term 'institutional provisions', within the context of the Fund Convention, describes those portions of the Convention which established the IOPC Fund and the organization of the Fund. see; *Official Records*, vol.2 at 444 para.10.

⁷⁸Fund Convention, Article 10.1.

⁷⁹Explanatory Note 3 to the 'Report on contributing oil receipts' contained in *International Oil Pollution Compensation Fund: Texts of the 1971 Fund Convention*, 1969

The important notion of "contributing oil" is comprised of two separate kinds of oil; crude oil and fuel oil, which are both defined in terms of Article 1.3 of the Fund Convention. The definitions do not encompass non-persistent oils.

'(a) "Crude Oil" means any liquid hydrocarbon mixture occurring naturally in the earth whether or not treated to render it suitable for transportation. It also includes crude oils from which certain distillate fractions have been removed (sometimes referred to as "topped crudes") or to which certain distillate fractions have been added (sometimes referred to as "spiked" or "reconstituted" crudes).

(b) "Fuel Oil" means heavy distillates or residues from crude oil or blends of such materials intended for use as a fuel for the production of heat or power of a quality equivalent to the "American Society for Testing and Materials' Specification for Number Four Fuel Oil (Designation D 396-69),⁸⁰ or heavier."

The definition of "contributing oil" was elaborated at the 1971 Diplomatic Conference on the basis of a text presented by organisations representing the oil industry. The intentions behind the texts, at that time, were *inter alia*, the following:

'(a) to cover all crude oil carried by sea and to prevent a situation arising where a simple treatment or steaming of crude oil, or the addition of an extra component would enable an operator to claim that the material was not crude oil but something different and that he was therefore not

Civil Liability Convention, 1976 Protocol to the Fund and Civil Liability Conventions, Internal Regulations and Rules of Procedure 2nd ed. (1987) at 59.

⁸⁰Designation D396-69 has been updated, most recently by designation D396-90A; however, the definition of Number Four Fuel Oil has not been changed; see FUND/A.15/17 page 3.

liable to contribute for this material;

(b) to define fuel oil so as to exclude lubricating oil and blendstocks therefor, bitumen and process stocks which were not intended to be burned as fuel.'⁸¹

Oil is counted for contribution to the IOPC Fund each time it is received after carriage by sea, into tankage or storage, at ports or terminal installations⁸² in a Fund Member State. The analysis which follows examines the various circumstances by which oil is considered as contributing oil as well as the practical and conceptual difficulties which arise in this regard.

Oil received from a non-Contracting State at an installation in a Contracting State which had originally been carried by sea to the non-Contracting State is counted as contributing oil even though it did not in fact reach the Contracting State by sea-transport.⁸³ For example, such oil may have been transported to the Contracting State in question by pipeline, non-sea-going barge, road or rail.⁸⁴ In such cases the oil in question is only counted for contribution purposes where it is first received in the Contracting State.⁸⁵

The place of loading is irrelevant; the oil may be imported from

⁸¹FUND/A.15/17 page 2.

⁸²A 'terminal installation' would include a Single Buoy Mooring (SBM) which is a floating facility to which large oil tankers moor in order to discharge cargo. From the SBM the oil is then pumped through an underwater pipeline to a shore facility such as an oil refinery or into storage.

⁸³Fund Convention, Article 10.1(b).

⁸⁴Explanatory Note 5(b) to the 'Report on contributing oil receipts' contained in *International Oil Pollution Compensation Fund: Texts of the 1971 Fund Convention, 1969 Civil Liability Convention, 1976 Protocol to the Fund and Civil Liability Conventions, Internal Regulations and Rules of Procedure* 2nd ed. (1987) at 59.

⁸⁵Fund Convention, Article 10.1(b).

abroad, carried from another port in the same Contracting State or transported by ship from an offshore production rig. Oil which is received after carriage at sea at a storage tank for trans-shipment by ship to another port in the same Contracting State or elsewhere is counted as contributing oil. Thus where trans-shipment is to the same Contracting State or another Contracting State the same oil will be assessed twice.

Oil received after carriage by sea for further transport by pipeline or any other means is considered received for contributing purposes.⁸⁶ This statement must be qualified in the light of ship-to-ship transfers. In 1980 the IOPC Fund Assembly attempted to clarify when oil should be considered received in terms of Article 10.1 of the Fund Convention. The Assembly adopted the position that a '[s]hip-to-ship transfer shall not be considered as receipt, irrespective of where this transfer takes place (ie within a port area or outside the port but within territorial waters) and whether it is done solely by using the ships' equipment or by means of a pipeline passing over land.' However, the Assembly further noted that 'in the case where the oil passed through a storage tank before being loaded to the other ship it has to be reported as oil received at that tank in that Contracting State.'⁸⁷

The application of this rule has significant financial implications in a wide variety of circumstances one of which is as follows. The Government of the Arab Republic of Egypt was considering becoming a Member State of the Fund Convention but was concerned about the levies it would be required to make to the IOPC Fund for quantities of oil transferred through the SUMED pipeline. Large tankers are unable to pass through the confines of the Suez Canal. In order to avoid such tankers having to sail around the Cape of Good Hope to deliver cargo to Europe the SUMED

⁸⁶*International Oil Pollution Compensation Fund: General Information on Liability and Compensation for Oil Pollution Damage* February 1992 section 3.5 at 8.

⁸⁷*IOPC Fund Annual Report 1993*, section 9 at 18.

pipeline was constructed. The pipeline consists of a terminal on the Gulf of Suez which receives oil from tankers into oil storage tanks. The oil is then pumped through the pipeline to the Mediterranean coast where it is again received into storage tanks and then trans-shipped to other tankers. The Egyptian Government attempted to argue that if Egypt became a member of the Fund Convention the oil transferred through the pipeline should not be considered as contributing oil. To this end the Government argued that '[t]ransport through the SUMED pipeline should be considered as a ship-to-ship transfer and the quantities received for such transport should therefore not be taken into account for the purpose of levying contributions to the IOPC Fund.' In October, 1993, the IOPC Fund Assembly rejected this argument.⁸⁸ In principle it would seem that this decision is correct.

The levy is based on reports on oil receipts in respect of individual contributors. A member State is required to communicate every year to the Director of the IOPC Fund the name and address of any person in that State who is liable to contribute to the IOPC Fund, as well as data on the relevant quantities of contributing oil received by any such person.⁸⁹ Although the reports are submitted by governments of Fund Member States, the contributions are paid by the individual contributors directly to the IOPC Fund. Governments have no responsibility for these payments, unless they have voluntarily accepted such responsibility.⁹⁰ Although the obligation to pay contributions to the IOPC Fund rests directly on the individual oil receivers and not on the State Parties to the Fund Convention, the legal basis for the obligations of the oil receivers to make contributions to the IOPC Fund is the treaty obligations under the Fund Convention of the State in which they received the

⁸⁸The account of the SUMED pipeline debate is taken from the *IOPC Fund Annual Report 1993*, section 9 at 17-18.

⁸⁹Fund Convention, Article 15.2.

⁹⁰Fund Convention, Article 14.1.

oil.⁹¹

Each Contracting State has a duty to ensure that all contributions due from parties within that State are made. Where a party who is required to make such contributions fails to do so, measures must be taken against the erring party by the State in question to ensure that this obligation is fulfilled.⁹² In terms of the Internal Regulations of the IOPC Fund, if a contributor is in arrears with the payment of an initial or annual contribution, the Director of the IOPC Fund may notify the State within whose territory the relevant quantities of contributing oil were received and request advice on the action to be taken to ensure that the obligations of that contributor are fulfilled.⁹³ Where a person liable to make contributions to the IOPC Fund does not fulfil his obligations in respect of any such contribution, or any part thereof, and is arrear for a period exceeding three months, the Director shall take all appropriate action against such person on behalf of the Fund with a view to the recovery of the amount due. However, where the defaulting contributor is manifestly insolvent or the circumstances otherwise warrant, the Assembly may, upon recommendation of the Director, decide that no action shall be taken or continued against the contributor.⁹⁴ The Director is allowed a wide discretion on this issue.

Contributions are also levied against holding companies which import oil to the Contracting State, in which they operate, by means of subsidiary companies or other commonly controlled

⁹¹FUND/A.15/19, paragraph 11, page 2-3.

⁹²Fund Convention, Article 13.2.

⁹³Internal Regulations of the IOPC Fund, Regulation 3.9. These Regulations were adopted by the IOPC Fund's Assembly at its 2nd session in April 1979. The Regulations were amended at the 3rd, 4th, 5th, 6th and 9th sessions of the Assembly, in accordance with Regulation 15.1.

⁹⁴Fund Convention, Article 13.3.

entities.⁹⁵ Contracting States are required to report any person who, in the relevant calendar year, has received contributing oil in a quantity not exceeding 150,000 tons if the quantity of contributing oil received in that year by that person, when aggregated with quantities received in the reporting State in that same calendar year by a person or persons associated with that person, exceeds 150,000 tons.⁹⁶ An "[a]ssociated person" means any subsidiary or commonly controlled entity. The question whether a person comes within this definition shall be determined by the national law of the State concerned.⁹⁷ In this way, a large oil importer is prevented from circumventing the IOPC Fund levies on contributing oil by operating a number of subsidiaries each importing less than 150,000 tons of oil per annum.

5.8.1 Initial and Annual contributions

Two general categories of contributions are made to the IOPC Fund i.e. initial and annual contributions.

5.8.1.1 Initial contributions

Initial contributions are payable when a State becomes a member of the IOPC Fund on the basis of a fixed amount per tonne of contributing oil received during the year preceding that in which the Fund Convention entered into force for that State.⁹⁸ The IOPC Fund Assembly was required to determine this fixed amount within two months after the entry into force of the Fund Convention.⁹⁹ At the 1st session of the IOPC Fund Assembly in

⁹⁵Fund Convention, Article 10.2.

⁹⁶*IOPC Fund, Texts of the 1971 Fund Convention, 1969 Civil Liability Convention, 1976 Protocols to the Fund and Civil Liability Conventions, Internal Regulations and Rules of Procedure* 2nd Ed. (1987) Explanatory Note 8 at 59.

⁹⁷Fund Convention, Article 10.2 (b).

⁹⁸Fund Convention, Article 11.1.

⁹⁹Fund Convention, Article 11.2.

November, 1978, the sum of 0.04718 (gold francs) per tonne of contributing oil was decided upon.¹⁰⁰ Accordingly, initial contributions are calculated on the basis of 0.04718 (gold) francs (0.003145 SDR or US\$0.0044)¹⁰¹ per tonne of contributing oil received by each contributor in the relevant Contracting State. If there is no one who has received contributing oil in a quantity exceeding 150,000 tonnes in the year preceding that in which the State becomes a Member of the IOPC Fund, then there are no initial contributions payable in respect of that State. At the 1984 Conference to revise the Civil Liability and Fund Conventions, Dr Reinhard H. Ganten, the Director of the IOPC Fund at that time, observed that '... the very high known level of initial contributions had been an obstacle to the ratification of the Fund Convention.'¹⁰²

5.8.1.2 Annual contributions

Annual contributions are levied to meet the anticipated payments of compensation and indemnification by the IOPC Fund and the administrative expenses during the coming year and any deficit from operations in preceding years.¹⁰³ Each contributor pays a specified amount per tonne of contributing oil received. The amount levied is decided each year by the IOPC Fund Assembly.

Annual contributions are of two kinds; those levied in respect of the General Fund and those levied in respect of Major Claims Funds.

5.8.1.2.1 General Fund contribution

¹⁰⁰*IOPC Fund Statistics* 1 October 1992, at 5.

¹⁰¹15 (gold) francs = 1 SDR see Internal Regulations of the IOPC Fund, Regulation 2 (a); the amount given in U.S. dollars is calculated on the rate of exchange at 30 January 1992 (US\$1.39921 = 1 SDR).

¹⁰²*Official Records*, vol.2 at 515 para.77.

¹⁰³Fund Convention, Article 12.1 (i).

Contributions to the General Fund are levied, as described earlier, on the basis of the quantity of contributing oil received by the contributor in question during the year preceding that in which the IOPC Fund Assembly decides to levy the contributions.¹⁰⁴ The General Fund is designed to cover the costs and expenses of the administration of the Fund in the relevant year and any deficit from operations in preceding years.¹⁰⁵ It should, also, cover payments to be made by the Fund in the relevant year in satisfaction of claims against the Fund, where the aggregate amount of such claims, in respect of any one incident, does not exceed 1 million SDR.¹⁰⁶

5.8.1.2.2 Major claims contributions

As for Major Claims Funds, the contributions are calculated on the basis of the quantity of contributing oil received during the calendar year preceding that in which the incident in question occurred, provided that the State in which the oil was received was a party to the Fund Convention at the date of the incident.¹⁰⁷ Major Claims Funds are used to satisfy claims against the Fund to the extent that the aggregate amount of such claims in respect of any one incident is in excess of 1 million SDR.¹⁰⁸

5.8.1.3 Contribution returns

¹⁰⁴Fund Convention, Article 12.2 (a).

¹⁰⁵Fund Convention, Article 12.2 (a) read with Article 12.1 (i) (a).

¹⁰⁶Fund Convention, Article 12.2 (a) read with Article 12.1 (i) (a) and [(b) as amended by Article III (d) of the 1976 Protocol to the Fund Convention which provides that the sum of 15 million (gold) francs shall be substituted for 1 million units of account, which in turn equals 1 million SDR].

¹⁰⁷Fund Convention, Article 12.2 (b).

¹⁰⁸Fund Convention, Article 12.2(b) read with Article 12.1(i)(c) [as amended by Article III(d) of the 1976 Protocol to the Fund Convention].

The IOPC Fund's Director issues an invoice to each contributor, following the decision taken by the Assembly to levy annual contributions.¹⁰⁹ Unless otherwise decided by the Assembly, annual contributions are due on 1 February of the year following that in which the Assembly decides to levy contributions.¹¹⁰ Contributions are levied retroactively, and sometimes contributions to a Major Claims Fund are levied a long time after the incident occurred. This is because it may take time to assess the full extent of any given claim.

If contributions levied in respect of a major claims fund are not totally used for the payments made by the IOPC Fund in respect of the particular incident for which they were levied, the balance is repaid to the contributors.¹¹¹ For example, the IOPC Fund Assembly decided that an amount of £13.9 million of the balance remaining on the *Tanio* major claims fund should be reimbursed *pro rata*, on 1 February 1989, to the persons who had made contributions to that major claims fund, and that any amount in excess of £13.9 million should be transferred to the general fund. In addition, the Assembly decided that each contributor should be given the option to choose whether the amount to which he was entitled should be repaid to him, or whether the amount should be credited to his account with the IOPC Fund for set-off against annual contributions that would be levied in subsequent years.¹¹² The particularly high balance on the *Tanio* major claims fund stemmed from the recovery of a substantial amount of money through recourse proceedings and the subsequent conclusion of an out-of-court settlement to the benefit of the IOPC Fund.¹¹³

¹⁰⁹Internal Regulations of the IOPC Fund, Regulation 3.7.

¹¹⁰Internal Regulations of the IOPC Fund, Regulation 3.8.

¹¹¹Internal Regulations of the IOPC Fund, Regulation 4.4.1.

¹¹²*IOPC Fund Annual Report* 1988, section 7.1 (c) at 14.

¹¹³*IOPC Fund Annual Report* 1992, section 9 at 24.

5.8.1.4 Variations in contributions

Payments made by the IOPC Fund in respect of claims for compensation for pollution damage vary considerably from year to year. As a result, the level of contributions to the IOPC Fund also fluctuate from one year to another. The table below sets out the contributions levied by the IOPC Fund during the period 1979-1993 and illustrates how contributions fluctuate in accordance with different claims experience. The amounts are shown in Pounds Sterling¹¹⁴ and the very high amounts in 1993 relate primarily to the *Haven Major Claims Fund*.

Year	General Fund	Major Claims Fund	Total Levy
1979	750 000	0	750 000
1980	800 000	9 200 000	10 000 000
1981	500 000	0	500 000
1982	600 000	260 000	860 000
1983	1 000 000	23 106 000	24 106 000
1984	0	0	0
1985	1 500 000	0	1 500 000
1986	1 800 000	0	1 800 000
1987	800 000	400 000	1 200 000
1988	2 900 000	90 000	2 990 000
1989	1 600 000	3 200 000	4 800 000
1990	500 000	0	500 000
1991	5 000 000	21 700 000	26 700 000
1992	0	10 950 000	10 950 000
1993	8 000 000	70 000 000	78 000 000

Certain similarities exist between the manner of meeting claims under the IOPC Fund and the system of initial and supplementary calls used by the P&I Clubs to meet claims brought against their members. However, there are also fundamental differences between the two systems. The main difference is that under P&I insurance (which is indemnity insurance) the P&I Club does not customarily accept primary liability. However, as an insurer of pollution liabilities under the Civil Liability Convention the insurer, which in most instances will be a P&I Club, does concede to

¹¹⁴IOPC Fund Annual Report 1992, section 9 at 24.

limited direct action. The IOPC Fund, by contrast, in the role of providing supplementary compensation, accepts primary (albeit strictly limited) liability.

5.8.2 Contribution difficulties

Generally the system of contribution to the IOPC Fund works well. The apparent success of this system can largely be attributed to the nature of the industry engaged in the importation of persistent oil in bulk by sea. Most contributors are oil companies which receive large quantities of oil in relatively large tankers. The extensive infrastructure of these oil companies allow them to have experts trained to understand the contribution mechanism.¹¹⁵ The co-existence of the CRISTAL voluntary fund makes this procedure even more complex.

However, like any system which requires the cooperation of so many diverse entities, and the payment of money, it is to be anticipated that certain practical and conceptual difficulties will inevitably arise. Some of these difficulties are discussed below.

5.8.2.1 Orimulsion

A new petroleum product, known as orimulsion, is being transported at sea in tankers and combination carriers. The IOPC Fund had to consider whether or not orimulsion should be classed as "persistent oil" for the purpose of Article I.5 of the Civil Liability Convention, and if so, whether it should also be considered as falling within the definition of "contributing oil" set out in Article 1.3 of the Fund Convention. This product is derived from a bituminous hydrocarbon found in the Orinoco Belt of Eastern Venezuela which until recently had been too viscous to exploit economically. A procedure was developed which now permits this energy source, when mixed with water and an emulsion

¹¹⁵*Official Records*, vol.2 at 345 para.56.

stabiliser, to be transported and used as fuel for power stations and other heavy industries. Hence the origin of the product's name.

Under Article 1.2 of the Fund Convention, "oil" has the same meaning for the Fund Convention as in Article I.5 of the Civil Liability Convention, provided that for the purpose of the Fund Convention "oil" shall be confined to "persistent hydrocarbon mineral oils". On an examination of the definition of "oil" contained in Article I.5 of the Civil Liability Convention it is clear that there is no exact or exhaustive definition of "oil". "Oil" is merely defined as meaning '... any persistent oil such as crude oil, fuel oil, heavy diesel oil, lubricating oil and whale oil, whether carried on board a ship as cargo or in the bunkers of such ship'. In colour and viscosity, orimulsion is indistinguishable from heavy fuel oil and its specification points are within the range of those for heavy fuel oil. Accordingly, it was decided at the 15th session of the IOPC Fund Assembly held from 6 to 9 October 1992 that the product known as orimulsion should be considered as "persistent oil" for the purpose of Article I.5 of the Civil Liability Convention.¹¹⁶

It was explained in the text above how "contributing oil", as defined in Article 1.3 of the Fund Convention, can either fall within the category of crude oil¹¹⁷ or fuel oil.¹¹⁸ It was decided by the IOPC Fund Assembly that orimulsion could be considered as falling within either of the categories referred to in Article 1.3 of the Fund Convention. This is because orimulsion could be considered as "crude oil" as it is a '... liquid hydrocarbon mixture occurring naturally in the earth'

¹¹⁶*IOPC Fund Annual Report 1992*, section 6.1 (i) at 15. The description of the above deliberation was obtained from FUND/A.15/17, para 3-5 at 2.

¹¹⁷Fund Convention, Article 1.3 (a).

¹¹⁸Fund Convention, Article 1.3 (b).

and has been 'treated to render it suitable for transportation'.¹¹⁹ On the other hand, it could also be considered as "fuel oil", which is defined as '... residues from crude oil ... intended for use as a fuel for the production of heat or power'.¹²⁰ The bituminous hydrocarbon material which constitutes the major component of orimulsion is not suitable for refining as a normal crude oil and is only used for the production of heat and power. For this reason the Director of the IOPC Fund advised the Assembly that orimulsion should be considered as "fuel oil" for the purpose of the definition of "contribution oil." The suggestion was endorsed by the IOPC Fund Assembly.¹²¹

The IOPC Fund Assembly also decided that the assessment of contributions on quantities of orimulsion received in parties to the Fund Convention would not be reduced on account of its water content. This was decided on the advice of the IOPC Fund Director who stressed that the contribution system established by the IOPC Fund Convention was based on the principle that each tonne of contributing oil received after carriage at sea would result in the same amount in contribution being levied. This fundamental feature of the IOPC Fund's operation may be described as the principle of "fair shared sacrifice". The amount of contribution is independent of any other factors, such as differences in pollution potential of the cargo, relative ease or difficulty of cleaning up after spills of different oil, length of journey or route undertaken, mode of loading and delivery, the place of delivery or the quality, age or class of the vessel used or its crew.¹²²

¹¹⁹See the definition of "crude oil" contained in Article 1.3 (a) of the Fund Convention.

¹²⁰See the definition of "fuel oil" contained in Article 1.3 (b) of the Fund Convention.

¹²¹*IOPC Fund Annual Report 1992*, section 6.1 (i) at 15. The description of the above deliberation is extracted from FUND/A.15/17, paragraphs 6-9, pages 2-3.

¹²²FUND/A.15/17, para.9, page 3.

The deliberations concerning the inclusion of the new product orimulsion under the Civil Liability and Fund Conventions is noteworthy in that it shows how the two tiered compensation regime evolves when faced with new situations. Another characteristic which is illustrated by these proceedings is the interaction and convergence between the Fund Convention and its voluntary equivalent, CRISTAL. Thus, the Board of Directors of Cristal Limited¹²³ had decided in May 1990 that orimulsion would be regarded as contributing oil under the CRISTAL Contract and that no deduction would be allowed for water content. This was a factor which the IOPC Fund Director and the IOPC Fund Assembly took into account in approaching problems posed by orimulsion. In certain specific circumstances, which will be explained, interaction sometimes occurs between the Civil Liability and Fund Conventions on the one hand and the voluntary compensation agreements on the other. Therefore, it was decided that it would be beneficial to both compensation systems and to possible claimants that the policy adopted towards orimulsion was consistent under the two regimes.¹²⁴ Significantly, the voluntary regimes were able to respond far more rapidly to the issue of whether or not to include orimulsion within the ambit of the voluntary compensation system than was the case under the Conventions. This would seem to support the notion that the voluntary regimes have greater flexibility as opposed to the Conventions. However, flexibility is not the only criterion to be considered in comparing the respective strengths and weaknesses of these compensation systems. Considerations such as the ability to have recourse to public, impartial and independent courts which are in a position to decide upon the admissibility of claims, determine liability and the levels of compensation awards, are very important considerations which strongly favour the international compensation conventions over the voluntary compensation agreements.

¹²³Cristal Limited is the company which manages the CRISTAL Contract on behalf of CRISTAL Members.

¹²⁴FUND/A.15/17, paragraph 11, page 3.

In contrast to the inclusion of orimulsion, the IOPC Fund Assembly decided in October, 1993, that cohasset-panuke crude oil should not be considered as a persistent oil for the purpose of Article I.5 of the Civil Liability Convention and as such should be considered as falling outside the definition of contribution oil as determined by Article 1.3 of the Fund Convention.¹²⁵

5.8.2.2 Interpretation of "received"

One of the basic concepts of the system of contributions to the IOPC Fund established by the Fund Convention is that contributions are payable by the person who has "received" contributing oil after sea transport.¹²⁶ Four storage companies in the Netherlands have argued that the interpretation of the notion "received" in the Fund Convention applied by the IOPC Fund is incorrect. They submitted that because they were only storage companies who "received" oil on behalf of other persons they could not be considered "receivers" of contributing oil as defined by Article 10 of the Fund Convention (or applicable Dutch legislation). The position adopted by the Dutch storage companies is that the person for whom the storage is carried out should be considered as the "receiver". The following arguments in support of their claim were put forward.

Firstly, they conceded that Dutch law does not support the interpretation relied on by the Dutch storage companies. A Royal Decree of 18th August, 1982 (No.491) was issued which elaborated on the notion of "receiver". The Royal Decree contains some provisions relating to the notion of "receipts of oil" and includes those who receive contributing oil on behalf of someone else. But it was submitted by the Dutch storage companies that Dutch legislation exceeds the meaning of "receiver" contained in Article 10 of the Fund Convention and that the obligation to contribute to the IOPC Fund can be based only on the Convention.

¹²⁵*IOPC Fund Annual Report 1993, Section 6.1 at 9.*

¹²⁶Fund Convention, Article 10.

In accordance with this position, they submitted that the background to the Fund Convention and its preamble makes it clear that the intention was that the financial burden of the contributions should fall upon the oil companies which have financial interests in the oil and who are instrumental in the transport of that oil by sea. Furthermore, the Fund Convention uses the expression "has received" and not "has taken receipt of" or "discharged" or "stored".¹²⁷

These arguments were judged contrary to the interpretation given to the notion of "receiver" by the Assembly of the IOPC Fund. The IOPC Fund Assembly has determined that, within the scope of Article 10 of the Fund Convention, Member States should have a certain flexibility to adopt a practical reporting system allowing an effective and easy checking of the figures and taking into account the peculiarities of the oil movement and local circumstances of a particular country. Reports may designate a person as a "receiver" who was not the immediate actual (physical) "receiver" of the oil after shipment by sea. Accordingly, reports may designate a person as a "receiver" who has their place of business or residence outside the Contracting State. But the IOPC Fund Assembly has emphasised that, failing payment by persons reported as "receivers" other than the immediate physical "receivers", the immediate "receivers" shall ultimately become liable for contributions. This is so irrespective of whether the persons in fact reported have their place of business or residence in a Member State or not.¹²⁸ In conclusion the IOPC Fund Assembly did not accept the arguments put forward by the Dutch storage companies in question and adopted the position that their outstanding contributions had to be made.

This method of defining contributions under the Fund Convention is probably the most effective in practice. Although, strictly

¹²⁷FUND/A.15/18, paragraph 18, page 4.

¹²⁸FUND/A/ES.1/13, paragraph 10, pages 7-8.

speaking, it is most equitable for the actual oil importer to make the contribution to the IOPC Fund this can not always be achieved. In practice, storage companies will incorporate the amount of capital expended in making contributions to the IOPC Fund into the price of the service rendered to the oil company. The oil company will ultimately incorporate this cost into the price of the product eventually sold. Therefore, in effect, the cost of pollution is ultimately borne by the consumer of the petroleum product. This is equitable because in the final analysis it is the public demand for petroleum based products that has brought about the transportation of persistent oil by tanker at sea - and hence oil pollution. The final consumer also has a so called "financial interest" in the oil.

5.8.2.3 Oil "receivers" in the former USSR

On the 26th December, 1991, the Russian Federation instructed the Secretary General of the International Maritime Organization (IMO) that the membership of the Union of Soviet Socialist Republics (USSR) in all Conventions concluded within the framework of IMO would be continued by the Russian Federation.¹²⁹ Accordingly, as from that date the membership of the USSR in the Civil Liability and Fund Conventions is continued by the Russian Federation. None of the other independent States which had previously formed part of the USSR had, at the close of the 1991 year, made similar declarations or submitted an instrument of ratification, acceptance, approval or accession in respect of the Fund Convention. It was not clear, at that time whether any of these other States would continue to be, or would choose to become, Parties to the Fund Convention.¹³⁰

In November 1991 the IOPC Fund issued invoices to ten receivers of contributing oil which had been designated in a report

¹²⁹The Fund Convention had entered into force for the USSR on 15 September, 1987.

¹³⁰FUND/A.15/19, paragraph 1, page 1.

submitted to the IOPC Fund by the Government of the former USSR. Five of the designated receivers were situated in the Russian Federation. As the Russian Federation had elected to remain a member of the Civil Liability and Fund Conventions no legal difficulties existed in respect of contributions from these receivers. In respect of the other five oil receivers located outside the Russian Federation (one in Georgia, two in Azerbaijan and two in Turkmenistan) certain conceptual problems arose concerning the obligations of these receivers to contribute to the IOPC Fund. The difficulty was in that contributions to the IOPC Fund are levied retroactively, and that sometimes contributions to a Major Claims Fund are levied a long time after the incident.

The question arose whether or not the five non Russian Federation receivers should be permitted to neglect their responsibility to make contributions for that period during which they received oil in the former USSR which was then a State Party to the Fund Convention? If this was permitted other receivers would be prejudiced in having to make up this loss. On the other hand could these receivers be expected to contribute for that portion of 1991 subsequent to the 26th of December during which they were no longer receiving oil in a State Party to the Fund Convention?

The Director of the IOPC Fund suggested to the IOPC Fund Assembly the following method of resolving this unique situation. In respect of annual contributions to the General Fund the five receivers in question should pay 359/365 of the contributions which normally would be payable by a contributor who received the same quantity of contributing oil. The receivers would be under no obligation to make annual contributions to the General Fund for 1992 and subsequent years.¹³¹ In respect of contributions to Major Claims Funds arising from incidents occurring prior to the 26th December, 1991, the oil receivers in question should be required to pay not only the total annual contributions for 1991,

¹³¹FUND/A.15/19, paragraph 18 (a) and (b), page 4.

but also any annual contributions to be levied in 1992 or subsequent years to these Major Claims Funds, without reduction. In respect of annual contributions to Major Claims Funds arising from incidents occurring after the 25th December, 1991, the oil receivers in question should be under no obligation to make contributions.¹³²

5.8.3 Conclusions on the contribution system

The crucial difference between the settlement of liability for oil pollution by oil receivers through the IOPC Fund in terms of the provisions of the Fund Convention compared to liability of the shipowner under the Civil Liability Convention is this. Under the Civil Liability Convention the shipowner is personally liable and his right to limit can be broken thereby resulting in unlimited liability. Under the Fund Convention the oil receiver or the shipper of the oil can never become personally liable for the resulting oil pollution. The IOPC Fund incurs liability on their behalf thereby insulating the actual oil owner from becoming directly implicated in the question of liability. One can conclude that the oil companies are insulated from the question of liability and hence responsibility in two important ways. Firstly, the shipowners bares primary liability. This in effect allows oil companies to pollute the seas vicariously through the shipowner at little personal risk. Secondly the IOPC Fund bares second tier liability on behalf of all oil receivers not the individual oil company responsible for transporting the particular cargo at sea in a tanker which may in truth well be unfit to carry out such hazardous operations.

Nevertheless, for oil companies to fund the IOPC Fund and thereby accept in principle that they are responsible for oil pollution is to set a "dangerous" precedent which if carried to its logical conclusion may well result ultimately in the actual oil cargo owner being forced to accept primary liability together with the

¹³²FUND/A.15/19, paragraph 18 (c) and (d), page 4.

shipowner.

5.9 Conclusion to the Fund Convention

The Fund Convention and the IOPC Fund was unique in conception and implementation. It evolved to meet the particularly high liability levels associated with tanker-source oil pollution and reflected the reality that the cargo owner was just as responsible for this type of damage as the shipowner. In this way victims of oil pollution damage were given access to a certain source of additional compensation over and above that available from the shipowner under the Civil Liability Convention. The development of the Fund Convention also afforded significant relief to shipowners who would have been hard-pressed to carry the ever increasing burden of oil pollution liability without contributions from the considerable financial resources of oil cargo owners.

Because the legal and organisational provisions of the Civil Liability and Fund Conventions have been dealt with in Chapters Four and Five, respectively, it is now possible to examine claims practice under those Conventions in the following Chapter. In turn the analysis of claims practice leads on to an examination of the admissibility of claims under these Conventions in Chapter Seven.

CHAPTER 6

Civil Liability & Fund Conventions' Claim Practice

6.1 Introduction

The purpose of this Chapter is to explain the actual operation of the two-tier system of compensation brought about by the international Conventions. The way in which claims are settled under the Civil Liability and Fund Conventions is of importance to a complete understanding these instruments. In the subsequent chapter, chapter seven, the admissibility and assessment of claims brought by victims of oil pollution damage in terms of the Civil Liability and Fund Conventions against the shipowner and the IOPC Fund respectively is discussed in detail. Clearly it is necessary to explain the mechanics of claims settlement before dealing with the substantive issues of admissibility and assessment of damage claims under those instruments. Accordingly, two fundamental issues will be discussed in this chapter. Firstly, the relationship between the IOPC Fund and the Civil Liability interests in the settlement of oil pollution claims will be discussed. Secondly, the special institutional provisions of the IOPC Fund which facilitate the payment of claims through this organisation must also be considered.

It is the express policy and practice of the P&I Clubs and the IOPC Fund that claims for oil pollution damage under the Civil Liability and Fund Conventions are settled without recourse to litigation. As a result there are few judicial interpretations of these international instruments. The P&I Clubs are privately owned organizations which manage the delicate issue of their members' liability within a highly competitive commercial environment. Accordingly, detailed information relating to the settlement of oil pollution claims under the Civil Liability Convention or otherwise is seldom disclosed by the individual Club involved. By contrast the IOPC Fund is a single inter-governmental organization and has an expressed policy of

disclosing information about its activities, including claims settlement practice, to interested members of the public.

Notwithstanding these differences in approach between the P&I Clubs and the IOPC Fund strong similarities exist between the provisions of the Civil Liability and Fund Conventions and consequently the claims settlement policy under both instruments are also similar. Therefore, the analysis of the claims policy articulated by the IOPC Fund within the context of claims settlement under the Fund Convention is also a strong indicator as to the scope of application of the Civil Liability Convention. In this analysis of claims settlement under the Civil Liability and Fund Conventions greater emphasis is placed on the policy expounded by the IOPC Fund than that of the P&I Clubs. This is so because the settlement of claims by the P&I Clubs is confidential and information on the subject is not readily available.

6.2 Relationship between the Fund and shipowners in claims settlement

In its claims settlement procedures, the IOPC Fund endeavours to cooperate closely with the insurer of the shipowner's oil pollution risks. As stated previously, tanker owners' third party liability for oil pollution damage is usually covered with one of the Clubs participating in the International Group of Protection and Indemnity Clubs or indemnity associations such as the Bermuda-based International Tanker Owners' Indemnity Association (ITIA).

6.2.1 Joint and separate investigations

Where the IOPC Fund feels it may be required to provide compensation for pollution damage or indemnify the shipowner in respect of an incident, the investigation of the incident and the assessment of the damage is usually carried out jointly by the shipowner's P&I Club and the IOPC Fund. This cooperation is based

on a Memorandum of Understanding signed on the 5th November, 1980, by the International Group of P&I Clubs and the IOPC Fund. Under this Memorandum, the Clubs will report to the IOPC Fund each escape or discharge of oil which is likely to involve a claim against the IOPC Fund. The parties will exchange views concerning the incident and cooperate in an attempt to avoid, eliminate or minimise pollution damage. A special Memorandum of Understanding, signed on the 25th November, 1985, governs the cooperation between the Japan Ship Owners' Mutual Protection and Indemnity Association (JPIA) and the IOPC Fund. This Memorandum contains provisions in respect of cooperation similar to those in the Memorandum signed by the International Group.¹

These arrangements suggest strongly that the P&I Clubs, which represent the interests of shipowners, and the IOPC Fund which, *inter alia*, represents oil importer interests, collaborate to a definite degree to safe-guard their collective self-interest by ensuring (or attempting to ensure) that third party liability is kept within manageable limits. At the same time, it is necessary for the two organizations to be jointly, or in certain circumstances, separately, involved in the investigation from the outset as conflicts may well arise between the interests of the P&I Clubs and the IOPC Fund.

The IOPC Fund follows a flexible policy on this issue. It appoints legal and technical experts to carry out independent investigations into the cause of a particular incident involving the IOPC Fund only in those cases where the Director considers it to be in the best interest of the Fund to do so.² The decision of the Director in this regard, and the course of action decided upon, will, of course, depend largely on the particular circumstances of each case. In some cases, for example the

¹FUND/A.15/13, paragraph 6, page 2.

²IOPC Fund Annual Report 1992, section 6.1 (h) at 14-15.

*Volgoneft 263*³ and *Haven*⁴ incidents, the IOPC Fund has appointed its own experts at a very early stage in order to make an independent assessment as to the cause of the incident. In the *Tanio* case, the IOPC Fund and the French Government jointly carried out an extensive investigation into the cause of the incident.⁵ In other cases, for example the *Tolmiros*⁶ and *Amazzone*⁷ incidents, the IOPC Fund has waited for the results of investigations carried out by the public authorities of the States concerned. After having examined the results of such investigations, the IOPC Fund decided to appoint its own experts for the purpose of assisting the Director in his assessment of the findings of the investigation by the public authorities. In many cases, for example the *Brady Maria*⁸ and the *Thuntank 5*⁹

³*IOPC Fund Annual Report 1992*, section 12.2 at 45-46; this incident occurred 22 kilometres off the Swedish east coast, south of Karlskrona, as a result of a collision between the USSR tanker *Volgoneft 263* and the general cargo vessel *Betty*.

⁴*IOPC Fund Annual Report 1992*, section 12.2 at 59-71; three separate inquiries into the cause of this incident have been conducted; these are a Summary Enquiry, a Formal Enquiry and a Criminal Investigation. The IOPC Fund followed these enquiries through lawyers and technical experts.

⁵*IOPC Fund Annual Report 1988*, section 12.2 at 25-30.

⁶*IOPC Fund Annual Report 1992*, section 12.2 at 39-41; in this instance Sweden suffered pollution damage but was unable to prove the actual source.

⁷*IOPC Fund Annual Report 1992*, section 12.2 at 41-44; here investigations into the cause of the incident were carried out on behalf of the Commercial Court in Antwerp and by an investigating judge in Paris. The French Government and the IOPC Fund employed their own experts for the same purpose.

⁸*IOPC Fund Annual Report 1988*, section 12.2 at 38-41.

⁹*IOPC Fund Annual Report 1988*, section 12.2 at 41-43 and *IOPC Fund Annual Report 1992*, section 12.2 at 36-37. This incident occurred on the 21 December, 1986. The Swedish vessel *Thuntank 5* (2,866 GRT), carrying 5,024 tonnes of heavy fuel oil, ran aground, in very bad weather, outside Gävle, on the east coast of Sweden, 200 kilometres north of Stockholm. It was estimated that between 150-200 tonnes of oil escaped as a result of the incident. The oil caused considerable pollution damage in areas along a 150 kilometre stretch of coast around Gävle, including a number of small islands.

incidents, the Director accepted the findings of the investigations carried out by the respective public authorities, and did not elect to undertake any further investigations.

6.2.2 Possible consequences of investigations

The cause of the incident can be significant to the IOPC Fund for a number of reasons which are discussed below.

6.2.2.1 Recourse recovery may be possible

It has already been shown how in the *Tanio* case the IOPC Fund recovered a substantial amount of money it had paid to claimants under the Fund Convention through recourse action against the registered shipowner, his guarantor and certain other responsible parties.¹⁰ The IOPC Fund's right of recourse is conferred by Article 9 of the Fund Convention. As against the shipowner or his guarantor the IOPC Fund is placed "in the shoes" of claimants to whom it pays compensation. This is according to Article 9.1 of the Fund Convention which specifically provides that:

' ... the Fund shall, in respect of any amount of compensation for pollution damage paid by the Fund ... acquire by subrogation the rights that the person so compensated may enjoy under the Civil Liability Convention against the owner or his guarantor.'

An important point to consider here is that the the owner and his guarantor are still afforded the protection conferred upon them by the Civil Liability Convention. Article 9.2 goes on to preserve the Fund's rights of subrogation against any other party who may be liable to claimants that the Fund has paid compensation to. For the purposes of subrogation this provision provides that the IOPC Fund's rights of recourse will be

¹⁰This aspect of the *Tanio* case was discussed under the topic of actions brought against various parties outside the parameters of the Civil Liability Convention; see pg. 113.

identical to those enjoyed by an insurer of such claimants. In this way the IOPC Fund may recover payments made to claimants from persons other than the shipowner or his guarantor. One of the limitations placed upon the Fund's right of recourse against such persons is that due to the channelling provisions contained in Article III.4 of the Civil Liability Convention claimants are precluded from bringing actions against the 'servants or agents of the owner'. Consequently, the IOPC Fund can not acquire any enforceable rights of recourse against those categories of persons under the provisions of Article 9.2 of the Fund Convention. Therefore, the IOPC Fund is placed in a less advantageous position than the shipowner regarding its ability to recover its losses through the recourse action because the shipowner is able to recover by way of recourse action against all third parties including its servants and agents.

The rights of recourse conferred upon the IOPC Fund by Article 9.1 and 9.2 of the Fund Convention were used to considerable effect in the *Tanio* incident. In that case the total amount paid by the IOPC Fund was FFfr222,140,643, corresponding to approximately £18.3 million at the rate of exchange prevailing when the respective payments were made.¹¹ In practice, the IOPC Fund's rights of recourse are one of the most important factors to be considered by all potentially responsible parties.

6.2.2.1.1 'Actual fault or privity of the shipowner'

An investigation may reveal a strong possibility that the incident occurred as a result of the 'actual fault or privity' of the shipowner, in which case the shipowner may well lose his right to limit liability under the Civil Liability Convention. This would be of particular interest to the IOPC Fund because, where the shipowner loses the right to limit liability in terms of Article V.2 of the Civil Liability Convention, the IOPC Fund may be able to recoup its losses (by having provided compensation)

¹¹The IOPC Fund paid part compensation to claimants during 1983-1985 and a remaining amount was paid in October 1988.

though a recourse action against the shipowner. It has been seen how this was done with considerable effect in the *Tanio* case.

In the *Amazzone* case, the IOPC Fund also took legal action against the shipowner, the charterer and the P&I insurer. During the night of 30-31 January, 1988, the Italian tanker *Amazzone* (18,325 GRT) was damaged in a severe storm off the west coast of Brittany (France). The vessel was on a voyage from Libya to Antwerp (Belgium), carrying about 30,000 tonnes of heavy fuel oil. Several covers were lost from the Butterworth openings¹² of two cargo tanks and, as a result, approximately 2,000 tonnes of the cargo escaped when displaced by seawater entering the open holes. Over the following three to four weeks, oil came ashore in patches along 450-500 kilometres of coastline, affecting four different departments in France and the Channel Islands of Jersey and Guernsey.¹³ Considerable pollution damage was caused.

The amounts paid in settlement of claims for pollution damage, caused as a result of this incident, under the Civil Liability and Fund Conventions appear in the table below:¹⁴

	FFr	FFr
Total amount of claims paid		20,587,776
<i>Amazzone</i> limitation fund	13,860,369	
Add interest on limitation fund	<u>5,440,430</u>	
	19,300,799	- <u>19,300,799</u>
Balance paid by IOPC Fund		<u>1,286,977</u>
		(£132,300)

¹²The *Amazzone* was equipped with deck openings which made it possible to clean the cargo tanks by using pressurised water (the so called "Butterworth" system). Many tankers had this system before it was gradually replaced from the 1980s, by cleaning facilities integrated in the tanks which use the cargo as a cleaning fluid (crude oil washing).

¹³IOPC Fund Annual Report 1992, section 12.2 at 41.

¹⁴IOPC Fund Annual Report 1992, section 12.2 at 42.

Investigations into the cause of the incident were carried out on behalf of the Commercial Court in Antwerp and by an investigating judge in Paris. The French Government and the IOPC Fund employed their own experts for the same purpose. After having examined the results of these investigations, the French Government and the IOPC Fund Director came to the following joint conclusions:

'The *Amazzone* was not seaworthy at the time of the incident, as a result of inadequate maintenance of the Butterworth system. The shipowner and the charterer had not taken any measures to examine the condition of the Butterworth holes, neither when the ship was acquired in 1987 nor thereafter, not even by taking samples of the thickness of the steel plates. Immediately after the incident, during the night in the Port of Antwerp, the charterer of the *Amazzone* cut the edges of certain Butterworth openings, disregarding the most elementary safety rules. He then replaced the system for tightening the deck covers by a conventional mechanism, ie using nuts for tightening. The experts interpreted this act as a clumsy attempt to "eliminate the trace of the most flagrant corrosion". The action taken by the charterer shows that he must have been aware of the bad condition of the ship in this regard. In addition, the shipowner and the charterer had not given their personnel the necessary training and proper instructions so as to ensure that the Butterworth deck covers remained fastened in bad weather. The shipowner was responsible for the proper maintenance of the vessel and he could not escape this responsibility by chartering out the vessel.'¹⁵

Accordingly, the IOPC Fund and the French Government decided to take legal action in the Court of Cherbourg (France) against the owner of the *Amazzone* and the charterer of the vessel, as well

¹⁵IOPC Fund Annual Report 1992, section 12.2 at 42-43.

as against the Standard P&I Club, in its capacity as third party liability insurer of the charterer. In respect of the action against the shipowner the French Government and the IOPC Fund invoked the strict liability laid down in the Civil Liability Convention and maintained that the owner was not entitled to limit his liability, since the incident had occurred as a result of the actual fault or privity of the owner. The action against the charterer was based on fault as regards the lack of maintenance of the Butterworth system, and it was argued that his lack of care would deprive him of the right to limit his liability under the 1976 Convention on Limitation of Liability for Maritime Claims.¹⁶ However, these arguments were not tested in court. After the French Government's claim had been paid out-of-court in November 1991, the Government withdrew its action.

What occurred was that in March 1992 the parties to the court action entered into negotiation for the purpose of reaching an out-of-court settlement. A Settlement Agreement was signed in June 1992 in terms of which the shipowner waived his claim for indemnification under Article 5 of the Fund Convention in the amount of FFfr3,465,092 (£416,400). The shipowner, the charterer and the Standard Club undertook to indemnify the IOPC Fund for FFfr1 million (£102,830) in respect of payments made by the IOPC Fund to the victims of pollution damage. This amount was paid to the IOPC Fund in June 1992. Accordingly, the amount recovered by the IOPC Fund constituted a high proportion of the total amount paid out. The total paid out by the IOPC Fund was FFfr1,286,977 (£132,300) of which FFfr1 million (£102,830) was recovered.¹⁷

This incident depicts how all parties, the IOPC Fund, P&I Clubs and even government seemed to display a preference for a negotiated settlement in favour of litigation.

6.2.2.1.2 Proof of third party fault

¹⁶*IOPC Fund Annual Report 1992*, section 12.2 at 43.

¹⁷*IOPC Fund Annual Report 1992*, section 12.2 at 43-44.

An incident may have been caused by a third party; for example a colliding vessel, and the IOPC Fund may then consider it appropriate to take recourse action against that third party in order to recover any amount which the IOPC Fund has paid in compensation or indemnification. As a result of the experience gained by the IOPC Fund from the *Tanio* incident, the IOPC Fund Executive Committee adopted the position that, except in collision cases, the IOPC Fund should only take recourse action in cases where there are very strong reasons for taking such action, and where, in addition, there was a considerable likelihood of success.¹⁸ In eight collision cases, the IOPC Fund successfully recovered from the owner of the colliding vessel part of the amount paid by the Fund in compensation and indemnification. Six of these cases were in Japan, one in Sweden and one in the Federal Republic of Germany.¹⁹

In cases where the third party is the owner of a colliding vessel, the question arises as to whether that shipowner is entitled to limit his liability under the applicable international convention or national law. An incident which illustrates this issue, as dealt with by the IOPC Fund, is the *Kazuei Maru* which occurred on 11th April, 1990. The Japanese tanker *Kazuei Maru No.10* (121 GRT) was supplying heavy fuel oil to a ferry in the port of Osaka in Japan, when it collided with a cargo vessel, the *Sumryu Maru*. As a result of the collision, a cargo tank of the *Kazuei Maru No.10* was damaged, and approximately 30 tonnes of the cargo oil escaped into the sea. Considerable pollution damage was caused in the territorial sea and territory of Japan.²⁰ In February 1991, the IOPC Fund paid ¥49,443,626 (£191,724), representing the total amount of the agreed claims, minus the shipowner's liability, ¥3,476,160 (£13,470). Indemnification of the shipowner, amounting to

¹⁸FUND/EXC.20/6, paragraph 4.2.

¹⁹FUND/A.15/13, paragraph 14, page 4.

²⁰Japan acceded to the Civil Liability Convention on 3 June, 1976 and ratified the Fund Convention on 7 July, 1976.

¥869,040 (£3,730), was paid in September 1991.

In the view of the IOPC Fund's lawyer in Japan, the incident was entirely due to the negligent navigation of the *Sumryu Maru*. Accordingly, the IOPC Fund prepared to initiate recourse action against the owner of that vessel. Investigations into the incident showed that the *Sumryu Maru* would be entitled to limit her liability under the 1976 Convention on Limitation of Liability for Maritime Claims.²¹ The limitation amount applicable to that vessel was ¥60,574,645 (£320,500). In a recourse action, the IOPC Fund would have competed with other claimants, mainly the hull underwriters, for the distribution of the limitation amount of the *Sumryu Maru*. After negotiations with the other parties concerned, the IOPC Fund agreed in May 1992 that its share of the limitation amount would be ¥45,038,833 (£212,447). The IOPC Fund received that amount in September 1992.²² This illustration shows how, in circumstances where the shipowner establishes the right to limit competing claims can often be of considerable significance. This incident also illustrates an important policy of the IOPC Fund in operation. This policy is to avoid litigation and settle out-of-court wherever possible.

Another important issue which must be resolved in collision cases is to what degree the respective parties negligence contributed to the incident. The *Eiko Maru No.1* incident, which occurred on the 13th August, 1983, aptly illustrates this feature (which is frequently considered in the resolution of collision claims). Here, the Japanese tanker *Eiko Maru No.1* (999 GRT), loaded with 2,459 tonnes of heavy fuel oil, collided with the Panamanian cargo ship *Cavalry* (4,827 GRT) in dense fog off Karakuwazaki, Miyagi, Japan. Approximately 357 tonnes of cargo oil spilled from the *Eiko Maru No.1* and considerable pollution damage was caused

²¹This Convention was done at London, 19 November 1976 and entered into force on 1 December, 1986. Japan acceded to this convention on 4 June, 1982.

²²IOPC Fund Annual Report 1992. section 12.2 at 44-45.

in the territorial sea and territory of Japan. In 1984 the IOPC Fund paid compensation amounting to ¥24,735,109 (£76,722), representing the amount of agreed claims (minus the shipowner's liability under the Civil Liability Convention of ¥39,445,920). Indemnification of the shipowner of the *Eiko Maru No.1*, in the amount of ¥9,861,480 (£32,018), was paid in 1985.

The official investigation into the cause of the incident led to the conclusion that the incident was caused by improper navigation on the part of both vessels. The IOPC Fund started negotiations with the owners of the *Cavalry* with the intention of recovering part of the amount paid by the IOPC Fund. In 1987, agreement was reached between the *Cavalry* representatives and those of the *Eiko Maru No.1*, which included the IOPC Fund, on the apportionment of liability in the ratio 41:59 in favour of the *Cavalry*. In line with this apportionment the amount recovered from the owner of the *Cavalry* for pollution damage was ¥28 million, of which the IOPC Fund received ¥14,843,746 (£65,800).²³

6.2.2.2 Proof of exoneration

An investigation may show that the IOPC Fund is exonerated from its obligation to pay compensation in accordance with Article 4.2 of the Fund Convention, because the pollution damage resulted from an act of war or a similar act or was caused by oil escaping from a warship or another State owned ship on non-commercial service. The investigation may reveal facts of the sort which could be invoked by the ship-owner in order to exonerate him from any liability pursuant to Article III.2 of the Civil Liability Convention. In certain circumstances, for example where 'irresistable natural phenomena' cause incidents leading to pollution damage, the shipowner may be wholly exonerated in terms of the Civil Liability Convention, while the IOPC Fund is not afforded the same protection.

²³*IOPC Fund Annual Report 1987*, section 9.4 at 17-18.

6.2.2.3 Claimant at fault

The pollution damage may have 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 IOPC Fund may then be exonerated wholly or partially from its obligation to pay such person.²⁴

6.2.2.4 Cancelled or reduction of indemnification

If it is established that the pollution damage resulted from the wilful misconduct of the ship-owner himself, the IOPC Fund is exonerated wholly or partially from its obligation to indemnify the ship-owner for part of his liability.²⁵ Finally, the investigation may show that, as a result of the "actual fault or privity of the owner", the ship did not comply with the requirements laid down in any of the instruments included in Article 5.3 (a) of the Fund Convention. In such a case, the IOPC Fund may be exonerated wholly or partially from its obligation to indemnify the shipowner for part of his liability.

6.2.3 Adversarial or collaborative relationship in legal proceedings

The Internal Regulations of the International Oil Pollution Compensation Fund, Regulation 7.1 and 7.2, govern the Intervention of the Fund in legal Proceedings. The wording of these regulations depicts the ambivalence of the relationship between the IOPC Fund and shipowners, who are simultaneously partners and opponents in the complex task of compensating victims of oil pollution.²⁶

6.3 IOPC Fund settlement procedure

²⁴Fund Convention, Article 4.3.

²⁵Fund Convention, Article 5.1.

²⁶These sub-regulations are reproduced in Annexure Four.

The machinery set up to compensate claims through the IOPC Fund is unique and the smooth operation of this system is intrinsic to the success of the Fund Convention. It can be argued that the IOPC Fund functions as an international quasi-judicial body. The provisions of the Fund Convention and IOPC Fund Regulations, in this regard, will now be discussed.

6.3.1 Role of the Executive Committee and Assembly

In terms of Article 26.1(b)(ii) of the Fund Convention read in conjunction with Article 18.7, the settlement of claims against the IOPC Fund is approved by the Executive Committee of the IOPC Fund. Article 26 provides that:

'1. The functions of the Executive Committee shall be:
(b) to assume and exercise in place of the Assembly the following functions:

(i) ...

(ii) approving settlements of claims against the Fund and taking all other steps envisaged in relation to such claims in Article 18, paragraph 7;'

Article 18.7 goes on to provide:

'The functions of the Assembly shall, subject to the provisions of Article 26, be:

7. to approve settlements of claims against the Fund, to make decisions in respect of the distribution among the claimants of the available amount of compensation in accordance with Article 4, paragraph 5, and to determine the terms and conditions according to which provisional payments in respect of claims shall be made with a view to ensuring that victims of pollution damage are compensated as promptly as possible;'

These provisions aptly illustrate the manner in which the Fund Convention places emphasis on negotiated settlements and how by adopting this philosophy, to some extent, in effect usurps the traditional role played by the courts in the settlement of disputes. It may be argued that the continued success and legitimacy of the Fund Convention may lie in ability of the IOPC Fund to reach acceptable negotiated settlements with claimants.

6.3.2 Director's responsibility

As mentioned previously, the Director exercises considerable powers regarding the settlement of claims under the Fund Convention. The wide discretion that has been conferred upon the Director is significant because it facilitates more frequent success of out-of-court settlements, greater flexibility and the more speedy settlement of claims.

Regulation 8.4.1 of the IOPC Funds Internal Regulations permits the Director of the IOPC Fund to settle certain types of claims without the approval of the Executive Committee.

'Where the Director is satisfied that the Fund is liable under the Fund Convention to pay compensation for pollution damage, he may, without the prior approval of the Assembly,²⁷ make final settlement of any claim, if he estimates that the total cost to the Fund of satisfying all claims arising out of the relevant incident is not likely

²⁷The wording of Regulation 8.4.1 refers to the Assembly and not the Executive Committee, but, as explained above, for certain functions the Executive Committee wields effective power. Regulation 1.6 of the Internal Regulations of the International Oil Pollution Compensation Fund reiterates this distinction by way of an extended definition of the term "Assembly":

'"Assembly" means the Assembly referred to in Article 17 of the Fund Convention or, where appropriate, the Executive Committee referred to in Article 21 of that Convention when it performs functions in accordance with Article 26 of the Fund Convention.'

to exceed 37.5 million francs. The relevant date for conversion shall be the date of the incident in question.'²⁸

Thus, in terms of Regulation 8.4.1, the relevant ceiling above which the Director may not settle claims without the prior approval of the executive Committee is 37.5 million francs. As previously discussed, this unit of measurement refers to (gold) francs or Poincaré Francs. In 1976, Protocols were adopted amending the Civil Liability and Fund Conventions by replacing the (gold) francs with the Special Drawing Rights (SDR) of the International Monetary Fund. The method of conversion is applied by the IOPC Fund in accordance with Regulation 2 of the Internal Regulations of the International Oil Pollution Compensation Fund; which provides that:

'Where an amount is expressed in francs in these Internal Regulations such amounts shall be converted into the currency of the Headquarters State in accordance with the following rules:

(a) the amount determined in francs shall be converted into Special Drawing Rights as defined by the International Monetary Fund on the basis that 15 francs are equal to one Special Drawing Right;

(b) the number of Special Drawing Rights found pursuant to (a) shall be converted into the currency of the Headquarters in accordance with the method of evaluation applied by the International Monetary Fund in effect for its operations and transactions at the

²⁸The general limit of the Director's authority to make final settlements of claims for compensation without prior approval by the Executive Committee was increased from 25 million francs to 37.5 million francs at the 14th session of the Assembly of the IOPC Fund, held from 8 to 11 October 1991. The Internal Regulations of the International Oil Pollution Compensation Fund may be amended by the Assembly in accordance with Regulation 15.

date applicable under these Regulations.'

Accordingly, the current ceiling over which the Director may not settle claims arising from one incident is 2.5 million SDR. On the basis of the rate of exchange at 30th January, 1992,²⁹ the Director's ceiling was then set at US\$3.5 million. This ceiling is reviewed by the IOPC Assembly and Executive Committee every four years. Furthermore, where an incident has occurred, the Assembly may authorize the Director to settle claims in respect of that incident beyond the limit established in regulation 8.4.1.³⁰ In addition, the Director may make final settlements of claims from individuals and small businesses up to an amount of 10 million francs, in respect of any one incident. This is equivalent to 0.667 million SDR, or upon the rate of exchange given at 30th January, 1992, US\$930,000.³¹

In terms of Regulation 8.4.3, it is a condition for making a final settlement to any claimant under Regulation 8.4.1 or 8.4.2, that the Director obtains a full and final release in favour of the Fund from the claimant in respect of all claims of that claimant arising from that incident. Also, subject to Regulation 8.4.1, where a claim has been submitted to the Fund and agreement has been reached between the Fund and the claimant as to the value of the majority of items of the claim, but further investigation is considered necessary with respect to the remaining items, the Director may make payment in respect of the agreed items. Regulation 8.4.3 also applies to this provision.³²

Where the Director exercises this discretion, he must satisfy the usual conditions set for him by the Internal Regulations. The Director must be satisfied that the Fund is liable under the Fund

²⁹US\$1.39921 = 1 SDR.

³⁰Internal Regulations of the IOPC Fund, Regulation 8.4.2.

³¹This was achieved at the 14th session of the Assembly of the IOPC Fund held from 8 to 11 October 1991.

³²Internal Regulations of the IOPC Fund, Regulation 8.4.4.

Convention to pay compensation for pollution damage and that the total cost to the Fund of satisfying all claims arising out of the relevant incident is not likely to exceed 37.5 million francs. For those items where the Director provides compensation, he is first required to obtain a full and final release, from the claimant, in favour of the Fund, in respect of those claims. Clearly, the Internal Regulations confer important discretionary power upon the IOPC Fund Director and the Director is required to make decisions which often involve very large sums of money.

6.3.3 Provisional payment

On certain conditions, and within limited amounts, the IOPC Fund Director may make provisional payment before the final settlement of a claim, where it is necessary to do so in order to mitigate undue financial hardship to the victim. This is facilitated through Regulation 8.6, 8.7 and 8.8 of the Internal Regulations.³³ What is envisaged are circumstances where an oil pollution incident has caused such devastation in a particular area that inhabitants (who, for instance may depend wholly on oceanic resources for survival are unable to pursue income-generating activities or a subsistence livelihood.

In the *El Hani* case, the Director refused to grant a request by Indonesian Authorities for advance payment. Here on the 22nd July, 1987, the Libyan tanker *El Hani* (81,412 GRT), bound for the Republic of Korea, ran aground outside Singapore in Indonesian territorial waters. As a result of the grounding, fractures were caused to the hull of the vessel and approximately 3,000 tonnes of crude oil escaped. In August 1987, the Indonesian authorities informed the IOPC Fund that the incident had caused pollution damage in Indonesia and that they would claim compensation from the IOPC Fund.³⁴ No information was given as to the nature and

³³These sub-regulations are reproduced at Annexure Five.

³⁴Indonesia ratified the Civil Liability Convention and acceded to the Fund Convention on the 1st September, 1978. The Fund Convention entered into force for Indonesia on the 30th

extent of the damage. The Indonesian authorities requested urgent advance payment from the IOPC Fund of US\$242,800 to enable them to carry out an assessment of the damage. The Director informed the Indonesian authorities that the IOPC Fund could provide such compensation only where the aggregate amount of damage sustained in all States involved in the incident (Indonesia, Malaysia and Singapore) exceeded the shipowner's limitation amount under the Civil Liability Convention. Since the extent of the total damage sustained in these States could not be estimated when the Indonesian Authorities applied for provisional payment, the IOPC Fund Director declined to furnish such payment.³⁵

6.3.4 Arbitration as a form of Dispute Resolution

Arbitration is a means of settling disputes legally, without going to court. A qualified person, whose appointment has been agreed to by the parties involved, will hear the case and give a decision. If the IOPC Fund cannot reach agreement with any claimant, the Director may agree with any claimant to submit a claim to binding arbitration. Claims established by such arbitration shall be promptly satisfied by the Director.³⁶

In many respects the courts are better suited to dealing with complex disputes relating to oil pollution claims than is the arbitration forum. Arbitration has serious disadvantages: (i) the outcome is unpredictable; (ii) furthermore, it is seldom satisfactory to the parties due to the compromising nature of the decision, the lengthy procedure, and high costs; (iii) other serious disadvantages are: that awards are not published and they do not therefore serve as guidelines for future disputes and: that arbitrators seldom provide reasons for their decisions. The hostility between the parties is, typically, no less than that between parties in the courts and the pool of arbitrators is

November, 1978.

³⁵*IOPC Fund Annual Report 1987*, section 9.14 at 32.

³⁶Internal Regulations of the IOPC Fund, Regulation 8.3.

limited.³⁷

Public disclosure of pollution awards and the reasons for such awards is especially relevant in cases which relate to environmental degradation of the type caused by oil spills. Environmentalists have consistently criticised the oil industry for their philosophy of secrecy. Secrecy is particularly prevalent in connection with oil spills from tankers. Both shipowners, as represented by their P&I associations, and oil companies, in this particular instance most often represented by Cristal Limited and the OCIMF, are especially guarded on the subject of oil pollution. This is understandable from the position of industry members, because no one will willingly wish to provide the "rope" which could very well be used for his own "execution" at some stage in the future. However, full disclosure will, in the long term, enhance the viability of both the oil and shipping industry. Disclosure would improve the image and reputation of the shipping and oil industries in the eyes of the public and also improve relationships with public authorities, thereby enhancing mutual-trust and co-operation.

The IOPC Fund is a welcome exception to the general attitude of secrecy surrounding oil pollution claims. It is noteworthy that although the IOPC Fund is funded by the oil industry it is independant in that its authority and ultimate enforceability is sanctioned by the Contracting State in which an oil pollution incident has occurred.

6.3.5 Claims may ultimately be settled by the courts

Claimants may pursue claims against the IOPC Fund before the courts of the Contracting State where the damage occurred. Such courts will usually first decide the question of liability and

³⁷Bentgärde 'Drafting catastrophe wordings: how to avoid disputes' in *Leading Developments in International Reinsurance and Pollution Insurance: An Industry Report* Lloyd's of London Press (1991) 42 at 44.

the assessment of damages is usually dealt with at a later stage. Such was the case in the *Tanio* litigation.³⁸ Claims against the IOPC Fund shall be brought only before those courts which are competent under Article IX of the Civil Liability Convention in respect of actions against the shipowner, who is, or who would, but for the provisions of Article III.2, of that Convention,³⁹ have been liable for pollution damage caused by the relevant incident.⁴⁰ Article IX.1 of the Civil Liability Convention provides:

'Where an incident has caused pollution damage in the territory including the territorial sea of one or more Contracting States, or preventive measures have been taken to prevent or minimize pollution damage in such territory including the territorial sea, actions for compensation may only be brought in the Courts of any such Contracting State or States.'

However, where an action for compensation for pollution damage under the Civil Liability Convention has been brought before a court in a State party to the Civil Liability Convention, but not to the Fund Convention, any action against the IOPC Fund under Article 4 (general pollution compensation) or under Article 5.1 (indemnification of the shipowner) of the Fund Convention shall, at the option of the claimant, be brought either before a court of the State where the IOPC Fund has its headquarters (the United Kingdom) or before any court of a State Party to the Fund Convention competent under Article IX of the Civil Liability

³⁸*IOPC Fund Annual Report* 1888, section 12.2 at 29. This procedure was also followed by the courts in the United States during protracted litigation associated with the *Amoco Cadiz* incident.

³⁹One will recall that Article III.2 of the Civil Liability Convention relates to the three categories of absolute defences available to the ship-owner.

⁴⁰This is in terms of Article 7.1 of the Fund Convention.

Convention.⁴¹

The Director of the IOPC Fund has a duty to promptly satisfy any claims for pollution damage under Article 4 of the Fund Convention which have been established by judgement against the Fund enforceable under Article 8 of the Fund Convention.⁴² For an exposition of Article 8 and related provisions see Annexure Six of this work.

6.4 Conclusion on claims practice

The significance of the emphasis upon out of court negotiated settlements between claimants and the IOPC Fund and the P&I Clubs cannot be under estimated. This policy serves to defuse potential conflict in a highly emotive and politically charged area of law, speeds up the settlement of claims and reduces legal costs. While negotiated settlements are to be encouraged it is also important that claimants have the right to resort to the Courts of their own country when no agreement can be reached. What is particularly interesting is the role played by the IOPC Fund in the settlement of claims under the Fund Convention. The IOPC Fund does not seem to adopt an adversarial role as against claimants but, rather places a priority upon principles of fairness. For example, it has been seen how the IOPC Fund may provide interim relief to victims where there is a demonstrable need. However, the IOPC Fund must always operate within the constraints of its rules. In this regard the IOPC Fund's rights of recourse against the shipowner and other third parties in certain conditions is of considerable practical importance. It has also been seen how under the Civil Liability Convention the shipowner also enjoys considerable opportunities to recover payments made under that Convention by way of recourse actions. Now that the actual claims practice under the Civil Liability and Fund Convention has been dealt with it is appropriate to discuss the admissibility of

⁴¹Fund Convention, Article 7.3.

⁴²Internal Regulations of the IOPC Fund, Regulation 8.2.

certain categories of pollution claims under those Conventions in the next Chapter.

CHAPTER 7

Admissibility of Claims

7.1 Introduction

The main aspects of damage claims arising out of an oil pollution incident under the Fund Convention and the Civil Liability Convention will be considered from the point of view of the victims of oil pollution and those who provide compensation for their damage. Claims for pollution damage were not dealt with in depth during the analysis of the Civil Liability Convention. The main reason for not doing so was to avoid repetition because both the Civil Liability and Fund Conventions share definitions of fundamental concepts such as "Ship", "Person", "Oil", "Pollution Damage", "Preventive Measures", and "Incident", accordingly, these Conventions apply in similar ways to similar claims.¹ The uniformity of treatment of claims for "pollution damage" by the IOPC Fund and the P&I Clubs, under the Fund and Civil Liability Conventions respectively, is also further enshrined in Clause 6 of the Memorandum of Understanding between the IOPC Fund and the International Group of P&I Clubs of the 5th November, 1980. The uniform approach to the compensation of oil pollution damage is further facilitated by the close cooperative relationship which exists between the IOPC Fund and the P&I Clubs during the actual on-site management of claims procedure. This cooperative relationship becomes especially close in cases where large oil spills occur; for example, the *Haven*, *Aegean Sea* and *Braer* spills. In these cases the shipowners' P&I insurers and the IOPC Fund set up joint claims offices in the polluted areas to distribute to potential claimants claim forms provided by the P&I Clubs and the IOPC Fund. For this reason it is possible to consider the question of the admissibility of claims under the respective Conventions together in the same Chapter.

¹Fund Convention, Article 1.2.

7.1.1 Admissibility of claims

In order for a claim to be accepted by the IOPC Fund, it has to be proved that the claim is based on real damage or expense actually incurred. There must be a link between the damage or expense and the incident which caused the pollution and all expenses must have been incurred for reasonable purposes. These criteria are significantly more favourable for claimants than the traditional position under English law, for example. Under English law, a claimant had to prove that the shipowner had caused an oil spillage as a result of negligence, that the shipowner owed a duty of care to the claimant, had failed to exercise that duty of care and that such failure was causally linked to the resulting damage.²

For the purpose of the Fund Convention, pollution damage has the same meaning as in Article I.6 of the Civil Liability Convention provided that, for the purpose of the Fund Convention, "oil" in the definition of "oil pollution damage" means persistent hydrocarbon mineral oils and does not include whale oil.

' "Pollution damage" means 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.'

As was pointed out in the preliminary analysis of pollution damage, undertaken in the context of the Civil Liability Convention, varying interpretations exist as to the parameters set by the definition. However, the IOPC Fund has, during the time of its existence, acquired a wide range of experience at

²For a detailed consideration of English Common Law, see Abecassis & Jarashow *Oil Pollution from Ships: International, United Kingdom and United States Law and Practice* 2nd ed. (1985) Chapter 15.

deciding the admissibility or non-admissibility of claims and has formulated certain guiding principles as to the meaning of pollution damage. The IOPC Fund has also articulated certain significant statements of policy pertaining to the ambit of the definition of pollution damage. In addition both Directors of the Fund have developed and elaborated upon certain important principles during their negotiations with claimants. It may be said that the definition is constantly evolving as a result to new pressures being brought to bear upon the IOPC Fund by claimants. As a general rule it can be said that the ambit of the definition is getting broader.

It has previously been noted that although the normative function of the IOPC Fund policy is frequently adhered to this is not always the case. Further examples of significant departures from Fund policy will appear from the ensuing commentary. On this issue, however, the view has been expressed that the Fund Convention has had '... a beneficial influence on the payment of compensation to victims, by helping to harmonize compensation approaches internationally and by speeding up procedures.'³

Indeed, the IOPC Fund Assembly has expressed the opinion that a uniform interpretation of the definition of pollution damage is essential for the functioning of the regime of compensation established by the Civil Liability Convention and the Fund Convention.⁴ This is because the Fund Convention is founded upon the principle that, theoretically, each party state will recover from the Fund in proportion to the contributions made. This, of course, is not true in practice because some party states do not receive contributing oil and also certain states are more prone to oil pollution damage because of particular local conditions which may prevail.

The consequence of disparate interpretations of the notion of

³*Official Records*, vol.2 at 372 para.81.

⁴*IOPC Fund Annual Report* 1988, section 13.4 (a) at 58.

pollution damage is that states which favour a narrow interpretation of pollution damage are forced to contribute to the compensation of claimants in those states which favour a broader interpretation. In other words, the principle of "fair shared sacrifice" is upset. This is especially relevant to the disparity between those states which do not permit compensation for damage to the environment *per se* and those states which do.⁵

7.2 Loss or damage caused outside the ship carrying oil

Although the definition of pollution damage applies to loss or damage caused outside the ship carrying the oil this does not necessarily preclude damage caused on another ship from being admissible under the Conventions. This point is illustrated by the approach adopted by the IOPC Fund's interpretation of the Civil Liability and Fund Convention in a series of Japanese pollution claims.

On the 18th May, 1989, during a transfer of heavy fuel oil from a Japanese registered tanker of 74 grt., the *Tsubame Maru No.58* to a fishing boat at Shiogama in Japan, a crew member inserted the fuel supply line into a cargo inlet hole of the fishing vessel instead of into the bunker tank inlet. In this way about seven tonnes of oil entered the cargo hold and polluted a cargo of about 140 tonnes of fish. No oil escaped into the sea. The question which arose was could the damage caused to the cargo of fish and the expense of cleaning the cargo hold of the fishing boat be construed as damages within the definition of "pollution damage" laid down in the Civil Liability and Fund Conventions? According to the definition, such damage must necessarily be caused by contamination caused outside the ship carrying the oil which caused the damage.

In previous cases experienced in Japan, the IOPC Fund had paid compensation for damage caused by an overflow of oil during the

⁵Brodecki 'New definition of Pollution damage' [1985] *Lloyd's Maritime and Commercial LQ* 382 at 382.

transfer of oil from a tanker to another vessel, but in those cases the oil had escaped into the sea and necessitated clean-up operations. For example on the 15th May, 1989, a Japanese tanker of 94 grt. the *Fukkol Maru No.12* was supplying heavy fuel oil to a fishing boat at Shiogama through a supply line connected to a tank on board the fishing boat. The tank was overfilled and oil overflow spread across the deck of the fishing boat escaping into the sea and also onto a pier. Some fishing nets on the pier, as well as cars parked there, were contaminated by oil. Claims were submitted to the IOPC Fund relating to the expenses of clean-up operations at sea, for washing polluted cars and for replacing polluted fishing nets. These claims were accepted as constituting "pollution damage" within the meaning of both the Civil Liability and Fund Conventions and received full compensation as such.⁶

However, the facts of the *Tsubame Maru No.58* were distinct from those of the *Fukkol Maru No.12* because, in the former case, no oil escaped into the sea and no expenses for clean-up operations at sea were made. Nevertheless, the Executive Committee of the IOPC Fund decided in 1989 that the damage in the *Tsubame Maru No.58* should be considered as being covered by the definition of "pollution damage".⁷

This principle is now well established and was subsequently endorsed by the IOPC Fund in a another case. On 27th July, 1990, the Japanese tanker of 31 grt. the *Hato Maru No.2*, was supplying heavy fuel oil to a dry cargo vessel in the port of Kobe in Japan, when, due to the mishandling of the valve of the supply line, the oil spread over the deck and into the hold of the cargo vessel. A cargo of acrylic fibre was contaminated but no oil leaked into the sea. The IOPC Fund Director decided that, in view of the previous position adopted by the IOPC Fund in the *Tsubame Maru No.58* incident, the damage caused to the cargo of the *Hato Maru No.2* would be considered as "pollution damage" as provided

⁶IOPC Fund Annual Report 1990, section 12.2 at 41.

⁷IOPC Fund Annual Report 1990, section 12.2 at 41.

for in the Civil Liability and Fund Conventions.⁸

The approach adopted by the IOPC Fund in the cases of the *Tsubame Maru No.58* and the *Hato Maru No.2* was also adopted in a more recent case that of the *Fukkol Maru No.2*.⁹

It is submitted that this interpretation is correct based on the wording of the definition of "pollution damage". However, a strong argument could be made that, from the moment that the oil was pumped off the tanker and into the holds of either a fishing boat or a dry cargo ship, it was no longer being carried on board the tankers in question but in the other vessels. Strictly speaking, this would have been true in these cases. If this argument were to be accepted then the Civil Liability and Fund Conventions would not be applicable because these conventions may only apply in circumstances where "pollution damage" is caused outside the ship carrying oil ...'. In these cases no damage would have been done outside the 'carrier' vessels. Of course, a fishing boat or a dry cargo ship is unlikely to satisfy the requirements of being a "ship" for the purposes of the Civil Liability or Fund Conventions because they would seldom, if at all, be carrying persistent oil in bulk as cargo. Nonetheless this question could be relevant where a tanker is lightering a cargo of oil into another tanker and damage is done on board such tanker. Despite the possibility of this alternative argument, the liberal interpretation adopted by the IOPC Fund on this matter is to be commended. The IOPC Fund has recognised that in the first instance the oil which caused the damage was discharged from a "ship" as defined for the purpose of the Conventions. The IOPC Fund Executive Committee did not choose to interpret the fact that the oil was put on board another vessel as constituting grounds upon which compensation under the Civil Liability and Fund Conventions could be refused. That the Liability Conventions should apply in such circumstances is good in principle.

⁸*IOPC Fund Annual Report 1990*, section 12.2 at 48.

⁹*IOPC Fund Annual Report 1993*, section 12.2 at 46.

A further observation incidental to this issue is that every accident of this type that the IOPC Fund has had occasion to deal with (so far) has occurred in Japan. Significantly, Japan is also by far the largest contributor to the IOPC Fund. This factor may have had some influence on the readiness of the Fund to accept this particular type of claim.

7.3 Preventive measures

The definition of pollution damage contained in the Civil Liability and Fund Conventions includes the cost of "preventive measures", which are defined as '... any reasonable measures taken by any person after an incident has occurred to prevent or minimise pollution damage.'¹⁰ For the purpose of this definition and the Conventions as a whole an "incident" means any occurrence, or series of occurrences having the same origin, which causes pollution damage.'¹¹

Significantly, the fourth paragraph of the preamble to the Fund Convention reads:

'Considering that the International Convention of 29 November 1969, on Civil Liability for Oil Pollution Damage, by providing a regime for compensation for pollution damage in Contracting States and for the costs of measures, wherever taken, to prevent or minimize such damage, represents a considerable progress towards the achievement of this aim, ... '

The wording of this paragraph confirms the view that preventive

¹⁰The definition of "preventive measures" is contained in Article I.7 of the Civil Liability Convention. This definition is incorporated by reference into the Fund Convention by Article 1.2 of that Convention.

¹¹The definition of an "incident" is contained in Article I.8 of the Civil Liability Convention. This definition is incorporated by reference into the Fund Convention by Article 1.2 of that Convention.

measures undertaken outside the territory or territorial sea of a Contracting State will nevertheless also in principle be recoverable under the Civil Liability and Fund Conventions.

7.3.1 Only reasonable measures are compensable

It must be emphasised that the definition of preventive measures under the Civil Liability and Fund Conventions only cover expenses for reasonable preventive measures. Some preventive measures may not be considered 'reasonable' under all the circumstances.

For example, on the 10th December, 1988, while carrying approximately 1,100 tonnes of heavy fuel oil the *Kasuga Maru No.1*, a Japanese coastal tanker of 480 grt., capsized and sank off the west coast of Japan during a storm. Oil continued to escape from the tanker, which was lying at a depth of 270 metres within an extensively used fishing ground. After having considered various ways of preventing further oil from escaping from the sunken tanker the IOPC Fund and two major Japanese salvage companies agreed that it was impracticable to carry out salvage work at that depth. This finding was accepted by the Japanese authorities and the local fishery interests. However, the Marine Safety Agency which was co-ordinating the preventive and clean-up operations requested that an inspection of the sunken tanker be undertaken using a robot-controlled video camera to examine the possibility of taking measures to prevent further leakage. The IOPC Fund opposed this request as unreasonable under the circumstances as such preventive operations had already been determined as unfeasible.¹²

The requirement of reasonableness constitutes an important defence which may be invoked by shipowners, their insurers and the IOPC Fund where allegedly unreasonable preventive operations are embarked upon by governments in order to satisfy political

¹²*IOPC Fund Annual Report 1989*, section 12.2 at 36.

pressure.¹³ The concept of reasonableness is not defined in either the Civil Liability or Fund Conventions; accordingly this question fall to be decided by the courts where the disputes are heard. It has been suggested, however, that the reasonableness or unreasonableness of the measures taken must be gauged by an objective standard, considering the extent of information available to the actor at the time when the measures in question where taken.¹⁴ Jacobsson and Trotz have expressed their support for the application of the following principle.

'The costs incurred must not be disproportionate to the results achieved or to the results which could reasonably be expected. However, it must be recognised that the authorities concerned and the parties involved in the operations will often have to decide very rapidly, and without full knowledge of the circumstances, on the taking of preventive measures. For this reason, it appears that when the test of reasonableness is to be applied, they should be allowed a certain margin of error in their judgements.'¹⁵

It is to be welcomed that these commentators advocate a degree of leniency in assessing the "on-the-moment" judgements of decision makers made while carrying out preventive measures. This is in keeping with the well established standard used to assess decisions made by salvors who are also required to act under difficult circumstances and on the spur of the moment. It is also noteworthy that the same commentators refer to the reasonableness of the measures being dependant upon the 'results' acheived by

¹³Abecassis & Jarashow, *op cit*, 210 para.10-54.

¹⁴D.W. Abecassis *the Law and Practice Relating to Oil Pollution from Ships* 1st ed. (1978) at 137 referred to with approval by Jacobsson & Trotz 'The Definition of Pollution Damage in the 1984 Protocols to the 1969 Civil Liability Convention and the 1971 Fund Convention' (1986) 17 *Journal of Maritime Law and Commerce* 467 at 472.

¹⁵Jacobsson & Trotz, *op cit*, 472.

such measures. If the submission is that preventive, clean-up and remedial measures will only be regarded as reasonable where the cost of such measures is proportionate to the risk of damage posed or the chances of success of such operations then certain fundamental difficulties arise. Such views are especially vulnerable to criticism in respect of environmental damage caused by oil spills. For example, if a mangrove swamp is polluted, which will cost US\$30 million to rehabilitate, then it could be argued that rehabilitation measures will be reasonable (and therefore justified) only where the mangrove swamp is worth US\$30 million or more. The difficulty is how to measure the value of that natural resource. This very important issue will be dealt with under an analysis of claims for "environmental damage" as under the Civil Liability and Fund Conventions, the voluntary compensation regimes and under the United States Oil Pollution Act 1990.

7.3.2 Pure threat removal measures

Significantly, because the definition of pollution damage refers to 'damage done outside a ship carrying oil by contamination resulting from the escape or discharge of oil from the ship', preventive measures will only be considered pollution damage once persistent oil has actually escaped from the ship carrying the oil. For this reason, pure threat removal measures may not receive compensation under the Civil Liability or the Fund Convention.

The problem of obtaining compensation for pure threat removal measures under the Civil Liability and Fund Conventions came to the fore in the *Tarpenbeck* case where claims were made for preventive measures undertaken in the United Kingdom. Here, on the 21st June, 1979, the *Tarpenbeck*, a tanker registered in the Federal Republic of Germany collided with the *Sir Geraint* an auxiliary ship of the British Royal Fleet with the result that the *Tarpenbeck* capsized in the English Channel near the coast of the United Kingdom. The cargo tanks of the *Tarpenbeck* fortunately

remained undamaged and none of her cargo of about 1,600 tonnes of persistent lubricating oil escaped. However, a quantity of non-persistent light diesel oil escaped from the *Tarpenbeck's* bunkers into the sea.¹⁶ The United Kingdom Government and local authorities carried out various measures to prevent a possible spill of oil which could have caused damage to beaches or the marine environment. There was considerable doubt as to whether the Civil Liability and Fund Conventions applied on the facts in this case because there was insufficient evidence to establish whether or not persistent oil had actually escaped into the sea as a result of the incident. Despite uncertainty on this important issue, the IOPC Fund nevertheless compensated various parties for preventive measures. In settling these claims the IOPC Fund Director took into account the uncertainty that existed both as to whether a spill of persistent oil had in fact taken place and as to the interpretation of the Conventions and relevant United Kingdom legislation.¹⁷ Had the bunker oil been persistent oil there could have been no room for dispute on this issue.

The exclusion of all pure threat removal measures, regardless of the appropriateness of such actions, is distinctly unfortunate because timely measures taken to assist a tanker in distress can often avoid significant pollution damage. Salvage operations, in particular, remain the first line of defence against accidents occurring at sea which could cause pollution damage. Essentially, prevention is better than cure. This time-tested adage is especially true of marine oil pollution incidents where the cure, if indeed one can be found and effectively administered, is likely to be a painful and lengthy experience for polluters and victims alike. Of course, in most instances, there is no cure available for the numerous species of marine wildlife which perish in such spills. Because the strict, literal interpretation of the Conventions on this issue has such an undesirable result,

¹⁶Abecassis & Jarashow, *op cit*, 198 para.10-16.

¹⁷IOPC Fund Annual Report 1986, section 9.2 at 10.

it has been noted that in some jurisdictions the Civil Liability Convention has been interpreted to include reasonable measures taken in anticipation of a spill.¹⁸ In circumstances where pure threat preventive measures are taken and the anticipated spill does in fact subsequently occur and the threat preventive measures adopted do in fact prevent or minimize pollution damage, the strict application of the rule excluding pure threat measures is particularly inequitable and is not conducive to optimum practical outcomes. Nevertheless, even in these circumstances, such measures will not receive compensation under the Civil Liability and Fund Conventions.¹⁹ At this point it is important to note that threat removal measures are admissible under the 1992 Protocols to the Civil Liability and Fund Conventions, TOVALOP, TOVALOP Supplement and CRISTAL.

The central provision of the Civil Liability and the Fund Conventions provides that the respective conventions apply exclusively to pollution damage caused on the territory, including the territorial sea, of a Contracting State and to preventive measures taken to prevent or minimize such damage. The question therefore arises as to whether or not preventive measures taken beyond the territorial limits of a Contracting State will be admissible under the Conventions? In circumstances where it is reasonable to expect that an incident outside the territorial limits of a Contracting State threatens to cause pollution damage in the territory or territorial seas of a Contracting State such measures will be admissible. A prerequisite to the success of such claims will be that the measures taken were reasonable under the circumstances.

Preventive measures may result, for example, in expenses for the sealing of fractures in a grounded vessel to prevent oil from

¹⁸Popp 'Liability and compensation for pollution damage caused by ships revisited - report on an important international conference' (1985) *Lloyd's Maritime & Commercial Law* 118 at 127.

¹⁹Jacobsson & Trotz, *op cit*, 472-3.

escaping. Measures may have to be taken to prevent oil which has escaped from a ship from reaching the coast by placing booms along the threatened stretch of coastline. Dispersants may be used at sea to combat the oil. Costs for such operations are, in principle, all classed as costs for preventive measures. It is convenient to divide preventive measures into two broad categories: firstly, the salvage type measures and, secondly, clean-up measures.

7.3.3 Salvage operations

The IOPC Fund and the P&I Clubs regard only the cost of salvage operations as preventive measures and as such compensable as pollution damage under the Civil Liability and Fund Conventions, if the primary purpose of such operations is to prevent or minimise pollution damage.²⁰ In most instances the prime objective of salvage operations is to save the ship and its cargo, not prevent pollution damage. But with increased environmental awareness and high levels of liability for pollution damage, every shipowner, ship management company and P&I insurer of ships in general (and ships carrying oil in bulk in particular) are well aware of the very real possibility of being faced with extensive liability where a ship for which they are responsible has an oil spill. For this reason where a tanker sustains structural damage, or is involved in a collision, a grounding, catches alight or experiences mechanical failure, the party responsible for such ship will be especially concerned to prevent pollution damage. Salvage operations are usually the first option available to owners and operators through which they will attempt, amongst other considerations, to avoid damage to the environment. In such circumstances it is obviously very difficult to determine whether the primary purpose of such operations is to prevent or mitigate pollution damage or to save

²⁰Jacobsson & Trotz, *op cit*, 475; Browne 'Oil Pollution Damage Compensation under the Civil Liability Convention 1969' in McLean (ed) *Compensation for Damage: An International Perspective* (1993) pp.137-164 at 150.

the ship and its cargo. Disputes have arisen as to the primary purpose of salvage operations in circumstances where the Civil Liability and Fund Conventions apply.

A case in point is that of the *Patmos*, where disagreement arose between the IOPC Fund and various claimants as to the primary nature of certain salvage operations. On 21st March, 1985, the *Patmos*, a Greek registered tanker of 51,627 grt. carrying 83,689 tonnes of crude oil, collided with the Spanish tanker *Castillo de Montearagon* of 92,289 grt. which was fortunately unladen at the time of the collision. As a result of the collision considerable pollution damage was caused in the territory and territorial sea of Italy when approximately 700 tonnes of oil escaped from the damaged hull of the *Patmos*. A further consequence of the collision was that the *Patmos* caught alight and the crew were forced to abandon ship. On the 22nd March, 1985 a state of emergency was declared by the Harbour Master of Messina due to the serious danger of explosion and consequent excessive pollution, since the structure of the *Patmos* had been severely damaged. The unmanned, burning, structurally weakened tanker containing a large quantity of oil clearly continued to pose a serious pollution hazard. The danger of further pollution damage became more acute when the out-of-control tanker drifted onto a beach, discharging several tonnes of oil in the vicinity of a Sicilian coastal village. However, the possibility of considerable additional pollution damage was averted when the tanker was refloated by salvors. After two days of fire fighting operations, salvors were able to extinguish the fire with the use of fire-fighting tugs. These actions permitted the *Patmos* then to be towed into the port of Messina where her remaining cargo was discharged. On the 1st April, 1985, the state of emergency was lifted.²¹

In accordance with Article V.3 of the Civil Liability Convention, the owner of the *Patmos* and the owner's P&I insurer established

²¹IOPC Fund Annual Report 1986, section 9.9 at 16-18.

a limitation fund with the Court of Messina. The Court fixed the limitation amount at LIt3,263,703,650 (£5.6 million). The IOPC Fund was notified of the limitation proceedings in accordance with Article 7.6 of the Fund Convention. Since the sum total of claims submitted for pollution damage greatly exceeded the shipowner's limitation amount, the IOPC Fund became involved in the settlement process. Many claims were submitted to the IOPC Fund, of which twelve claims totalling about LIt40,000 million (£20 million) related to the cost of operations which, in the view of the IOPC Fund Director, would normally be considered as salvage operations and related measures. The key point was whether, and to what extent, the costs of such operations fell within the definition of "pollution damage" contained in Article I.6 of the Civil Liability Convention as incorporated by reference into the Fund Convention. Specifically, could the operations in question be considered "preventive measures" as defined in Article I.7 of the Civil Liability Convention as also incorporated by reference into the Fund Convention?

The IOPC Fund Director adopted the view that operations could be encompassed within the definition of "preventive measures" only where the primary purpose of such operations was to prevent pollution damage. If the operations primarily had another purpose, such as salvaging hull or cargo, the operations would not be covered by the definition.²² At its 16th session, held in 1986, the Executive Committee of the IOPC Fund endorsed the position adopted by the Director on this issue.²³ Despite the policy adopted by the IOPC Fund, seven of the claimants pursued their claims in the Court of first instance in Messina. The trial outcome was that the conceptual analysis formulated by the IOPC Fund Director was endorsed by the decision of this Court on the 30th July, 1986. The Court made a general statement to the effect that salvage operations could not be considered as "preventive

²²*IOPC Fund Annual Report 1986*, section 9.9 at 17.

²³*IOPC Fund Annual Report 1988*, section 12.2 at 34 and section 13.4 (e) at 60.

measures" since the primary purpose of such operations was that of rescuing the ship and its cargo. This general principle applied even if the operations had also had the further effect of preventing oil pollution damage. The Court further stated that, to the extent that an extra component of the operations were considered as "preventive measures", only that fraction of the costs and losses could be compensated under the Civil Liability Convention. Accordingly, the actual salvage reward, over and above the salvors expenses, would certainly not be recoverable under the Civil Liability or Fund Conventions. On the application of this principle to the facts of each claim, the Court rejected four of the seven claims and the others were reduced to differing degrees.²⁴

In a further instance, claims arose under the Civil Liability and Fund Conventions when the car-ferry *Moby Prince* collided with the Italian tanker *Agip Abruzzo*. Two claimants submitted claims to the IOPC Fund which resulted in deliberations as to the primary purpose of salvage operations. The IOPC Fund Director adopted the following approach to these claims. He rejected certain items which could not, in his view, be considered as falling within the definitions of "pollution damage" and "preventive measures" as defined for the purpose of the Civil Liability and Fund Conventions. In his view the primary purpose of such operations was to salvage the *Agip Abruzzo* and not to prevent pollution. However, the Director also observed that it was not possible to ascertain the primary purpose in every case because certain operations had a dual purpose.

It was therefore decided that the costs of these operations should be proportionately distributed between pollution prevention measures and activities with some other purpose.²⁵ This was an important conceptual break-through because the strict

²⁴*IOPC Fund Annual Report 1986*, section 9.9 at 18.

²⁵*IOPC Fund Annual Report 1991*, section 12.2 at 54-59 and *IOPC Fund Annual Report 1992*, section 12.2 at 54-57.

application of the "primary purpose rule", which was essentially an "all-or-nothing", inflexible, approach, would inevitably have led to unfair results. At its 30th session, in December 1991, the Executive Committee of the IOPC Fund endorsed the position adopted by the Director, stating that the costs of such operations should be apportioned between pollution prevention and other activities in the light of the surrounding circumstances in which such operations are carried out.²⁶

Another case where the proportionality principle was applied was that of the *Portfield*.

On the 5th November, 1990, the *Portfield* a 481 grt. British Registered tanker with a cargo of 80 tonnes of diesel oil and 220 tonnes of medium fuel oil sank at her berth in Pembroke Dock, Wales. Consequently approximately 110 tonnes of medium fuel oil escaped. Amongst other claims submitted for pollution damage under the Civil Liability and Fund Conventions, the owner of the *Portfield* submitted a claim to the IOPC Fund which related to clean-up operations, salvage and preventive measures. The shipowner maintained that the primary purpose of the salvage operations was to prevent pollution. He argued that, had the operations been carried out primarily to save the vessel, such operations would have been completed in a much shorter time and at a considerably lower cost. The IOPC Fund accepted that the salvage operations were carried out partly for the purpose of saving the vessel and partly for the purpose of preventing oil pollution, and that the risk of pollution had made the shipowner carry out the operations in a more expensive way than would have been necessary in order to save the vessel. An agreement was reached to apportion the cost of these operations, with $\frac{2}{3}$ for preventive measures and $\frac{1}{3}$ for salvage.²⁷

²⁶FUND/EXC.30/5, paragraph 4.2.3 and FUND/EXC.32/3/Add.1, paragraph 3.2.

²⁷IOPC Fund Annual Report 1991, section 12.2 at 51.

Protracted salvage operations were undertaken in the *Rio Orinoco* case. On the 16th October, 1990, the 5,999 grt. asphalt carrier *Rio Orinoco* with about 9,000 tonnes of heated asphalt, and about 300 tonnes of intermediate fuel oil and heavy diesel oil on board, went aground on the south coast of Anticosti Island in Canadian territorial waters. Under Canadian Law, the Government may take the necessary measures to minimise or prevent pollution damage from a ship, including the removal and destruction of the ship. Accordingly, the Canadian Coast Guard determined that the bunker oil remaining in the vessel should be removed. To the extent that this was possible, the bunker oil in question was removed by contractors on behalf of the shipowner in December 1990. In March 1991 the Executive Committee of the IOPC Fund determined that these operations fell within the definition of "preventive measures", as there had been a considerable risk posed that the remaining bunker oil could have escaped and caused further harm to coastal areas surrounding the grounding site. Accordingly these expenses incurred on behalf of the shipowner by his P&I insurer were admissible under Article V.8 of the Civil Liability Convention and Article 4.1 of the Fund Convention.²⁸

The Executive Committee also recognised in principle that the unsuccessful attempts: firstly, to drag the *Rio Orinoco* free and secondly to refloat the vessel were encompassed within the definitions of "pollution damage" and "preventive measures" laid down in Articles I.6 and I.7 of the Civil Liability Convention, since the primary purpose of these operations had been to prevent pollution. Nevertheless, the IOPC Fund Director decided that during certain periods of activity the operation in question had a dual purpose which was to prevent and minimise pollution and additionally, to save the vessel. In presenting its claim the Canadian Government had anticipated this controversy and had formulated the cost distribution between salvage and pollution prevention measures which the IOPC Fund accepted.²⁹ In September

²⁸IOPC Fund Annual Report 1991, section 12.2 at 45-48.

²⁹IOPC Fund Annual Report 1991, section 12.2 at 47 and 50.

1991, the Director also accepted a claim by the Canadian Government for the expense of operations undertaken by a private salvage company to remove the *Rio Orinoco* from her grounded position and to tow her to a place of safety.³⁰

It would seem that the *Rio Orinoco* case was resolved with a minimum of difficulty and it is referred to as something of a legal showpiece. At the 31st session of the Executive Committee of the IOPC Fund, the Canadian Government expressed its great satisfaction with the speed with which the Canadian Government's claims had been settled and paid. The Canadian delegation stressed the value of the close co-operation between the Canadian administration and the IOPC Fund during the clean-up and salvage operations and in the preparation and examination of claims. In the view of the Canadian delegation, this incident demonstrated the high quality and viability of the system of compensation established by the Civil Liability Convention and the Fund Convention.³¹

At that time it was very important to the IOPC Fund and shipowners and P&I Clubs that this incident was resolved without any major disagreements as the United States had rejected the Civil Liability and Fund Conventions and had passed unilateral oil pollution control and compensation legislation in the form of the Oil Pollution Act 1990 on the 18th August, 1990. If the Canadian authorities had been dissatisfied with the operation of the Liability Conventions, they may have considered denouncing the Conventions and adopting unilateral action.

At the 1969 Brussels Conference which formulated the Civil Liability Convention Canada had been at the fore of the so-called "environmental" delegations. The Canadian delegation proposed 'strict and *unlimited* liability imposed *jointly* on the ship- and cargo-owners. Canada's extreme demands remained unaffected by the

³⁰*IOPC Fund Annual Report 1991*, section 12.2 at 50.

³¹*IOPC Fund Annual Report 1992*, section 6.2 at 17.

negotiations and compromises going on around it and, in the end, cast the only negative vote against the convention'.³² This may have been further reason why it was important to the P&I Clubs and the IOPC Fund that the Canadian Government be satisfied with the resolution of the *Rio Orinoco* incident. There may well have been an element of "putting old ghosts" of discord to rest. It is interesting to note that the more progressive environmental states in the US; Alaska, California, Hawaii, Maryland, North Carolina, Oregon and Washington, all now expressly provide in their State legislation, not only strict liability for ship- and cargo-owners but further stipulate that such liability is unlimited. In the U.S. legal trends in California are often emulated by other states and Federal legislation, and by the same token the rest of the world often looks to the U.S. to determine the direction of domestic legislation. Accordingly strict and unlimited liability imposed jointly on the ship- and cargo-owner for tanker-source oil pollution damage could be a portent of things to come. This would be something of a harbinger for oil importer interests, but, it is submitted, for reasons which will subsequently be explained such evolution in the law would ultimately redound to the benefit of the shipping and oil industries. If this change does in fact take place, and the benefits which this writer predicts results, the original position adopted by the Canadian Delegation during the pioneering days of 1969 shall have been justified.

Certain anomalies exist in the traditional law of salvage which discourage salvors from taking preventive action in circumstances where environmental damage may occur from a vessel in distress. In an attempt to remedy these deficiencies certain legal instruments evolved within industry and through the work of the International Maritime Organization to encourage salvors to take action to prevent or mitigate environmental damage. These developments are directly relevant to oil pollution damage and thus by implication the issue of oil pollution liability. In

³²M'Gonigle & Zacher *Pollution, Politics, and International Law: Tankers at Sea* (1979) 176.

keeping with the holistic approach adopted in this work these important legal innovations are briefly discussed in Annexure Seven of this work.

7.4 Clean-up expenses

The IOPC Fund pays compensation for expenses incurred by way of clean-up operations at sea or on the shore. The cost of materials and equipment specially purchased for combatting a particular oil spill are claimable. By the same token the cost of equipment and materials purchased prior to the spill as a precaution against the occurrence of a spill can also be claimed for where such equipment is actually used to combat the spill. At the termination of clean-up operations certain equipment will be capable of being cleaned and used again. Allowances are however made for the depreciation in the value of such equipment. Compensation will also include the cost of cleaning, repairing and replacing material and equipment.³³

Certain conceptual difficulties may arise as to the determination and delimitation of such costs. As a result of the second *Antonio Gramsci*³⁴ incident which occurred on the 6th February, 1987, on the south coast of Finland, the Finnish Government incurred considerable costs carrying out clean-up operations. A major part of the claim submitted by the Finnish Government related to the purchase of equipment and materials which were not in fact used during the clean-up operation. The Finnish Government argued that the total cost of these purchases should be recoverable, under the Civil Liability and Fund Conventions, as preventive measures and therefore falling under the definition of pollution damage. The IOPC Fund did not accept this assertion and adopted the position that reasonable hire charges were compensable for equipment which was actually used but which had a considerable

³³Jacobsson & Trotz, *op cit*, 474.

³⁴The first *Antonio Gramsci* incident occurred off Sweden on 27th February, 1979.

remaining value after the completion of the operations. Stand-by rates would be paid as compensation for equipment which was not used but which was reasonably placed on stand-by. After negotiation the Finnish Government accepted the position advanced by the IOPC Fund.³⁵

7.4.1 Operations at sea

The costs incurred for operations at sea may relate variously to the use of vessels for applying chemical dispersants, emulsion breakers, gelling agents, nutrients, burning agents, sorbents, deploying booms or for skimming.

Chemical dispersants break up surface oil into smaller component parts which become suspended in the water and diluted by the turbulent motion of the sea. The dispersion, or more accurately dilution, of oil into the water helps prevent the formation of persistent water-in-oil emulsions and residues which are difficult to recover.³⁶ The toxicity of modern dispersants is significantly less than the early formulations as used, for example, in the *Torrey Canyon* spill. Nevertheless environmental concerns are still voiced as to the appropriateness of application in many instances. It has been suggested that oil treated with dispersants may have a greater detrimental effect on some marine biota (and specifically on certain developmental cycles of marine animals; e.g. fish spawning) than the oil on its own. In the light of these hazards the use of dispersants is sometimes limited by local regulations. Accordingly, measures must be taken within the parameters of such regulation and where required responders must obtain authorisation for the use of specific chemicals.³⁷ Ultimately the decision whether or not to

³⁵IOPC Fund Annual Report 1989, section 12.2 at 28.

³⁶'Use of oil spill dispersants' (1982) *The ITOPF Ltd. Technical Information Paper No.4* at 1.

³⁷Report No.9/81 (1987) *A Field Guide to Coastal Oil Spill Control and Clean-Up Techniques* Prepared by CONCAWE'S Oil Spill Clean-up Technology Special Task Force No.1 at 23-24 and

use dispersants will be influenced by the circumstances of each case. Such decisions may even involve exposing certain resources to possible harm in order to protect a resource of higher priority. In most cases governmental authorities are best suited to make the necessary decisions, since the economic and environmental values to the community have to be assessed.³⁸

The aerial application of oil spill dispersants from helicopters, as well as single and multi-engined fixed wing aircraft, is an accepted means for combating oil spills. Aerial spraying has the advantage of rapid response and the ability to deliver a significant quantity of dispersant in a short space of time.³⁹ However, the cost effectiveness and merit of aerial spraying is frequently questioned.⁴⁰

Aerial reconnaissance and surveillance is also essential for an effective, efficient and co-ordinated response to oil spills at sea.⁴¹ For example, at the height of the clean-up operations carried out as a result of the *Kasuga Maru No.1* incident, there were some 13 vessels and four helicopters involved. An estimated 200 tonnes of dispersants were applied, mainly from helicopters.⁴² These categories of costs are recoverable.

Emulsion breakers are used to break-up the water-in-oil emulsions while gelling agents are chemicals which when added to oil can

'Use of oil spill dispersants' (1982) *The ITOFF Ltd. Technical Information Paper No.4* at 6-7.

³⁸'Contingency planning for oil spills' (1985) *The ITOFF Ltd. Technical Information Paper No.9* at 2.

³⁹'Aerial application of oil spill dispersants' (1982) *The ITOFF Ltd. Technical Information Paper No.3* at 1.

⁴⁰See for example "Aerial spraying of oil spills 'a waste of time'" *Lloyds List* June 23, 1993 and 'The thick black line' *New Scientist* vol.137 No.1858 30 January 1993 at 24.

⁴¹'Aerial observation of oil at sea' (1981) *The ITOFF Ltd. Technical Information Paper No.1* at 1.

⁴²*IOPC Fund Annual Report 1989*, section 12.2 at 36.

gel the oil into a semi-solid form which can then be more easily recovered. The addition of nutrients or fertilizer to the area affected by a spill can facilitate biodegrading of oil by certain bacteria. The costs of these techniques may be recovered where reasonably used. The intentional burning of oil from a spill is seldom a success.⁴³ However, considerable amounts of oil may be burned off by spontaneous ignition at the site of the accident, where the concentrations of oil are high. This phenomenon has been observed in the *Agip Abruzzo*, *Haven*, *Mega Borg*, *Aegean Sea* and *Maersk Navigator* incidents.

There are many different types of floating barriers or booms which are used in various ways to combat oil spills.

Generally, booms may enable surface oil to be intercepted, contained and collected. Surface oil may be collected by skimmer vessels or other mechanical means once it has been gathered in greater concentrations by booms. A skimmer is any device designed to recover oil or oil/water mixtures from the surface of the water. These devices are most effective where the oil has been concentrated against a boom or other obstacle such as a weir, quay, pier or a cliff.⁴⁴ Booms may be used to divert or deflect surface oil to a specific point where it can more easily be collected. They may be used to contain oil in sheltered areas where spilled oil has collected naturally. Such action serves to minimise the extent of the pollution damage, by preventing the oil from moving should weather conditions change, and also facilitates the controlled removal of contained oil. The arrangement of booms around damaged ships to contain the oil in that immediate vicinity frequently occurs. Booms may be deployed to deflect surface oil away from, or to protect, sensitive areas such as fish farms and freshwater inlets for fish farms, lobster

⁴³Report No.9/81 (1987) *A Field Guide to Coastal Oil Spill Control and Clean-Up Techniques* Prepared by CONCAWE'S Oil Spill Clean-up Technology Special Task Force No.1 at 91-92.

⁴⁴'Use of skimmers in combating oil pollution' (1983) *The ITOFF Ltd. Technical Information Paper* No.5 at 1.

and crab grounds, shell-fish beds, locations where mariculture such as sea weed farming is carried out, inlets to marshy areas, salt marshes and mudflats, estuaries, mangrove swamps, coral reefs, bird and wildlife sanctuaries, yachting marinas or cooling water intakes for power stations and industry.⁴⁵ The mechanical recovery of spilled oil is not very successful, rarely achieving a ten per cent retrieval rate.⁴⁶

A summary of the important resources at risk from oil spills should be contained in a map of the affected area. These maps should include the location and nature of biological, industrial and recreational resources. If such maps do not exist they should be created as soon as possible. As it is seldom possible to defend all important resources, decisions to set priority will be necessary.⁴⁷

The salaries of crew, use-value of equipment and cost of materials will be recoverable.

7.4.2 On-shore operations

In respect of on-shore clean-up, the operations may result in major costs for personnel and equipment. Extensive manual labour may be required to collect oil on beaches or to spray cobble stones, rocks, boulders, cliffs or man-made structures by way of hot water washing or high pressure steam washing procedures. Sorbent boom may be used to contain released oil prior to collection. It may also be necessary to use dispersants in certain circumstances. Equipment such as mechanical grabs,

⁴⁵See generally, Report No.9/81 (1987) *A Field Guide to Coastal Oil Spill Control and Clean-Up Techniques* Prepared by CONCAWE'S Oil Spill Clean-up Technology Special Task Force No.1 at 75-80 and 'Use of booms in combating oil pollution' (1981) *The ITOFF Ltd. Technical Information Paper No.2*.

⁴⁶'The thick black line' *New Scientist* vol.137 No.1858, 30 January 1993 at 24.

⁴⁷'Contingency planning for oil spills' (1985) *The ITOFF Ltd. Technical Information Paper No.9* at 2.

tippers, vacuum trucks and fleets of lorries to transport collected oil debris to suitable disposal sites will usually be required.⁴⁸ The expense incurred in the rehabilitation of affected wildlife can also be recovered as it constitutes pollution damage within the meaning of the Civil Liability and Fund Conventions. For example, in the case of the *Amazzone* which occurred off France on 31st January, 1988, a claim for FFfr50,949 (£5,300) relating to the cost of cleaning oiled sea-birds, which was submitted by a private organisation, was accepted in full by the shipowner's P&I Club.⁴⁹

Experience in Europe has shown that where the clean-up sites are generally accessible and the necessary clean up equipment is available, it is reasonable to deploy between 500-800 persons per kilometer (800-1300 persons per mile) of heavily oiled coastline.⁵⁰ Under normal conditions, such manpower will have to be hired at commercial rates; for example, from construction companies who may also supply earth-moving equipment. Manpower may be commissioned for specific tasks by appropriate government authorities who may choose to make use of the armed forces.⁵¹ In this context the Norwegian Minister of the Environment, Thorbjørn Berntsen, has expressed the view that the Norwegian defence forces will play a prominent role in both the prevention of and emergency response to marine oil pollution incidents. It was pointed out that the defence forces are well suited for these operations as they are mobile, flexible, have strong

⁴⁸See generally, Report No.9/81 (1987) *A Field Guide to Coastal Oil Spill Control and Clean-Up Techniques* Prepared by CONCAWE'S Oil Spill Clean-up Technology Special Task Force No.1 and 'Shoreline clean-up' (1983) *The ITOPF Ltd. Technical Information Paper* No.7.

⁴⁹*IOPC Fund Annual Report* 1991, section 12.2 at 37.

⁵⁰Report No.9/81 (1987) *A Field Guide to Coastal Oil Spill Control and Clean-Up Techniques* Prepared by CONCAWE'S Oil Spill Clean-up Technology Special Task Force No.1 at 61-62.

⁵¹Report No.9/81 (1987) *A Field Guide to Coastal Oil Spill Control and Clean-Up Techniques* Prepared by CONCAWE'S Oil Spill Clean-up Technology Special Task Force No.1 at 26.

organisational structures, have clear pre-established chains of command, are accountable and already possess certain useful basic equipment which can be used in logistic support roles. The Norwegian defence forces, which are at present responsible for Norway's Coast Guard service for coastal and offshore surveillance, are due to become more closely involved in coastal protection.⁵²

7.4.3 Calculating costs

The policy of the IOPC Fund is to pay the salaries and allowances of personnel directly involved in clean-up operations, whether undertaken by private entities,⁵³ local authority contractors,⁵⁴ government agencies⁵⁵ or voluntary actors.⁵⁶ In most instances the task of cleaning inshore waters and coastlines falls to port authorities or local governments.

⁵²L.H. Halvorsen 'Norway tightens green controls' June 1993 *Statoil* at 14.

⁵³See for example the *Vistabella*, in *IOPC Fund Annual Report* 1992, section 12.2 at 54 where claims for clean-up costs submitted by the owner of a hotel on Peter Island, British Virgin Islands, was accepted in full.

⁵⁴See for example the *Agip Abruzzo*, in *IOPC Fund Annual Report* 1992, section 12.2 at 57 where claims submitted by RTI Castalia, a contractor, were settled by the IOPC Fund. This claim related to clean-up operations at sea and the supply of vessels, booms and skimmers in response to the requirements laid down by the Livorno Harbour Master.

⁵⁵For example the IOPC Fund compensated the Coast Guard of the United Arab Emirates in the *Akari* incident *IOPC Fund Annual Report* 1992, section 12.2 at 39.

⁵⁶See for example the *Amazzone* in the *IOPC Fund Annual Report* 1992, section 12.2 at 42 and further the *Nestucca* in *IOPC Fund Annual Report* 1990, section 12.2 at 40. In the latter case the IOPC Fund Director was compelled to reject the claims by 12 voluntary workers who participated in the clean-up of the shores of Vancouver Island. This was because at the time of the incident Canada was not Party to the Fund Convention. However the IOPC Fund Director did not reject these claims on the basis that the actors were voluntary.

Where clean-up operations involve the use of army and navy personnel and equipment or other state personnel or equipment the question arises as to whether compensation should be made for 'additional' as well as 'fixed costs' incurred. The distinction between these concepts arose in connection with the Swedish Government's claims for compensation in the *Thuntank 5* incident.

On the 21st December, 1986, the *Thuntank 5*, a Swedish vessel of 2,866 grt., carrying 5,024 tonnes of heavy fuel oil, ran aground on the east coast of Sweden. About 150-200 tonnes of oil escaped and significant pollution damage was suffered by the Swedish coastline. Extensive clean-up operations were undertaken by the Swedish Coast Guard and five municipalities affected by the spill.⁵⁷ Various claims were submitted to the shipowner, the shipowner's P&I Club and the IOPC Fund. It may be noted that the cost of certain experimental measures were voluntarily borne by the Swedish Government. In principle, there is no reason why the cost of experimental clean-up measures can not be claimed where such measures are reasonable in the circumstances.

The IOPC Fund took exception to the way in which Swedish authorities had calculated the costs of certain clean-up operations. The IOPC Fund argued that the rates charged for the utilization of oil-combatting vessels owned by Swedish public authorities and the rates levied for government and municipal personnel used in clean-up operations were too high. The Swedish authorities in question had assessed these amounts according to fixed tariffs issued by the Swedish Customs Board, as authorized by Statute.⁵⁸ In a previous case, the *Jan*, which was settled under the provisions of the Civil Liability and Fund Convention, a similar dispute had also arisen in respect of the tariffs applied by Danish Authorities.⁵⁹

⁵⁷*IOPC Fund Annual Report 1989*, section 12.2 at 23.

⁵⁸*IOPC Fund Annual Report 1989*, section 12.2 at 25-26.

⁵⁹*IOPC Fund Annual Report 1988*, section 12.2 at 38.

The grounds upon which the IOPC Fund questioned the appropriateness of these costs was that certain items claimed for related partly to 'fixed costs' (which would have been incurred even if the incident had not happened) and not 'additional costs', which constitute expenses incurred solely as a result of the incident (which would not have arisen had the incident, and the operations relating thereto, not taken place).⁶⁰ For example, in respect of personnel permanently employed by public authorities, costs of overtime allowances, additional allowances for heavy duties and travel costs attributable to an oil spill are recognised additional costs. By contrast, the normal salaries of such personnel are considered as fixed costs.⁶¹ In this case the IOPC Fund and the Swedish authorities reached an agreement as to an acceptable rate. The challenge to the Swedish claims based on fixed costs is in keeping with the policy decision adopted by the IOPC Fund Assembly in October 1988, which stressed the necessity of following a restrictive approach to the admissibility of claims for fixed costs.⁶²

Since 1981 it has been established that additional costs are always recoverable under the Civil Liability and the Fund Conventions. Furthermore, a reasonable proportion of fixed costs is also recoverable under the Conventions where these costs correspond closely to the clean-up period in question and do not include remote overhead charges.⁶³

Australia is party to the Civil Liability Convention but has not yet agreed to become party to the Fund Convention. Nevertheless, it is noteworthy that this method of assessing clean-up costs has

⁶⁰*IOPC Fund Annual Report 1989*, section 12.2 at 25.

⁶¹*IOPC Fund Annual Report 1988*, section 13.4 (d) at 59.

⁶²*IOPC Fund Annual Report 1988*, section 13.4 (d) at 60.

⁶³*IOPC Fund Annual Report 1988*, section 13.4 (d) at 59-60.

been used by the Australian Courts.⁶⁴ The United States Court of Appeals also had to consider this issue in the *Amoco Cadiz* case, where France and certain French Municipalities had claimed the expense of salaries and equipment utilized during the clean-up operations. They had not claimed the costs of holding men and material at the ready. The Appeal Court held that the court *a quo* had erred in deducting certain operational costs which would have been incurred by the French authorities even if the spill had not occurred. The Appeal Court held that under French law, the government was entitled to recover the full expense of salaries and equipment involved in the clean-up.⁶⁵ From the general tenor of the Appeal Judge's comments on this issue, it seems quite likely that, had the French claimants claimed certain standing costs, these costs may also have been awarded.

The motivation for adopting this policy under the Civil Liability and Fund Conventions was primarily economic self-interest rather than considerations of equity. Initially, the Working Group considering this issue erroneously adopted the view that the P&I Clubs and the IOPC Fund could rely on private firms to undertake clean-up operations and that in this way fixed costs would not be incorporated in the cost of the clean-up. At the same time, it was recognised that where private clean-up operations were utilized, additional costs would be much higher. Indeed this could be unavoidable because private contractors would inevitably and necessarily incorporate their fixed and additional costs into the price exacted from the P&I Clubs and the IOPC Fund and, furthermore, include a significant profit margin. There is, of course, the possibility of this additional expense being off-set by greater efficiency.

This hypothesis is substantiated if one draws parallels with the

⁶⁴*Maritime Services Board of New South Wales v. Poseidon Navigation Inc. (The "Stolt Sheaf" and The "World Encouragement").* [1982] 1 NSWLR 72.

⁶⁵*In the Matter of Oil Spill by the "Amoco Cadiz" off the Coast of France on March 16, 1978;* 1992 AMC 913 at 951-953.

costs incurred and charged for salvage operations. Where a salvor uses his vessel, equipment, crew and fuel to rescue a ship in distress, it is incorrect to maintain that he should only recover his additional costs. Salvage equipment must be purchased and maintained at the ready at a substantial fixed cost. Where such equipment is used the salvage award or the rates charged must cover the entire, appropriate fixed cost, plus additional costs and permit a profit to encourage further salvage operations. Accordingly it was incorrect to argue that fixed costs could be avoided by use of private contractors as opposed to use of State agencies. This fundamental principle of economics was it seems appreciated by the Working Group since they recognised the possibility that private responders additional costs could well be greater than would be the case where the clean-up operations had been undertaken by State employees with fixed costs included.⁶⁶ Presumably this would be the case as State agencies are not forced to make a profit in order to remain in operation.

The final outcome, as already stated, was that a reasonable proportion of fixed costs would properly be recoverable. Also, if public authorities were not compensated for fixed costs incurred during the clean-up operations, the oil industry in these states would be in effect, subsidising states which do not maintain an efficient public force to deal with oil spills. This is because where a member of the IOPC Fund does not maintain such capability, probably more expensive private contractors will have to be utilized. Contributions to meet this added cost will be made from all Party States.

The Working Group considered that the policy of reimbursing certain fixed costs served the long term interests of both the P&I Clubs and the IOPC Fund, as well as the State suffering pollution because this policy would encourage party states to continue the upkeep of a response force capable of responding quickly and economically to an oil spill. It is worth emphasising

⁶⁶*IOPC Fund Annual Report 1988*, section 13.4 (d) at 60.

again, however, that the IOPC Fund Assembly at present follows a policy decision to adhere to a restrictive approach to fixed costs.⁶⁷

Despite the statements of policy issued by the IOPC Fund, the final decision as to the extent of fixed costs recoverable will be made by the courts of the state in which the pollution damage was sustained. Such courts could well consider the claims of their own governments more favourably than the concerns of the IOPC Fund and the P&I Clubs to keep liability levels within manageable levels. The courts should also be aware that an interdependant relationship exists between the compensation regimes and the victims of oil pollution. Nevertheless, the compensation regimes have to avoid being seen as unwilling to compensate legitimate kinds of damage which are considered equitable in the eyes of the public and government. Where such a perception becomes "main-stream", the compensation regimes will tend to loose legitimacy and fail. The response will very probably be the enactment of relatively draconian, unilateral domestic legislation. Here, the claims environment would become more hostile and probably less predictable than is the case under the regimes. This is not a desirable situation from the perspective of shipowners or oil shippers, which is partly why the IOPC Fund is generally willing to take a fairly lenient view in settling claims for pollution damage.

As previously discussed, the oil industry, through the IOPC Fund has as at the 31st December, 1993, paid an amount of £67 million for pollution damage caused in Fund Convention States and by way of providing indemnification to shipowners.⁶⁸ This represents nearly fifteen years of quite frequent heavy oil pollution and with a large part of the transportation of oil in comparatively low quality, cheaply constructed and operated tankers. In other words the amount of compensation paid through the IOPC Fund could

⁶⁷*IOPC Fund Annual Report 1988*, section 13.4 (d) at 60.

⁶⁸*IOPC Fund Annual Report 1993*, section 12.1 at 22.

be viewed as a very good "investment" from the perspective of oil companies. Such compensation serves in part as a palliative to appease governments and an unsympathetic public and restrain these groups from adopting measures which they would very probably be forced to take if such compensation were not available. Harsher measures and more widely defined damages would inevitably increase the cost of carrying oil at sea. The fact that the oil companies greatly benefit from the existence of the compensation regimes and the continuation of the *status quo* is well illustrated by the wide support given to these regimes by the oil industry. For example, when making recommendations for more greater state supervision of tankers at a European Commission on tanker safety, Shell International Marine Ltd. also strongly urged European States to quickly ratify the 1992 Protocols to the Civil Liability and Fund Conventions and emphasised speed of payments under the IOPC Fund.⁶⁹ On the other hand the courts are often reluctant to extend the parameters of compensation theoretically available under the Conventions for fear of placing the two tier compensation system under significant financial stress.

7.4.4 Disposal operations

The large volumes of material requiring disposal following clean-up operations often result in substantial storage, transportation and disposal costs. For example, approximately 25,000 cubic metres of collected oily waste had to be disposed as a result of the *Haven* spill. In addition, some 20,000 metres of contaminated booms had to be cleaned or disposed of.⁷⁰ Booms cost between £50 to £200 per metre so the cost in lost booming could be considerable.⁷¹ These costs are recoverable as pollution damage,

⁶⁹*Oil & Gas Journal* Feb. 1, 1993 at 18. See also *Oil & Gas Journal* Dec. 14, 1992 at 24.

⁷⁰*IOPC Fund Annual Report* 1991, section 12.2 at 61.

⁷¹'The thick black line' *New Scientist* vol.137 No.1858 30 January 1993 at 24.

but, because numerous options for the separation and disposal of oil and debris exist, the question may arise whether the method of disposal utilized was reasonable.

The most common form of disposal is dumping at designated landfill sites. Materials intended for direct dumping should have a maximum oil content of about 20 per cent. Precautions should be taken to ensure that ground water is not contaminated. Landfill sites can vary in cost from US\$3 per tonne of oily waste to as much as US\$100 per tonne, depending on the type and sophistication of the site. Sometimes oil and sand mixtures are stabilized through the addition of binding agents. The resulting substance can be disposed of under less stringent conditions because the procedure forms an inert substance from which oil is unlikely to leach. It is also possible to use such substances in road construction. Oil has also been disposed of by burning and biodegradation.⁷² Difficulties may arise in obtaining administrative authorization for certain disposal operations. For instance in the *Rio Orinoco* case, about 300 tonnes of oily waste was recovered during clean-up operations carried out in autumn of 1990. It proved impossible to obtain permission from the local authorities for disposal within the Province of Quebec. After the disposal operations had been put out to tender, the waste was exported to disposal facilities in the United States.⁷³

When a claim for costs of preventive measures and clean-up operations is made under the Civil Liability and Fund Conventions it should include the following information.

'(a) Delineation of the area affected describing the extent of pollution and identifying those areas which were most heavily contaminated. This should be presented in the form of a map or nautical chart, supported by photographs or

⁷²'Disposal of oil and debris' (1984) *The ITOFF Ltd. Technical Information Paper* No.8.

⁷³*IOPC Fund Annual Report* 1992, section 12.2 at 48.

video tapes.

(b) Analytical and/or other evidence linking the oil pollution with the tanker involved in the incident (eg chemical analysis of oil samples,⁷⁴ relevant wind, tide and current data, observation and plotting of floating oil movements).

(c) Summary of events, including a description of the work carried out at sea, in coastal waters and on shore, together with an explanation of why the various working methods were selected.

(d) Dates on which work was carried out.

(e) labour costs (number and categories of response personnel, regular or overtime rates of pay, hours or days worked, other costs).

(f) Travel, accommodation and living costs for response personnel.

(g) Equipment costs (types of equipment used, rate of hire or cost of purchase, quantity used, over what period).

(h) Consumable materials (description, quantity, unit cost and where used).

(i) In respect of purchased equipment and materials, any remaining value at the end of the operations.

(j) In respect of equipment not purchased for the incident in question, the age of the items.⁷⁵

(k) Transport costs (number and types of vehicles, vessels or aircraft used, number of hours or days operated, rate of

⁷⁴O'Donovan 'Presentation and Handling of Claims for Oil Pollution Damage' at 25 contained in *Oil Pollution Claims, Liability & Environmental Concerns* International Business Communications Ltd. Conferences Documentation 3-4 November, 1992 London; makes the following important point:

'If English law is applicable, it may be possible to invoke the jurisdiction of the Court to order the taking of samples under RSC Ord. 29 r.3 (see e.g. the "Erikoussa" LMLN 131, the "Othoni" - unreported and, more recently, the reported decision of Sheen J. in The "MARE DEL NORD" [1990] 1 Lloyd's Rep. 40.'

⁷⁵Presumably this is to enable the estimation of depreciation costs.

hire or operating cost).

(1) Cost of temporary storage (if applicable) and of final disposal of recovered oil and oily material.'⁷⁶

In relation the categories of information described in points (c), (d), (e), (f), (g), (h), (k) and (l) above, it is suggested that: '... scrupulous records should be kept - preferably in the form of a log - so that individual items of claim can be linked to action taken in specific areas and, on separate work sites, separate logs should be kept to record this information. The imperative need is to link the action taken to the resulting costs.'⁷⁷

7.5 Proprietary damage

The general principle that a victim of a tort or delict shall be restored to the same position that he had enjoyed before the tort or delict occurred, and that he will be compensated for his losses, has been recognised in all jurisdictions where controversies under the Civil Liability and Fund Conventions may be entertained.⁷⁸ The definition of pollution damage contained in Article I.6 of the Civil Liability Convention (which is also incorporated by reference into the Fund Convention by Article 1.2 of that Convention) refers to 'loss or damage caused outside the ship carrying oil by contamination resulting from the escape or discharge of oil from the ship'.

This indicates that more than just physical damage caused by contamination is admissible.⁷⁹ The use of the word 'resulting' as opposed to 'caused' seems to support the argument that the authors of the Civil Liability and Fund Conventions wanted to

⁷⁶IOPC Fund Claims Manual 2nd ed. (1990) section 7.2 at p.5

⁷⁷O'Donovan (1992), *op cit*, 25-26.

⁷⁸Jacobsson & Trotz, *op cit*, 471.

⁷⁹Abecassis & Jarashow, *op cit*, 209 para.10-50.

include consequential damages. Accordingly, claims for direct physical damage and claims for consequential loss are in principle admissible. Under the Civil Liability and the Fund Conventions, restitution is made by providing compensation in money for the reduction in value of property, for necessary costs of repairs owing to contamination, as well as consequential losses incurred as a result of such contamination.

In principle, it seems that all legal systems recognise the recoverability of consequential loss. However, a diversity of jurisprudential traditions apply in the various States in which claims under the Civil Liability and Fund Conventions may be decided. The admissibility of consequential losses may vary according to whether the principles of foreseeability, remoteness and causation are widely or narrowly construed in any one Contracting State. Who may or may not have *locus standi* to bring an action under the Civil Liability and Fund Conventions and the method of quantifying damage will also be decided by the courts of the *lex fori* and as such no uniform approach can be identified.⁸⁰

It must be recognized that the system of compensation under the Civil Liability and Fund Convention does not purport to provide full restitution to victims of oil pollution. Firstly, the level of compensation under these regimes is limited to an upper ceiling. Once this ceiling is reached, all excess damage shall remain uncompensated unless the injured party can recover from a responsible party who is not a registered owner or an agent or servant of the owner. Clearly where the incident was caused by the actual fault or privity of the registered owner, the shipowner will not be entitled to limit his liability under the Civil Liability Convention and further claims may be brought against him. Secondly, although consequential loss is usually recoverable by claimants having a proprietary interest in property which sustains actual physical damage by contamination,

⁸⁰Abecassis & Jarashow, *op cit* 209 para.10-50; Jacobsson & Trotz, *op cit*, 471.

the same is not always true for claimants who suffer economic loss unconnected to actual physical damage to a proprietary interest held by them. The admissibility of claims under the Civil Liability and Fund Conventions for so-called "pure economic loss" are discussed in a separate section below. Thirdly, certain categories of damage in which no one is said to have a proprietary interest are not recoverable. This problem arises in connection with damage to the environment and aesthetic depreciation of the environment and amenities caused by oil contamination. This issue is also discussed separately. Fourthly, where the shipowner and the IOPC Fund is able to invoke one (or a combination of) the absolute defences successfully, liability will not be due under the respective Conventions. Fifthly, the Conventions may not cover all forms of damage which may derive from persistent oil carried at sea. For example it has been suggested that the term "contamination" as used in the definition of pollution in the Civil Liability and Fund Convention was chosen with the specific purpose of excluding the recovery of damage caused by fire or explosions of persistent oil carried at sea in bulk as cargo.⁸¹ Nevertheless, claims for death or injury of workers and and loss or damage to equipment sustained during "preventive measures" as defined in the Conventions, are admissible even where caused by fire, explosion or other accidents which could not be described as contamination. It has already been illustrated how pure threat preventive measures are not admissible.

It has also been suggested that damage caused by soot and smoke which emanates from a burning tanker or from burning surface oil spilled by a tanker is not covered by either the Civil Liability or Fund Convention. The basis for this view is that soot or smoke damage is not damage caused by oil contamination.⁸² This view would not seem to be supported by the wording of the definition

⁸¹Wood 'An Integrated International and Domestic Approach to Civil Liability for Vessel-source Oil Pollution' 7 (1975) *Journal of Maritime Law and Commerce* 1 at 28-29.

⁸²Abecassis & Jarashow, *op cit*, 208-9 paragraphs 10-49/50.

of "pollution damage" contained in Article I.6 of the Civil Liability Convention. Nowhere in either the Civil Liability or Fund Conventions is it stipulated that pollution damage must be caused by actual oil-contamination in order for such damage to be admissible. Article I.6 of the Civil Liability Convention merely provides that contamination must result from the escape of oil from the ship and does not stipulate that there must be an escape of oil in the form of oil. By definition when a given quantity of oil inside a ship burns into the atmosphere, oil has escaped from the ship. Accordingly, all types of contamination caused by that escape should be admissible as "pollution damage". Furthermore, contamination is a general term which does not specifically refer to pollution or infection by liquids. For example, the term may refer to contamination by radioactive substances or clouds of radioactive smoke. The question of whether damage caused by smoke is admissible has been settled by the *Aegean Sea* incident. Here, on the 3rd December, 1992, the *Aegean Sea* grounded on the North-Western coast of Spain, broke in two and burned fiercely for about twenty-four hours. A number of houses were contaminated by smoke generated by the burning oil. One hundred and ninety-four claims for the expense of cleaning these houses were approved by the IOPC Fund for a total of Pts 30,470,229 (£145,096).⁸³

Contamination by oil-sourced smoke or soot may, besides causing extensive property damage, also have a bearing on claims for injury or death. A study conducted by Dr Parris Georghiou, a chemist at the university of Newfoundland, determined that in general those components of crude oil which cause mutations in cells and hence genetic damage have a greater propensity to cause genetic harm after burning.⁸⁴

Oil spills may result in damage to property by, for example, contaminating fishing boats and fishing equipment, yachts,

⁸³*IOPC Fund Annual Report* 1993, section 12.2 at 49.

⁸⁴*The Economist* August 26, 1989 at 85.

beaches, piers and embankments. In the *Volgoneft 263* a Swedish fisherman sustained significant damage when 400 of his salmon nets and the deck of his fishing boat became contaminated by oil. In this instance, in order to mitigate undue financial hardship to the fisherman, the IOPC Fund made provisional payments to the fisherman during June and August 1990 amounting to SKr442,890 (£41,047). The fisherman's final claim amounted to Skr530,239 (£49,157) and was accepted in full; the balance being paid in September 1990.⁸⁵

The IOPC Fund accepts the cost of cleaning polluted property. For example, in the *Haven* incident, oil entered a marina in Arenzano, resulting in the oiling of moorings, harbour walls and about 130 yachts and fishing boats. Smaller quantities of oil entered a marina at Varazze and approximately 200 boats became polluted. Subsequently, the owners of 33 yachts and 150 fishing boats claimed compensation under the Civil Liability and Fund Conventions, for contamination of their boats, in the amounts of Lit168,143,771 (£77,000) and Lit1,264,303,328 (£579,000), respectively.⁸⁶

If the polluted property cannot be cleaned, the IOPC Fund compensates the cost of replacement, subject to deduction for wear and tear.⁸⁷ When claims are submitted for the replacement and repair costs the following details should be included.

- '(a) Extent of pollution damage to property.
- (b) Description of items destroyed, damaged or needing replacement, repair or cleaning (eg boats, fishing gear, roads, clothing.
- (c) Cost of repair work, cleaning or replacement of items.
- (d) Age of items to be replaced.
- (e) Cost of restoration after clean-up, such as repair of

⁸⁵IOPC Fund Annual Report 1990, section 12.2 at 47.

⁸⁶IOPC Fund Annual Report 1992, section 12.2 at 60, 64.

⁸⁷Jacobsson & Trotz, *op cit*, 474.

roads, piers and embankments damaged by the clean-up operations.'⁸⁸

The definition of "pollution damage" includes the costs of preventive measures and further loss or damage caused by preventive measures.' For example, measures taken to combat an oil spill may cause damage to roads, piers and embankments. Reasonable costs for necessary repairs of such property are accepted by the IOPC Fund. For example, in the *Tanio* incident, the IOPC Fund settled claims made by local authorities for damage to roads caused by the heavy traffic that the clean-up operation produced.⁸⁹ Clearly, in some cases, complex questions of remoteness may arise. For example, a claim for damage caused by a traffic accident occurring during clean-up operations was rejected because the loss did not result directly from the incident in question.⁹⁰ Damage caused by the contamination of ground water caused by the inappropriate disposal of oily waste at land-fills will, however, be admissible. Where oily waste is disposed through controlled incineration and damage is caused by smoke or soot, such damage will, also, be admissible.

7.5.1 Loss of life and personal injury

Claims for loss of life and personal injury claims will be admissible where they occur as a result of contamination. For example if people get sick due to contact with or breathing fine particles of persistent oil carried from a spill by high winds, their costs and damages will be recoverable. Clean-up workers who are exposed to the various components of crude oil may be particularly susceptible to adverse side effects. That such claims could arise is by no means impossible. Research indicates that exposure to oil fumes (and especially the more harmful

⁸⁸*IOPC Fund Claims Manual* 2nd ed. (1990) section 7.3 at p.5

⁸⁹*IOPC Fund Annual Report* 1987, section 9.2 at 11.

⁹⁰Jacobsson & Trotz, *op cit*, 474.

benzene components) can cause mutations in cells and lead to certain cancers.⁹¹ The IOPC Fund has had limited experience in respect of claims for personal injury and death but in one case paid the costs of necessary medical treatment of personnel who had been involved in clean-up operations.⁹² Where salvors die or are injured in the process of attempting to prevent oil pollution damage, these claims will in principle be admissible. Clean-up personnel who suffer injury or die accidentally during such operation will also be in a position to receive compensation. For example, a clean-up worker lost his life during clean-up operations in the aftermath of the *Exxon Valdez* oil spill. He was on board a supply-ship's dumb waiter when a hatch was closed at the top crushing him to death.⁹³

The cost of oil pollution can not always only be measured in purely financial terms or by the extent that damage is caused to the environment because in this particular instance the spill also took a life.

7.5.2 Pure economic loss and remoteness of damage

Generally speaking, there has often been a reluctance to permit claims where the damage complained of is purely economic in nature and unrelated to actual physical damage to a proprietary interest of a claimant. Of course, it is very unlikely that the national courts of the countries where claims for pure economic loss may be brought under the provisions of the Civil Liability and Fund Conventions will treat this issue in a uniform manner. There are as yet no firmly fixed rules as to what types of claims for economic loss are admissible. Each case has to be considered on its merits and within the context of the surrounding circumstances in each particular incident. It may be expected that the practice of the IOPC Fund may have a normative effect

⁹¹*The Economist* August 26, 1989 at 85.

⁹²Jacobsson & Trotz, *op cit*, 471.

⁹³*The Economist* August 26, 1989 at 85.

upon the diverse legal systems in which it operates.

For example, the IOPC Fund regards economic loss suffered by those who depend directly on earnings from coastal or sea-related activities is recoverable even though such claimants do not strictly possess proprietary rights in the ocean or its resources.⁹⁴ However, compensation under the Civil Liability and Fund Conventions may only be made according to the provisions of those Conventions. The definition of oil pollution damage specifically covers 'loss or damage caused by contamination'. In this regard, the Executive Committee of the IOPC Fund has expressed the view that a causal link must exist between the claim for damage or loss and the alleged contamination by oil.⁹⁵ This statement brings into issue the degree of remoteness of damage required.

7.5.2.1 Fishermens' claims for economic loss

Although it has not always been the case, fishermen are now increasingly viewed as a favoured class of claimants in cases of marine pollution, and their claims for loss of earnings are usually considered sympathetically under most jurisdictions. Where such claimants are able to prove economic loss it is usually compensated by the IOPC Fund. Where a fishing ground becomes contaminated by oil, fishing may be impossible in that area until the oil is cleaned-up or dissipates. This sometimes results in considerable economic loss to fishermen who do not have access to alternative fishing grounds. Also, where fishing equipment has been contaminated by oil, fishermen may suffer damage through lost catches while restoring equipment or until new equipment can be obtained. In the *Thunktank* incident, a situation arose where certain Swedish fishermen refused to fish because they feared that, by doing so, they would risk fouling

⁹⁴*General Information on Liability and Compensation for Oil Pollution Damage* IOPC Fund, February 1992 at 13.

⁹⁵*IOPC Fund Annual Report 1993*, section 12.2 at 41.

their fishing boats and nets, thereby incurring damages. By not fishing, the fishermen were behaving in a way which would give rise to claims for economic loss under the Conventions. When the fishermen resumed fishing certain equipment was in fact damaged.⁹⁶ Where, however, a refusal to fish is unreasonable in the circumstances claims made by fishermen in terms of the Conventions will be inadmissible.

In Japan, members of fishery co-operative associations are endowed with a legally recognized right to fish within specifically designated fishing grounds. Such rights, in effect, confer a group proprietary interest upon the marine resources of a particular area.⁹⁷ In December 1989 as a result the *Kasuga Maru No.1* incident the IOPC Fund paid four Japanese fishery co-operative associations an amount of ¥53,500,000 (£230,850). This was in settlement of claims which related mainly to loss of income incurred during a certain period during which oil emanating from the *Kasuga Maru No.1* prevented fishing.⁹⁸

7.5.2.2 Fishing restrictions and destruction of marine produce

Where spills occur, local or national authorities may expressly prohibit fishing and related activities from being undertaken in the area.

For example, as an immediate response to the *Aegean Sea* incident, the Spanish Government declared a fishing ban over the near shore waters and the shoreline in the vicinity of the spill. In this area, over 2,500 fishermen who were licensed to collect clams, cockles, sea urchins and goose barnacles, suffered a loss of revenue as the ban on fishing extended to the gathering of all

⁹⁶*IOPC Fund Annual Report* 1987, section 9.12 at 28-29.

⁹⁷Jacobsson & Trotz, *op cit*, 477.

⁹⁸*IOPC Fund Annual Report* 1989, section 12.2 at 37.

edible marine resources, not only fish.⁹⁹ Two observations may be made regarding the granting of licences to exploit the marine resources of the affected area. Firstly, the regional government of Galicia had granted the licences to thirteen local fishermen's unions which in turn issued the licences to individual fishermen. Secondly, the unions negotiate the settlement of claims on behalf of their members through the joint claims office of the P&I Club and the IOPC Fund. In this case the IOPC Fund also decided that it would compensate claimants who exploited marine resources without a licence to do so.¹⁰⁰

A dispute also arose regarding the destruction of cultivated mussels, salmon, oysters and scallops which were being cultivated in an area polluted by the Aegean Sea spill. The Fisheries Council of Galicia ordered the entire destruction of these categories of mariculture in that area. The IOPC Fund, the shipowner and the shipowner's P&I insurer objected to the blanket destruction of these products. Such draconian measures were, in their view, unnecessary and therefore unjustifiable. Despite these objections total destruction was in fact carried out.¹⁰¹

In another case, that of the *Braer*, which on the 5th January, 1993, ran aground on the west coast of the Shetland Islands, resulting in a serious spill, an exclusion zone was declared in the area affected by the spill. The exclusion zone prohibited the '... capture, harvest and sale of all fish and shellfish species from within the zone.'¹⁰² Compensation has been made under the provisions of the Civil Liability and Fund Conventions to fishermen who normally fished within this area but were prevented from doing so due to the ban. The IOPC Fund and the shipowner's P&I Insurer have also agreed to pay £7,175,470 in compensation

⁹⁹IOPC Fund Annual Report 1992, section 12.2 at 77.

¹⁰⁰IOPC Fund Annual Report 1993, section 12.2 at 49.

¹⁰¹IOPC Fund Annual Report 1993, section 12.2 at 50.

¹⁰²IOPC Fund Annual Report 1993, section 12.2 at 58.

for the slaughter and disposal of salmon farmed in cages within the exclusion zone but which had not been harvested prior to the pollution incident.¹⁰³

Where fishing prohibitions or the destruction of marine produce are reasonable in the surrounding circumstances, the IOPC Fund will pay such claims and will have no right of recourse against the authorities or private organizations implementing such measures.

7.5.2.3 Fishing related industries

In the *Aegean Sea* incident the Executive Committee of the IOPC Fund accepted in principle the admissibility of claims brought by self-employed fish porters who allegedly lost opportunities to unload fishing boats as a result of the spill. In the view of the IOPC Fund this category of economic loss was recoverable since the activities of fish porters were integral to the fishing industry in the polluted area.¹⁰⁴ By contrast the IOPC Fund declined to accept the losses allegedly suffered by employees at fish farms and fish processing plants due to the reduction of employment within those industries. The IOPC Fund took the view that these losses were not directly attributable to contamination by oil because 'the losses of the employees were the result of their employers being affected by the consequences of the spill'.¹⁰⁵ This policy is difficult to support. The different approaches adopted by the IOPC Fund concerning the distinction between self-employed fish porters and employed workers seems artificial and unnecessarily rigid. Clearly, courts of the *lex fori* could justifiably extend the notion of pollution damage to encompass the claims of employed workers in contradiction of the policy of the IOPC Fund.

¹⁰³ *IOPC Fund Annual Report 1993*, section 12.2 at 59.

¹⁰⁴ *IOPC Fund Annual Report 1993*, section 12.2 at 52-53.

¹⁰⁵ *IOPC Fund Annual Report 1993*, section 12.2 at 53.

7.5.2.4 Loss of income to tourist activities

In the *Tanio* incident the IOPC Fund paid compensation to local authorities for the loss of earnings of municipal camping sites.¹⁰⁶ Claims for loss of earnings suffered by hoteliers, restaurateurs and shop-owners at seaside resorts are also in principle admissible under the Civil Liability and Fund Conventions.¹⁰⁷

In most instances such claimants will not sustain direct contamination of their businesses by oil. Nevertheless pure economic loss to business is often alleged. The approach adopted by the IOPC Fund to determine the admissibility of these categories of claims has been to ascertain whether or not a causal link between the loss alleged and the act of contamination actually exists. For example, in the *Haven* case the Executive Committee of the IOPC Fund decided that the reduction in income caused to the operators of beach facilities, owners of hotels, restaurants and shops located along the Italian Coast from Genoa to the French border should as a matter of principle be admissible even though these establishments had not been directly affected by the oil spill. In amplification of this principle the Executive Committee also stated that where a causal link was established between the contamination of beaches and the reduction of tourist trade in any particular town or village, the negative impact would probably affect all establishments of the same kind in the locality irrespective of the particular position of individual businesses in that locality.¹⁰⁸

7.5.2.5 Establishing economic loss in fishing and tourist cases

¹⁰⁶IOPC Fund Annual Report 1987, section 9.2 at 11.

¹⁰⁷The *Tanio* case, (FUND/EXC. 10/WP. 1, paragraph 3.1); see also, commentary on claims settlement in the *Aegean Sea* incident in IOPC Fund Annual Report 1993, section 12.2 at 52.

¹⁰⁸IOPC Fund Annual Report 1993, section 12.2 at 41.

With respect to claims for economic loss allegedly suffered by the tourist industry and fishermen as a result of the *Patmos* incident, the Executive Committee of the IOPC Fund expressed the opinion that compensation in respect of such damage could only be claimed by each individual person having suffered the damage who, in addition, was able to prove the amount of economic loss sustained.¹⁰⁹ Fishermen and owners of other businesses affected by marine oil pollution often face considerable difficulty establishing the validity and amount of their damages.¹¹⁰

A method through which the quantum of loss suffered by a claimant may be assessed is by a comparison with earnings during a comparable period of time in previous years. Any variables such as investments made by the claimant prior to the incident to expand his operations must, also, be taken into account. Where some time has elapsed since the damage was alleged to have been suffered, it may be possible to compare the claimant's income during an appropriate period some years after the incident.¹¹¹

For example, in the case of the *Showa Maru* which occurred off Japan on the 9th January, 1980, over 3,000 nets in an important seaweed farming area were polluted requiring cleaning or replacement and fishermen lost earnings because polluted seaweed could not be sold. The fishery claims of ¥184 million were eventually agreed at ¥100 million (£225,000). The loss of income

¹⁰⁹*IOPC Fund Annual Report* 1988, section 12.2 at 30.

¹¹⁰In the *IOPC Fund Claims Manual* 2nd ed. (1990) section 7.4 at 6 the IOPC Fund advises claimants claiming for economic loss to include the following basic information in their claims:

'(a) nature of loss, including proof that the alleged loss resulted directly from the incident.
(b) Comparative figures for earnings in previous periods and during the period when economic loss was suffered.
(c) Comparison with similar areas outside the areas affected by the oil spill.
(d) Method of assessment of loss.'

¹¹¹Jacobsson & Trotz, *op cit*, 478.

was assessed on the basis of a comparison of the harvests of polluted farms with those of unaffected adjacent farms and records of previous years were also examined.¹¹² Any saved overheads or other normal expenses not incurred as a result of the incident must be subtracted in the claims calculation. Furthermore, where a claimant has received any extra income as a result of the incident, this should be indicated. For example, information should be given of any proceeds from the sale of recovered oil. Similarly, allowance should be made for income earned as a result of the incident, for instance, by fishermen through employment in the clean-up operations.¹¹³ This reasoning may not be readily endorsed by the courts of the State where the damage was done.

7.5.2.6 Costs of measures taken to mitigate pure economic loss

Recently a new type of claim for oil pollution damage has been brought under the Civil Liability and Fund Conventions. Claimants in communities damaged by oil spills have claimed compensation for the cost of measures undertaken to counter the negative public perception created of their regions attributable to an oil spill. In October, 1993, the Executive Committee considered this issue and decided that measures taken to prevent or mitigate pure economic loss should be admissible as preventive measures provided that they satisfied four preconditions.

- (a) the costs of the proposed measures were reasonable;
- (b) the costs of the measures were not disproportionate to the further damage or loss that they were intended to mitigate;
- (c) the measures were appropriate and offered a reasonable prospect of being successful; and
- (d) in the case of a marketing campaign, the measures

¹¹²IOPC Fund Annual Report 1988, section 13.5 at 66.

¹¹³IOPC Fund Claims Manual 2nd ed. (1990) section 7.4 at 6.

related to actual targeted markets.'¹¹⁴

Furthermore, the Executive Committee has adopted the position that the IOPC Fund should only consider the actual merits and quantum of such claims once the preventive measures have been carried out.¹¹⁵ In circumstances where claimants did not, however, possess the financial resources to undertake such measures the IOPC Fund may in its discretion make funds available.¹¹⁶

In two recent cases this problem has been considered. In the *Haven* case the City of Cannes (France) claimed damages under the Civil Liability and Fund Conventions relating to costs incurred by the City for publicity to counter damage caused by the *Haven* spill to the reputation of the City as a tourist resort. The Executive Committee of the IOPC Fund did not approve this claim since in its view the claimants had not established that the *Haven* spill had damaged the touristic reputation of Cannes.¹¹⁷ By contrast, in the *Braer* case, the IOPC Fund gave favourable consideration to three Associations which undertook a publicity campaign to counter the negative effect that the *Braer* oil spill had had on the reputation of Shetland Island fish products. The IOPC Fund also advanced funds to enable these Associations to carry out the proposed campaign. The IOPC Fund is also considering the admissibility of a proposed five-year £3,395,800 publicity campaign launched by Shetland Island Tourism, a tourist industry interest group, which is envisaged will counter the negative effect of the *Braer* spill on tourism in the area.¹¹⁸ In such cases the actual effect of advertising could be relevant to the

¹¹⁴*IOPC Fund Annual Report 1993*, section 12.2 at 63.

¹¹⁵Hence the past-tense construction of the of the four-pronged test cited above.

¹¹⁶*IOPC Fund Annual Report 1993*, section 12.2 at 63.

¹¹⁷*IOPC Fund Annual Report 1993*, section 12.2 at 42.

¹¹⁸*IOPC Fund Annual Report 1993*, section 12.2 at 63-64.

admissibility of this category of damage.

7.5.3.7 Other categories of pure economic loss

Claims for pure economic loss do not relate to fishing and tourist activities in all instances. For instance, in the *Patmos* incident, the IOPC Fund reached an out-of-court settlement with the owner of a Libyan vessel who had claimed compensation for loss resulting from that vessel having to be moved from its shipyard in the port of Messina to a shipyard in Palermo in order to make room available for undertaking emergency repairs to the *Patmos* at the port of Messina.¹¹⁹ Claims for economic loss suffered as a result of the closure of coastal industrial or processing installations due to an oil spill are, in principle, admissible under the Civil Liability and Fund Convention.¹²⁰

Compensation for costs incurred for pre-spill preventive measures are not admissible under either the Civil Liability or Fund Conventions. This rule will also apply to pure economic loss incurred during pure threat removal measures.

5.7.3 Environmental loss

Noting that under the Civil Liability Convention, a claim for ecological pollution damage, based on a theoretical model, had been raised against a shipowner, the IOPC Fund Assembly unanimously adopted Resolution No.3, in October 1980, which confirmed its intention that: '... the assessment of compensation to be paid by the International Oil Pollution Compensation Fund is not to be made on the basis of an abstract quantification of damage calculated in accordance with theoretical models.'¹²¹

¹¹⁹IOPC Fund Annual Report 1988, section 12.2 at 35.

¹²⁰IOPC Fund Claims Manual 2nd ed. (1990) section 7.4 at 6.

¹²¹IOPC Fund Statistics 1 October 1992 at 8.

Claims for "non-economic" environmental damages, such as those based on calculations according to "theoretical models", are not as yet accepted, in principle, by the IOPC Fund. This is a particularly complex and controversial issue and is by no means settled. This issue is discussed in more detail below, where it is shown that the policy adopted by the IOPC Fund cannot in practice preclude such claims under the Civil Liability and Fund Conventions.

The incident which brought about the adoption of this resolution was that of the *Antonio Gramsci* which occurred in the territorial sea of the former USSR on 27th February, 1979. Here the *Antonio Gramsci*, a 27,694 grt. tanker registered in the USSR, grounded in the Baltic sea, spilling about 5,500 tonnes of crude oil. Pollution damage was sustained in Sweden, the USSR, and Finland. At the time of the incident, Sweden was party to the Civil Liability and Fund Conventions. Accordingly, second-tier compensation from the IOPC Fund was available to cover pollution damage in the territory and territorial sea of Sweden. The USSR was only party to the Civil Liability Convention and Finland was party to neither the Civil Liability nor Fund Convention. The Swedish Government claimed an amount of SKr112 million (£10 million) in the City Court of Stockholm against the shipowner and the IOPC Fund under the provisions of the Civil Liability and Fund Conventions, respectively. Soviet authorities claimed a total of Rbls48 million (£44 million) in the Soviet Court of Riga. The amount claimed included a claim for Rbls47 million for environmental damage claimed by the Soviet Ministry for Conservation and Control and Utilization of Water. The quantum of environmental damage had been assessed according to a mathematical formula known as the "metodika" which had been incorporated into Soviet Legislation subsequent to the accident.¹²²

¹²²This legislative act, made by the Minister responsible for Water Economy, is called METODIKA: Moscow, 10th February, 1981 No.13-5-01/117.

The "metodika" is a theoretical model which leads to the abstract quantification of loss according to the following procedure. Firstly, the quantity of oil spilled is estimated and taken to disperse into the marine environment at a concentration of 50 parts oil per million water (ppm). Secondly, the quantity of water affected is estimated by dividing the quantity of oil spilled by 50ppm. Finally the quantity of affected water derived is multiplied by an amount per cubic metre read from tables giving expenses per cubic metre for restoration.¹²³ The result is the amount of notional damage inflicted on the State by the pollution. In this case the amount of damage was calculated at 2 Roubles per cubic metre of polluted water which in total came to Rbls48 million (£44 million).¹²⁴ These claims were accepted by the Soviet Court of Riga.

As the USSR was not Party to the Fund Convention at the time of the incident the IOPC Fund was not obliged to provide compensation for damage sustained in the USSR. Nor was the IOPC Fund obliged to indemnify the shipowner for any proportion of compensation paid by him in settlement of claims in the USSR. Nevertheless, the IOPC Fund was concerned at the quantum and nature of the Soviet claims under the Civil Liability Convention because such claims competed with the claims submitted by the Swedish Government against the shipowner's limitation fund. The owner of the *Antonio Gramsci* had established a limitation fund under the Civil Liability Convention in the Court of Riga for an amount of Rbls2,431,854 (£2.2 million) and the Soviet claims (£44 million) under the "metodika" alone were over twenty times this amount. To the extent that the claims of the Swedish Government were not satisfied by the shipowner's limitation fund because the fund was exhausted by the Soviet claims, the Swedish Government would be forced to recover their outstanding losses from the IOPC Fund. Accordingly, the IOPC Fund was disadvantaged by the admissibility of the Soviet claims established in terms of the

¹²³Abecassis & Jarashow, *op cit*, 209 para.10-51.

¹²⁴IOPC Fund Annual Report 1988, section 13.5 at 63-64.

"metodika". The position adopted by the Executive Committee of the IOPC Fund was that claims based on the "metodika" were not covered by the notion of "pollution damage" as defined in the Civil Liability and Fund Conventions in that such claims were not based on quantifiable losses which could be attributed to a particular incident. Although the IOPC Fund notified the Soviet Authorities of their position on the issue, the IOPC Fund decided not to attempt to intercede in the actual legal proceedings. The adoption by the IOPC Fund Assembly of Resolution No.3 was a direct result of the deliberations of the Executive Committee of the IOPC Fund in relation to the *Antonio Gramsci* incident and the problems raised by the use of the "metodika" to assess pollution damage.¹²⁵

In conclusion, the "metodika" was accepted as a method of calculating pollution damage in the context of the Civil Liability Convention. In doing so the Court of Riga effectively pronounced that claims for pure environmental loss assessed according to abstract theoretical models could be admissible under the Civil Liability Convention where municipal law (ie. state law) facilitated this procedure. It has been pointed out that the underlying premise for the admissibility of such claims for compensation for purely environmental damage was that the Soviet State had proprietary rights in nationalized industry, land and sea encompassed within the USSR. In keeping with this view, the Constitution of the USSR and the civil codes of particular Soviet Republics, define the territorial sea as State property. Accordingly, the Soviet State, through the Minister responsible for Water Economy, had the right to claim for the impairment of the marine environment by pollution.¹²⁶ This precedent could well have caused considerable consternation to tanker owners and the oil industry in general beyond the ranks of the IOPC Fund. All industries connected to the transportation of oil in bulk at sea could conceivably become subject to claims

¹²⁵*IOPC Fund Annual Report 1988*, section 13.5 at 64.

¹²⁶Brodecki, *op cit*, 387.

for environmental damage which had previously been unquantifiable and therefore deemed inadmissible.

Following the adoption of Resolution No.3 a Working Group was assembled to consider whether, and to what extent, claims for environmental damage should be admissible under the Civil Liability and Fund Conventions. The Working Group concluded that, where a claimant possesses a legal right to claim under national law and has further suffered quantifiable economic loss, compensation may be paid. The position adopted by the Working Group on this issue was endorsed by the Assembly of the IOPC Fund at its 4th session held during September and October of 1981.¹²⁷ Notwithstanding such action, it is still conceivable that claims by governments and other claimants for damage to the environment under the Civil Liability and Fund Conventions may be deemed admissible under municipal law.

Certainly it is true that, if Resolution No.3 had binding force over all claims submitted under the Civil Liability and Fund Conventions, it would effectively preclude the recovery of non-economic environmental damage. However, the definition of pollution damage as it appears in the texts of the Civil Liability and Fund Conventions actually does not preclude the recovery of damage assessed according to theoretical models. "Pollution damage" means loss or damage caused outside the ship carrying oil by contamination resulting from the escape or discharge of oil from a ship, ...'.¹²⁸ The actual interpretation and delimitation of the notion of pollution damage as defined in the Conventions is left to the laws of the State in which disputes regarding the provisions of the Conventions are entertained. Disputes as to the meaning of any concept used in the Conventions must be resolved according to the texts of the Conventions as incorporated in the domestic legislation of the

¹²⁷*IOPC Fund Annual Report 1988*, section 13.4(g) at 61-62; Jacobsson & Trotz, *op cit*, 480-481.

¹²⁸Civil Liability Convention, Article I.6 as incorporated by reference into the Fund Convention, Article 1.2.

particular State. Accordingly, where the municipal State laws permit the calculation of damage according to theoretical models such methodology may in principle be used notwithstanding the existence of Resolution No.3 as adopted by the Assembly of the IOPC Fund. The effect of Resolution No.3 is more in the nature of an important policy guideline and legally does not supercede or modify the meaning of the original texts of the Conventions as interpreted by a party State unless such state has incorporated the resolution into its domestic legislation. Nevertheless, the policy statement expressed in any resolution passed by the Assembly of the IOPC Fund will be of significant persuasive force and domestic courts may be reluctant to go against the the policy articulated by such resolutions. However, caution does not always prevail over claimants and judges as has previously been observed in relation to the decision of the Italian Court in Genoa to assess the *Haven* limitation amount under the Fund Convention in accordance with the Gold Franc and not the SDR as was the preferred method of conversion contained in Resolution No.1 passed by the Assembly of the IOPC Fund in November 1978.

The significance of a statement of policy in the form of a resolution passed by the Assembly of the IOPC Fund is that, if a claim is submitted to the IOPC Fund which is founded on an argument contrary to the position adopted in any resolution, the IOPC Fund will not compensate such claim. Furthermore, where the claimant pursues his claim in the domestic courts where the damage was sustained, the IOPC Fund will strongly contest such claims and persevere in most instances until every opportunity for appeal has been exhausted. The Director of the IOPC Fund will seldom if ever allow any matter (which is, in his view, a matter relating to principle) to prevail against the IOPC Fund without the issue being thoughtfully contested through the courts. The knowledge that disputes relating to an important statement of policy contained in a resolution of the Assembly of the IOPC Fund will be strongly opposed will often make claimants reluctant to adopt a position contrary to such policy because such claimants

will usually be aware that the eventual legal costs will be considerable and final settlement will inevitably be delayed.

The application of Resolution No.3 often results in certain damage going uncompensated. Accordingly, there have been various attempts made, subsequent to the first *Antonio Gramsci* incident, to circumvent the implications of this resolution. In the second *Antonio Gramsci* incident, which occurred on 6th February, 1987, the *Antonio Gramsci* ran aground on the south coast of Finland resulting of a spill of about 600-700 tonnes of crude oil. Pollution damage was sustained in Finland and the USSR. At the time of the incident Finland was party to the Civil Liability and the Fund Conventions while the USSR was party only to the Civil Liability Convention. As was the case in the first *Antonio Gramsci* case, a limitation fund was established in the Court of Riga on behalf of the owner of the *Antonio Gramsci* for the purpose of limiting his liability under the Civil Liability Convention.

Once again the IOPC Fund had an interest in the quantum of claims accepted under the Civil Liability Convention in the USSR because the greater the extent of the USSR claims the less Finnish claimants would be able to recover under the Civil Liability Convention from the *Antonio Gramsci* limitation fund. In turn, the IOPC Fund would be required to compensate a higher amount to the Finnish claimants. The Soviet Government, through the Estonian State Committee for Environmental Protection, submitted a claim for environmental damage. The amount claimed was Rbls712,200 (£720,200), which had been derived through the application of the "metodika". In contrast to the methodology used in the first *Antonio Gramsci* incident, in this case the assessment of the damage was linked to the quantity of the oil allegedly recovered in the territorial waters of the USSR, as opposed to the amount of oil spilled. The IOPC Fund once again argued against the application of the "metodika", stating that it was contrary to the definition of "pollution damage" in the Civil Liability Convention as interpreted by the IOPC Fund Assembly through

Resolution No.3. However, the IOPC Fund did not intervene in the legal proceedings in the Court of Riga. The the IOPC Fund and the shipowner's P&I Club submitted that the quantity of oil collected in USSR territorial waters was in fact less than the quantity used for the purpose of the "metodika" calculations and further that an allowance should be made to reflect the water content of recovered oil. In the light of these observations, the Estonian State Committee revised the calculations and reduced the amount claimed from Rbls712,200 to Rbls436,448 (£441,350). This amount was accepted by the Court of Riga.¹²⁹ It is noteworthy that the Finnish Government submitted a claim for FM2,146,000 (£329,300) relating to environmental research. The IOPC Fund objected to this claim since, in its view, the cost of environmental research was not an admissible claim under the definition of "pollution damage" as laid down in the Civil Liability Convention. The Finnish Government subsequently withdrew this claim.¹³⁰

The fundamental point made by the second *Antonio Gramsci* case is that the adoption of Resolution No.3 by the IOPC Fund Assembly failed to preclude the subsequent recovery of environmental damage assessed by way of abstract quantification and the use of theoretical models. Therefore in conclusion the courts of the USSR did not in principle consider the restrictions imposed by Resolution No.3 on the recovery of environmental damage as appropriate. The next forum in which the appropriateness of Resolution No.3 would be questioned was Italy.

In the *Patmos* incident¹³¹, the Italian Government through the Ministry of Merchant Shipping submitted a claim for environmental damage under the Civil Liability and Fund Conventions for an amount of LIt20,000 million (£10 million) which was subsequently reduced to LIt5,000 million (£2.5 million). The claim failed to

¹²⁹*IOPC Fund Annual Report* 1989, section 12.2 at 26-30.

¹³⁰*IOPC Fund Annual Report* 1989, section 12.2 at 28.

¹³¹Italy, 21st March, 1985. The facts surrounding this incident are described at pg.208 of this work.

stipulate the nature of the alleged damage caused and also did not explain how the quantum of damage had been assessed. Furthermore, no explanation was offered to indicate why the initial claim had been so substantially reduced.¹³² In accordance with Resolution No.3, the IOPC Fund adopted the position that this claim was not covered by the definition of pollution damage because it related to the abstract quantification of non-economic environmental damage calculated in accordance with theoretical models. For this reason the IOPC Fund considered these claims inadmissible under either the Civil Liability or Fund Conventions. During proceedings to determine the admissibility of claims against the shipowner's limitation fund in the Court of the 1st Civil Division of Messina, the Italian Government contested the view adopted by the IOPC Fund. On the 18th February, 1986, the Court of Messina, composed of a single judge, rejected the admissibility of the Italian claim, stating that no evidence had been given that ecological damage had been caused to the Italian coast or that there was any damage to the marine fauna.¹³³

The saga of the Italian Government claims for environmental damage did not end with this decision. According to the laws of civil procedure in Italy, oppositions to the decision of a court on the admissibility of claims in limitation proceedings may be brought in the same court. The Italian Government utilized this opportunity, alleging that the damage sustained to the environment constituted a violation of the right of sovereignty over the territorial sea of the Italian State. It has been suggested that this was an "ingenious" attempt to overcome difficulties in establishing *locus standi* which in this case necessitated that the Government claimants show a legal interest in the marine environment allegedly damaged before the institution of legal proceedings would be allowed. In support of their claims the Government furnished the Court of Messina with

¹³²IOPC Fund Annual Report 1986, section 9.9 at 17.

¹³³IOPC Fund Annual Report 1986, section 9.9 at 18.

the report of an expert who had used abstract models and theoretical calculations to assess the nature and extent of the pollution damage allegedly done to the marine environment.¹³⁴ The Court of Messina, comprising three judges, rendered its judgement on the merits of this claim on 30th July, 1986.¹³⁵ The Court held that the rights of sovereignty over the marine environment enjoyed by the Italian Government could not be equated with the right of ownership and accordingly could not be violated by acts of private subjects.

'The Ministry of Merchant Shipping has also claimed indemnity for ecological damage to marine flora and fauna. This claim cannot be admitted. Territorial waters are not state owned property but a *res communis omnium* and the public right to sovereignty over territorial waters cannot be injured by private persons.'¹³⁶

The Court held that the Italian Government, as represented in this instance by the Ministry of Merchant Shipping, had not suffered any loss of profit or incurred any costs as a result of the alleged damage to the territorial waters, or the fauna or flora.¹³⁷ Significantly, the Court made reference to the statement of policy expressed in Resolution No.3 of the Assembly of the IOPC Fund when coming to their decision. Abecassis suggests that the consideration by the Court of Resolution No.3 'lends support to the view that the claims practice of the IOPC Fund can have a legally normative effect under some

¹³⁴Abecassis 'Oil Pollution The Patmos' [1987] *Lloyd's Maritime and Commercial LQ* 275 at 277.

¹³⁵*General National Maritime Transport Company v. The Patmos Shipping Corporation and another, The International Oil Pollution Compensation Fund and Mellina Francesco v. The Patmos Shipping Corporation and others*. Civil action Gen. Reg. No.676/86, 337.

¹³⁶Translation of the judgement obtained from Abecassis (1987), *op cit*, 277.

¹³⁷*IOPC Fund Annual Report 1986*, section 9.9 at 18-19.

jurisdictions'.¹³⁸ This may well be true of that case but the learned commentator's apparent support for such a "legally normative" influence may not, in fact, serve the best long-term interest of the international community and the natural environment or principles of equity. In order for any legal system to develop with changing conditions the "legal norm" must be able to evolve in response to fluctuating economic, political, social, environmental and philosophical conditions. A strict adherence to Resolution No.3 in the context of environmental law pertaining to oil pollution is not conducive to flexibility and the incremental development of law. In any event, developments in the Italian courts relating to the *Patmos*, and subsequently in the *Haven* litigation, indicate that the policy of the IOPC Fund can not prevent courts from interpreting the notion of pollution damage in a different way.

The Italian Government appealed against the decision of the Court of first instance to the Court of Appeal of Messina. On appeal, the Italian Government formulated their claims for damage to the environment so as to avoid directly infringing the requirements of Resolution No.3. In this regard it was important to plead quantifiable economic loss. To this end it was pleaded that the nature of the claim was for actual damage to the marine environment and to actual economic loss suffered by the tourist industry and fishermen as a consequence of that damage.

The IOPC Fund opposed these claims by emphasizing again, that it was unreasonable to claim damage to the marine environment according to the abstract quantification of damage calculated in accordance with theoretical models. Furthermore, in the opinion of the IOPC Fund, economic damage allegedly suffered by fishermen and the tourist industry could only be claimed by the individual persons having suffered the damage who would also be required to prove the amount of economic loss sustained. On 30th March, 1989, the Court of Appeal reversed the decision of the court of first

¹³⁸Abecassis (1987), *op cit*, 277.

instance by holding that the Italian Government's claims were, in fact, admissible as pollution damage within the meaning of the Civil Liability and Fund Conventions.¹³⁹ The Court stated that the owner of the *Patmos*, the U.K. P&I Club and the IOPC Fund were liable for the damage covered by the claim made by the Italian Government.¹⁴⁰

Although these claims were admissible it was necessary to assess the quantum of such damage. On the 30th March, 1989, the Court of Appeal appointed three experts to ascertain whether or not damage had been caused to Italian marine resources as a result of the oil spill from the *Patmos* and to advise the Court as to the nature and quantum of such damage. In March 1990, the Court considered the report of the experts in which they had only been able to identify, assess and quantify damage to fishing activities. The amount of this damage was assessed as being no less than LIt1,000 million (£465,000). The experts' report also stated that the lack of reliable data had precluded the evaluation of the economic impact and damage sustained by other (non-fishing) activities (eg tourism). In the opinion of the experts it was not possible to quantify the damage to the tourist industry. The experts suggested that the Court was in the best position to evaluate the damage to non-fishing activities.¹⁴¹ In October 1991, the Court of Appeal requested information from the experts. In April 1992, the Court experts produced a second report in which they indicated that their conclusions were hypothetical and not confirmed by factual evidence.

'The quantity of water affected by the oil was estimated, and the experts then considered how the oil might affect

¹³⁹*The Ministry of the Merchant Marine and others v. Patmos Shipping Corporation & the United Kingdom Mutual Steamship Assurance Association and others*, Com Cas Reg No.391, 392,393, 398, 426, 459, 460 and 570/1986, The Court of Appeal of Messina, Civil Section, decided 30 March 1989.

¹⁴⁰*IOPC Fund Annual Report 1989*, section 12.2 at 20-21.

¹⁴¹*IOPC Fund Annual Report 1991*, section 12.2 at 30.

the plankton and the development and growth of fish. A mathematical formula was used to calculate a quantity of fish which allegedly were not born or did not develop, due to lack of nutrition. The experts stated that only a percentage of the quality of fish not having come into existence would have been caught and gave a nominal value to the quantity which would have been caught.'¹⁴²

It may be noted that the method used by the Italian experts was not in principle very different to the "metodika" used in both the *Antonio Gramsci* cases.

It has been reported that in its final judgment delivered on the 14th December, 1993, the Court of Appeal in Messina held that:

'... under the Civil Liability and Fund Conventions the term "pollution damage" embraces deterioration and destruction in whole or in part of the environment and includes any damage caused to the coast and to the interest of the coastal states which relate to the environment, such as interest in the preservation of marine biological resources, both in so far as fauna and flora are concerned.'¹⁴³

The importance of the question of admissibility and assessment of claims for environmental damage under the Civil Liability and Fund Conventions has become of even greater importance in Italy as a result of the *Haven* incident which occurred off the Italian coast on 11th April, 1991. The Italian Government has submitted claims for damage to the marine environment in the amount of Lit100,000 million (£45 million).¹⁴⁴ Essentially the same

¹⁴²*IOPC Fund Annual Report* 1992, section 12.2 at 36.

¹⁴³Trotz & de la Rue 'Admissibility and assessment of claims for pollution damage' in *CMI Yearbook* (1993) 90 at 114 fn.75.

¹⁴⁴*IOPC Fund Annual Report* 1992, section 12.2 at 64.

parties will be involved as in the *Patmos* incident: the Italian Government, the U.K. P&I Club and the IOPC Fund and it would seem the same rules apply. The outcome cannot yet be predicted and a long and interesting legal struggle can be expected to unfold in the Italian Courts.

7.6 Particulars of Claims against the IOPC Fund

In terms of Regulation 6.1 of the Internal Regulations of the International Oil Pollution Fund, where a claim is presented to the Fund, the Director shall request the claimant to support his claim by a notice in writing containing, to the extent possible, the following particulars:

- '(a) the name and address of the claimant and his representative; if any;
- (b) the identity of the ship involved in the incident;
- (c) the date, place and specific details of the incident;
- (d) the type of pollution damage and the place where it was experienced;
- (e) the amount of the claim.'

Regulation 6.2 provides that the Director shall request any claimant to provide such further information and such documents as he deems necessary to determine the validity of the claim.

7.7 Conclusions on the 1969/71 Regime

The 1969/71 Regime represented an improvement upon the laws applicable in the pre *Torrey Canyon* era. Strict but limited liability is channelled in the first instance to the shipowner under the Civil Liability Convention. Where the compensation available from the shipowner is insufficient oil cargo interests provide additional sources of compensation under the provisions of the Fund Convention through the IOPC Fund up to a supplementary limit. The idea of making the shipowner primarily

liable for pollution damage has been questioned by the International Maritime Committee (CMI), which suggested that the channelling of primary liability for oil pollution damage towards the IOPC Fund '... would have given victims of oil pollution an accessible and convenient remedy and the cost of providing that remedy would have been mitigated by recoveries the International Fund could then obtain from negligent shipowners.'¹⁴⁵ For the time being, however, shipowners will continue to provide primary liability under the Conventions. It is submitted that the role played by oil cargo interests in financing oil pollution compensation is becoming increasingly important relative to that played by the shipowner and that this trend will become more pronounced with the passage of time.

The two-tier system has successfully been able to deal with small pollution incidents as well as large scale pollution disasters through the availability of comprehensive liability limits. This system facilitates the speedy settlement of claims with minimum legal and administrative costs. The second tier Fund provides what amounts to reinsurance for pollution caused by tankers and helps to maintain the shipowners' limit of liability under the first tier Civil Liability Convention. In this way shipowners are able to obtain insurance cover for the high risks associated with tanker-source oil pollution damage. One of the principle virtues of this system is its potential for worldwide acceptance. The capital intensive tanker and oil industry are truly international operators which ideally require internationally uniform and stable legal dispensations so that they can continue to fulfil the function of energy supplier with maximum efficiency. One of the perceived ideals which has yet to be attained in the actual operation of the Conventions is a uniform interpretation of the notion of pollution damage. The attitude of the Courts in a given jurisdiction can obviously affect the extent of oil pollution claims. Claims brought in a jurisdiction which applies a mathematical formula for the computation of claims or has a wider

¹⁴⁵*Official Records*, vol.2 at 92.

concept of pollution damage may be disproportionate to claims settled in a jurisdiction where a more conservative approach is adhered to.

Generally speaking, by adopting the Conventions, Contracting States secure for their citizens comprehensive compensation for oil pollution damage, and, at the same time, ensure that such compensation will be affordable and made in the most cost effective way possible. However, as with most international arrangements established to deal with rapidly changing situations, the 1969/71 regime has become less adequate than it was when it was originally established. This has become especially evident with regard to the levels of compensation provided for victims of oil pollution damage. The limitation amounts agreed upon in 1969 and 1971 have declined in value because of inflation and cost increases. Furthermore, developments in the law of the sea during the existence of the 1969/71 Regime, and the expansion of the concept of environmental damage in national legislation, have exposed certain inadequacies in the existing compensation Conventions. A number of serious oil pollution incidents in 1978, 1979 and 1980 resulted in increased pressure to revise the Civil Liability and Fund Conventions. This pressure led to an International Conference held in 1984 where Protocols to both Conventions were developed. The substantive revisions effected by these Protocols, the failure of those instruments and the further development of the 1992 Protocols to the Civil Liability and Fund Conventions are discussed the next chapter, chapter eight, which constitutes the remainder of Part Two.

CHAPTER 8

Revision of the Compensation Conventions

8.1 Introduction and analytical approach

The International Conference on Liability and Compensation for Damage in Connexion with the Carriage of Certain Substances by Sea, 1984, achieved two objectives. First, it adopted the Protocol of 1984 to amend the 1969 Civil Liability Convention, and, secondly, it adopted the Protocol of 1984 to amend the 1971 Fund Convention. When it became clear that these two protocols would not enter into force work was initiated by the IOPC Fund to elaborate two new protocols with the same substantive provisions as those of 1984 but with lower entry into force requirements. Following this preparatory work, IMO convened an international conference to consider the resulting draft agreement, and, in 1992, the International Conference on the revision of the 1969 Civil Liability Convention and the 1971 Fund Convention adopted two new protocols; the Protocol of 1992 to amend the Civil Liability Convention and the Protocol of 1992 to amend the 1971 Fund Convention.

It is now very unlikely that the 1984 Protocols will enter into force and in practice the 1992 Protocols will replace the 1984 Protocols. Therefore, the approach adopted in this part of the analysis undertaken by this work is to assume that the 1984 Protocols will not enter into force. The method of analysis used here is to analyse the changes brought about to the 1984 Protocols from the framework of the of the 1992 Protocols. In keeping with this approach the reasons for the failure of the 1984 Protocols will first be discussed. Then the advent of the 1992 Protocols and the changes that the subsequent Protocols brought about to the 1984 Protocols will be explained. Once the latest developments have been fully explained then the changes brought about to the Civil Liability and Fund Conventions in 1984 and which were incorporated into the 1992 Protocols may be

explained more effectively. In this way the reader is able to appreciate the broad developments before the more detailed amendments are dealt with. In most instances the amendments introduced by the respective Protocols are common to both Conventions. For this reason the Protocols to the two Conventions are considered together in this Chapter, and, in this way, repetition is avoided or reduced to a minimum.

8.1.1 The impact of the "Amoco Cadiz" spill

The Civil Liability Convention entered into force on the 19th June, 1975, while the Fund Convention entered into force on the 16th October, 1978. The Civil Liability Convention had not been in force for very long and the Fund Convention had not yet entered into force, before the wreck of the *Amoco Cadiz*, off the coast of France, took place on the 16th March, 1978. The extent of pollution damage which ensued demonstrated the need for the amendment of the Civil Liability and Fund Conventions.¹ In 1984, french experts reported that the cost of the *Amoco Cadiz* clean-up operations would reach US\$160 million in 1984 values.² This was almost twice the amounts available under the Civil Liability and Fund Conventions. Clearly, the Conventions had to be amended to ensure that their specified liability limits would realistically reflect the potential levels of liability which could arise as a result of catastrophic oil spills. Although the main objective of the 1984 Protocols was the amendment of the original Conventions so as to increase the amount of compensation available to victims of oil spills by raising liability limits, the Legal Committee of IMO also realized that other amendments

¹Abecassis & Jarashow *Oil pollution from ships: International, United Kingdom and United States Law and Practice* 2nd ed. (1985) 227; also M. Jacobsson 'Future of the International Conventions on Liability and Compensation for Oil Pollution Damage' *Proceedings of the 1991 Oil Spill Conference*, American Petroleum Agency, March 4-7 (1991) San Diego. CA 689 at 689.

²*Official Records*, vol.2 at 45 para.10.

would also have to be made.³

In May, 1984, a Diplomatic Conference was convened in London, under the auspices of the International Maritime Organization, to revise the 1969 Civil Liability and 1971 Fund Conventions. From this Conference, Protocols to the 1969 Civil Liability Convention and the 1971 Fund Convention emerged. These Protocols never came into force, because the United States, whose participation was to bring into play the higher ceiling of compensation provided for in the 1984 Fund Protocol, did not ratify either the Civil Liability or the Fund Protocols.⁴

Instead of participating in an enhanced, international regime governing oil pollution compensation, which probably would have come into effect had the United States ratified the 1984 Protocols to the Civil Liability and Fund Conventions, the United States developed its own Federal oil pollution compensation legislation in the form of the Oil Pollution Act 1990 (OPA) which entered into force on the 18th August, 1990. The OPA contains no provisions which would facilitate the implementation of the 1984 Protocols and expressly rejects the Protocols as providing insufficient protection and compensation for oil spills.

8.1.2 Why U.S. support was required to effect the 1984 Protocols

³Popp 'Liability and compensation for pollution damage caused by ships revisited - report on an important international conference' (1985) *Lloyd's Maritime & Commercial Law* 118 at 119.

⁴For an analysis of the arguments advanced urging U.S. ratification of the 1984 Protocols see Paulsen 'Why the United States should ratify the 1984 Protocols to the International Conventions on Civil Liability for Oil Pollution Damage (1969) and the Establishment of an International Fund for Compensation for Oil Pollution Damage (1971)' (1984/85) 20 *The Forum* 164; Van Hanswyk 'The 1984 Protocols to the International Convention on Civil Liability for Oil Pollution Damages and the International Fund for Compensation for Oil Pollution Damages: An Option for Needed Reform in United States Law' (1988) 22 *The International Lawyer* 391.

The entry into force of the 1984 Protocol to the Civil Liability Convention would have required ratification by ten States, including six States each with not less than one million units of gross tanker tonnage.⁵ While the 1984 Protocol to the Fund Convention would have entered into force after ratification by at least eight states where the total quantity of contributing oil, received in the preceding calendar year, in all ratifying States was at least 600 million tons.⁶ A further pre-condition for the entry into force of the 1984 Fund Convention, was that the 1984 Civil Liability Convention should already have entered into force.⁷

Had the 1984 Civil Liability and Fund Conventions come into force, the basic coverage provided by both Conventions would have been 135 million units of account (SDR).⁸ This provision would have increased the Civil Liability and Fund Convention's maximum compensation limits by 225 per cent.⁹ However, the ultimate purpose behind the 1984 Protocol to the Fund Convention was to achieve an expanded ceiling of cover of 200 million units of account (SDR). This level of expanded cover would have increased the Civil Liability and Fund Convention's maximum compensation limits by 333.3 per cent.¹⁰ It was envisaged that the expanded ceiling would come into effect when the combined quantity of

⁵Article 13(1) of the 1984 Protocol to the Civil Liability Convention.

⁶Article 30 of the 1984 Protocol to the Fund Convention.

⁷Article 40.2 of the 1971 Fund Convention as incorporated into the 1984 Protocol to the Fund Convention by Article 36 of that Protocol.

⁸Article 4.4 (a) of the 1971 Fund Convention as amended by Article 6.3 of the 1984 Protocol to the Fund Convention.

⁹This figure of 225 per cent is based on the increases of aggregate limits relating to liability for a single pollution incident under both the Civil Liability and Fund Conventions.

¹⁰This figure of 333.3 per cent is based on the increases of aggregate limits relating to liability for a single pollution incident under both the Civil Liability and Fund Conventions.

contributing oil received by persons in the territories of any three Parties to the Fund Convention equalled or exceeded 600 million tons during the preceding calendar year.¹¹

This two-stage 1984 Fund Convention maximum and the procedure whereby it would be brought into being, was specially designed to meet U.S. demands for high liability limits and to assure other large oil importer States such as Japan that their contribution would not be dramatically increased without the U.S. assuming a large proportion of that increase.¹² States would participate in the expanded coverage only after the Fund had been joined by the United States and at least two other large oil importing countries. Three possible combinations existed: (a) the U.S. with Japan and France or (b) the U.S. with Japan and Italy and (c) the U.S. with Japan and the Netherlands.¹³ In other words the participation of both the U.S. and Japan in the 1984 Protocols was a prerequisite for its entry into force.

8.2 The 1992 Civil Liability and Fund Protocols

In view of the implications that the development of the OPA had for the coming into force requirements of the 1984 Protocol to the Fund Conventions it was unlikely that either Protocol would ever enter into force because the revised regime was designed to function as a two-tier compensation system. Clearly, the 1969 Civil Liability Convention and 1971 Fund Convention had to be revised to ensure their continued viability. To this end, upon the initiative of the Government of the United Kingdom, the IOPC Fund Assembly at its 13th session, held in September 1990, undertook to establish a 6th Intercessional Working Group to consider the amendment of the 1984 Protocols. Måns Jacobsson, the

¹¹Article 4.4(c) of the Fund Convention as amended by Article 6.3 of the 1984 Protocol to the Fund Convention.

¹²Popp, *op cit*, 129; Paulsen, *op cit*, 176.

¹³Abecassis & Jarashow, *op cit*, 292; *Official Records*, vol.2 at 299.

Director of the IOPC Fund provides an abridged summation of the important suggestions made to the IOPC Fund Assembly by the Government of the United Kingdom in elaboration of their initiative.¹⁴ It was proposed: '... that the IOPC Fund should undertake a thorough review of the conventions, including the following points:

[1] The continued relevance of the definition of "pollution damage" found in the conventions.

[2] The geographical scope of the conventions.

[3] The future inadequacy of the limits of compensation in the conventions in the light of recent oil pollution incidents and the maintenance of appropriate balance between shipowning and cargo interests.

[4] The future availability and cost of Protection and Indemnity Club cover.

[5] The distribution of costs across developed and developing countries of possible increased contributions from cargo interests.

[6] The relationship between the intergovernmental scheme and any compensation that may be available in future from voluntary, industry-based oil pollution compensation schemes.'

The same commentator reported that the U.K. also expressed the view that the conventions required amendment in the light of increases in the cost of oil pollution response which had been brought to the fore during the preparatory work for the Conference on International Co-operation on Oil Pollution Preparedness and Response.¹⁵ This conference, held under the auspices of the International Maritime Organization in November 1990, led to the development of an international convention by

¹⁴M. Jacobsson 'Future of the International Conventions on Liability and Compensation for Oil Pollution Damage' *Proceedings of the 1991 Oil Spill Conference*, American Petroleum Agency, March 4-7 (1991) San Diego. CA 689 at 690.

¹⁵*Id.*

that name.

The actual mandate given to the 6th Intercessional Working Group was to consider the future development of the intergovernmental oil pollution liability and compensation system. This entailed examining the prospects for the entry into force of the 1984 Protocols and to consider whether it would be possible to facilitate the entry into force of the content of these Protocols by amending their entry into force provisions. The Working Group was also called upon to consider which substantive provisions in the existing Conventions and the 1984 Protocols appeared to form the main obstacles to their continued relevance, including a review of the existing contribution scheme.¹⁶

The report of the 6th Intercessional Working Group was considered at the 14th session of the Assembly of the IOPC Fund during October 1991. As a result, the IOPC Fund Assembly adopted Resolution No.8, in which it requested the Secretary-General of IMO to convene an International Conference, to be held if possible before the end of 1992 to consider draft protocols modifying the 1969 Civil Liability Convention and the 1971 Fund Convention. Further, this Conference was to consider whether there should be introduced to the Fund Convention a system setting a cap on contributions, payable to the IOPC Fund, in any given State, for a transitional period.¹⁷ Consequently, on the 7th November, 1991, the Assembly of IMO adopted a resolution requesting the Legal Committee of IMO to consider draft protocols modifying the Civil Liability Convention and the Fund Convention and the issue of "capping" contributions. The Resolution also provided for the convening of a Diplomatic Conference.¹⁸

The International Conference was held in London, under the auspices of IMO from 23 to 27 November, 1992. The Conference

¹⁶*IOPC Fund Annual Report 1990*, section 7 at 16.

¹⁷*IOPC Fund Statistics 1 October 1992* at 10.

¹⁸IMO Resolution A.729(17).

adopted two Protocols (the 1992 Protocols) which will amend the 1969 Civil Liability Convention and the 1971 Fund Convention when, and if, these Protocols enter into force. These Protocols are now individually referred to as the 1992 Protocol to the International Convention on Civil Liability for Oil Pollution Damage, 1969 (the 1992 Civil Liability Convention Protocol) and the 1992 Protocol to the International Convention on the Establishment of an International Fund for Oil Pollution Damage, 1971 (the 1992 Fund Convention Protocol).

With the exception of the lowering of the entry into force provisions contained in the 1984 Protocols and the inclusion in the Fund Convention of a system of setting a transitional "cap" on the contributions payable by oil receivers in any given State, the substantive and administrative provisions of the 1992 Protocols are identical to those of the 1984 Protocols. This is because the provisions of the 1984 Protocols, were largely incorporated by reference into the 1992 Protocols.

The inter-relationship between the 1992 and 1984 Protocols and the original 1969 Civil Liability and 1971 Fund Conventions follow the principle that the later Protocols, although elaborating and often altering the provisions of the original Conventions, still retain the basis structure, format and organisation of the original Conventions. Although the 1984 Protocols retained the original structure and organisation of the 1969 Civil Liability and 1971 Fund Conventions they would have brought about significant changes to the original Conventions if they had come into force. By contrast the 1992 Protocols make very minor changes to the 1984 Protocols. Therefore, in the discussion of the 1992 Protocols which follows, one should be aware that in most instances the changes in the original Conventions were brought about by the 1984 Protocols.

Despite the achievements of the 1992 Diplomatic Conference, the future of the 1992 Protocols are not certain and could conceivably share a similar fate to the 1984 Protocols. It

18 difficult to avoid the inference that the hurried development of the 1992 Protocols was at least partly motivated by a desire to send a political message to the U.S. that the international community was capable of adopting positive measures to control oil pollution liability despite non-participation of that influential State. It was felt necessary to demonstrate that the Civil Liability and Fund Conventions could have a viable future notwithstanding the existence of the more comprehensive, but not necessarily superior, provisions of the OPA and U.S. State Oil Pollution Legislation. The regional system of managing tanker-source oil pollution liability which was adopted by the U.S. disconcerted many of the interest groups which favoured the continued operation of the international approach. A note by the International Chamber of Shipping (ICS) delivered at the 1992 Conference articulates some of these concerns.

'The credibility of the concept of global agreement on oil pollution liability issues is at stake, and the development of regional agreements - which would be as damaging to IMO as much as to the shipping industry - must be anticipated if the Conference should unexpectedly fail in its objectives.'¹⁹

It is also true that the high limits contained in the 1984 Protocols to the Civil Liability and Fund Conventions were largely agreed upon at the 1984 Conference in an attempt to obtain the support of the U.S. in the inter-governmental oil pollution liability and compensation system. Without U.S. support and contributions, the limits provided for by the 1984 Protocol to the Fund Convention were unrealistically and insupportably high. Therefore, allowing for inflation, the amendments brought about by the 1992 Protocols can be seen as the realistic reflection of what the delegates may have agreed to in 1984 had the U.S. delegation not intimated that they were willing to support the intergovernmental regime. After a delay of six years,

¹⁹*Official Records*, vol.4 at 84.

the international community was in essence rectifying a mistake brought about by the fact that the U.S. had "led them up the garden path" in 1984. During the discussion of limitation amounts at the 1984 Conference the lead U.S. representative, Rear Admiral B.F. Hollingsworth, acknowledged that: ' ... he was aware that some delegations believed that his Government had no serious intention of ratifying the instruments that would establish a revised CLC²⁰/IOPC Fund regime.'²¹ He then also conceded that: '[s]uch scepticism was understandable, based as it was on the fact that his Government had not ratified the 1969 and 1971 Conventions, as well as other transportation treaties, not necessarily maritime, in spite of all the efforts of the co-signatories of those instruments.'²² With hindsight such scepticism was justified and it would seem that within this field of international law the credibility of the U.S. Executive Branch as a negotiating partner has been severely tarnished.

8.2.1 Main 1992 amendments

The main amendments to the 1984 Protocols to the Civil Liability and the Fund Conventions brought about by the respective 1992 Protocols are discussed below.

8.2.1.1 Entry into force requirements

The most significant amendment brought about to the 1984 Protocols by the 1992 Protocols is that the subsequent Protocols contain less stringent requirements for their entry into force.

The 1992 Protocol to the Civil Liability Convention requires for its entry into force, that it is ratified by ten States, including four States each with not less than one million units

²⁰CLC is a commonly used acronym for the Civil Liability Convention.

²¹*Official Records*, vol.2 at 399-400 para.16.

²²*Official Records*, vol.2 at 400 para.16.

of gross tanker tonnage.²³ These requirements are less stringent than those of the 1984 Protocol to the Civil Liability Convention because although the 1984 Protocol also required a minimum of ten States it had stipulated six, as opposed to four, States with such large tanker registries.

Both the 1984 and 1992 Civil Liability Convention Protocols, stipulate that upon their respective requirements being met twelve months must elapse before these instruments would enter into force.

The 1992 Protocol to the Fund Convention requires that at least eight States have agreed to be bound to it²⁴ and that the total contributing oil received in contracting States together is at least 450 million tons per annum.²⁵ Thus the necessity for minimum of eight ratifying States remains the same under the 1984 and 1992 Protocols, but, the amount of contributing oil was reduced from 600 million tons in the 1984 Protocol to 450 million tons in the 1992 Protocol i.e. a twenty-five per cent reduction.

Both the 1984 and 1992 Fund Protocols, stipulated that upon their respective requirements being met twelve months must elapse before these instruments would enter into force.

The 1992 Protocol to the Fund Convention shall not be permitted to enter into force before the 1992 Civil Liability Convention has entered into force.²⁶ There is no equivalent provision in the 1992 Protocol to the Civil Liability Convention stipulating that the 1992 Civil Liability Convention will only enter into force at the same time as the 1992 Fund Convention. This was also the position under the 1969/71 regime and under the 1984

²³1992 Protocol to the Civil Liability Convention, Article 13.1.

²⁴1992 Protocol to the Fund Convention, Article 30.1(a).

²⁵1992 Protocol to the Fund Convention, Article 30.1(b).

²⁶1992 Protocol to the Fund Convention, Article 30.2.

Protocols. The strong possibility exists that the 1992 Civil Liability Convention could enter into force before the 1992 Fund Convention. If this should occur the liability limits for shipowners will be substantially increased without the benefit of the complementary increase in the revised Fund Convention limits. The possibility also exists that certain States could be satisfied with the increased limits of the 1992 Civil Liability Convention and opt not to ratify the 1992 Fund Convention. In this way such States would avoid the obligation of having to make contributions to the 1992 IOPC Fund. At both the 1984 and 1992 Conferences shipowner interests were particularly concerned with this potential problem. Significantly, the International Chamber of Shipping (ICS) and the Baltic and International Marine Council (BIMCO) expressed fears that Courts in States where only the Civil Liability Convention applied could be tempted to break the shipowner's right to limit under that Convention so that greater funds would become available to compensate victims of large oil spills.²⁷ The ICS urged States to co-ordinate the ratification of both Protocols so as to facilitate the simultaneous entry into force of the 1992 Civil Liability and Fund Conventions.²⁸ It remains to be seen whether the desired co-operation between States on this important issue will in fact eventuate.

8.2.1.2 Transitional contribution limit

The 1992 Fund Protocol provides that the aggregate amount of the annual contributions payable (in respect of contributing oil received in a single Contracting State during a calendar year) is not to exceed 27.5 per cent of the total annual contributions from all States.²⁹ The "capping system" is a transitional measure which will only operate until either the total quantity of contributing oil, received in all Contracting States in a calendar year, has reached 750 million tonnes or until the elapse

²⁷*Official Records*, vol.4 at 84 (ICS); and at 94 (BIMCO).

²⁸*Official Records*, vol.4 at 84.

²⁹1992 Protocol to the Fund Convention, Article 36 ter 1.

of a period of five years after the date of entry into force of the 1992 Fund Protocol, whichever occurs earlier.³⁰

No "capping system" had been incorporated into the 1984 Fund Protocol and none applies to the present system of contributions to the IOPC Fund under the 1971 Fund Convention. As such, this provision constitutes an unprecedented departure from the "fair shared sacrifice" principle which had previously always been the underlying principle of the IOPC Fund contribution system. The idea of "capping" is not, however, unique in the history of the development of the Fund Convention. At the 1984 Conference the U.S. had suggested that during the interim stage of the operation of the 1984 Fund Convention the aggregate contribution made by any one Contracting State should not exceed 25 per cent of the total contribution to the IOPC Fund.³¹ The concerns of the U.S. in 1984 were the same as those of Japan in 1992. Large oil importer States which represented a substantial proportion of the total contributions to the IOPC Fund did not wish to assume an inordinate proportion of those contributions. The concerns of large oil importers are well founded because during the initial period after the entry into force of the 1971 Fund Convention certain States had carried an inordinate proportion of contributions.³²

During the Working Group discussions leading up to the development of the 1992 Fund Protocol, most delegations expressed a reluctance to accept the idea of a "capping system". They pointed out that contributions to the IOPC Fund were not levied on Member States but on individual contributors in these States. Following this reasoning it was argued that the implementation of a "capping system" would distort competition between industries in various Member States as contributors in Member States entitled to "capping" would be paying a lower amount per

³⁰1992 Protocol to the Fund Convention, Article 36 ter 4.

³¹*Official Records*, vol.2 at 284 para.3 and 5.

³²*Official Records*, vol.4 at 226.

tonne of contributing oil than oil receivers in other Member States. In principle it is difficult to justify the "capping" procedure but the rationale for the decision was based on political expediency, not considerations of equity. The delegation from Japan pointed out that the introduction of a "capping system" was of vital importance to its domestic oil industry which without a "cap" on contributions could be called on to carry a very heavy burden during the initial phase. In a revealing admission by a government of the powerful influence that the oil industry can exert over governmental initiatives on oil pollution, the Japanese delegation emphasised that strong opposition from the oil industry could lead to the Government of Japan losing the possibility of ratifying the 1992 Protocols at an early stage.³³ In the light of this statement, one may question whether governments or oil companies exert actual control over the management of oil pollution liability. This issue is discussed in greater detail in Part Three of this work.

The 1992 Conference resolved that the "capping system" should not be interpreted as setting a precedent which could be used to influence the form of other existing or future International Conventions.³⁴ Where this precedent could have been influential was in the context of the development by IMO of the Convention for the compensation of pollution damage caused by hazardous and noxious substances carried at sea.³⁵ It is, however, difficult to ignore the example that this development has set in the field of international law. Under circumstances where a particular

³³Paragraphs 127 and 129 'Extract from the Report of the Legal Committee on the Work of its Sixty-Sixth Session' (IMO document LEG 66/9, paragraphs 125-141) reproduced in FUND/A.15/15 Annex II.

³⁴Resolution 5 (Resolution on the Acceptance of an Interim Cap on Contributions Payable by Oil Receivers in any Given State) see *Official Records*, vol.4 at 225/6.

³⁵Gaskell 'Compensation for Oil Pollution: 1992 Protocols to the Civil Liability Convention and the Fund Convention' (1993) 8 *International Journal of Marine and Coastal Law* 286 at 290.

State's support is indispensable to the success of an international convention it is possible for that State to dictate favourable terms of entry. This does not bode well for the future of the intergovernmental oil pollution liability and compensation system established by the Civil Liability and Fund Conventions.

Clearly, the adoption of the "capping system" is a striking concession to encourage the participation of Japan in the 1992 Protocols to the Fund Conventions. Japanese ratification of the 1992 Fund Protocol is undeniably a prerequisite for the successful implementation of the 1992 Protocol. This is illustrated by the relative quantities of contributing oil received in the territories of the three largest oil receiver Fund Member States in 1991.³⁶ In the table which appears below, contributing oil is measured in tonnes.

Member State	Contributing Oil	% of Total
Japan	266,411,278	28.89
Italy	121,292,963	13.15
Netherlands	<u>97,452,566</u>	<u>10.56</u>
	<u>485,156,807</u>	<u>52.60</u>

It will be observed that Japan contributed 28.89 per cent of the total contributions to the IOPC Fund during 1991 and the Japanese contribution was 5.18 per cent above the summed proportional contributions made by Italy plus the Netherlands; respectively the second and third largest contributors. According to the "capping system" the aggregate amount of the annual contributions payable in respect of contributing oil received in a single Contracting State during a calendar year is not to exceed 27.5 per cent of the total annual contributions to the IOPC Fund. Accordingly, in terms of the 1991 statistics as reported at 31st December, 1992, the Japanese contribution would be reduced by 1.39 per cent. This amount would be distributed *pro rata* amongst the other contributors.

³⁶IOPC Fund Annual Report 1992, Annex X at 91 (as reported by 31st December, 1992).

During 1989 calendar year the contribution made by Japan constituted 27 per cent of the total contributions to the IOPC Fund and therefore had the "capping system" applied it would have not come into operation during that year.³⁷ However, in 1990 the contribution made by Japan constituted 28.92 per cent of the total contributions to the IOPC Fund and thus the "capping system" would certainly have come into operation during that year.³⁸ The Japanese contribution would have been reduced by 1.42 per cent. An example will show the monetary effects of this reduction. On 4th October, 1991, the IOPC Fund Assembly levied an amount of £15 million for the *Haven* Major Claims Fund, to be paid by 1st February, 1992. The amount payable by each contributor, per tonne of contributing oil received, in 1990, was £0.0159675³⁹ (1990 was the year before the incident). Japan's proportional contribution in this instance was £4,121,099.⁴⁰ If the "capping system" had been in operation during that year this contribution would have been reduced by 1.42 per cent. Accordingly the Japanese contribution would have been reduced by £58,520.

8.3 Substantive changes implemented by the 1984 Protocols and incorporated in the 1992 Protocols

Now that the amendments made to the 1984 Protocols by the 1992 Protocols have been explained, the amendments brought about to the 1969 Civil Liability Convention and 1971 Fund Convention by the 1984 Protocols, which were in turn incorporated into the 1992 Protocols can be described and explained within the broader framework.

³⁷*IOPC Fund Annual Report 1990*, Annex VII at 61 (as reported by 31st December, 1990).

³⁸*IOPC Fund Annual Report 1990*, Annex X at 83 (as reported by 31st December, 1991).

³⁹*IOPC Fund Annual Report 1992*, section 9 at 22.

⁴⁰*IOPC Fund Statistics 1 October 1992* at 17.

8.3.1 Higher Limits of Compensation

The most important change is the increase in the maximum limit of liability for the shipowner and the maximum compensation available from the IOPC Fund. In determining these limits the delegates at the 1994 Conference were required to balance three major conflicts. Firstly, an acceptable apportionment of liability between shipowner interests and oil importer interests had to be made.⁴¹ Secondly, less developed countries perceived that they were required to pay relatively higher amounts for compensation as opposed to developed countries due to the fact that their currencies had lower value.⁴² Thirdly, and perhaps most importantly, an attempt had to be made to reconcile the inherent conflict between the demand for industrial development and the preservation of the environment.⁴³

8.3.2 The revised limits of shipowners

In their revision of provisions of the 1969 Civil Liability and 1971 Fund Conventions the delegates at the 1984 Conference were obliged to consider, *inter alia*, 'the costs of the maritime industry.'⁴⁴ This is so in terms of the November, 1981, IMO Assembly Resolution A.500, which is reproduced at Annexure Eight of this work.

The cost of obtaining liability insurance for shipowners is primarily determined by three inter-related factors: the number of incidents, the quantum of damage *per* incident, and, most importantly, the limitation amounts applicable to such accidents under relevant national legislation.⁴⁵ Reliable limitation

⁴¹*Official Records*, vol.1 at 329 para.6.

⁴²*Official Records*, vol.1 at 329 para.4.

⁴³*Official Records*, vol.1 at 328 para.1.

⁴⁴*Official Records*, vol.2 at 83.

⁴⁵*Official Records*, vol.2 at 124-5 para.46.

levels are important for insurers so that they are able to predict their maximum potential exposure per insured incident.⁴⁶ Insurers operate on the assumption that the shipowner will be able to limit his liability to a pre-determinable amount under the national laws of most States.⁴⁷ Where the insurance of oil pollution risks is undertaken the existence of liability limits which can be relied upon is particularly important because the frequency of oil spills is unpredictable and the costs associated with these spills are often exceedingly high and difficult to predict.

At the 1969 Conference the limited availability of marine liability insurance forced delegates to exercise caution in setting liability limits applicable to shipowners under the Civil Liability Convention. At the 1984 Conference it was recognised that the capacity of the marine insurance market had increased and that the shipowners could reasonably be required to assume higher liability limits.⁴⁸ In this regard it has been suggested that the increased availability of insurance for oil pollution risks was brought about by the existence of the IOPC Fund and the CRISTAL contract. These additional sources of compensation for tanker-source oil pollution damage had the 'profound effect' of maintaining shipowners' liability limits by satisfying claims which exceeded those limits.⁴⁹

At the 1984 Conference the limit of the shipowner's liability under the Civil Liability Convention was changed through the introduction of a special minimum liability limit for owners of small vessels and a substantial general increase in the limitation amounts. The "fixed tranche" for small ships was recommended by the Oil Companies International Marine Forum

⁴⁶*Official Records*, vol.2 at 142.

⁴⁷*Official Records*, vol.2 at 29 para.34.

⁴⁸*Official Records*, vol.2 at 380 para.14 and vol.1 at 161 para.3.

⁴⁹*Official Records*, vol.2 at 29 para.34.

(OCIMF), a lobby group for the oil industry, which had become concerned that oil importers were increasingly being called upon to contribute though the IOPC Fund to oil spills from small ships which had very low limitation funds under the 1969 Civil Liability Convention.⁵⁰ This phenomenon still remains prevalent, especially in relation to oil spills in Japan, where small coastal tankers are involved.⁵¹

The revised limits under 1984 Protocol to the Civil Liability Convention were incorporated into the 1992 Protocol and are described below.

Ships which do not exceed 5,000 gt. (gross tons) are subject to a fixed limit of 3 million SDR.⁵² As at 31st December, 1992, the amount of 3 million SDR corresponded to £2.7 million or US\$4.1 million. Ships measuring between 5,000 gt. and 140,000 gt. are subject to the fixed sum of 3 million SDR and then, on an escalating scale, an additional 420 SDR⁵³ for every gross ton above the 5,000 gt. measurement. Ships exceeding 140,000 gt. are permitted to limit their liability to 59.7 million SDR.⁵⁴ As at 31st December, 1992, the sum of 59.7 million SDR corresponded to £54.4 million or US\$82 million.

Tanker size

Gross Tons

Up to 5,000

5,000-140,000

Limitation

3 million SDR

3 million SDR plus

⁵⁰Popp, *op cit*, 129; for a 'Review of the limits of liability and compensation' submitted by the OCIMF at the 1984 Conference, see, *Official Records*, vol.2 pp.98-113.

⁵¹For an analysis of this issue see pg.99 of this work.

⁵²Article 6.1 of the 1992 Protocol replacing Article V.1(a) of the 1969 Civil Liability Convention.

⁵³420 SDR as at 31st December, 1992 corresponded to £382 or US\$577.

⁵⁴Article 6.1 of the 1992 Protocol replacing Article V.1(b) of the 1969 Civil Liability Convention.

140,000 and above ..

420 SDR per gt. over 5,000 gt.

59.7 million SDR

Nowhere in the 1992 Protocol to the Civil Liability Convention is this critical measurement of 140,000 gt. specifically mentioned. But the 1992 Protocol stipulates that the overall maximum limits of the shipowner shall not exceed 59.7 million SDR. On the escalating scale referred to above, this upper ceiling is reached at 140,000 gt.

8.3.2.1 Revised tonnage measurement

Under the 1969 Civil Liability Convention as it presently applies tonnage is measured according to "limitation tonnage" which essentially reflects the net tonnage of the ship plus engine room space.⁵⁵ For the purpose of assessing the shipowner's limitation fund under the 1992 Protocol, it is significant that the use of limitation tonnage has been replaced by gross tonnage, which is calculated in accordance with the tonnage measurement regulations contained in Annex I of the 1969 International Convention on Tonnage Measurement of Ships.⁵⁶ The gross tonnage measurement of a ship is greater than its measurement according to limitation tonnage. Accordingly, larger limitation funds will be assessed using the gross tonnage measurement than had the limitation tonnage continued to apply.

It has been observed that the difference between the systems of tonnage measurement under the 1969 Civil Liability Convention and the 1992 Protocol makes accurate direct comparison between the respective limits difficult.⁵⁷ This difficulty may be further exacerbated because most ships have not yet been measured for gross tonnage according to the 1969 International Convention on

⁵⁵Civil Liability Convention, Article V.10.

⁵⁶Article 6.5 of the 1992 Protocol replacing Article V.10 of the 1969 Civil Liability Convention. The 1969 International Convention on Tonnage Measurement of Ships entered into force on the 18th July, 1982.

⁵⁷Abecassis & Jarashow, *op cit*, 241 para.10-143.

Tonnage Measurement of Ships. Where such ships become involved in claims for oil pollution damage under the 1992 Civil Liability Convention it may become necessary to re-measure the vessel so that an accurate limitation Fund can be assessed.⁵⁸ Despite such fears, the general consensus at the 1984 Conference was that these difficulties were more of a theoretical nature than of practical significance. For example, delegates from Norway, India and the United States agreed that the gross limitation tonnage could be ascertained even in cases where the ship had sunk as sufficient ship's documentation and drawings would usually exist to permit an *ex post facto* assessment.⁵⁹ The delegate from New Zealand expressed the view that in the case of large oil tankers the differences between the old and the new tonnage measurements would not be very significant.⁶⁰

One can, however, state with certainty that the upper limits of 14 million SDR under the 1969 Civil Liability Convention has been considerably increased to 59.7 million SDR under the 1992 Protocol thereto.

8.3.3 The revised IOPC Fund limits

The guiding principle of the existing, two tier, oil pollution compensation arrangement is that shipowners and cargo owners share liability. This principle remains fundamental to the amended compensation regime which evolved from the 1984 and 1992 Conferences.

The maximum compensation payable by the IOPC Fund under the 1992 Protocol to the Fund Convention in respect of any one incident

⁵⁸Browne 'Oil Pollution Damage Compensation under the Civil Liability Convention 1969' in McLean (ed) *Compensation for Damage: An International Perspective* (1993) pp.137-164 at 143.

⁵⁹*Official Records*, vol.2 at 474 paras.8,9 and at 475 paras.11,14.

⁶⁰*Official Records*, vol.2 at 473 para.3.

is increased to 135 million SDR, which includes the amount of compensation available from the shipowner under the 1992 Protocol to the Civil Liability Convention.⁶¹ As at the 31st December, 1992, the sum of 135 million SDR corresponded to £123 million or US\$186 million.

An arrangement is provided for under the 1992 Protocol to the Fund Convention whereby the limitation ceiling, of 135 million SDR, may automatically be increased to 200 million SDR,⁶² if, and when, certain circumstances prevail. The enhanced ceiling of limitation shall be activated when three States, Party to the 1992 Fund Convention have a combined quantity of contributing oil, received during a given year, in their respective territories, which exceeds 600 million tonnes.⁶³ These are the same conditions which were agreed upon at the 1984 Conference. However, it must be recognised that under the 1992 Protocol different conditions prevail because it must be assumed that the U.S. will not ratify the 1992 Protocols. In spite of additional funds becoming available from the oil industry through the expanded ceiling, shipowners' limits under the Civil Liability Convention, will remain the same.

Given that the 1992 Fund Protocol, in fact, enters into force, it is unlikely that the enhanced ceiling of 600 million SDR will come into effect in the foreseeable future. This is because the sum total of contributing oil received in the territories of the three largest oil receivers presently party to the 1971 Fund Convention only amounted to 485,156,807 tonnes during the 1991

⁶¹Article 6.3 of the 1992 Protocol replacing Article 4.4(a) of the 1971 Fund Convention.

⁶²As at the 31st December, 1992, the sum of 200 million SDR corresponded to £182 million or US\$275 million.

⁶³Article 6.3 of the 1992 Protocol replacing Article 4.4(c) of the 1971 Fund Convention.

calendar year.⁶⁴

Were the upper ceiling of liability is reached under the 1971 or 1992 Fund Convention, the total amount paid by the IOPC Fund can not be predicted exactly because this amount will be influenced by the amount of the shipowner's limitation fund as established under the Civil Liability Convention. The greater the shipowner's limitation amount the less the IOPC Fund will be required to pay in compensation. Conversely, the smaller the limitation fund the larger the amount paid by the IOPC Fund. This principle applies whether the liability ceiling under the Fund Convention is reached or not. At the 1984 Conference the argument was made by the oil industry that the amount of compensation available from the Fund Convention should also be determined in relation to the tonnage of the ship causing the spill.⁶⁵ This proposal was not adopted at the 1984 Conference. Accordingly, the smaller the ship causing the oil spill the greater the potential liability of cargo interests will be relative to that of the shipowner. The oil industry also failed to persuade the delegates at the 1984 Conference that the IOPC Fund should only be responsible for a fixed supplement which would not fluctuate in accordance with the tonnage of the polluting ship.⁶⁶

A statistical analysis of oil spills occurring during 1970-82 concluded that under the 1984 Protocols, as opposed to the 1969 Civil Liability and 1971 Fund Conventions, the shipowner's share of liability would rise from 26.4 per cent to 55.9 per cent while the oil receivers share would drop from 49.4 per cent to 44.1 per cent.⁶⁷ This redistribution of liability in favour of the oil

⁶⁴As reported by 31 December 1992 Japan received 266,411,278 tonnes of contributing oil, Italy 121,292,963 tonnes and the Netherlands 97,452,566; see *IOPC Fund Annual Report 1992*, Annex X at 91.

⁶⁵*Official Records*, vol.2 at 113.

⁶⁶*Official Records*, vol.2 at 619 para.79.

⁶⁷*Seatrade Magazine* July 1984. at 25 quoted by Paulsen, *op cit*, 175.

importer interests was partly attributable to the abolition of "roll-back relief" under the 1992 Fund Convention Protocol.

Although these statistics are interesting history, they can no longer be taken as an accurate reflection of the relative theoretical proportional distribution of liability between shipowners and oil importers under the Civil Liability and Fund Conventions as amended by the 1992 Protocols thereto. Firstly, the upper limits of the 1971 Fund Convention have been raised twice subsequent to the quoted study. Once on 30th November, 1986, and then again on 30th November, 1987. By contrast, the upper ceiling of the 1969 Civil Liability Convention has not been raised since its inception in 1969. The increases in the liability ceiling of oil importers under the 1971 Fund Convention relative to that of shipowners under the 1969 Civil Liability Convention will have the effect that liability will now be distributed between shipowners and oil importers more favourably for the shipowner than was the case before these increases occurred. Secondly, claims for oil pollution damage have showed a marked tendency to be larger nowadays than was the case in 1984. Consequently, the second tier compensation under the 1971 Fund Convention will be invoked with greater frequency. As such, oil importers will be required to pay an increased proportion of total liability through the advent of higher claims exceeding the limits of liability under the Civil Liability Convention and thereby becoming compensable under the 1971 Fund Convention.

8.3.4 Updating of 1992 Protocol limitation amounts

The 1992 Protocols to both the Civil Liability and Fund Conventions incorporate a simplified procedure by which the limits can be increased if the claims experience justifies such action. This innovation constitutes a significant improvement on the Conventions in their original forms. One of the most significant faults of the 1969 Civil Liability and Fund Conventions was that they did not allow for the flexible adjustment of limits to reflect inflation and a continued

escalation in the quantum of claims. The new procedure which is described below has the potential to mitigate this fault.

Where one-quarter of the Contracting States to the 1992 Civil Liability and Fund Conventions propose that the liability limits be raised, the other Members shall be made aware of the proposal and not less than six months thereafter the Legal Committee of IMO shall be required to consider the proposal. All Contracting States have the right to participate in the deliberations of the Legal Committee. Amendments shall be adopted by a two-thirds majority of Contracting States present and voting at the Legal Committee, on condition that at least one-half of the Contracting States are present.⁶⁸ The Legal Committee must consider the experience of incidents, and in particular the amount of damage resulting therefrom, and inflation. It shall also take into account the relationship between the respective limits contained in the 1992 Civil Liability and Fund Conventions.⁶⁹ Upon all Contracting States being made aware of the amendment it shall be deemed to have been accepted after 18 months, unless one-quarter of Contracting States object.⁷⁰

Certain prerequisites must be met before such amendments may be considered. No amendments shall be considered before the Protocols have entered into force. Also, at least five years must have elapsed from the date on which the Protocols are opened for signature. Further a period of at least five years must elapse between entry into force of an amendment and a subsequent invoking of the procedure.⁷¹ There are also limits imposed on

⁶⁸1992 Civil Liability Convention Protocol, Article 15.1-4 and the 1992 Fund Protocol, Article 33.1-4.

⁶⁹1992 Civil Liability Convention Protocol, Article 15.5 and the 1992 Fund Protocol, Article 33.5.

⁷⁰1992 Civil Liability Convention Protocol, Article 15.7 and the 1992 Fund Protocol, Article 33.7.

⁷¹1992 Civil Liability Convention Protocol, Article 15.6 (a) and the 1992 Fund Protocol, Article 33.6 (a).

the amount of any increase.⁷²

8.3.5 "Roll-back relief" abolished

"Roll-back relief", it will be recalled, is a phrase used to describe the indemnification of shipowners, and their guarantors, by the IOPC Fund, of a proportion of the liability assumed by shipowners under the 1969 Civil Liability Convention.⁷³ This procedure is abolished by the 1992 Protocols to the Fund Convention.⁷⁴ Therefore, should the 1992 Protocols to the 1969 Civil Liability and 1971 Fund Conventions enter into force the liability level under the revised Civil Liability Convention will be borne entirely by the shipowner and his guarantors.

In principle, the loss of "roll-back relief", and the way in which such relief was linked to compliance with certain international safety conventions is regrettable. The IOPC Fund will have lost one means through which it could encourage shipowners to be especially conscientious in obeying the applicable safety conventions. On the other hand the abolition of "roll-back relief" will serve to simplify the liability regime instituted by the 1992 Civil Liability and Fund Conventions.

8.3.6 Extended geographical application

The 1969 Civil Liability and 1971 Fund Conventions apply only to pollution damage caused on the territory and the territorial sea

⁷²1992 Civil Liability Convention Protocol, Article 15.6 (b), (c) and the 1992 Fund Protocol, Article 33.6 (b), (c).

⁷³For an analysis of "Roll-back relief" see pg.143 of this work.

⁷⁴Article 5 of the Fund Convention is deleted by Article 7 of the 1992 Protocol to the Fund Convention. All other references to the indemnification of the shipowner in the text of the 1992 Protocols are also removed.

of a Contracting State.⁷⁵ The geographical scope of application of the original Conventions is enlarged by the 1992 Protocols to encompass pollution damage caused in the exclusive economic zone (EEZ). The expanded geographical application applies equally to both Protocols which is consistent with the common approach followed in both components of the two tier regime.

The EEZ, established under Part V of the 1982 United Nations Convention on the Law of the Sea,⁷⁶ extends 200 nautical miles from the baseline from which the breadth of the territorial sea is measured. The Law of the Sea Convention attributes to coastal States preferential rights for the purpose of exploring, exploiting, conserving and managing the living and non-living natural resources of the waters in their EEZ.⁷⁷ The Convention also recognizes State jurisdiction over the protection of the marine environment of the EEZ, including special rights to control ship-source pollution in 'special areas'.⁷⁸ In addition, States are obliged to co-operate to ensure that adequate compensation in respect of all damage caused by pollution to the marine environment is provided.⁷⁹ Furthermore, the preamble to the Convention emphasises that the international community should, through the various conventions governing maritime matters, encourage the evolution of laws which are consistent with one another.

A.H.E. Popp, who was a member of the Canadian delegation at the 1984 Conference, describes the debate surrounding the

⁷⁵This is so in terms of Article 3.1 of the 1969 Civil Liability Convention and Article II of the 1971 Fund Convention.

⁷⁶This Convention was developed at the Third United Nations Conference on the Law of the Sea 1982 (UNCLOS III).

⁷⁷Law of the Sea Convention, Article 56.1(a).

⁷⁸Law of the Sea Convention, Article 56.1(b)(iii) and Article 211.6.

⁷⁹Law of the Sea Convention, Article 235.3.

geographical application of the 1984 Protocols as 'one of the dramatic highlights of the conference'.⁸⁰ This appraisal is confirmed by the *Official Records* of the Conference.

Certain issues, one of which was that the geographical scope of both Conventions should be extended to cover all areas in which Contracting States exercised sovereign rights over natural resources, were crucial to the United States.⁸¹ In this regard, Rear Admiral B.F Hollingsworth, the lead U.S. representative, stated that the U.S. '... could not support any text which did not include at least the exclusive economic zone.'⁸² He justified U.S. policy by pointing out that U.S. oil pollution legislation, in effect at that time, regulated and maintained jurisdiction over areas beyond the territorial seas of the United States.⁸³

Many other States also supported extending the geographical scope of application of the Conventions because to do so was consistent with developments in international law and the Law of the Sea Convention.⁸⁴ Mr Douay, the representative from France, stated that '... [i]t was impossible to ignore the Law of the Sea Convention, which provided for States to exercise their jurisdiction in the exclusive economic zone in order to preserve the marine environment.'⁸⁵

However, many States which were already Party to the Conventions argued that such extension was unwarranted as most pollution

⁸⁰Popp, *op cit*, 123.

⁸¹*Official Records*, vol.2 at 317 para.28.

⁸²*Official Records*, vol.2 at 522 para.48.

⁸³*Official Records*, vol.2 at 522 para.47.

⁸⁴*Official Records*, vol.1 at 147 para.4.

⁸⁵*Official Records*, vol.2 at 367 para.35.

damage occurred within the territorial seas,⁸⁶ and that, if such extension was permitted, it would result in the assumption of too great a risk by Contracting States.⁸⁷ These arguments put forward by the States which were opposed to the extension would seem to have been contradictory, and as such, self-defeating. On the one hand they argued that the extension to the EEZ was not necessary because little pollution damage would be caused in that zone, then they claimed that, if the Conventions were extended to the EEZ the potential liability would be prohibitive.

The stand adopted by the U.S. eventually prevailed. This would appear in principle to be the most desirable outcome because it lends uniformity to international maritime law, protects the rights of coastal states and extends the rights of, for example, fishermen to claim for pollution damage beyond the territorial seas but within the EEZ.

The geographical application of both the 1992 Civil Liability and Fund Conventions shall, upon entry into force, be governed by the following provision.

'This Convention shall apply exclusively:

(a) to pollution damage caused:

- (i) in the territory, including the territorial 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

⁸⁶For example, this was the approach endorsed by the Federal Republic of Germany, see *Official Records*, vol.2 at 362 para.8; the United Kingdom, *Official Records*, vol.2 at 363 para.9; Sweden, *Official Records*, vol.2 at 367 para.31 and the Netherlands, *Official Records*, vol.2 at 368 at 43.

⁸⁷Popp, *op cit*, 123, for example, this concern was articulated by the Federal Republic of Germany, *Official Records*, vol.1 at 362 para.8, Bahamas, *Official Records*, vol.1 at 364 para.14 and the Netherlands, *Official Records*, vol.1 at 368 para.43.

such a zone, in an area beyond and adjacent to the territorial 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.’⁸⁸

Clearly this amendment is an improvement upon the equivalent provisions of the original Conventions as compensation for tanker-source oil pollution damage shall be made more certain within a wider area of potential application. The geographical application is also described with greater certainty which will diminish the possibility of different interpretations of the geographical scope being employed in different jurisdictions.

The extended geographical application may also benefit shipowners. Under the existing regime where pollution damage is caused within the EEZ but beyond the territorial sea neither the Civil Liability or the Fund Conventions apply and national law will normally apply. The application of different liability laws under diverse national legal systems leads to uncertainty and poses the risk of unlimited liability under those systems. By contrast shipowners benefit from legal uniformity and reliable rights to limit liability under the 1992 Protocols.⁸⁹

8.3.7 Pollution from tankers in ballast

Pollution damage caused by spills of persistent oil from unladen tankers and combination carriers shall be compensated for under the provisions of the 1992 Protocols to the Civil Liability and

⁸⁸This important amendment was implemented by Article 3 of the 1992 Civil Liability Protocol replacing Article II of the 1969 Civil Liability Convention and Article 4 of the 1992 Fund Protocol replacing Article 3 of the 1971 Fund Convention.

⁸⁹*Official Recordss*, vol.1 at 147 para.4 and 148 para.5.

Fund Conventions provided certain conditions exist. This constitutes a departure from the provisions of the 1969 Civil Liability and 1971 Fund Conventions, which only provide compensation where pollution damage is caused from laden tankers. This change was conceived at the 1984 Conference by way of an amended definition of a "ship".

8.3.7.1 The existing definition of a "Ship"

The 1969 Civil Liability Convention, defines a "Ship", for the purpose of that Convention, 'as any sea-going vessel and any sea-borne craft of any type whatsoever, actually carrying oil in bulk as cargo'.⁹⁰ The 1971 Fund Convention provides that a "Ship" for the purposes of the Fund Convention has the same meaning.⁹¹

8.3.7.2 "Ship" as defined in the 1992 Protocols

The definition of a "Ship" contained in the 1992 Protocols to the 1969 Civil Liability Convention, is broader, and will, if the 1992 Protocols enter into force, permit more sources of oil pollution damage to be recovered under the 1992 Conventions. For the purpose of the 1992 Protocols a "Ship" includes:

'any sea-going vessel and any sea-borne 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.'⁹²

⁹⁰Civil Liability Convention, Article I.1.

⁹¹Fund Convention, Article 1.2.

⁹²Article 2 of the 1992 Protocol to the 1969 Civil Liability Convention replaces the original definition of a "Ship", and this definition is incorporated by reference by Article 2.3 of the 1992 Protocol to the 1971 Fund Convention.

The revised definition is more complex than that of the original Conventions and envisages two kinds of situations. The first part of the definition is fairly clear and extends the scope of the Conventions to cover unladen tankers. The second part of the definition is a proviso which relates to dual-purpose bulk carriers, also known as combination carriers. These vessels are specially designed, and are capable of carrying liquid and/or solid cargoes. According to the wording of the second part of the definition oil pollution from such vessels shall only qualify for compensation under the 1992 Civil Liability and Fund Convention under two circumstances.

(a) the combination carrier is in fact carrying persistent oil in bulk as cargo. ,

(b) the combination carrier has carried persistent oil in bulk as cargo and the shipowner or the IOPC Fund is unable to prove that no oil residues remained on board. Here the important points are that the burden of proving the negative is on the shipowner or the IOPC Fund and the proviso can apply to any succeeding voyage not only the immediately succeeding voyage.⁹³ The adoption of the phrase 'any voyage' in preference to 'the voyage' raises the possibility of the applicability of the 1992 Conventions to incidents entirely unconnected with the transportation of oil or oil residues at sea in combination carriers.⁹⁴

In conclusion, the definition of "ship" in the 1992 Protocols is wide enough to include tankers on ballast voyages, when they are returning empty, and combination carriers only when they are in fact carrying oil as cargo or in a subsequent voyage with residues of oil on board. During the preparatory work leading up to the 1984 Conference the suggestion that the regime be extended to encompass damage caused by the escape of oil from non-tank

⁹³Popp, *op cit*, 128.

⁹⁴*Official Records*, vol.2 at 6.

vessels was rejected.⁹⁵

The envisaged contribution of oil cargo owners towards the compensation of oil pollution damage in circumstances where the ship causing the spill is not in fact carrying oil as cargo raises certain conceptual problems. At the 1984 Conference the International Chamber of Shipping (ICS) and the International Group of P&I Clubs argued that the cargo interests derived an economic benefit from ballast voyages of tank-vessels in that such voyages were an integral part of the process whereby oil was transported at sea.⁹⁶ Accordingly, they asserted that oil cargo interests should share the risks involved in these voyages. On the other hand, the Oil Companies International Marine Forum (OCIMF), attempted to argue that oil pollution caused by tank-vessels on ballast voyages was unconnected with the carriage of oil at sea and that the Fund Convention should not be made responsible for this damage.⁹⁷ As has been explained the shipowner interests prevailed in this respect.

8.3.8 Pre-Spill Preventive measures

The 1992 Protocols permit recovery of "pure threat" preventive measures where certain conditions prevail.

8.3.8.1 The existing position

The notion of "pollution damage" contained in the 1969 Civil Liability and 1971 Fund Conventions, does not cover expenses, costs or damages incurred in responding to "pure threat" situations. Regrettably this is an absolute rule which originates in the meaning contained in the circular reading of the

⁹⁵*Official Records*, vol.1 at 336.

⁹⁶*Official Records*, vol.2 at 6 (ICS comment) and vol.2 at 53 (P&I comment).

⁹⁷*Official Records*, vol.2 at 334 para.27 this view was also shared by Popp, the Canadian representative, see *Official Records*, vol.2 at 334 para.27.

definitions of "pollution damage", "preventive measures" and "incident".

' "Pollution damage" means loss or damage caused outside the ship carrying oil by contamination *resulting from the escape or discharge of oil from a ship*, wherever such escape or discharge may occur, and includes the costs of preventive measures and further loss or damage caused by preventive measures.'⁹⁸

' "Preventive measures" means any reasonable measures taken by any person *after an incident has occurred* to prevent or minimize pollution.'⁹⁹ An ' "incident" means any occurrence, or series of occurrences having the same origin, *which causes pollution damage*.'¹⁰⁰ (emphasis added by the present writer).

The above definitions read together has the unfortunate consequence that for measures to qualify as preventive measures and as such receive compensation those measures must have been undertaken to prevent or minimize pollution damage. The definition of pollution damage is worded to exclude situations where oil has not in fact escaped, or been discharged, from a ship. Therefore preventive measures will only be "preventive measures" and as such receive compensation where an oil spill actually occurs. It has previously been explained in relation to salvage and other preventive measures how this rule was not conducive to the prevention of pollution damage. It was also noted that in certain jurisdictions this rule had been interpreted generously to include "pure threat" removal measures.

⁹⁸This is in terms of Article I.6 of the 1969 Civil Liability Convention which is incorporated by reference into the 1971 Fund Convention in terms of Article 1.2 of that Convention.

⁹⁹This is in terms of Article I.7 of the 1969 Civil Liability Convention, which is incorporated by reference into the 1971 Fund Convention in terms of Article 1.2 of that Convention.

¹⁰⁰This is in terms of Article I.8 of the 1969 Civil Liability Convention, which is incorporated by reference into the 1971 Fund Convention in terms of Article 1.2 of that Convention.

In order to clarify the position under the Conventions and formulate a more practical and equitable dispensation the definition of "incident" was amended at the 1984 Conference to facilitate the recovery of "pure threat" removal measures.¹⁰¹ These important improvements are explained below within the context of the 1992 Protocols.

8.3.8.2 The position under the 1992 Protocols

The 1992 Protocols permit the recovery of expenses incurred by way of preventive measures, even in those situations where oil has not actually escaped or been discharged from a ship. Claimants must, however, prove that they responded to a grave and imminent danger of pollution damage and that in doing so they acted reasonably.

Article 2.3 of the 1992 Civil Liability Protocol replaces Article I.6 of the 1969 Convention. Sub-paragraph (b) of Article I.6 provides that:

‘“Pollution damage” means:

(a) ...

(b) the costs of preventive measures and further loss or damage caused by preventive measures.’

The 1992 Civil Liability Protocol does not replace or delete the definition of "preventive measures" contained in Article I.7 of the 1969 Convention. Therefore for the purpose of the 1992 Civil Liability Convention "preventive measures" remains - 'any reasonable measures taken by any person after an incident has occurred to prevent or minimize pollution damage'. The definition of an "incident" has however been altered in a manner which facilitates claims for pure threat preventive measures. Article

¹⁰¹Jacobsson & Trotz 'The Definition of Pollution Damage in the 1984 Protocols to the 1969 Civil Liability Convention and the 1971 Fund Convention' (1986) 17 *Journal of Maritime Law and Commerce* 467 at 490-491.

2.4 of the 1992 Civil Liability Protocol replaces the Article I.8 definition of an "incident" contained in the 1969 Convention with a new definition:

'"Incident" means any occurrence, or series of occurrences having the same origin, which causes pollution damage or creates a *grave and imminent*¹⁰² threat of causing such damage.' (emphasis and footnote added by the present writer)

The definition of the terms "pollution damage", "preventive measures" and "incident" in the 1992 Fund Protocol have the same meaning as in Article I of the 1992 Civil Liability Protocol.¹⁰³ Therefore pure threat pollution damage will also be included as a claim for pollution damage under the 1992 Fund Convention.

At the 1984 Diplomatic Conference the U.S. delegation expressed concerns that the term 'grave and imminent' in conjunction with 'threat' '... might result in a failure to compensate Governments for wholly necessary preventive measures.'¹⁰⁴ On this issue the CMI pointed out that the word 'grave' as used in this context in conjunction with the word 'imminent' means approximately the same as 'extremely serious' and 'imminent' means 'near at hand ... on the point of happening'.¹⁰⁵ The CMI further noted that the words 'grave and imminent' are used in the parallel section of the 1969 International Convention Relating to Intervention on the High Seas in Cases of Oil Pollution

¹⁰²As an alternative to the phrase 'grave and imminent' the word 'serious' was considered by the delegates at the 1984 Conference, see, *Official Records*, vol.2 at 241.

¹⁰³Article 2.3 of the 1992 Fund Protocol.

¹⁰⁴Paulsen, *op cit*, 170; see *Official Records*, vol.2 at 317 para.28.

¹⁰⁵*Official Records*, vol.2 at 49 quoting *Black's Law Dictionary* 5th ed. (1979).

Casualties.¹⁰⁶ For these reasons the CMI preferred the incorporation of the proviso 'grave and imminent threat' as opposed to 'serious threat' because in their view it would '... avoid frivolous claims and unnecessary expenditures.'¹⁰⁷ At the 1984 Conference the International Salvage Union (ISU) favoured the incorporation of the phrase 'serious threat' into both Protocols. The ISU believed that the opportunities for successfully preventing the threat of a pollution incident were greater where action was taken while the threat was 'serious' rather than 'grave and imminent'.¹⁰⁸ Clearly, there is considerable merit in this view as it is not ideal to defer salvage measures to the last hour.

It has been noted that the application of the phrase 'grave and imminent' will exclude from compensation the costs of general measures to prevent oil pollution.¹⁰⁹

A further point is that according to Articles 3 and 4 of the 1992 Protocols to the Civil Liability and Fund Conventions respectively the 1992 Conventions shall apply to preventive measures, wherever taken, to prevent or minimize pollution damage. In other words in respect of a claim for costs and losses sustained as a result of preventive measures these can be claimed, wherever taken, even where there is no physical damage to property. For instance salvors may be able to recover their losses where they prevent threatened damage to the environment. Such measures must in any event be reasonable under the circumstances. The concept of reasonableness is not defined in the 1992 Protocols and will therefore have to be decided by the

¹⁰⁶The International Group of P&I Clubs also cited this consideration as a reason for adopting the qualifying phrase 'grave and imminent', see, *Official Records*, vol.2 at 53.

¹⁰⁷Paulsen, *op cit* Appendix A at 180, *Official Records*, vol.1 at 49.

¹⁰⁸*Official Records*, vol.2 at 42 para.3.

¹⁰⁹Jacobsson & Trotz, *op cit*, 491.

courts of the *lex fori*.

8.3.9 Definition of "Pollution Damage"

The 1992 Protocol to the Civil Liability Convention contains a new definition of "pollution damage". This definition retains some of the wording of the 1969 definition with certain additions. Firstly, pure threat pollution damage is included in the 1992 definition through the amendment to the definition of an "incident". Secondly, the 1992 definition incorporates a phrase which clarifies the question of whether, and to what extent, damage to the environment is included within the definition of pollution damage.

Article 2.3 of the 1992 Civil Liability Convention provides that:

' "Pollution damage" means:

(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 by preventive measures.' (the emphasis has been provide by the present writer in order to draw attention to the additional phrase added in 1984 to the original definition).

This definition is incorporated by reference into the 1992 Fund Protocol by Article 2.3. Therefore if the 1992 Civil Liability and 1992 Fund Conventions enter into force compensation for the 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.

The proviso was devised to satisfy the concerns of the IOPC Fund for greater certainty in the type of claims which would be considered admissible under the Conventions. The IOPC Fund was anxious to incorporate a proviso which would prevent the admissibility of claims for environmental loss of the type declared admissible by the Court of Riga in the *Antonio Gramsci* case. One may note that the *Patmos* incident occurred subsequent to the 1984 Conference. It has been submitted that the resulting amendment was not intended to '... change the substance of the present definition as to its general scope, but only to give a clearer delimitation of the scope, thus ensuring a uniform interpretation in Contracting States'.¹¹⁰ Strictly speaking, this observation is only accurate if the general scope of the notion of pollution damage is taken to be the meaning attributed to that concept by the IOPC Fund. It is, however, true that prior to the 1984 Conference compensation had been provided for the reinstatement of the environment under the existing Conventions. For example, the costs of beach clean-up operations have always been admissible as pollution damage regardless as to whether or not actual economic loss arose from the pollution in question.¹¹¹

The original definition of pollution damage is virtually all encompassing and its interpretation is left to the Courts of the *lex fori*. Therefore any delimitation brought about by the proviso will clearly alter the substance of the definition. The proviso in fact restricts the notion of pollution damage and therefore narrows the potential ambit of this concept. In the 1988 Annual Report of the IOPC Fund, an important observation was made as to the purpose and motivation for the amended wording of the definition of "pollution damage".

¹¹⁰Jacobsson & Trotz, *op cit*, 483.

¹¹¹*Official Records*, vol. 1 at 338.

'The Diplomatic Conference based its deliberations on the policy of the IOPC Fund and the principles developed by the IOPC Fund Assembly and Executive Committee as regards the admissibility of claims and the interpretation of the definition of "pollution damage" as worded in the original text of the Convention. The Diplomatic Conference adopted the modified wording of this definition in order to codify the interpretation of the definition as developed by the IOPC Fund.'¹¹²

This analysis of events at the 1984 Conference is confirmed by A.H.E. Popp, who reported that '... there was considerable sympathy for the view that some uniformity of interpretation would be desirable'. In support of uniformity of damage claims under the Fund Convention it was argued that diverse interpretations of the notion of pollution damage in different jurisdictions would violate the "fair shared sacrifice" principle. Oil industries in States maintaining a restrictive definition of pollution damage would effectively be subsidising clean-up and damage claims in States where more liberal interpretation were allowed.¹¹³ Clearly, it is not desirable that this argument be taken too far because logically this would require that all Contracting States to the Fund Convention should incorporate the most restrictive definition of pollution damage. Nonetheless, the argument would seem to have met with some success in that the proviso was incorporated, however, a more rigid definition was avoided in order to facilitate the continued evolution of the concept of pollution damage.¹¹⁴

It has previously been observed, particularly within the context of damage to the environment, that the courts of Contracting States have not always conformed to the policy of the IOPC Fund. It is also unrealistic to expect that private and state claimants

¹¹²*IOPC Fund Annual Report 1988*, section 13.4 (g) at 62.

¹¹³Popp, *op cit*, 122.

¹¹⁴Jacobsson & Trotz, *op cit*, 482; Brodecki, *op cit*, 383.

will obey the policy of the IOPC Fund under the amended 1992 definition. In fact it is desirable that such claimants continue to challenge the policy of the IOPC Fund because by doing so preconceived legal assumptions are questioned and new legal norms are able to develop. In the light of this statement it is necessary to determine what effect the proviso regarding compensation payable for environmental loss has on the ability of claimants to recover such loss.

The proviso is designed to regulate compensation for two types of pollution damage. Direct damage to the environment and pure economic loss as a consequence of damage to the environment. Although the amended definition would at first glance seem to offer greater clarity and certainty than the definition in the original form upon closer examination it is equally open to wide interpretation under national law. Three areas of potential ambiguity exist. Firstly, what constitutes loss of profit? Secondly, what are reasonable measures? Thirdly, must measures "to be taken" in fact be taken?

8.3.9.1 Loss of profits

The word profit as used in the definition of pollution damage is not defined. The Oxford Dictionary provides two meanings to the word profit. Firstly, profit can mean an advantage or benefit. Secondly, profit can mean pecuniary gain, excess of returns over outlay.¹¹⁵

The first meaning has a more general meaning and could conceivably include claims for lost aesthetic value caused by the impairment of the environment sustained by a community at large. In the same way that individuals profit from the maintenance of their looks a coastal region profits from the maintenance of a beautiful and diverse natural environment. A person whose features are disfigured by an assault suffers a loss of advantage

¹¹⁵*The Concise Oxford Dictionary* 7th ed. (1982).

or benefit in exactly the same way the inhabitants of a coastal region suffer a loss of advantage or benefit due to the contamination of their environment by oil. As a matter of principle the IOPC Fund strongly disputes the admissibility of such claims under the 1971 Fund Convention and would be better able to do so under the 1992 Fund Convention according to the wording of the proviso.¹¹⁶ In this respect the proviso has furthered the objectives of the oil and ship-owning industries in precluding claims for irreparable damage caused to the environment and damage pending restoration and in this way has detracted from the substantive scope of the notion of pollution damage. Nevertheless, the degree to which the proviso will be successful in preventing such claims can only be gauged in the future.

The second meaning would include the more usual consequential damage claims founded for example upon lost tourist revenues, lost fishing-catches and lost taxes. The IOPC Fund has no objection to such claims where a claimant has a legal right to claim under national law and can establish that he has suffered quantifiable economic loss. This will even be so where the claimant can not be said to have a proprietary interest in the damaged resource. Clearly the proviso merely describes the pre-existing policy of the IOPC Fund and as such cannot be said to expand or detract from the notion of pollution damage.

On the usual understanding of the meaning of the word 'profit' both types of profits mentioned above may in principle be held admissible by the courts of the *lex fori*. Because the definition does not stipulate how lost profits are to be assessed and does not expressly exclude the abstract quantification of such lost profits according to theoretical models it would be possible for claimants resorting to the abstract quantification of loss to argue that the theoretical model used calculates actual loss of profits. This was the argument raised by the Italian Government

¹¹⁶Jacobsson & Trotz, *op cit* 487.

in the litigation following the *Patmos* incident. One may therefore expect that the proviso will not prevent the assessment of pollution damage in ways which contradict the policy expressed in Resolution No.3 of the IOPC Fund Assembly.

8.3.9.2 Reasonable reinstatement measures

That this particular feature of the proviso may have been incorporated in response to the issues raised by the *SS Zoe Colocotroni* incident has not gone unnoticed by certain commentators.¹¹⁷ At the 1984 Conference, Dr F.L. Wiswall, representing Liberia, noted that the 1969 Conference had not intended that compensation for oil pollution damage under the Civil Liability Convention would include awards such as those awarded in the *Zoe Colocotroni* case.¹¹⁸ This important case is discussed below.

At 0300 hours on 18th March, 1973, the oil tanker *Zoe Colocotroni* ran aground on a reef three and a half miles off the coast of Puerto Rico. In circumstances reminiscent of the *Southport Corporation* case¹¹⁹ the captain of the *Zoe Colocotroni* jettisoned approximately 5,170 tons of crude oil. The prevailing currents carried the oil into a bay called Bahia Sucia which was at the time a healthy, functioning estuarial ecosystem. As a result of the spill considerable ecological damage was caused. The Commonwealth of Puerto Rico and its principal environmental agency, the Environmental Quality Board (EQB) sought recovery for this loss. The owners of the *Zoe Colocotroni* were denied exoneration or limitation of liability on account of the substantial evidence of their privity. In 1978 the U.S. Court for

¹¹⁷Abecassis & Jarashow, *op cit* 237 para.10-138; Wilkinson 'Moving the Boundaries of Compensable Environmental Damage Caused by Marine Oil Spills: The Effect of Two New International Protocols' (1993) 5 *Journal of Environmental Law* 71 at 85.

¹¹⁸*Official Records*, vol.2 at 483 para.55.

¹¹⁹For an analysis of this case see pg.19 of this work.

the District of Puerto Rico delivered judgment in the case of *Commonwealth of Puerto Rico et al. v. The SS Zoe Colocotroni et al.*¹²⁰ The Court awarded damages in favour of the plaintiff, the nature of which caused considerable consternation to shipowners and their P&I Clubs.

The District Court held that the Commonwealth of Puerto Rico had *locus standi* or standing to claim for the requisite environmental damage as it possessed a proprietary interest in the damaged natural resources,¹²¹ and it was the trustee of the public trust in those resources.¹²² Furthermore, the Court held that the Commonwealth of Puerto Rico could maintain the suit in its capacity of *parens patriae* because it had a quasi-sovereign interest in the natural environment.¹²³ The District Court held that the EQB had *locus standi* or standing to claim for the same environmental damage under the provisions of a specific enabling statute.¹²⁴

¹²⁰456 F. Supp. 1327 (D.P.R. 1978) hereinafter abbreviated to *Zoe Colocotroni* (1978).

¹²¹*Zoe Colocotroni* (1978) at 1337 citing *State of Maine v. M/V Tamano*, 357 F. Supp. 1097, 1098-99 (D. Me. 1973); *State Department of Fish & Game v. SS Bournemouth*, 307 F. Supp. 922, 926-30 (C.D. Cal. 1969).

¹²²*Zoe Colocotroni* (1978) at 1337 citing *Geer v. Connecticut*, 161 U.S. 519, 534 (1859); *State of Maryland, Department of Natural Resources v. Amerada Hess Corp.*, 350 F. Supp. 1060, 1065-67 (D. Md. 1972); *State Department of Environmental Protection v. Jersey Central Power & Light Co.*, 124 N.J. Super. 97, 308 A.2d 671 (1973).

¹²³*Zoe Colocotroni* at 1337 citing *Missouri v. Illinois*, 180 U.S. 208, 208, 241 (1901); *Louisiana v. Texas*, 176 U.S. 1 (1900); *Georgia v. Pennsylvania R. Co.*, 324 U.S. 439, 447 (1945); *Georgia v. Tennessee Copper Co.*, 206 U.S. 230, 237 (1907); *Maine v. M/V Tamano*, 357 F. Supp. 1097 (D. Me. 1973).

¹²⁴*Zoe Colocotroni* (1978) at 1337. The enabling statute, P.R. LAWS ANN. tit. 12 § 1131(29), (1977), states that the EQB was conferred powers:

'To bring, represented by the Secretary of Justice, by the Board's attorneys, or by a private attorney contracted for such purpose, civil actions for damages in any court of Puerto Rico or the United States of America to recover the total value of the damages caused to the

More germane to the present analysis was the Court's decision regarding the assessment of harm to non-commercial living natural resources. The Court recognized that the damage to the biological components of the Bahia Sucia ecosystem did not have a market value in the sense of loss of market profits but nevertheless determined that the quantum of damage would be assessed at the cost of restoring the affected areas to the condition in which they were before the incident.¹²⁵ The Court awarded the plaintiffs the market costs of replacing the damaged marine organisms at US\$5,526,583.20 calculated according to biological supply catalogs. The sum of US\$559,500 was awarded to replant mangrove trees which included the cost of a five year monitoring and fertilizing program at a cost of US\$36,000 *per annum* or US\$180,000 for the five year period.¹²⁶ All these costs were estimations based on what the IOPC Fund would consider 'abstract quantification' and 'theoretical models'.

The U.S. Court of Appeals affirmed the District Court's decision to reject the traditional 'diminution of value' test for assessing the quantum of environmental damage by which only the commercial value of the damage would have been taken into account. This decision was based, *inter alia*, upon the interpretation of P.R. LAWS ANN. tit. 12 § 1131(29), (1977), which provided that in a civil cause of action 'the total value of damage caused to the environment' may be recovered. Further,

environment and/or natural resources upon committing any violation of this chapter and its regulations. The amount of the judgment collected to such effect shall be covered into the Special Account of the Board on the Environmental Quality.' (emphasis provided by the present writer).

The District Court also noted, at the same place, that the EQB could not recover damages separate and apart from the Commonwealth.

¹²⁵*Zoe Colocotroni* (1978) at 1344-45 citing *Feather River Lumber Co. v. United States*, 30 F.2d 642, 644 (9th Cir. 1929).

¹²⁶*Zoe Colocotroni* (1978) at 1345.

the recovery provisions of section 311 of the Clean Water Act¹²⁷ provided that the U.S. Federal Government and U.S. States were authorized to recover 'costs or expenses incurred ... in the restoration or replacement of natural resources damaged or destroyed as a result of a discharge of oil or a hazardous substance ... '.¹²⁸ The Appeal Court, however, determined that the decision of the District Court to award damages according to the actual cost of removing oil-damaged mangroves and oil-contaminated sediments and their replacement with healthy mangroves and clean sediments was unreasonable. The Appeal Court also rejected the calculation of damage to marine biota according to their replacement purchase price as if obtained from suppliers of laboratory specimens.¹²⁹

On the question of reasonableness the Appeal Court made the following statement:

' ... the primary standard for determining damages in a case like this is the cost reasonably to be incurred by the sovereign or its designated agency to restore or rehabilitate the environment in the affected area to its pre-existing condition, or as close thereto as is possible without grossly disproportionate expenditures. The focus in determining such a remedy should be on the steps a reasonable and prudent sovereign or agency would take to mitigate the harm done by the pollution, with attention to such factors as technical feasibility, harmful side effects, compatibility with or duplication of such regeneration as is naturally to be expected, and the extent to which efforts beyond a certain point would become

¹²⁷33 U.S.C § 1321(f)(4) (Supp. I. 1977).

¹²⁸*Commonwealth of Puerto Rico, et al., Plaintiffs, Appellees, v. The S.S. Zoe Colocotroni, Her Engines, Appurtenances, etc., et al., Defendants, Appellants*, U.S. Court of Appeals, 628 F.2d 652, 673-74 (1st Cir. 1980) hereinafter abbreviated to *Zoe Colocotroni* (1980).

¹²⁹*Zoe Colocotroni* (1980) at 675-77.

redundant or disproportionately expensive.'¹³⁰

The definition of pollution damage in the 1992 Conventions stipulates that the measures taken to reinstate the environment shall be limited to the 'costs of reasonable measures'. No mention is made as to the relative cost of the measures adopted as constituting a criteria upon which unreasonableness may be established but it would seem likely that this criteria would be one of the factors to be considered. It would, however, be possible for Government authorities responsible for the rehabilitation of the environment to argue that the reasonableness requirement should be based upon the expected success of such operations or the choice of different restoration techniques employed in preference to the pure cost consideration.

The Appeal Court further noted the fact that the case primarily relied upon by the District Court to support the award of damages for replacement value *Feather River Lumber Co. v. United States*,¹³¹

'... did not contemplate a purely *abstract recovery* such as that proposed here, where the *theoretical* "loss" was worked out in terms of what it would cost to buy thousands of creatures which, as a practical matter, would never be brought in such a manner and could not be expected to survive if returned to their damaged habitat. Rather, the Ninth Circuit was simply willing to permit the government to recover its *actual and reasonable* expected restoration costs ... '¹³² (emphasis added by the present writer)

On these grounds the Appeal Court vacated the District Court's

¹³⁰Zoe Colocotroni (1980) at 675.

¹³¹30 F.2d 642 (9th Cir. 1929).

¹³²Zoe Colocotroni (1980) at 677 the wording used by the Appeal Court closely reflects the wording chosen by the IOPC Fund Assembly in Resolution No.3 of 11 October, 1980.

damage award and remanded the case to the District Court with instructions to reopen the record for further evidence on the issue of damages in line with the court's discussion of the principles governing recovery in such cases. The court also offered a number of suggestions to the parties and the District Court on how to address the question of damage assessment on remand. As alternatives to restoration costs, the court suggested (1) the cost of acquiring comparable lands for public parks, (2) the cost of reforesting a similar proximate site where the presence of oil would not pose the same hazard to ultimate success, and (3) the ecological value in monetary terms of non-commercial natural resources. The court also expressed the view that the EQB should have the opportunity on remand to show the feasibility of carrying out a practicable plan for the actual restoration of the environment which would not result on excessive destruction of natural resources or disproportionate costs. If such a plan could be developed the EQB would be able to recover those costs.¹³³ This analysis could in principle be applied to the definition of pollution damage in the 1992 Civil Liability and Fund Protocols.

Certain important conceptual problems arise in connection with the new definition contained in the 1992 Protocols. Firstly, it would seem to be accepted that the cost of environmental reinstatement must be proportionate to the value of the ecological resource damaged. Where the adoption of a plan for the reinstatement of the environment is grossly disproportionate to the value of the natural resource then the measures will be deemed unreasonable and no compensation will be made where such measures are carried out. A fundamental problem arises, however, when an attempt is made to determine the value of the natural resource for the purpose of assessing relative value as opposed to cost of reinstatement. The IOPC Fund as a matter of policy denies that the environment has any value *per se*. The policy of the IOPC Fund stipulates that no compensation shall be made for

¹³³*Zoe Colocotroni* (1980) at 678.

damage to the environment *per se* unless a claimant can prove quantifiable economic loss. The question now arises as to how the IOPC Fund will attempt to evaluate the value of a natural resource where no claimant has suffered quantifiable loss in order to determine whether measures taken to reinstate that resource are proportionate to the value of that resource? For example, where a mangrove swamp which has no use value in quantifiable terms is contaminated by oil one could argue in terms of IOPC Fund policy that the relevant authority is not justified in spending any money reinstating the swamp because any amount spent on the renovation will be disproportionate to the value of the swamp. Clearly, it is difficult to reasonably justify this argument. But the conceptual problem for the IOPC Fund is that where they admit that the swamp has a specific value which therefore justifies reinstatement to a certain level of expense they are conceding in principle that a mangrove swamp does have an actual quantifiable value. Therefore certain contradictions in the policy of the IOPC Fund may be brought to the surface.

If the new definition of pollution damage contained in the 1992 Fund Protocol comes into force the IOPC Fund could now be placed in the difficult position where it may be required to establish the value of natural resources in order to show that the cost of proposed reinstatement measures are grossly disproportionate. In these circumstances the IOPC Fund will be faced with the same problems of quantification that the Soviet and Italian Governments were faced with in the *Antonio Gramsci* and *Patmos* litigation. It remains to be seen how the IOPC Fund experts will attempt to quantify such value without resorting to some type of abstract quantification or theoretical model. This new proviso if it calls for the assessment of the of non-commercial value of natural resources may well have the beneficial result that both parties to the dispute will be forced to consider the actual value of such resources and finally be forced to recognise that such resources do in fact have a value. It is preferable to determine an actual value of a natural resource rather than

maintain the fiction that such resources have no value and only reasonable reinstatement costs can be compensated.

If under the 1992 definition of pollution damage it is maintained that non-commercial natural resources have no value then no compensation will be available where it is not possible or practicable to restore the contaminated resources because reinstatement under such circumstances would be unreasonable. If this is the case then polluters who cause mild environmental damage would be called upon to pay compensation through reinstatement costs while polluters who cause irreparable damage to the environment may not be held responsible.¹³⁴ To overcome this conceptual difficulty the Appeal Court in the *Zoe Colocotroni* case suggested that equivalent alternate sites may be renovated or the ecological value in monetary terms of non-commercial resources could be recovered.¹³⁵

D. Wilkinson is of the opinion that the restoration of alternative sites although being a 'sensible approach' is unlikely to be permitted under the definition of pollution damage in the 1992 Protocols because such reinstatement '... could hardly be described as re-instatement'.¹³⁶ However, the 1992 Protocols do not define the concept of reinstatement nor do they specifically stipulate that reinstatement must relate to the actual resource damaged. Therefore the exact interpretation of the term must lie with the courts of the *lex fori*. The normal understanding of the word reinstate is 'to restore to or replace in a lost position'.¹³⁷ It is significant that the definition refers to reasonable reinstatement for compensation to the

¹³⁴Wilkinson, *op cit*, 88.

¹³⁵*Commonwealth of Puerto Rico, et al., Plaintiffs, Appellees, v. The S.S. Zoe Colocotroni, Her Engines, Appurtenances, etc., et al., Defendants, Appellants*, U.S. Court of Appeals, 628 F.2d 652, 677-78 (1st Cir. 1980).

¹³⁶Wilkinson, *op cit*, 88.

¹³⁷*The Concise Oxford Dictionary* 7th ed. (1982).

environment. Clearly what is reasonable depends on the circumstances of the particular case. Where it is not possible to reinstate the particular part of the environment contaminated it is reasonable that the environment of the area receive treatment which will remedy depreciation of the total ecosystem caused by the irreparable damage to one component thereof.

A further conceptual problem arises in relation to the wording of the definition of pollution damage contained in the 1992 Protocols. If we assume that claimants and the IOPC Fund shall have to determine some value of non-commercial resources in order to determine whether reinstatement costs are justified then both parties must accept that some reduction in that value will occur pending restoration. Once the IOPC Fund has had to concede that some value has been lost the logical conclusion is that compensation must be made for this loss. This brings the IOPC Fund and claimants back to the question of the valuation of the inherent worth of non-commercial natural resources. That this category of loss exists cannot be denied, however, difficulties in quantifying such loss continue to exist.

In the *Zoe Colocotroni* (1980) case the following sentiments were expressed:

'To say that the law on this question is unsettled is to vastly understate the situation. The parties in this lawsuit, and we ourselves, have ventured far into uncharted waters. We do not think plaintiffs could reasonably have been expected to anticipate where this journey would take us'.¹³⁸

This statement is almost as true today as in 1980, however, the legal "waters" on this particular issue are considerably more chartered than was then the case. This is especially so in the light of legal developments in the United States. The laws on

¹³⁸*Zoe Colocotroni* (1980) opinion of the Court, per Campbell, Circuit Judge, at 678.

this issue as they pertain to oil pollution from ships is explained in Part Four of this work which deals with the substantive provisions of the OPA of 1990.

8.3.10 Channelling of liability to the shipowner

The delegates at the 1984 Conference hoped that the amended channelling provisions would result in the uniform treatment of potentially responsible parties in the many States where the revised Civil Liability Convention would come to apply.¹³⁹ The definition of an "owner" is not changed but the channelling (and conversely restriction) of claims to the registered owner under 1969 Civil Liability Convention has been made more certain under the 1992 Protocol to the Civil Liability Convention.

8.3.10.1 Existing channelling provisions

The reader will recall¹⁴⁰ that Article III.4 of the 1969 Civil Liability Convention stipulates:

'No claim for compensation for pollution damage may be made against the owner otherwise than in accordance with this Convention. No claim for pollution damage under this Convention or otherwise may be made against the servants or agents of the owner.'

8.3.10.2 The 1992 channelling provisions

The 1992 Protocol to the Civil Liability Convention provides for the extension of those categories of persons against whom claims may not be made. In this way the 1992 Protocol precludes claims for compensation in terms of the Convention, or otherwise, against a wider class of persons against whom liability could

¹³⁹*Official Records*, vol.1 at 154 para.10.

¹⁴⁰For a detailed analysis of the channelling provisions of the 1969 Civil Liability Convention, see pg.108 of this work.

otherwise conceivably attach. This important change is brought about in terms of Article 4.2 of the 1992 Protocol which amends Article III.4 of the 1969 Civil Liability Convention and which provides that:

'No claim for compensation for pollution damage may be made against the owner otherwise than in accordance with this Convention. Subject to paragraph 5 of this Article,¹⁴¹ no claim for compensation for pollution damage under this Convention or otherwise may be made against:

- (a) the servants or agents of the owner or members of the crew;
- (b) the pilot or any other person who, without being a member of the crew, performs services for the ship;
- (c) any charterer (howsoever described, including a bareboat charterer), manager or operator of the ship;
- (d) any person performing salvage operations with the consent of the owner or on the instructions of a competent public authority;
- (e) any person taking preventive measures;
- (f) all servants or agents of persons mentioned in subparagraph (c), (d) and (e);

unless the damage resulted from their personal act or omission, committed with the intent to cause such damage, or recklessly and with knowledge that such damage would probably result.' (footnote and emphasis provided to the proviso by the present writer)

Thus, when the 1992 Civil Liability Convention applies to oil pollution damage and the proviso emphasised above does not apply, claimants may not proceed against the registered shipowner's servants and/or agents. Pilots, time charterers, all other

¹⁴¹Civil Liability Convention, Article 3.5 remains unamended and preserves the shipowner's rights of recourse against third parties.

charterers, including bareboat charterers, ship managers and operators, salvors and people taking preventive measures together with their respective servants and agents are also protected. Abecassis and Jarashow correctly observe that the protected categories of potentially responsible parties is not exhaustive. For example, these commentators submit that ship-builder, ship-repairer, ship-classification societies and those associated with ships colliding with tankers may not be protected.¹⁴²

The registered owner retains all the normal rights of recourse, according to the usual national laws of negligence, tort or delict, against the exempted categories of people.¹⁴³ Where a third party is sued by the registered owner in a recourse recovery action that third party is precluded from proceeding against any other third party encompassed within the categories listed (a) to (f) to recover its losses unless it is able to invoke the proviso.

At the 1984 Conference the Oil Companies International Marine Forum (OCIMF) made a proposal in terms of which the channelling provisions would be replaced by the following provision.

'No claim for compensation for pollution damage under this Convention or otherwise should be made against any person other than the owner'.¹⁴⁴

The OCIMF was not, however, recommending that the shipowner's right to recourse should be dispensed with.¹⁴⁵ In the event the OCIMF proposal received little support from the delegates and was

¹⁴²Abecassis & Jarashow, *op cit*, 233 para.10-126.

¹⁴³1992 Civil Liability Convention, Article III.5.

¹⁴⁴Popp, *op cit*, 121 fn.12 citing IMO Doc. LEG/CONF.6/C.2/W.P.24 and contained in the *Official Records*, vol.2 at 283.

¹⁴⁵*Official Records*, vol.2 at 434 para.27.

rejected.¹⁴⁶ Nonetheless, it is important to consider the rationale for the suggestion. The proposal no doubt had its roots in the judgement of Judge McGarr of the United States District Court for the Northern District of Illinois rendered on the 18th April, 1978 (coincidentally some two weeks prior to the opening of the Conference).¹⁴⁷ Interpreting the 1969 Civil Liability Convention, in the context of the *Amoco Cadiz* oil spill, Judge McGarr held a number of affiliated oil companies liable for the incident in addition to the registered owner. Oil companies were understandably very concerned by this decision as it had the effect of exposing them to direct liability. This concern is alluded to in the statement which accompanied the OCIMF channelling proposal where it was argued that the proposal would minimize '... the risk of ingenious attempts to circumvent the Conventions.'¹⁴⁸ This comment made by the OCIMF clearly referred to the exceptional developments which occurred in the *Amoco Cadiz* litigation. Due to the significance of this case it is described in greater detail below.

On the 16th March, 1978, the supertanker *Amoco Cadiz*, ran aground on the French coast after its steering gear failed in a storm. Severe pollution damage was sustained to the French coastline. The 1969 Civil Liability Convention applied to all claims for oil pollution damage in France. This was because France had ratified that Convention on the 17th March, 1975, and therefore when the Civil Liability Convention came into force on the 19th June, 1975, the provisions of the Convention became the law applicable in France. Unfortunately, the 1971 Fund Convention did not apply because France only acceded to that Convention on the 11th May, 1978, and the Fund Convention came into force for France on the 16th October, 1978. Therefore, at first blush, the *Amoco Cadiz* pollution damage would have had to be resolved according to the

¹⁴⁶*Official Records*, vol.2 at 436 para.44.

¹⁴⁷*In re Oil Spill by the Amoco Cadiz off the Coast of France on March 16, 1978*, 1984 A.M.C. 2123 (N.D. Ill. 1984).

¹⁴⁸*Official Records*, vol.2 at 283.

provisions of the 1969 Civil Liability Convention alone. Clearly, the Civil Liability Convention was the law of the place where the wrong was committed (i.e. the *lex loci delicti*). The extent of the damage caused by the spill greatly exceeded the limits of liability under the Civil Liability Convention, French claimants responded to this predicament by attempting to obtain compensation from parties other than the registered owner of the *Amoco Cadiz*. To this end they endeavoured, successfully, to establish jurisdiction in the United States.

The registered owner of the *Amoco Cadiz* was Amoco Transport Company ("Transport"), a Liberian corporation indirectly wholly owned by Standard Oil of Indiana ("Standard"). In practice the management of the *Amoco Cadiz* was carried out entirely by Amoco International Oil Co. (AIOC) which like "Transport" was a wholly owned subsidiary of "Standard". Judge McGarr held that the proper law to be applied to determine whether AIOC and "Standard" could be sued was that of the United States. However, he went on to safeguard this decision by stating that even if the French law, including the 1969 Civil Liability Convention, were applicable to this issue, none of the provisions of the Civil Liability Convention would bar suits against "Standard" or AIOC. This, the learned judge held, was because the 1969 Civil Liability Convention is not the exclusive remedy available to victims of oil pollution damage and does not prohibit such victims from bringing an action in tort outside the Civil Liability Convention against anyone other than the registered owner of the vessel or its agents or servants. The learned Judge therefore concluded that none of the plaintiffs were precluded under French law from suing Standard or AIOC because neither "Standard" nor AIOC, both parent corporations of "Transport", were the registered owner of the *Amoco Cadiz* or an agent or servant, of the registered owner.¹⁴⁹ Therefore, even if the 1969 Civil Liability Convention does apply it will not preclude actions against a vessel-

¹⁴⁹*In re Oil Spill by the Amoco Cadiz off the Coast of France on March 16, 1978*, 1984 A.M.C. 2123 at 2171, 2190-1 (N.D. Ill. 1984).

operating affiliate or a corporate parent company of the registered owner.

Judge McGarr pierced the corporate veil and held that "Standard" and its two subsidiaries "Transport" and AIOC were liable without limitation for the damage caused by the accident.

Firstly, AIOC as the party which exercised complete control over the operation, maintenance and repair of the *Amoco Cadiz*, and the selection of her crew, had a duty to ensure that the vessel was seaworthy and adequately maintained; this they failed to do and they were therefore not entitled to limit their liability.¹⁵⁰ Secondly, "Transport" as the nominal (registered) owner of the *Amoco Cadiz* had failed to meet the burden of proving that it was free from privity and knowledge with respect to the negligence which proximately caused the grounding of the vessel. "Transport" was therefore liable without limitation for the damage suffered by the claimants as a result of the grounding of the *Amoco Cadiz*.¹⁵¹ Thirdly, "Standard" as a multinational corporation was responsible for the tortious acts of its wholly owned subsidiaries, AIOC and "Transport". Also, "Standard" was initially involved in and controlled the design, construction, operation and management of *Amoco Cadiz* and treated the vessel as if it were its own so that "Standard" was liable for its own negligence and that of AIOC and "Transport" and was liable to the French claimants for damages resulting from the grounding.¹⁵² Therefore, a major oil company can be held liable not only for its own negligence but also for the negligence of its subsidiaries based on a relationship of control and dominance

¹⁵⁰*In re Oil Spill by the Amoco Cadiz off the Coast of France on March 16, 1978*, 1984 A.M.C. 2123 at 2171, 2191-3 (N.D. Ill. 1984).

¹⁵¹*In re Oil Spill by the Amoco Cadiz off the Coast of France on March 16, 1978*, 1984 A.M.C. 2123 at 2193-4 (N.D. Ill. 1984).

¹⁵²*In re Oil Spill by the Amoco Cadiz off the Coast of France on March 16, 1978*, 1984 A.M.C. 2123 at 2194 (N.D. Ill. 1984).

over those subsidiaries. It is not necessary to establish any abuse of that control or unfairness resulting therefrom. On appeal to the U.S. Court of Appeals, Seventh Circuit, all the findings of law by the District Court were upheld.¹⁵³

Thus, the reasoning and judgement of the District Court as endorsed by the U.S. Court of Appeals has the result that the major oil companies that own or operate ships through subsidiaries, in veiled attempts to insulate the parent company from liability, may nevertheless be exposed to unlimited liability for oil pollution. Hence, the recommendation by the OCIMF at the 1984 Conference to limit liability strictly to the registered owner. Significantly, when the 1992 Protocol to the 1969 Civil Liability Convention enters into force a parent company which is not the registered owner of the ship nor an operator, manager, servant or agent of the registered owner is not afforded the protection of Article III.4 of the 1992 Civil Liability Convention.

In a further attempt to eliminate the existence of this legal loop-hole which exposes oil companies to potential liability the OCIMF also proposed that the 'affiliates and subsidiaries' of the registered owner be specifically included as a category of protected persons under Article III.4(a) of the 1992 Civil Liability Convention.¹⁵⁴ As the delegates expressly rejected this proposal one may infer that their intention was that such parties should be exposed to liability outside the 1992 Civil Liability Convention.

It is frequently argued that the channelling provisions are necessary to obviate the need for the whole spectrum of potentially responsible parties associated with the operation of

¹⁵³*In re Oil Spill by the Amoco Cadiz off the Coast of France on March 16, 1978*, 1992 A.M.C. 913.

¹⁵⁴*Official Records*, vol.1 at 157.

a tanker to obtain oil pollution liability insurance.¹⁵⁵ However, to a large extent the owner's rights of recourse negate this perceived benefit of channelling. Delegates at the 1984 Conference perceived this contradiction¹⁵⁶ and it is necessary to isolate the true purpose of the channelling procedure. It is submitted that the channelling procedure serves the primary purpose of insulating the tanker industry and especially the oil industry from unlimited liability for oil pollution damage. This is because where the owner is able to limit his liability in terms of the Civil Liability Convention, which will be the case in most instances, then all parties protected by the channelling provisions are protected by that limitation amount as the owner only has recourse to the other parties up to the amount he has paid in compensation. As such, these parties are still exposed to potential liability but in the majority of circumstances the risk is limited.

8.3.11 Barring the shipowner's right to limit

The criterion in terms of which the shipowner can lose his right to limit liability under the 1969 Civil Liability Convention was revised by the 1984 Protocol to that Convention, the revised test has been incorporated by reference into the 1992 Protocol to the 1969 Civil Liability Convention.

8.3.11.1 The 1969 barring test

Upon proof that 'the incident occurred as a result of the actual fault or privity of the owner' shipowners lose their right to limit liability under the 1969 Civil Liability Convention.¹⁵⁷ This test is generally applied, under the provisions of the 1957

¹⁵⁵Abecassis & Jarashow, *op cit*, 233 para.10-126; *Official Records*, vol.2 at 55; vol.2 at 125 para.6 and 7; vol.2 at 419 para.9; vol.2 at 442 para.4.

¹⁵⁶*Official Records*, vol.1 at 154 para.8.

¹⁵⁷Article V.2 of the 1969 Civil Liability Convention.

Convention on Limitation of Liability, to many different types of maritime claims and is in no way specific to claims for oil pollution damage.

The phrase 'actual fault or privity of the owner' has on past occasions been broadly interpreted¹⁵⁸ and interpretations have varied from one jurisdiction to another.¹⁵⁹ It is possible that the tendency to interpret the 'fault or privity' test widely may become even more marked in the future especially where disputes involve large oil pollution claims. This is because judges are sometimes placed under considerable pressure to find ways in which compensation can be exacted, commensurate with the degree of damage caused. One of the ways to achieve this is by breaking the owner's right to limit, particularly where the owner is thought to have an especially "deep pocket". This phenomenon, whereby the traditional shipowner's right to limit has been eroded obviously places shipowners in a tenuous position as liability cannot be predicted with any degree of certainty. In a submission made by the International Group of P&I Associates at the 1984 Conference the test of 'actual fault or privity' was described as '[o]ne of the most glaring defects in the CLC'. Their criticism was based upon the delay caused in effecting payments of compensation due from the shipowner, his insurer and the IOPC Fund while a ruling as to the shipowner's right to limit was made.¹⁶⁰ Clearly, the main concern of shipowners and the P&I Clubs was that the test was not worded strongly enough to protect them from unlimited liability for oil pollution damage.

8.3.11.2 The 1992 barring test

¹⁵⁸Springall 'P&I Insurance and Oil Pollution' (1988) 6 *Journal of Energy and Natural Resources Law* 25 at 36 suggests that this test has generally been given an increasingly artificial interpretation in many jurisdictions.

¹⁵⁹*Official Records*, vol.1 at 149 para.1 and vol.1 at 159 para.1.

¹⁶⁰*Official Records*, vol.2 at 55.

The general consensus at the 1984 Conference was that the right to limit liability should be linked to the limits available. The more comprehensive the limits the more secure the rights of the shipowner to limit liability would have to be. The revised test under 1992 Protocol should enable shipowners to maintain the right to limit with greater certainty. Article 6.2 of the 1992 Protocol to the 1969 Civil Liability Convention replaces Article V.2 of that Convention, with the following test:

'The owner shall not be entitled to limit his liability under this Convention if it is proved that the pollution damage resulted from his personal act or omission, committed with intent to cause such damage, or recklessly and with knowledge that such damage would probably result.'

The substantive part of this test mirrors the wording of Article 4 of the 1976 Convention on Limitation of Liability for Maritime Claims (1976 LLMC Convention)¹⁶¹ and the Convention for the unification of certain rules relating to International Carriage by Air (the Warsaw Convention) as amended by the Hague Protocol of 1955.¹⁶² One of the factors which was taken into consideration in adopting the new test was that the revised Civil Liability Convention would be aligned with the provisions of these Conventions.¹⁶³ As the revised test is more narrow than the 'actual fault or privity' test it will greatly improve the shipowner's chances of maintaining his right to limit if and when the 1992 Protocol to the Civil Liability Convention enters into force. This test is worded strongly in favour of the shipowner interests which led the leading commentator on the subject of oil pollution claims to the conclusion that '... for all practical

¹⁶¹Done at London, on the 19th November, 1976 which entered into force on the 1st December, 1986.

¹⁶²*Official Records*, vol.2 at 55.

¹⁶³*Official Records*, vol.1 at 159 para.1.

purposes, the new right to limit may be regarded as unbreakable.'¹⁶⁴ Obviously, the accuracy of such predictions can only be gauged after the actual application of the test within the context of serious oil spills.

The relationship between the enforceability of the shipowner's insurance contract and the criteria in terms of which the owner will be able to limit liability may at times become tenuous. The standard of behaviour of the owner which will break his right to limit liability under the 1992 Protocol is dangerously similar to the English legal concept of 'wilful misconduct' which is the standard of misconduct by the assured which invalidates the insurance contract. Given that most policies insuring oil pollution liability are governed by English law of marine insurance, where the owner's right to limit is broken it will also be possible that the insurer will be able to prove 'wilful misconduct' and as such is entitled to refuse to pay out on the owner's liability insurance policy. In most cases cover will remain intact where the shipowner successfully invokes the right to limit, and the cover may in some circumstance fail if the right to limit is broken. This reality may discourage victims of oil pollution from attempting to challenge the owner's right to limit.

8.3.12 The relationship between the 1976 LLMC Convention, and the Civil Liability Convention

In terms of Article 3(b) of the 1976 LLMC Convention, the provisions of the Convention shall not apply to:

' ... claims for oil pollution damage within the meaning of the International Convention on Civil Liability for Oil Pollution, dated 29 November 1969 ... '

¹⁶⁴Abecassis & Jarashow, *op cit*, 244; Springall, *op cit*, 36 describes limitation under the 1984 Protocol, as 'virtually unbreakable'. Because the same test for limitation was incorporated into the 1992 Protocols, by implication these opinions will apply to the 1992 Protocol.

Accordingly, all claims for oil pollution damage, as defined in Article I.6 of the 1969 Civil Liability Convention, do not fall within the scope of the 1976 LLMC Convention. Article 3 (b) of the 1976 LLMC Convention has the effect of excluding claims for oil pollution damage, which are within the meaning of the Article I.6 definition of pollution damage, but not within the geographical scope of the 1969 Civil Liability Convention.¹⁶⁵ Therefore claims for pollution damage outside the Article I.6 definition of pollution damage contained in the 1969 Civil Liability Convention are excluded from the application of the 1976 LLMC Convention, but claims for oil pollution outside that definition are by implication subject to limitation in terms of the 1976 Convention. As such oil pollution damage caused by the escape of non-persistent oil, or by oil which was not carried in bulk as cargo will be encompassed under the 1976 LLMC Convention. As such the owners of such polluting ships may be able to assert the right to limit liability according to the provisions in the 1976 LLMC Convention. This will of course depend on whether or not the State, in which such oil pollution has been caused, has contracted to the 1976 LLMC Convention. Furthermore, certain States may have promulgated national legislation governing the control of oil pollution other than the 1969 Civil Liability Convention.

8.4 Conclusion to the 1992 Protocols

In sum, the 1984 Protocols achieved certain increased protection for victims of oil pollution. The Protocols balanced the relative limitation limits applicable to small and large tankers. A simplified amendment procedure was developed which permits the increase of the limitation limits where appropriate. The geographical scope of the Conventions are extended to the EEZ in conformity with international legal developments. Pure threat

¹⁶⁵Article II of the 1969 Civil Liability Convention stipulates that the 1969 Civil Liability Convention shall apply exclusively to pollution damage caused on the territory including the territorial sea of a Contracting State and to preventive measures taken to prevent or minimize such damage.

removal measures shall become admissible and the definition of a "ship" is expanded to cater for wider pollution sources. Most significantly, the limits of applicable damage are greatly increased.

On the other hand the 1984 Protocols also introduce amendments which protect polluters and which will work against the interests of victims. The Protocols narrow the definition of "pollution damage" and thus restricts the potential application of this notion. This is especially relevant in the context of environmental damage. The test for breaking the shipowner's right to limit has become more secure. The channelling provisions have been expanded, thus increasing the scope of potentially responsible parties protected from liability under the Civil Liability Convention.

The 1992 Protocols introduce revisions upon the 1984 Protocols which increase the probability of the 1992 Protocols entering into force through decreasing the entry into force requirements. At the same time the 1992 Protocol to the Fund Convention introduces a "capping" procedure which has the potential to encourage the early ratification of the 1992 Fund Protocol by Japan which is the major oil importer and contributor to the IOPC Fund. This new procedure should help to bring the 1992 Protocols into force at an early date. If the 1992 Protocols enter into force it will help to settle the problem of the gold franc/SDR conversion conundrum which has been the cause of such controversy in the *Haven* case.

On the 19th January, 1993, Shell International Marine delivered a list of proposals to the European Parliament, European Commission, and industry bodies, outlining a course of action to be adopted by government. The aim of this document which had been initiated by the *Braer* spill and the fact that tanker-source oil spill prevention was on the agenda at the European Parliament on

the 21st January, 1993,¹⁶⁶ was:

'... to help force substandard ships out of business while leading to increased freight rates needed to encourage shipowners to invest in safer maintenance and manning policies, as well as new tonnage.'¹⁶⁷

In this policy document Shell International Marine proposed an eight point plan of action, urging governments to:

'[1] Improve accountability of flag state administrations to the International Maritime Organization (IMO).

[2] Tighten links between tanker ownership and country of registry and prevent owners from "shopping around" among registries.

[3] Tighten international manning, training, and certification rules.

[4] Increase financial resources of government agencies to recruit and train sufficient qualified staff.

[5] Improve quality, frequency, scope and coordination of inspections while strengthening sanctions against substandard ships.

[6] Publicize ship inspection deficiencies and inquiries into ship casualties.

[7] *Quickly ratify the 1992 IMO Protocols for Oil Pollution Compensation.*

[8] *Speed payments from the Oil Pollution Compensation Fund.*¹⁶⁸ (emphasis and numbering that of the present writer)

¹⁶⁶D. Knott 'Voice of experience joins tanker debate' Feb. 1, 1993 *Oil & Gas Journal* at 19.

¹⁶⁷'Shell calls for improved tanker safety' Feb. 1, 1993 *Oil & Gas Journal* at 18.

¹⁶⁸'Shell calls for improved tanker safety' Feb. 1, 1993 *Oil & Gas Journal* at 18 The reference to 'the Oil Pollution Compensation Fund' refers to the International Oil Pollution Compensation Fund (IOPC Fund) as developed by the Fund Convention and funded by oil companies importing oil to states party to that convention.

What is apparent from the position advanced by Shell International Marine is that this organization proposes the implementation of strong "command and control" measures.¹⁶⁹ Presumably, Shell's rationale for this position was that if all maritime states were committed to prevent all sub-standard tankers from operating this would reduce the capacity of the tanker fleet and raise the freight rates of the high-quality tonnage which is permitted to continue trading. This in turn would provide the necessary capital to enable the standards of the tanker fleet to improve. Clearly, if this plan was uniformly implemented to a very high standard the desired result would eventually occur. However, it is unlikely that this ideal will be attained.

When dealing with the question of liability, in the final two recommendations, Shell supports the maintenance of the *status quo*. Shell urges the governments European coastal states to 'quickly ratify' the 1992 Protocols to the Civil Liability and Fund Conventions. It is noteworthy that these Protocols like the original Conventions preclude claimants from suing the actual cargo owner, who is, in most instances, the charterer. Instead, under the 1992 Protocol to the Fund Convention all importers of oil by sea to Fund Convention states mutually bear the costs of pollution claims paid by the IOPC Fund. Furthermore, the amount of compensation which can be paid by the Fund is limited to an unassailable upper ceiling. In this way the losses which would be incurred by the actual owner of oil involved in a spill are distributed between the entire oil industry, and, because this liability is limited it is kept to easily manageable and acceptable limits. Obviously, this system of mutual cargo owner liability does not provide significant incentives for the cargo owner to be selective where he charters a tanker. In fact, the opposite is true. Where the individual cargo owner knows he will not be exposed to personal liability he will continue to use the least expensive tanker. As a group all the cargo owners will tend

¹⁶⁹Points 1-6.

to behave in this way to maximise individual profits.

The final proposal made by Shell is that payments under the IOPC Fund must be made as fast as possible. One would reasonably expect a large oil importer such as Shell to be reluctant to pay claims under the IOPC Fund as such claims are paid by oil importers in Fund Convention States, including Shell. Why then, it may be asked is this suggestion made, or rather, how does Shell, and the oil industry benefit from speedy payments?

Is it possible that Shell is being benevolent? Is Shell so concerned that victims of oil pollution are compensated that it almost wants to give its money, and that of other oil companies, away? It is not difficult to conclude that this is not the real reason. Shell, and by implication the entire oil industry, is very concerned that victims of oil pollution receive generous compensation as soon as possible after the spill, without claimants which are frequently government agencies who incur clean-up expenses, being forced to resort to litigation. Where governments do not receive such compensation they may be inclined to revise their domestic legislation to include cargo owner liability in order to have recourse to a defendant with greater resources than tanker owners. Shell, and other oil companies, would not welcome such developments. However, it is suggested in this work that such development would be advantageous not only in that it would provide claimants with defendants with large resources but would also rapidly see the development of a two-tier tanker freight market. The two tier freight market describes a situation where oil company charterers of tankers pay a premium for high quality tankers while avoiding lower quality tankers or paying a reduced rate for the use of such vessels. The advent of the two tier tanker market would result in the capitalization of the tanker industry and the subsequent improvement in tanker standards. This concept will be amplified upon after the analysis of oil pollution liability under the voluntary compensation agreements and OPA 90 and U.S. State Legislation, respectively, in Part Three and Part Four. The question will be asked to what

extent these liability mechanisms together with those of the international Conventions contribute to or retard the development of safer tanker standards. To justify a shift towards including the cargo-owners as a party potentially liable for tanker-source oil pollution damage involves a two stage argument. First, the exact cause of tanker-source oil pollution will be isolated and second it will be shown why subjecting the cargo owner to potential pollution liability will effectively and efficiently solve the problem. This analysis is undertaken in Chapter Fourteen, the penultimate chapter of this work, which covers U.S. State liability legislation and the provision for direct cargo owner liability.

CHAPTER 9

TOVALOP and CRISTAL: An Introduction

9.1 Introductory discussion

In addition to the 1969 Civil Liability Convention and 1971 Fund Convention, there are two further agreements, which were invented and evolved by the shipping and oil industry. Through these agreements, compensation for certain ship-source oil pollution damage may be recoverable. These agreements are: the Tanker Owners Voluntary Agreement concerning Liability for Oil Pollution (TOVALOP), and the Contract Regarding a Supplement to Tanker Liability for Oil Pollution (CRISTAL). The format and substantive provisions of these agreements, together with the utilization of a two-tier compensation system, bear a close resemblance to the Civil Liability and Fund Conventions. Nevertheless, despite many similarities between TOVALOP and CRISTAL *vis-à-vis* the 1969 Civil Liability Convention and 1971 Fund Convention, numerous important substantive and conceptual differences also exist. These differences will be amplified in the present discussion. One of the objectives of the present inquiry is to indicate the relative strengths and weaknesses of the parallel systems of compensation and to assess which, on a broad balance of criteria, would best serve the international community.

The TOVALOP and CRISTAL agreements presently in existence will expire on 20th February, 1997. It is not coincidental that these agreements are renewed and expire on the same date that the P&I Clubs employ as the start and close their policy years (i.e. 20th February). This is done because the P&I Clubs provide the financial backing necessary to guarantee the financial responsibility assumed by individual members under the TOVALOP agreement. P&I mutual insurance was explained in Part Two and the TOVALOP agreement may be described a special kind of P&I cover, which is regulated by its own particular terms and conditions; (i.e. the TOVALOP agreement), which sometimes operates in

conjunction with sources of mutual funds derived from oil companies; (i.e. funds levied on oil importers in terms of the CRISTAL contract).

Under their respective agreements, tanker owners and oil companies, of their own accord, accept, through TOVALOP and CRISTAL respectively, limited 'financial responsibility' for certain kinds of ship-source oil pollution damage. Recognizing that compensation provided by participating members in terms of these agreements is, in principle, voluntary, the term 'financial responsibility' is used in preference to 'liability' which *de facto* connotes responsibility determined through the operation of law.

9.1.1 Objectives of this inquiry

This part, (i.e. Part Three), of the present work clarifies and explains the provisions and operation of the voluntary compensation agreements. These agreements, which have been fundamentally revised since 20th February, 1987, have on the whole attracted remarkably little commentary from legal practitioners, industry, government or academic commentators. Current, critical and comparative analysis of this important, innovative, complex and unique compensation arrangement is clearly overdue.

In line with the fundamental proposition proposed in this thesis, the present inquiry will demonstrate that the existence of the voluntary compensation regime serves to allow the oil companies to continue to avoid direct and full responsibility for the standard of tankers used by that industry. This argument points to a widely held misconception about the voluntary compensation regimes and the role they fulfil. Thus, it is regularly professed, that the voluntary compensation agreements demonstrate the responsibility of the oil industry towards the problem of oil pollution. This professed 'responsibility' certainly exists on a *prima facie* examination of the agreements; however, on a more

complicated and critical level, the 'responsibility' is revealed as a strategy which postpones the assumption of full responsibility and accountability of the oil industry for the quality of the tankers they charter. It will be argued that the oil industry, through Cristal Limited,¹ in effect pays oil tanker owners to continue accepting responsibility for oil pollution. And, by implication, pays the governments of the international community to accept this state of affairs.

An examination of the voluntary agreements which does not automatically accept the "fully-responsible" characterisation of those agreements, must take into account the active competition waged for control (over the form of liability) between the voluntary agreements and the international conventions.

9.1.2 The enigmatic voluntary agreements

The paucity of commentary relating to this facet of oil pollution compensation, may, in part, be attributable to the scanty information divulged by the P&I Clubs and Cristal Limited relating to the actual operation of TOVALOP and CRISTAL respectively.

All settlements entered into under these agreements are subject to strict confidentiality. Information concerning the number and nature of claims, the criteria in terms of which damages are assessed and the amounts paid to claimants for different types of claims under TOVALOP and CRISTAL is never made public.² Other information made available to the public is, in general, discreet

¹Briefly, Cristal Limited is the organization which manages the CRISTAL contract.

²Interviews conducted by the present writer in October, 1992, at the registered offices of International Tanker Owners Pollution Federation Limited (ITOPF) and Cristal Services Limited; Staple Hall, 87-90 Houndsditch, London. See also Becker 'Acronyms and Compensation for Oil Pollution Damage from Tankers' (1983) 18 *Texas International Law Journal* 475 at 478.

and circumspect. This policy has been steadfastly adhered to with a singular strength of purpose throughout the existence of the voluntary agreements. Put plainly, the workings of these agreements are fairly secretive.

The rationale for this veil of secrecy is easily understood from the perspective of both the shipping and oil industries, which must take cognizance of their respective self-interest. Nevertheless, it cannot be expected that this guarded policy should be endorsed by independent bodies. The international community must also champion its own (higher) self-interest. Clearly, the control of information by the oil and shipping industry concerning the settlement of a large proportion of oil pollution claims is not an ideal state of affairs. It may further be pointed out that the general control of information by the oil industry frequently attracts criticism. Adverse comment on the prevalence of secrecy in the oil industry has by no means been confined to environmental concerns, however, this is increasingly becoming a regular cause for complaint. In short, there is a definite need for better disclosure of information to the public in the area of voluntary compensation for tanker-source oil pollution damage.

Therefore, although it is accepted that the voluntary compensation agreements provide important mechanisms through which compensation for oil pollution damage can be obtained, it is difficult to gauge the exact nature or extent of the remedies available. Only the Management and Directors of the ITOPF; which, among other activities, administers the TOVALOP agreement; P&I Clubs, which pay the claims which arise under TOVALOP, and Cristal Limited, which settles and pays CRISTAL claims, are in a position to assess the record of TOVALOP and CRISTAL from a truly comprehensive perspective. It is not possible for an "outsider" to determine the precise manner in which the agreements operate in practice. Regrettably, therefore, in endeavouring to assess the true character of these agreements, "outsiders" are forced to rely to a very large extent upon the

texts of the agreements themselves. It becomes necessary to base the analysis on whatever scant information is available and to interpret and extrapolate from that. Nevertheless, as a general statement, it may be surmised that the interpretation of pollution damage adopted under TOVALOP and CRISTAL will be similar to that adopted by the IOPC Fund. Where the voluntary agreements have broadened the definition of pollution damage beyond the scope permitted under the 1969 Civil Liability and 1971 Fund Conventions, however, such extension is to be taken into account. The practice of the IOPC Fund has been explained in considerable detail in Part Two of this work. It will be recalled that the IOPC Fund and the P&I Clubs strive for consistent interpretations of the notion of pollution damage under the Fund Conventions and the Civil Liability Convention, respectively. This is done in terms of the Memorandum of understanding dated 5th November, 1980.

9.1.3 Previous commentaries

Considering the major role that both voluntary agreements have secured in facilitating compensation and generally managing liability and conflict in the controversial and politically sensitive field of tanker-source oil pollution damage, they require carefully considered and frequently updated analysis.

This task has previously been undertaken at different times by commentators working within the field of oil pollution liability and management. For example, in their work on oil pollution; *Pollution Politics, and International Law: Tankers at Sea*, the authors M'Gonigle and Zacher discuss the development and also the motivation for the voluntary compensation agreements.³ However, although those authorities make comprehensive observations upon the nature of and rationale for the voluntary agreements, it must be borne in mind that they were writing in 1979. The nature and

³M'Gonigle & Zacher *Pollution Politics, and International Law: Tankers at Sea* (1979) pp 154-60 TOVALOP is discussed and pp 178-99 CRISTAL is discussed.

form of the systems controlling oil pollution liability and the politics of oil pollution from tankers has evolved considerably since that time.

Also, Abecassis and Jarashow in their work: *Oil Pollution from Ships: International, United Kingdom and United States Law and Practice*, provide lengthy and penetrating coverage of these agreements.⁴ However, these authors deal with the nature and form of the agreements as they stood in 1985 - since then nine years have elapsed.

9.1.4 Significant post-1985 developments

Significant developments in the law relating to oil pollution have taken place during these nine years, which are covered by the present work. Together with the *Exxon Valdez* spill, on 24th March, 1989, the most important developments which have occurred are the following.

Firstly, the United States explicitly rejected the international approach and passed the Oil Pollution Act (OPA) on 18th August, 1990. Repercussions from this development have been (and shall continue to be) felt in the tanker and oil industries for some time to come. One of the particular concerns of the present work lies in the likely consequences of OPA, and associated state legislation. This impact is already discernible on the international pollution regimes covered by the international Conventions and associated voluntary agreements. This subject is explored further in Part Four of this work.

⁴Abecassis & Jarashow *Oil Pollution from Ships: International, United Kingdom and United States Law and Practice* 2nd ed (1985) Chapter 12 pp 303-325. For further descriptions of the earlier versions of TOVALOP and CRISTAL, see Becker 'A Short Cruise on the Good Ships TOVALOP and CRISTAL' (1974) 5 *Journal of Maritime Law and Commerce* 609; Clark 'The future of TOVALOP' (1978) 2 *Lloyd's Maritime and Commercial LQ* 572; Jacobsen & Yellen 'Oil Pollution: The 1984 London Protocols and the Amoco Cadiz' (1984) 15 *Journal of Maritime Law and Commerce* 467; Becker (1983), *op cit*, 475.

Secondly, the inability of the 1984 Protocols to the 1969 Civil Liability and 1971 Fund Conventions to attract sufficient support to bring about their entry into force and the amendment and substitution of those instruments by the 1992 Protocols thereto, is a notable development for the international regulation of oil pollution liability. This development is discussed in detail in Chapter Eight of this work.

It is arguable that both these developments were largely precipitated by the *Exxon Valdez* spill. Alternatively, it could be argued that the *Exxon Valdez* spill merely hastened what would have been an inevitable evolution of the law in this area.

During this same time-span the shipping and oil industries (the architects of TOVALOP and CRISTAL respectively) have not assumed a passive or static role. It is remarkable that the shipping and especially the oil industry have, so far, maintained control over the distribution, mode of assessment and form of liability for oil pollution from tankers. On each occasion when a "watershed" tanker spill occurs (i.e. *Torrey Canyon*, 18th March, 1967; *Amoco Cadiz*, 17th March, 1978 and *Exxon Valdez*, 24th March, 1989)⁵ it seems as if the system of voluntary compensation will be replaced by government or inter-governmental action. But, so far, this has not been the case, instead, the two-tier voluntary scheme is rapidly revised to better suit its changed surroundings.

The voluntary agreements were originally set up in response to the changing environment within which the oil industry was being called upon to operate in the wake of the *Torrey Canyon* spill. Since then, they have been regularly adapted to cope with

⁵An analysis of the three watershed oil spills, which prompted developments in the law governing oil spill liability reveals a remarkable pattern of ineptitude and lack of responsibility from oil companies as both cargo and tanker owners. Cutting through the obfuscations of corporate structures: the *Torrey Canyon* was owned by the Union Oil Company of California (UNOCAL) and the cargo owner was BP. The *Amoco Cadiz* was owned by AMOCO and the cargo owner was Shell. The *Exxon Valdez* and its cargo was owned by EXXON.

changing circumstances. Significantly, since 20th February, 1987, both voluntary agreements operate in an entirely different manner than had previously been the case. As from 20th February, 1987, parties to TOVALOP have been bound by the revised form of that agreement which incorporates a Supplement to the original agreement. The terms of the TOVALOP Supplement apply only to pollution incidents in which a TOVALOP tanker is carrying a cargo which is owned by a member of CRISTAL. In all other cases, only the terms of the TOVALOP agreement - excluding its Supplement - are applicable (i.e. the Standing Agreement).⁶ A convenient way to recall this dichotomy is to bear in mind that the Standing Agreement can 'stand' on its own, whereas the Supplement and CRISTAL are inextricably linked and co-dependant. At the same time as TOVALOP became a two-tier agreement, the CRISTAL Contract which came into operation on the 20th February, 1987, was extensively revised.⁷

This discussion of the voluntary agreements refers to the relevant historical development of the voluntary agreements, where this illuminates the legal evolution of these regimes. However, the versions of TOVALOP and CRISTAL described herein are the agreements that came into force on 20th February, 1994. The

⁶The Standing Agreement and TOVALOP Supplement originally had a stated duration of five years from 20th February, 1987. It was due to have expired on 20th February, 1992. Fortunately, at an Extraordinary General Meeting in Oslo on the 30th October, 1991, the parties to TOVALOP voted overwhelmingly in favour of a Special Resolution calling for a two-year extension of the Agreement to the 20th February, 1994. In October of 1993, the membership agreed to further the TOVALOP agreement, appropriately amended to 20th February, 1997.

⁷The revised CRISTAL contract originally had a stated duration of five years from 20th February, 1987. As such it was due to have expired on 20th February, 1992. On the 28th October, 1991, the membership of CRISTAL voted to extend their supplementary compensation arrangements to 20th February, 1994. Accordingly, CRISTAL, like TOVALOP, was due to expire on 20th February, 1994. Fortunately, at a Special General Meeting of CRISTAL members, held in Victoria, British Columbia, Canada, it was resolved to amend the CRISTAL contract and extend its application to 20th February, 1997.

revised TOVALOP and CRISTAL agreements will remain in force until expiry on 20th February, 1997. Accordingly, this work undertakes retrospective and contemporary analyses of TOVALOP and CRISTAL.

Although it is possible that these agreements may be extended beyond 20th February, 1997, it is not possible, to predict now whether this will be the case. It is, nevertheless, possible, to identify developments, which may, motivate either for or against the further extension of the voluntary agreements (beyond 20th February, 1997). Two factors which would obviously negatively impact on the further extension of these compensation arrangements would be the following. Firstly, if the 1992 Protocols to the Civil Liability and Fund Conventions come into force, and were to receive wide support, the voluntary agreements may be discontinued. In the view of the present writer this is probably unlikely to occur before 1997. Secondly, if significant states, or groups of states (i.e. the European Community), reject the international approach and adopt unilateral or regional action of the type already adopted by the United States, the voluntary agreements might well be discontinued or would at least cease to have relevance in those areas. Clearly, of these two possible scenarios the oil and shipping industries would prefer international uniformity as opposed to regional fragmentation. Realistically, however, the industry probably realizes that international uniformity will not eventuate (in the short term) and that they will have to operate within a mixture of international and regional control.

It may be noted, in this regard, that the Supplement to TOVALOP and CRISTAL are presently the only truly internationally applied oil pollution compensation mechanisms in operation. Some would be quick to hail this state of affairs as a triumph of private enterprise and the philosophy of *laissez-faire* over government control. Certainly, as will be explained, such assertion could be understood, at many different levels.

9.2 The nature of the Agreements

Both TOVALOP and CRISTAL are private agreements amongst tanker owners and oil companies, formulated and agreed to with the specific purpose of compensating certain types of loss caused by vessel-source oil pollution. Under these agreements certain rights and duties arise between the members *inter se*. Such rights and duties may be enforced by and against the members through the operation of the laws governing contractual obligations. By contrast, third party claimants may not enforce any provisions of these agreements through recourse to the courts. Such claimants are expressly prevented from doing so according to the provisions of the voluntary agreements. Nevertheless, such claimants would be free to forego possible benefits under the agreements and to attempt to recover their losses under other applicable law.

9.2.1 TOVALOP: Standing Agreement and Supplement

As mentioned above, the position has been that since 20th February, 1987, the TOVALOP agreement has consisted of two separate dispensations: the Standing Agreement and the Supplement. Despite this bifurcation of the TOVALOP agreement, it nevertheless still remains a single agreement and every participating member is required to become party to both parts thereof. Generally, according to the TOVALOP Agreement, the participating owners and bareboat charterers of approximately 97 per cent of the world's tanker tonnage,⁸ voluntarily assume a contractual obligation, between themselves, to pay compensation according to the provisions of the agreement, for certain kinds of pollution damage caused where persistent oil is discharged from a participating tanker.

9.2.2 CRISTAL

CRISTAL is a close voluntary equivalent to the Fund Convention. Under CRISTAL, a Fund provides additional compensation where that

⁸The *International Tanker Owners Pollution Federation Review* (1992) at 3.

available from the shipowner, under the TOVALOP Supplement, is insufficient to compensate victims of oil pollution damage. The CRISTAL Fund is financed by CRISTAL members, which include cargo owners, charterers, and oil traders. These participants each finance the fund in proportion to the quantity of oil received individually (as against the total quantity received by all members). Periodic calls are made when funds are required to meet CRISTAL claims. Under TOVALOP, each participating member has responsibility, in an individual capacity, to compensate victims of pollution damage caused by his vessels, whereas, under the CRISTAL Contract, no liability attaches to individual cargo owners in their personal capacity.

9.3 Historical retrospective

Before the detailed analysis of the agreements is embarked upon, in Chapters Ten and Eleven, it is necessary briefly to consider how and why these agreements were devised and in what way the original forms of those agreements have evolved, in response to external variables, since their conception, up to the present time.

9.3.1 Torrey Canyon: catalyst for change

In the same way that the wreck of the *Torrey Canyon* ultimately resulted in the development of the 1969 Civil Liability and 1971 Fund Conventions, it was also the *fons et origo* of both the voluntary compensation agreements. When the oil companies realized that the governments of the international community of sovereign states were meeting to devise an international pollution compensation regime, the oil and shipping industries resolved to take pre-emptive measures.⁹ It is submitted that the use of the adjective 'pre-emptive' is entirely justified, because the *raison d'être* for the voluntary agreements was, ideally, to prevent, and, at least, significantly postpone, the evolution of

⁹M'Gonigle & Zacher, *op cit*, 156.

rules which would make cargo owners directly and fully financially accountable for the damage caused by oil pollution from tankers.

Accordingly, although the voluntary agreements were ostensibly constructive initiatives which were intended to be seen as indicative of the responsible philosophy prevalent within the shipping and oil industries, the agreements were in point of fact reactionary in nature. Through these initiatives the oil companies endeavoured, with considerable success, to oppose a complete change and maintain traditional liability relationships which better suited their purposes. By voluntarily making certain sacrifices on their own terms and within their control they hoped to avoid attracting what they perceived as unacceptable penalties.

9.3.2 The "Seven Sisters" make the rules

The appellation, the "seven sisters", refers to the seven largest and most powerful multinational oil companies. In 1969 when TOVALOP, the first of the two voluntary agreements, appeared, the sisters were: ESSO, Standard Oil Company of California, Mobil, Gulf, TEXACO, Shell and BP. Some changes have, however, occurred since that time. ESSO is now called EXXON and the Standard Oil Company of California is now Chevron. Gulf no longer exists as it was acquired by Chevron on 5th March, 1984, for US\$13.2 billion and was fully merged into that company.¹⁰

9.3.3 Conception of TOVALOP

On 7th January, 1969, TOVALOP was signed by the tanker owning arms of the "Seven Sisters", namely: ESSO Transport Company Inc., Standard Oil Company of California, Mobil Oil Corporation, Gulf Oil Corporation, TEXACO Inc., Shell International Petroleum

¹⁰For a discussion of the acquisition of Gulf Oil by Chevron, and the restructuring of the oil industry during the mid-1980s, see Yergin *The Prize* (1991) pp.734-44.

Company Ltd.¹¹ and BP Tanker Corporation. Nine months later, on 6th October, 1969, TOVALOP came into operation, when fifty per cent of the gross registered tonnage of tankers in existence globally had become subject to the TOVALOP Agreement and its entry into force requirements were thus fulfilled.¹² It is significant that TOVALOP came into force in 1969, the same year as the Civil Liability Convention was promulgated, although the Civil Liability Convention did not enter into force until 1975.¹³

9.3.4 Conception of CRISTAL

The CRISTAL Contract was adopted on 14th January, 1971, and entered into force on 1st April, 1971, at which time thirty eight oil companies receiving over seventy per cent of the world's crude and fuel oil had agreed to become party. At this point TOVALOP had already been operational for nearly eighteen months. Significantly, CRISTAL entered into force in 1971, the same year as the promulgation of the Fund Convention, although the Fund Convention did not enter into force until 1978.¹⁴

Since CRISTAL entered into force, TOVALOP and CRISTAL have, on most occasions, been integrally linked. The two agreements provide a double layered system of compensation for oil pollution from participating tankers, with CRISTAL providing a supplemental layer of compensation, where the limits under TOVALOP are exceeded.

¹¹Shell, which traditionally stressed the possession of a powerful tanker service was particularly instrumental in the initiation and development of the TOVALOP agreement, see M'Gonigle & Zacher, *op cit*, 156.

¹²Abecassis & Jarashow, *op cit*, 304 para.12-04.

¹³The 1969 Civil Liability Convention was done at Brussels, 29th November, 1969 and entered into force on 19th June, 1975.

¹⁴The 1971 Fund Convention was done at Brussels, 18th December, 1971 and entered into force on 16th October, 1978.

9.3.5 The nature of the threat and response

It must be stressed from the outset that the oil companies and the tanker industry were adamantly opposed to the post Torrey Canyon proposals, put forward by a wide grouping of governments, to develop a liability regime for oil pollution damage. Writing in 1979, M'Gonigle and Zacher discern that '[t]raditional commercial interests were ... not at all happy to see IMCO's role expanding into the realm of "private" legal liability ... [which those interests considered] were of private commercial and economic significance only.'¹⁵ When the oil companies realized that their ability to determine the shape of new liability rules, to be evolved under the auspices of IMCO, was largely slipping out of their hands, they correctly began to comprehend a threat.

Usually a threat constitutes an indication of an impending undesirable event which may restrain a person's freedom of action or general well being. Therefore, because it was the oil companies who set up the voluntary compensation agreements the most logical line of inquiry is to ask what possible threats were posed to the oil industry at that time. What did the oil industry possibly stand to lose through the IMCO initiatives aimed at reforming the liability rules of tanker-source oil pollution? Conversely, what advantages did the oil industry perceive in making voluntary concessions through TOVALOP and later CRISTAL? Certain suggestions, which will be considered seriatim, have been made by previous commentators in an endeavour to explain this issue.

All analysts provide some kind of explanation as to the rationale for the voluntary agreements. For the most part, however, commentators provide an inadequate "statement-of-fact" type explanation. For example: the voluntary agreements were adopted by the oil and shipping industries in recognition of the fact that the transportation of oil by sea was an inherently dangerous

¹⁵M'Gonigle & Zacher, *op cit*, 155.

business. By the example of the *Torrey Canyon* incident the oil and shipping industries were galvanized into action. The resulting agreements were designed as interim measures established along the lines of the 1969 Civil Liability and 1971 Fund Conventions, which would provide benefits comparable to those available under the conventions, until such time as the universal acceptance of those instruments occurred.¹⁶

Although such explanations are not incorrect, they are unsatisfactory, and, it is submitted, inhibit a complete understanding of the purpose and nature of the voluntary agreements. Predictably, members of the shipping and oil industry, or those who work in close association with those industries, adhere to this line of interpretation. For a more precise understanding of the rationale for the agreements it is necessary first to examine the exact nature of perceived or actual threats posed by the independent workings of IMCO.

An Australian commentator, R.C. Springall, makes the following observation, which more accurately describes the original motivation behind the development of TOVALOP:

'... the purpose was to persuade governments to refrain from taking steps to protect themselves against oil pollution, such as by the introduction of strict safety precautions and *restrictions of different kinds*, with which the [large international oil] companies were not going to be able to live.'¹⁷ (emphasis that of the present writer)

The above observation is cited with approval by a Canadian

¹⁶These explanations basically imitate the Introduction to the TOVALOP Standing Agreement.

¹⁷Springall 'P&I Insurance and Oil Pollution' (1988) 6 *Journal of Energy & Natural Resources Law* 25 at 34.

commentator, R.J. White-Harvey,¹⁸ who, nonetheless, concludes, on this point, that '... it remains unknown whether or not stricter requirements imposed by coastal states might have further reduced the amount of petroleum entering the marine environment.'¹⁹

For the sake of clarity one may assume that where R.C. Springall refers to large international oil companies 'not being able to live' with those requirements which, he suggests, may otherwise have been forthcoming from coastal states, he is not suggesting that the oil companies would not have been able to continue to operate in the face of such measures. A more precise inference is that the oil companies simply preferred not to bear the additional costs that compliance with such measures would have entailed. It is suggested that, from the point of view of the oil companies, forced compliance with such measures would, in the long term, have cost the oil companies considerably more than was the case where they preempted government interference by assuming responsibility for oil pollution compensation on terms of their own choice.

R.C. Springall's statement requires further interpretation. Where the commentator refers to '... the introduction of strict safety precautions and *restrictions of different kinds*, ...' the exact ambit of that description is unclear. The inference made by the present author, which also seems to have been made by R.J. White-Harvey, is that the commentator is referring to the development of rules which place restrictions on action. He is not, on the plain reading of the description, referring to liability, which would better be described as a penalty. If this is a correct understanding then, although there is certainly a strong element of truth in the observation made, it is not, in the opinion of the present author and other commentators, an exact or entire

¹⁸White-Harvey 'Black Tide at the Convergence of Admiralty and Environmental Law' (1991) 1 *Journal of Environmental Law & Practice* 258 at 269.

¹⁹*Ibid.* at 270.

explanation. It is submitted that the immediate and critical concern of the oil companies related to the question of liability, not regulation.

In this regard M'Gonigle and Zacher, correctly point out:

'The major thrust of the post-Torrey Canyon activity clearly was in the field of liability and compensation and, later, in the development of the 1973 Convention on the Prevention of Pollution from Ships. ... TOVALOP and CRISTAL were clearly responses to activities undertaken by governments in opposition to industry.'²⁰

Furthermore, those authors have also assessed the reasoning behind the actions of the oil industry:

'In each case [TOVALOP and CRISTAL] the actions of the oil industry were prompted by the hope that they would engender goodwill and that states would, therefore, refrain from unilateral action and follow the industry's precedent in the ensuing conference'²¹

M'Gonigle and Zacher go to some length to provide particular examples of ways in which the voluntary agreements influenced the conferences and benefited the oil and tanker industries. They neglect, however, to consider a fundamental point, however.

Abecassis and Jarashow come closer to pinning down the fundamental motivation behind the initiatives of the oil companies. In their discussion of TOVALOP these authors make the following observation:

'The first members were, of course, all oil companies, and the fact that they happened to own large fleets of tankers

²⁰M'Gonigle & Zacher, *op cit*, 192.

²¹M'Gonigle & Zacher, *op cit*, 178.

does not stop them behaving like oil companies. The early *TOVALOP* can therefore be viewed as an attempt to influence the international community of states to think in terms of oil pollution liability resting solely on the tanker owner, with liability being based on fault, with relatively modest limits, and with compensable damage being limited to clean-up and removal costs.'²² (emphasis that of the present writer)

Of the motivational criteria listed above, the factor emphasised, appears first on the authors' list. Therefore, it may be surmised that the authors correctly identified this factor as being a prime objective of the oil industry. The position adopted by the present writer is that this consideration was indeed the overriding imperative of the oil industry and that the other concerns, although relevant, were ancillary. The prime intention of the oil industry was to ensure that whatever liability rules were to be developed by IMCO, that such rules would not place direct accountability for oil pollution damage upon the cargo owner in his personal capacity. From the point of view of the oil companies no expense would be spared to persuade the international community that the tanker-owner alone should remain personally liable for these risks and accountability should not be extended to the cargo owner. The threat, quite correctly perceived by the oil companies, was the possibility that the traditional precept of maritime law, whereby liability is placed squarely upon the shipowner, may have been expanded to encompass unlimited and absolute liability placed upon the shipowner together with the actual cargo-owner. If this had occurred the oil companies would have lost a considerable commercial advantage and would have been exposed to greater risks associated with the tanker transport sector of their integrated operations.

Certainly, the oil companies did not relish the idea of unilateral action by states in the field of oil pollution

²²Abecassis & Jarashow, *op cit*, 305 para.12-05.

liability regulation. Not only would unilateralism work to their disadvantage due to the fragmentation of liability rules, but states acting independently would, in their search for responsible parties with "deep pockets", be more likely to focus their attentions on cargo-owners. Hence the rationale for the voluntary offer made to governments to cover oil pollution damages. This concern did not, as has already been explained, mean the oil companies were unreservedly in favour of the international initiatives.

Oil interests as a group (i.e. cargo-owners generally), were not opposed to making an *ex gratia* contribution to the cost of oil pollution from tankers so long as they could limit or accommodate that cost. However, they feared the imposition of a larger risk which they would not be able to assimilate as an operational cost. In other words, they did not want to see the development of rules which articulated and imposed open-ended potential liabilities and thereby required cargo-owners to accept a very greatly expanded scale of risk in the venture of carrying oil at sea. The way the oil companies as a group orchestrated the form of the voluntary agreements, and also influenced the development and form of the Civil Liability and Fund Conventions, saw them in the position that, where although they would accept a limited scale of loss, a small and manageable one at that, they would not become exposed to open-ended danger. The danger would be borne by the owner of the tanker spilling the oil in the form of potentially unlimited and personal liability. In effect, it could even be said that the tanker industry became the scapegoat for the oil industry.

The fact that since 1969 the oil companies have largely been able to insulate themselves from direct liability for tanker-source oil pollution damage can be attributed to their considerable financial resources and political influence. It would seem also, that the oil companies achieved an even more remarkable coup later when they succeeded in avoiding direct personal responsibility, as cargo owners, under the measures adopted by

the U.S. Oil Pollution Act of 1990.

Significantly, Abecassis and Jarashow fail to make the connection between: (a) the success of the oil cargo owners in escaping personal liability for pollution damage caused by their cargoes and (b) the continued decrease in the quality of the tanker fleet. A detailed analysis of this inter-relationship and remedies suggested is undertaken in Chapter Fourteen which deals with U.S. State legislation and the implications thereof.

9.3.6 Possible alternative strategies

One of the alternatives available to the oil interest groups, at the time of the development of the voluntary schemes, was to continue to operate in the usual fashion and accept that costly oil spills would inevitably occur from time to time. In such cases very large claims would be brought against them by the victims of oil pollution. Claimants would include governments as well as private claimants. When faced with such claims the oil companies could contest these claims by way of difficult, expensive, protracted and unpredictable litigation, in the hope that this would deter future claimants. Thus more claims would be settled out of court for considerably less than would have been the case had claimants risked litigation.

If it were not for the scale of the damage caused by large oil spills and that governments were more often than not the major claimants this strategy may have met with considerable success. Government claimants, however, in contrast to private claimants, possess considerable influence domestically and internationally, and are also able to sustain lengthy and expensive litigation. Therefore, an obviously uncompromising attitude adopted by oil polluters could only contribute to the long term detriment of the tanker and oil importer industry. Public outcry would have been considerable and governments, as well as the judiciary, would rapidly have adopted measures to make the whole legal process for the recovery of oil pollution compensation more favourable to

claimants. Such changes would have been made on terms which would have been largely outside the control of the tanker and oil industries.

The oil industry correctly perceived that, where co-operation ceased, litigation and outside regulation would begin. Any environmental controversy fought out in the courts would result in the rapid polarisation of positions in public statements of precedential legal authority. Hence, the general reluctance of oil companies and shipowners to resort to litigation.

In this regard it is significant that TOVALOP in its original form extended only to the shipowners' clean-up costs and the costs of reasonable governmental clean-up costs. The original agreement did not extend to claims by third parties who still were required to pursue their claims under applicable local law. One may reasonably surmise that the primary concern was to placate powerful adversaries, while the less influential victims of oil pollution would not be specially catered for.

Instead, tanker owners and oil importers adopted a more subtle approach, which did not include any special efforts to improve the safety of tanker operations. They offered a system through which claimants could obtain compensation upon the terms and conditions laid down by the tanker industry and the oil companies. The alternative to claiming from these funds was to attempt to recover loss caused due to oil spills through litigation. This avenue was not an inviting prospect for any claimant, particularly in this type of maritime matter. The extent of the daunting task facing such claimants is aptly illustrated in the context of the *Amoco Cadiz* litigation.

Essentially, claimants attempting to recoup losses sustained by tanker-source oil pollution are faced with two choices. Firstly, they may accept whatever compensation is judged appropriate according to the voluntary compensation regimes or under the Conventions. Secondly, they may attempt to break the shipowners

right to limit his liability under the terms of the 1969 Civil Liability Convention, or other applicable law. This would result in protracted litigation and difficulties in recovering substantial amounts in the case where the shipowner is not also an oil company.

What, in essence, has been created are mechanisms through which victims of oil spills are offered certain amounts of compensation upon the terms and conditions of the interest groups which cause the pollution. Those who do not accept these offerings have to face the uncertain prospects of success in expensive lawsuits.

What has just been described is encapsulated by the "carrot and the stick" adage. The "stick" is litigation, with the possibility of non-recovery, and the "carrot" is carefully measured and controlled compensation made in a manner which is suitable to the interests of the oil and tanker industries.

The only negotiations which took place in formulating the terms of the voluntary agreements was between oil companies and tanker owners. When one considers that a significant proportion of the oil tankers were, and still are, owned by oil companies, actual negotiation was reduced to a conflict between the oil companies and the independent oil tanker owners as to the respective apportionment of liability. Clearly, the independent tanker owners were in a comparatively weak position because they depend on the oil companies to charter their tankers. Under the principle that "he who pays the piper calls the tune", the resulting agreements naturally favour the self-conservative instincts of the oil companies.

9.3.7 Evolution of TOVALOP and CRISTAL

In 1978 both TOVALOP and CRISTAL were amended to reflect the coming into force of the 1969 Civil Liability Convention and the 1971 Fund Convention. The next epoch in the evolution of the voluntary agreements would occur some eight years later.

On a broad spectrum of interests, aims and activities, the relationship between tanker owners and cargo importers may be described as co-dependant and co-operative. Close co-operation certainly exists between tanker owners and cargo importers in the matter of compensating claims for oil pollution under TOVALOP and CRISTAL and also, but to a lesser extent, under the Civil Liability and Fund Conventions. However, a considerable area of conflict remains, between oil importer and oil carrier interests, as to how liability ought to be apportioned.

Within the context of the voluntary agreements, shipowners and cargo owners, would each, ideally, prefer the other to assume a greater responsibility for dealing with pollution compensation. Naturally, this would reduce their own contribution, whether by way of P&I contributions or contributions to the CRISTAL Fund. This conflict is evidenced by the lack of support shown by oil tanker owners, and especially the independent tanker-owners, for the PLATO agreement.²³ At this time, the oil industry was not satisfied with the distribution of liability between the tanker owner and the cargo owner under the 1984 Protocols to the Civil Liability and Fund Conventions respectively.

The then existing TOVALOP and CRISTAL agreements were due to expire on 20th February, 1987. Abecassis and Jarashow suggest that the oil industry '... therefore set themselves the task of providing an alternative to the 1984 Protocol to the Fund Convention ... which might ensure that it never comes into force.'²⁴ The alternative was a new voluntary compensation regime which consisted of CRISTAL Revised 1985, which was designed to come into effect if the PLATO agreement was accepted by tanker owners. The tanker owners were not, however, prepared to accept PLATO. They perceived that the oil industry was attempting, through PLATO, to impose an unacceptably high degree of primary financial responsibility for oil pollution liability

²³Pollution Liability Agreement Among Tanker Owners, 1985.

²⁴Abecassis & Jarashow, *op cit*, 316 para.12-39.

upon the tanker industry. As a result of this negotiations between tanker owners and oil importers became strained and the voluntary agreements almost floundered. However, after further negotiations, the two regimes were extended for a further five years from 20th February, 1987.²⁵

On 20th February, 1987, a Supplement to TOVALOP was implemented. Henceforth, although TOVALOP remains a single agreement, it has become a two-tier system of compensation in its own right. This two-tier system consists of the original agreement, which is referred to as the Standing Agreement, and the TOVALOP Supplement. These supplementary revisions were largely initiated in response to the development of the 1984 Protocols to the Civil Liability and Fund Conventions. Essentially, under the Standing Agreement, the tanker owner assumes financial responsibility in a similar fashion to the liability imposed under the 1969 Civil Liability Convention.

A fundamental point to the understanding of the revised agreements is that CRISTAL must apply to the incident before the two-tier compensation under the TOVALOP Supplement may be brought into being. Accordingly, the TOVALOP Supplement only applies to incidents where a tanker participating in TOVALOP (which includes the Standing Agreement and TOVALOP Supplement), is carrying oil which is covered by CRISTAL. Where the tanker is entered in TOVALOP but the cargo is not a CRISTAL cargo, compensation may only be made under the Standing Agreement.

At the same time as the introduction of TOVALOP Supplement, a revised CRISTAL Contract came into being which provides a higher level of supplementary compensation over and above that received

²⁵Because the PLATO agreement did not enter into force and was replaced by an alternative voluntary compensation regime it is not discussed in detail here. However, for a full analysis of its provisions, see Abecassis & Jarashow, *op cit*, pp.316-325; Birnie 'PLATO' (1986) vol.1 pt.4 *International Journal of Estuarine and Coastal Law* 396. For a discussion of PLATO after its failure to come into fruition; see Springall, *op cit*, pp.37-8.

by victims of oil pollution under the TOVALOP Supplement. The amendments to CRISTAL, like those to TOVALOP, were also initiated in response to the development of the 1984 Protocols to the Civil Liability and Fund Conventions. The word "Interim" was also dropped from the full title of CRISTAL which reflected the reality that it had been in force for some sixteen years and to indicate that it would serve a more permanent function.

The revised voluntary compensation available from 20th February, 1987, brought about a substantial potential increase over and above the previous limits. This was achieved through higher limits of liability under the TOVALOP Supplement and the revised CRISTAL Contract. The revised voluntary arrangements apply worldwide, irrespective of whether the state in which an incident occurs is a party to the 1969 Civil Liability Convention or the 1971 Fund Convention. The application of the Conventions in a given situation will, however, have a bearing upon the manner in which the voluntary agreements operate.

9.4 Conclusion

The fundamental characteristics of the voluntary compensation agreements have been previewed in this introductory discussion. The analysis to be used during the further investigation of TOVALOP and CRISTAL involves following the application and unfolding of the relevant agreements as they may arise in practice. In keeping with this practical approach two broad chapters ensue. First, Chapter Ten, which covers the possible situation where a tanker, entered in TOVALOP, causes pollution damage but is not carrying a CRISTAL cargo at the time. Here, only the TOVALOP Standing Agreement applies. Second, Chapter Eleven covers the case, more frequently encountered, where CRISTAL oil escapes from a TOVALOP tanker causing pollution damage. Here, both the TOVALOP Supplement and CRISTAL apply and are discussed in turn.

CHAPTER 10

The TOVALOP Standing Agreement

10.1 Introduction

Where oil pollution damage is caused from a tanker which is not at the time of the incident carrying a CRISTAL cargo, only the Standing Agreement applies. Therefore, in such cases, no supplementary compensation will be available under the TOVALOP Supplement or CRISTAL. The Standing Agreement is, in essence the TOVALOP as it stood prior to 20th February, 1987.

Furthermore, the Standing Agreement will not apply where the 1969 Civil Liability Convention applies.¹ Correspondingly, where the Standing Agreement does apply no supplementary compensation, above the limit set by the Standing Agreement, will be available under the 1971 Fund Convention because the Fund Convention may only come into force in a state which has already contracted to the 1969 Civil Liability Convention.² Where the Standing Agreement alone applies to an incident, and the damage caused is considerable, claimants may be forced to pursue actions for compensation through the traditional avenues of tort or negligence or any applicable municipal legislation in order to obtain full compensation where the limits of the Standing Agreement are exhausted.

10.2 Introduction to the Standing Agreement

It is appropriate to start this description of the Standing Agreement with an analysis of the introduction to that agreement. The Introduction is a declaration of intent and can be equated with the preambles to the Civil Liability and Fund Conventions. The Introduction to the Standing Agreement highlights certain

¹Standing Agreement, Clause IV(B)(a).

²Fund Convention, Article 37.4 and 40.2.

fundamentals of the agreement.

10.2.1 Three prerequisite factors

'The Parties to this Agreement are Tanker Owners and Bareboat Charters.'³

Within the context above, a "Tanker" means any sea-going vessel and any sea-borne craft of any type whatsoever, designed and constructed for carrying Oil⁴ in bulk as cargo, whether or not it is actually so carrying Oil.'⁵ "Oil" means any persistent hydrocarbon mineral oil such as crude oil, fuel oil,⁶ heavy diesel oil and lubricating oil whether or not carried as cargo.'⁷ Therefore, oil pollution damage caused from pollution from laden tankers, as well as tankers in ballast, are covered by the Standing Agreement.

An "Owner" means, the person or persons registered as the owner of the Tanker or, in the absence of registration, the Person or Persons owning the Tanker. However, in the case of a Tanker owned by a State and operated by a company which in that State is registered as the Tanker's operator, "Owner" shall mean such company. ... '⁸ This proviso is necessary because TOVALOP members include many government-owned fleets.'⁹

³Introduction to the Standing Agreement.

⁴Capitals have been used in order to alert the reader that certain concepts have been given special meanings for the purpose of the agreements concerned.

⁵Standing Agreement, Clause I.(m).

⁶ASTM No.4 or heavier.

⁷Standing Agreement, Clause I.(f).

⁸Standing Agreement, Clause I.(g).

⁹*Guidelines for the Preparation of Shipboard Oil Spill Contingency Plans*, 1990 at 26.

' ... Notwithstanding the foregoing, in the case of a Tanker under bareboat Charter, "Owner" means the Bareboat Charterer.'¹⁰ Therefore, bareboat charterers as well as registered owners can contract to the Standing Agreement. A "Bareboat Charterer" means the Person(s) who has chartered a Tanker upon terms which provide, among other things, that the Charterer shall have exclusive possession and control of the Tanker during the life of the charter.'¹¹ Once these three requisite factors are met the tanker owner is eligible to become a "participating owner" who is a party to the agreement.

10.2.2 Composition of participating members

The gross tanker tonnage owned or bareboat chartered by parties to TOVALOP stood at approximately 159.8 million tons, as at 20th February, 1992. This represents about ninety-seven per cent of the total world tanker tonnage. Accordingly, any internationally trading tanker not entered in TOVALOP is a rare exception. Over half the tankers registered with TOVALOP during the 1992-93 year were under 6,000 gross tons but the total tonnage of these vessels is only some three per cent of the TOVALOP total. By comparison, there were only 161 tankers over 140,000 gross tons entered, which represented about two percent of the total by number but over sixteen per cent of the total tonnage. The most significant size group of tankers in TOVALOP are those in the 20,000-59,999 range which represent over nineteen per cent by number and almost thirty percent by tonnage of the total membership.¹² In total TOVALOP has a membership of 3,200 tanker owner and bareboat charterer members.¹³

¹⁰Standing Agreement, Clause I.(g).

¹¹Standing Agreement, Clause I.(a).

¹²*The International Tanker Owners Pollution Federation Review* (1992) at 3.

¹³*Guidelines for the Preparation of Shipboard Oil Spill Contingency Plans* (1990) at 26.

10.3 Contractual nature of the Standing Agreement

' ... the Parties ... in consideration of their mutual promises, have agreed with one another and do hereby agree ... ' (to the terms of the TOVALOP Agreement)¹⁴

Both TOVALOP and CRISTAL are universally described as voluntary agreements. Although the decision to participate in either agreement is voluntary once a tanker owner or an oil company agrees to become party, a contractual obligation arises in terms of which he must fulfil the terms and conditions of the applicable agreement.¹⁵

Under TOVALOP, the tanker owner voluntarily assumes a contractual obligation to pay compensation for oil pollution according to the provisions of the TOVALOP Agreement. In this way participating tanker owners voluntarily assume financial responsibility where they may not otherwise be legally required to do so. Financial responsibility is assumed irrespective of fault. In essence, this constitutes a voluntary assumption of liability. In exchange for the voluntary assumption of liability, unassailable monetary limits are imposed.

Although the decision to contract to TOVALOP and CRISTAL is in principle voluntary, tanker owners and oil companies are placed under considerable pressure to become party to the respective agreements. For instance, oil companies will not charter tankers which are not entered in TOVALOP.¹⁶

10.4 Contractual exemptions from financial responsibility

¹⁴Introduction to the Standing Agreement, the text between brackets is provided by the present writer.

¹⁵TOVALOP and CRISTAL A Guide to Oil Spill Compensation Produced by The ITOPF and Cristal Limited 3rd ed. (1992) at 1.

¹⁶Interviews.

Under the Standing Agreement, as is the position under the 1969 Civil Liability Convention, tanker owners are not unconditionally responsible. Certain absolute and limited exemptions are available to protect the members of TOVALOP.

10.4.1 Absolute exemptions

The absolute exemptions contained in Clause IV(B) of the Standing Agreement are the same as those of Article III.2 of the 1969 Civil Liability Convention. These are of a *force majeure* type: such as war, natural phenomena of exceptional, inevitable and irresistible character,¹⁷ terrorism and vandalism¹⁸ and also governmental failure to maintain navigational aids.¹⁹

10.4.2 Contributory negligence of the claimant

A party to the Standing Agreement will be exonerated either wholly or partially from responsibility under the Agreement to any person who sustained pollution damage or who took threat removal measures if the negligence of that person wholly or partially gave rise to the damage or threat.²⁰

10.4.3 If the Civil Liability Convention applies

If an oil spill or the threat thereof from a tanker participating in TOVALOP causes damage, any part of which is subject to the 1969 Civil Liability Convention, no responsibility for such pollution damage or for the cost of threat removal measures shall be assumed under the Standing Agreement.²¹ As such, only where the spill of a non-CRISTAL cargo occurs in a State which has not

¹⁷Standing Agreement, Clause IV(B) (b) .

¹⁸Standing Agreement, Clause IV(B) (c) .

¹⁹Standing Agreement, Clause IV(B) (d) .

²⁰Clause IV. (C) .

²¹Clause IV. (B) (a) .

ratified the 1969 Civil Liability Convention shall the owner's liability be settled in accordance with the Standing Agreement and any applicable local law.

For example, a tanker owned by a participating member of TOVALOP, transporting a non-CRISTAL cargo, causes pollution damage to the neighbouring States of Moçambique and South Africa. As CRISTAL is not applicable to the incident, the enhanced compensation under TOVALOP Supplement does not apply. Because the tanker is owned by a participating member of TOVALOP the Standing Agreement will apply. In view of the fact that Moçambique has not ratified the 1969 Civil Liability Convention that country would be able to receive compensation from the tanker owner in terms of the Standing Agreement. By contrast, South Africa has ratified the 1969 Civil Liability Convention but not the 1971 Fund Convention. Accordingly, all oil pollution damage occurring in South Africa is subject to the provisions of the Civil Liability Convention and South African claimants will be precluded from obtaining compensation under the Standing Agreement.

To conclude, where the Civil Liability Convention does not apply to the incident, and none of the defences are successfully invoked, the participating owner is under a contractual obligation to compensate the victims of oil pollution up to the limits contained in the Standing Agreement. The tanker owner is strictly responsible and bears financial responsibility regardless as to fault. The claimant merely has to show that damage occurred and was caused by a spill or the threat thereof from a particular vessel. The claimant is not required to prove fault on the part of the owner or the charterer or servants or agents of the owner.

10.5 Standing Agreement financial limits

In respect of any one incident, the maximum compensation which may be obtained from a participating owner, for all claims under the Standing Agreement, is set at US\$160 per limitation ton of

the tanker involved in the incident, or US\$16.8 million, whichever is the smaller amount.²² The sliding tonnage scale with fixed upper ceiling is the same method which is used for the purpose of the 1969 Civil Liability Convention, although the amounts differ and the amounts are assessed in US\$ and not the Special Drawing Right (SDR).²³

Tanker limitation tonnage is determined as the net tonnage of the tanker plus the amount deducted from the gross tonnage on account of the engine room space for the purpose of ascertaining the net tonnage.²⁴ This is referred to as limitation tonnage and must not be equated with gross registered tonnage (grt.) because that measurement is a greater amount. The assessment in the Standing Agreement of US\$160 per limitation ton is roughly the equivalent of US\$147 per gross registered ton.²⁵

The limit of US\$16.8 will be reached on a limitation tonnage calculation for tankers of 105,000 limitation tons or roughly 114,286 grt. Where the Standing Agreement applies, all participating tankers above 105,000 limitation tonnes will be subject to the US\$ 16.8 million limit. Furthermore, in the case of a tanker for which this tonnage cannot be ascertained, the tanker's tonnage shall be deemed to be forty per cent of the weight, in tons of 2,240 lbs., which the tanker is capable of carrying.²⁶

10.5.1 Where multiple members are involved

²²Standing Agreement, Clause VII.(A).

²³Civil Liability Convention, Article V.1 as amended by Article II of the 1976 Protocol thereto.

²⁴The same definition is used in Article V.10 of the Civil Liability Convention for the measurement of limitation tonnage under that Convention.

²⁵I.C. White 'Tovalop & Cristal' (1988) vol.19 No.6 *Marine Pollution Bulletin* 251 at 252.

²⁶Standing Agreement, Clause I(p).

Subject to the provisions of the Agreement, where two or more TOVALOP tankers are involved in an incident, they shall be jointly and severally responsible for all pollution damage and threat removal measures which is not reasonably separable.²⁷ Because such an event will be considered one incident, the limitation provisions of the Standing Agreement shall apply. Accordingly, each tanker owner will be financially responsible up to his respective limit either on a per limitation tonnage assessment or the absolute ceiling. However, in no event may the amount due from both participating tanker owners exceed the absolute ceiling of US\$16.8 million.

10.5.2 All payments included for limits

If, before the owner has satisfied all claims made under the Standing Agreement, the owner, his insurer or other person providing him financial security pays compensation for pollution damage and/or the cost of threat removal measures, the amount of such payment shall be taken into account in assessing the aggregate of established claims under this Agreement in respect of the incident.²⁸ As such, these payments will be included in the calculation as to the ship owner's limit of financial responsibility. Furthermore, the owner or his insurer(s) or person providing him financial security shall, to the extent of that payment, be in the same position as the person to whom that sum was paid.²⁹ In other words, he may pursue any actions against other parties which may have shared responsibility for the spill or any other damage caused as a result of that spill.

10.5.3 Limits are unassailable

Unlike the Civil Liability Convention which provides that the

²⁷Standing Agreement, Clause V.

²⁸Standing Agreement, Clause VII(C) (a).

²⁹Standing Agreement, Clause VII(C) (b).

tanker owner's right to limit will be broken where the incident occurred as a result of the actual fault or privity of the owner,³⁰ the right to limit the extent of his financial responsibility in terms of the Standing Agreement is unbreakable.

10.5.4 Where the limits are exceeded

In cases where the aggregate of the established claims under the Standing Agreement exceed the limits of financial responsibility the claims are reduced proportionally.³¹ When a participating owner establishes that the aggregate of claims in respect of an incident may exceed his maximum financial responsibility under the Standing Agreement, he or any person providing him insurance or other financial security may in his sole discretion make partial payment to claimants until the full extent of all claims is determined.³²

10.6 Financial Responsibility

It is imperative for the viability of TOVALOP that its members are able to satisfy successful claims brought against them under the Agreement. Accordingly, it is a general condition of TOVALOP that each participating owner establishes and maintains his financial capability to fulfil his obligations under this Agreement to the satisfaction of ITOPF (The International Tanker Owners Pollution Federation Limited).³³

³⁰Civil Liability Convention, Article V.2.

³¹Standing Agreement, Clause VII(B).

³²Standing Agreement, Clause VII(E).

³³Standing Agreement, Clause II(B)(3). ITOPF was established in 1968 for the principle purpose of administering the TOVALOP oil pollution compensation agreement. Although the administration of TOVALOP (e.g. checking of insurance arrangements and issue of TOVALOP Certificates) remains an important function, the Federation now also provides technical services in the field of practical response to marine oil spills; damage assessment and the analysis of claims for compensation; contingency planning and advisory work;

The requirement of financial responsibility for tanker owners and bareboat charterers under TOVALOP is in most instances, obtained though the recognised shipowner's mutual Protection and Indemnity Associations (P&I Clubs), or the International Tanker Indemnity Association (ITIA).³⁴ All the major P&I Clubs are members of the International Group of P&I Clubs. Whilst each individual Club bears the first part of any claim, the concept of mutuality is extended by the pooling of large claims amongst the members of the International Group. The P&I Clubs and the ITIA will in turn place excess liability insurance on the commercial markets so as to afford greater protection to their members in the event of a catastrophic claim. This is also the position under the 1969 Civil Liability Convention.

In order for TOVALOP to come into being it was imperative that the P&I Clubs were prepared to extend the scope of cover available to shipowners to include the owner's responsibilities under the TOVALOP Agreement. Originally, the P&I Clubs required tanker owner's participating in TOVALOP to pay an additional premium to obtain cover for their responsibilities under TOVALOP. These additional premiums were paid separately from those obtaining cover for normal risks. After the Civil Liability Convention came into force in 1975, the Clubs transferred half of this additional premium to normal P&I rates to take into account the partial transfer of liability from TOVALOP to the Civil Liability Convention. As the Civil Liability Convention was ratified by a greater number of States and its application became more universal, the premium was wholly transferred to normal P&I rates and no separate premium is charged for the

training, information and publications; see, *Guidelines for the Preparation of Shipboard Oil Spill Contingency Plans*, 1990 at 26.

³⁴TOVALOP and CRISTAL A Guide to Oil Spill Compensation, 1992 at 4; for and analysis of the origins and evolution of the ITIA see M'Gonigle & Zacher *Pollution Politics, and International Law: Tankers at Sea* (1979) at 158-159.

TOVALOP risk.³⁵ Nowadays, separate premiums are once again being levied by P&I Clubs for the inordinate pollution risks assumed by tankers transporting oil to the United States.

10.6.1 Certificates of financial responsibility

Where ITOPF is satisfied that an applicant's insurance arrangements are sufficient to meet his responsibilities under TOVALOP, a TOVALOP Certificate is issued in respect of the vessels entered with TOVALOP by that owner.³⁶ Such a certificate is not a guarantee by ITOPF that the tanker owner will in fact be able to provide compensation up to the amounts specified in the certificate of financial responsibility, but merely demonstrate that the named tanker owner or bareboat charterer and vessel satisfied the entry requirements at the date of issue.³⁷ This has become a very important distinction in the light of the provisions relating to evidence of financial responsibility under the 1990 U.S. Oil Pollution Act.

Evidence that a tanker is currently entered in TOVALOP is frequently demanded by charterers and port authorities around the world. The production of a valid TOVALOP Certificate normally meets the requirement. Failure to comply with a request for evidence of financial responsibility normally results in delays, whilst the necessary confirmation is provided by the tanker owner's P&I Club and ITOPF.³⁸ TOVALOP certificates will almost invariably also cover an owner's potential limited liability in terms of the Civil Liability Convention or national oil pollution legislation.

³⁵The Britannia Steam Ship Insurance Association Ltd
TOVALOP AND CRISTAL Explanatory Notes - Revised Edition
October 1987 at 12.

³⁶TOVALOP and CRISTAL A Guide to Oil Spill Compensation,
1992 at 4.

³⁷Standing Agreement, Clause VIII(H).

³⁸Ocean Orbit, February 1992 at 8.

10.7 Loss recoverable

Claims under the Standing Agreement and the Supplement may go to arbitration, however, at the time of writing none have been reported. Regarding the settlement of claims by P&I Clubs under the Civil Liability Convention, the policy of the P&I Clubs is to settle claims confidentially and avoid litigation. It would seem that the same policy is adhered to within the context of claims settlement under the TOVALOP agreement. Consequently, it is not possible to provide detailed commentary in this regard.

Nevertheless, there are two categories of loss that are recoverable under the Standing Agreement. Firstly, the participating owner of a TOVALOP tanker assumes responsibility, for "pollution damage" caused by oil which has escaped or which has been discharged from his tanker. Secondly, the cost of "threat removal measures" taken as a result of that incident are also recoverable.³⁹

10.7.1 Pollution damage defined

The geographical scope of the Standing Agreement, who may claim and the type and extent of admissible damage are factors which must be considered. Under the Standing Agreement the notion of "pollution damage" is defined as:

' ... loss or damage caused outside the Tanker by contamination resulting from the escape or discharge of Oil from the Tanker, wherever such escape or discharge may occur, provided that the loss or damage is caused on the territory, including the territorial sea, of any State and includes the costs of Preventive Measures, wherever taken, and further loss or damage caused by Preventive Measures but excludes any loss or damage which is remote or speculative, or which does not result directly from such

³⁹Standing Agreement, Clause IV(A).

escape or discharge.'⁴⁰

The definition of "pollution damage" facilitates the recoverability of the following categories of damage under the Standing Agreement.

10.7.2 Damage to property

Physical loss, for example the oiling of fishing boats and fishing gear, the contamination of cultivated stocks of sea-weed, shell-fish or other marine products, will be included. Physical loss or damage caused by preventive measures, for example, the destruction or depreciation of equipment will likewise be included.

10.7.3 Economic loss

The Standing Agreement '... excludes any loss or damage which is remote or speculative, or which does not result directly from such escape or discharge.'⁴¹ The view has been expressed that this proviso probably excludes most economic loss.⁴² What categories of economic loss would, or should in fact, be admissible under the Standing Agreement?

Does the proviso have the affect of rendering inadmissible all proven economic loss actually sustained as a direct result of contamination resulting from the escape or discharge of oil? Under the definition of pollution damage, recovery for economic loss, unaccompanied by physical loss or damage, is unclear because the word 'directly' can be either widely or narrowly interpreted. A narrow interpretation could require a claimant to suffer physical loss or damage in order to receive compensation.

⁴⁰Standing Agreement, Clause I(K).

⁴¹Standing Agreement, Clause I(K).

⁴²Bates & Benson *Marine Environmental Law* Lloyd's of London Press Ltd (1993) 4-23 para.4.99.

Despite such uncertainty, pure economic loss is reported to have been recovered, in terms of the same definition, by claimants upon oil pollution damage caused when the *Betelgeuse* exploded in Bantry Bay, Ireland on 8th January, 1979.⁴³

Accordingly, a more precise analysis of the ambit of economic loss under the Standing Agreement reveals that the definition of pollution damage extends to proven economic loss actually sustained as a direct result of contamination even in circumstances where such damage is unaccompanied by physical damage.⁴⁴ Therefore, the most important difficulty claimants would be faced with would be in establishing that their claims were not 'remote or speculative'. Clearly, viewpoints can differ on what constitutes remote or speculative claims.

10.7.4 Damage to the marine environment

Under the Standing Agreement, claims for the recovery of damage to the environment *per se*, unrelated to proven economic loss actually sustained by a particular claimant, are generally regarded as inadmissible. Damage to non-commercial natural resources or claims for environmental damage which are theoretical or speculative⁴⁵ are not admissible under the Standing Agreement or the Supplement.

⁴³Cohen 'Revisions of TOVALOP and CRISTAL: Strong Ships for Stormy Seas' (1987) 18 *Journal of Maritime Law and Commerce* 525 at 531 fn.29.

⁴⁴This proposition would seem to be borne out by the Foreword to *TOVALOP* (Incorporating amendments as at February 20th, 1992) published by ITOPF at 2. The following warning is provided at 1:

'This foreword is not part of, and is in no sense a substitute for *TOVALOP* and its related documents, nor should anything contained herein be construed as modifying or amending them.'

⁴⁵Foreword to *TOVALOP* (Incorporating amendments as at February 20th, 1992) published by ITOPF at 2.

Under the Standing Agreement, however, it is conceivable that such damages may be allowed by arbitration, as such damage is not specifically excluded, by the definition of pollution damage, or elsewhere in the agreement. The arbitrator will have to determine that such loss, which may even be assessed on a theoretical basis, was a direct consequence of an oil spill or the threat thereof and that such loss was not remote or speculative.

By contrast such claims are very unlikely to be held admissible under the Supplement or CRISTAL as there is no provision for arbitration under those agreements. The P&I Clubs and the CRISTAL Directors, who decide the admissibility of claims under the Supplement and CRISTAL respectively, are likely to resist this category of damage on principle.

10.5.1.3 Preventive measures

Reasonable costs⁴⁶ of reasonable measures taken by any person, after an oil spill or the threat thereof arises,⁴⁷ adopted to prevent or minimize pollution damage shall be admissible under the Standing Agreement as preventive measures.⁴⁸

Such costs may include, *inter alia*, booms, skimmers and taking other clean-up measures. On the issue of the reasonableness of costs the distinction between fixed and additional costs will have to be considered. The reasonableness of the measures adopted will also have to be assessed under the circumstances of each case. Clearly, it is reasonable to attempt to restore and even reinstate a contaminated natural resource, even where the resource in question does not have a use value, because to do so may nonetheless be described as attempting to 'prevent or minimise' pollution damage.

⁴⁶Standing Agreement, Clause I(b).

⁴⁷Standing Agreement, Clause I(d).

⁴⁸Standing Agreement, Clause I(1).

10.7.5 Pure threat removal measures

Threat removal measures are compensable as pollution damage under the Standing Agreement even where no oil has actually been spilled. This class of preventive actions, which are frequently referred to as "pure threat" removal measures, can be of crucial importance for the prevention and minimisation of oil pollution damage. Such measures may include salvage operations, and the deployment of preventive booms.

The Standing Agreement permits the recovery of "pollution damage" and "threat removal measures".⁴⁹ "Threat removal measures" are defined as '... reasonable measures taken by any Person after an Incident has occurred for the purposes of removing the Threat of an escape or discharge of Oil.'⁵⁰ In turn, the "Threat of an escape or discharge of Oil" is defined as '... a grave and imminent danger of the escape or discharge of Oil from a Tanker which, if it occurred, would create a serious danger of Pollution Damage, whether or not an escape or discharge in fact subsequently occurs.'⁵¹

Accordingly, expenses may be recovered from the tanker owner under the Standing Agreement where, in the face of a grave and imminent danger of an oil spill, costs are incurred through reasonable measures taken to prevent a spill from actually occurring. The recovery of loss incurred in pure threat situations constitutes an extension of the ambit of oil pollution compensation beyond that recoverable under the 1969 Civil Liability Convention and the 1971 Fund Convention, which in contrast do not facilitate the recovery of such pure threat removal costs. The 1992 Protocols to both those Conventions do facilitate the recovery of pure threat removal measures.

⁴⁹Standing Agreement, Clause IV(A).

⁵⁰Standing Agreement, Clause I(o).

⁵¹Standing Agreement, Clause I.(n)

10.8 Obligatory preventive and clean-up measures

Whether or not the incident was due to the fault of the tanker owner, he is obliged to take prompt action to prevent pollution and to undertake clean up measures. Members are also obliged to exercise their best efforts in carrying out such preventive measures and/or threat removal measures as are practicable and appropriate under the circumstances.⁵²

This provision articulates the voluntary adoption of a policy by the shipping industry to initiate voluntarily proactive measures to prevent pollution. It may be asked how this commendable policy is translated into practice. Two immediate questions arise in this regard.

Firstly, how does TOVALOP ensure that the member will in fact undertake such measures? If members are able to avoid their obligations then the policy will be defeated. Because members are required under TOVALOP to provide proof that they possess the financial security to fulfil these important obligations, compliance with the policy is made more likely.⁵³ Such security is usually provided by a P&I Club. Therefore, when the owner adopts measures in terms of TOVALOP, his P&I Club will indemnify him for his costs. Where he fails to adopt such measures the P&I Club may nevertheless be moved to intervene.

Secondly, it is unclear who shall determine whether the member has in fact taken prompt action and is exerting best efforts as practicable and appropriate, under the circumstances, to prevent or combat pollution. In the first instance, it would seem that the individual member has a discretion to determine for himself what kind of measures are practicable and appropriate under the circumstances. He may well be influenced by the existence of local legislation which may empower relevant authorities to issue

⁵²Standing Agreement, Clause VI.

⁵³Standing Agreement, Clause VI.

instructions in this regard. Also, the owner's P&I Club and ITOPF will exert considerable influence over these decisions. As a last resort it is possible for the ITOPF, as representative of all TOVALOP members, to enforce these contractual obligations where members are in breach.

This sound policy is founded on the principle that prevention is better than cure. In most instances, by taking timely pro-active measures, significant cost (to participating members, though increased oil pollution damage made against their respective P&I Clubs) can be avoided. It is noteworthy that the 1969 Civil Liability Convention does not place such obligations on tanker owners whose vessels cause oil pollution.

10.8.1 The 'TOVALOP Clause'

Many tanker charterparty agreements include a 'TOVALOP Clause' which was initiated by the P&I Clubs to clarify the conditions and extent to which the charterer could take clean-up measures on behalf of the tanker owner.⁵⁴ This clause permits the oil company charterer to clean up a spill, caused by the chartered tanker, at the tanker owner's expense where the owner does not take such action on his own accord. Rapid deployment of preventive measures are essential if the amount of pollution damage is to be most effectively reduced. Through the incorporation of a 'TOVALOP Clause' in the charterparty agreement charterers can implement proactive measures with the minimum delay because in most instances they can recover their expenses from the owner's P&I Club.⁵⁵

10.8.2 Recovery of costs

⁵⁴The Britannia Steam Ship Insurance Association Ltd *TOVALOP AND CRISTAL* Explanatory Notes - Revised Edition October 1987 at 5. A version of this charterparty clause, issued in May 1987 appears at 75.

⁵⁵Becker 'Acronyms and Compensation for Oil Pollution Damage from Tankers' (1983) 18 *Texas International Law Journal* 475 at 478.

Costs incurred by the participating owner or his insurers as a result of the participating owner taking preventive measures and/or threat removal measures are taken into account in assessing the aggregate of established claims, under the Standing Agreement, in respect of the incident.⁵⁶ The participating owner or any person providing him insurance or other financial security are placed in the same position as any other person with a claim under this Agreement⁵⁷ and their claims for such expenses are treated in the same manner as claims by persons other than the participating owner.⁵⁸ Consequently, where the limits of financial responsibility under the Standing Agreement have been exceeded, the amounts spent by the owner in preventive and/or threat removal measures are effectively offset against the limitation amounts. Therefore, where the ceilings of liability are reached, clause VII has the effect of reducing the quantum available for distribution to third party victims of oil pollution damage under the Standing Agreement. In other words, as a practical matter, the TOVALOP limits are not always as high as presented in the Agreement.

Upon acceptance by ITOPF of an application to become party to TOVALOP, the applicant is required to establish and maintain proof of his financial capability to fulfil his obligations under TOVALOP.⁵⁹ Such evidence of financial responsibility shall include appropriate provision for the reimbursement of the cost of preventive and threat removal measures voluntarily undertaken by the owner in the manner described above.⁶⁰

10.9 Claims procedure

⁵⁶Standing Agreement, Clause VII(D) (a) .

⁵⁷Standing Agreement, Clause VII(D) (b) .

⁵⁸Standing Agreement, Clause VII(D) .

⁵⁹Standing Agreement, Clause II(B) (3) .

⁶⁰Standing Agreement, Clause VI(A) .

10.9.1 Contractual prescription

No responsibility shall arise under the Standing Agreement unless written notice of claim is received by the participating tanker owner or bareboat charterer within two years of the date of the incident.⁶¹ This requirement is considerably less generous and flexible than is the case under the Civil Liability Convention.⁶²

An "incident" is defined as, ' ... any occurrence, or series of occurrences having the same origin, which causes Pollution Damage, or which creates the Threat of an escape or discharge of Oil.'⁶³ It is, therefore, conceivable that certain types of pollution damage such as incremental oil pollution damage occurring from sunken tankers, may become time-barred. Where a tanker sinks with oil aboard, the original condition which led to oil pollution or the threat of such pollution will be considered the date of the incident and prescription will begin to run from that time. If oil escapes from the sunken tanker after two years has elapsed, all claims in terms of the Standing Agreement would, consequently, be time-barred.

10.9.2 Payment of claims

Under the Standing Agreement the participating member is responsible for damage caused by his tankers.⁶⁴ Except as provided by Clause V, which covers the situation where two or more TOVALOP tankers are involved in an incident, no participating owner shall be responsible under the Standing Agreement for the claims in respect of another participating

⁶¹Standing Agreement, Clause VIII(C).

⁶²Civil Liability Convention, Article VIII.

⁶³Standing Agreement, Clause I.(d).

⁶⁴Standing Agreement, Clause IV(A).

tanker.⁶⁵

As such, the individual members and their respective insurers settle all claims. The responsible participating owner is obliged to dispose of all valid claims against him, arising under the agreement, as promptly as is practicable.⁶⁶ No fund of money for the settlement of claims is maintained by TOVALOP (which is only an agreement) nor ITOFF, which is just the administrative organ of the TOVALOP agreement.⁶⁷ This is an important clarificatory point because it is frequently imagined that claims under TOVALOP are settled from a fund controlled by ITOFF. Clearly, this is a fundamental misconception.

In most cases it is the P&I Club of the responsible member which ultimately bears the onus of settling claims for pollution damage brought against him. Accordingly, although participating owners are not financially responsible, under TOVALOP, for pollution damage caused by spills from other participating tankers, they will sometimes bear a proportion of the cost of such incidents where they have entered their own tankers in a P&I Club in which the tanker causing the oil spill is also entered. Due to the mutual sharing of third party liability claims with P&I Clubs, they will be required to contribute to the total loss according to their ratable participation in their respective P&I Club. Furthermore, because the P&I Clubs pool between each other their liabilities above a certain level, where large claims arise, most of the world's shipowners will have to make some contribution where a significant oil pollution claim arises.

10.9.3 Payment is not a presumption of liability

Payments made by, or on behalf of a participating owner in terms

⁶⁵Standing Agreement, Clause VIII(G).

⁶⁶Standing Agreement, Clause II(B)(4).

⁶⁷Standing Agreement, Clause VIII(H).

of the Standing Agreement, may not be taken as an admission of liability or evidence of such liability.⁶⁸ Neither shall such payments constitute a submission to any particular jurisdiction.⁶⁹

10.9.4 Cession and owner's right of recourse

The owner may also require that any payment under the Standing Agreement made by him, or by anyone providing him insurance or other financial security, shall be conditional upon either the claimant assigning to the owner his right of action, or authorising him to proceed in his name.⁷⁰ Furthermore, nothing in the Standing Agreement shall prejudice the right of recourse of a participating owner against third parties.⁷¹

10.9.5 Payment may preclude other remedies

Unless otherwise agreed in writing, any payment to a person by or on behalf of a participating owner shall be in full settlement of all said person's claims against the participating owner, the tanker involved, its master, crew, its charterer(s), manager or operator and their respective officers, agents, employees and affiliates and underwriters, which arise out of the incident.⁷² Therefore, where the Standing Agreement alone is applicable to the incident and a claimant has very large claims against the ship he may be ill advised to accept any settlement of these claims under the Standing Agreement unless he obtains written agreement from the owner that such settlement does not constitute full settlement of the claim. A claimant is of course not obliged to accept the voluntary compensation arrangements provided by

⁶⁸Standing Agreement, Clause VIII(J)(i).

⁶⁹Standing Agreement, Clause VIII(J)(ii).

⁷⁰Standing Agreement, Clause VIII(B).

⁷¹Standing Agreement, Clause VIII(K).

⁷²Standing Agreement, Clause VIII(D).

TOVALOP and may pursue an action under local law.

10.10 Dispute resolution (arbitration)

The Standing Agreement and Supplement provide that claimants may, in the event of an irreconcilable dispute with a participating owner, commence International Chamber of Commerce (ICC) arbitration proceedings.⁷³ Such proceedings are the exclusive and final means of enforcing the owner's liability under the Agreement. Proceedings must commence within three years of the date of the incident and the claimant bears the onus of proving that he actually suffered pollution damage or took reasonable threat removal measures to avoid such damage. Tanker owners participating in TOVALOP assume a contractual obligation to other members to submit to such proceedings.⁷⁴

In contrast to the arbitration clauses in TOVALOP, the 1969 Civil Liability Convention makes no reference to the application of arbitration to disputes arising under that instrument. Indeed for the tanker owner to claim the benefit of limitation, he is required to establish a limitation fund with the court of the contracting state in which action is brought against him under the Convention.⁷⁵ Although Article IX of 1969 Civil Liability Convention facilitates the resolution of disputes through the courts of the contracting State in which the damage was done, the majority of cases are nevertheless settled through negotiation

⁷³For analysis of arbitration in the context of the TOVALOP Agreement and marine pollution generally; see Gold 'Dangerous, hazardous and noxious cargoes: A new role for maritime arbitration' (1990) 14 *Marine Policy* 375; O'Donovan 'Claims for oil pollution damage - Arbitration and alternative dispute resolution' *American Petroleum Agency (EPA) 1991 Oil Spill Conference* (March 4-7, 1991 San Diego, CA) 691; for a general discussion of marine arbitration, see Mustill 'Maritime arbitration: the call for a wider perspective' (1992) vol.9 *Journal of International Arbitration* pp.5-30.

⁷⁴Standing Agreement, Clause VIII(E) and (F); Supplement, Clause 5(A).

⁷⁵Civil Liability Convention, Article V.3.

as opposed to litigation.

10.11 The proper law to be applied

The Standing Agreement and the Supplement are governed by the laws of England. This provision is not applied without certain exceptions. A participating owner shall not be required to incur any obligation or take any action, in respect of any incident in which his tanker is involved, which would violate the laws or government regulations of the flag State of the tanker.⁷⁶ Nor shall a participating owner be required to incur any obligation or take any action which would, if a majority of the stock of the participating owner is owned, directly or indirectly, by another corporation, partnership or individual, violate any laws or government regulations which may apply to said other corporation, partnership or individual.⁷⁷

10.12 Conclusion to the Standing Agreement

The relief afforded to claimants under the Standing Agreement is severely limited and will probably be insufficient to compensate all claims in the event of a large oil spill. Fortunately, it will not apply in most instances because either additional the TOVALOP Supplement together with CRISTAL and/or the international Conventions will apply. Furthermore, in certain States, and, in particular, the United States, claimants would elect to recover under local law. In the next Chapter the application of the TOVALOP Supplement, together with the CRISTAL Fund, is discussed. In certain circumstances these two voluntary sources of compensation interact with the workings of relief available from the 1969 Civil Liability and 1971 Fund Conventions. For this reason it is important that both the international Conventions and the voluntary agreements are considered in this work.

⁷⁶Standing Agreement, Clause XI(a); Supplement, Clause 1(1)(E).

⁷⁷Standing Agreement, Clause XI(b); Supplement, Clause 1(1)(E).

CHAPTER 11

TOVALOP Supplement and CRISTAL

11.1 Introduction

Since the 20th February, 1987, the Standing Agreement has been augmented by a Supplement which only comes into operation when CRISTAL applies to the incident. In terms of the Supplement, members of TOVALOP assume an obligation to provide compensation up to an additional level of financial responsibility.¹ The proportion of successful claims which goes uncompensated where the limits of the Supplement are exceeded will be compensated by CRISTAL Limited within the limits and conditions of the CRISTAL Contract. In other words, CRISTAL provided an addition source of compensation over and above the limits of the Supplement.

The application of the Supplement is contingent upon the application of CRISTAL. Accordingly, it is necessary first to discuss the conditions under which CRISTAL will operate before considering the possible compensation which may become available under the Supplement and CRISTAL.

11.2 Pre-conditions for the application of CRISTAL

It is a condition precedent to CRISTAL Limited's obligation to make any payment, that, at the time of the incident, the oil involved is "owned" by an oil company party to CRISTAL.² "Ownership" is defined in extremely wide terms which may not be simply equated with the traditional notions of ownership.³ Cargoes of oil may be deemed to be CRISTAL cargoes in

¹That limit of liability has been set at a level equivalent, at current exchange rates, to the 1984 Civil Liability Convention Protocol.

²CRISTAL, Clause IV(D).

³CRISTAL, Clause V.

circumstances where no CRISTAL member actually possesses legal title to that oil.

11.3 Extended CRISTAL "ownership" rules

A wide definition of "ownership" has the result that more cargoes are considered CRISTAL cargoes than would be the case if a strict interpretation of the concept of "ownership" were relied upon. In this way the designers of the CRISTAL contract endeavoured to ensure that the supplementary compensation under CRISTAL would be available to claimants in the greatest number of cases. This suggests that the oil companies perceive real advantages where they settle as many oil pollution disputes possible within their private and confidential compensation framework, as opposed to normal procedures.

Cristal "ownership" may arise through title to the oil or it may be deemed to be owned.

11.3.1 Cargo legally owned

A shipment of oil is considered owned by an oil company party to CRISTAL where, at the time of the incident, a CRISTAL member in fact possessed title to the shipment.⁴

Significantly, the term "title" to the shipment, within the special context of CRISTAL, is carried beyond strict legal title to include a broader range of circumstances. In certain circumstances, for instance, where a contract or a series of contracts of sale of a shipment of oil, which either begins with the contract in which a CRISTAL member is seller, or, ends with a CRISTAL member as buyer, the shipment can be construed as a CRISTAL cargo.⁵ In such situations, while, at the time of the incident, legal title to the polluting oil may in fact rest with

⁴CRISTAL, Clause V(A) (1).

⁵Rules of Cristal Limited, Rule 2.5.

a non-CRISTAL party, that cargo will still be regarded as "owned" by the party to CRISTAL. Recognizing the artificiality of this enhanced notion of ownership, the Rules of Cristal Limited stipulate that the broad interpretation of title shall have no effect on the legal rights and obligations of the parties under any other contract or applicable law.⁶

11.3.2 Cargo deemed "owned"

Under certain circumstances, although the cargo may not strictly speaking be owned by a CRISTAL member, it may be deemed to be owned. Three general ways in which this is facilitated are explained below.

11.3.2.1 By election

11.3.2.1.1 Transfer provisions

A CRISTAL member may elect to be considered the owner of an oil cargo under circumstances where he has transferred title to a non-member.⁷ It is a pre-condition for the application of this provision that notification of an election is made in writing to Cristal Limited prior to the occurrence of any incident.⁸

When invoking this procedure the elector must state that he is a direct or indirect transferor of the oil shipment to a non CRISTAL member and that he unequivocally elects to be considered as the "owner".⁹ He must also identify the tanker carrying the shipment, the name of transferee, the approximate quantity of oil involved, or otherwise identify the shipment to CRISTAL Limited's

⁶Rules of Cristal Limited, Rule 2.5.

⁷CRISTAL, Clause V. (A) (2).

⁸CRISTAL, Clause V(B); Rules of CRISTAL Limited, Rule 6.1(a).

⁹Rules of CRISTAL Limited, Rule 6.1(a)(i).

satisfaction.¹⁰ The elector must also fulfil all the requirements necessary for the levy of contributions to the CRISTAL Fund regarding the oil in question.¹¹

11.3.2.1.2 Transportation provisions

Where a non CRISTAL cargo is carried aboard a tanker owned by a CRISTAL member or one of its affiliates, the CRISTAL member or his affiliate, may elect to be considered the owner. In this way the cargo shall be deemed to be a CRISTAL cargo.¹²

Due notification to Cristal Limited prior to the occurrence of an incident is required here, also, to enable the application of this provision.¹³

11.3.2.1.3 General election

As an alternative to furnishing Cristal Limited with notification for each shipment, as described in sections 11.3.2.1.1 and 11.3.2.1.2 immediately above, a member is entitled to notify Cristal Limited of his intention to be considered "owner" of all such shipments of oil. Such notification is subject to approval by CRISTAL Limited.¹⁴

11.3.2.2 By contractual linkage

Where at the time of an incident the owner of a cargo of oil is not a CRISTAL member but he has contracted to sell such cargo to

¹⁰Rules of CRISTAL Limited, Rule 6.1(a)(ii).

¹¹Rules of CRISTAL Limited, Rule 6.1(a)(iii).

¹²CRISTAL, Clause V(A)(3).

¹³CRISTAL, Clause V(B); Rules of CRISTAL Limited, Rule 6.1(b).

¹⁴Rules of CRISTAL Limited, Rule 6.1(c).

a CRISTAL member, the cargo shall be deemed a CRISTAL cargo.¹⁵ In such case the CRISTAL buyer of the cargo shall have to make the contributions to the CRISTAL Fund in respect of that cargo.

11.3.2.3 By contractual linkage and location

Where a cargo of oil is owned by a non-member, that oil will nevertheless be considered a CRISTAL cargo, where three prerequisite factors are fulfilled. Firstly, where the shipment is contracted to go to or from a terminal or other facility in which, secondly, a CRISTAL member has ownership or other interest and, thirdly, the incident occurs or pollution damage is caused within 250 nautical miles¹⁶ of such terminal.¹⁷

In this context a '... terminal or other facility shall mean any property, fixed or floating, from which Oil can be unloaded from or discharged into a Tanker including, but not limited to, oil terminals, tank farms, refineries, single point moorings, floating storage or offshore discharging or loading vessels.'¹⁸

Where all these criteria are satisfied, the cargo shall be deemed to be a CRISTAL cargo and the CRISTAL contract will accordingly apply even though no CRISTAL member possesses a proprietary interest in the oil.

The President of Cristal Limited, Mr J.A. Hawkes, has expressed the view that this provision is '... not entirely satisfactory.' Clearly, certain conceptual difficulties may arise. Where, for instance, due to an oil spill outside the 250 nautical mile limit, oil pollution is subsequently caused within the 250 mile zone, the delay between the incident and the subsequent pollution

¹⁵CRISTAL, Clause V(A) (4).

¹⁶1 Nautical mile = 1.852 m ergo 250 nautical miles = 463 km (277.8 land miles).

¹⁷CRISTAL, Clause V(A) (5).

¹⁸CRISTAL, Clause V(A) (C).

can lead to uncertainty.¹⁹ This is significant not only to the issue of compensation but uncertainty could result in hesitation on the part of responders who may not be sure whether they will be able to recover their costs under the enhanced limits of the Supplement and CRISTAL.

Notwithstanding certain difficulties, the endeavours of the developers of CRISTAL have, in this regard as in other aspects of the contract, clearly indicated that the oil industry intended to provide a reliable source of compensation for oil pollution above that paid by tanker owners. It has, however, been suggested that the oil industry created CRISTAL merely to convince the public of the industry's large monetary willingness to help in the fight against pollution.²⁰ To a large extent this is an unsophisticated analysis which fails to take into account the full subtleties of international oil pollution compensation.

11.4 Parties eligible for CRISTAL membership

Any person who falls within the CRISTAL definition of an oil company may become a party to CRISTAL upon acceptance by Cristal Limited.²¹ Cristal Limited is a Bermuda-registered company which administers the Contract while the actual working of the Contract is handled by its subsidiary, Cristal Services Ltd in London.

For the purpose of CRISTAL, an oil company may include any individual or partnership or any public or private body, whether corporate or not, including a State or any of its constituent

¹⁹J.A. Hawkes 'The Voluntary Compensation Schemes CRISTAL' at 8 contained in *Oil Pollution Claims, Liability & Environmental Concerns* International Business Communications Ltd. Conference Documentation 3-4 November, 1992 London.

²⁰Buglass 'The Big Oil Spill: Potential Labilities v. Available Insurance' (1978) *Dynamic Aspects of Marine and Offshore Liabilities* at III-4 cited by McKaig 'Liability For Oil Tanker Spills' (1991) vol.44 *Southwestern Law Journal* 1599 fn.157 at 1608.

²¹CRISTAL, Clause II(A).

subdivisions engaged in the production, refining, marketing, storing, trading or terminaling of oil, or that receives oil in bulk for its own consumption or use.²² As a result of this broad definition, major consumers of crude oil such as power stations also become members of CRISTAL together with oil companies and traders in oil.

11.4.1 Oil traders included

Originally, the categories of eligible CRISTAL members did not include companies trading in oil. The term "trading" was incorporated in 1987 to ensure that oil traders could become CRISTAL members.²³ This amendment was brought about to reflect a profound change that had occurred in the oil industry in the late 1970s. Yergin outlines the development of oil trading as follows.

'Until the end of the 1970s, no more than 10 percent of internationally traded oil was to be found in the spot markets, By the end of 1982, ... more than half of internationally traded crude oil was either in the spot market or sold at prices keyed to the spot market.'²⁴

The ability of the parties to both voluntary agreements, and in this instance CRISTAL, easily to amend their agreements is conducive to the continued success of the voluntary regimes.

11.4.2 Composition of CRISTAL membership

²²CRISTAL, Clause I(H) read with Clause I(K).

²³Cohen 'Revisions of TOVALOP and CRISTAL: Strong Ships for Stormy Seas' (1987) 18 *Journal of Maritime Law and Commerce* 525 at 536.

²⁴Yergin *The Prize* (1991) at 722 for an analysis of the reasons for this development (essentially due to a glut of cheap oil on the international market, together with the loss of secured oil sources by the majors) see Yergin pp.715-24.

As the ambit of potential membership is construed widely and CRISTAL facilitated an enhanced definition of "ownership", a high proportion of the total volume of oil transported by sea is subject to the terms of the Contract.

In general, CRISTAL membership remains fairly constant in number and make-up. As at 31st December, 1991, 732 Companies were parties to CRISTAL. This represented a reduction of thirty-six compared with the membership at the end of the 1990 year. This reduction was mainly due to the withdrawal by one Group member of twenty-three of its Companies.²⁵ As at 1st June, 1992, Cristal Limited had 726 members, comprising oil companies, oil refinery and terminal operators and oil traders, as well as a number of other companies consuming or using oil in bulk.²⁶ These members are located in over ninety countries many of which are party to the 1971 Fund Convention.

It is noteworthy that the U.S. Groups of certain multinational oil companies, which are otherwise CRISTAL members, sometimes choose not to become members. This, for instance, is so in the case of BP America Inc.²⁷

11.5 CRISTAL "ownership" permits Supplement's application

Compensation under the Supplement shall be permitted only if the claim arises from an "applicable incident".²⁸ An occurrence or series of occurrences with the same origin which causes pollution damage or creates the threat of an oil spill from a tanker carrying oil "owned" by an oil company party to CRISTAL

²⁵*Cristal Limited Annual Report and Consolidated Financial Statements Year ended December 31, 1991* at 4.

²⁶*TOVALOP & CRISTAL A Guide to Oil Spill Compensation* 3rd ed. (1992) at 14.

²⁷*CRISTAL 1991 List of Members* at 7.

²⁸Introduction to the Supplement.

constitutes an "applicable incident".²⁹ The seminal idea behind the Supplement's definition of an "applicable incident" is that the Supplement only operates where the oil involved in the spill is actually owned or deemed to be "owned" by a party to CRISTAL.

11.6 CRISTAL applies if Supplement limit is met

Supplementary compensation under CRISTAL will not become available until the tanker owner has first paid compensation up to the applicable limit calculated in accordance with the Supplement. Such payment may result from claims for oil pollution damage or costs of preventive measures or threat removal measures and payments or costs incurred by the tanker-owner as a result of the application of the 1969 Civil Liability Convention, applicable domestic laws or otherwise.³⁰

It is not necessary that the tanker owner directly pays these amounts. Such payments may be made on his behalf through, for instance, his P&I Club or other insurer. Furthermore, tanker owners who are not party to the TOVALOP Agreement at the time of the "applicable incident" may nevertheless bring about the application of CRISTAL by paying compensation according to the terms of the TOVALOP Agreement and up to the limits encapsulated in the Supplement.

This procedure is a further illustration of how the oil industry has seen fit to enable the application of the voluntary compensation regimes in as many instances as possible. However, before tanker owners can invoke the very substantial benefits afforded to them by this provision, the oil causing the spill must have been owned, or deemed to be owned, by a party to CRISTAL.

²⁹Supplement, Clause 1(1)(A).

³⁰CRISTAL, Clause IV(D)(4) the limits mentioned in this clause are equivalent to the limits of financial responsibility specified by Clause 3(C)(3) of the Supplement.

11.7 Scope of the Supplement and CRISTAL

Because the Supplement and CRISTAL are required to provide compensation arising out of the same incidents they have a similar scope of application.

11.6.1 Tanker defined

The Supplement does not define the term "tanker" but Clause I(2)(A) of the agreement stipulates that insofar as words and phrases are not varied by Clause I(1) of the Supplement they shall have the same meanings as defined in Clause I of the Standing Agreement. In keeping with this provision, the term "tanker" does not have the same meaning in the Standing Agreement as in the Supplement. This because the definition of an applicable incident for the purpose of the Supplement confirms that the Supplement only applies where CRISTAL applies to the incident. Therefore, the incident in question must occur from a tanker as defined in CRISTAL and the other requirements for the application of CRISTAL must also be met.

For the purpose of CRISTAL and for the purpose of the Supplement, a tanker includes any seagoing vessel and any seaborne craft of any type whatsoever, designed and constructed for carrying oil in bulk as cargo, where actually carrying oil in bulk as cargo at the time of the incident.³¹

Accordingly, the definition of a tanker in CRISTAL and the Supplement is narrower than that of the Standing Agreement as it only covers tankers actually carrying oil, in bulk as cargo at the time of the incident. Furthermore, the oil in question must be owned or deemed to be owned by a CRISTAL member. By contrast, the Standing Agreement applies whether or not the tanker is actually laden at the time of the incident.³²

³¹CRISTAL, Clause I(N).

³²Standing Agreement, Clause I(m).

Under CRISTAL, as is the case with the Standing Agreement, the tanker need not be at sea at the time of the incident, but must be capable of sea-going or being seaborne. The Great Lakes shall be regarded as seas for this purpose and sea-going or seaborne capability shall normally be determined in the light of the tankers certification.³³

11.6.2 Oil defined

"Oil" means any persistent hydrocarbon mineral oil including, but not limited to, crude oil, fuel oil, heavy diesel oil and lubricating oil whether carried on board a tanker as cargo or in the bunkers of such tanker.³⁴ The Supplement does not expressly define "oil" but, because the definition of an applicable incident refers to oil as defined in CRISTAL, the Supplement incorporates the CRISTAL definition by reference.

Therefore, provided that the incident occurs while a tanker is transporting "oil" which is owned, or deemed to be owned, by a party to CRISTAL, compensation shall be made in terms of the Supplement and CRISTAL, even in circumstances where the oil pollution damage was not due to a spill of cargo oil, but was due to a spillage of persistent bunker oil from that vessel.

As has been the experience of the IOPC Fund, CRISTAL has also encountered problems with regard to the categorization of persistent oil as opposed to non-persistent oil. For example it has been noted that at least two crude oils are not categorized as being persistent oil by both the IOPC Fund and CRISTAL. The IOPC Fund, like CRISTAL, accepts that the product called Orimulsion is a persistent oil.³⁵

³³CRISTAL, Rule 2.1.

³⁴CRISTAL, Clause I(G).

³⁵J.A. Hawkes 'The Voluntary Compensation Schemes CRISTAL' at 6 contained in *Oil Pollution Claims, Liability & Environmental Concerns* International Business Communications Ltd. Conference Documentation 3-4 November, 1992 London.

11.6.3 Ballast voyages excluded

From the standpoint of the oil shipper, as opposed to that of the oil haulier, the justification for the definitions of "tanker" and "oil" is understandable. Unladen tankers do not transport cargoes of oil and therefore why should owners of oil cargoes contribute to damages arising from incidents where no oil is actually being transported in bulk as cargo?

In rebuttal, the tanker owner camp have argued that the oil industry should assume a significant proportion of the financial responsibility for spills of bunker oil from unladen tankers when tankers are on ballast voyages to receive an oil shipment. The foundation for this assertion is that the oil cargo owners are integrally linked, through association, with the ballast voyage, and as such should shoulder a large degree of responsibility for incidents and resulting pollution damages which occur during ballast voyages.

11.7 Loss recoverable - Supplement and CRISTAL

The Supplement and CRISTAL were designed as a dual system of compensation. Of necessity, therefore, they share the same definitions of oil "pollution damage", "preventive measures" and "threat removal measures". Consistency between the types of damage admissible under the Supplement and CRISTAL echoes the endeavours of the P&I Clubs and the IOPC Fund to achieve conformity as to the admissibility of claims under the 1969 Civil Liability and 1971 Fund Conventions respectively.

11.7.1 Pollution damage defined

For the purpose of the Supplement and CRISTAL, (but not the Standing agreement), the definition of pollution damage was amended to clarify the position relating to environmental damage. For the purpose of CRISTAL this important amendment became effective from 23rd October, 1989, and for the Supplement on 20th

February, 1990. At the time of writing the definition is as it appears below.

"Pollution Damage" means (i) physical loss or damage caused outside the Tanker by contamination resulting from the escape or discharge of Oil from the Tanker, wherever such escape or discharge may occur, including such loss or damage caused by Preventive measures, and/or (ii) proven economic loss actually sustained, irrespective as to accompanying physical damage, as a direct result of contamination as set out in (i) above, including the Costs of Preventive Measures, and/or (iii) Costs actually incurred in taking reasonable and necessary measures to restore or replace natural resources damaged as a direct result of an Applicable Incident, but excluding any other damage to the environment.³⁶

The type of damages recoverable under the Supplement and CRISTAL are considerably clearer and broader than is the case under the Standing Agreement. However, as is the case under TOVALOP, it is difficult to assess the approach adopted by the Directors of Cristal Limited in the resolution of claims arising under the CRISTAL contract because of the confidentiality involved. The Rules of Cristal Limited do, however, provide certain insights into the policy, practice and principles applicable to the CRISTAL contract.

In accordance with provisions of the CRISTAL Contract and the Rules of Cristal Limited, any person, including a CRISTAL member, may make a claim and receive compensation for pollution damage occurring as the result of an escape or discharge of oil or the cost of preventive or threat removal measures.³⁷

11.7.2 Economic loss

³⁶Supplement, Clause 1(G); CRISTAL, Clause I(M).

³⁷Rules of Cristal Limited, Rule 3.2.

Although it seems the Standing Agreement also permitted the recovery of proven economic loss actually sustained, irrespective of accompanying physical damage, the exact position under that agreement was not clear. Any uncertainty concerning the recovery of pure economic loss under the Supplement and CRISTAL has now been clarified.

The Rules of Cristal Limited have elaborated on the CRISTAL definition of pollution damage. The term 'proven economic loss actually sustained', as used in Clause I(M) of CRISTAL, excludes any remote or speculative economic loss or economic loss based upon theoretical calculations in any form.

The term includes loss or damage (and reasonable measures to prevent further loss or damage) directly caused by airborne particles of oil emanating from a tanker.³⁸ Such particles may be carried by wind or in the form of soot from a tanker fire.

Of course, under the Supplement, the exact meaning of the term, 'proven economic loss actually sustained', may be determined by ICC arbitration. Also, such recovery shall be permitted only where the loss incurred is directly linked to the contamination.

An example, provided by Cristal Limited, depicting how definition of pollution damage may operate in practice is given as follows.

'A hotel owner who spent money to clean up a beach which fronts the hotel and which is contaminated by oil spilled from a tanker has certainly sustained pollution damage. Again, loss of income which the hotel owner is able to prove is the result of the contamination will constitute pollution damage.'³⁹

³⁸Rules of Cristal Limited, Rule 2.4.

³⁹CRISTAL; Memorandum of Explanation, Cristal Contract and Rules of Cristal Limited, Revised February 20, 1992 at 7.

This very simple example depicts a hotel owner suffering damage by way of clean up costs and economic loss reasonably attributable to contamination. It envisages a hotel situated in front of a contaminated beach, suggesting a very close proximity to the site of contamination. The example, could seem indicative of a particularly narrow interpretation of economic loss. Certainly, resorts that depend upon water-related activities may suffer a severe decline in custom even where such resorts are not situated in close proximity to the pollution site.⁴⁰

There are numerous types of reliably attributable economic loss which are removed from the site of contamination. For instance would lost taxes be claimable from the voluntary compensation regimes? According to the interpretation of the definition of pollution damage, as articulated by Rule 2.4 of *Cristal limited*, such claims are in principle recognizable under the definition of pollution damage where the Directors of *Cristal Limited* determine that they satisfy the criteria of directness.

11.7.3 Loss of natural resources

The Standing Agreement makes no direct reference to the admissibility of claims for the recovery of damage to the environment caused by oil pollution. As loss or damage which is remote or speculative is not covered by the definition of pollution damage in the Standing Agreement, it is probable that claims for damage to the environment are inadmissible under that agreement. The position under the Standing Agreement on this issue is analogous to the policy expressed by the IOPC Fund in relation to its interpretation of the definition of pollution damage under the 1969 Civil Liability Convention and the 1971 Fund Convention, in that compensation would be granted only where a claimant had suffered quantifiable economic loss. Compensation

⁴⁰For a discussion of the question of economic loss, see Mulhern 'Marine Pollution, Fishers, and the Pillars of the Land: A Tort Recovery Standard for Pure Economic Losses' (1990) 18 *B.C. Env'tl. Aff. L. Rev.* at 85.

for damage to the marine and coastal environment on the basis of an abstract quantification of damage, calculated in accordance with theoretical models, will presumably be precluded under the Standing Agreement. However, as pointed out previously, it would be possible for an ICC arbitration tribunal to determine otherwise.

The 1984 Protocols to the 1969 Civil Liability and 1971 Fund Conventions introduced a revised definition of pollution damage which was incorporated into the 1992 Protocols to those Conventions. This revised definition of pollution damage includes, *inter alia*, compensation for damage to natural resources, provided that compensation for impairment of the environment (other than the loss of profit from such impairment) shall be limited to costs of reasonable measures of reinstatement actually undertaken or to be undertaken.⁴¹

The industries behind the two-tier voluntary compensation regimes responded to the 1984 amendment to the definition of pollution damage by implementing amendments to the definitions of pollution damage contained in the Supplement and CRISTAL. These amendments facilitate the recovery of damage to natural resources prior to the coming into force of the 1992 Protocols.

The relevant portion of the Supplement and CRISTAL definition provides that pollution damage includes costs actually incurred in taking reasonable and necessary measures to restore or replace natural resources damaged as a direct result of an applicable incident, but excluding any other damage to the environment. Consequently, damage to the environment *per se* is inadmissible, under the Supplement and CRISTAL.

Mr J.A. Nichols and Dr I.C White, respectively, Technical Manager and Managing Director of ITOPF, have expressed the following

⁴¹Article 2.3 of the 1992 Civil Liability Protocol which is incorporated by reference into the 1992 Fund Protocol by Article 2.3 of that Protocol.

industry concerns over the admissibility of claims for environmental loss.

'The fundamental problem with such claims is the fact that such resources do not usually have an easily definable economic value. As a result natural resource damage assessment procedures and the resulting claims are usually based on formulae and on questionable scientific premises and unrelated economic indicators. This is a highly complex area involving scientific, legal, economic and political considerations ... '42 (emphasis by the present writer)

It would seem that these commentators even agree that such resources have an economic value *per se* but their concern is that such value is difficult to determine (refer to emphasis in quote above). However, an obvious point is that just because the economic value of a thing damaged is not easily discernible it does not mean that such damage must go uncompensated. Clearly, courts are often called upon to make such decisions and may also make use of abstract or theoretical models when reaching a decision as to the quantum of damage.

11.7.3.1 Recovery of damage assessment costs

In the sole discretion of the Directors, CRISTAL may compensate claimants for the cost of studies undertaken to assist in quantifying or verifying pollution damage and for any additional costs which CRISTAL determines as having assisted in resolving claims. It could well be the case that legal expenses could be recoverable under the heading of additional costs. Such costs may be included within the limits payable by CRISTAL.

CRISTAL will not, however, compensate for any environmental studies, even if required by local law, unless such studies were authorised by CRISTAL or the Directors determine they were

⁴²Nichols & I.C. White 'The Role of ITOPF and P&I Clubs in Oil Spill Response' (undated paper) at 9.

designed to assist in quantifying or verifying pollution damage.⁴³ It seems that as a matter of policy, at this stage all claims for wider environmental damage *per se* will be resisted by the P&I Clubs and the Directors of Cristal Limited.

11.7.3.2 The importance of ecological damage

It has been suggested that despite great differences between legislation, case law and scholarly writing in different legal systems, there are common characteristics in the definition of ecological damage, which can be identified as '... the detrimental physical change of the environment, that do not only affect personal property, health or economic interests, but injures the public interest in the conservation and use of the environment.'⁴⁴ This definition articulates a broader category of damage than the restricted parameters within which the voluntary regimes and the international Conventions allow for the recovery of damage to the environment.

Clean-up operations and attempts to restore damaged ecosystems are in most instances only partly successful. Therefore, by merely paying for clean up and attempted rehabilitation expenses, the polluter can never provide full compensation for damage to the environment. At best, even if reinstatement measures were entirely effective, damage to natural resources would still have occurred because the environment will have been impaired during the interim period from the time of the spill up to the time when full reinstatement occurs. This is generally referred to as 'depreciation of resources pending restoration.' Also, in certain circumstances, remedial measures are counter-productive, unfeasible or impossible. This would be so, for example, where the technology does not exist to restore the damage to an ecosystem or where remedial action would cause greater damage

⁴³Rules of Cristal Limited, Rule 4.4.

⁴⁴Marticke 'Liability for Ecological Damage: a Report' (1992) 22 *Envtl. Pol. & Law* 28 at 28.

than would be the case if no remedial action were taken.

For these reasons it is unsatisfactory to maintain that claimants should only be permitted to recover 'the cost of reasonable measures of reinstatement actually undertaken or to be undertaken'⁴⁵ or 'costs actually incurred in taking reasonable and necessary measures to restore or replace natural resources damaged as a direct result of an applicable incident, but excluding any other damage to the environment.'⁴⁶

The extant position fails to accommodate the loss sustained by a community when their shoreline is polluted by an oil spill and attempted reinstatement measures have proved unsatisfactory or ineffective. If one concedes that a community whose environment is thus heavily polluted with oil suffers damage, and it would seem difficult to argue otherwise, then on grounds of equity the present position adopted by industry regarding the compensation of such damage is untenable. The position of industry can only be justified on the traditional policy grounds that shipowners, and by implication the oil industry, must be allowed to limit their liability to manageable levels. The policy of limitation as it applies to maritime law has been steadily eroded. In keeping with this trend, provision should now be made for full compensation for environmental damage, including monetary compensation and compensation in kind where reinstatement is not feasible.

As the definitions of environmental damage contained in the Civil Liability and Fund Conventions, the 1992 Protocols thereto and the Standing Agreement, Supplement and CRISTAL do not realistically reflect the requirement that compensation must be made beyond the artificial constraints of reinstatement costs, it can be predicted that such definitions will not enjoy

⁴⁵As in the position under the 1992 Protocols to the Civil Liability and Fund Conventions.

⁴⁶As is the position under the Supplement and CRISTAL.

longevity or legitimacy. Where law attempt to regulate conflict between groups but fails to reflect the legitimate demands of the more powerful group, those laws will inevitably be superseded by laws more favourable to the most influential group.

During periods of rapid industrialisation: for example in England during the industrial revolution, environmental considerations were sacrificed in the interest of rapid industrial growth. This trend is still evident in developing countries where governments sacrifice the demands of conservationists to satisfy the dictates of rapid development. When frenetic industrialisation reaches more stable levels and the dictates of industrialists are replaced by more humanist considerations, the law is forced to reflect this change if it is to retain legitimacy. This general observation is also true within the context of marine oil pollution from tankers.

It has already been seen how in the United States the public outcry following the *Exxon Valdez* spill has resulted in OPA, which, *inter alia*, provides that environmental damage will be recoverable to a far wider extent than is the case under the relevant provisions of the international Conventions and the voluntary compensation regimes. This reflects a swing in the balance of power from industry to the public at large which is beginning to demand that the cost of pollution be realistically and truthfully assessed.

What the oil industry, and to a lesser extent the independent tanker owners, fear more than higher liability is external control and unpredictability. External control will be forced upon the tanker process if the oil industry fails to meet the standards of responsibility expected of them. Such standards naturally fluctuate over time, and differ in different geographical locations around the world where different conditions prevail. But, as a general statement, it is very likely that environmental standards will increase significantly as the general public becomes more conscious of the need to

preserve the environment. It is also significant that the groups of people who use the most oil, which is in most cases imported by tankers, are the most articulate, educated, influential and litigious in the world (i.e. North American and European citizens).

It is not sufficient or satisfactory that the oil industry merely compensate victims of narrowly defined oil pollution without paying the full cost of the destruction of natural resources caused by their less than adequate levels of performance. The parties ultimately responsible for the pollution must be forced to provide full compensation, including the full costs of damage to the environment. Punitive damages and fines should also be levied in appropriate circumstances. To avoid external control the industry must provide such compensation until they manage to make the tanker transport process safe.

Unless the international Conventions and the voluntary compensation regimes adequately reflect the legitimate demands and expectations of the public, they will lose legitimacy and fail. The consequence of such failure will be a fragmentation of oil pollution compensation systems to the point where a different system applies in each State. This is effectively what has already occurred in the United States with the passing of OPA. In this regard one commentator has expressed the following view.

'The fate of international law regarding oil spill pollution is most likely settled. The interest in resolving the oil spill pollution problem through an international treaty will slowly fade as more and more nations follow the United States lead, moving further away from an international solution to the oil spill liability problem.'⁴⁷

⁴⁷Smith 'An Analysis of the Oil Pollution Act of 1990 and the 1984 Protocols on Civil Liability for Oil Pollution Damage' (1991) 14 *Houston J. of Int'l Law* 115 at 150.

In essence the above prediction is probably correct, however, it is not desirable that the form of the various fragmented compensation regimes emulate the system of control implemented by OPA. Unfortunately, OPA channels liability to the tanker owner, when in the view of the present writer, it is more effective to place responsibility on the owners of the cargo which, as noted previously, is the case in certain U.S. State Legislation. Furthermore, international control over oil pollution and the compensation thereof is desirable because it creates uniformity and therefore predictability.

The U.S. is the world's largest oil importer and possesses sufficient political and economic influence to adopt unilateral action. No single state other than the U.S. is in the same position to dictate terms to the shipping and oil industry and avoid isolation or considerable additional costs. Therefore, although the proponents of internationalism have come under pressure from the United States since 1990, a more united European community and Japan are likely to adopt an amended international system of control with greater liability and an effective channelling of liability to the oil cargo owner. Such development would be in keeping with the thrust of this thesis and would serve the central purpose of increasing tanker safety. This argument is developed in more detail in Chapter 14 of this work.

11.7.4 Preventive measures

The CRISTAL Contract defines preventive measures as any reasonable measures taken by any person, after an incident has occurred, to prevent or minimise pollution damage.⁴⁸ The Standing Agreement also contains this definition.⁴⁹ The Supplement defines preventive measures in the same way, except in that it refers to an applicable incident to emphasise that the

⁴⁸CRISTAL, Clause I(L).

⁴⁹Standing Agreement, Clause I(1).

Supplement shall only apply in those cases where CRISTAL applies to the incident.⁵⁰

For the purpose of CRISTAL the term "preventive measures" shall be interpreted to mean any reasonable measures taken after an escape or discharge of oil from a tanker to prevent pollution damage from being caused or to contain, remove, disperse or eliminate any oil that has escaped, or to reduce or prevent the further escape of oil from the tanker but shall not include measures the primary purpose of which is not directed towards the prevention of further pollution damage or the elimination of the further escape or discharge of oil.⁵¹

Examples of preventive measures are the booming of an estuary to prevent oil entering the estuary, or putting a boom around oil which has been spilt and picking it up from the surface of the water by means of a skimmer in order to ensure that it does not cause extended pollution damage.⁵²

In principle, Cristal Limited considers the type of measures mentioned above, and any other reasonable clean up measures, to be included within the ambit of preventive measures. By implication these heads of damage would also receive compensation under the Supplement. Therefore the two-tiered system of compensation under the Supplement and CRISTAL will reimburse governments and other claimants who incur reasonable costs in undertaking preventive measures.

11.7.5 Threat removal measures

The wording of the definition of threat removal measures is almost identical across the Standing Agreement, the Supplement

⁵⁰Supplement, Clause 1(1)(H).

⁵¹CRISTAL, Rule 2.2.

⁵²CRISTAL; Memorandum of Explanation, Cristal Contract and Rules of Cristal Limited, Revised February 20, 1992 at 7.

and CRISTAL. The CRISTAL Contract defines threat removal measures as reasonable measures taken by any person after an incident has occurred for the purposes of removing the threat of an escape or discharge of oil.⁵³ The TOVALOP Supplement defines threat removal measures in the same way except that it refers to an applicable incident to emphasise that the supplement shall only apply in those cases where CRISTAL applies to the incident.⁵⁴ The Standing Agreement also contains this definition.⁵⁵

The CRISTAL Contract defines a "threat of an escape or discharge of oil" in the same way in which that phrase is defined in the Standing Agreement. The threat of an escape or discharge of oil means a grave and imminent danger of the escape or discharge of oil from a tanker, which if it occurred, would create a serious danger of pollution damage, whether or not an escape or discharge in fact subsequently occurs.⁵⁶ This term is not directly defined in the Supplement but for the purpose of the Supplement the phrase "threat of an escape or discharge of oil" shall have the same meaning as that of the Standing Agreement, provided that the Supplement in fact applies to the incident. In effect, because the Supplement only applies where CRISTAL applies, the ability of the Supplement to compensate threat removal measures is not as wide in the Supplement as under the Standing Agreement. On the other hand, greater compensation is potentially available under the Supplement and CRISTAL where those agreements apply.

In terms of the Supplement and CRISTAL, compensation is available for measures taken to remove a grave and imminent danger of an oil spill. This might include, for instance, the removal of oil from a damaged cargo tank on a tanker in order to prevent the

⁵³CRISTAL, Clause I (P).

⁵⁴Supplement, Clause 1(1)(K).

⁵⁵Standing Agreement, Clause I(O).

⁵⁶CRISTAL, Clause I(O); Standing Agreement, Clause I(n).

risk of that oil escaping into the sea.⁵⁷ "Threat removal measures" are interpreted to include reasonable measures taken directly to prevent an escape or discharge of oil from a tanker. It does not, however, include measures the primary purpose of which is not directed towards the prevention of an escape or discharge of oil, nor shall it include measures which, irrespective of pollution considerations, any reasonable or prudent owner would have taken in the circumstances to ensure the safety of the tanker, its personnel and/or its cargo.⁵⁸ In other words, the policy of Cristal Limited is analogous to that of the IOPC Fund, in that a distinction is drawn between pollution prevention operations and operations in the nature of salvage.

Significantly, pure threat removal measures are recoverable under the Supplement and CRISTAL (and the Standing Agreement) while such measures are inadmissible under the 1969 Civil Liability and 1971 Fund Conventions. The recovery of reasonable threat removal measures had been permitted in terms of CRISTAL since the contract was first initiated but such claims were only recognized by Cristal and TOVALOP where an oil spill had actually occurred. TOVALOP was amended as from 20th February, 1973, to provide for the recovery of costs for pure threat removal measures and since 25th May, 1973 the CRISTAL Contract likewise permitted the recovery of claims for reasonable pure threat removal measures.⁵⁹ These changes were incorporated in the Supplement to TOVALOP. In this way claimants who incur costs reacting to the threat of an oil spill are able to recover such loss regardless as to whether or not an actual spill eventuates.

It is not necessary that the actual owner of the polluting tanker claim for the costs of preventive measures or the cost of threat

⁵⁷CRISTAL; *Memorandum of Explanation, Cristal Contract and Rules of Cristal Limited*, Revised February 20, 1992 at 7.

⁵⁸The Rules of CRISTAL Limited, Rule 2.3.

⁵⁹Abecassis & Jarashow *Oil Pollution from Ships: International, United Kingdom and United States Law and Practice* 2nd ed. (1985) 311 para.12-23.

removal measures taken by an owner. Such claims may be made by a person other than the owner, provided that such person establishes to CRISTAL's satisfaction that he is expressly or implicitly authorized by the owner to receive such compensation.⁶⁰ Accordingly, the owners P&I insurer or other insurer may claim compensation from CRISTAL.

11.7.6 Fixed and additional costs

As a matter of principle, CRISTAL will not compensate Governments, for any fixed costs incurred by that Government to establish and maintain a public service mobilised in response to a pollution incident. Where such costs are recoverable under local law, the tanker owner may be required to provide compensation for these fixed costs. Further, a person who compensates governments for this category of loss shall not be reimbursed by CRISTAL. However, CRISTAL will provide compensation to Governments, and any person who compensates Governments, for reasonable incremental (additional) costs incurred by a public oil pollution response service, over and above fixed costs, when it actually responds to an oil pollution incident.⁶¹

11.8 Limitation - Supplement and CRISTAL

The limits available under the Supplement and CRISTAL are greater than that under the 1969 Civil Liability and 1971 Fund Conventions. Consequently, as the Supplement may apply in states which are party to the Civil Liability Convention, tanker owners may voluntarily assume greater "liability" under the Supplement than they may legally be required to assume.

However, the limits available under the Supplement and CRISTAL are not as great as those available under the 1992 Protocols to the Civil Liability and Fund Conventions which, it should not be

⁶⁰Rules of Cristal Limited, Rule 3.1.

⁶¹Rules of Cristal Limited, Rule 3.2.

forgotten, are not in force. Indeed, it is moot whether or not the 1992 Protocols will ever enter into force.

Significantly, again, the limits available under the Supplement and CRISTAL are not as great as those available under OPA.

The revised version of the Supplement and CRISTAL which came into operation on 20th February, 1994, contain new limits. The limits have been increased and are no longer denominated in U.S. Dollars but linked to the Special Drawing Right (SDR) as defined by the International Monetary Fund. There are two main reasons for these changes. Firstly, the limits of the Supplement and CRISTAL had been eroded due to weakening (devaluation) of the US\$ on the international currency market. Secondly, the members of TOVALOP and CRISTAL considered that the voluntary agreements should be brought into conformity with the international Conventions.⁶² Notwithstanding such amendments, the Standing Agreement limits have remained at the previous limits and remain denominated in the U.S. Dollar.

11.8.1 Supplement (20/2/94) limits

In terms of Clause 3(C)(3) of the Supplement the maximum compensation available under that agreement for all claims arising out of a single incident is as follows. All tankers measuring under 5,000 gross tons (gt.) are assessed a fixed amount of 3 million SDR. Tankers measuring above 5,000 gt. are charged the fixed amount of 3 million SDR plus an additional amount of 420 SDR for each gross ton above 5,000 gt. up to a maximum of 59,7 million SDR. These are exactly the same limits as will become applicable in contracting states if the 1992 Protocol to the Civil Liability Convention enters into force. However, the 1992 Civil Liability Convention limits will become available even where the 1992 Fund Convention does not apply to the incident. By contrast the Supplement only applies if the

⁶²Interviews.

tanker causing the spill is carrying a CRISTAL cargo.

11.8.2 CRISTAL (20/2/94) limits

In terms of Clause IV(D) (5) (a) of CRISTAL, the following maximum limits of responsibility, determined according to a measurement of the gross tonnage of the tanker, may apply. In all cases the stated amounts include compensation that would be payable according to the limits of financial responsibility in the Supplement.

Tankers measuring under 5,000 gt. are rated a fixed amount of 32 million SDR. Tankers over 5,000 gt. are charged the fixed amount of 32 million SDR and an additional amount of 652 SDR for each gross ton above the 5,000 gross ton measurement subject to a maximum of 120 million SDR. While the Supplement's limitation provisions conform to the 1992 Protocol to the Civil Liability Convention, CRISTAL's limitation amounts are linked to the tonnage of the polluting tanker and, as such, do not reflect the 1992 Protocol to the Fund Convention. It is significant that the upper limit of CRISTAL is substantially lower than that provided for in the 1992 Protocol to the Fund Convention. This is designed to provide states with an incentive to ratify the Fund Protocol.⁶³

11.8.3 Tonnage measurement

As is to be expected, the Supplement and CRISTAL measure tonnage for the purpose of limitation in the same way. This ensures that compensation under both tiers of the voluntary regime are synchronised. And the apportionment of financial responsibility, as between the tanker and oil industries under the Supplement and CRISTAL, respectively, remains uniform. A "ton" means a ton of a tanker's gross tonnage as determined in accordance with the provisions of the International Convention on Tonnage Measurement

⁶³Notice of Special General Meeting of CRISTAL Members, Resolution 1 Para.4.

of Ships, 1969, as amended, and in force at the effective date of this contract.⁶⁴ This is the unit of measurement under the 1992 Protocols, but not under the 1969 Civil Liability and Fund Conventions.

11.8.4 Contractual exemptions to financial responsibility

A tanker-owner participating in the TOVALOP Supplement is not obliged to take preventive measures or threat removal measures or pay any costs or make any compensation to a person and neither shall compensation be paid under CRISTAL where the incident results from an act of war, hostilities, civil war, insurrection or a natural phenomenon of an exceptional, inevitable and irresistible character,⁶⁵ was wholly caused by an act or omission done with intent to cause damage by a third party,⁶⁶ or if the incident was wholly caused by the negligence or other wrongful act of any Government or other authority responsible for the maintenance of lights or other navigational aids in the exercise of that function.⁶⁷

Certain qualifications are relevant to these absolute rules as between the TOVALOP party and Cristal Limited, and Cristal Limited and its members, regarding the balancing of financial responsibility assessed under the international Conventions as opposed to the voluntary schemes. Significantly, under the terms of the Fund Convention, the IOPC Fund will pay claims arising out of exceptional, inevitable and irresistible natural phenomena. In terms of the Civil Liability Convention, however, the tanker owner will be exonerated from all liability caused by such

⁶⁴TOVALOP Supplement, Clause 1 (1)(L); CRISTAL, Clause I (Q).

⁶⁵Supplement, Clause 3(C)(1)(i); CRISTAL, Clause IV(D)(2)(i).

⁶⁶Supplement, Clause 3(C)(1)(ii); CRISTAL, Clause IV(D)(2)(ii).

⁶⁷Supplement, Clause 3 (C)(1)(iii); CRISTAL, Clause IV (D)(2)(iii).

phenomena.

It may also be noted that in the case of the Supplement an ICC arbitration tribunal may have the discretion to decide the application or non-application of these defences. By contrast, under the Cristal Contract, there is no provision for external influences and the Directors of CRISTAL, alone, will determine the application of these defences in the event of a dispute.

11.9 Financial responsibility - Supplement and CRISTAL

Certain important differences exist as to the sources of payment applicable under the Supplement and CRISTAL. However, both schemes rely on the concept of mutual protection.

11.9.1 Supplement (P&I cover or other insurance)

Payments from the tanker owner under the Supplement are made from the same sources as under the Civil Liability Convention and the Standing Agreement. The P&I insurer indemnifies the tanker owner for the amounts that he is required to pay under the Supplement. Furthermore, the tanker owner may also have obtained cover pertaining to pollution liability insurance from commercial insurers. In such cases claimants may attempt to recover directly from insurers.

11.9.2 CRISTAL (CRISTAL Fund)

In order to assure its financial capability to pay successful claims established under the CRISTAL contract Cristal Limited, maintains and administers an account which is known as the CRISTAL Fund. The CRISTAL Fund is funded in roughly the same way as the IOPC Fund through the mutual pooling of money by members. Cristal Limited is empowered to make Periodic Calls on its members as required to pay claims, meet the administrative expenses of Cristal Limited and any other expenses incurred by

contract, or otherwise.⁶⁸

The motivation for incorporation of Cristal Limited under the laws of Bermuda is to be found in the tax relief available in that island State. Under the current laws of Bermuda, Cristal Limited is not required to pay any taxes in Bermuda on either income or capital gains. The Company has received an undertaking from the Minister of Finance in Bermuda, under the Exempted Undertakings Tax Protection Act, 1966, which exempts the company from any such tax at least until the year 2010.⁶⁹ It may also be observed that many of the P&I Clubs are also incorporated under the laws of Bermuda.

11.9.2.1 Contributions assessed on oil receipts

Each member's contributions to the CRISTAL Fund are worked out upon a proportional assessment of crude/fuel oil receipts (hereinafter referred to as oil receipts) submitted to Cristal Limited by its members. Prior to the 1st April of each calendar year, each member is required to notify Cristal Limited as to his oil receipts measured in barrels received during the immediately preceding calendar year.⁷⁰

The method used to assess each member's contribution is relatively simple. The amount of the periodic call in SDR is divided by the total barrel amount of oil receipts received from all CRISTAL members during the calendar year preceding the date of the call. This calculation yields an overall assessment of financial responsibility per barrel of all oil received by all CRISTAL members over that year. This amount per barrel is multiplied by the barrel amount contained in each of the oil receipts of each particular member during the same period and the

⁶⁸CRISTAL, Clause VII(A) (1).

⁶⁹*Cristal Limited Annual Report and Consolidated Financial Statements Year ended December 31, 1991* at 12.

⁷⁰Rules of Cristal Limited, Rule 7.1(a).

individual members ratable contribution per barrel is derived.⁷¹

The volume of crude and fuel oil received by CRISTAL members from 1986-1990 are given below in barrels.⁷² The fluctuations recorded here are quite considerable from year to year. It is also noteworthy that the amount of oil received by CRISTAL members is increasing rapidly.

Year	Volume Billion Bbls	Change
1986	8.75	12.4 %
1987	9.51	8.68 %
1988	10.17	6.94 %
1989	11.71	15.14 %
1990	11.87	1.37 %

Note: One barrel is equivalent to 159 litres or 42 U.S. gallons and approximately 7.4 barrels is the equivalent of one tonne of crude oil.

11.9.2.1.1 After carriage of oil by sea

The submission of oil receipts to Cristal Limited by its members is closely linked to the expanded notion of "ownership" used by CRISTAL.

Receipts are required when oil is received at an installation or terminal by a CRISTAL member which has been transported all or part of the way to such installation or terminal by a tanker and at the time of receipt is "owned" by a CRISTAL member. If the oil is not received and owned by a CRISTAL member such oil must nevertheless be included in an oil receipt if a CRISTAL member elects to be considered the owner. Any oil which is received at

⁷¹CRISTAL, Clause VII(B) (2) .

⁷²Cristal Limited Annual Report and Consolidated Financial Statements Year ended December 31, 1991 at 4.

an installation or terminal solely for trans-shipment to another installation or terminal where it is to be received by a CRISTAL member need not be included in such oil receipt.⁷³ Where oil owned by a CRISTAL member, but having title transferred at destination to a non-member, a receipt must be furnished by the member.⁷⁴

Where a CRISTAL member has title to oil at some point after loading and prior to discharge from a tanker, that member will be required to submit an oil receipt in respect of that oil unless that oil is included in the receipts of that oil company party or any other related or affiliated oil company party by reason of any other provision.⁷⁵ Furthermore, where that oil has been sold to another oil company party to CRISTAL, the later member may furnish the receipt.⁷⁶

Oil receipts shall be required for any portion of oil received at a terminal or other facility which is partly owned by a CRISTAL member. Such receipts shall reflect the quantity of oil in proportion to that member's relative equity interest compared to the equity interest(s) of all other CRISTAL members in that terminal or other facility. Notwithstanding this rule, the member's proportional assessment will not be necessary where the oil in question has been reported (or is to be reported) in the other receipts of the member in question or any other related or

⁷³CRISTAL, Clause VII(A)(2)(i) and (ii).

⁷⁴CRISTAL, Clause VII(A)(2)(iii).

⁷⁵The question of affiliated companies is important. For example, in 1992, Shell International Petroleum Company Ltd. had 81 different subsidiaries listed as members of CRISTAL, see; *CRISTAL 1991 List of Members* at pp 39-41. Members may, when transmitting its oil receipts include the receipts of an affiliated member. However, where this is done, any assessments due from the affiliate will be forwarded by CRISTAL to the Member submitting the receipt.

⁷⁶CRISTAL, Clause VII(A)(2)(vi).

affiliated member.⁷⁷

11.9.2.1.2 For oil in storage tankers

Oil receipts must also be made by CRISTAL members who maintain stocks of oil in storage tankers. Although the amount of oil and tanker tonnage engaged in floating storage fluctuates over time, according to variations of supply and demand, the quantities of oil involved are usually considerable.

By way of illustration, the demand for floating storage increased sharply in the first half of 1991. In March 1991 it was estimated that a total of 26 million deadweight tons (mdwt.) of tanker capacity was engaged in storage operations. As much as 17 mdwt. of this was in floating storage in the Gulf of Arabia, representing about 125 million barrels of mainly Saudi Arabian and Iranian crude oil and petroleum products. However, in the first week of July 1991, Samarec, the Saudi Arabian oil refining and marketing company, issued tender calls for the sale of nearly 1.5 million barrels of petroleum products from their stocks in floating storage. It was reported that by mid-July of 1991, Saudi Arabian and Iranian floating stocks of crude and petroleum products were probably down to 40 million barrels.⁷⁸

Under CRISTAL, after oil has been stored on board a tanker for six months and at which time is owned by a CRISTAL member, the member must submit an oil receipt. Thereafter, if oil is retained on board such storage tanker which is on the last day of each ensuing calendar year owned by a CRISTAL member an oil receipt is required.⁷⁹ In other words, oil in tanker storage is rated after six months of storage and then again on the last day of each calendar year thereafter. When oil is received on board a tanker for the sole purpose of being discharged from such tanker

⁷⁷CRISTAL, Clause VII(A) (2) (v).

⁷⁸*Petroleum Economist* August 1991 at 15.

⁷⁹CRISTAL, Clause VII(A) (2) (iv).

into another tanker for onward transportation, the tanker shall not be deemed an "installation" or "terminal" in relation to the obligation of a member to report oil receipts so long as such discharge shall take place within six months from time of receipt on board the receiving tanker.⁸⁰

This is an improvement upon the position pertaining to storage tankers under the 1969 Civil Liability and 1971 Fund Conventions where there is uncertainty as to whether or not oil in storage is covered by that regime.

11.9.2.2 Minimum contributions to the Fund

Each CRISTAL member pays a minimum charge which is determined by Cristal Limited to be reasonable under the circumstances. The minimum charge is assessed regardless of the quantity of oil received by the member. Even if the member has not had any oil receipts during the preceding calendar year, the minimum charge will be made.⁸¹ When determining the amount to be paid by members in respect of a periodic call, Cristal Limited shall determine the minimum charge to be paid.⁸² If the amount of oil receipts notified by a member is either nil or is of an amount that would give rise to a contribution less than the minimum charge determined by CRISTAL the member shall be required to pay the minimum charge.⁸³

Under the 1971 Fund Convention and the 1992 Protocol thereto there is no minimum contribution made to the IOPC Fund. Contributions are only required from oil receivers in states contracting to the Fund Convention who receive over 150,000 tonnes of oil per annum. This procedure has been criticised upon

⁸⁰Rules of Cristal Limited, Rule 7.1(e).

⁸¹CRISTAL, Clause VII(B)(3)(i).

⁸²Rules of Cristal Limited, Rule 7.4(a).

⁸³Rules of Cristal Limited, Rule 7.4(b).

the basis that certain small oil importer states were being subsidised by the major oil importers.⁸⁴

11.9.2.3 Notification by a new member

When an oil company becomes a member, it shall forthwith advise CRISTAL in writing of its crude and fuel oil receipts for the immediately preceding calendar year.⁸⁵

11.9.2.4 Rules of notification and contribution

As soon as practicable after a periodic call has been made, Cristal Limited will mail notice to its members advising them of the total amount of the call and the date on which it is payable. Where the call is to be paid in installments, the member will be notified as to the date on which each instalment is payable. The notice will also state the minimum charge payable.

After forty-five days from the date of mailing notice Cristal Limited will not accept any changes in a member's advice of his oil receipts for the calendar year upon which that call is to be calculated.⁸⁶ By implication it would seem that members are permitted to change their oil receipts if they do so before the specified date. This is a pragmatic and equitable practice because given the complexity of the provisions governing "ownership" and submission of oil receipts and the number of affiliated members listed in the membership of multinational oil companies it is conceivable that the same oil could mistakenly be counted more than once.

Following the expiry of the stipulated forty-five day period from posting, but not later than sixty days prior to the date on which the contributions shall become payable, Cristal Limited notifies

⁸⁴Wilkinson, *op cit*, 78 fn.39.

⁸⁵Rules of Cristal Limited, Rule 7.2.

⁸⁶Rules of Cristal Limited, Rule 7.3(b).

each member as to the amount of his contribution, as well as the contribution for any other member, whose oil receipts have been included in the advices submitted by that member.⁸⁷ This notification will also stipulate the date upon which payments or installments are due,⁸⁸ the place or places where payment is to be made⁸⁹ and the consequences of a failure of a member to pay said contribution.⁹⁰

11.9.2.5 Contribution enforcement

Cristal Limited reserves the right to take such steps as it shall think fit, to confirm the accuracy of any members' oil receipts and members are obliged to provide such information as may reasonably be requested by CRISTAL.⁹¹ Where a member still fails to report, or inaccurately reports, his oil receipts, then, for the purpose of calculating the contribution of such member, CRISTAL may determine, in its absolute discretion, what shall be deemed to be the member's oil receipts for the relevant calendar year.⁹²

11.9.2.6 Interest on overdue payments

If a member fails to pay his contribution to any call on the date on which such payment is due then such member shall pay to the CRISTAL Fund interest on the amount not paid at a rate per annum, which is four per cent above the Bank of Bermuda lending rate applicable on the due date, from the due date to the date on which payment is made to CRISTAL. The liability of a member to

⁸⁷Rules of Cristal Limited, Rule 7.3(c)(i).

⁸⁸Rules of Cristal Limited, Rule 7.3(c)(ii).

⁸⁹Rules of Cristal Limited, Rule 7.3(c)(iii).

⁹⁰Rules of Cristal Limited, Rule 7.3(c)(iv).

⁹¹Rules of Cristal Limited, Rule 7.1(h).

⁹²Rules of Cristal Limited, Rule 7.3(a).

pay interest is not extinguished by the cessation of membership.⁹³

11.9.2.7 Default

A member shall be in default in payment of his contributions to any periodic call where payment is not made within forty-five days from the date upon which it was due. However, where the delay was due to causes beyond the reasonable control of such member he shall not be in default. The President of CRISTAL may decide that the circumstances of that delay shall be referred to the Directors to determine what action should be taken in relation to the member.⁹⁴ If a Member is in default, any deficit shall be made good, at the discretion of the Directors, upon written demand from CRISTAL, by the other members rateably in proportion to the contributions last due from them in respect of the calendar year in question. Such payment shall be made by such members without prejudice to any right CRISTAL or any other member may have against the member then in default.⁹⁵ Where a member claiming compensation or reimbursement from CRISTAL is in default, CRISTAL will not respond to that claim to the extent that the member is in default.⁹⁶

11.9.2.8 Confidentiality of oil receipt data

All data, including oil receipts, submitted by a CRISTAL member shall be treated as confidential and for the use of CRISTAL only, and shall not be disclosed by CRISTAL or by any representative of CRISTAL to any other member, or to any other party, without the express, prior, written consent of the member involved, or unless a question arises as to such member's contribution and its

⁹³Rules of Cristal Limited, Rule 7.5.

⁹⁴Rules of Cristal Limited, Rule 7.6(a).

⁹⁵Rules of Cristal Limited, Rule 7.6(b).

⁹⁶Rules of Cristal Limited, Rules 3.1 and 3.2.

calculation, and the Directors authorise the disclosure of the data but then only to the extent and in the manner so authorised by the Directors.⁹⁷ The reason for this confidential relationship is understandable from political and economic concerns. It is interesting to note by way of example that, while South Africa was technically not permitted to import oil during the existence of the United Nations oil embargo, South Africa's major oil importers were members of CRISTAL.

11.10 Harmonizing conflicting sources of liability

The voluntary arrangements operate independently of the Civil Liability and Fund Conventions, but the application of the Conventions does not preclude claimants from seeking additional compensation in terms of the Supplement and CRISTAL. Both the Supplement and CRISTAL incorporate rules which serve to reconcile the different liabilities which may arise in terms of the Conventions and the voluntary compensation regimes.

11.10.1 Where the Civil Liability Convention applies but the Fund Convention does not

In terms of the Supplement, the participating tanker owner is required to satisfy his legal liabilities under any domestic legislation giving effect to the Civil Liability Convention or any other local laws before compensating any person under the Supplement.⁹⁸ Where CRISTAL applies to an incident which results in pollution damage in a jurisdiction where the Fund Convention is not in force, Cristal Limited will reimburse the tanker owner, up to the maximum CRISTAL limits, where any settlement under the Civil Liability Convention or local law exceeds limits of the Supplement.⁹⁹

⁹⁷Rules of Cristal Limited, Rule 7.1(i).

⁹⁸Supplement, Clause 3(A)(1).

⁹⁹CRISTAL, Clause IV(A).

Accordingly, where claims for oil pollution, brought against the tanker owner under the Civil Liability Convention, or other local laws, exceed the limits of the Supplement, tanker owners and bareboat charterers who become liable for such damage will in most instances be able to recover all or a proportion of that excess liability from Cristal Limited. This will be so where a CRISTAL cargo is involved in an incident and all other conditions laid down by the CRISTAL Contract are satisfied. Where the pollution damage sustained by the tanker owner occurs as a result of the wilful misconduct of the owner or is due to unseaworthiness of the tanker attributable to the privity of the owner, that owner will not be reimbursed, or reimbursement will be proportionately reduced.¹⁰⁰ As a result of this rule, owners and bareboat charterers may, for instance, be able to obtain a measure of relief where they are subjected to high potential liability under OPA 90 and/or individual U.S. state laws. This is basically a procedure for distributing financial responsibility between tanker-owners and oil importers.

In this way tanker owners are able to operate under the expectation that in most cases their liability will be contained within the liability limits stipulated in Clause 3(C)(3) of the Supplement. In very serious cases, however, where very high claims succeed against the shipowner, or in those instances where large claims arise, and the CRISTAL Contract does not apply, or where the shipowner's standard of misconduct exempts CRISTAL from providing reimbursement, then the shipowner will still have to bear additional liability.

11.10.2 Where the Civil Liability and the Fund Conventions apply

The first point to note is that if the spill occurs in a state where the Civil Liability and Fund Conventions are in force, but the shipowner is not entitled to limit his liability, CRISTAL may still provide supplementary compensation to third parties up to

¹⁰⁰CRISTAL, Clause IV(D)(3).

the CRISTAL limits. This relieves the shipowner of that proportion of liability to third parties which exceeds the maximum compensation payable under the Supplement. However, CRISTAL will not provide such relief where the incident 'results from the wilful misconduct of the owner or from the unseaworthiness of the tanker when this occurs with the privity of the owner'.¹⁰¹ The terms 'wilful misconduct', 'privity' and 'unseaworthiness' shall have the same meaning as they have under the Marine Insurance Act, 1906 as interpreted by the English Courts under English Law.¹⁰² In terms of Article V.2 of the 1969 Civil Liability Convention, the tanker owner will lose his right to limit his liability where the incident occurred as a result of the actual fault or privity of the owner. Significantly, the test upon which claimants may break the owners right to limit liability under the Civil Liability is wider and therefore more easily satisfied than is the test on the basis of which Cristal Limited can refuse to provide supplementary compensation.

As explained in Part Two of this work, where a tanker owner is able to maintain his right to limit liability under the Civil Liability Convention, and the sum total of successful pollution claims exceeds those limits, then the IOPC Fund provides second tier compensation. Where this occurs, Cristal Limited will reimburse CRISTAL members for the contributions they have been required to make under the Fund Convention.¹⁰³ In turn, within the applicable limits of the Supplement, the tanker owner is obliged to compensate Cristal Limited for this amount.¹⁰⁴ The amount available from the Supplement is, however, limited. Accordingly, where the amounts due from the tanker owner to Cristal Limited to reimburse contributions of CRISTAL members to the IOPC Fund, are insufficient, Cristal Limited compensates such

¹⁰¹CRISTAL, Clause IV(D) (3).

¹⁰²CRISTAL, Clause IV(D) (10).

¹⁰³CRISTAL, IV(B) (1).

¹⁰⁴TOVALOP, Clause 3(B) (2).

members for the outstanding portion of their contributions.¹⁰⁵

A TOVALOP member is required to fulfil this obligation in all applicable circumstances except where the incident resulted from an act of war, hostilities, civil war or insurrection or was wholly caused by an act or omission done with intent to cause damage by a third party.¹⁰⁶ Significantly, he must even reimburse Cristal Limited where the incident was a result of an exceptional, inevitable and irresistible natural phenomenon. This obligation exists whether or not the owner bears any liability under the Civil Liability Convention. However, where the owner is exempt from liability under Article III.2(a) and (b) of the Civil Liability Convention, which also cover the exceptions in Clause 3(C)(1) of the Supplement, then the owner will be exempt from having to make payments to Cristal Limited and liability under the Civil Liability Convention. But where the owner is exonerated from liability under the Article III.2(a) of the Civil Liability Convention on the grounds that the incident resulted from an exceptional, inevitable and irresistible natural phenomenon, he will nevertheless be required to reimburse Cristal Limited for the contributions that CRISTAL members in Fund Convention States were required to make in respect of that incident. It will be recalled that under the terms of the Fund Convention the IOPC Fund will pay claims arising out of exceptional, inevitable and irresistible natural phenomena.

Equally, no reimbursement shall be made by Cristal Limited where the incident leading to the pollution damage or threat removal measures resulted from an act of war, hostilities, insurrection, or was wholly caused by an act or omission done with intent to cause damage by a third party.¹⁰⁷

The procedure described above ensures that CRISTAL members in

¹⁰⁵CRISTAL, Clause IV(B)(1).

¹⁰⁶Supplement, Clause 3(C)(1).

¹⁰⁷CRISTAL, Clause IV(D)(2).

Fund States do not bear a disproportionate share of the costs of oil pollution settlements through having to contribute to settlements made under both CRISTAL and the Fund Convention.¹⁰⁸ Cohen provides an explanation as to the reasons for the incorporation of the reimbursement provisions in the Supplement and CRISTAL.

'The inclusion of this provision addresses concerns of oil companies in CRISTAL located in FC (Fund Convention) States who, heretofore, were not only required to contribute to FC by law but were also required to contribute to CRISTAL claims occurring outside FC States. With the substantial increase in compensation to claimants afforded by CRISTAL on a worldwide basis (since 20th February, 1987) it was considered equitable to permit companies incurring assessments in cases involving oil owned by a CRISTAL member to reduce their payments by mutualizing them over the much larger CRISTAL membership. Therefore, members of CRISTAL located in FC States will not be penalized by being members of CRISTAL.'¹⁰⁹

Essentially, the oil company members of CRISTAL wanted to establish and maintain a true mutual. This is indicative of the oil companies ability to co-operate on an international scale to protect each other and by so doing protect themselves against externally imposed penalties. It may also be noted that CRISTAL members in Fund Convention States are often of the same corporate group as those which operate in non-Fund states.

In the event that the maximum amount of compensation available under CRISTAL is insufficient to meet all claims and claims for reimbursement by CRISTAL members in Fund Convention States, all

¹⁰⁸TOVALOP and CRISTAL A Guide to Oil Spill Compensation 3rd ed. 1992 at 7.

¹⁰⁹Cohen, *op cit*, 536.

claims are reduced proportionally.¹¹⁰ In this way CRISTAL members do not receive any priority over other claimants.

Statistics indicate that the overlap between the compensation mechanism under the Civil Liability and Fund Conventions and TOVALOP Supplement and the CRISTAL Contract is considerable. In 1990, CRISTAL receipts reported by Companies located in States which are parties to the Fund Convention totalled approximately 6.25 billion barrels, total reported CRISTAL crude/fuel oil receipts for 1990 amounted to 11.87 billion barrels.¹¹¹

11.10.3 CRISTAL and other oil-sourced compensation funds

Where the requirements of the CRISTAL Contract are satisfied, Cristal Limited will provide compensation to a person who has compensated another person for pollution damage and/or costs of threat removal measures. For instance, where a government provides compensation for claimants (i.e. victims of oil pollution) the government may claim reimbursement from Cristal Limited. However, CRISTAL does not permit claims made against Cristal Limited for compensation earlier paid out from funds established and/or maintained by means of assessments against oil companies.¹¹² With the exception of claims brought under the Civil Liability and Fund Conventions, if a claimant accepts compensation from such funds he forfeits any rights to payment from Cristal Limited.¹¹³ This rule discourages the development of numerous oil industry based funds in nation states or regions.

11.11 CRISTAL claims and payment procedure

11.11.1 Notice of claim and prescription

¹¹⁰CRISTAL, Clause IV(D) (6) .

¹¹¹*Cristal Limited Annual Report and Consolidated Financial Statements Year ended December 31, 1991* at 4.

¹¹²CRISTAL, Clause IV(C) .

¹¹³CRISTAL, Clause IV(D) (7) .

Written notice of claims should be made to CRISTAL as promptly as possible after the incident, allegedly giving rise to the claim, occurred.¹¹⁴ Notice must be given within two years from the date of the incident. Once notice has been given, CRISTAL permits the claimant to amend, or make additions to, his claim at any time prior to final determination.¹¹⁵

11.11.2 Information to be contained in a claim

The Rules of Cristal Limited advise that, wherever possible, claims should provide the name and address of the claimant or his representative and identify and describe the tanker allegedly involved. The following information should be given: the name of the vessel, its flag, tonnage, owner or bareboat, time or voyage charterer and P&I Insurer. For the purpose of Cristal Limited, determining the status of the cargo involved in the incident is essential. Claimants are asked to identify the owner, shipper, consignee, quantity and type of oil involved in the alleged incident.

The claim should stipulate when and where the alleged incident occurred and outline the nature of the incident, the type of pollution damage incurred and where it was sustained. It should describe the nature of preventive and threat removal measures taken, or to be taken, and the location of such operations; identify the responders and include their addresses. Obviously, the claimant must also stipulate the approximate amount of the claim, expressed in the currency(ies) in which it is incurred.¹¹⁶

Cristal Limited may require information relating to legal opinions obtained and details as to proceedings held before Courts, Arbitrators or Administrative Agencies. This is to enable

¹¹⁴Rules of Cristal Limited, Rule 4.1(a).

¹¹⁵Rules of Cristal Limited, Rule 4.1(c).

¹¹⁶Rules of Cristal Limited, Rule 4.1(b).

Cristal Limited to determine the validity of the claim and the amount, if any, payable.¹¹⁷

At its discretion, Cristal Limited may elect to conduct private investigations into the particulars of a claim. This may be done so that CRISTAL can obtain an independent assessment as to the validity, and quantum, of the claim. Once Cristal Limited has reached a final determination as to the merits of the claim, it shall promptly advise the claimant as to the amount, if any, that will be paid and the release or releases that will be required as a condition precedent to any payment of compensation.¹¹⁸

11.11.3 Filing for payment

Where a CRISTAL member makes a contribution to the IOPC Fund, and he believes that CRISTAL is required to reimburse him for all or any portion of that contribution, he must notify CRISTAL and provide certain relevant information.¹¹⁹ To the extent that it is known or available to the claimant, such notice should *inter alia* disclose: the amount of the contribution made or to be made to the IOPC Fund and provide relevant supporting documentation,¹²⁰ the details of the member and, where relevant, his affiliated companies,¹²¹ information pertaining to the incident or incidents to which the contributions relate, and designation of the tanker involved, its owner or, in the event that the tanker is under bareboat charter, the bareboat charterer, time or voyage charter and P&I insurer.¹²²

Such notice may be amended or added to by a member at any time

¹¹⁷Rules of Cristal Limited, Rule 4.2.

¹¹⁸Rules of Cristal Limited, Rule 4.3(c).

¹¹⁹Rules of Cristal Limited, Rule 4.5(a).

¹²⁰Rules of Cristal Limited, Rule 4.5(b)(i).

¹²¹Rules of Cristal Limited, Rule 4.5(b)(ii).

¹²²Rules of Cristal Limited, Rule 4.5(b)(iii).

prior to the final determination of a payment by CRISTAL, provided that initial written notice was made within one year from the date on which the contribution is to be made to the IOPC Fund. Where notice involves related or affiliated companies of the member seeking reimbursement, such notice must be made within one year from the date on which the last contribution is to be made, by all those companies.

As in the case of any claim made under the CRISTAL Contract, the Directors may request additional information¹²³ and may also initiate investigations into the validity of reimbursement claims. In the course of such investigations CRISTAL may make ' ... any contacts as may be deemed appropriate with the [IOPC] Fund ... ' ¹²⁴

11.12 Final Determination of payment

The Directors of Cristal Limited determine the compensation to be paid to claimants and members in accordance with the terms and conditions of CRISTAL and the Rules. To this end the Directors meet as often as they may consider necessary for the prompt and expeditious determination of claims.

No Director is permitted to participate in the determination of compensation where he represents or is employed by an interest which owns a tanker or cargo involved in an incident. However, even where such a link exists, a Director may participate in the determination of reimbursement claims for oil company members required to contribute to the IOPC Fund.¹²⁵

The Directors are the sole and final judges as to whether, and to what extent, compensation or payment shall be paid. However, subject to certain limits and conditions that the Directors may

¹²³Rules of Cristal Limited, Rule 4.6.

¹²⁴Rules of Cristal Limited, Rule 4.7.

¹²⁵Rules of Cristal Limited, Rule 4.8.

deem appropriate, they may delegate this authority to the President of Cristal Limited or any other person.¹²⁶

11.13 Interest

Where the payment of compensation is delayed interest shall accumulate for such a period and at such a rate as CRISTAL, in its sole discretion, believes to be appropriate under the circumstances. Generally, interest shall be counted towards the overall limits of liability available from CRISTAL.¹²⁷

11.14 Conclusion

It is incontestable that the voluntary regimes have provided an important service to coastal states throughout the world and in the foreseeable future, they will probably continue to do so. At the same time this arrangement does present certain problems of principle. That the voluntary compensation regimes provide compensation for pollution damage on terms that are largely determined, and controlled, by the selfsame agents of that pollution is contrary to the fundamental precept of the western legal tradition; that no party should be a judge in his own cause.

Writing in 1985, Abecassis and Jarashow et al expressed the fear that by means of the voluntary compensation agreements the oil industry had mounted '... a threat to the 1984 Protocols to the Fund Convention which, if successful, may ensure that it does not enter into force'.¹²⁸ Even if this hypothesis were correct, the failure of the 1984 Protocol to the Fund Convention to enter into force in that form was due to different reasons. It was not the alleged manoeuvring of the oil industry, aimed at retaining effective control over tanker source oil pollution compensation

¹²⁶Rules of Cristal Limited, Rule 4.10.

¹²⁷Rules of Cristal Limited, Rule 4.9.

¹²⁸Abecassis & Jarashow, *op cit*, 304 para.12-03.

that caused the failure of the 1984 Fund Convention. It was in fact quite the opposite; it was the desire of the U.S. Government to increase potential liability for oil pollution damage in the U.S. through domestic legislation, and their pivotal refusal to support that Convention, which resulted in the failure of the entry into force requirements of that Protocol being fulfilled.

The oil industry has traditionally been wary and resentful of external control. This has been evident since the dissolution of the Rockefeller oil monopoly, Standard Oil Company, under the Sherman Antitrust Act of 1890. In May 1911 Chief Justice Edward White ordered that Standard Oil Company was to dissolve itself within six months in order to break the monopoly over the American oil industry.¹²⁹ Another, more crucial, struggle waged by the oil companies was that against the threat of nationalization of oil wells in the oil producing areas of the Soviet Union, the Middle East and South and Central America.

It may be predicted that the issues posed by environmentalism may well become the next major force that the oil companies and other industries are going to have to confront and eventually accommodate. The lessons that have been learned from previous confrontations between the oil industry and governments is that the oil companies are not always able to operate with the degree of independence they might ideally wish. It has been shown that governments are capable of curtailing the operations of the oil companies when it is politically expedient or necessary.

A fundamental part of managing a multinational oil company is that the corporation must be seen to be responsive to a number of demands and expectations that are made upon them by diverse interest groups. The response must be sufficient to preempt the assumption of control by outsiders. Such a response will, in most instances, prove most effective in postponing or avoiding external control if it is undertaken before any given potential

¹²⁹Yergin, *op cit* 110.

conflict situation reaches a crisis point.

It is one of the main submissions of this thesis that the most effective way in which to improve the standards of tanker operation (and thereby decrease the incidence of tanker source oil pollution) is by placing a high degree of liability at the door of the actual cargo owner. This is because the cargo owners, which are very often multinational oil companies, have far greater resources than tanker owners. Accordingly, these corporate bodies are in a better position to substantially raise the safety standards of tanker operations. In contrast, tanker owners are able to increase the quality of their operation only in so far as the prices paid by the oil shippers for the use of their tankers allow them to do so. Therefore, where freight rates are depressed the tanker owners do not have access to the capital required to improve, or even maintain the safety of their operations. As capital runs short, tankers continue to operate beyond the reasonable lifespan of such vessels. Corrosion sets in and goes unchecked, crew standards decline and oil spills inevitably occur.

There are various options that can be utilized to remedy the problems associated with a dangerously undercapitalized tanker industry. Firstly, one can utilize the government controlled regulatory approach, in terms of which, no vessel with a hazardous cargo on board will be granted permission to approach a port in a specific State unless it in fact satisfies certain standards of operation. What is required here is classification societies of a reputable standard.

In terms of this approach, the rationale is that tanker owners will have to achieve and maintain certain standards of operation before they can deliver or receive a cargo. To meet such standards they will be required to undertake vast capital expenditure; building new tankers or up-grading older tankers, improving crew standards and adhering to safer operating procedures. Because, in theory, the tankers which do not meet

these standards are prevented, through legislation and control from competing with the better more expensive vessels, these vessels can consequently demand higher freight rates. In turn, the higher freight rates will enable the tanker operators to keep the quality of tanker operations at an acceptable level.

This methodology could well work; however, it entails the uniform adoption, and enforcement of such safety regulations in all of the large oil importer states throughout the world. Also, states are loath to turn tankers away from their shores when the cargoes play such strategic roles in their economies. Despite these difficulties, and the fact that this methodology has been patently unsuccessful up until now, it is the opinion of this writer that the safety of oil tankers will eventually be brought up to appropriate standards through a synthesis of such government regulation and self-regulation undertaken by the large oil importers. This process has already started to take place.

As the liability for oil pollution increases, and is shifted to the owners of the polluting oil cargo, two changes can be expected to occur. Firstly, the major oil companies will once again begin to acquire their own tankers, which will be built and operated to very stringent standards. The oil companies will begin to invest considerably more capital in tanker safety than has been necessary in the past. Secondly, where the oil companies have to charter tankers they will only charter tankers of a high standard. When doing so, they will be required to pay considerably higher freight rates than those currently demanded by ship owners. The extra costs involved in achieving a safer tanker process will inevitably be transferred to the consumers of oil products.

The present writer agrees with D.W. Abecassis where that commentator is opposed, in principle, to the continued maintenance of control over the process and terms of compensation for tanker-source oil pollution by oil companies through the voluntary agreements. However, this writer's objections are not

for the same reasons as those expounded by that author. The objection stated here is not only that the shipowner and oil companies retain substantial control over the degree and nature of the amount of compensation available. In addition, because they have been permitted to do so, they have effectively held down the actual and potential penalties of pollution to a point where it is cost-effective (a) to pay controlled compensation, and (b) to continue to operate in a fashion which causes pollution. In this way they have successfully negated real incentives for changing the manner in which polluting tankers are operated.

In the context above the sentiments expressed by P.J. Goulandris the Chairman of the International Tanker Owners Pollution Federation must be critically appraised:

'It is our view that, far from an adversarial interest, the tanker and oil industries share with governments and with the potential victims of oil spills the greatest community of interest, in an efficient and effective approach to clean-up and compensation. We shall continue to direct our energies in that spirit.'¹³⁰

If the CRISTAL contract had been a mere exercise in public relations its founders would have been content to undertake responsibility solely in those circumstances where title to the oil cargo was held by CRISTAL members in the strict sense of the word. However, the object of the developers of CRISTAL was to bring into existence a regime which would satisfy the legitimate expectations of victims of oil pollution worldwide. To do so effectively it was imperative that the voluntary regimes avoid the impression of paying only lip service to claims for oil pollution damage. If these regimes lost legitimacy in the eyes of actual and potential claimants, which would include the governments of the world, the oil companies correctly perceived that they would rapidly lose any real ability to determine the

¹³⁰The Chairman's Statement *The International Tanker Owners Pollution Federation Review 1992* at 2.

terms and conditions under which hazardous cargoes of crude oil are transported around the coastlines of the globe.

Therefore, because of this threat the voluntary regimes have evolved in a serious manner that can not accurately be explained as a mere public relations exercise. These regimes evolved in response to the increased transfer of control over the oil industry by governments and the ever present threat that the measure of government control would be increased wherever the industry failed to meet acceptable standards of responsibility. In no other type of industrial enterprise have governments permitted such a degree of self regulation as has been the case in relation to the activities of multinational oil companies. Nevertheless, where the oil industry behaves in a way which offends the political sensitivities of influential governments, these governments have on numerous occasions interfered in that realm of self regulation by transferring a greater portion of permitted self control to government control.

Within the context of oil pollution this phenomenon has been well illustrated on three occasions. The *Torrey Canyon* brought about the 1969 Civil Liability and 1971 Fund Conventions. The *Amoco Cadiz* brought about the 1984 Protocols to those Conventions. Most recently, the *Exxon Valdez* spill brought about the most dire consequences for the oil industries ability to influence control over the international control of oil pollution. Here the oil industry failed to meet the terms of the tacit understanding between the oil industry and the victims of pollution. What resulted was overwhelming pressure brought to bear on the United States Government, which, acting as referee to the conflicts which sometimes arise between oil companies and the public, responded by exerting a greater measure of control over the oil industry in the form of OPA. This important subject is considered in the following chapters.

CHAPTER 12

An Introduction to U.S. Oil Pollution Liability Law

12.1 Introduction

This work is intentionally broad, so as to effectively illustrate and explain certain underlying principles of maritime law and practice regarding liability for oil pollution damage. The Civil Liability and Fund Conventions and TOVALOP and CRISTAL agreements have already been discussed. While this work has, up till now, avoided undertaking an analysis of the liability laws of individual states, the oil pollution liability laws of the United States are considered due to the special circumstances prevailing in that State.

It is submitted that the analysis of the oil pollution liability laws applicable in the U.S. is imperative to an adequate understanding of the regulation of oil pollution liability. The U.S. encompasses a considerable portion of the world's coastline and very large quantities of oil are carried to the U.S. by tankers. The potential for oil pollution damage in that jurisdiction is, therefore, considerable. For the purpose of this thesis, however, the Oil Pollution Act of 1990 and U.S. State legislation is discussed because the laws covering oil pollution liability under those jurisdictions exert considerable influence on the legal approaches followed by other nations. Clearly, legal developments in the United States may well depict or even precipitate the emergence of new legal trends or policy within the context of the Civil Liability and Fund Conventions and the voluntary agreements. In particular, a well-developed trend towards the inclusion of cargo-owner liability at the level of U.S. state legislation is identifiable.

The U.S. has a highly educated, environmentally aware and politically active population. According to one survey,

approximately 2,5 million Americans are "active members"¹ of either the National Republican or Democratic Parties² and together contribute approximately US\$ 90 million to those parties. In contrast, during the same period, roughly thirteen million Americans were "active members" of the twelve foremost U.S. environmental organizations and together contributed approximately US\$ 340 million to those organisations.³ By the same token the U.S. has the most powerful and largest oil companies.⁴ Thus, within the context of tanker-source oil pollution the U.S. represents an interesting study because it depicts the conflict between environmental considerations and oil company concerns (i.e. conservation versus development) at a critical level.

It is therefore necessary to consider the policy choices made by the U.S. Federal and State governments in attempting to deal with the problem of tanker-source oil pollution damage. An attempt is also made to illustrate how the U.S. approach differs from that adopted under the international Conventions and the voluntary agreements and to assess the relative strengths and weaknesses of the different regimes. The impact that legal developments in the U.S. may have on the viability of the international Conventions and the voluntary agreements is also considered. The most far-reaching and recent U.S. developments in this field of law will now be considered in Chapters 12 and 13 and 14 which together make up Part Four of this work.

Chapter 12, the introductory chapter, depicts the development of

¹"Active members" are defined as members who make financial contributions to their respective organizations.

²These are the two largest political parties in the United States.

³G. Pokorny 'The Greening of America: A New Climate of Opinion and its Implications for Utilities' (1990) *Strategic Publications Series* No.226 1 at 6.

⁴Exxon, Mobil, Chevron, Amoco, Conoco and Arco being some of the largest.

OPA, its comprehensive scope, aims and objectives. It is also explained how OPA inter-relates with other important Federal and state U.S. legislation. Chapter 13 deals with the liability provisions of OPA while Chapter 14 illustrates how certain state laws contradict the liability provisions of OPA in important ways. Through explaining how the policy of certain U.S. State oil pollution liability laws fundamentally differ that of the international Conventions, the voluntary agreements and OPA it is then possible to suggest the development of a new policy for tanker-source oil pollution liability. In Chapter 13 it will also be argued that the further development and acceptance of this embryonic legal norm may have the effect of greatly improving the standard of tanker operations.

12.2 The development of OPA

In what constituted a major defeat for the Bush administration and other protocol proponents the government of the United States made a decision not to accede to the 1984 Protocols to the Civil Liability and Fund Conventions. This is a key event in the history of the subject of oil pollution liability management and an important part of this thesis is an analysis of the effect of this event on the international approach to oil pollution compensation. In early 1990, prior to the enactment of the Oil Pollution Act of 1990,⁵ Congress announced that the 1984 Protocols to the Civil Liability and Fund Conventions would not be ratified by the United States because to do so would effectively preempt the rights of U.S. states to enact provisions pertaining to oil pollution more stringent, if necessary, than those contained in the conventions.⁶ On the 18th August, 1990,

⁵Pub. L. No.101-380, 104 Stat. (Statute at Large) 484 (18th August 1990) (codified at 33 USC §§ 2701-2761) hereinafter referred to as OPA. Where provisions of OPA are referred to in this work they are cited first as they appear in the Statute at Large and second by reference to the United States Code Service (USC).

⁶Ad hoc group of legal experts on dumping LDC/LG 5/10 7th August, 1991 Annex 3 para 2.2.3 at 2.

the OPA was signed into law by former President Bush (once also a Texas "oilman") after it had been unanimously approved by the House of Representatives and the Senate.⁷ This major development constituted a clear rejection of the international approach in favour of domestic U.S. legislative control.

A pertinent articulation of the standpoint taken by Congress regarding the non-participation of the United States in the system of compensation provided by the 1984 Protocols to the Civil Liability and Fund Conventions is contained in the "sense of Congress" provision incorporated in OPA:

'It is the sense of Congress that it is in the best interests of the United States to participate in an international oil pollution liability and compensation regime that is at least as effective as Federal and State laws in preventing incidents and in guaranteeing full and prompt compensation for damages resulting from incidents.'⁸

This statement represents the culmination of a concession made to the Senate by the House of Representatives on the 28th June, 1990, whereby the House Conferees agreed to delete the provisions contained in House Report 1465 in terms of which the House had intended to implement the international protocols.⁹

The "sense of Congress" may be interpreted as a challenge and an invitation to the proponents of internationalism. Clearly the International Maritime Organisation, the tanker and oil-importing

⁷The bill was approved by the Senate 99 votes to 0 on August 2, 1990, 136 Cong. Rec. S11,547 (daily ed. Aug. 2, 1990), and by the House 360 votes to 0 on August 3, 1990. 136 Cong. Rec. H6,949 (daily ed. Aug. 3, 1990) cited by Rodriguez & Jaffe 'The Oil Pollution Act of 1990' (1990) 15 *Tulane Maritime L.J.* 1 at 11 fn.68.

⁸OPA § 3001.

⁹Grumbles 'Major Provisions, Themes of the Oil Pollution Act of 1990' (1990) 21 *Environment Reporter* 1264 at 1266.

industries and their insurers will be required to revise their respective roles to meet this challenge by the United States. Detailed commentary on the U.S. position, therefore, is a prerequisite to the development of a new, more broadly acceptable international oil pollution compensation programme to take the place of the Civil Liability and Fund Protocols of 1992.

President Bush clearly held reservations about the omission of the Conventions from the system of oil pollution control implemented by the OPA. In a formal statement accompanying the signing of the Act President Bush emphasised *inter alia* the policy arguments in favour of the adoption of the 1984 Protocols by the United States.

Firstly, he cited the advantages which would accrue to U.S. claimants from the enhanced level of compensation which would have been available from the International Oil Pollution Compensation Fund. Secondly, he expressed the desirability of an international approach to the problem of tanker-source oil pollution and stressed that the U.S. had to reaffirm its credibility in the development of such solutions. Thirdly, he issued the following warning:

'I am concerned about another consequence of the failure to ratify the Protocols. We must work to ensure that, in response to the provisions of this Act, a situation is not created in which larger oil shippers seeking to avoid risk are replaced by smaller companies with limited assets and a reduced ability to pay for the clearing up of oil spills. We will need to monitor developments in order to protect against such undesirable consequences.'¹⁰

President Bush then urged Congress to continue working to ratify and implement the protocols.

¹⁰Statement on Signing the Oil Pollution Act of 1990, 26 Weekly Comp. Pres. Doc. (Aug. 18, 1990).

The adoption of this Act by the U.S. scuttled any chance of the 1984 Protocols entering into force in that form. Given this existing situation, the IOPC Fund and its member States, in consultation with IMO, considered various options for the amendment and revision of the coming into force provisions of the 1984 Protocols so as to attract sufficient support to enable the Protocols to enter into force.¹¹ These efforts saw the adoption of the 1992 Protocols to the Civil Liability and Fund Conventions.

The existence of individual U.S. state liability legislation and a diminished prospect of tanker owners and operators being able legitimately to limit liability in the event of oil spills in U.S. jurisdictions is a continuing cause for great concern to the wide array of interest groups connected to the tanker industry.

12.3 Aims and Objectives the U.S. Oil Pollution Act

The OPA is a comprehensive response to the diverse problems associated with oil pollution. Broadly, the Act provides a statutory framework for oil spill liability, compensation, prevention, and removal. In addition it contains provisions relating to particular problems encountered, in the Alaska region, associated with the *Exxon Valdez* spill. The extent and form of this comprehensive system of control is most effectively illustrated through an overview of the nine titles making up the Act. The provisions relevant to the question of tanker-source oil pollution liability will be discussed in greater detail later.

12.3.1 Title I - Oil Pollution Liability and Compensation

This title contains the definitions used in the Act, establishes the liability scheme for oil spills, provides the mechanisms for recovery from the Oil Spill Liability Trust Fund and from responsible parties, and establishes financial responsibility

¹¹Ad hoc group of legal experts on dumping LDC/LG 5/10 7th August, 1991 Annex 3 para 2.2.4 at 3.

requirements. In essence, Title I sets forth comprehensive liability and compensation provisions detailing who is liable to whom, when, and for how much.¹² Accordingly, analysis of the OPA contained in this thesis will largely focus on this title of the OPA as it applies specifically to tank-vessels.

12.3.2 Title II - Conforming Amendments

This title contains amendments necessary to conform certain other federal statutes to the OPA provisions and to clarify their application. Conforming Amendments are made to the Intervention on the High Seas Act,¹³ the Clean Water Act (CWA)¹⁴ [also known as the Federal Water Pollution Control Act (FWPCA)], the Deepwater Port Act,¹⁵ and the Outer Continental Shelf Lands Act Amendments of 1976.¹⁶ The substance of the amendments will be discussed in connection with the amending sections, where they affect the question of liability. A patch-work of provisions, contained in diverse Federal instruments previously controlling oil pollution liability, are consolidated under OPA.¹⁷

¹²OPA §§ 1001-1020, 33 USC §§ 2701-2719.

¹³33 USC § 1486.

¹⁴33 USC § 1321.

¹⁵33 USC § 1502.

¹⁶43 USC § 1811.

¹⁷OPA § 2002 provides that functions concerning oil pollution liability under the Federal Water Pollution Control Act (33 USC 1321), the Deepwater Port Act of 1974 (33 USC 1502) are transferred to OPA, Title III of the Outer Continental Shelf Lands Act Amendments of 1978 (43 USC 1811-1824) is repealed. The Trans-Alaska Pipeline Authorization Act remains applicable to liability for oil pollution and is extensively amended by the Trans-Alaska Pipeline System Reform Act of 1990 contained in Title VIII of OPA. Furthermore any funds held by these instruments were transferred to the Oil Spill Liability Trust Fund established under § 9509 of the Internal Revenue Code of 1986 (26 USC 9509), which in terms of § 1012 the OPA is to be used to cover the costs incurred by the National Contingency Plan.

It must be stressed that the FWPCA remains in existence, however, OPA now governs liability for oil pollution while the FWPCA continues to govern the discharge of other hazardous substances.¹⁸

12.3.3 Title III - International Oil Pollution Prevention and Removal

This title relates to the United State's participation in international efforts to prevent and clean up oil spills. It directs the Secretary of State to review international agreements and treaties and to negotiate agreements with Canada regarding oil spills on the Great Lakes, Lake Champlain, and Puget Sound.¹⁹ The president of the United States is directed to work with international organizations to establish an international store of response equipment and personnel.²⁰ In his formal statement accompanying the signing of the OPA President Bush reported that he would construe this provision as only "advisory". This construction is not only contrary to the language of § 3004 but also seemed to contradict his earlier statement expressing a preference for an international solution to the problem of tanker-source oil pollution.

12.3.4 Title IV - Prevention and Removal

Three subtitles aimed at preventing and cleaning up of oil spills are included in this title.

12.3.4.1 Subtitle (A) - Prevention

Subtitle (A) provides for the review of information contained in the National Drivers Register for issuing licences, certificates of registry and merchant mariners' documents; provides for the

¹⁸33 USC § 2002(a).

¹⁹OPA § 3001.

²⁰OPA § 3004.

suspension and revocation of those documents for alcohol and drug abuse incidents; and establishes prevention measures, which include manning standards for foreign and domestic tank vessels, the requirement for a study on tanker navigation safety standards, and the establishment of double hull requirements for tank vessels.²¹

12.3.4.2 Subtitle (B) - Removal

Subtitle (B), provides authority for federal removal of oil spills and requirements for the national oil spill planning and response system.²²

12.3.4.3 Subtitle (C) - Penalties and Miscellaneous

Subtitle (C), strengthens and increases the civil and criminal penalties available to the government under the Act.²³

12.3.5 Title V - Prince William Sound Provisions

This title contains provisions specifically designed to avoid future oil spills in the Prince William Sound in Alaska.²⁴

12.3.6 Title VI - Miscellaneous

This title includes the OPA's savings clause which states that rules and regulations, effective under laws predating OPA, continue in effect unless and until repealed, amended or superseded. It also states that nothing in the Act applies to rights and duties that matured, penalties incurred, or proceedings that were begun prior to the date of the Act unless

²¹OPA §§ 4101-4118.

²²OPA §§ 4201-4205.

²³OPA §§ 4301-4306.

²⁴OPA §§ 5001-5007, 33 USC §§ 2731-2737.

specifically provided in the Act. Furthermore, unless specifically provided otherwise in the statute, OPA does not affect the admiralty and maritime law or the jurisdiction of the courts. This title also governs annual appropriations to the Oil Spill Liability Trust Fund. It restricts drilling on the Outer Banks of North Carolina,²⁵ and encourages the cooperative development of certain hydrocarbon-bearing, underwater lands so as to prevent unrestrained competitive production of hydrocarbons from these areas.²⁶

12.3.8 Title VII - Oil pollution research and development program

This title is intended to establish a vehicle for the coordination and development of a comprehensive program of oil pollution research, technological development and technological demonstration. An Inter Agency Coordination Committee on Oil Pollution Research is established which will be chaired by the Coast Guard. Among other projects, this committee will provide for research, development and demonstration of new and improved technologies effective in preventing or mitigating pollution incidents, and which protect the environment. It is also envisaged that the program will include an evaluation of oil pollution prevention and mitigation technology, including a program for field tests and the development of standards and testing protocols. Improved modelling and oil spill behaviour prediction techniques are to be developed and damage assessment technology is also to be improved.²⁷

12.3.9 Title VIII - Trans-Alaska Pipeline System

This title is called the Trans-Alaska Pipeline System Reform Act

²⁵In his formal statement accompanying the signing of the OPA President Bush opposed this provision (§ 6003) and pledged to work towards its repeal.

²⁶OPA §§ 6001-6004, 33 USC §§ 2751-2753.

²⁷OPA § 7001, 33 USC § 2761.

of 1990. This Act amends the Trans-Alaska Pipeline System, through increasing certain penalties, providing for additional liability provisions, merging the Trans-Alaska Pipeline Liability Fund into the Oil Spill Liability Trust Fund and requiring an inspection of and report on the Trans-Alaska Pipeline System.²⁸

12.3.10 Title IX - Amendments to the Oil Spill Liability Trust Fund (OSLTF)

This title contains provisions relating to the funding of and expenditures by the OSLTF.²⁹ This important feature of the OPA will be dealt with in greater detail below and comparisons with the IOPC Fund and the CRISTAL Fund will be made.

12.4 Circumstances leading up to the Oil Pollution Act

It was not only the oil spill from the *Exxon Valdez* on the 24th March, 1989, which served as a catalyst for Congress and Senate to pass legislation concerning oil pollution. The cumulative effect of a spate of smaller oil spills preceding the *Exxon Valdez* spill added impetus to calls for the implementation of comprehensive oil pollution legislation.

Within twenty-four hours on June 23rd and 24th, 1989, the Greek-registered tanker *World Prodigy* struck a rock and spilled over 290,000 gallons³⁰ of heating oil into Naragansett Bay in Newport, Rhode Island; the oil tanker *Rachel B.* collided with another oil tanker in the Houston Ship Channel, spilling over 250,000 gallons of heavy crude oil; and over 300,000 gallons of heating oil was spilled into the Delaware River when the

²⁸OPA §§ 8001-8302.

²⁹OPA §§ 9001-9002.

³⁰42 US gallons is equal to one barrel and 7.4 barrels of crude oil is the equivalent of one tonne of crude oil.

Uruguayan-registered tanker *President Rivera* ran aground.³¹

On 7th February, 1990, the tanker *American Trader* went aground on her starboard anchor while in the process of manoeuvring into the sea berth off Huntington Beach, California, causing a spill of nearly 400,000 gallons of Alaskan crude oil.³² From the standpoint of the oil and tanker industries the political consequences of the *American Trader* spill were significant in that the influential House Public Works and Transportation Chairman Glen M. Anderson (California) who had, until then been a strong supporter of the oil and shipping industries, shifted his support towards the adoption of mandatory, more costly, double hull requirements.³³

In June 1990, the supertanker, *Mega Borg* exploded and burned in the Gulf of Mexico while transferring some of its 41 million gallon cargo of oil to a smaller vessel. Oil leakage created a slick thirty miles long and eight miles wide off the shores of Galveston, Texas. In total, it is estimated that the *Mega Borg* lost over four million gallons of oil, although fortunately a large proportion of this oil was burned off in the fire that ensued.³⁴

The above incidents are examples and do not constitute a complete

³¹These three spills were considered by the House of Representatives in H.R. Rep. No.242, 101st Cong., 1st Sess., pt.3 at 9-10 (1989) cited by Ruhl & Jewell 'Oil Pollution Act of 1990: Opening a New Era in Federal and Texas Regulation of Oil Spill Prevention, Containment and Cleanup, and Liability' (1991) 32 *S. Tex. L. Rev.* 475 at 478.

³²Fisher & Martinet 'Response to the American Trader Oil Spill' (1993) 19 *Ocean & Coastal Management* 59.

³³Kuntz 'Recent Oil Spill Adds Force to Calls for Double Hulls' (1990) 48 *Cong. Q.* 655 at 655 cited by T.M. Alcock '“Ecology Tankers” and the Oil Pollution Act of 1990: A History of Efforts to Require Double Hulls on Oil Tankers' (1992) 19 *Ecology Law Quarterly* 97 at 138.

³⁴Edelman 'The Oil Pollution Act of 1990' (1990) 8 *Pace Environmental Law Review* 1 at 2-3.

list of oil spills from tankers occurring in the U.S. during that period.

12.5 The Oil Pollution Act does not pre-empt State Law

The Supremacy Clause of the U.S. Constitution states that '[t]his Constitution, and the Laws of the United States ... shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby ...'.³⁵ Despite this constitutional rule the most recent approach adopted by the courts of the United States has been to preserve state law unless Congress has expressed an unequivocal intent to preempt such law.³⁶ Preemptive Congressional intent would be manifest where the language of federal law expressly preempts state law. Moreover, where Congress has enacted legislation which does not expressly preempt state law preemption has been implied in circumstances where Congress evidences an unmistakable³⁷ intent to occupy a given field.³⁸ Preemption has also been inferred by the courts where state law obstructs or even conflicts with federal law.³⁹ However, it is noteworthy that the Supreme Court of the United States has adopted the position that state laws are particularly well suited to the regulation of the environment and as such are

³⁵US Constitution, Article VI, § 2, clause 2.

³⁶*Penn Dairies v. Milk Control Comm'n*, 318 US 261, 275 (1943); see Bowers 'Oil Pollution Regulation: The Continuing Trend of Uncertainty' (1990) vol.9 No.1 *Temple Environmental Law & Technology Journal* 59 at 63.

³⁷*Florida Lime & Avocado Growers, Inc. v. Paul*, 373 US 132 (1963).

³⁸*Pennsylvania v. Nelson*, 350 US 491 (1956).

³⁹*California Coastal Comm'n v. Granite Rock Company*, 480 US 572 (1987); *Michigan Cannery and Freezers Ass'n v. Agricultural Mktg and Bargaining Bd*, 467 US 461 (1987); *Bill M. Silkwood v. Kerr-McGee Corp.*, 464 US 238 (1984); *Capital Cities Cable, Inc. v. Richard A. Crisp*, 467 US 691 (1981).

to be protected from federal encroachment.⁴⁰

In each of the fourteen years between 1975 and 1990, the House of Representatives consistently had passed one or other form of oil pollution bill. During the same period the Senate, on two occasions, passed their own version of oil spill compensation bills. Despite these efforts, no agreement could be reached between the House and Senate and consequently no new oil spill legislation was passed. The inability to reach agreement was due mainly to a fundamental difference of opinion on whether or not the preemption of state oil spill clean-up funds and state liability laws should be allowed by a revised Federal regime.⁴¹

The pre-emption debate was also linked to the question of whether or not the United States should implement the Civil Liability and Fund Conventions (as amended by the 1984 Protocols thereto). As international agreements, if the conventions had been adopted by the United States, the provisions contained therein would have become binding on the entire nation without reserve. Accordingly, individual state law would have been superseded. In 1986, the U.S. Congress gave serious consideration to the implementing of the 1984 Protocols. The House of Representatives approved such a step, subject to the Senate's advice and consent, and eventual ratification.⁴² The Senate, however, did not accept the House bill.⁴³

Proponents of pre-emption submitted that uniform federal and

⁴⁰*Chevron, U.S.A., v. Hammond*, 726 F.2d 483, 488 (9th Cir. 1984), cert. denied sub. nom., *Chevron, U.S.A. v. Sheffield*, 471 US 1140 (1985).

⁴¹Jones 'Oil Spill Compensation and Liability Legislation: When Good Things Don't Happen to Good Bills' (1989) 19 *Envtl. L. Rep.* 10333 at 10333.

⁴²H.R. 1232. 99th Cong., 1st Sess. § 102 (1986).

⁴³Noyes 'The US Oil Pollution Act of 1990' (1992) vol.7 No.1 *International Journal Of Estuarine and Coastal Law* 43 at 44.

international liability requirements allow for quick and complete payment of reasonable claims without resort to cumbersome litigation. On the other hand, opponents of pre-emption argued that oil pollution legislation, like other federal environmental laws, should set minimum standards but should allow states to provide greater protection (if desired) for their own natural resources and citizens.⁴⁴ Generally speaking, the House of Representatives supported the case for a comprehensive oil spill bill that would provide a uniform system of liability and compensation which would also pre-empt state laws. The Senate believed that ratifying the 1984 Protocols would leave the states powerless to recover compensation for oil spills in which damage claims exceeded the limits provided by the 1984 Protocols.⁴⁵

The Exxon Valdez spill strengthened the view that federal oil pollution legislation should not preempt state legislation. The mindset which had previously advocated the consolidation of U.S. oil pollution law under a federal dispensation began to shift towards a more generally agreed approach whereby existing and evolving state legislation would co-exist with the federal laws.⁴⁶ The federal dispensation would be a minimum standard which could be supplemented by state legislation where necessary.

Also during the period immediately preceding the development of the OPA, many states had adopted (or were in the process of developing) state laws pertaining to the control of and compensation for oil pollution and oil pollution damage. This state of affairs ensured that the issue of pre-emption was accepted as being of particular importance as the congressional

⁴⁴G.J. Mitchell 'Preservation of State and Federal Authority Under the Oil Pollution Act 1990' (1991) 21 *Environmental Law* 237 at 239.

⁴⁵Smith 'An Analysis of the Oil Pollution Act of 1990 and the 1984 Protocols on Civil Liability for Oil Pollution Damage' (1990) 14 *Houston J. Int'l Law* 115 at 135.

⁴⁶Grumbles, *op cit*, 1268.

debate on the OPA got underway.⁴⁷

The agreement to the adoption of the OPA represents a compromise between Senate Bill 686⁴⁸ and House of Representatives Bill 1465.⁴⁹ On the issue of pre-emption the Senate prevailed over the House and, accordingly, the OPA encapsulates the principle that states may retain and enact law relating to oil pollution, even where these laws conflict with, or exceed the provisions of the OPA. Section 1018 (a) of the Act⁵⁰ states:

'Nothing in this Act or the Act of March 3, 1851 shall -
(1) affect, or be construed or interpreted as preempting, the authority of any State or political subdivision thereof from imposing any additional liability or requirements with respect to -

(A) the discharge of oil or other pollution by oil within such State; or

(B) any removal activities in connection with such discharge.

(2) affect, or be construed or interpreted to affect or modify in any way the obligations or liabilities of any person under the Solid Waste Disposal Act (42 USC 6901 et seq.) or State law, including common law.'

Likewise, the state pollution funds are unaffected by the implementation of the federal Oil Spill Liability Trust Fund.⁵¹

Some states have deemed it appropriate to enact legislation which

⁴⁷Ruhl & Jewell, *op cit*, 489.

⁴⁸S. 686, 101st Cong., 1st Sess. (1989).

⁴⁹H.R. 1465, 101st Cong., 1st Sess. (1989).

⁵⁰codified at 33 USC § 2718 (a).

⁵¹OPA § 1018(b); 33 USC § 2718(b).

imposes liability for oil pollution damage on cargo owners as distinct from the carrier or haulier. In total, some ten states hold shippers of oil liable for oil pollution damage.⁵² This is a significant departure from the provisions of the OPA which does not include oil cargo owners within the definition of a "responsible party".⁵³ The direct inclusion of oil-importers into the liability regime would have provided significant relief to ship owners and operators but would have encountered strong opposition from oil-importer interests.⁵⁴

12.6 The Demise of the Limitation of Liability Act

The Oil Pollution Act stipulates that the Limitation of Liability Act of March 3, 1851⁵⁵ shall no longer apply to claims for oil pollution damage founded upon state or common law.⁵⁶ However the Limitation Act will continue to apply to damage claims of a non-oil pollution nature even where such damages arise out of an incident where oil pollution damage also occurred.

The Limitation Act provides that where damage is caused by a ship, without the privity or knowledge of the shipowner(s), the shipowner(s) will not be held liable in excess of the amount or value of the interest of such owner in the vessel and her freight then pending.⁵⁷ The protection afforded to the shipowner under the Limitation Act also extends to demise charterers.⁵⁸

⁵²Edelman, *op cit*, 16 at fn.114.

⁵³The OPA definition of a "responsible party" is described and discussed in detail in Chapter 13.

⁵⁴Which would have included the major and minor US and non-US oil companies.

⁵⁵Act of Mar. 3, 1851, ch. 43, 9 Stat. 635 (codified at 46 USC app. §§ 181-196 (1988)) (the Limitation Act).

⁵⁶OPA § 1018(a), 33 USC § 2718(a).

⁵⁷The 1851 Limitation Act, § 183(a).

⁵⁸The Limitation Act, § 186.

By judicial interpretation it has been held that the value of the vessel should be calculated at the completion of the voyage during which the damage occurred.⁵⁹ It is not difficult to see how this rule can easily result in an outcome which is particularly prejudicial to claimants. It is not uncommon for vessels involved in maritime accidents, which result in great damage or loss, to be of little or no value at the close of the voyage during which the accident took place. An obvious situation where this would be so is where the vessel causing the damage sinks and there is no freight pending. This was the position in the litigation surrounding damage claims resulting from the oil pollution damage caused by the *Torrey Canyon* incident.⁶⁰

The position, prior to the OPA, was that claims brought by the federal government under the Federal Water Pollution Control Act (FWPCA) were not subject to the Limitation Act and the FWPCA preempted other remedies previously available to the U.S. Government to recover cleanup costs.⁶¹ Under the FWPCA the U.S. Government was permitted to recover its cleanup costs according to the liability limits contained in the Act.⁶² Where the U.S. Government was able to show that the discharge 'was the result of wilful misconduct within the privity or knowledge of the owner' the liability limits would be broken and the owner or

⁵⁹*Norwich Co. v. Wright.*, 80 U.S. (13 Wall.) 104 (1871); *Place v. Norwich & N.Y. Transp.*, 118 U.S. 468, 492 (1886).

⁶⁰*In re Barracuda Tanker Corp.*, 281 F. Supp. 228, 230-33 (S.D.N.Y. 1968), *rev'd*, 409 F.2d 1013 (2d Cir. 1969).

⁶¹*U.S. v. Dixie Carriers, Inc.*, 627 F.2d 736 (5th Cir. 1980), Here the court rejected an attempt by the U.S. Government to recover under the Refuse Act, common law theories of public nuisance, and maritime tort negligence. See also, *In re Oswego Barge Corp.*, 664 F.2d 327 (2d Cir. 1981), *reh'g denied* 673 F.2d 47, in which the court held that § 1321 (f) preempts other means of recovery by the U.S. government. *Sed contra* see *U.S. v. City of Redwood City*, 640 F.2d 963 (9th Cir. 1981).

⁶²33 USC § 1321.

operator would become liable for the full removal costs.⁶³

The FWPCA does not appear to preempt states, individuals, or foreign governments from recovering actual cleanup costs under state law, even where these costs exceed the limits of the FWPCA. However, claims based on state and common law would be subject to the 1851 Limitation Act.⁶⁴

Courts have construed the Liability Act narrowly in recent decades and in most instances decisions have been adverse to ship owners seeking limitation.⁶⁵ Therefore, although this statute is not enforced in every instance, it has not been abandoned entirely by the courts. In *In re Harbour Towing Corporation*⁶⁶ the Liability Act operated to preempt a Maryland statute which required liability in excess of the value of the ship. This principle was upheld in *In re Oswego Barge Corp.*,⁶⁷ where the court held that oil pollution claims founded on state laws are subject to the Limitation Act.

⁶³33 USC § 1321 (f). See, *Tug Ocean Prince, Inc. v. U.S.*, 584 F.2d 1151 (2d Cir. 1978), cert. denied 440 U.S. 959 (1979). Here a tug owner was denied the right to limitation of liability under 33 USC § 1321 (g), the term "wilful misconduct" was applied.

⁶⁴*Complaint of Steuart Transp. Co.*, 435 F. Supp. 798 (E.D. Va. 1977), *aff'd*, 596 F.2d 609 (4th Cir. 1979). Here the court held that the State of Virginia's recovery of cleanup costs under Virginia legislation was not preempted by the FWPCA. See also, *Complaint of Hokkaido Fisheries Co., Ltd.*, 506 F. Supp. 631 (D. Ak. 1981), cited by Vickers 'Deterrence or Prevention - Two Means of Environmental Protection: An Analysis of the Oil Pollution Act of 1990 and Oregon Senate Bill 242' (1992) 28 *Willamette L. Rev.* 405 at 411.

⁶⁵Gilmore & Black, *The Law of Admiralty* § 10-4(a), at 822 (2nd ed. 1975) cited by King 'In Re Complaint of Armatur, S.A.: The Limitation of Liability Act and Environmental Disasters' (1991) 21 *Environmental Law* 357 at 408 fn.23.

⁶⁶335 F. Supp. 1150 (D. Md. 1971).

⁶⁷439 F. Supp. 312, 320 (N.D.N.Y. 1977).

Considering the protection afforded to the shipowner and certain kinds of charterers under the provisions of the Limitation Act, Congress had good reason to exclude the Act from application to oil pollution claims where the OPA would apply. The Limitation Act could have subverted one of the main purposes behind the OPA, which is to permit states to impose supplementary liability over and above that provided by the OPA. For oil pollution claims arising after the 18th August, 1990, it seems that Congress has, in effect, abandoned the Liability Act although it still applies to non-oil pollution claims. Consequently claimants are no longer limited to recovery under federal law where they were previously hindered at state and the common law by the protectionist provisions of the Liability Act. It has been observed that the Limitation Act will in principle continue to apply to claims for oil pollution damage brought in the U.S. to recover damage caused in international waters or in foreign jurisdictions.⁶⁸

12.7 Geographical Scope of the Oil Pollution Act

The Oil Pollution Act contains a pervasive system of control over the discharge of oil, and makes considerable changes to the liability which may be incurred for clean-up operations and damages where oil is spilled, or a substantial threat of an oil spill is posed within the navigable waters, adjoining shorelines and exclusive economic zone (EEZ) of the United States.⁶⁹ For the purpose of this discussion it is necessary to define the area encompassed by the terms navigable waters and EEZ.

12.7.1 Navigable Waters

As was the position under the Clean Water Act,⁷⁰ OPA defines "navigable waters" as meaning 'the waters of the United States

⁶⁸Thaddeus Miller & Braunreuther 3 *Benedict on Admiralty* 7th ed. revised 1992 Chapter IX 'Marine Oil Pollution' 9-27.

⁶⁹OPA § 1002(a), 33 USC § 2702(a).

⁷⁰Clean Water Act § 502(7), 33 USC § 1362(7) (1989).

including the territorial sea.'⁷¹ It is convenient to begin by describing what is meant by the words 'waters of the United States'. This concept is not defined in the OPA; however it is significant that for the purpose of § 311 of the Clean Water Act (the forerunner of OPA) the Environmental Protection Agency (EPA) defined the "waters of the United States" to encompass very broad categories of water resources in the following terms.

- (a) All waters that are currently used, were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters that are subject to the ebb and flow of the tide;
- (b) Interstate waters, including interstate wetlands;
- (c) All other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, and wetlands, the use, degradation, or destruction of which would affect or could affect interstate or foreign commerce including any such waters:
 - (1) That are or could be used for interstate or foreign travellers for recreational or other purposes;
 - (2) From which fish or shellfish are or could be taken and sold in interstate or foreign commerce;
 - (3) That are used or could be used for industrial purposes by industries in interstate commerce;
- (d) All impoundments of waters otherwise defined as navigable waters under this section;
- (e) Tributaries of waters identified in paragraphs (a) through (d) of this section, including adjacent wetlands;
- (f) Wetlands adjacent to waters identified in paragraphs (a) through (e) of this section: Provided, that waste treatment systems (other than cooling ponds meeting the criteria of this paragraph) are not waters of the United States; ... '⁷²

⁷¹OPA § 1001(21), 33 USC § 2701(21).

⁷²40 C.F.R. § 110.1(a) to (f) (1990).

Within the context of claims for water pollution the U.S. Courts have taken the view that despite the use of the adjective "navigable" it is not necessary that the water source be capable of supporting water traffic.⁷³ However the courts do require that the polluted water source bears some connection to interstate commerce.⁷⁴ Pierce raises the question as to whether or not damages incurred by way of a discharge of oil, or the threat thereof, into groundwater could be admissible under the OPA. The learned writer seem to suggest that such damage would be admissible under OPA as he points out that groundwater 'is used in interstate commerce for agriculture, other industries, and for municipal water supply.'⁷⁵

12.7.1.2 Territorial Seas

The territorial seas are defined as 'the belt of the seas measured from the line of the ordinary low water along that portion of the coast which is in direct contact with the open sea and the line marking the seaward limit of inland waters, and extending seaward a distance of three miles.'⁷⁶

12.7.2 The Exclusive Economic Zone

The "exclusive economic zone" means the zone established by Presidential Proclamation No.5030, dated March 10, 1983, including the areas referred to as the "eastern special areas" in Article 3(1) of the Agreement between the United States of America and the Union of Soviet Socialist Republics on the

⁷³See, *United States v. Texas Pipe Line Co.*, 611 F.2d 345, 346-47 (10th Cir. 1979).

⁷⁴*Ibid.* and see also, *United States v. Ashland Oil & Transp. Co.*, 504 F.2d 1317, 1328 (6th Cir. 1974).

⁷⁵Pierce 'The Emerging Role of "Liability-Forcing" in Environmental Protection' (1991) 30 *Washburn Law Journal* 381 at 415.

⁷⁶OPA § 1001(35), 33 USC § 2701(35).

Maritime Boundary, signed June 1, 1990.⁷⁷

Presidential proclamation No.5030 defines the exclusive economic zone as follows:

'The Exclusive Economic Zone of the United States is a zone continuous to the territorial sea, of the United States, the Commonwealth of Puerto Rico, the Commonwealth of the Northern Mariana Islands and the United States Overseas territories and possessions. The Exclusive Economic Zone extends to a distance 200 nautical miles from the baseline from which the breadth of the territorial sea is measured. ... within the Exclusive Economic Zone, the United States has, to the extent permitted by international law, ... jurisdiction with regard to the ... protection and preservation of the marine environment.'⁷⁸

The OPA, therefore, covers any oil spill in U.S. navigable waters within the territorial waters and 200 nautical mile limit of the EEZ. Also, oil spilled in this area which contaminates the adjoining shoreline is encompassed within OPA. However, uncertainty exists as to whether or not discharges of oil on the high sea which drift into the EEZ, navigable waters or adjoining shoreline are subject to the OPA. It would seem that the preferable approach is that the provisions of the act would apply to such spills.⁷⁹

12.8 The Oil Pollution Act only applies to Oil Pollution Incidents

For the purpose of the OPA, "oil" means oil of any kind or in any form, including, but not limited to, petroleum, fuel oil, sludge,

⁷⁷OPA § 1001 (8); 33 USC § 2701 (8).

⁷⁸Proclamation No.5030, 3 CFR §§ 22-23 (1983), reprinted in 16 USC § 1453 (1988).

⁷⁹Thaddeus Miller & Braunreather, *op cit*, 9, 15-16.

oil refuse, and oil mixed with wastes other than dredged spoil. However, the definition excludes petrol, and crude oil or any fraction thereof, which is specifically listed or designated as a hazardous substance under subparagraphs (A) through (F) of section 101 (14) of the Comprehensive Environmental Response, Compensation, and Liability Act (42 USC 9601) (hereinafter CERCLA) and which is subject to the provisions of that Act.⁸⁰

Up to the word "spoil" the definition is the same as that contained in the FWPCA. The remainder of the definition was added in order to clarify that OPA and CERCLA are intended to cover discrete matters rather than overlap. One possible problem is that a hydrocarbon which would fall within the definition of "oil" contained in the OPA can be transformed into a substance listed or designated as a hazardous substance under CERCLA after a manufacturing process.⁸¹ Accordingly, where the hydrocarbon material contains a listed or designated substance, a discharge of the hydrocarbon will be covered by CERCLA rather than OPA. The new OPA definition settles a previous point of uncertainty which had been created, whereby CERCLA had overlapped with other federal oil pollution laws. The potential application of CERCLA to incidents involving product carriers in United States Waters remains a distinct possibility.

12.9 The Prospective Application of the Oil Pollution Act

OPA stipulates that claims founded upon incidents occurring prior to enactment shall be decided in terms of the law which was then

⁸⁰OPA § 1001(23), 33 USC § 2701(23).

⁸¹When crude oil is refined the fuel oils are distilled off at varying boiling points. The lower-number fuel oils are distilled off first and contain a higher proportion of compounds with shorter chains. These are either chains of carbon atoms (aliphatic) or benzene rings or carbon atoms (aromatics). Number 2 fuel oil contains about 38 per cent aromatic compounds. See, *New Scientist, Aromatics poison ocean in new oil spills*, July (1993) 36.

in force.⁸² The Act goes on to provide that the provisions of OPA may be applied only to those matters arising from incidents subsequent to the date of enactment.⁸³ Therefore, the Act applies only to incidents occurring after the 18th August, 1990, the date of its enactment.

12.10 Conclusions

In this chapter the development of OPA and its relationship to the international Conventions and other U.S. Federal and State law has been dealt with. Significantly, it was seen how OPA did not pre-empt State law and how the 1851 Limitation of Liability Act no longer applies to oil pollution claims in the United States. Also, certain general but important features of OPA which are fundamental to understanding the liability provisions of that instrument were identified and explained.

⁸²OPA § 1017(e), 33 USC § 2717(e).

⁸³OPA § 1020.

CHAPTER 13

OPA Liability Provisions

13.1 Introduction

In this Chapter the central liability provisions of OPA will be explained and compared to the equivalent provisions contained in the Civil Liability and Fund Conventions and the 1992 Protocols thereto and in the voluntary agreements. Because OPA does not pre-empt U.S. state law, the analysis contained in Chapters 12 and 13 also provides the preparatory framework which leads to the penultimate chapter. In Chapter 14, U.S. state legislation is discussed and the development of a new policy governing tanker-source oil pollution liability is identified. The possible ramifications of the broader acceptance of this policy at the U.S. Federal level and in the international Conventions will be explored.

13.2 General Elements of Liability

With certain exceptions OPA governs liability for discharges of oil from vessels or facilities.¹ For the purpose of the OPA "liable" or "liability" shall be construed to be the same standard of liability which obtains under section 311 of the Federal Water Pollution Control Act (FWPCA 33 USC 1321).² The courts have repeatedly determined that the standard provides strict, joint, and several liability.³ In the Joint Explanatory

¹OPA § 1002(a), 33 USC § 2702(a).

²OPA § 1001(17), 33 USC § 2701(17).

³*Total Petroleum, Inc. v. United States*, 12 Cl. Ct. 178, 180, 17 ELR 21001 (1987); *United States v. M/V Big Sam*, 681 F.2d 432, 12 ELR 20994 (5th Cir.), *re'g denied*, 693 F.2d 451 (5th Cir. 1982) *cert. denied*, 462 U.S. 1132, 13 ELR 20226 (1983); *Burgess v. M/V Tamano*, 564 F.2d 164 (1st Cir.), *cert. denied*, 435 U.S. 941 (1977). cited by Randle 'The Oil Pollution Act of 1990: Its Provisions, Intent, and Effects' (1991) 21 ELR 10121 at 10121.

Statement of the Committee of Conference Considering the OPA, the Conference Committee is unequivocal in this regard.⁴ It is therefore likely that each person or corporation defined as a "responsible party" under the OPA (an "owner" or "operator"), is strictly and jointly liable for removal costs and damages caused by such spills or threatened spills, subject to certain statutory exceptions.

Because liability is strict the responsible party will be liable without regard to fault and the claimant shall only be required to establish that a discharge of oil from a vessel or facility occurred and that the defendant is a responsible party.

The impact of joint and several liability under OPA is demonstrated by the following example. Suppose three corporations (A,B,C) are held responsible for an oil pollution incident under OPA which is judged to have caused US\$150 million in pollution damage. Where the responsible parties cannot prove their respective contributions to the harm done they are all jointly liable for the damage i.e. A,B and C will each pay US\$50 million. Also each party is individually liable for the total cost of the incident. Where, for example, claimants proceed against A only, that defendant will be required to pay the entire US\$150 million judgment and attempt to seek contribution from B and C. To the extent that B and C do not have the resources to reimburse A for their share of the harm, A, instead of the claimants, must bear the loss. In *O'Neil v. Picillo*⁵ the court, commenting on the joint and several liability rules created under CERCLA, stated:

'It has not gone unnoticed that holding defendants jointly and severally liable in such situations may often result in defendants paying for more than their share of the harm. Nevertheless, courts have continued to impose joint and

⁴H.R. Conf. Rep. No.101-653, 101st Cong., 2d Sess. 103 (1990).

⁵883 F.2d 176 (1st Cir. 1989), *cert. denied*, 110 S. Ct. 1115 (1990).

several liability on a regular basis, reasoning that where all of the contributing causes cannot fairly be traced, Congress intended for those proven at least partially culpable to bear the cost of the uncertainty.⁶

It seems to be the case that the strict, joint and several liability provisions of the OPA are designed to safe guard the interests of claimants which in most instances shall include the Government of the United States or other governmental bodies which undertake costly clean-up measures.

13.2.1 Discharges excluded from the provisions of the Oil Pollution Act

The OPA excludes from its broad assertions of liability discharges permitted by a permit issued under Federal, State, or local law.⁷ Where the responsible party intentionally or accidentally exceeds the conditions of the permit, the OPA would become applicable to such discharge. The responsible party for such violation would be held liable for removal costs and damages under the OPA.⁸

Discharges emanating from public vessels are also excluded.⁹ A "public vessel" is defined as 'vessel owned or bareboat chartered and operated by the United States, or a by a State or political subdivision thereof, or by a foreign nation, except when the vessel is engaged in commerce.'¹⁰ The OPA's liability provisions will not apply to any discharge from an onshore facility which is subject to the Trans Alaska Pipeline Authorization Act (43 USC

⁶*O'Neil v. Picillo*, 883 F.2d at 178-79.

⁷OPA § 1002(c)(1), 33 USC § 2702(c)(1).

⁸*Randle, op cit*, 10122.

⁹OPA § 1002(c)(2), 33 USC § 2702(c)(2).

¹⁰OPA § 1001(29), 33 USC § 2701(29).

1651 et seq).¹¹

13.3 Responsible Parties under the Oil Pollution Act

Section 1002(a) of OPA¹² is a broad statement of how liability accrues under the Act, and provides the following:

' ... each responsible party for a vessel or a facility from which oil is discharged, or which poses the substantial threat of a discharge of oil, into or upon the navigable waters or adjoining shorelines or the exclusive economic zone is liable for the removal costs and damages ... that result from such incident.'

The OPA does not preclude the existence of more than one responsible party.¹³ This observation would be supported by the use of the word "each".

The Act defines the responsible party according to the type of structure giving rise to the discharge.¹⁴ Where the source of an oil spill or the substantial threat thereof is a vessel, the responsible party is any person owning, operating, or demise chartering¹⁵ the vessel.¹⁶ Where an actual or threatened oil

¹¹OPA § 1002(c)(3), 33 USC § 2703(c)(3).

¹²33 USC § 2702(a).

¹³H.R. Rep. No.242, 101st Cong. 1st Sess., pt. 2, at 55 (1989), cited by Ruhl & Jewell 'Oil Pollution Act of 1990: Opening a New Era in Federal and Texas Regulation of Oil Spill Prevention, Containment and Cleanup, and Liability' (1991) 32 *S. Tex. L. Rev.* 475 at 494 fn.133.

¹⁴See, OPA § 1001(32)(A) to (F), 33 USC § 2701(32)(A) to (F); this provision lists six categories of structures: vessels, onshore facilities, offshore facilities, deepwater ports, pipelines and abandoned structures.

¹⁵A bareboat or demise charterer leases and operates the vessel and employs its own crew; See, *International Marine Towing, Inc. v. Southern Leasing Partners, Ltd.*, 722 F.2d 126 (5th Cir. 1983).

emission occurs from an abandoned vessel, the persons who would have been responsible immediately prior to the abandonment of the vessel shall be the responsible party.¹⁷ The above definition of a responsible party could support either wide or narrow interpretations. As such, the legal definition of potential defendants who may be included within the meaning of a responsible party has yet to be determined. This will be considered in the next two sections.

13.3.1 The meaning of a "person"

Due to the fundamental importance of the notion of a responsible party it is necessary to amplify the constituent parts of the definition. The OPA defines a "person" as 'an individual, corporation, partnership, association, State, municipality, commission, or political subdivision of a State, or any interstate body.'¹⁸ Although this definition is broad it is noteworthy that it excludes the United States Government from the category of persons or entities who may be considered responsible parties. This is in contrast with the CERCLA definition of a "person" which expressly includes the United States Government as a potentially responsible party.¹⁹

13.3.2 The meaning of an "owner"/"operator"

Fortunately the legislative history of the OPA provides some insight into the meaning of the phrase "owner or operator".

¹⁶OPA § 1002(a), 33 USC § 2702(a) read with the definition of "owner and operator" in § 1001(26)(A), 33 USC § 2701(26)(A) and the definition of a "responsible party", contained in § 1001(32)(A), 33 USC § 2701(32)(A).

¹⁷OPA § 1002(a), 33 USC § 2702(a) read with the definition of "owner and operator" in § 1001(26)(C), 33 USC § 2701(26)(C) and the definition of "responsible party", contained in § 1001(32)(F), 33 USC 2701(32)(F).

¹⁸OPA § 1001(27), 33 USC § 2701(27).

¹⁹CERCLA § 101(21), 42 USC § 9601(21) (1988).

According to the Conference Committee, the OPA definition of "owner and operator" was adopted from section 311(a) of the FWPCA and is intended to have the same meaning.²⁰ In accordance with this Congressional intent two avenues of enquiry exist which offer guidance as to the meaning attributable to the concepts of an "owner" and "operator". In this regard applicable regulations promulgated under the FWPCA and decisions interpreting the relevant provisions of FWPCA will be discussed.

13.3.2.1 Regulations promulgated under the FWPCA

Regulations promulgated under the financial responsibility requirements of the FWPCA²¹ by the U.S. Coast Guard provide that:

"Operator" or "Vessel operator" means any person, including, but not limited to, an owner, demise charterer or other contractor who conducts or who is responsible for the operation of a vessel. Persons who are responsible for vessels in the capacity of a builder, repairer, scrapper, or seller are included in this definition of operator.

"Owner" or Vessel "owner" means any person holding legal or equitable title to a vessel. In a case where a Certificate of Registry or equivalent document has been issued, the owner is the person or persons whose name or names appear thereon as owner: Provided, however, that where a Certificate of Registry has been issued in the name of the president or secretary of an incorporated company

²⁰H.R. Conf. Rep. No.101-653, 101st Cong., 2d Sess. 102 (1990), cited by Ruhl & Jewell, *op cit*, 495 fn.137 - see also Thaddeus Miller & Braunreuther 3 *Benedict on Admiralty* 7th ed revised 1992 Chapter IX 'Marine Oil Pollution' 9-19. This would also conform with the definition of "liable" and "liability" which terms are intended to have the same meaning as in the FWPCA.

²¹The law requiring Certificates of Financial Responsibility (COFR) prior to OPA was contained in FWPCA, 33 USC § 1321.

under 46 U.S.C. 15, such incorporated company is the owner.²²

The definition of an "owner" does not seem to be problematic as it designates the registered owner as the owner for liability purposes. However, the definition of an "operator" presents considerable difficulty as it can be interpreted to encapsulate a broad range of potentially responsible parties. The difficulty lies in that the definition of an operator includes anyone who conducts the operation of a vessel. Therefore anyone who directs or manages a vessel, which in the case of a tanker involves a wide array of entities, could risk being construed as a potentially responsible party. It could be argued, for example, that where a large oil company directs an independent tanker owner to carry a cargo of crude oil from Saudi Arabia to a specific port in the United States that oil company is to some extent conducting (directing) the operation of that tanker.

Because FWPCA clearly contemplated the possibility of more than one operator being implicated in an incident it would be difficult for a potentially responsible party who did exercise some control over the vessel to successfully avoid liability on the basis that the proper enquiry should be the comparative degree of control exercised. All such "operators" together with "owners" could possibly be held jointly and severally liable under OPA.

13.3.2.2 Previous decisions under FWPCA

In *U.S. v. Mobile Oil Corp.*²³ the court attributed the following interpretation to the phrase "owner-operator":

'The owner-operator of a vessel or a facility has the capacity to make timely discovery of oil discharges. The

²²33 C.F.R. 130.2.

²³464 F.d 1124, (5th Cir. 1972).

owner-operator has power to direct the activities of persons who control the mechanisms causing the pollution. The owner-operator has the capacity to prevent and abate the damage.'²⁴

This "definition" by description of power or capacity was used by the court in *CPC Int'l, Inc. v. Aerojet-General Corp.*²⁵ as guidance to interpret the definition of "owned or operated" in § 107(a)(2) of CERCLA.²⁶ In this case, the court also noted that where 'a party assumes control of an activity and then fails to perform ... [that party] should bear the responsibility for any pollution which results.'²⁷ Generally, OPA equates legal responsibility for the consequences of the incident with ownership, and/or the right to control the source of a spill.²⁸

Contemporary courts have displayed a tendency to impute responsibility to parties connected to pollution where previously the causal connection between that party and the damage would have been considered too remote for liability to attach. This trend is particularly evident in environmental law as practised in the United States.²⁹ For example, in *U.S. v. Fleet Factors*³⁰ the court made the following statement:

' ... in order to achieve the "over-whelming remedial" goal of the CERCLA statutory scheme, ambiguous statutory terms should be construed to favour liability for the costs

²⁴Id at 1127.

²⁵731 F. Supp. 783 (W.D. Mich. 1989).

²⁶42 USC § 9607 (a)(2) (1988).

²⁷*CPC Int'l, Inc. v. Aerojet-General Corp.*, 731 F. Supp. 783, 788 (W.D. Mich. 1989).

²⁸Ruhl & Jewell, *op cit*, 495.

²⁹Ruhl & Jewell, *op cit*, 480.

³⁰901 F.2d 1550, 1557, *cert. denied*, 111 S. Ct. 752 (1991) cited by Ruhl & Jewell, *op cit*, 528 fn.436.

incurred by the government in responding to hazards at such facilities.'

When the definition of a responsible party is considered in the light of such developments, it is reasonable to anticipate that ship-marketers, managers, builders, lenders, insurers, classification societies and shippers (cargo owners) may well be included within the expanded spectrum of potentially responsible parties (PRPs).

13.3.3 Concerns facing particular PRPs

The following concerns have been voiced in relation to the possible width of the OPA definition of a "responsible party".

13.3.3.1 Ship management concerns

Although the OPA does not strictly define an operator, it seems clear from the way in which the courts of the United States have chosen to interpret similar provisions in legislation parallel to the OPA, that the party which arranged for the execution of the voyage, including the manning and navigating of the vessel and therefore the vessel manager or managing agent, will be included. Of particular concern to the managers is that liability under the OPA refers to owners and operators; therefore the operator's liability will be joint and several with that of the owner.³¹

13.3.3.2 Directors and Officers

It is uncertain whether the OPA's reference to the liability of persons who are operators would extend to directors and officers of a tanker company.³²

³¹*Spruyt Ship Management* 1st ed 134 (1990).

³²See, 'D&O Liability from Oil Pollution Act' *World Insurance Report* (19 Mar. 1991); cf. *United States v. Northwestern Pharmaceutical & Chem. Co.*, 579 F. Supp. 823

13.3.3.3 Lending Transactions

Banks traditionally provide the capital necessary to acquire tankers. They will usually lend sixty to eighty per cent of the acquisition cost in exchange for the security of a mortgage over the vessel together with the assignment of its earnings and insurances.³³ What typically transpires is that the financier remains the registered owner of the vessel while actual responsibility for the control and operation of the vessel is relinquished to the borrower in his capacity as a bareboat or demise charterer.³⁴ Through this tanker-leasing arrangement the financier retains legal ownership of the ship until the amount due under the lending agreement has been repaid. This practice is primarily to protect the lender's security interest in the vessel.

The question which arises is whether financiers who maintain legal or titular ownership over vessels run the risk of facing liability under the OPA if such vessels cause oil pollution in the United States.³⁵ Under general maritime law the position prevailed that the bareboat or demise charterer had insulated the registered owner from liability incurred by the vessel.³⁶

(W.D. Mo. 1984); where the court upheld the liability under CERCLA of a vice president actively participating in polluting practices - cited by Noyes 'The US Oil Pollution Act of 1990' (1992) vol.7 No.1 *International Journal Of Estuarine and Coastal Law* 43 at 47 fn.24.

³³K. Cottrill 'Owners Count The Cost Of Oil Spills' August 1992 *Petroleum Economist* 14 at 15.

³⁴Thaddeus Miller & Braunreuther, *op cit*, 9-21.

³⁵This question is posed by A.F Bessemer Clark 'The U.S. Oil Pollution Act of 1990' (1991) *Lloyd's Maritime and Commercial LQ* 247 at 247.

³⁶*Dant & Russell Inc. v. Dillingham Tug & Barge Corp., Inc.*, 895 F.2d 507 (9th Cir. 1989), as amended (1990); *Deakle v. John E. Graham & Sons, Inc.*, 756 F.2d 821 (11th Cir. 1985); *Nutt v. Loomis Hydraulic Testing Co., Inc.*, 552 F.2d 1126 (5th Cir. 1977).

This issue was considered during the process leading up to the development of the OPA. In the original House-approved version of the OPA, such lenders were expressly exempted from the definition of an "owner".³⁷ However, in the compromise between the House and the Senate, the conferees decided not to incorporate the House definition of "owner" in the OPA and instead adopted the definition of "owner or operator" contained in § 311(a) of the FWPCA which does not expressly exclude such lenders from liability. However, if the term "owner or operator" is, for the purpose of the OPA, interpreted in the same way as has been the case under the FWPCA, financiers who hold titular ownership over a vessel primarily to protect a security interest in that vessel shall not be deemed to be a responsible party under the OPA.

Where the terms of the security document contain conditions which permit the lender to retain control over the manner in which the borrower operates the vessel, the lender could be construed as an "operator" under the provisions of the OPA because it would be open to the court to hold that such lender has the 'power to direct the activities of persons who control the mechanisms causing the pollution'.³⁸

Where a lender holds titular ownership of a vessel and participates in the management of that vessel, he would run a very high risk of being considered a responsible party under the provisions of the OPA. In conclusion, lenders may face real risks where they adopt certain types of ship-financing procedures and those vessels operate within the U.S. jurisdiction. Insurance cover has been drafted to protect mortgagees from the prejudicing

³⁷See H.R. 1465, 101st Cong., 1st Sess. (1989) § 1001 (23), cited by Ruhl & Jewell, *op cit*, 527 fn.429.

³⁸Ruhl & Jewell, *op cit*, 526 citing *U.S. v. Mobile Oil Corp* 464 F.d 1124, 1127 (5th Cir. 1972)

of their security as a result of potential OPA liability.³⁹

13.3.3.4 Ship Manufacturers

The OPA does not specifically address the liability of those who design or manufacture vessels or components used on board such ships. Normally such parties would not be included within the meaning of "owners or operators of vessels", nor is it likely that such parties could be construed as having the "power to direct the activities of persons who control the mechanisms causing the pollution."⁴⁰ It would seem, then, that the proper way which claimants would proceed against this category of responsible party would be as a claim against third parties. For example, it is possible that ship builders and designers could be faced with claims brought against them by vessel owners and operators arising out of the failure of vessels to comply with the OPA's construction standards.⁴¹

13.3.3.5 Classification Societies

Can it be said that a classification society which surveys a vessel may be construed as an "owner or operator" of that vessel? Or, put differently, does the a classification society have the "power to direct the activities of persons who control the mechanisms causing the pollution".⁴² If this is so, then, where such vessel sinks or is damaged in the jurisdiction of the United States and a subsequent discharge of oil occurs, that classification society may be held jointly and severally liable with the actual owner or operator in terms of OPA. A central

³⁹George & de la Rue *Liability for Oil Pollution from Ships and the Effect of the United States Oil Pollution Act*, 38.

⁴⁰Ruhl & Jewell, *op cit*, 526 citing *U.S. v. Mobile Oil Corp* 464 F.d 1124, 1127 (5th Cir. 1972)

⁴¹See further at pg.479 of this work.

⁴²*Ibid.*

feature of commercial maritime ventures is that it is nearly impossible for an owner or operator to trade a vessel without having satisfactory insurance. This is particularly true of tankers, which are required to be in possession of adequate liability insurance to meet the requirements of the Civil Liability Convention and TOVALOP and U.S. Coast Guard Requirements. It is a prerequisite that, in order to obtain such cover from either a P&I Club or a commercial insurer, the vessel must have been certified as being within the standards of a particular class of ship classification. Furthermore the continuation of cover will in most circumstances depend on the vessel remaining within that classified class of quality. Although the classification society does not have actual direct physical control over the vessel in the sense that it could bar the vessel from trading, it does in fact have the "power to direct the activities of persons who control the mechanisms causing the pollution".⁴³ This is so because where the classification society declines to certify a vessel in class it will lose insurance cover and effectively be precluded from operating.⁴⁴ On the other hand it could reasonably be argued that there is a difference between "directing" activities and having the ability to abort such activities *ab initio*.

13.3.3.6 Insurers

Insurers who take efforts to monitor and control their insured's activities to protect themselves against pollution claims may face the same concerns as lenders and classification societies of being construed as an owner within the meaning of the OPA.⁴⁵

13.3.3.7 Cargo Owners

⁴³*Ibid.*

⁴⁴See generally, Russell Harding 'The Liability of Classification Societies to Cargo Owners' (1993) 1 Lloyd's Maritime and Commercial LQ 1.

⁴⁵Ruhl & Jewell, *op cit*, 530.

In a significant departure from previous federal oil pollution legislation and general maritime law the House of Representatives included in their version of the OPA bill an innovative provision which would have made the actual cargo owner involved in the spill secondarily liable for removal costs incurred as a result of the spill. The proposed liability of the cargo owner was set at fifty per cent of removal costs which would only become due once the other responsible parties had paid their allocated proportion of liability. However, towards the final phase of the Conference the House of Representatives agreed to the Senate's request to delete this shared liability arrangement.⁴⁶

Cargo owners are increasingly aware of the quality of the vessels they charter to carry their oil cargoes. Cargo owners take efforts to monitor and control the vessels they use so as to provide a degree of protection against becoming embroiled in pollution claims. By doing so they may face the same concerns as lenders, classification societies and insurers in that they possibly could be construed as an "owner and operator" within the meaning of the OPA. Of course, where the cargo owner is the owner of the tanker or the demise charter he will be liable unless he is able to prove that he exercised due care, that the pollution was caused by a third party other than his servant, agent or independent contractor. It will also be recalled that the OPA does not preempt individual states retaining or enacting legislation over and above that of the OPA. The OPA liability regime makes no provision for primary responsibility for clean-up costs or damages on cargo interests such as voyage or time charterers. On this very important issue individual states have adopted a different approach.

Furthermore, even though a cargo owner may not bear any legal responsibility for a spill they are often placed under considerable public pressure to participate in removal efforts.

⁴⁶Grumbles 'Major Provisions, Themes of the Oil Pollution Act of 1990' (1990) 21 *Environment Reporter* 1264 at 1266 and Randle, *op cit*, 10121.

13.4 Limited Liability under the Oil Pollution Act

The OPA has attracted widespread, strong criticism especially from tanker industry representatives. One such criticism is that the provisions of the Act significantly narrow the opportunities for responsible parties to limit liability. An examination of the provisions of the OPA shows that the fears of the tanker industry are well founded. Furthermore, whatever benefits are afforded to the responsible party (who under the OPA will be in most instances a tanker owner or operator) may be of minimal use because the OPA does not preempt state law remedies which may therefore exceed the provisions of the OPA. This move away from the concept of limitation reflects a general trend in environmental law which is becoming increasingly evident within the context of maritime law.⁴⁷ The traditional protection afforded to the industrial sector through the right to limit liability (at the expense of the public and the environment) is diminishing. This observation is seen in the process leading up to the development of the OPA. Both Houses narrowly defeated efforts to delete liability limitations from the bill.⁴⁸ As such OPA does provide limits to liability although the circumstances under which the responsible party may avail himself of this protection are narrowly defined. Strictly speaking, therefore, OPA is an instrument which maintains, at least in principle, the philosophy of limited liability.

13.4.1 Limits under the Oil Pollution Act

Different rules for determining liability limits apply for different types of discharging sources.⁴⁹ These differences are

⁴⁷White-Harvey 259.

⁴⁸Randle, *op cit*, 10123 fn.40.

⁴⁹The different types of activities which may cause a discharge of oil or the threat thereof are (a) tank vessels (b) all other vessels (c) Offshore facilities (d) Onshore facilities and deepwater ports (e) Mobile Offshore Drilling Units (MODU) and (f) Outer Continental Shelf Facilities (OCS

designed to reflect the different risks of oil pollution associated with different sources.⁵⁰ The focus of this work is on the liability of discharges from tank vessels.

It is understandable that tank vessels (tankers, manned and dumb barges)⁵¹ have been allocated higher limits than other vessels because tank vessels have a greater potential than other vessels for causing damage of the kind contemplated by the OPA. Also, larger tank vessels attract higher liability limits, on the rationale that the larger the tanker the greater harm it may be expected to cause. Consequently, different rules for the calculation of liability limits apply to tankers exceeding 3,000 gross tons (gt.) as opposed to tankers of 3,000 gt. or less.

Under the United States' rules, a "gross ton" is equivalent to 100 cubic feet. The vessel's tonnage is intended to reflect the vessel's approximate volume, and represents the total volume of all enclosed spaces less certain spaces permitted to be exempted.⁵²

Where a discharge of oil occurs from a tank vessel and the responsible party is able to maintain his right to limit liability under the provisions of the OPA, the amount of his limitation fund is calculated in the following way.

Facilities).

⁵⁰Randle, *op cit*, 10123.

⁵¹OPA § 1001(34), 33 USC § 2701(34) defines a "tank vessel" as a vessel that is constructed or adapted to carry, or that carries, oil or hazardous material in bulk as cargo or cargo residue, and that -

(A) is a vessel of the United States;

(B) operates on the navigable waters; or

(C) transfers oil or hazardous material in a place subject to the jurisdiction of the United States;

Therefore a tank vessel is a tanker operating in US jurisdiction.

⁵²OPA § 1001(12), 33 USC § 2701(12) "gross ton" has the meaning given to that term by the Secretary under part J of title 46 - United States Code (46 USC §§ 14101 et seq.).

13.4.1.1 Tank vessels over 3000 gt.

If the tank vessel from which the discharge occurred is over 3,000 gt. the responsible party may not be held liable for removal costs, including pure threat removal costs and damages exceeding the greater of \$1,200 per gt. or \$10 million.⁵³

13.4.1.2 Tank vessels under 3000 gt.

If the tank vessel from which the discharge occurred is 3,000 gt. or less, the responsible party may not be held liable for removal costs and damages exceeding the greater of \$1,200 per gt. or \$2 million.⁵⁴

The effect of the above provisions is that all tank vessels over 3,000 gt. are subject to a minimum liability limit of \$10 million. Arithmetically, a tank vessel of 8,333 gt. will equal the \$10 million minimum upon a calculation based on the \$1,200 per gross tonnage calculation. Therefore, all tank vessels between 3,000 gt. and 8,333 gt. will be liable for the \$10 million minimum limit because according to the per gross ton calculation they would fall below the \$10 million minimum for that class of tanker. All tank vessels exceeding 8,333 gt. assess their liability fund according to the \$1,200 per gross ton calculation.

Tankers of 3,000 gt. or less are subject to a minimum liability limit of \$2 million. Arithmetically, parties responsible for a discharge from a tank vessel of 1,667 gt. will equal the \$2 million minimum upon the \$1,200 per gross ton calculation. Therefore, tank vessels below 1,667 gt. will be liable for the

⁵³OPA § 1004(a)(1)(A), 33 USC § 2704(a)(1)(A) read in conjunction with § 1004(a)(1)(B)(i), 33 USC § 2704(a)(1)(B)(i).

⁵⁴OPA § 1004(a)(1)(A), 33 USC § 2704(a)(1)(A) read in conjunction with § 1004(a)(1)(B)(ii), 33 USC § 2704(a)(1)(B)(ii).

\$2 million minimum limit because on the \$1,200 per gross ton calculation such vessels would fall below the \$2,000,000 minimum. Tank vessels between 1,667 gt. and 3,000 gt. limit will assess liability fund according to the \$1,200 per gross ton calculation.

A schematic representation of maximum possible compensation available from the "responsible party" under OPA on the gross ton to US\$ assessment is provided below.

<i>Gross Tons</i>	<i>Limitation</i>
Up to 1,667	\$2,000,000
1,668-3,000	\$2,000,000 plus \$1,200 per ton over 1,667
3,001-8,333	\$10,000,000
Over 8,333	\$10,000,000 plus \$1,200 per ton over 8,333

For other vessels the limit is set at the greater of \$600 per gross ton or \$500,000.⁵⁵

An interesting theoretical question in connection with the established per gross ton method of assessing the liability limit of the responsible party is the following. Is it equitable to assess a responsible party for the total potential capacity of the tank vessel where that vessel only discharges a small proportion of her cargo or where the vessel loses her cargo but was only partially laden? Furthermore, is it equitable to assess larger tank vessels for higher limitation amounts in the light of the possibility for a relatively small tank vessel to inflict as significant damage as larger vessels under given circumstances? In counter to these questions, it is probably true that so long as the concept of limited liability remains in use in maritime claims, the per tonnage assessment is probably the most workable. Alternatives would probably result in significant

⁵⁵OPA § 1004 (a) (2), 33 USC § 2704 (a) (2).

insurance and evidentiary problems and prove too unwieldy. Nonetheless, the above observation does illustrate that the true nature of limitation of liability in maritime law is not a legal principle founded on equitable grounds, but rather a compromise based on policy considerations. It is, however, submitted that in the not too distant future the concept of limited liability will disappear altogether within the context of oil pollution.

13.4.2 Owners Removal Costs Creditable to the Limitation Fund

The provisions of the OPA allow any removal costs incurred by, or on behalf of, the responsible party, with respect to each incident, to be credited against his overall limit.⁵⁶ This concession to the shipowner removes the anomaly which existed under the FWPCA whereby an owner who undertook cleanup operations could not credit those sums against his overall limit. This provision will go some way towards encouraging the responsible party to become involved in the cleanup process. However, where the responsible party is able to limit his liability, other damage claims may go unrecovered where the limitation fund has been exhausted. In such cases such claimants may have recourse to the Oil Spill Liability Trust Fund the provisions of which are dealt with in due course.

13.4.3 Adjustment of Limitation Amounts

The President of the United States has the discretion to pass regulations which adjust the liability limits for all potential sources of oil pollution as he deems necessary. The President must carry out this duty at least every three years. These adjustments are to reflect significant increases in inflation as measured by the consumer price index.⁵⁷

13.4.4 Interest not subject to Limitation

⁵⁶OPA § 1004(a), 33 USC § 2704(a).

⁵⁷OPA § 1004(d)(4), 33 USC § 2704(d)(4).

The OPA specifically provides that, except under certain particular circumstances, the responsible party shall be liable to claimants for interest beginning thirty days after the claim is presented until the claim is paid.⁵⁸ The amount due in interest is not subject to the limitation provisions of the Act.⁵⁹ However, where interest is paid by a guarantor of financial responsibility, the guarantor is never obliged to pay more than the extent of the guarantee.⁶⁰

If, within sixty days of the presentation of a claim to a guarantor of financial responsibility the claimant is offered an amount equal to or greater than the amount finally paid in satisfaction of the claim no interest shall accrue to the claimant.⁶¹ Where an offer is made to the claimant sixty days or more from the presentation of the claim (by the claimant to the guarantor) and the claimant is offered an amount equal to or greater than the amount finally paid in satisfaction of the claim, interest shall only accrue for that period running from thirty days after the claim was presented up until the date on which the offer was made.

This is an interesting aspect of the OPA which would seem to be an attempt to expedite the settlement of claims. Responsible parties and their guarantor[s] are hereby encouraged to address claims-handling issues promptly so that the accrual of interest can be kept to a minimum. Responsible parties and their guarantor[s] are also encouraged to offer settlements to claimants based upon a realistic estimation of settlements which a court could assess in the settlement of that claim. If the offer is not at least equal to the final settlement the responsible party and the guarantor[s] will have to pay full

⁵⁸OPA § 1005(b)(1), 33 USC § 2705(b)(1).

⁵⁹OPA § 1005(b)(5)(A), 33 USC § 2705(b)(5)(A).

⁶⁰OPA § 1005(b)(5)(B), 33 USC § 2705(b)(5)(B) read in conjunction with § 1016(g), 33 USC § 2716(g).

⁶¹OPA § 1005(b)(2), 33 USC § 2705(b)(2).

interest. Further, claimants are encouraged to accept reasonable offers made by responsible parties and their guarantor[s] or they may find that after protracted litigation the eventual settlement will have been significantly diminished by inflation. This would be the situation where the original offer was equal to or greater than the amount finally paid in satisfaction of the claim and accordingly no interest, or at best a small amount of interest, accrued to the claimant.

The applicable interest rate is calculated at a rate published by the Federal Reserve, which is the average of the highest rate for short term, 180 days or less, commercial and finance company paper. Interest is computed on each day included within the interest period.⁶²

13.5 Comparison between OPA Limits and Previous Limits

The way in which the OPA formulates limitation is essentially similar to the previous limitation provisions contained in the FWPCA. However, the tonnage liability limits for tank vessels under § 1004(a)(1) of the OPA⁶³ is eight times higher than was the case under § 311(f) of the FWPCA. Previous federal law permitted the owners and operators of tank vessels Without 'wilful negligence or wilful misconduct within the privity and knowledge of the owner', to limit their liability for federal cleanup costs to the greater of \$150 per gross ton or \$250,000.⁶⁴ These limits were criticised for being unrealistically low.

The very great increase in a shipowner's potential liability can be illustrated by using a 100,000 gross ton oil tanker as an example. Under the FWPCA, a vessel of this size would have been liable for a maximum of \$15 million in cleanup and removal costs

⁶²OPA § 1004(b)(4), 33 USC § 2705(b)(4).

⁶³33 USC § 2704(a)(1).

⁶⁴33 USC § 1321 (f).

(100,000 gt. x \$150), assuming that the responsible party had not been guilty of wilful negligence or wilful misconduct, and that no statutory defences applied. Under the provisions of the OPA, the same vessel would now be liable for federal cleanup costs up to a maximum of \$120 million (100,000 gt. x \$1,200).

13.6 Unlimited Liability under the Oil Pollution Act

13.6.1 Introduction

To shipowners, operators and other potentially responsible parties of greater significance than the increases in liability limits is that it is more difficult to invoke limitation under the OPA. This is because the circumstances through which a party may lose the right to limit have been made far more inclusive than was formerly the position under the FWPCA. The OPA requires a broad standard of pre-spill and post-spill conduct, which the responsible party may not transgress if he is to successfully limit liability.

This is an important development because it would seem that shipowners and other responsible parties are unable to rely with any degree of certainty on an ability to invoke limitation. As liability insurance cannot be obtained for potentially unlimited liability they are forced to conduct their operations under the threat of full liability. Accordingly, whenever a tanker with a cargo of oil enters the jurisdiction of the United States, the company operating that vessel runs the risk of incurring liability which conceivably could force that company into liquidation.

13.6.2 Losing the Right to Limit Liability under the Oil Pollution Act

The right to limit liability may be lost under the same circumstances which cause the loss of the absolute defences.

13.6.2.1 Gross Negligence or Wilful Misconduct

The OPA will deny limitation where the incident was proximately caused by the gross negligence⁶⁵ or wilful misconduct⁶⁶ of the responsible party or an agent⁶⁷ or employee of the responsible party, or person acting within a contractual relationship with the responsible party.⁶⁸ Although this test is widely stated, it requires the presence of a close causal connection or proximate cause between the standard of negligence and the occurrence of the incident.

Under the FWPCA, limitation was permitted where the discharge occurred without evidence of 'wilful negligence'⁶⁹ or wilful

⁶⁵As opposed to ordinary negligence.

⁶⁶The difficulties facing an owner who seeks to avoid charges of wilful misconduct and hence hold his right to limit are well illustrated in *Tug Ocean Prince, Inc. v. United States*, 584 F.2d 1151 at 1163 (2d Cir. 1978), cert. denied, 440 U.S. 959 (1979). Here the Second Circuit Court of Appeals defined wilful misconduct as: 'an act, intentionally done, with knowledge that the performance will probably result in injury, or done in such a way as to allow an inference of a reckless disregard of the probable consequences'. In this instance a tug caused a barge, which it was pushing, to ground and spill oil in the Hudson River. The court held that the tug owner's failure to appoint a captain, failure to post a lookout and failure to inform one pilot of the other pilot's unfamiliarity with the river constituted wilful misconduct. Accordingly tug owners were denied the right to limit and the United States was allowed to recover its full cleanup costs under the FWPCA. This interpretation of the meaning of wilful misconduct will be applicable to the OPA.

⁶⁷The OPA does not define the term "agent". Thus, it is unclear what type of agent[s] can possibly subject a responsible party to unlimited liability under the Act.

⁶⁸OPA § 1004(c)(1), 33 USC § 2704(c)(1) this provision does not apply where the sole contractual arrangement arises in connection with the carriage by a common carrier by rail.

⁶⁹The fourth Circuit Court of Appeals held that an owner's reckless disregard for seaworthiness was capable of constituting wilful negligence, which would subject the owner to unlimited liability - *Steuart Transportation Co. v. Allied Towing Corp.*, 596 F.2d 609, 619 (4th Cir. 1979).

misconduct within the privity and knowledge of the owner'. Under the OPA, proof of privity and knowledge on the part of the shipowner is no longer required in order for the responsible party to lose limitation and the concept of "wilful negligence" is replaced by "gross negligence". Thus, whereas under the FWPCA, limitation could have been granted if the discharge of oil was caused by an isolated act of gross negligence by one member of an otherwise competent crew, the OPA will deny limitation under similar circumstances.⁷⁰

A finding of unlimited liability depends on the accumulative nature of the mistakes involved and the degree of foreseeability that the harm might occur.⁷¹ Where the owner makes several errors and could easily have foreseen the disaster, full liability exists.⁷² Where the errors are few or unimportant and the harm could not reasonably have been anticipated, liability will be limited to the applicable U.S. dollar amounts.⁷³

13.6.2.2 Violation of Federal Rules

As a matter of International and U.S. Federal Law, all ocean going vessels must comply with certain statutes and regulations.⁷⁴ The OPA provides that any violation of an

⁷⁰Burlingham Underwood and Lord *Report on the United States Oil Pollution Laws* (1990) 28.

⁷¹Schoenbaum 'Liability for Spills and Discharges of Oil and Hazardous Substances From Vessels' (1984) XX *Forum* 152 at 155 cited by McKaig 'Liability for Oil Tanker Spills' (1991) 44 *Southwestern Law Journal* 1599 at 1603 fn.65.

⁷²*Tug Ocean Prince, Inc. v. United States*, 584 F.2d 1151, 1162 (2d Cir. 1978) here limitation was denied when the grounding resulted from a series of negligent acts.

⁷³*Steuart Transp. Co. v. Allied Towing Corp.*, 596 F.2d 609, 613 (4th Cir. 1979).

⁷⁴U.S. Oil Pollution Act of 1990, Pub. L. 101-380, 33 USC § 1321, et seq; U.S. Federal Water Pollution Control Act, Pub. L. 95-217, 33 USC § 1251, et seq; U.S. Port and Tanker Safety Act of 1978, Pub. L. 95-474, 33 USC § 1221, et seq; MARPOL 1973-1978; Safety of Life at Sea (SOLAS), 1974/1978/1983;

applicable Federal safety, construction, or operating regulation by the responsible party or an agent or employee of the responsible party, or person acting within a contractual relationship with the responsible party, which proximately causes an incident, will result in unlimited liability.⁷⁵

A breach of a federal safety, construction or operating requirement will result in unlimited liability for the responsible party only if the breach is shown to have contributed to the occurrence of the incident. It is not tenable to argue that the breach of any federal requirement, especially one without a causal link with the incident, will result in unlimited liability.⁷⁶ Such an interpretation would effectively preclude any real opportunity to limit liability; as it would usually be possible in most cases to prove some, albeit minor, violation of federal rules.

It remains to be seen how this new exception will be interpreted. Suffice it to say that many operating regulations, such as those

Applicable Flag State Law; Vessel Classification Society Rules and Industry recognized guidelines and standards, as developed by the; (a) International Maritime Organization (IMO), (b) International Chamber of Shipping, (c) Oil Companies International Marine Forum.

⁷⁵OPA § 1004(c)(1)(B), 33 USC § 2704(c)(1)(B). This provision will not work to the detriment of the responsible party where a person acting within a contractual relationship with the responsible party, in connection with carriage by a common carrier by rail, violates an applicable federal rule - see *supra* fn.68.

⁷⁶Gold 'Marine Pollution Liability After "Exxon Valdez": The U.S. "All-Or-Nothing" Lottery!' (1991) vol.22 No.3 *Journal of Maritime Law and Commerce* 423 at 436; Wagner 'The Oil Pollution Act of 1990: An Analysis' (1990) 21 *Journal of Maritime Law and Commerce* 569 at 582; James 'Legislative Reaction to Recent oil Spills' (1990) River and Marine Industry Seminar. 432; 'Submission Made by the International Group of P&I Associations regarding Draft Oil Pollution in the United States' (undated) at 5.

contained in the *Rules of the Road*,⁷⁷ may well be violated by conduct that would most likely be characterized as ordinary negligence.⁷⁸

13.6.2.3 Failure or Refusal of the Responsible Party to abide with § 1004(2) results in the loss of Limitation

The OPA liability limits do not apply if the responsible party fails or refuses to (a) report the incident as required by law; (b) cooperate with a responsible official in connection with removal activities; or (c) comply, without sufficient cause, with an order issued under § 311(c) or (e) or the Intervention on the High Seas Act.

Section § 1004(2) is identical to section 1003(c) which extrapolates the circumstances in which an erring responsible party may be excluded from the benefit of the complete defences provided for in section 1003(a).

13.6.2.4 The Responsible Party must report the Spill

The right to limitation will be lost if the responsible party fails, or refuses to report the incident, as required by law, where he knows, or has reason to know, of the incident.⁷⁹ A judge, it is submitted, should consider whether the responsible party made a voluntary, timely and complete disclosure of the matter at hand. Consideration should be given to whether the responsible party came forward promptly on becoming aware of the incident, and to the quantity and quality of the information provided. Consideration may be given to whether or not the disclosure substantially aided the government response, and whether it occurred before a federal, state or local authority

⁷⁷See 33 CFR §§ 81.1 - 82.3. pt. 81, app. A (1990) (The international navigation rules).

⁷⁸Noyes, *op cit*, 49.

⁷⁹OPA § 1004(c)(2)(A), 33 USC § 2704(c)(2)(A).

had already obtained knowledge of the incident. It is submitted that the phrase 'has reason to know', is analogous to 'should have known'. Clearly, where the facts show that the responsible party did have the requisite knowledge although there is a denial of such knowledge the responsible party will be found to have had 'reason to know'.

The responsible party is put in a difficult position because the OPA amends the FWPCA penalty provisions to enable information, obtained by way of such notification, to be used against any owner, operator, or persons in charge of any vessel in any criminal prosecution which may arise in connection with the discharge.⁸⁰ This is a significant departure from the previous law pertaining to the use of oil spill reports in criminal prosecutions.⁸¹ This amendment raises Fifth Amendment concerns regarding protection of the reporter's constitutional right to avoid self incrimination.⁸² Before the FWPCA was amended by Title IV of the OPA, however, the United States was able to use the oil spill report to support the assessment of penalties against the responsible party because such penalties under the FWPCA were civil rather than criminal in nature.⁸³

It may be in the notifying party's best interest to report only the bare minimum required, in order to avoid inadvertently including information that might later be used against him in criminal proceedings. Surely the public interest is better served by prompt, complete notification of a discharge? The extent to which this amendment will defeat the public interest will only

⁸⁰OPA § 4301(a)(3), 33 USC § 1321(b)(5).

⁸¹Ruhl & Jewell, *op cit*, 514.

⁸²Ruhl & Jewell, *op cit*, 531.

⁸³In *United States v. Ward*, 448 U.S. 242 (1980), *rehg. denied* 448 U.S. 916; the court held that as the penalties were civil, the Fifth Amendment could not be invoked to protect a violator from having his oil spill report under 33 USC § 1321(b)(5) used to support an assessment of a penalty under 33 USC § 1321(b)(6).

become clear from the operation of this provision in future maritime accidents involving tank vessels.⁸⁴

Furthermore, an additional disincentive to make detailed notification is that such information may well be used by claimants in any litigation for the recovery of removal costs and damages which may arise after a discharge of oil or the threat thereof.

13.6.2.5 The Responsible Party must render Reasonable Cooperation and Assistance

The right to limitation will be lost if the responsible party fails or refuses to provide reasonable assistance requested of him by a responsible official in connection with removal activities.⁸⁵ The possible loss of the liability limit for non-cooperation helps to assure that enforcement of the removal orders is not jeopardised by the availability of the right to limit.⁸⁶ Clearly, where the responsible party expects that he will be able to limit liability he will be unlikely to jeopardise this privilege by being uncooperative. By contrast, where the responsible party expects that he has no expectation of limiting liability, he may not provide full cooperation with removal orders because where he is unable to limit, his removal costs are not credited to a limitation fund. However, by failing to cooperate the responsible party could be open to heavy civil and criminal sanctions. Also, where the responsible party neglects to remove the oil, the cleanup operation will be carried out by the Federal Government. In the U.S. it is not unusual for government cleanup operations to be significantly more expensive

⁸⁴Ruhl & Jewell, *op cit*, 531.

⁸⁵OPA § 1004(c)(2)(B), 33 USC § 2704(c)(2)(B).

⁸⁶Randle, *op cit*, 10124.

than those undertaken by the industry.⁸⁷

In the final analysis, the level of reasonableness of the cooperation and assistance offered by the responsible party, in connection with removal activities, can be decided only by a judge after a lengthy enquiry. A judge may wish to consider the degree and timeliness of cooperation by the responsible party. Considerable weight may be given to prompt and willing efforts to reach environmental compliance and remedial agreements with federal or state authorities including the United States Coast Guard. Full compliance with such agreements could be a factor to be considered in the favour of the responsible party in any decision to regarding limitation.

In many situations a determination of which party is the responsible party may be possible only after litigation. Where a party feels he is not responsible for the incident, but nevertheless is called upon to cooperate and assist in removal operations, he is under pressure to oblige for fear of facing the substantial penalties and increased liability that non-cooperation may attract.⁸⁸

Removal costs incurred by a responsible party, whether assumed voluntarily, or in compliance with official orders, will be offset against the limitation fund where the responsible party has established the right to limit.⁸⁹ This rule provides some relief to shipowners and operators and encourages the initiation of polluter sponsored clean-up operations. On the other hand, where a responsible party foresees no possibility of being able to limit liability, clean-up expenditure may well be perceived as an additional burden.

⁸⁷Interviews conducted at the Marine Ecology Committee Meeting of the American Maritime Law Association in New York November, 1992.

⁸⁸A.F. Bessemer Clark at 248.

⁸⁹OPA § 1004(a), 33 USC § 2704(a).

Prior to the OPA the position was that, in terms of § 1321(i)(1) of FWPCA, no "credit" was allowed against the discharger's limited liability fund for clean-up costs undertaken voluntarily by the discharger.⁹⁰

13.6.2.6 The Responsible Party must comply with certain Orders

The right to limitation will be lost if the responsible party, without sufficient cause, failed or refused to comply with an administrative or judicial order issued under subsection (c) or (e) of § 311 of the FWPCA (33 USC 1321), or the Intervention on the High Seas Act (33 USC 1471 et seq.).⁹¹ Possible grounds for not obeying such order would be where the responsible party was unable to comply with those orders or where in the circumstances it was not reasonable to do so i.e. where human life would be endangered.

13.6.2.6 Conclusion

What will the position be where an agent, employee or a third party in a contractual relationship with the responsible party fails or refuses to report the incident, to cooperate or assist in the clean up as instructed to do; or, without sufficient cause, does not comply with orders given under FWPCA or the Intervention on the High Seas Act? Will the responsible party incur the sanction of losing the option of using the complete defences and the possibility of limited liability? The wording

⁹⁰*Steuart Transportation Co. v. Allied Towing Corporation*, 596 F.2d at 619, 1979 AMC at 1201-02, *United States v. Dixie Carriers*, 736 F.2d 180, 183-85, 1985 AMC 815, 818-21 (5th Cir.) In the former decision it is interesting to note the dissenting judgement of Williams, Ct.J. He concluded at 824-26 (AMC) that the reasoning of the majority was unwise in that, by almost doubling the discharging party's liability, the majority decision discouraged vessel owners from cleaning up oil spills. The dissenting judges reasoning was preferred by the authors of OPA. See further *Tanker Hygrade No.18, Inc. v. United States*, 1976 AMC 840, 526 F.2d 805 (Ct. Cl. 1975).

⁹¹OPA § 1004(c)(2)(C), 33 USC § 2704(c)(2)(C).

of the Act would suggest not, but this question remains open to interpretation by the courts.

Where the responsible party, and possibly his agents or employees and those operating within a contractual relationship with that party fall foul of the above three requirements, the right to limitation may be denied. This may be the case even where the actual spill occurred without the gross negligence or wilful misconduct of the responsible party or those associated with him. Therefore, any responsible party who does not comply with these requirements does so at his peril.

These provisions vividly exemplify the spirit of OPA, incorporating the threat of unlimited liability as a mechanism to promote increased responsibility, higher operational standards, and technological improvements within the tanker industry. Dischargers are prompted to report the incident timeously, to undertake reasonable clean-up measures and to follow orders given by the appropriate authority, or run the risk of losing access to provisions of the Act which may be invoked to their benefit.

13.7 The Oil Spill Liability Trust Fund (OSLTF)

It is important at this point to realize that the OPA, like the Civil Liability/Fund Convention and TOVALOP/CRISTAL compensation arrangement, provides for a two-tiered compensation regime. The OSLTF (the Fund) was established by § 9509 of the Internal Revenue Code of 1986 (USC 9509).⁹² The size of the Fund as amended by OPA Title IX is \$1 billion. Where the responsible party is entitled to limit his liability, then the costs and damages which remain uncompensated can be recovered against the Fund. The Fund may spend no more than \$1 billion on any one incident, and no more than a total of \$500 million may be spent on compensating damage to natural resources. The guiding

⁹²OPA § 1001(11), 33 USC § 2701(11).

principle of the OPA is that the responsible party is required to satisfy all claims for removal costs and damages in the first instance. Alternatively, the Fund will provide interim compensation with the right to seek recovery from the responsible party thereafter.

A comprehensive consideration of the OSLTF is necessary in order to illustrate the full operation of the compensation regime created by OPA. Furthermore, by considering the OSLTF the similarities and differences between the U.S. Federal regime and those encapsulated by the two-tier international Conventions and the voluntary compensation agreements become evident. Also, the OSLTF represents the cargo owners' portion of financial responsibility for tanker-source oil pollution damage under the Federal dispensation. As such it is necessary to illustrate how OPA, through the OSLTF, insulates the actual cargo owner from personal liability where that cargo owner's oil causes oil pollution damage.

Because the responsible party bears primary compensation, it is appropriate to continue the examination of the OPA as it applies to the responsible party. A more comprehensive examination of the provisions relating to the Fund is undertaken below.

13.8 Evidence of Financial Responsibility (§ 1016 provisions)

A requirement of the 1969 Civil Liability Convention is that vessels trading to member states must be in possession of a certificate of financial responsibility sufficient to meet the liability limits of that Convention. Also, in terms of TOVALOP, a tanker owner will be admitted as a member only once he has satisfied the International Tanker Owners Pollution Federation (ITOPF) that his vessel(s) have sufficient insurance to meet its potential contractual responsibility under that Agreement. The OPA has similar requirements, which provide that financial responsibility to meet claims (that may be imposed under the OPA) must be maintained.

Any vessel over 300 gt. using any place subject to the jurisdiction of the United States or any vessel using the waters of the exclusive economic zone of the U.S. to transship or lighter oil destined for a place subject to the jurisdiction of the United States shall establish and maintain evidence of financial responsibility.⁹³ The degree of financial responsibility required must be sufficient to meet the maximum liability limit which can be assessed against the vessel in terms of the Act, as if the responsible party is entitled to limit his liability.⁹⁴

Section 1016 also provides that where a responsible party owns or operates more than one vessel, evidence of financial responsibility need meet the maximum limited liability applicable only to the vessel having the greatest liability limit (i.e. the largest vessel in the fleet). The rationale behind this rule is that it is "unlikely" for two vessels owned or operated by the same company to be the cause of different oil spills at the same time. On the other hand, considering the size of certain tanker fleets, and that certain companies have a preference for operating at a particular terminal, the possibility of a collision between two tankers owned by the same company can not be discounted.⁹⁵

13.8.1 Discouraging One-ship Operations under § 1016

⁹³OPA § 1016(a), 33 USC § 2716(a), however, a non-self-propelled vessel, (a dumb barge) that does not carry oil as cargo or fuel is excluded from this requirement.

⁹⁴Tank vessel limits are contained in OPA § 1004(a)(1) or (d), 33 USC § 2704(a)(1) or (d), and limits for other ships in § 1004(a)(2) or (d), 33 USC § 2704(a)(2) or (d).

⁹⁵The collision of the 292,666 ton ULCC *Atlantic Empress* and the 210,000 ton VLCC *Aegean Captain* resulted in the spillage of 330,000 tons of oil. This was the largest tanker source oil spill in history. Both ships were ostensibly owned by Liberian companies, but the beneficial owners were Greek interests. Coincidentally, both ships were under charter to Mobil see Renouf 'Counting the Cost of the Tobago Collision' *Seatrade Magazine* October 1979 at 47.

The above rule may also work to discourage the expected proliferation of so called single-ship companies, in the face of diminished prospects for limiting liability, and widened heads of liability facilitated by OPA.⁹⁶ One-ship companies are designed to operate with minimal assets in an attempt to exclude claims against the larger organization in the event of a maritime accident. Should the owners of tanker fleets choose to subdivide fleets into numerous one-ship companies, they would then be required to provide evidence of financial responsibility with respect to each and every ship operating in U.S. waters. By contrast if they operate in the normal way, they will have to provide evidence of financial responsibility only for an amount equal to the limitation ceiling assessable against the largest vessel in that fleet. However, one response to the above observation is that such operators may decide to operate only one ship in U.S. waters. This is not, however, a viable long term proposition for large oil companies or tanker owners.

13.8.2 Acceptable Forms of Evidence of Financial Responsibility

In terms of the OPA, evidence of financial responsibility may take the form of an insurance policy, a surety bond, a guarantee, a letter of credit, qualification as a self insurer, or any other evidence of financial responsibility. In promulgating requirements under this section, the Secretary or the President, may specify policy or other contractual terms, conditions, or defences which are necessary, or which are unacceptable, in establishing evidence of financial responsibility to effectuate the purposes of the Act.⁹⁷ OPA provides that interested parties may contest regulations promulgated under the Act only in the U.S. Court of Appeals for the District of Columbia. Challenges

⁹⁶On the possibility of single ship companies developing in the wake of the OPA see; Gold (1991), *op cit*, 438-439; Rodriguez & Jaffe 'The Oil Pollution Act of 1990' (1990) 15 *Tulane Maritime L.J.* 1 at 25-27; Noyes, *op cit*, 55; Sullivan 'Oil firms, Shippers Seek to Circumvent Laws Setting No Liability Limits for Spills' (26 July 1990) *Wall St.J.* at 1.

⁹⁷OPA § 1016(e), 33 USC § 2716(e).

must be initiated within 90 days from the date on which the regulations are promulgated. Because regulations promulgated in terms of the OPA may not be challenged in a civil or criminal enforcement action, high priority is placed on promptly resolving such challenges.⁹⁸

The proposed rules set forth only four options for providing evidence of financial responsibility; (a) Insurance (b) Surety Bond (c) Guaranty⁹⁹ (d) Self-Insurance.¹⁰⁰

13.8.2.1 Qualification as a Self-Insurer

The proposed rules stipulate that in order to qualify as a self-insurer the responsible party must satisfy the following two tests.

13.8.2.1.1 The Working Capital Test

The responsible party must be able to prove that his current assets located in the United States, less all current liabilities, is equal to or greater than the total applicable amount of financial responsibility required.¹⁰¹

13.8.2.1.2 The "Net Worth" Test

The responsible party must also be able to prove that the amount of all assets located in the United States, less all liabilities

⁹⁸OPA § 1017(a), 33 USC § 2717(a).

⁹⁹In the case of ordinary insurance, surety bond and a guaranty, the insurer the surety and the guarantor must consent to be sued directly.

¹⁰⁰Proposed 33 C.F.R. § 130.8, Federal Register, Vol. 56, No.187, Thursday, September 26, 1991, 49,006.

¹⁰¹Proposed 33 C.F.R. § 130.8(3); cited by Alcantana & Cox 'OPA 90 Certificates of Financial Responsibility' (1992) vol.23 No.3 *Journal of Maritime Law and Commerce* 369 at 384 fn.34.

anywhere in the world, is equal to or greater than the total applicable amount of financial responsibility required.¹⁰²

Therefore a self-insurer must possess assets in the United States that may in the event of a costly spill be attached to satisfy judgment. In addition, the responsible party's assets in the United States are offset against his liabilities throughout the world. This is intended to ensure that assets available to U.S. claimants in the United States are not exhausted in meeting competing claims established upon foreign liabilities.

The Coast Guard has stated that P&I Club cover, or other insurance coverage will not be counted as an asset for the purpose of self-insurance. The reasoning for this decision was outlined in the Testimony of Rear Admiral Appelbaum, as follows:

'I have recently heard of a proposal to allow the use of protection and indemnity club membership, P&I Club membership, or insurance as an asset for self-insurance purposes. There are several points that I would like to make concerning this proposal. First, as between the insured and the insurer, insurance is subject to policy defenses, some of which may not be explicit in the insurance contracts ... Second, typically P&I Club insurance specifically prohibits attachment or direct action by claimants. Third, we understand that P&I insurance normally can be cancelled without the consent of the shipowner and without the knowledge of the Coast Guard. Fourth, P&I insurance is typically characterized as indemnity insurance. That means that if a vessel covered by a P&I club has an oil spill, the insured must first pay for the removal costs and damages out of its own pocket. Then and only then would the shipowner have legal standing to demand that the P&I Club pay - provided, of course, that the club did not have the right to assert a policy defense.

¹⁰²Proposed 33 C.F.R. § 130.8(3); cited by Alcantana & Cox, *op cit*, 384 fn.34.

....

If we were to issue regulations permitting an insurance policy to be counted as an asset, the insurer could avoid direct action, thereby thwarting the requirements of OPA-90.

[W]hile there may be some equity or value to the insured by having the policy, that does not extend to the third party claimant.

[M]ost of the assets that we consider in terms of qualification for self-insurance are assets that can be attached.¹⁰³

Until the Secretary issues actual regulations, the position is that regulations governing existing Coast Guard Certificates of financial responsibility will remain in force.¹⁰⁴ Nowhere in the OPA or elsewhere was any specific closing date imposed by which these regulations have to be passed.

The P&I Clubs have refused to allow existing cover, which is limited to US\$ 500 million and, in some cases, the option of an added US\$ 200 million on the commercial markets, to serve as evidence of financial responsibility. It is noteworthy that these limits set by the P&I Clubs substantially exceed the levels required by the proposed Coast Guard regulations.

13.8.3 Enforcement of Financial Responsibility

The Act provides for the enforcement of vessel financial responsibility. In essence, no vessel for which evidence of financial responsibility is required, will be allowed entry clearance, or clearance to leave the United States, without

¹⁰³*The Impact on the Country of Proposed Rules for Evidence of Financial Responsibility Required by the Oil Pollution Act of 1990: Hearing Before the Subcomm. on Coast Guard and Navigation of the House Comm. on Merchant Marine and Fisheries, 102nd Cong., 1st Sess. (1991) at 6-9; cited by Alcantana & Cox, op cit, 384 fn.35.*

¹⁰⁴OPA § 1016(h), 33 USC § 2716(h).

evidence of financial responsibility. While the OPA does not specify where evidence of financial responsibility must be maintained, it will probably be required to be maintained on board the vessel.¹⁰⁵

Any vessel, which is required to maintain evidence of financial responsibility, but fails to do so, shall be refused clearance.¹⁰⁶ If the offending vessel has already obtained such clearance, this shall be revoked.¹⁰⁷ Furthermore, if upon being requested to produce evidence of financial responsibility a vessel does not comply with that request, the Secretary¹⁰⁸ may at his discretion either detain the vessel,¹⁰⁹ or deny entrance to U.S. navigable waters or to any place in the United States.¹¹⁰ Offending vessels discovered in U.S. navigable waters shall be seized and forfeited to the United States.¹¹¹

Civil penalties may also be assessed for failure to comply with the financial responsibility requirements of § 1016.¹¹² After notice and hearing, a noncomplying party may be assessed up to \$25,000 per day in violation. The President is granted the authority to assess the civil penalty after considering 'the nature, circumstances, extent, and gravity of the violation, the

¹⁰⁵Ruhl & Jewell, *op cit*, 503 fn.204 citing H.R. Rep. No.242, 101st Cong., 1st Sess., pt.2, at 69 (1989).

¹⁰⁶Clearance for entry into US waters under § 4197 of the Revised Statutes of the United States may be withheld or revoked by the Secretary for the Treasury.

¹⁰⁷OPA § 1016 (b) (1).

¹⁰⁸For the purpose of the OPA the Secretary is designated by § 1001(33), 33 USC § 2701(33) as the Secretary of the department in which the Coast Guard is operating, this is the Secretary of the Treasury.

¹⁰⁹OPA § 1016(b) (2) (B), 33 USC § 2716(b) (2) (B).

¹¹⁰OPA § 1016(b) (2) (A), 33 USC § 2716(b) (2) (A).

¹¹¹OPA § 1016(b) (3), 33 USC § 2716(b) (3).

¹¹²33 USC § 2716.

degree of culpability, any history of prior violation, ability to pay, and such other matters as justice may require.' Where appropriate, the President may exercise his discretion to adjust or modify the penalty after imposition. Where such civil penalty has been assessed but has not been paid, the President can refer the issue to the Attorney General for collection.¹¹³

In addition to, or in lieu of, assessing a penalty, the President may request the Attorney General to secure such relief as necessary to compel compliance with § 1016, including a judicial order terminating operations.¹¹⁴

The OPA provides that the states are authorized to enforce the requirements for evidence of financial responsibility under § 1016¹¹⁵ of the OPA on state navigable waters.¹¹⁶

13.8.4 Claims may be brought directly against the Guarantor

A guarantor is any person, other than the responsible party, who provides the responsible party with evidence of financial responsibility.¹¹⁷ For ocean-going tankers the guarantor is normally the vessel's P&I Club, which furnishes the United States Coast Guard with the FWPCA¹¹⁸ or other required Certificate of Financial Responsibility (COFR).

Claimants who establish removal costs or damages under § 1002¹¹⁹ may assert their claims directly against the guarantor.¹²⁰ This

¹¹³OPA § 4303(a), 33 USC § 2716a (a).

¹¹⁴OPA § 4303(b), 33 USC § 2716a(b).

¹¹⁵33 USC § 2716.

¹¹⁶OPA § 1019, 33 USC § 2719.

¹¹⁷OPA § 1001(13), 33 USC § 2701(13).

¹¹⁸As laid down by CFR § 130.

¹¹⁹33 USC § 2702.

¹²⁰OPA § 1016(f), 33 USC § 2716(f).

rule enhances opportunities for claimants to proceed against a financially solvent defendant. Direct action against guarantors has become a controversial issue for the P&I Clubs and marine underwriters. These interest groups have adopted the position that they will not provide COFR for limits above those specified by the 1969 Civil Liability Convention and FWPCA. The P&I Clubs have also expressed a reluctance to provide certificates of financial responsibility required in terms of State legislation.¹²¹ Furthermore, P&I underwriters have expressed the opinion that direct action against them on the basis of the financial responsibility certificate may expose their mutual associations to potentially unlimited liability.¹²² This would seem unfounded, as no guarantor will be held liable for damages or removal costs exceeding the financial responsibility provided for the vessel involved.¹²³ This fear is largely associated with COFR for U.S. state legislation. The P&I Clubs' fears are that the COFR will be construed as being appropriate to pollution damage caused in one state. Therefore, where pollution damage is caused in more than one state the fund could be multiplied by the number of states where damage was sustained.¹²⁴

13.8.4.1 Defences available to the Guarantor

Where direct claims are brought against guarantors they may invoke the rights and defences which would be available to the

¹²¹See, Oil Pollution Legislation in the United States, BIMCO Special Circular, No.9, 15 August 1990. See also, Temple, Barker & Sloane Ltd. *Initial Industry Reaction to the Oil Pollution Act of 1990* report prepared for the U.S. Coast Guard, December 5, 1990 (Cited as Temple, Barker & Sloane Report II).

¹²²Gold (1991), *op cit*, 437.

¹²³OPA § 1016(g), 33 USC § 2716(g).

¹²⁴Interviews.

responsible party.¹²⁵

Guarantors may also invoke any defence contained in regulations pertaining to the establishment and maintenance of COFR.¹²⁶ This provision refers to the authorization of certain policy terms and defences which may be allowed in terms of regulations passed under § 1016 (e).¹²⁷ It was envisaged that concessions to insurers were to be made through this channel so as to promote the continued existence of a market for providers of financial responsibility.¹²⁸ A notice of proposed rulemaking concerning regulations that will implement the financial responsibility requirements was issued by the Coast Guard.¹²⁹ Here the Coast Guard recognized that some vessel owners may encounter difficulty obtaining these certificates of financial responsibility once the proposed rules come into effect.¹³⁰

The guarantor will be exempt from liability where he proves that the incident was caused by the wilful misconduct of the responsible party. The guarantor may not, in that case, invoke any defense that he would otherwise be entitled to against the responsible party.¹³¹ These would be the usual range of defences

¹²⁵OPA § 1016(f)(1), 33 USC § 2716(f)(1) - these defences are dealt with more fully in the text below, the OPA provides some relief to the responsible party where the incident is solely caused by an act of God, an act of war or the act or omission of a third party, on condition that the responsible party abides with certain requirements.

¹²⁶OPA § 1016(f)(2), 33 USC § 2716(f)(2).

¹²⁷33 USC § 2716(e).

¹²⁸H.R. Conf. Rep. No.101-653, 101st Cong., 1st Sess. at 120 (1990) cited by Ruhl & Jewell, *op cit*, 504 fn.215.

¹²⁹56 Fed. Reg. 49,006 (1991) (to be codified at 33 C.F.R. Parts 130, 131, 132 and 137) (proposed September 26, 1991); cited by Donaldson 'The Oil Pollution Act of 1990: Reaction and Response' (1993) 3 *Villanova Environmental Law Journal* 283 at 295 fn.71.

¹³⁰*Ibid.* at 49009.

¹³¹OPA § 1016(f), 33 USC § 2716(f).

which the guarantor would incorporate in a policy of insurance or the P&I Club Rules.

The Conference Committee limited the defenses that a guarantor could assert 'to facilitate the prompt recovery by claimants'.¹³²

13.8.4.2 Concerns of Guarantors - Submission to U.S. Jurisdiction

A major part of the financial responsibility provisions is the designation of a guarantor in the United States, subject to the United States Jurisdiction. Claimants may have grounds for arguing that upon the wording of § 1016(a)(1) guarantors can be said to submit to U.S. jurisdiction.¹³³

13.9 Defenses to Liability Under the Oil Pollution Act

The OPA offers complete defences to liability as well as defences to claims asserted by particular claimants. These defences to liability are limited and narrowly construed. The practical utility of the three complete defences is considerably diminished because the immunity from liability applies only to the federal government's damages and cleanup costs. Claims under state oil pollution statutes are governed by the defenses, if any, provided by those state laws.¹³⁴

13.9.1 Absolute Defences to Liability

A responsible party shall not be liable for removal costs, costs

¹³²H.R. Conf. Rep. No.101-653, 101st Cong., 1st Sess. at 119 (1990) cited by Ruhl & Jewell, *op cit*, 504 fn.215.

¹³³OPA § 1016(a)(1), 33 USC § 2716(a)(1) provides that -
The responsible party for -
 (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 United States ...*

¹³⁴OPA § 1018(c)(1), 33 USC § 2718(c)(1).

incurred during threat removal operations, or damages, where the responsible party, by a preponderance of the evidence, is able to establish that the sole cause of the discharge, or substantial threat thereof, was caused solely by any one or a combination¹³⁵ of the complete defences available.¹³⁶ These are where the incident leading to the damage was caused solely by (a) an act of God, (b) an act of war, or (c) an act or omission of a third party.¹³⁷

13.9.1.1 Act of God

A responsible party shall escape liability under the OPA where the incident was caused solely by an "Act of God".¹³⁸ For the purpose of the OPA an "Act of God" means an unanticipated grave natural disaster or other natural phenomenon of an exceptional, inevitable, and irresistible character, the effects of which *could not have been avoided by the exercise of due care or foresight* (emphasis added).¹³⁹ It is to be expected, therefore, that bad weather, such as seasonal hurricanes, or earthquakes in

¹³⁵OPA § 1003(a)(4), 33 USC § 2703(a)(4).

¹³⁶OPA § 1003(a) 33 USC § 2703(a).

¹³⁷See, *Travellers Indemnity Co. v. United States*, 230 Ct. Cl. 867, 867 (1982) ('... the phrase *caused solely by* means that an owner or operator will be excused from liability in those situations which are completely beyond his control.'). In *Travellers Indemnity Co. v. U.S.* however, the court determined that an owner of an onshore facility did not take all reasonable precautions to prevent an act of vandalism, and that such act did not constitute an act or omission of a third party which would absolve the onshore facility owner of liability. See also, *Cities Service Pipe Line Co. v. United States*, 742 F.2d 626 (Fed. Cir. 1984).

¹³⁸OPA § 1003(a)(1), 33 USC § 2703(a)(1).

¹³⁹OPA § 1001 (1). In contrast under the FWPCA an "Act of God" was defined as, 'an act occasioned by an unanticipated grave natural disaster,' - 33 USC § 1321 (a)(12) (1988). Both an unknown underwater object which was struck by a vessel and the run off of melted snow were recognized to be acts of God as defined by the FWPCA - *Sabine Towing & Transportation Co. v. United States*, 666 F.2d 561, 564 (Ct. Cl. 1981).

areas where earthquakes are common, will not satisfy the act of God.¹⁴⁰ This traditional defence, therefore, is more likely to favour prospective plaintiffs, and to provide relatively minor relief to ship owners or operators.

13.9.1.2 Act of War

A responsible party shall escape liability under the OPA where the incident was caused solely by an act of war.¹⁴¹ "Act of War" is not defined in the OPA, the CERCLA, or the FWPCA. Congress probably envisaged a discharge caused by the destruction or damaging of a vessel by a hostile foreign power.¹⁴² It is uncertain whether an act of terrorism would be included in this defence. It must be borne in mind that this defence will be successful only where the aggressive action is the sole cause of the discharge.

13.9.1.3 Sole Cause Third Party Defence

A responsible party shall not be liable under the OPA where the incident was caused solely through the act or omission of a third party.¹⁴³ The potential application of this defence is narrow. To be invoked successfully, the third party may not be an employee or agent of the responsible party, or any person who has entered into a contractual relationship with the responsible party.¹⁴⁴ For example, a barge owner who contracts with a tug to

¹⁴⁰Randle, *op cit*, 10121.

¹⁴¹OPA § 1003(a)(2), 33 USC § 2703(a)(2).

¹⁴²Randle, *op cit*, 10121.

¹⁴³OPA § 1003(a)(3) 33 USC § 2703(a)(3).

¹⁴⁴Where, however, the sole contractual arrangement arises in connection with the transportation of oil by rail, the contractual relationship will not bar the responsible party from invoking the third party defence. In *Atlantic Coast Line v. Riverside Mills*, 219 U.S.186 (1911), the Supreme Court was asked to determine the constitutionality of the Carmack Amendment. By this amendment, a railroad receiving goods to be

provide propulsive power cannot assert the third party defense where the tug's negligence or even gross negligence was the sole cause of the discharge. Here claimants would be able to establish that the owner or operator or demise charterer of the barge had a contractual relationship with the tug owner.

The utility of this defence is further curtailed in that the responsible party must prove that he exercised due care with respect to the oil concerned, taking into consideration the characteristics of the oil and in the light of all relevant facts and circumstances.¹⁴⁵ Furthermore, the responsible party must prove that he took precautions against foreseeable acts or omissions of the third party and the foreseeable consequences of those acts or omissions.¹⁴⁶

A very high standard of diligence is demanded of the responsible party in his dealings with third parties if he is to be able to escape liability under the sole third party defence. Nevertheless, although a responsible party may forfeit the "third party defence" under the circumstances listed above, the responsible party may still seek indemnity or contribution under general concepts of maritime law (ie: the maritime law based on judicial precedent) for the claims paid out under OPA.¹⁴⁷

13.9.1.3.1 Previous construction of the 3rd party defence

shipped over more than one rail line was held liable for damage to the goods occurring while the goods were in the hands of the subsequent carrier - Referred to in *Portland Pipe Line Corporation v. Environmental improvement Commission* 1341, 1973 A.M.C. 1355.

¹⁴⁵OPA § 1003(a)(3)(A) 33 USC § 2703(a)(3)(A).

¹⁴⁶OPA § 1003(a)(3)(B), 33 USC § 2703(a)(3)(B).

¹⁴⁷OPA § 1015(a), 33 USC § 2715(a) provides that: 'Any person, including the Fund, who pays compensation pursuant to this Act to any claimant for removal costs or damages shall be subrogated to all rights, claims, and causes of action that the claimant has under any other law.'

The courts of the United States have held with respect to the FWPCA that the third party defence is not available if the spill results from the negligence of a compulsory pilot acting under the general supervision of the ship's master.¹⁴⁸ Similarly, the defence is not available to the owner of an oil barge if the crew of the tug having the barge in tow caused the spill, because a tug is an independent contractor and not a third party under the FWPCA.¹⁴⁹ The third party defence may be available for the acts of vandals.¹⁵⁰

13.9.1.3.2 Third party/Responsible party

As a general rule, the owner or operator of the vessel causing the incident is the responsible party for the purpose of the OPA.¹⁵¹ But where a responsible party is able to prove that a discharge or the threat thereof was caused solely by the act or omission of one or more third parties, or by their act or omission in combination with a cause that amounts to a complete defence, such as an act of God or an act of war, the third party will be treated as the responsible party.¹⁵² Under such circumstances, the third party and not the "owner or operator" of the tank vessel will become liable for removal costs and damages under the OPA.

13.9.1.3.3 Negligence on the part of the United States excluded

Under § 311(f)(1)(C) of the FWPCA, 'negligence on the part of the

¹⁴⁸*Burgess v. M/V Tamano*, 564 F.2d 964, 982 (1st Cir. 1977).

¹⁴⁹*United States v. LeBoeuf Bros. Towing Co.*, 621 F.2d 787, 789 (5th Cir. 1980); *United States v. Hollywood Marine, Inc.*, 625 F.2d 524, 524 (5th Cir. 1980).

¹⁵⁰*Union Petroleum Corp. v. United States*, 651 F.2d 734, 736 (Ct. Cl. 1981).

¹⁵¹OPA § 1002(a), 33 USC § 2702(a).

¹⁵²OPA § 1002(d)(1)(A), 33 USC § 2702(d)(1)(A).

United States Government' was a complete defence if the discharge resulted solely from that cause.¹⁵³ Significantly, the OPA eliminates this defence.¹⁵⁴ This defence had considerable importance where the U.S. Coast Guard was responsible for maintaining aids to navigation, and where other agencies were responsible for publishing navigational charts, maintaining channel depths, and forecasting the weather.¹⁵⁵

13.9.1.3.4 The Responsible Party remains Liable in the First Instance

The OPA requires a responsible party to pay all cleanup and damage claims as a condition precedent to seeking redress from a culpable sole cause third party. Where the responsible party alleges one or more third party[s] were the sole cause of the discharge, the responsible party is required to satisfy claims in the first instance.¹⁵⁶ Upon doing so, he may then proceed by subrogation to recover removal costs or damages from the alleged third party[s] or the Oil Spill Liability Trust Fund.¹⁵⁷ In certain situations, as where, for example, the third party is bankrupt, an otherwise blameless "responsible party" will bear the burden of cleanup costs and damage claims.¹⁵⁸ Although this situation may seem inequitable it does force the owners of tankers to accept responsibility for the inherently dangerous

¹⁵³33 USC § 1321 (f) (1) (C) (1988).

¹⁵⁴OPA § 2002 (a) effectively eliminates the defense of negligence on the part of the United States:

'Subsections (f), (g), (h) and (i) of section 311 of the Federal Water Pollution Control Act (33 USC 1321) shall not apply with respect to any incident for which liability is established under section 1002 of this Act.'

¹⁵⁵Randle, *op cit*, 10122.

¹⁵⁶OPA § 1002(d) (1) (B) (i), 33 USC § 2702(d) (1) (B) (1).

¹⁵⁷OPA § 1002(d) (1) (B) (ii), 33 USC § 2702(d) (1) (B) (ii).

¹⁵⁸Healy, Paulson & Marion 'The United States Oil Pollution Act' (1990) September/October 27 *BIMCO Bulletin* 5/90 at 29.

activity of transporting oil at sea.

13.9.1.3.5 Limitation Limits applicable to Sole Cause Third Parties

If the sole cause of the incident was due to an act or omission of a third party vessel, such vessel owner or operator is permitted to limit liability based on the tonnage limits applicable as if the third party vessel was the discharging vessel. For example, where a vessel which is not a tank vessel is the sole cause of a collision with a tank vessel and the owner of the third party vessel maintains the right to limit, he will be liable for removal costs and damages under the OPA up to \$600 per gt. of his vessel or \$500,000, whichever is the greater.¹⁵⁹

Where one tank vessel causes a discharge from another, the applicable limit will be that for the third party tank vessel.¹⁶⁰ Where the third party is not an owner or operator of a vessel or a facility, the third party's liability is limited to the liability limits that would have applied to the owner or operator of the vessel or facility from which the discharge emanated, but for the existence of the third party defense.¹⁶¹ A possible example would be where an aircraft strikes a tanker and a discharge of oil results.

13.9.2 Action which excludes all defences

A breach of any of the following three duties by the responsible party prevents the application of the above defences. A breach of such requirements will also result in the loss of limitation for the responsible party, including a sole cause third party.

¹⁵⁹OPA § 1002(d)(2), 33 USC § 2702(d)(2) read in conjunction with OPA § 1004(a)(2), 33 USC § 2704(a)(2).

¹⁶⁰See limitation amounts above.

¹⁶¹OPA § 1002(d)(2)(B), 33 USC § 2702(d)(2)(B).

None of these defences may be invoked if the responsible party fails or refuses (a) to report the incident, as required by law, where he knows or has reason to know of the incident;¹⁶² where he fails or refuses (b) to provide all reasonable cooperation and assistance requested of him by a responsible official in connection with removal activities;¹⁶³ or the responsible party, without sufficient cause, failed or refused (c) to comply with an order issued under subsection (c) or (e) of § 311 of the FWPCA (33 USC 1321), as amended by the OPA, or the Intervention on the High Seas Act (33 USC 1471 et seq.).¹⁶⁴ This third element applies to orders to comply with a National Contingency Plan and to judicial enforcement of abatement orders designed to force a private party to commence cleanup activities.¹⁶⁵

¹⁶²OPA § 1003(c)(1), 33 USC § 2703(c)(1).

¹⁶³OPA § 1003(c)(2), 33 USC § 2703(c)(2).

¹⁶⁴OPA § 1003(c)(3), 33 USC § 2703(c)(3).

¹⁶⁵33 USC § 1321 (c)(1)(B) provides: '... the President may - ... (ii) direct or monitor all Federal, State, and private actions to remove a discharge' [emphasis added].

Subsection 1321 (c)(2) provides:

(A) If a discharge, or a substantial threat of a discharge, of oil or a hazardous substance from a vessel, offshore facility, or onshore facility is of such a size or character as to be a substantial threat to the public health or the United States (including but not limited to fish, shellfish, wildlife, other natural resources, and the public and private beaches and shorelines of the United States), the President shall direct all Federal, State, and private actions to remove the discharge or to mitigate or prevent the threat of the discharge [emphasis added].

Subsection 1321 provides:

(A) Each Federal agency, State, owner or operator, or other person participating in efforts under this subsection shall act in accordance with the National Contingency Plan or as directed by the President.

(B) An owner or operator participating in efforts under this subsection shall act in accordance with the National Contingency Plan and the applicable response plan required under subsection (j) of this section, or as directed by the President.

13.9.3 Defences as to a Particular Claimant

Clearly situations can arise where the claimant has in some way, by action or omission, contributed to the cause of the incident. The OPA provides that, where the gross negligence or wilful misconduct of a claimant has contributed to causing the incident giving rise to the claim, the amount of liability exacted will be reduced proportionately.¹⁶⁶ Therefore, if the responsible party cannot prove that the third party claimant was guilty of gross negligence or wilful misconduct in causing the discharge, he is required to pay the whole of that claimant's claim even where the claimant's ordinary negligence was a cause of the accident.

It is possible to read ambiguity into the language of the clause providing for an exemption of responsibility to the claimant '*to the extent that the incident is caused by gross negligence or wilful misconduct of the claimant*'.¹⁶⁷ This clause is open to

Subsection 1321 (e) (1) provides:

In addition to any action taken by a State or local government, when the President determines that there may be an imminent and substantial threat to the public health or welfare of the United States, including fish, shellfish, and wildlife, public and private property, shorelines, beaches, habitat, and other living and nonliving natural resources ... because of an actual or threatened discharge of oil or a hazardous substance from a vessel or facility in violation of subsection (b) of this section, the President may -

(A) require the Attorney General to secure any relief from any person, including the owner or operator of the vessel or facility, as may be necessary to abate such endangerment; or

(B) after notice to the affected State, take any other action under this section, including issuing administrative orders, that may be necessary to protect the public health or welfare.

¹⁶⁶OPA § 1003(b), 33 USC § 2703(b).

¹⁶⁷OPA § 1003(b), 33 USC § 2703(b).

the interpretation that, as between such claimant and a responsible party, the apportionment should be on the basis of pure comparative apportionment of responsibility according to maritime law. This analysis was adopted in the paragraph immediately above. Alternatively, the clause may be interpreted so that the claimant's gross negligence is an absolute defence. The latter construction, although not in keeping with general admiralty practice, seems the easier to apply in the limited number of cases likely to arise. Such a construction would also operate as a sanction to a party who had contributed in a significant manner to the cause of the incident. This hypothesis can be settled only by the courts but it is submitted that the former interpretation is preferable.

13.10 Damage Recoverable under the Oil Pollution Act

Besides claims for removal costs, there are six heads in terms of which claims for pollution damage¹⁶⁸ may be pursued.¹⁶⁹ Generally, claims will be made for removal costs, physical damage, pure economic loss and natural resource damage. The extent of potential liability permitted under the Act clearly transcends the established boundaries of maritime tort.

13.10.1 Removal Costs

Removal costs are the costs of removal incurred after a discharge of oil has occurred, or the costs to prevent, minimise, or mitigate oil pollution where a substantial threat of an oil spill had been posed.¹⁷⁰ The responsible party is liable¹⁷¹ for all removal costs incurred by the federal government, State governments, or Indian tribes under subsection (c), (d), (e), or

¹⁶⁸The definition of damage expressly includes recovery of damage assessment costs. OPA § 1001(5), 33 USC § 2701(5).

¹⁶⁹OPA § 1002(b)(2)(A-F), 33 USC § 2702(b)(2)(A-F).

¹⁷⁰OPA § 1001(31), 33 USC § 2701(31).

¹⁷¹OPA § 1002(a), 33 USC § 2702(a).

(1) of § 311 of FWPCA,¹⁷² as amended by the 1990 Act,¹⁷³ under the Intervention on the High Seas Act,¹⁷⁴ or under state law.¹⁷⁵ Any removal costs incurred consistent with the National Contingency Plan are also recoverable.¹⁷⁶

Is it a precondition for the recovery of removal costs that the clean up expenses were incurred in operations consistent with the National Contingency plan.¹⁷⁷

Prior to 1990 the oil industry had accepted the recoverability of threat removal costs, thereby accepting that claims based on pure economic loss were justifiable in certain circumstances. The Oil Pollution Act of 1990 broadens the scope of liability through an expanded definition of pure economic loss.

13.10.2 Claims for Damage other than by way of Removal Costs

13.10.2.1 Natural Resource Damage Claims

The first head of claim concerns natural resource damage, which is defined to include; land, fish, wildlife, biota, air, water, ground water, drinking water supplies, and other such resources belonging to, managed by, held in trust by, appertaining to, or otherwise controlled by the United States (including the resources of the exclusive economic zone), any State or local government or Indian tribe, or any foreign government.¹⁷⁸

¹⁷²33 USC § 1321 (c), (d), (e), (1) (1988).

¹⁷³OPA § 4201.

¹⁷⁴33 USC §§ 1471-1487 (1988).

¹⁷⁵OPA § 1002(b) (1) (A), 33 USC § 2702(b) (1) (A).

¹⁷⁶OPA § 1002(b) (1) (B), 33 USC § 2702(b) (1) (B).

¹⁷⁷Edelman, *op cit*, 13.

¹⁷⁸OPA § 1002(b) (2) (A), 33 USC § 2702(b) (2) (A) read with OPA § 1001(20), 33 USC § 2701(20).

The right vested in federal and state governments to recover expenses incurred in the restoration and replacement of natural resources has been recognised previously.¹⁷⁹ Some states had enacted state legislation in terms of which the state was entitled to sue as a trustee of its citizens.¹⁸⁰ Despite the availability of some precedent,¹⁸¹ the law pertaining to pure environmental loss and particularly the development of a precise legal standard or norm in terms of which the quantum of damages may be assessed is as yet unsettled.

Clarity is, however, expected to be derived from the promulgation of regulations for the assessment of natural resource damage caused by oil pollution. The Act provides that these regulations will be made by the President, acting through the Under Secretary of Commerce for Oceans and Atmosphere and in consultation with the Administrator of the Environmental Protection Agency, and Director of the United States Fish and Wildlife Service, and the heads of other affected agencies, not later than two years after the date of OPA's enactment.¹⁸²

These regulations will confer a significant advantage on Federal, State and Indian trustees, in that, if a determination of natural resource damage is made according to the regulations, that determination will have the force and effect of a rebuttable presumption in favour of the trustee in any administrative or

¹⁷⁹Federal Water Pollution Control Act (CWA) of 1972, costs for the replacement or restoration of natural resources are found in § 311(f)(4), (5), 33 USC § 1321(f)(4), (5) (1988 & Supp. V); CERCLA § 111(i), 42 USC § 9611(i); Outer Continental Shelf Lands Act, 43 USC § 1813(b)(3) (1988); Deepwater Port Act, 33 USC 1517(d) (1988); Trans-Alaska Pipeline Authorization Act, 43 USC § 1653(a)(1) (1988).

¹⁸⁰See *Maine v. M/V Tamano*, 357 F. Supp. 1097 (D.C. Me. 1973); *In re Steuart Trans.*, 495 F. Supp. 38 (D.C. Va. 1980); *Ohio v. United States Dep't of the Interior*, 880 F.2d 432 (D.C. Cir. 1989).

¹⁸¹See for example *Commonwealth of Puerto Rico v. The S.S. Zoe Colocotroni* 628 F.Supp. 38 (D.C. Va. 1980).

¹⁸²OPA § 1006(e)(1), 33 USC § 2706(e)(1).

judicial proceeding under this Act.¹⁸³ It is significant that this presumption does not however apply to a foreign trustee.

The Oil Pollution Act does provide a general indication of how damage is to be assessed. The measure of damages shall reflect the cost of restoring, rehabilitating, replacing, or acquiring the equivalent of, the damaged natural resources.¹⁸⁴ It will include, as well, the diminution in value of those natural resources pending restoration;¹⁸⁵ plus the reasonable cost of assessing those damages.¹⁸⁶ The standpoint taken by the authors of the OPA was that, where possible, the definitions contained in the Act should be interpreted in a manner consistent with the decision in *Ohio v. Dep't of the Interior* which permits subjective evaluations of the intangible worth of natural resources to be taken into account in damage assessment.¹⁸⁷ The Federal U.S. Court of Appeal refused to uphold regulations promulgated by the Department of the Interior which limited the damage sustained to natural resources to a calculation of the use or market value of the damaged resource.¹⁸⁸

It seems that potential liability under this head could be virtually impossible for tanker owners and operators and their insurers to predict with any accuracy for the purposes of risk assessment and insurance.

13.10.2.2 Claims for Damage to Real or Personal Property

¹⁸³OPA § 1006(e)(2), 33 USC § 2706(e)(2).

¹⁸⁴OPA § 1006(d)(1)(A), 33 USC § 2706(d)(1)(A).

¹⁸⁵OPA § 1006(d)(1)(B), 33 USC § 2706(d)(1)(B).

¹⁸⁶OPA § 1006(d)(1)(C), 33 USC § 2706(d)(1)(C).

¹⁸⁷Conference Committee Report, H.R. Rep. No.653, 101st Cong., 2d Sess (1990), reprinted in 1990 USCCAN 779-818.

¹⁸⁸*Ohio v. Dep't of the Interior* 880 F.2d 432 (D.C. Cir. 1989).

Damages for injury to, or economic losses resulting from destruction of, real or personal property, shall be recoverable by a claimant who owns or leases that property.¹⁸⁹

13.10.2.3 Claims for the Loss of Subsistence Use

Damages for loss of subsistence use of natural resources, shall be recoverable by any claimant who so uses natural resources which have been injured, destroyed, or lost, without regard to the ownership or management of the resources.¹⁹⁰

13.10.2.4 Claims for the Loss of Revenue

Damages equal to the net loss of taxes, royalties, rents, fees, or net profit shares due to the injury, destruction, or loss of real property, personal property, or natural resources, shall be recoverable by the Government of the United States, a State, or a political subdivision thereof.¹⁹¹

13.10.2.5 Claims for lost Profits and Earning Capacity

Damages equal to the loss of profits or impairment of earning capacity due to the injury, destruction, or loss of real property, personal property, or natural resources, shall be recoverable by any claimant sustaining such loss.¹⁹² A claimant for these lost profits and lost earning capacity does not have to be the owner of the damaged property or resources to recover the lost profits of income.¹⁹³

¹⁸⁹OPA § 1002(b)(2)(B), 33 USC § 2702(b)(2)(B).

¹⁹⁰OPA § 1002(b)(2)(C), 33 USC § 2702(b)(2)(C).

¹⁹¹OPA § 1002(b)(2)(D), 33 USC § 2702(b)(2)(D).

¹⁹²OPA § 1002(b)(2)(E), 33 USC § 2702(b)(2)(E).

¹⁹³H.R. Conf. Rep. No.101-653, 101st Cong., 2d Sess. 103 (1990), cited by Ruhl & Jewell, *op cit*, 500 fn.181.

13.10.2.6 Claims for the Cost of Public Services

Damages for costs of providing increased or additional public services during or after removal activities, including protection from fire, safety, or health hazards, caused by a discharge of oil, shall be recoverable by a State or a political subdivision of a State.¹⁹⁴

13.10.2.7 The "physical injury" rule

When interpreting the ambit of the above heads of damage one must bear in mind that the OPA imposes liability, 'notwithstanding any other provision or rule of law ... ' The Conference Committee reports that it intended to avoid the "Physical Injury" rule which was formulated by the United States Supreme Court in *Robbins Dry Dock & Repair Co. v. Flint*.¹⁹⁵ Here the defendant dry dock company negligently damaged a ship's propeller in the course of repairs. The plaintiff, who had chartered the vessel, sued for loss of profits suffered because of the vessels extra delay in the dry dock.¹⁹⁶ The Court held that the defendant had caused damages only to the persons owning the ship, not to the charterers.¹⁹⁷ The Court also found that, because the defendant had no knowledge of the contract between the plaintiff and the shipowner, the injury complained of was not foreseeable.¹⁹⁸ Justice Holmes, writing for the majority, explained that the claims did not originate from any legally protected interest because the plaintiff charterer had neither a contract with the defendant dry dock company nor a proprietary interest in the

¹⁹⁴OPA § 1002(b)(2)(F), 33 USC § 2702(b)(2)(F).

¹⁹⁵275 U.S. 303 (1927).

¹⁹⁶*Robbins Dry Dock & Repair Co. v. Flint*, 275 U.S. 303, 307 (1927).

¹⁹⁷*Id.* at 309.

¹⁹⁸*Id.* at 307-309.

vessel.¹⁹⁹ Holmes' judgement further determined that the law did not extend so far as to impose liability beyond the claim for property damage (physical injury) that was owed to the shipowner.²⁰⁰

In *Louisiana ex rel. Guste v. M/V Testbank*,²⁰¹ the Court of Appeals for the Fifth Circuit, sitting *en banc*, addressed the applicability of the physical injury rule to maritime tort claims.²⁰² In that case, the *M/V Sea Daniel* collided with the *M/V Testbank* in the Mississippi River outlet, resulting in a spill of approximately twelve tons of pentachlorophenol (PCP) in the Mississippi River and surrounding waterways.²⁰³ The area was temporarily closed to navigation and fishing. Several businesses including shipping interests, marinas, boat rentals, restaurants, tackle shops, fishers, seafood processors, suppliers, and distributors sued to recover for economic losses that resulted from this closure.²⁰⁴ The trial court granted the defendant's motion for summary judgment as to all the pure economic loss claims except those of the commercial fishers.²⁰⁵

The court of appeals barred the plaintiffs' claim for pure economic losses in the *Testbank* appeal. The majority held that

¹⁹⁹Id. 307-308.

²⁰⁰Id. at 309

²⁰¹752 F.2d 1019 (5th Cir. 1985) (*en banc*), *cert. denied*, 477 U.S. 903 (1986).

²⁰²Id. at 1021.

²⁰³Id. at 1020.

²⁰⁴Id. at 1020-1021.

²⁰⁵*Louisiana ex rel. Guste v. Testbank*, 524 F. Supp. 1170, 1174 (E.D. La. 1981). The district court noted that seamen are favoured litigants under admiralty law, and that their economic interests require the greatest legal protection available. *Id.* at 1173 (citing *Carbone v. Ursich*, 209 F.2d 178, 182 (9th Cir. 1953)). In keeping with this notion the courts have protected commercial fishers when there has been a tortious invasion of their fishing grounds. *Id.* at 1173.

the *Robbins* physical injury rule should extend to all maritime tort claims because it provided a necessary, identifiable, and predictable rule for determining a defendant's liability.²⁰⁶ The court held that, although the losses and delays from the spill were foreseeable, the pure economic losses should be barred by application of the physical injury rule because foreseeability alone was insufficient to limit a defendant's liability fairly.²⁰⁷

It remains to be seen whether the intent of Congress to remove the application of the *Robbins Dry Dock* principle to claims under the OPA will prevail. Given the scope of the damages imposed under the OPA, this issue will no doubt be thoroughly litigated.

13.11 Periods of Limitation for Claims other than Claims against the Fund

13.11.1 Damage Limitation Periods

Except with regard to matters of contribution and subrogation as discussed below, an action for damages must be brought within three years after the date on which the loss and the connection of the loss with the incident are reasonably discoverable with the exercise of due care,²⁰⁸ - in the case of natural resource damages, three years from the date of completion of the natural resources damage assessment.²⁰⁹

10.11.2 Removal Costs Limitation Periods

The action must be commenced within three years after completion

²⁰⁶Id. at 1029.

²⁰⁷Id. at 1026.

²⁰⁸OPA § 1017(f)(1)(A), 33 USC § 2717(f)(1)(A).

²⁰⁹OPA § 1017(f)(1)(B), 33 USC § 2717(f)(1)(B).

of the removal.²¹⁰ This could be a considerable length of time after the incident.

13.11.3 Contribution for removal costs or damages

An action for contribution must be commenced within three years after the date of judgment in any action for recovery of costs or damages,²¹¹ or three years after the date of entry of a judicially approved settlement with respect to costs or damages.²¹²

13.11.4 Subrogation

Action based on rights subrogated under the OPA by reason of claim payment must be commenced within three years after the date of payment.²¹³

13.12 Uses of the Oil Spill Liability Trust Fund

13.12.1 Introduction

The Oil Spill Liability Trust Fund (the Fund) was established by § 9509 of the Internal Revenue Code of 1986.²¹⁴ The Fund is generated by a five cents per barrel tax on crude oil received at United States refineries, and on any petroleum products entering the United States for consumption or warehousing.²¹⁵

²¹⁰OPA § 1017(f)(2), 33 USC § 2717(f)(2).

²¹¹OPA § 1017(f)(3)(A), 33 USC § 2717(f)(3)(A).

²¹²OPA § 1017(f)(3)(B), 33 USC § 2717(f)(3)(B).

²¹³OPA § 1017(f)(4), 33 USC § 2717(f)(4).

²¹⁴26 USC § 9509 (Supp. 1991).

²¹⁵26 USCA § 4611(a)(1) and (2) (West Supp. 1991) as amended by the OPA, cited by Nash 'The Adequacy of the Oil Pollution Act's Compensation Scheme in the Case of a Catastrophic Oil Spill' (Spring 1991) 7 *J. Min. L. & Pol'y* 105 at 105 fn.4.

The size of the Fund as amended by the OPA Title 9 is \$1 billion.²¹⁶ The Fund may spend no more than \$1 billion on any one incident, of which no more than \$500 million may be spent on damages to natural resources.²¹⁷ This section describes how, and for what purpose, money in the Fund may be spent.

13.12.2 Purpose of the Fund

The Fund may be used for purposes listed in § 1012²¹⁸ of OPA.²¹⁹ The Fund is available for the payment of removal costs including the costs of monitoring removal actions determined to be consistent with the National Contingency Plan (NCP) by Federal authorities or the designated state official where special circumstances prevail.²²⁰

The Fund is available for the payment of costs incurred by natural resource trustees²²¹ in executing functions pursuant to § 1006 in connection with natural resource damage assessment and the development and implementation of natural resource remedial plans consistent with the NCP.²²² However, the Fund may be utilized for remedial natural resource measures undertaken outside the parameters of a NCP, where the exigencies of the situation require emergency action: (a) to avoid irreversible loss of natural resources, or (b) to prevent or reduce any

²¹⁶OPA § 9001 (c) .

²¹⁷OPA § 9001 (c) (2) .

²¹⁸33 USC § 2712.

²¹⁹Internal Revenue Code of 1986 § 9509 (c) (1) (A) as amended by OPA § 9001 (b) .

²²⁰OPA § 1012(a) (1), 33 USC § 2712(a) (1) for a description of these special circumstances see heading below, *State officials' emergency power to obligate the Fund*.

²²¹See pg. 508 of this work.

²²²OPA § 1012(a) (2), 33 USC § 2712(a) (2) .

continuing danger to natural resources.²²³

Individuals residing or transacting business in the area affected by the spill shall be given preference, to the extent possible, in the expenditure of federal funds for the removal of oil, but this imposes no limitation on the use of Defense Department resources in responding to an incident.²²⁴

The Fund may be utilized for the payment of removal costs and damages resulting from a discharge or threat of discharge from a foreign offshore unit.²²⁵ It may also be utilized for the payment of uncompensated removal costs (incurred in keeping with a NCP) and uncompensated damages, where the responsible party cannot be identified or is unable to pay, or where the liability limits have been exceeded.²²⁶ It may be used, further, for payment of federal administrative, operational, and personnel costs and expenses reasonably necessary to implement, administer and enforce the OPA as well as § 311 of FWPCA.²²⁷ Expenses under this provision, limited in each fiscal year to not more than \$25 million, may be allocated to the Coast Guard for operating expenses.²²⁸

13.12.3 Defences of the Fund against claims

The Fund has a defence to any claim for removal costs or damages made by a particular claimant, based on the extent that the incident, costs, or damages were caused by the gross negligence

²²³OPA § 1012(j), 33 USC § 2712(j).

²²⁴OPA § 1012(k), 33 USC § 2712(k).

²²⁵OPA § 1012(a)(3), 33 USC § 2712(a)(3).

²²⁶OPA § 1012(a)(4), 33 USC § 2712(a)(4).

²²⁷FWPCA § 311(b), (c), (d), (j) and (l).

²²⁸OPA § 1012(a)(5)(A), 33 USC § 2712(a)(5)(A).

or wilful misconduct of the claimant.²²⁹ Again, the language is ambiguous, and it is uncertain whether the defence is absolute or based on comparative causation. The better interpretation is that this provision facilitates a pro rata reduction in the liability of the Fund.²³⁰

13.12.4 State officials' emergency power to obligate the Fund

Use of the OSLTF by state officials will be governed by regulations which are to be promulgated by the President.²³¹ The states will be authorized to obligate the Fund, for emergency response, in an amount not to exceed \$250,000 for removal costs consistent with the National Contingency Plan.²³² The President is also empowered to promulgate regulations regarding how the Fund may be obligated to pay certain costs.²³³ The delay in promulgating these regulations has hindered the Coast Guard's ability to assess the Fund.²³⁴

13.12.5 Limitation period for claims against the Fund

Claims against the Fund are governed by different limitation provisions. The limitation period varies, depending on the basis of the claim. For removal costs no claim may be brought six years after the date of completion of all removal action.²³⁵ Claims for all damages, apart from natural resource damage claims, may

²²⁹OPA § 1012(b), 33 USC § 2712(b).

²³⁰See pg.505 of this work for an analysis of the application of this defence by the responsible party against the claimant.

²³¹OPA § 1012(c), 33 USC § 2712(c).

²³²OPA § 1012(d)(1), 33 USC § 2712(d)(1).

²³³OPA § 1012(e), 33 USC § 2712(e).

²³⁴*Outdated Rules, Lack of Authority Limits Coast Guard Use Of Oil Spill Fund*, 21 Env't Rep. (BNA) 1058, 1058-59 (1991), cited by Ruhl & Jewell, *op cit*, 502 fn.191.

²³⁵OPA § 1012(h)(1), 33 USC § 2712(h)(1).

not be brought three years after the date on which the injury, and its connection with the discharge, was reasonably discoverable in the exercise of due care.²³⁶ Claims for natural resource damages may not be brought after the limitation period applicable to all other damage claims, or three years after the completion of the natural resource damage assessment, whichever is later.²³⁷

The limitation provisions also prohibits duplicate payments out of the Fund for any removal costs or damages.²³⁸

13.13 Claims Procedure under § 1013 - A Fund of Last Resort

Claims for removal costs or damages are to be handled as described in this section. The guiding principle is that the responsible party should pay. Accordingly, claims are to be presented first to the responsible party or guarantor of the source of the discharge as designated under § 1014 (a).²³⁹ Alternatively, the Fund will, at least in the interim, provide compensation and then attempt to recover from any other responsible party.

13.13.1 Claims against the Fund

In the following three situations, claims may be presented to the Fund in the first instance.

Claims may be presented to the Fund in the first instance when the U.S. President has notified claimants, in accordance with § 1014(c), that claims should be directed to the Fund.²⁴⁰ This

²³⁶OPA § 1012(h)(2), 33 USC § 2712(h)(2).

²³⁷Id.

²³⁸OPA § 1012(i), 33 USC § 2712(i).

²³⁹OPA § 1013(a), 33 USC § 2713(a).

²⁴⁰OPA § 1013(b)(1)(A), 33 USC § 2713(b)(1)(A).

situation will arise where the responsible party and the guarantor both deny a designation within five days of receiving notification as a designated responsible party²⁴¹ where (a) the source of the discharge or threat was a public vessel,²⁴² or (b) the President is unable to designate the source or sources of the discharge or threat thereof.²⁴³

The designation of source and advertisement is a procedure designed to expedite the submission and handling of claims. If the source of the spill is a vessel or a facility, the Coast Guard will notify the responsible party and the guarantor immediately.²⁴⁴ The allegedly responsible party and his guarantor must both deny the designation within five days or begin advertising the designation and the procedures whereby claims may be presented. If the designated party fails to begin advertising, the Coast Guard will do so for not less than thirty days.²⁴⁵

Claims may be presented to the Fund in the first instance when a responsible party is in a position to assert a claim against the Fund.²⁴⁶

When a state is seeking reimbursement for removal costs incurred by that state,²⁴⁷ an automatic draw is established for requests from governmental agencies so as to circumvent the possible

²⁴¹OPA § 1014 (c) (1), 33 USC § 2714 (c) (1) .

²⁴²OPA § 1014 (c) (2), 33 USC § 2714 (c) (2) .

²⁴³OPA § 1014 (c) (3), 33 USC § 2714 (c) (3) .

²⁴⁴OPA § 1014 (a), 33 USC § 2714 (a) .

²⁴⁵OPA § 1014 (b), 33 USC § 2714 (b) .

²⁴⁶OPA § 1013 (b) (1) (A), 33 USC § 2713 (b) (1) (A) such claim can be asserted against the Fund under the OPA § 1008, 33 USC § 2708 .

²⁴⁷OPA § 1013 (b) (1) (C), 33 USC § 2713 (b) (1) (C) .

adversarial claims procedure.²⁴⁸

Claims may be presented to the Fund in the first instance when a United States claimant is pursuing damages caused by a foreign offshore unit for which the Fund is liable under 1012 (a) (3).²⁴⁹

13.13.2 Procedure after presentation of claim to Responsible Party

If a claim is presented to the responsible party or his guarantor and he denies liability for the claim, or the claim is not settled within 90 days of presentation or advertisement in terms of § 1014 (b), whichever is later, the claimant may initiate suit against the responsible party or his guarantor. Alternatively he may present the claim to the Fund.²⁵⁰ Where the claimant proceeds against the Fund, the Fund may not approve or certify any claim during the pendency of a lawsuit to recover costs which are the subject of the same claim.²⁵¹

If a claim is presented to the responsible party, but full and adequate compensation is unavailable, a claim for the uncompensated damage and removal costs may be presented to the Fund.²⁵² These provisions illustrate how the Fund is intended to operate as a secondary source of coverage, should a responsible party be unable to satisfy claims asserted against it under the Act.

13.13.3 The Fund has the Right of Recourse Action

²⁴⁸S. Rep. No.94, 101st Cong., 2d Sess. 10, reprinted in 1990 U.S. Code Cong. & Admin. News 722, 731 cited by McKaig, *op cit*, 1619 at fn.318.

²⁴⁹OPA § 1013(b) (1) (D), 33 USC § 2713(b) (1) (D).

²⁵⁰OPA § 1013(c), 33 USC § 2713(c).

²⁵¹OPA § 1013(b) (2), 33 USC § 2713(b) (2).

²⁵²OPA § 1013(d), 33 USC § 2713(d).

If the Fund pays the Claim, the Fund is subrogated to that claim.²⁵³ The Attorney General (the Department of Justice) will initiate suit on behalf of the Fund to recover compensation it has paid. In such actions, the Fund may recover its administrative costs, interest (including prejudgment interest), costs of court and attorney's fees. The suit may be initiated against any responsible party or guarantor or any other person who is liable pursuant to any law.²⁵⁴

13.13.4 Fund Regulations

The President is obliged to promulgate, and he may from time to time amend, regulations for the presentation, filing, processing, settlement and adjudication, and settlement of claims under the OPA against the Fund.²⁵⁵

13.13.5 No pro rata reduction of claims

Where the Fund has insufficient money to satisfy all valid claims, the order of filing determines which are to be paid.²⁵⁶ Accordingly all valid claims are paid in full in the order that they are filed and there is no pro rata reduction of all valid claims. This provision makes prompt filing of claims imperative.²⁵⁷

13.14 Litigation, Jurisdiction and Venue

Apart from the review of regulations promulgated under the OPA

²⁵³OPA § 1015(a), 33 USC § 2715(a).

²⁵⁴OPA § 1015(b), 33 USC § 2715(b).

²⁵⁵OPA § 1013(e), 33 USC § 2713(e).

²⁵⁶Internal Revenue Code § 9509 (e)(3) cited by Randle, *op cit*, 10127 fn.65.

²⁵⁷Randle, *op cit*, 10127-10128.

and state court jurisdiction,²⁵⁸ the United States district courts have original jurisdiction over all controversies arising under the OPA without regard to citizenship of the parties or the amount of the controversy. The proper venue in which claims shall be heard is generally that of the district in which the discharge or injury or damage occurred or in which the defendant resides, may be found, or has its principal office, or has appointed an agent for service of process. For the purposes of venue the Fund resides in the District of Columbia.²⁵⁹

13.15 Conclusions

Upon consideration of the OPA liability provisions it becomes clear that, at least in theory, the Civil Liability and Fund Conventions, even as revised by the 1984 Protocols, could not have provided the same degree of control or compensation. The limits of liability in the OPA are greater, there is a broader range of responsible parties, fewer opportunities for the responsible party to limit liability and a broader variety of damage recoverable. Furthermore there is the added protection of the billion dollar Oil Spill Liability Trust Fund and the existence of State legislation.

In reaction to the above observations it must be said that certain advantages would have accrued to the international community and the U.S. had that State ratified the 1984 Protocols and thereby brought the revised conventions into force. These advantages were identified by the Director of the IOPC Fund in 1989 in 'A Note Promoting United States' Ratification of the 1984 Protocols', and appear below, as summarized by S.T. Smith:

'First, participation by the United States would ensure that insurance certificates are internationally recognized.

²⁵⁸OPA § 1017(c), 33 USC § 2717(c) State trial courts of competent jurisdiction over claims for removal costs and/or damages may consider claims under OPA or state law.

²⁵⁹OPA § 1017(b), 33 USC § 2717(b).

Second, the financial burden of cleaning up after a major oil spill would not be met exclusively by the oil companies and taxpayers of one country, but would be shared among the oil industry and consumers globally. Third, international participation in the 1984 Protocols would encourage and provide a means for protecting the marine environment of developing countries. Fourth, United States participation in the 1984 Protocols would enable it to influence the development of international law by examining compensation claims under the CLC and the 1984 Fund. Fifth, victims of oil spill pollution would be ensured compensation for damages suffered without having to resort to costly and time consuming litigation.²⁶⁰

The advent of OPA and the continued application of U.S. State law to oil pollution liability is a *fait accompli* and the result is in general preferable in spite of the arguments quoted above. However, one of the main faults of OPA is that it neglected to expressly include the cargo owner as a responsible party. This fault has been remedied by certain progressive State legislation.

²⁶⁰Director of the International Oil Pollution Compensation Fund, A Note Promoting United States' Ratification of the 1984 Protocols 3 (Feb. 22, 1989) cited by Smith 'An Analysis of the Oil Pollution Act of 1990 and the 1984 Protocols on Civil Liability for Oil Pollution Damage' (1990) 14 *Houston J. Int'l Law* 115 at 144-145.

CHAPTER 14

U.S. State legislation and direct cargo owner liability for Oil Pollution

14.1 Introduction

The analysis of all applicable U.S. State tanker-source oil pollution liability legislation is beyond the scope of this work. It may even be questioned whether to do so would be appropriate in terms of the largely "international" focus of this study. Therefore, in this Chapter, an attempt will not be made to reproduce in respect of applicable U.S. State legislation the same degree of detailed analysis which has been undertaken within the context of the international Conventions, the voluntary agreements and the OPA. Instead, only a succinct description of important provisions is undertaken. The focus in this analysis is on the liability provisions of U.S. state legislation where these provisions depict the emergence of a new policy governing tanker-source oil pollution liability. Accordingly, the relevant areas of enquiry are the provisions of U.S. State legislation which determine which parties will be exposed to liability, the scope of damage recoverable and the test upon which such liability is founded. In this Chapter the evaluative analysis of the economic consequences of certain state legislation is emphasised above the exposition of the actual provisions of all U.S. State liability legislation.

This conceptually important Chapter will be structured in the following manner. Firstly, the relevant provisions of U.S. State legislation will be identified. Then an attempt can be made to explain how the direct cargo-owner liability provisions provided for in certain U.S. State legislation may exert a significant remedial influence upon the quality of tankers used to transport oil at sea. An attempt will also be made to assess whether or not it is desirable that direct cargo-owner liability provisions be implemented at the level of U.S. Federal law and in the

international Conventions.

41.2 Important liability provisions in U.S. State Legislation

Including the Great Lakes there are no fewer than 32 coastal states, and consequently diverse liability rules apply.

Several states expressly impose liability on cargo owners. The most notable among them is California. California imposes strict, unlimited liability upon the owner, operator, lessee or charterer by demise of any vessel or marine facility or person accepting responsibility for the vessel or marine facility; owner or transporter of discharged oil.¹ Clearly, the owner of the cargo may become independently liable. Furthermore, the criteria of admissible damages includes economic loss and injury to natural resources.²

Subject to certain defences, Oregon imposes strict liability for clean-up and removal costs and all damages to persons and property upon 'any person owning or having control over any oil or hazardous material spilled or released or threatening to spill or release.'³

Washington's Water Pollution Control Act⁴ imposes strict unlimited liability upon 'any person owning oil or having control over oil that enters the waters of that state.'⁵ Damages include injury to natural resources.⁶

¹Cal. Gov't Code § 8670.25

²Cal. Gov't Code § 8670.65.5; see Thaddeus Miller & Braunreuther 3 Benedict on Admiralty 7th ed. Chapter 9 'Marine Oil Pollution' 1992 Revision § 113 at 9-52.

³Or. Rev. Stat. § 468.790.

⁴Wash. Rev. Code Ann. § 90.48.037 *et seq.*

⁵Wash. Rev. Code Ann. § 90.48.336.

⁶Thaddeus Miller & Braunreuther, *op cit*, 9-62.

Alaska's oil pollution law⁷ imposes unlimited strict liability for clean-up and removal expenses, all damages including loss of income or economic benefit, and natural resource damages upon the owners and operators of vessels and the owner of the oil cargo at time of loading, if loading occurred within the territorial jurisdiction of the state or facility adjacent to the state.⁸

The liability provisions of the Hawaiian Environmental Emergency Response Act⁹ impose strict unlimited liability upon the owner of the oil who has arranged for its transportation and upon any person who has accepted the pollutant for transport.¹⁰

On the East Atlantic Coast of the United States, Maryland's Water Pollution Control and Abatement Act imposes unlimited strict liability upon the vessel owner or operator and owner of the discharged oil.¹¹

North Carolina's Oil Pollution and Hazardous Substances Control Act¹² provides strict unlimited liability for cargo owners, operators, demise charterers and lessees of vessels causing oil pollution.¹³

In effect the legislators of the above U.S. States have adopted the approach advanced in this work. Such approach is an improvement on the provisions of OPA which in the majority of circumstances allow cargo owners to escape any form of direct liability. It is submitted that the OPA approach is ineffective

⁷Alaska Stat. § 46.03.011, *et seq.*

⁸Thaddeus Miller & Braunreuther, *op cit*, 9-50.

⁹Haw. Rev. Stat. § 128D-6.

¹⁰Thaddeus Miller & Braunreuther, *op cit*, 9-54.

¹¹Md. Env't. Code §§ 4-401, 4-410. cited by Thaddeus Miller & Braunreuther, *op cit*, 9-55.

¹²N.C. Gen. Stat. §§ 143-215.83, 143-215.94Q.

¹³Thaddeus Miller & Braunreuther, *op cit*, 9-58.

as a tool to force cargo owners to make secure the process whereby oil is transported by sea.

Furthermore, many states hold 'any person who causes' a spill liable. For example, the Alabama Water Pollution Control Act¹⁴ imposes unlimited liability upon any person who negligently, directly or indirectly, discharges oil into state waters. Compensatory damages extend to the replenishment of wildlife.¹⁵ Civil penalties include punitive damages if pollution results from wilful/wanton conduct (not merely a negligent act or omission).¹⁶ These open-ended provisions could make the cargo owner directly liable.

It may be predicted that there will be a progressive tendency amongst U.S. state legislators to impose clear, strict and unlimited liability on the owners of oil cargoes carried by tankers. This, in keeping with the argument to be proposed in this Chapter, may serve to improve the quality of the tanker industry and protect the environment. Such development is also sound on equitable grounds as it takes the "polluter pays" principle to its logical conclusion.

14.3 The possible effects of direct cargo-owner liability

14.3.1 Introduction

Now that a legal precedent for direct cargo-owner liability has been established in certain U.S. State legislation it is now appropriate to evaluate the possible effect that the existence of direct liability for cargo-owners may have on the tanker and oil industry. An attempt will also be made to predict the

¹⁴Ala. Code § 22-22-9.

¹⁵Thaddeus Miller & Braunreuther, *op cit*, 9-50.

¹⁶Other states which have similar "any person" provisions are Connecticut, Louisiana, New Hampshire, New Jersey, Rhode Island, South Carolina and Virginia - see generally Thaddeus Miller & Braunreuther, *op cit*, § 113.

possible impact that the wider acceptance of this policy may have upon those industries. This analysis will begin by identifying the underlying cause of tanker-source oil pollution. It is necessary to do this in order to further the argument which will unfold in the remainder of this Chapter.

14.3.2 Identifying the problem

Before one attempts to find a solution to any particular problem it is necessary to identify the cause of the problem to be solved. What then is the precise cause of tanker-source oil pollution? The cause is often said to be the poor quality of tankers and continued operation of such vessels. It is the view of the present writer that this state of affairs, like the resulting oil pollution which often ensues, is not the problem but a symptom of a more fundamental problem - the lack of capital available to the tanker industry to improve the standards of its vessels. The most accurate and persuasive explanations of the problems posed to the tanker industry are to be found in the statements of commentators within that industry. For this reason such commentators are quoted at some length where their observations substantiate the statement of policy advanced in this Chapter.

At the 1991 International Bar Association Business Law conference in Hong Kong, Phillippe Bisson, legal advisor to Bureau Veritas (a leading ship classification society) isolated two factors which have impacted on the working environment of the maritime world over the last fifteen years.

- ' - The economic crisis in shipping which has intensified competition among shipowners, forcing them to use older ships, and cut operating costs to the bone. Any effects on maintenance and servicing are obviously to the detriment of safety at sea.

- A greater awareness of marine conservation issues which

has arisen from a series of major ecological disasters, such as oil spills. At present, a typical reaction is to seek compensation at any cost.'¹⁷

It would seem that Tormod Rafgård the Managing Director of the International Association of Independent Tanker Owners (Intertanko) shares Bisson's perception of the problem.

'The problem is simply that what has been acceptable in the past to the public, to the politicians, to the media, is no longer acceptable. Polluted sea birds seem to attract far more media attention than incidents where human lives are at risk or lost. An air crash seems less spectacular than a polluted beach.

In addition, there has been a tanker market depression for 15 years, in which the cheapest rust bucket has been the rate setter.'¹⁸

In this regard an observation made in 1983 by David Abecassis, who is widely regarded as the world's foremost commentator on oil pollution issues, including the question of liability, is relevant:

'If you want to clean up the seas, it is better to turn your mind *first* how to provide the funds which are needed to maintain and raise standards of ship management, and second to then enforcing the legislative standards on prevention already in existence. But how to do that is, of

¹⁷Boisson on 'The Liability of Classification Societies in the Marine Industry Context' in J. Lux (ed) *Classification Societies* (Lloyd's of London Press 1993) pp 1-26 at 1.

¹⁸Rafgård 'A year in the life of the OPA' in *Leading Developments in Ship Management* Lloyd's of London Press Ltd (1992) pp 17-28 at 20.

course, another subject.'¹⁹ (emphasis that of the present writer)

Regrettably, after having succinctly identified the problem the commentator failed to suggest any answers as to how this funding should be achieved or where it would be derived.²⁰ Further, although the lack of funding in the tanker industry has been noted, especially in various industry publications, no commentator has suggested a clear and unambiguous remedy.

It would seem, however, that at least two commentators within industry: Roger Vielvoye, the International Editor for *Oil & Gas Journal* and Tormod Rafgård, the Managing Director of the International Association of Independent Tanker Owners (Intertanko), have identified the under-capitalization of the tanker industry as the root cause of oil pollution; two: also determined why this under-capitalization occurred and; three: implicitly, suggest the possibility of placing liability upon the cargo owner as a means of rectifying the problem of under-capitalization.

Both these commentators' statements on this issue, although important, are brief, unspecific, ambiguous, contradictory and vague. This is perhaps to be expected considering the direct links that these commentators have to both the tanker and oil industries and the considerable vested interests which may be affected in the course of a forthright policy debate.

14.3.3 Origins of the depressed tanker-market

Due to a high demand for oil in the United States, Western Europe

¹⁹Abecassis 'IMO and Liability for Oil Pollution from Ships: A Retrospective' [1983] *Lloyd's Maritime and Commercial LQ* 45 at 59.

²⁰In a subsequent work by Abecassis & Jarashow et al *Oil Pollution from Ships: International, United Kingdom and United States Law and Practice* 2nd ed. (1985) no solution to the under capitalization of the tanker industry is suggested.

and Japan during the mid-1970's there was an increased demand for oil tankers. On the assumption that the world's future demand for oil would further increase, an unprecedented tanker building boom took place during 1974-1977. However, this investment optimism proved premature. The increased global demand for oil did not materialize and as a result of energy conservation policies, and an increase in the price of oil, the world's demand for oil in fact declined. There followed a marked slump in both new construction and retirement of older tankers. Investors have been reluctant to build new tankers because of unprofitability in the crude oil tanker market. Consequently, the tankers built during this building boom are still transporting most of the world's crude oil.

As an excess capacity of tanker tonnage sought limited cargoes; profitability in the tanker sector of the shipping market declined. Recently this phenomenon has become particularly marked, with low profits, and even losses, in some years, experienced by tanker owners. In short, the crude oil tanker market has become increasingly over-traded. Low freight rates and intense competition have forced tanker owners to reduce maintenance and switch to low cost crews to remain competitive. Owners of higher-quality ships have lost the protection of long term contracts, which were a feature of the tanker market in the 60's and 70's, and are forced to compete with low quality tonnage.

Not only does the availability of old, low-cost tonnage reduce tanker freight rates and maintain those rates at a depressed level, but other tankers have to reduce operation costs to remain competitive. This creates a vicious, downward spiral of low quality tonnage. The standards of the lowest quality tonnage must not be permitted to continue dictating the standard of the entire tanker industry. The problem, basically, is how to render poor ships more costly to use than good ships.

It is the view of the present writer that the laws governing the

liability for tanker-source oil pollution can be harnessed to rectify these harmful consequences of the economic depression in the tanker industry.

14.3.4 Dynamics of an undercapitalized tanker-fleet

It is fitting to introduce this inquiry with another statement made by Rafgård, Managing Director of INTERTANKO:

'The ship chartering market is probably as close as you can come to a perfectly competitive market, with a worldwide daily open auction to match and fix ships and cargoes on various types of charters. The invisible hand of Adam Smith²¹ is constantly at work to ensure an effective utilisation of tankers and the cheapest freight rates under the law of supply and demand.'²²

Rafgård, further noted that 'there has been a tanker market depression for 15 years, in which the cheapest rust bucket has been the rate setter.'²³

The late Sir Roderick MacLeod, formerly Chairman of Lloyd's Register, observed that:

'World shipping is very largely a free market. The more free the market, the more difficult it is to enforce standards which to a considerable extent requires compelling people to do what they don't want to do.'²⁴

²¹Adam Smith an early, pioneering economist who is widely recognized as the champion of unbridled capitalism. (footnote inserted by the present writer)

²²Rafgård, *op cit*, 20.

²³Rafgård, *op cit*, 21.

²⁴'Forward' in J. Lux (ed) *Classification Societies* (Lloyd's of London Press 1993) at v.

In June 1993 Norwegian Minister for Environment, Thorbjørn Berntsen, articulated the problem in the following manner, but did not propose a solution:

'Unfortunately, shipowners in some countries do well from operating old tonnage which has been fully amortised or bought on the cheap. *This advantage must somehow be eliminated.* We can't let these owners decide the level of shipping safety.'²⁵ (emphasis that of the present writer)

An article by Derek Bamber echoes the concern of Minister Berntsen and also elaborates upon the nature of the problem raised by the Minister. In August 1992, Bamber reported that:

'The prospects for a recovery in rates are receding. Fearnley's Hammer comments that, at the present time, "the tanker market is flooded with tonnage of every stripe at low rates." No relief is in sight, unless the EC²⁶ and Japan enact legislation making it difficult, or *penalty expensive*, for sub-standard vessels to continue operating.'²⁷ (emphasis that of the present writer)

The reader may note that Bamber does not specifically state what he means by 'penalty expensive' nor who should be forced to face such penalties. It would seem that he is advocating some type of punitive "command and control" mechanism. However, in the same article he writes:

'Jarle Hammer director of the Fearn-research division of Fearnleys, an Oslo-based ship broker and consultancy, says: "As long as stubborn market optimists, with sweet memories

²⁵Halvorsen & Berge 'Norway Tightens Green Controls' June (1993) *STATOIL* 14-15 at 14.

²⁶European Economic Community (footnote inserted by the present writer).

²⁷Bamber 'Rust Buckets Must Go' August 1992 *Petroleum Economist* 12-14 at 14.

of the early 1970's refuse to adapt to reality and dispose of their rust buckets, the market will not improve. I believe we can only see a healthy tanker market when more realistic creditors, *quality-concerned cargo owners*, insurers and authorities, together with scrap-hungry steelmakers in the Far East, succeed in bringing about scrappings at a much higher level and thus contribute to the necessary renewal of the tanker fleet.'²⁸ (emphasis that of the present writer)

In January 1993, expanding upon the critically important question of 'quality concerned cargo owners', David Knott reports Andreas Ugland, Chairman of INTERTANKO, as voicing the following concern:

'He also said charterers should stop hiring substandard ships and start paying rates that justify the best maintenance and investment in new ships. "A shipowner is responsible to maintain and operate his ships at high standards," said Ugland, "but he must be given the means to do so."'²⁹

Prior to the statement above, there is evidence that the oil industry had, at least in principle, recognized the nature of this problem and realized the pivotal role that they would have to assume if a remedy was to be found. In an interview with Ian A. McGrath, Managing Director of Shell International Marine, Roger Vielvoye reported in June 1991 that:

'... McGrath said Shell conceded that in the past freight rates had been too low to *maintain or renew* the tanker fleet and had been driven down by the large surplus of tonnage throughout most of the 1980's. This situation could not continue, he said. *Higher quality vessels demanded*

²⁸Bamber (1992), *op cit* 12.

²⁹Knott 'Sealife safety could hike oil price' Jan. 18, 1993 *Oil & Gas Journal* 27.

*higher freight rates.*³⁰ Shell companies accepted that this change must be made and were prepared to *pay higher prices,*³¹ provided that they did so in a competitive environment. Shell companies wanted a level playing field where high standards applied to all.³² (emphasis and footnotes provided by the present writer)

In August 1992, fifteen months after the above statement had been made, Bamber made the following observation:

*'The availability of low-cost tonnage that is aggressively marketed not only forces down rates, but keeps them down because of the surplus capacity that the oldest tonnage represents. The apparent development of a two-tier market was stopped in its tracks, despite charterers' claims that they were prepared to pay a premium for quality, modern vessels. When it came to the crunch, the charterers were as aggressive as the owners of low-cost vessels in forcing down prices; none of them wanted to be seen paying more than their peers and competitors for a charter.'*³³ (emphasis that of the present writer)

In a similar vein, in two separate public statements, Rafgård expresses the following harsh but, it is submitted, justifiable criticisms of the oil industry:

'... the main problem for quality-tanker owners is that there is no premium paid in the spot market for quality tonnage. Major oil companies go public in the media and

³⁰This echoes Hammer's concern for 'quality-concerned cargo owners' see pg.534 of this work.

³¹In other words, the development of a two tier freight market with high freight rates for high-quality tonnage and low freight rates for low-quality tonnage.

³²Vielvoye 'World tanker industry maintains momentum from Persian Gulf War' June 10, 1991 *Oil & Gas Journal* 12 at 13-14.

³³Bamber (1992), *op cit* 13.

claim that they prefer first-class tankers, but this is really window-dressing when the sad fact remains that in the spot market it is the cheapest rustbucket which is the market leader and sets the rate.'³⁴

'The chartering divisions within the oil industry have not been up to par or in line with the declared policies of the oil majors to support environmental policies.'³⁵

It is submitted that the international community can not depend on the oil industry to, in the words of Shell's Managing Director, Ian A. McGrath, 'level the playing field'.³⁶ It seems that the "invisible hand of Adam Smith"³⁷ continues to exert an overwhelming influence on the oil companies that charter tankers.³⁸ The continued presence of sub-standard tankers on the international tanker market, which prevents a necessary and desired increase in freight rates (and thereby starves the tanker industry of new capital) will continue to exist until an effective way is found to force oil company charterers to look beyond the short-term dictates of the free market. Oil companies must be induced to adopt chartering strategies which consider tanker quality above the short-term "bottom line". The international community will be required to force this change in policy upon the oil industry as a whole.

If we consider once again the statement of Minister Berntsen, the Norwegian Minister of the Environment where he said '[w]e can't

³⁴Rafgård quoted by Bamber 'Never Up For Long' August 1991 *Petroleum Economist* 15-16 at 16.

³⁵Rafgård, *op cit*, 20.

³⁶See pg.535 of this work.

³⁷See pg.532 of this work.

³⁸In November 1993 a reliable and well informed London source within the oil and tanker industry confirmed that a two-tier freight market had not yet developed. This source was, however, hopeful that such a market would develop.

let these [ship]owners decide the level of shipping safety'³⁹ it would seem that he had misplaced the emphasis. The owners of poor quality tonnage are permitted to survive on the international market only because under short-term market forces the oil companies continue to charter poor quality tankers rather than higher quality tonnage.

By the same token, where Minister Berntsen suggests trying to eliminate the advantage conferred upon the owners of sub-standard tonnage, he once again misses the mark. The real "profiteers" of low-quality surplus tonnage are the oil company charterers of low-quality tonnage and, ultimately, the heavy consumers of petroleum who, so far, have avoided paying the true costs of the product. The correct inquiry is to ask how the advantage to the oil companies in using low-quality tonnage can be removed.

14.3.5 Possible remedies for tanker-source oil pollution

Before one can determine which solution is best suited to solve a given problem one must first consider all the possible remedies which may be employed. In this context a 'solution' can be defined as a course of action which will correct the circumstances giving rise to, or exacerbating, the problem. There are two broad approaches to the prevention of tanker-source oil pollution.

14.3.5.1 "Command and control"

As the name implies, the "command and control" methodology involves two inter-connected types of action. "Command" focuses on direct prevention by setting standards for vessel design, construction, navigation, crew training and crew certification. "Control" attempts to implement and enforce those standards through ship inspections and various penalties. Such penalties may include fines or the refusal to allow vessels of

³⁹See pg.533 of this work.

unsatisfactory standards permission to enter territorial seas, offshore installations or ports. Over the next three pages this approach is discussed.

The multi-national oil industry, including the international tanker fleet, has in comparison to most other commercial enterprises been allowed a large degree of autonomy from governmental interference. For instance, the extent of governmental regulation and control over the aviation industry is considerably more pervasive than that imposed upon the oil and tanker industry. It seems that the scale of operations undertaken by the oil industry and the tanker transportation system makes it necessary that the industry be permitted a large degree of self regulation. By way of an isolated illustration, the task of inspecting an average VLCC for corrosion involves repeatedly climbing vertical surfaces amounting in total to more than 10,000 metres. To place this task in perspective, this is roughly the equivalent to climbing Mount Everest. Further, it is not unusual in the case of an average VLCC for corrosion surveys to entail the examination of 1,200 kilometres of welding.⁴⁰ Notwithstanding the development of innovative technologies to assist this process, corrosion surveys require considerable resources.⁴¹

A question which is crucial to the resolution of marine oil pollution is whether or not the oil industry can be trusted to regulate its tanker operations in a way which protects the maritime and coastal environment. Considering the continued incidence of oil pollution from tankers it could be said that, so far, they have failed to do so effectively. The penalty for such failure is increased governmental control and by implication less autonomy and flexibility for the oil industry. The only way in which the industry can regain this autonomy is by providing

⁴⁰Cross & Hamer 'How to seal a supertanker' *New Scientist* 14 March 1992 40 at 43.

⁴¹'The Energy Carriers' *Lloyd's Register 100A1* April 1986 13 at 14.

real proof that they can in fact be entrusted with the responsibility of protecting the environment. This is the challenge that is posed to the oil and other industries as the world enters a period of greater environmental awareness.

Whatever form of governmental control is brought to bear on the oil industry (to enhance the quality of the tanker transport system) it should be aimed at preventing oil spills from occurring. It is inefficient for governments to pursue only measures which demand expensive and sometimes questionable clean-up operations, so as to placate public indignation, while insufficient measures are taken to ensure that oil spills do not occur in the first place. Measures taken by governments will be most effective where they provide disincentives to operate in a particular, risky way. One of the most telling disincentives to operate or utilize a sub-quality tanker will be if there exists a potential for prohibitive liability where that tanker causes oil pollution.

Tanker-source oil pollution is not a new problem and, although extensive and adequate laws governing the standards of tankers have been in effect for a considerable period of time, such laws have not, as yet, been satisfactorily enforced in any State - not even the United States. It is submitted that the "command and control" methodology represents an ideal, which, has not been brought about and probably is not possible to achieve in the short, and medium, terms given the practical realities of policing the international tanker fleet and the magnitude and cost of this task.

The authorities responsible for the implementation and enforcement of standards often lack the will or resources to enforce these standards. Commenting on the implementation and enforcement of tanker safety standards, Suzanne Hawkes and R. Michael M'Gonigle observe that '... the level of political will and commitment of resources to put new laws into practice

ultimately determines that law's actual effectiveness.'⁴² In the same vein John B. Hutchinson, formerly Deputy Chairman of Lloyd's Register, voices the following concern:

'It is disturbing to note that, despite the increase in importance of public and political opinion in the safety equation, the political will to maintain standards seems, in world terms, to be getting weaker rather than stronger.'⁴³

The "command and control" methodologies have not in fact succeeded in solving the problem of tanker source oil pollution. For these reasons it is the view of the present writer that attempts by governments to "police" the international tanker fleet will not bring about the desired capitalization of the tanker fleet. Even if the implementation and enforcement of tanker standards were possible, one might ask whether it is the duty of governments to continuously and vigilantly supervise the details of the transportation of oil at sea. Rather perhaps, it is the responsibility of the industry which benefits from the transportation of oil at sea, in a presently inexpensive but flawed system, to ensure that the standards of tankers are improved. The oil industry and, in turn, ultimately the consumers of oil, must bear the expense necessary to bring this improvement about. It is submitted that the oil companies are not, on their own, likely to ensure that the necessary changes are brought into fruition. Therefore, a way must be found whereby that industry is forced to accept this responsibility. This approach is discussed next.

⁴²S Hawkes & M'Gonigle 'A black (and rising?) tide: controlling maritime oil pollution in Canada' vol.30 no.1 (1992) *Osgoode Hall Law Journal* 165 at 181; for a discussion of the many difficulties working against the effective enforcement of "command and control" standards see pp 209-222.

⁴³Hutchison on 'Practical and Political Considerations' in J. Lux (ed) *Classification Societies* (Lloyd's of London Press 1993) pp 27-35 at 34.

14.3.5.2 "Liability-forcing"

The second and separate methodology, which falls within the realm of private law, focuses on liability and compensation where tanker-source oil pollution damage occurs. This area is the particular concern of the present work.

The phrase "liability-forcing" has been explained by Professor David E. Pierce who defines the concept as follows:

'Liability-forcing refers to regulatory programmes that require designated "responsible parties" to fix the environmental problems which they have, in part, created. Since "fixing" an environmental problem is usually a difficult and expensive proposition, potential liability as a "responsible party" should encourage industry to avoid, eliminate, or minimize such environmental risks.'⁴⁴

The important potential role that liability can play in the control of tanker-source oil pollution is frequently overlooked and is mostly perceived as a remedy to be utilized in only those instances where the "command and control" methodologies have failed.

14.3.6 A new policy approach

Given the risk of damage which can be caused where a cargo of tanker oil is spilled, it will be argued that insufficient capital is being invested in the tanker-transport system to prevent such accidents from happening. Legal mechanisms must evolve which have the effect of pushing and steering the entire

⁴⁴Pierce 'The Emerging Role of "Liability-Forcing" in Environmental Protection' (1991) 30 *Washburn Law Journal* 381 at 382. Although Professor Pierce discusses the application of "liability-forcing" within the context of U.S. Federal law regulating tanker-source oil pollution damage he does not isolate the cause of such oil pollution. Neither does that learned commentator propose the adoption of the policy suggested by the present writer in this work.

tanker-transportation industry and the users of that industry (i.e. cargo owners) in directions which safeguard the affected environment. In other words directions which ensure that greater capital investment is injected into the industry.

Oil pollution liability can be managed either to preserve the *status quo* or as a dynamic mechanism to bring about change. The present writer suggests that the eradication of low quality tonnage from the tanker market can be achieved by levelling unlimited, strict, joint and severable liability for tanker-source oil pollution damage on the cargo owner as well as the shipowner. As has been illustrated in the earlier part of this Chapter this is presently the legal position in the following U.S. states; Alaska, California, Hawaii, Maryland, North Carolina, Oregon and Washington. It is submitted that where this approach is followed, cargo owners will charter only quality tonnage. This chartering practice will force low quality tankers out of the tanker-market. As the capacity of available tanker-tonnage decreases so freight rates will increase. In this way, capital will be injected into what is at present a dangerously under-capitalized tanker industry and the quality of tankers and crews will rapidly improve.

14.3.6.1 Law can promote a desired evolution of the system

When oil pollution accidents occur, costs are often incurred by third parties in the course of clean-up operations and direct and consequential damage is caused to people in the vicinity of the spill. Compensation is, or more accurately, may be, sought from the parties judged responsible for these losses, and the law determines who is liable and assesses the scale of compensation to be exacted.

14.3.6.2 Apportioning liability between tanker and cargo owners

The two main groups involved in the tanker transport system: (a) the shipowners and (b) the oil-importers, are involved jointly

in tanker-source oil pollution and disagreement frequently arises between these two groups as to the manner in which liability for such damage should be apportioned.

14.3.6.3 How should liability be apportioned?

This is a question of considerable importance because the point where pressure, in the form of 'prohibitive' liability, is applied is where the remedial measures ultimately will be evolved. If pressure is applied to the party less able to implement improvements, then the measures undertaken to improve environmental safety of tanker transport will be less effective. It is submitted that this is currently the *status quo* in most legal systems.

It is suggested that the rate of tanker accidents can be reduced to an acceptable level in accordance with the economic constraints affecting the two groups involved. The 'conflict' between shipowners and oil-importers should ideally be transformed into a more realistic relationship with inevitable long-term goals taking priority over the consideration of short-term self-preservation and profit-enhancement.

Oil importers should be induced, through the legal system, to assume greater responsibility for the quality of the tankers they charter. Where previously oil companies have often been willing to charter poor quality tankers at low rates, they would, under a more mature set of liability laws, be encouraged to pay higher rates for higher quality tankers. This, in turn, will enable tanker owners to recover the costs of improving the quality of their tankers and accelerate the retirement of obsolete tonnage.

There is nothing unjust or unfair in levelling liability for pollution damage at the cargo owners, who, will pass the cost onto the consumer. To do so is to carry the now widely accepted principle of the "polluter pays" to its logical, and correct, conclusion. Accordingly, at the 1969 Brussels Convention (which

saw the development of the 1969 Civil Liability Convention) Mr. Philip, a Danish representative, made the following observation:

'Maritime transport was not dangerous in itself: it was only dangerous if the goods carried were dangerous and it was therefore normal to impose liability on the cargo for any damage caused to a third party. The industry which made a profit from that business should also accept the risks entailed.'⁴⁵

Also, such strategy is justifiable from a utilitarian perspective because the oil importers hold the "purse strings" which are necessary to finance increased tanker quality.

14.3.6.4 Liability Considerations

Upon a consideration of the *Exxon Valdez* spill,⁴⁶ one may conclude that most oil companies, and certainly all independent ship-owners, would not be able to continue in operation if subjected to the clean-up expenses and damage claims that were, and may yet be exacted, from the Exxon Corporation. This implies that all organizations directly or indirectly operating tankers should be very concerned not to be involved in an oil spill, particularly in the U.S. where claims are uniformly higher than elsewhere. One would expect tanker owners to be doing their utmost to ensure that the possibility of a spill occurring from one of their tankers is made as small as possible. However, at present they are not able to do so, due to economic constraints.

⁴⁵quoted by M'Gonigle & Zacher *Pollution, Politics, and International Law: Tankers at Sea* (1971) at 172 citing from Statement by Mr. Philip (Denmark), Committee II, *Official Records*, p. 642 (9 *International Legal Material* 45).

⁴⁶The *Exxon Valdez* spill was unusual because in that case the ship and the cargo was owned by an oil company (EXXON) in most cases oil is transported by oil companies on tankers owned by independent tanker owners which are not oil companies.

14.3.6.5 Economic considerations

The competitive environment of today's depressed tanker market naturally forces tanker owners to minimize their operational costs. By keeping costs low, tanker owners are able to offer charterers more attractive rates and thereby remain competitive.

Unfortunately, the quality of tankers is directly proportional to the freight rate. If satisfactory standards for tankers are to be implemented and maintained, it is imperative that the tanker industry operates at a level of profitability which will enable tanker owners to run seaworthy tankers. It is, moreover, certain that such a development could have beneficial consequences beyond the protection of the ocean and coastal environments. The tanker industry would become more efficient as a supplier of energy, the tanker construction industry would be re-vitalized, costs such as third party insurance would be reduced and the quality and safety of tanker employment would be improved. Also, coastal States would be able to reduce the amount of resources committed to "command and control" operations.

In order to illustrate why this suggested change is necessary, the present position (i.e. the *status quo*) will be briefly re-described in order to facilitate an over-arching explanation and justification of the argument.

14.3.7 Existing liability regulation

The vast majority of legal systems governing the issue of tanker-source oil pollution liability do not specify any form of liability from the cargo owner in his personal capacity. In fact the three dominant legal systems governing tanker-source oil pollution in the world today, which have already been dealt with in detail in this work, actually shield and protect oil cargo interests from personal liability.

14.3.7.1 Internationally applicable liability regimes

Certain important liability regimes governing tanker-source oil pollution apply in the international arena. To recapitulate, these two régimes are explained below.

14.3.7.1.1 Civil Liability and Fund Conventions

The actual owner of the oil aboard a tanker which causes oil pollution damage is not subject to any form of personal liability under the two-tier compensation arrangement brought about by the International Convention on Civil Liability for Oil Pollution Damage, 1969 (the Civil Liability Convention) and the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, 1971 (the Fund Convention) and under the provisions of the Protocols to these conventions of 1984, which have been further incorporated into the 1992 Protocols.

14.3.7.1.2 TOVALOP and CRISTAL

The cargo-owner is also excluded from liability in his personal capacity under the two-tier voluntary compensation agreements brought about by the oil and tanker industries.

14.3.7.1.3 The two tier system

Put simply, under these régimes the owner of the tanker which causes pollution damage is liable in the first instance under either the Civil Liability Convention or TOVALOP, in the circumstances where these instruments apply. The owner of the tanker is liable in his personal capacity and his liability is strict although certain limited absolute defences apply. On the other hand if the owner is not guilty of 'actual fault of privity' his liability is limited under the Civil Liability Convention, and is always limited where TOVALOP applies. The second tier liability regimes; the Fund Convention and CRISTAL, provide a second source of compensation where that available from the tanker owner is exhausted. The funds for second tier

compensation are obtained from a levy charged on quantities of oil imported either to Fund Convention states or oil carried at sea and "owned" by CRISTAL members.⁴⁷ Significantly, the actual owner of the oil involved in the pollution incident is not personally liable for damage claims under either the Fund Convention or CRISTAL. The burden is shared by all companies carrying oil at sea.

14.3.7.2 The U.S. Federal and State liability régime

Liability for tanker-source oil pollution in the U.S. is controlled at a federal and state level. U.S. State law is dealt with in the earlier part of this Chapter, therefore, it is only necessary to reconsider the U.S. Federal dispensation for the purpose of this analysis.

14.3.7.2.1 U.S. Federal law

The cargo-owner is also protected from personal liability under the federal laws governing tanker-source oil pollution in the United States, as regulated under the Oil Pollution Act (OPA) of 1990. This Act exposes tanker owners to primary and potentially unlimited liability for oil pollution damage occurring in the United States. It has been criticised widely, however, for letting oil importers escape direct liability. The Act does, however, propose the establishment of a billion dollar trust fund (the Oil Spill Liability Trust Fund) which is made up from a tax on all oil imports into the United States by sea. It is important to note that OPA does not preempt the right of individual U.S. states to enact liability legislation which is not in conformity with the federal provisions of OPA.⁴⁸ Hence the different, and, it is submitted, more desirable approach followed by the earlier mentioned six U.S. states.

⁴⁷The CRISTAL definition of ownership is extended beyond the strict meaning of proprietary ownership.

⁴⁸OPA § 1018(a) and (b); 33 USC § 2718(a) and (b).

14.3.8 Is cargo-owner liability an acceptable remedy?

Has cargo-owner liability been identified as an acceptable remedy by commentators in industry? At this juncture in this inquiry the observations of Vielvoye and Rafgård are once more relevant. In sum, Vielvoye, evaluates the problem in the following way:

'Tanker owners and cargo owners are moving into an era of tough regulation by government and changing public attitudes that will not accept sloppy, low grade ship operations. Cargo owners in particular will come under increased pressure to reject substandard vessels for time and spot charters and pay a premium for crude to be carried in modern, well maintained, well managed tankers. Changing regulations on liability for spills should ensure that these problems are tackled head-on.'⁴⁹ (emphasis that of the present writer)

The analysis quoted above is apt but finally unsatisfactory, as Vielvoye does not explain what form of increased pressure will be applied to the cargo owners, or what changes in the regulation of liability are expected to evolve. Despite the limitations of Vielvoye's comments they are important because he sees a link between pressurizing charterers with liability and selective chartering practices.

In considering the implications of OPA 90, Rafgård has stated that:

'... the US Oil Pollution Act gives no newbuilding incentive. The implementation of double hulls for existing tankers is very liberal, and legally the cargo owners have no financial responsibility if there is pollution damage, so neither the technical [i.e. double hulls] nor the legal aspects [i.e. liability regulation] seem to give the

⁴⁹Vielvoye, *op cit*, 12.

incentive to charter modern tankers.'⁵⁰ (emphasis and words between square brackets inserted by the present writer)

It has been pointed out that the Civil Liability and Fund Conventions and TOVALOP and CRISTAL also have the same weakness in that the cargo owner escapes direct liability.

In the same article Rafgård again criticises OPA for allowing oil cargo owners to escape liability. He comments as follows:

'It is bad enough that the cargo owners under federal law have been made immune from liability. It is even worse that OPA 90 significantly reduces the incentive for cargo owners to secure best-quality transportation. Congress's important efforts to improve marine and the environmental protection of the United States, is thereby dangerously jeopardised by a statute that is incompatible with commercial reality, and which *by excluding responsibility for cargo interests at the same time excludes the vast majority of assets involved in the transportation transaction*. The result of this anomaly in a statute is to place intolerable financial pressure on an extremely small sector of the transportation chain.'⁵¹ (emphasis that of the present writer)

By using the term 'modern tankers' it is likely that Ragård means high quality, well-equipped, expertly-managed and crewed tankers of recent design and construction. Such tankers may be contrasted with the aging, cut-rate tankers which are the focus of increasing criticism. In the view of the present writer, Rafgård is correct where he points out that if the cargo owner is not liable he has no incentive to hire high-quality tonnage. Clearly, Rafgård seems to suggest that cargo owners be forced to accept a degree of the total liability for oil pollution damage in the United States. However, he tends to avoid specifying the exact

⁵⁰Rafgård, *op cit*, pp 22-23.

⁵¹*Ibid.* at 26.

form that this liability should assume.

It is significant, and, also contradictory, that he seems to advance the régime incorporated in the 1984 Protocols to the Civil Liability and Fund Conventions as a model when considering the liability rules under OPA 90. To this end he states:

'It is both reasonable and logical for tanker owners to look for co-operation with cargo owners. It is the physical characteristics of the cargo that cause damage to the environment. The principle of sharing liability was reconfirmed by the 1984 IMO Protocols, and is based upon a proposal, made at that time by the US delegation.'⁵²

The obvious point is that the 1984 Protocols which have subsequently been amended and incorporated into the 1992 Protocols do not place liability upon the oil cargo owner in his personal capacity. The 1992 Protocols are not yet in force but even if they were in force, or if a oil pollution régime of a similar nature was incorporated in the U.S. in place of OPA, that régime would not, it is submitted, provide a cogent or clear incentive for cargo owners to charter high-quality tonnage. What is required is a very definite set of liability laws which place strict and unlimited liability on the cargo owner in conjunction with the tanker owner. This would very rapidly see the development of the desired two-tier freight market and hence the capitalization of a new, more secure tanker fleet.

Despite the inconclusive nature of Rafgård's observations concerning the liability of cargo-owners he provides a dramatic statement as to the relative distribution of resources between oil companies (i.e. cargo-owners) and tanker owners:

'By leaving cargo owners out of the responsible parties under the Oil Pollution Act, the Congress has afforded

⁵²*Ibid.*

immunity to 96 per cent of those assets that should logically stand exposed.'⁵³

One may therefore conclude that by excluding cargo-owners from liability the U.S. Government has excluded a very large part of the resources available to upgrade, replace and improve the tanker transportation process.

Although Rafgård does not say so directly, he seems to encourage the reader to draw the correct inference that the cargo owners hold the "purse strings" and if the Government of the U.S. wants to see the quality of tankers improved then the large required sum of money has to be obtained from the cargo owners. The reader is also led to draw the further inference that this objective can be achieved if the oil companies are given an incentive to charter only high-quality tonnage at higher freight rates.

The question of liability for oil pollution damage is a very sensitive issue for both tanker owners and oil companies. Certainly, under the U.S. Federal oil pollution dispensation (OPA) tanker owners are put to a significant disadvantage, while oil companies have been afforded significant relief under Federal legislation and likewise under the provisions of most U.S. State legislation. However, the rationale which Rafgård seems to be advancing within the context of OPA, must, if taken to its logical conclusion, be applied also to the system of compensation under the Civil Liability and Fund Conventions. If this was to be done the tanker owners would probably lose a significant advantage in that they would lose a certain protection from liability (i.e. a strong right to limit liability).

Furthermore, if the Civil Liability and Fund Conventions were to

⁵³*Ibid.* Rafgård is suggesting that the cargo owners be included within the scope of the meaning of a 'responsible party' as defined for the purpose of OPA. If this were done then very far-reaching consequences would flow. In effect direct cargo owner liability, as provided for in certain US State legislation, would result.

evolve to facilitate strict and unlimited joint liability on the cargo owner and the tanker owner in their personal capacity the voluntary compensation regimes of TOVALOP and CRISTAL would also be "adversely" affected from their point of view. Clearly, these are consequences which Rafgård, as the Managing Director of the International Association of Independent Tanker Owners (Intertanko), would not presumably welcome and it is no surprise that he hesitates to come forward with any specific suggestions.⁵⁴

14.3.9 Conclusions on direct cargo-owner liability

Compensation regimes should enable claimants to take direct legal action for damages against the cargo owner of the oil involved in a spill. Such right should ideally be incorporated into state legislation through amendments to the oil spill compensation conventions developed by IMO.

The cargo owner (i.e. oil shipper) has until recently generally avoided direct responsibility for damage caused by a spillage of his oil, and largely continues to do so. But, it can be expected that, in the foreseeable future, oil-shippers will have to face direct liability in certain situations. For example, oil shippers are already directly liable, with the ship-owner, for oil pollution damage in certain states of the United States.

As oil pollution incidents continue to occur and the amounts of liability available under the various compensation regimes prove insufficient to cover an ever-expanding range of claims and clean-up costs, the question of who should pay for pollution incidents may be re-examined. The example of certain U.S. state

⁵⁴In this regard it may be pointed out that the article which records Rafgård's ideas on OPA was 'Based on selected papers from the 2nd International Lloyd's Ship Manager Ship Management Conference 1991'. It is quite conceivable that because of the "in-house" nature of the conference Rafgård was a little more forthright than would otherwise have been the case.

legislation, together with the type of arguments raised here, may be of persuasive influence.

CHAPTER 15

Conclusion

15.1 Introduction

The most pronounced observation which can be made regarding the three compensation systems which have been compared and contrasted in this study are that the systems are so similar in so many respects. It seems almost as if some natural law of evolution has been applied and that the various systems are evolving along a course of natural evolution. However, although a significant area of commonality may be identified many differences exist. It is submitted that a definite pattern of future evolution can be seen emerging out of U.S. State legislation. It has been seen how certain U.S. States' Legislation facilitates the direct liability of the cargo owner as a potentially responsible party for an oil spill.

Although the laws relating to tanker-source oil pollution liability have evolved some way in a relatively short space of time they have yet to venture into still uncharted waters. Areas of future evolution will probably include the increasing admissibility of pure environmental loss, punitive damages, direct cargo owner liability and limitless strict and even absolute liability. It is predicted that although the progression towards international uniformity in this area of law has been delayed by regional initiatives, internationalism will eventually prevail. Obviously, international uniformity in an area of law which is so economically, politically and environmentally sensitive is a difficult ideal to achieve and difficulties in reaching consensus are to be expected.

15.2 Suggested policy changes

One of the prime objectives of this study was to evaluate the policies expounded by the three liability controlling mechanisms which have been compared and contrasted in this work. It was

stated from the outset that the critical analysis of the three broad legal systems was in order to suggest a new policy where and if the analysis reveals that a change in policy is necessary. It is the conclusion of the present writer that a change in policy is required in the case of the international Conventions, the voluntary agreements and in the U.S. Federal and certain U.S. State legislation. It is submitted that all tanker-source liability regimes which allow the actual cargo owner to escape liability are ineffective as tools to ensure that the standard of the world tanker fleet is maintained at an acceptable standard of quality. Without direct cargo owner liability the cargo owners have insufficient incentives to pay a premium for high quality tankers. It has also been argued that where cargo owners have no incentive to charter high quality tankers in favour of lower quality less expensive tankers a spiral of low quality tonnage ensues. The basis upon which this statement is made is explained in the previous chapter, Chapter Fourteen.

Unfortunately, although the international approach to oil pollution compensation is an ideal which should to be strived for the present international approach does not promote the remedial policy suggested in Chapter Fourteen. Therefore, it is submitted that it may be necessary that the responsibility of implementing a liability system such as that implemented in Alaska, California, Hawaii, Maryland, North Carolina, Oregon and Washington, will incrementally be brought about on a regional basis and not internationally. The future of the voluntary compensation regimes will depend on the nature of the liability laws enacted at a regional level or upon the support accorded to the international Conventions.

It is further submitted that as environmental considerations become more pronounced increasing pressure will be brought to bear upon the oil industry to solve the problem of tanker-source oil pollution. It is rare that any one cure is found for a complex problem. The most effective remedies are usually multi-pronged. Attempts to improve the standards of tanker

transportation will best include "liability-forcing" in association with other methods of control. It is, however, suggested that the oil and tanker industry is best able to bring about the required changes from within their own ranks. Nevertheless, the incentives to bring about these changes will probably have to be applied from without by governments and legal regulation.

15.3 Oil and the environmental context

The petroleum industry, which in this analysis includes the tanker industry, is a multi-faceted, influential, flexible and often secretive body which is accustomed to being confronted with, and usually overcoming, a wide variety of large, difficult and costly problems. It is, essentially, an international body.

This sometimes admired, often denigrated, industry has been able to solve problems of long-distance supply and widespread demand, manipulate supply and demand, and fix prices. It has been able to supply democratic forces in time of war and has also supported abhorrent regimes during war and peace.

Oil companies have weathered tumultuous quarrels with governments at different times. For example, they have survived and even thrived after anti-trust regulation and nationalization. Oil companies have often powerfully influenced U.S. and European foreign policy, particularly in the Middle East.

The achievements of oil companies in technology and engineering are well known. The extent of pipe-line networks, refineries and off-shore drilling operations are striking testaments to ingenuity. Not least, supertankers, the biggest self-propelled machines ever designed and constructed are impressive achievements.

However, in the process of supplying the world with energy, the oil companies have, of course, impacted negatively with other

major areas of concern and often attracted a great deal of adverse publicity and hostility.

15.3.1 The nature of the environmental challenge

It is suggested that the newest challenge facing the petroleum industry is in meeting escalating environmental demands. The industry's ability to manage the impact of this threat will be crucial to the future business success of individual companies, and the industry as a whole. Those oil companies which are most effective at understanding, responding to, and pre-empting public values, beliefs, and opinions on, especially, "environmental" or "green" issues will survive and prosper. Those who do not will probably incur severe government interference and may increasingly lose competitiveness.

It would seem that this point of view is also held by author Daniel Yergin, who in his Pulitzer-prize winning book, *The Prize*, makes the following prediction:

'Perhaps the single greatest challenge facing the entire petroleum industry is neither in supply or demand, nor in relations between companies and governments, but in meeting growing environmental demands while at the same time continuing to fulfil the traditional job of energy supplier. And that new reality is throwing the whole industry on the defensive.'¹

Environmentalists demand the general right to live in a clean environment and the implementation and maintenance of standards of behaviour which protect and even extend this right. A burgeoning environmentalist lobby has a powerful, but sometimes exaggerated, influence on the way in which the petroleum industry operates. It is likely that the influence of this pressure group will continue to increase in the future and the constraints and

¹Yergin *The Prize* (1991) at 776.

pressures of environmentalism will become increasingly influential throughout the broad spectrum of activities in which the petroleum industry is engaged.

This work deals with one particular battleground, where the environmentalist challenge posed to the petroleum industry is at present most concentrated: tanker-source oil pollution. This issue has attained high-profile status in the eyes of the public; understandably so, given the dramatic scale of such environmental disasters, images of which graphically impact upon the public psyche through the media, particularly television. There is no better example of this than the public outcry which followed the oil spill which occurred when the *Exxon Valdez* ran aground on Bligh Reef in Alaska's Prince William Sound on the 24th March, 1989. This catastrophe has precipitated changes in public attitudes which will impact on the petroleum industry in many different ways. Historically, the *Exxon Valdez* spill may even be equated with the disasters at Hiroshima, Bopal and Chernobyl in that these events also evoked significant changes in the way in which the world public viewed certain aspects of technology.

Five years have passed since the watershed *Exxon Valdez* experience and significant spills of oil from tankers continue to take place with disturbing regularity. The social, political, technological, economic and legal dispensations relating to oil pollution have evolved considerably since that time. One apparent trend is an increase in the price exacted from ship-owners and oil companies in the settlement of oil pollution claims. It is true to say that such liability is serving, consciously or unconsciously, as a powerful tool to increase effective 'environmental responsibility' amongst shipowners and shippers of oil.

15.3.2 Environmentalism and increased liability

In this work an attempt has been made to assess the effect that increased liability for tanker-source oil pollution has had, and

may yet have, on the shipping and petroleum industries, and to explain how these industries have responded, and may yet be expected to respond to this development.

An understanding of such developments, specific to tanker-source pollution, may serve as an important guide for industry in general, and especially for the petroleum industry, because it may serve as an indicator of the shape of future accommodations which may have to be made to demands from the environmentalist lobby. One may reasonably expect that similar patterns of increasing environmentalist pressure, and accompanying changes brought about within the context of tanker-source pollution, will be, and are already being replicated in other fields of industry and other facets of petroleum production. Some examples of areas where this is true for the petroleum industry are: emission standards for oil refineries and automobile exhausts; more efficient automobile fuel-burning standards; stringent requirements for oil storage facilities; comprehensive plant decommissioning or abandonment procedures, and restrictions on oil exploration in areas which are considered environmentally sensitive.

Supply is the central component of an integrated oil corporation's activities and the vitality, and even viability, of industrialized societies can, of course, be threatened significantly by fluctuations in supply. For these reasons, developments which may hinder the smooth and cost effective flow of oil from the regions where it is extracted to those where it is used must receive very careful consideration.

Henri Smets suggests makes the following important observation:

'The issue of whether ceilings (shipowners' liability or compensation by oil importing States) should be raised therefore boils down especially to a question of political expediency, having regard to the various interest involved,

and in particular the interests of oil spill victims.'²

Environmental issues have become important and this importance will increase but supply priorities will continue to be a persuasive factor. The evolution of liability laws governing tanker source oil pollution exhibit a constant tension between these two forces. In the final analysis it must be asked whether States are prepared to expose their oil companies to direct and possibly limitless liability. It may also be expected that supply considerations will become increasingly important. In a paper presented to the World Energy Council's Regional Forum, Keith Welham of the French International Energy Agency reported that world demand for oil, was expected to rise to a possible high of 102,7 million barrels a day or a low of 85,9 million barrels by 2010 from 66,9 million barrels in 1991.³ It is reasonable to assume that a significant proportion of that oil will be transported at sea in tankers. Consequently, a pressing need exists to improve the quality of the international tanker fleet in order to accommodate the additional demands which will be brought to bare on the tanker industry in the near future. Clearly, the oil industry has the financial capability and a moral responsibility to meet this challenge.

²Smets 'The Oil Spill Risk: Economic Assessment and Compensation Limit' vol.14, No.1 (1983) *Journal of Maritime Law and Commerce* 23 at 34.

³*Bussiness Day*, Monday, October 17, 1994 at 5.

ANNEXURE ONE

Genesis of the supertanker

Oil tankers are the largest self-propelled machines that mankind has ever constructed. The rapid growth in size of these vessels has been remarkable. During the 1930s the average size of an oil tanker was under 12,000 deadweight tonnes (dwt) and at the end of the second world war few tankers had a deadweight of more than 16,500 tonnes. Deadweight tonnage in the case of a tanker essentially reflects the quantity of oil that can safely be transported by that tanker. The measurement refers to weight (in long tons of 2,240 lbs, or 1.016 metric tons) of water displaced by an empty tanker when the tanker is loaded with fuel and cargo so that she settles in water up to her highest permissible loadline.¹

As the economic advantages of operating larger tankers became apparent, supertankers of 60,000 dwt began to be developed. With the closure of the Suez Canal in 1967, tankers were forced to undertake a more lengthy voyage from the Middle East to Europe around the Cape of Good Hope. Economics of scale became more important and larger tankers were constructed on an escalating scale, no longer constrained by size limits formerly imposed on vessels having to navigate the Suez Canal. Consequently very large crude carriers (VLCC) of up to 250,000 dwt were developed and by the 1970s ultra large crude carriers (ULCC) of over 300,000 dwt were constructed.² This process of expansion culminated in the construction of the *Seawise Giant*, fabricated in 1980 by adding a new centre section to an existing VLCC to create a vessel of 565,000 dwt. Although the engineers at the Japanese company NKK which built the *Seawise Giant* stated that

¹Meese 'When Jurisdictional Interests Collide' (1982) 12 *Journal of Marine Affairs* 71 at 81 and M'Gonigle & Zacher *Pollution, Politics, and International Law: Tankers at Sea* (1979) at 153.

²'The Energy Carriers' *Lloyd's Register* 100A1 April 1986 pp 13-14.

it was not impossible to build even larger tankers, it is not expected that such tankers will be made.³ The *Seawise Giant* will, therefore, probably remain the largest ship ever built. Today most VLCC are between 250,000 and 280,000 dwt.

³Cross & Hamer 'How to seal a supertanker' *New Scientist* 14 March 1992 40 at 40..

ANNEXURE TWO

Offshore Pollution Liability Agreement

Offshore drilling rigs and other such operations clearly will not fall under the provisions of the Civil Liability and Fund Conventions or TOVALOP, TOVALOP Supplement and CRISTAL for they do not carry oil in bulk as normal cargo.

The liability for oil pollution from offshore operations will usually be claimed under the provisions of the Offshore Pollution Liability Agreement (OPOL).¹ This is a voluntary agreement, dated 4th September, 1974, between oil companies that operate or intend to operate offshore installations and pipelines. The Agreement applies within the jurisdiction of the European Economic Community (EEC) and Norway.² Under this agreement, operating companies agree to accept strict liability for pollution damage and the costs of remedial measures, with only certain exceptions,³ up to a maximum of US\$100 million per incident.⁴ From this amount, US\$50 million is designated for reimbursement of remedial measures⁵ and US\$50 million for the compensation of pollution damage.⁶ Claims are met by the operating companies themselves and the parties undertake to establish and maintain evidence of financial capability to meet

¹The Agreement (as at January, 1992) is reproduced in *Bates & Benson Marine Environmental Law* (1993) at 7.504; see generally, *Summerskill Oil Rigs: Law and Insurance* (1979).

²OPOL, Clause I.3.

³The exceptions are contained in OPOL, Clause IV.B and are similar to those under the Civil Liability and Fund Conventions.

⁴OPOL, Clause IV.A.

⁵OPOL, Clause IV.A.1.

⁶OPOL, Clause IV.A.2.

possible claims under the agreement.⁷ In the event of a dispute, provision is made for International Chamber of Commerce arbitration in London.⁸

The Agreement is administered by a private limited liability company called the Offshore Pollution Liability Association Limited.⁹ This company does not pay any claims nor receive contributions for the payment of claims from its members. Therefore it is of a wholly different character from Cristal Limited which was formed to pay actual claims under the CRISTAL Contract.

It may be concluded that where pollution damage from storage tankers at offshore installations is outside the scope of the Civil Liability and Fund Conventions or TOVALOP, TOVALOP Supplement and CRISTAL then such claims may fall under OPOL.

⁷OPOL, Clause II.C.2.

⁸OPOL, Clause IX.

⁹OPOL, Clause II.A.

ANNEXURE THREE

Tacit Amendment Procedure

The tacit amendment procedure is a more speedy, convenient and less expensive method of amending International Conventions. See, for example the tacit amendment procedure as specified in Article 16 of the International Convention for the Prevention of Pollution from Ships, 1973, as modified by the protocol of 1978 relating thereto.¹ Under this procedure, an amendment adopted by the Marine Environment Protection Committee (MEPC) of the International Maritime Organization (IMO) is communicated by the Secretary-General to the Parties to the Convention. The amendment is deemed to have been accepted unless more than one third of the Parties, or Parties representing not less than one half of the worlds tanker-tonnage, have notified the Secretary-General of their objection to the amendment. An amendment that is deemed to have been accepted will, in practice, enter into force in respect of all parties except those having filed objections. The alternative to the tacit amendment procedure is to convene a diplomatic conference; obviously an expensive and time-consuming procedure.

The range of instruments included in Article 5.3 (a) has been expanded since the Fund Convention was drafted. This is illustrated below.

'5.3 The Fund may be exonerated wholly or partially from its obligations under paragraph 1 towards the owner and his guarantor if the Fund proves that as a result of the actual fault or privity of the owner:

(a) the ship from which the oil causing the pollution damage escaped did not comply with the requirements laid down in:

¹MARPOL 73/78.

Original Text.

(i) the International Convention for the Prevention of Pollution of the Sea by Oil, 1954, as amended in 1962; or

(ii) the International Convention for the Safety of Life at Sea, 1960; or

(iii) the International Convention on Load Lines, 1966; or

(iv) the International Regulations for preventing Collisions at Sea, 1960; or

(v) any amendments to the above-mentioned Conventions which have been determined as being of an important nature in accordance with Article XVI(5) of the Convention mentioned under (i), Article IX(e) of the Convention mentioned under (ii) or Article 29(3)(d) or (4) (d) of the Convention mentioned under (iii), provided, however, that such amendments had been in force for at least twelve months at the time of the incident;

and

Text as at 1 October 1992.

the International Convention for the Prevention of Pollution from Ships, 1973, as modified by the Protocol of 1978 relating thereto, and as amended by Resolution MEPC.14(20) adopted by the Marine Environment Protection Committee of the International Maritime Organization on 7 September 1984; or

(ii) the International Convention for the Safety of Life at Sea, 1974, as modified by the Protocol of 1978 relating thereto, and as amended by resolutions MSC.(XLV), MSC.6(48) and MSC.13(57) adopted by the Maritime Safety Committee of the International Maritime Organization on 20 November 1981, 17 June 1983 and 11 April 1989, respectively, and as amended by Resolution 1 adopted on 9 November 1988 by the Conference of Contracting Governments to the International Convention for the Safety of Life at Sea, 1974 on the Global Maritime Distress and Safety System; or

(iii) unamended.

(iv) the Convention on the International Regulations for preventing Collisions at Sea, 1972; or

(v) unamended.

(b) the incident or damage was caused wholly or partially by such non-compliance.

The provisions of this paragraph shall apply irrespective of whether the Contracting State in which the ship was registered or whose flag the ship is flying is a party to the relevant instrument.²

²*IOPC Fund Statistics* 1 October 1992 at 11.

ANNEXURE FOUR

IOPC Fund Regulations 7.1 and 7.2.

The Internal Regulations of the International Oil Pollution Compensation Fund, Regulation 7.1 and 7.2.

7.1 Where the Director considers that the Fund may be liable to meet any claims arising out of a particular incident, he shall arrange to have the Fund intervene as a party in any legal proceedings against the owner or his guarantor or, to the extent permitted under the applicable national law, in any arbitration concerning any claim arising out of the incident, if the Director considers that such intervention is required to safeguard the interests of the Fund. In case he is satisfied that the interests of the Fund and those of the owner and/or his guarantor are not in conflict, he may arrange for the Fund to join the owner and/or his guarantor in any legal proceedings or arbitration.

7.2 Where the Fund has joined the owner and/or his guarantor, the Fund may share the costs incurred in such proceedings or procedures on a basis agreed between the Director and the owner and/or his guarantor, unless a court or arbitration tribunal decides otherwise. In case of dispute the Director may agree with the other parties concerned to submit to arbitration the question of how costs should be shared.

ANNEXURE FIVE

IOPC Fund Regulations 8.6, 8.7 and 8.8.

The Internal Regulations of the International Oil Pollution Compensation Fund, Regulation 8.6, 8.7 and 8.8.

8.6 Where the Director is satisfied in respect of an incident that the owner is entitled to limit his liability under the Civil Liability Convention or has no liability under the said Convention and that the Fund will be liable under the Fund Convention to pay compensation to the victims of pollution damage arising from the incident, the Director shall make provisional payment to such victims if in his view this is necessary in order to mitigate undue financial hardship to them. These payments shall be at the discretion of the Director, who shall endeavour to ensure that no person receiving such payment receives more than 60% of the amount which he is likely to receive from the Fund in the event of the claims being abated pro rata. Total payments under this paragraph shall not exceed 90 million francs in respect of any one incident. The relevant date for such conversion shall be the date of the incident in question. Such provisional payments may be made before the shipowner has established the limitation fund in accordance with Article V.3 of the Liability Convention.

8.7 Where, in respect of a particular incident, the Director considers the level of provisional payments permitted under Regulation 8.6 is insufficient to mitigate undue financial hardships to victims, he may bring the matter to the attention of the Assembly. The Assembly may decide, in respect of such incident, that provisional payments may be made beyond the limit of 90 million francs as laid down in Regulation 8.6.

8.8 As a condition of making a provisional payment in

respect of a claim, the Director shall obtain from the claimant concerned a transfer to the Fund of any right that such a claimant may enjoy under the Liability Convention against the owner or his guarantor, up to the amount of the provisional payment to be made by the Fund to the claimant.

ANNEXURE SIX

Article 8 and related provisions

Article 8 of the Fund Convention provides:

'Subject to any decision concerning the distribution referred to in Article 4, paragraph 5, [pro rata distribution] any judgement given against the Fund by a court having jurisdiction in accordance with Article 7, paragraphs 1 and 3, shall, when it has become enforceable in the State of origin and is in that State no longer subject to ordinary forms of review, be recognized and enforceable in each Contracting State on the same conditions as are prescribed in Article X of the Liability Convention.'

Article X of the Civil Liability Convention provides:

'1. Any judgement given by a Court with jurisdiction in accordance with Article IX which is enforceable in the State of origin where it is no longer subject to ordinary forms of review, shall be recognized in any Contracting State, except:

- (a) where the judgement was obtained by fraud; or
- (b) where the defendant was not given reasonable notice and a fair opportunity to present his case.'

¹Article 7.5 of the Fund Convention states:

'Except as otherwise provided in paragraph 6, the Fund shall not be bound by any judgement or decision in proceedings to which it has not been a party or by any settlement to which it is not a party.'

Article 7.6 provides that:

'... where an action under the [Civil] Liability Convention for compensation for pollution damage has been brought against an owner or his guarantor before a competent court in a Contracting State, each party to the proceedings shall be

'2. A judgement recognized under paragraph 1 of this Article shall be enforceable in each contracting State as soon as the formalities required in that State have been complied with. The formalities shall not permit the merits of the case to be re-opened.'

entitled under the national law of that State to notify the Fund of the proceedings. Where such notification has been made in accordance with the formalities required by the law of the court seized and in such time and in such manner that the Fund has in fact been in a position effectively to intervene as a party to the proceedings, any judgment rendered by the court in such proceedings shall, after it has become final and enforceable in the State where the judgement was given, become binding upon the Fund in the sense that the facts and findings in that judgement may not be disputed by the Fund even if the Fund has not actually intervened in the proceedings.'

ANNEXURE SEVEN

The 1989 Salvage Convention

6.1 The 1989 International Convention on Salvage

It will be recalled that the Court in the *Patmos* case stated that, only to the extent that salvage operations were considered as "preventive measures", could costs and losses be compensated under the Civil Liability Convention. Accordingly the actual salvage reward over and above the salvors expenses would not be recoverable under the Civil Liability or Fund Conventions.

6.1.1 Traditional principles of salvage

Under traditional principles of maritime salvage law the salvor would only receive the payment of the salvage award where he had successfully saved the ship or cargo.¹ This principle was and still is referred to the principle of "no cure-no pay". Problems created by the adherence to this time honoured principle became manifest during the late 1970's when a number of oil pollution incidents occurred in which salvage operations prevented serious pollution damage but nevertheless received no salvage reward because such operations failed to save property. The attempts to salvage the *Amoco Cadiz* during March, 1978 showed the inequity of the "no cure-no pay" principle.

The inequity of the "no cure-no pay" principle is even more aptly illustrated by the misfortunes of two salvage companies which responded to the largest ship-source oil spill in history. In July, 1979, the *Atlantic Empress* a 292,666 dwt. ULCC and the *Aegean Captain* a 210,000 dwt. VLCC collided near the island of Tobago in the West Indies. In total, an estimated 330,000 tonnes of oil escaped as a result but, largely due to the efforts of the salvors, very little oil pollution damage was sustained in any

¹For a recent discussion of the Law of Salvage, see; G. Brice *The maritime law of salvage* (1993).

of the nearby islands. The salvors responsible for saving the *Aegean Captain* received no direct monetary reward from the owners or insurers of the vessel because the vessel was declared a Constructive Total Loss. The salvor was forced to recoup his expenses out of the scrap value of the vessel and any cargo remaining therein. The misfortunes which beset the salvor responsible for the *Atlantic Empress* were even greater. No coastal state would allow the burning tanker into sheltered water where emergency repairs might be carried out. In the end, after two weeks of costly salvage operations during which two salvors lost their lives, the salvors received no reward as the *Atlantic Empress* sank.² Therefore the prerequisite for salvage, that property actually be salvaged, was not met. How long, it was asked, would salvors continue to respond to ships in distress which posed pollution risks but were in such a critical condition that the prospects of successfully salvaging the ship or cargo and thereby recovering a salvage award were not very great?

6.1.2 Lloyd's Open Form 1980

The first attempt to rectify this problem was the development in 1980 by the marine insurance industry of an amended version of the Lloyd's Standard Form of Salvage Agreement. This agreement became known as the Lloyd's Open Form 1980 (LOF 1980) and was the standard instrument used by salvage companies from 1980 to 1990 when agreeing with shipowners and ships' masters to undertake the salvage of vessels in distress. Clause 1(a) of LOF 1980 provided that, where salvage services were rendered to ships laden or partly laden with cargoes of oil, salvors could in certain circumstances recover an "enhanced award" by virtue of a scheme which became known as the "safety net". This system applied in circumstances where, without the negligence of the salvor, the salvage operations failed to save property, or were only partly successful in doing so, or where a salvor was prevented from

²White-Harvey 'Black Tide at the Convergence of Admiralty and Environmental Law' (1991) 1 *Journal of Environmental Law and Practice* 259 at 264.

completing the services. In any of these circumstances 'the salvor shall nevertheless be awarded ... his reasonably incurred expenses and an increment not exceeding 15 % of such expense', but only if and to the extent that the total of such expenses and the appropriate increment was greater than any amount which would otherwise have been recoverable.³

The P&I Clubs undertook to pay these awards.⁴ Towards the end of the 1980's, however, experience had shown that the "safety net" and "enhanced award" provisions were not entirely successful in that they applied only to laden oil tankers and the rewards were not commensurate with the high risks involved in such operations.

6.1.3 The Salvage Convention

In an attempt to formulate a system of uniform international rules relating to salvage operations and to provide additional incentives to encourage salvors to take measures to prevent or minimize pollution damage, the International Maritime Organization facilitated the development of the International Salvage Convention in 1989. This Convention is not yet in force but upon entering into force will apply whenever judicial or arbitral proceedings relating to salvage are brought within a country which has become party to the Convention.⁵

The first point to note is that in terms of Article 12 of the 1989 Salvage Convention, the salvor need not actually save property in order to receive a salvage reward as long as such

³M. Kerr 'The International Convention on Salvage 1989 - How it came to be' (1990) 39 *International and Comparative LQ* 530 at 536.

⁴Jacobsson & Trotz 'The Definition of Pollution Damage in the 1984 Protocols to the 1969 Civil Liability Convention and the 1971 Fund Convention' (1986) 17 *Journal of Maritime Law and Commerce* 467 at 475.

⁵1989 International Salvage Convention, Article 2.

operations have had a useful result.⁶ In terms of Article 13, where the salvor's efforts have had a useful result, the salvage reward will be fixed with a view to encouraging salvage operations, taking into account certain criteria which include; the salved value of the vessel and other property,⁷ the skill and efforts of the salvors in preventing or minimizing damage to the environment,⁸ the measure of success obtained by the salvor,⁹ the nature and degree of the danger,¹⁰ the skill and efforts of the salvors in salving the vessel, other property and life,¹¹ the time used and expenses and losses incurred by the salvors,¹² the risk of liability and other risks run by the salvors or their equipment,¹³ the promptness of the services rendered,¹⁴ the availability and use of vessels or other equipment intended for salvage operations¹⁵ and the state of readiness and efficiency of the salvor's equipment and the value thereof.¹⁶

The central tenet of the 1989 Salvage Convention is Article 14, which allows the salvor to claim "special compensation" in certain circumstances. Special Compensation in essence reflects the "safety net" and "enhanced award" provisions of the LOF 1980. An important distinction is that the "safety net" and "enhanced

⁶1989 International Salvage Convention, Article 12(1).

⁷1989 International Salvage Convention, Article 13(1)(a).

⁸1989 International Salvage Convention, Article 13(1)(b).

⁹1989 International Salvage Convention, Article 13(1)(c).

¹⁰1989 International Salvage Convention, Article 13(1)(d).

¹¹1989 International Salvage Convention, Article 13(1)(e).

¹²1989 International Salvage Convention, Article 13(1)(f).

¹³1989 International Salvage Convention, Article 13(1)(g).

¹⁴1989 International Salvage Convention, Article 13(1)(h).

¹⁵1989 International Salvage Convention, Article 13(1)(i).

¹⁶1989 International Salvage Convention, Article 13(1)(j).

award" provisions of the 1989 Convention are not restricted to salvage operations undertaken in respect of laden oil tankers. For the purpose of the 1989 Salvage Convention a "vessel" means any ship or craft, or any structure capable of navigation'¹⁷ and "damage to the environment" means substantial physical damage to human health or to marine life or resources in coastal or inland waters or areas adjacent thereto, caused by pollution, contamination, fire, explosion or similar major incidents'.¹⁸ Potentially the 1989 Salvage Convention also permits the recovery of higher enhanced awards. Furthermore, where the LOF 1980 operated by force of contractual agreement, the provisions of the 1989 Salvage Convention will apply automatically through force of law.

Special compensation under Article 14(1) means that, where a salvor carries out salvage operations in respect of a vessel which by itself or its cargo threatens damage to the environment but fails to earn a reward under Article 13 which covers his expenses, he will nevertheless be entitled to recover his expenses from the owner of the vessel in question.

In contrast to the position as it stands in relation to oil pollution under the Civil Liability Convention and the Fund Convention, the salvor is entitled under the 1989 Salvage Convention to recover all his expenses incurred in the operation, not only those expenses which have the primary purpose of preventing or minimizing pollution damage. Significantly, the 1989 Salvage Convention also permits the recovery of expenses in so-called pure threat situations which are not admissible under the Civil Liability or Fund Conventions.

Under Article 14(2) where a salvor carries out salvage operations in respect of a vessel which by itself or its cargo threatens damage to the environment and the salvor by his salvage

¹⁷1989 International Salvage Convention, Article 1(b).

¹⁸1989 International Salvage Convention, Article 1(d).

operations has actually succeeded in preventing or minimizing damage to the environment, the special compensation payable by the owner to the salvor under Article 14(1) may be increased up to a maximum of thirty per cent of the expenses incurred by the salvor. In appropriate circumstances where it is considered fair and just to do so such salvor may be rewarded with additional special compensation which shall not however be assessed at more than one hundred per cent over and above the actual expenses incurred by the salvor.

Salvor's expense for the purpose of Article 14(1) and (2) is fixed as out-of-pocket expenses reasonably incurred by the salvor in the salvage operation and a fair rate for equipment and personnel actually and reasonably used in the salvage operation, taking into consideration the promptness of the services rendered, the availability and use of vessels or other equipment intended for salvage operations and the state of readiness and efficiency of the salvor's equipment and the value thereof.¹⁹

The Convention expressly obliges salvors to exercise due care to prevent or minimise damage to the environment.²⁰ If the salvor has been negligent and has thereby failed to prevent or minimize damage to the environment, he may be wholly or partially deprived of special compensations.²¹ The master or the owner of the salvaged property is similarly called upon to exercise due care to prevent or minimise damage to the environment,²² as well as to cooperate fully in the salvage operation²³ and when the vessel or property has been brought to a place of safety to accept redelivery of the vessel or property when reasonably requested to

¹⁹1989 International Salvage Convention, Article 14(3).

²⁰1989 International Salvage Convention, Article 8(1)(b).

²¹1989 International Salvage Convention, Article 14(5).

²²1989 International Salvage Convention, Article 8(2)(b).

²³1989 International Salvage Convention, Article 8(2)(a).

do so.²⁴ The issue of redelivery has posed salvors several problems in the past as seen in the case of the *Aegean Captain*. When, for example a ship has been made safe and taken to a safe haven, owners often refuse to accept the ship. This can involve a salvor in heavy expenses as tugs, personnel and equipment are tied up. It is not unheard of for shipowners to delay the salvors in this way while negotiating with the underwriters to declare the ship a Constructive Total Loss.

The 1989 Salvage Convention will not enter into force until one year after the date on which fifteen States have agreed to be bound by it.²⁵ This could well mean that the Convention will not come into force for some years to come. This delay is highly unfortunate because, as has previously been noted, efficient and timely salvage operations can clearly make a major contribution to the safety of vessels and other property in danger and to the protection of the environment. Hence, it is imperative that adequate incentives are available to persons who undertake salvage operations in such cases.²⁶ The 1989 Salvage Convention has been widely acknowledged as having a significant role to play in the protection of the marine environment and the continued viability of an efficient salvage industry.²⁷ Coastal States

²⁴1989 International Salvage Convention, Article 8(2)(c).

²⁵1989 International Salvage Convention, Article 29(1).

²⁶See the preamble to the 1989 International Salvage Convention.

²⁷See for example, Staniland 'Should the 1989 International Convention on Salvage be enacted in South Africa?' [1993] 110 *SALJ* 292; Neilson 'The 1989 International Convention on Salvage' Summer (1992) vol.24 *Connecticut Law Review* 1203; White-Harvey 'Black Tide at the Convergence of Admiralty and Environmental Law' (1991) 1 *Journal of Environmental Law and Practice* 259; Gaskell 'The 1989 Salvage Convention and the Lloyd's Open Form (LOF) Salvage Agreement 1990' (1991) 16 *Tulane Maritime LJ* 1; Allen 'The International Convention on Salvage and LOF 1990' (1991) 22 *Journal of Maritime Law and Commerce* 119; Binney 'Protecting the Environment with Salvage Law: Risk, Rewards, and the 1989 Salvage Convention' [1990] 65 *Washington Law Review* 639; Wooder 'The New Salvage Convention: A Shipowner's Perspective'

would therefore be well advised to ratify the Convention or to pre-empt its coming into force by incorporating it into domestic legislation.

6.1.4 Lloyd's Open Form 1990

An important positive development is that Lloyds have forestalled any lead time delay by introducing an amended Lloyd's Open Form of Salvage Agreement (LOF 1990) which incorporates the essential terms of the 1989 Salvage Convention as if it was already in force.²⁸ Because Article 14 of the 1989 Salvage Convention is expressly included in LOF 1990 and since a large proportion of salvage agreements are concluded on the basis of LOF it can reasonably be expected that the new approach adopted by LOF 1990 will overcome the shortcomings of LOF 1980 and will play a significant role in preventing or minimizing pollution of the sea by oil and other noxious and hazardous substances.

6.1.5 The *Kirki* - A case in point

In 1991, the *Kirki*, a Greek tanker of about 82,660 tonnes built

(1990) 21 *Journal of Maritime Law and Commerce* 81; Brice QC 'The new Salvage Convention: green seas and grey areas' [1990] *Lloyd's Maritime and Commercial LQ* 32; M. Kerr 'The International Convention on Salvage 1989 - How it came to be' (1990) 39 *International and Comparative LQ* 530; D.A. Kerr 'The 1989 Salvage Convention: Expediency or Equity' [1989] 20 *Journal of Maritime Law and Commerce* 505; Gaskell 'The International Convention on Salvage 1989' [1989] *International Journal of Estuarine and Coastal Law* 268; Gold 'Marine Salvage: Towards a New Regime' (1989) 20 *Journal of Maritime Law and Commerce* 487; Brice QC 'Salvage and enhanced awards' [1985] *Lloyd's Maritime and Commercial LQ* 33; Brice QC 'Salvage: Present and future' [1984] *Lloyd's Maritime and Commercial LQ* 394; Coulthard 'A New Cure for Salvors? - A Comparative Analysis of the LOF 1980 and the CMI Draft Salvage Convention' (1983) 14 *Journal of Maritime Law and Commerce* 45.

²⁸Clause 2. of LOF 1990 incorporates Articles 1 (a) to (e), 8, 13.1, 13.2 first sentence, 13.3 and 14 of the International Convention on Salvage 1989 ("the Convention Articles").

in 1969, was chartered by BP Shipping as agent for BP Australia to carry crude oil from Jebel Dhana to Kwinana. Due to a state of advanced corrosion, the bow section of the *Kirki* became detached from the rest of the vessel when she encountered bad weather off the coast of Western Australia. The Australian Department of Transport and Communications departmental investigation found that the vessel was very poorly maintained, heavily rusted and there had been a '... deliberate attempt to mislead ...' the marine surveyors by patching the deck with canvass disguised with paint.²⁹ As a result of the serious structural failure about 15,000 tonnes of oil escaped into the sea on 21st July, 1991.

Fortunately, prevailing weather conditions drove the oil away from the coast. The Master of the *Kirki* signed LOF 1990 with an Australian salvage company, United Salvage Limited, which towed the stricken vessel amidst difficult conditions to a place of refuge where the remaining cargo was transhipped to another tanker and finally delivered to Kwinana.³⁰

In this case the "special compensation" provisions of LOF 1990 will not be tested as the tanker and its cargo was successfully salvaged. However, if the case went to arbitration it is conceivable that the ultimate salvage award could be enhanced by the salvors' successful endeavours to minimise damage to the environment.

²⁹Report No.33 at 86 cited by M. White 'Oil Pollution in the Australian and New Zealand Region' (1993) vol.67 no.3 *The Australian Law Journal* 191 at 195.

³⁰M. White 'The *Kirki* Oil Spill: Pollution in Western Australia' (1992) vol.22 no.1 *Western Australian Law Review* 168.

ANNEXURE EIGHT
IMO Assembly Resolution A.500
(November, 1981)

Which required:

'That the Council and the committee entertain proposals for new conventions or amendments to existing conventions only on the basis of clear and well-documented demonstration of compelling need, taking into account the undesirability of modifying conventions not yet in force or of amending existing conventions unless such latter instruments have been in force for a reasonable period of time, and experience has been gained of their operation, and having regard to the costs of the maritime industry and the burden of the legislative and administrative resources or members states.'

Quoted from the *Official Records*, vol.2 at 77.

ANNEXURE NINE
Texts of Conventions and Agreements

Texts of the 1971 Fund Convention, 1969 Civil Liability Convention, 1976 Protocols of the Fund and Civil Liability Conventions.

Texts of TOVALOP and CRISTAL dated 20th February, 1994.

**INTERNATIONAL CONVENTION
ON THE ESTABLISHMENT OF AN INTERNATIONAL FUND
FOR COMPENSATION FOR OIL POLLUTION DAMAGE**

(Supplementary to the International Convention on
Civil Liability for Oil Pollution Damage, 1969)

The States Parties to the present Convention,

BEING PARTIES to the International Convention on Civil Liability for Oil Pollution Damage, adopted at Brussels on 29 November 1969,

CONSCIOUS of the dangers of pollution posed by the world-wide maritime carriage of oil in bulk,

CONVINCED of the need 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,

CONSIDERING that the International Convention of 29 November 1969, on Civil Liability for Oil Pollution Damage, by providing a régime for compensation for pollution damage in Contracting States and for the costs of measures, wherever taken, to prevent or minimize such damage, represents a considerable progress towards the achievement of this aim,

CONSIDERING HOWEVER that this régime does not afford full compensation for victims of oil pollution damage in all cases while it imposes an additional financial burden on shipowners,

CONSIDERING FURTHER that the economic consequences of oil pollution damage resulting from the escape or discharge of oil carried in bulk at sea by ships should not exclusively be borne by the shipping industry but should in part be borne by the oil cargo interests,

CONVINCED of the need to elaborate a compensation and indemnification system supplementary to the International Convention on Civil Liability for Oil Pollution Damage with a view to ensuring that full compensation will be available to victims of oil pollution incidents and that the shipowners are at the same time given relief in respect of the additional financial burdens imposed on them by the said Convention,

TAKING NOTE of the Resolution on the Establishment of an International Compensation Fund for Oil Pollution Damage which was adopted on 29 November 1969 by the International Legal Conference on Marine Pollution Damage,

HAVE AGREED as follows:

General Provisions

Article 1

For the purposes of this Convention:

1. "Liability Convention" means the International Convention on Civil Liability for Oil Pollution Damage, adopted at Brussels on 29 November 1969.

2. "Ship", "Person", "Owner", "Oil", "Pollution Damage", "Preventive Measures", "Incident" and "Organization", have the same meaning as in Article I of the Liability Convention, provided however that, for the purposes of these terms, "oil" shall be confined to persistent hydrocarbon mineral oils.
3. "Contributing Oil" means crude oil and fuel oil as defined in sub-paragraphs (a) and (b) below:
 - (a) "Crude Oil" means any liquid hydrocarbon mixture occurring naturally in the earth whether or not treated to render it suitable for transportation. It also includes crude oils from which certain distillate fractions have been removed (sometimes referred to as "topped crudes") or to which certain distillate fractions have been added (sometimes referred to as "spiked" or "reconstituted" crudes).
 - (b) "Fuel Oil" means heavy distillates or residues from crude oil or blends of such materials intended for use as a fuel for the production of heat or power of a quality equivalent to the "American Society for Testing and Materials' Specification for Number Four Fuel Oil (Designation D 396-69)", or heavier.
4. "Franc" means the unit referred to in Article V, paragraph 9 of the Liability Convention.
5. "Ship's tonnage" has the same meaning as in Article V, paragraph 10, of the Liability Convention.
6. "Ton", in relation to oil, means a metric ton.
7. "Guarantor" means any person providing insurance or other financial security to cover an owner's liability in pursuance of Article VII, paragraph 1, of the Liability Convention.
8. "Terminal Installation" means any site for the storage of oil in bulk which is capable of receiving oil from waterborne transportation, including any facility situated off-shore and linked to such site.
9. Where an incident consists of a series of occurrences, it shall be treated as having occurred on the date of the first such occurrence.

Article 2

1. An International Fund for compensation for pollution damage, to be named "The International Oil Pollution Compensation Fund" and hereinafter referred to as "The Fund", is hereby established with the following aims:
 - (a) to provide compensation for pollution damage to the extent that the protection afforded by the Liability Convention is inadequate;
 - (b) to give relief to shipowners in respect of the additional financial burden imposed on them by the Liability Convention, such relief being subject to conditions designed to ensure compliance with safety at sea and other conventions;
 - (c) to give effect to the related purposes set out in this Convention.
2. The Fund shall in each Contracting State be recognized as a legal person capable under the laws of that State of assuming rights and obligations and of being a party in legal proceedings before the courts of that State. Each Contracting State shall recognize the Director of the Fund (hereinafter referred to as "The Director") as the legal representative of the Fund.

Article 3

This Convention shall apply:

1. With regard to compensation according to Article 4, exclusively to pollution damage caused on the territory including the territorial sea of a Contracting State, and to preventive measures taken to prevent or minimize such damage;
2. With regard to indemnification of shipowners and their guarantors according to Article 5, exclusively in respect of pollution damage caused on the territory, including the territorial sea, of a State Party to the Liability Convention by a ship registered in or flying the flag of a Contracting State and in respect of preventive measures taken to prevent or minimize such damage.

Compensation and indemnification

Article 4

1. For the purpose of fulfilling its function under Article 2, paragraph 1(a), the Fund shall pay compensation to any person suffering pollution damage if such person has been unable to obtain full and adequate compensation for the damage under the terms of the Liability Convention,

- (a) because no liability for the damage arises under the Liability Convention;
- (b) because the owner liable for the damage under the Liability Convention is financially incapable of meeting his obligations in full and any financial security that may be provided under Article VII of that Convention does not cover or is insufficient to satisfy the claims for compensation for the damage; an owner being treated as financially incapable of meeting his obligations and a financial security being treated as insufficient if the person suffering the damage has been unable to obtain full satisfaction of the amount of compensation due under the Liability Convention after having taken all reasonable steps to pursue the legal remedies available to him;
- (c) because the damage exceeds the owner's liability under the Liability Convention as limited pursuant to Article V, paragraph 1, of that Convention or under the terms of any other international Convention in force or open for signature, ratification or accession at the date of this Convention.

Expenses reasonably incurred or sacrifices reasonably made by the owner voluntarily to prevent or minimize pollution damage shall be treated as pollution damage for the purposes of this Article.

2. The Fund shall incur no obligation under the preceding paragraph if:
 - (a) it proves that the pollution damage resulted from an act of war, hostilities, civil war or insurrection or was caused by oil which has escaped or been discharged from a warship or other ship owned or operated by a State and used, at the time of the incident, only on Government non-commercial service; or
 - (b) the claimant cannot prove that the damage resulted from an incident involving one or more ships.
3. If the Fund 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 Fund may be exonerated wholly or partially from its obligation to pay compensation to such person provided,

however, that there shall be no such exoneration with regard to such preventive measures which are compensated under paragraph 1. The Fund shall in any event be exonerated to the extent that the shipowner may have been exonerated under Article III, paragraph 3, of the Liability Convention.

4. (a) Except as otherwise provided in sub-paragraph (b) of this paragraph, the aggregate amount of compensation payable by the Fund under this Article shall in respect of any one incident be limited, so that the total sum of that amount and the amount of compensation actually paid under the Liability Convention for pollution damage caused in the territory of the Contracting States, including any sums in respect of which the Fund is under an obligation to indemnify the owner pursuant to Article 5, paragraph 1, of this Convention, shall not exceed 450 million francs.

(b) The aggregate amount of compensation payable by the Fund under this Article for pollution damage resulting from a natural phenomenon of an exceptional, inevitable and irresistible character shall not exceed 450 million francs.

5. Where the amount of established claims against the Fund exceeds the aggregate amount of compensation payable under paragraph 4, the amount available shall be distributed in such a manner that the proportion between any established claim and the amount of compensation actually recovered by the claimant under the Liability Convention and this Convention shall be the same for all claimants.

6. The Assembly of the Fund (hereinafter referred to as "the Assembly") may, having regard to the experience of incidents which have occurred and in particular the amount of damage resulting therefrom and to changes in the monetary values, decide that the amount of 450 million francs referred to in paragraph 4, sub-paragraphs (a) and (b), shall be changed; provided, however, that this amount shall in no case exceed 900 million francs or be lower than 450 million francs. The changed amount shall apply to incidents which occur after the date of the decision effecting the change. (See Decisions set out on page 48)

7. The Fund shall, at the request of a Contracting State, use its good offices as necessary to assist that State to secure promptly such personnel, material and services as are necessary to enable the State to take measures to prevent or mitigate pollution damage arising from an incident in respect of which the Fund may be called upon to pay compensation under this Convention.

8. The Fund may on conditions to be laid down in the Internal Regulations provide credit facilities with a view to the taking of preventive measures against pollution damage arising from a particular incident in respect of which the Fund may be called upon to pay compensation under this Convention.

Article 5

1. For the purpose of fulfilling its function under Article 2, paragraph 1(b), the Fund shall indemnify the owner and his guarantor for that portion of the aggregate amount of liability under the Liability Convention which:

(a) is in excess of an amount equivalent to 1,500 francs for each ton of the ship's tonnage or of an amount of 125 million francs, whichever is the less, and

(b) is not in excess of an amount equivalent to 2,000 francs for each ton of the said tonnage or an amount of 210 million francs, whichever is the less, provided, however, that the Fund shall incur no obligation under this paragraph where the pollution damage resulted from the wilful misconduct of the owner himself.

2. The Assembly may decide that the Fund shall, on conditions to be laid down in the Internal Regulations, assume the obligations of a guarantor in respect of ships referred to in Article 3, paragraph 2, with regard to the portion of liability referred to in paragraph 1 of this Article. However, the Fund shall assume such obligations only if the owner so requests and if he maintains adequate insurance or other financial security covering the owner's liability under the Liability Convention up to an amount equivalent to 1,500 francs for each ton of the ship's tonnage or an amount of 125 million francs, whichever is the less. If the Fund assumes such obligations, the owner shall in each Contracting State be considered to have complied with Article VII of the Liability Convention in respect of the portion of his liability mentioned above.

3. The Fund may be exonerated wholly or partially from its obligations under paragraph 1 towards the owner and his guarantor if the Fund proves that as a result of the actual fault or privity of the owner:

(a) the ship from which the oil causing the pollution damage escaped did not comply with the requirements laid down in:

- (i) the International Convention for the Prevention of Pollution of the Sea by Oil, 1954, as amended in 1962; or
- (ii) the International Convention for the Safety of Life at Sea, 1960; or
- (iii) the International Convention on Load Lines, 1966; or
- (iv) the International Regulations for Preventing Collisions at Sea, 1960; or
- (v) any amendments to the above-mentioned Conventions which have been determined as being of an important nature in accordance with Article XVI(5) of the Convention mentioned under (i), Article IX(e) of the Convention mentioned under (ii) or Article 29(3)(d) or (4)(d) of the Convention mentioned under (iii), provided, however, that such amendments had been in force for at least twelve months at the time of the incident;

and

(b) the incident or damage was caused wholly or partially by such non-compliance.

The provisions of this paragraph shall apply irrespective of whether the Contracting State in which the ship was registered or whose flag it was flying is a Party to the relevant Instrument.

4. Upon the entry into force of a new Convention designed to replace, in whole or in part, any of the Instruments specified in paragraph 3, the Assembly may decide at least six months in advance a date on which the new Convention will replace such Instrument or part thereof for the purpose of paragraph 3. However, any State Party to this Convention may declare to the Director before that date that it does not accept such replacement; in which case the decision of the Assembly shall have no effect in respect of a ship registered in, or flying the flag of, that State at the time of the incident. Such a declaration may be withdrawn at any later date and shall in any event cease to have effect when the State in question becomes a Party to such new Convention. (See Decisions set out on page 48)

5. A ship complying with the requirements in an amendment to an instrument specified in paragraph 3 or with requirements in a new Convention, where the amendment or Convention is designed to replace in whole or in part such Instrument, shall be considered as complying with the requirements in the said Instrument for the purposes of paragraph 3.

6. Where the Fund, acting as a guarantor by virtue of paragraph 2, has paid compensation for pollution damage in accordance with the Liability Convention, it shall have a right of recovery from the owner if and to the extent that the Fund would have been exonerated pursuant to paragraph 3 from its obligations under paragraph 1 to indemnify the owner.

7. Expenses reasonably incurred and sacrifices reasonably made by the owner voluntarily to prevent or minimize pollution damage shall be treated as included in the owner's liability for the purposes of this Article.

Article 6

1. Rights to compensation under Article 4 or indemnification under Article 5 shall be extinguished unless an action is brought thereunder or a notification has been made pursuant to Article 7, paragraph 6, within three years from the date when the damage occurred. However, in no case shall an action be brought after six years from the date of the incident which caused the damage.

2. Notwithstanding paragraph 1, the right of the owner or his guarantor to seek indemnification from the Fund pursuant to Article 5, paragraph 1, shall in no case be extinguished before the expiry of a period of six months as from the date on which the owner or his guarantor acquired knowledge of the bringing of an action against him under the Liability Convention.

Article 7

1. Subject to the subsequent provisions of this Article, any action against the Fund for compensation under Article 4 or indemnification under Article 5 of this Convention shall be brought only before a court competent under Article IX of the Liability Convention in respect of actions against the owner who is or who would, but for the provisions of Article III, paragraph 2, of that Convention, have been liable for pollution damage caused by the relevant incident.

2. Each Contracting State shall ensure that its courts possess the necessary jurisdiction to entertain such actions against the Fund as are referred to in paragraph 1.

3. Where an action for compensation for pollution damage has been brought before a court competent under Article IX of the Liability Convention against the owner of a ship or his guarantor, such court shall have exclusive jurisdictional competence over any action against the Fund for compensation or indemnification under the provisions of Article 4 or 5 of this Convention in respect of the same damage. However, where an action for compensation for pollution damage under the Liability Convention has been brought before a court in a State Party to the Liability Convention but not to this Convention, any action against the Fund under Article 4 or under Article 5, paragraph 1, of this Convention shall at the option of the claimant be brought either before a court of the State where the Fund has its headquarters or before any court of a State Party to this Convention competent under Article IX of the Liability Convention.

4. Each Contracting State shall ensure that the Fund shall have the right to intervene as a party to any legal proceedings instituted in accordance with Article IX of the Liability Convention before a competent court of that State against the owner of a ship or his guarantor.

5. Except as otherwise provided in paragraph 6, the Fund shall not be bound by any judgment or decision in proceedings to which it has not been a party or by any settlement to which it is not a party.

6. Without prejudice to the provisions of paragraph 4, where an action under the Liability Convention for compensation for pollution damage has been brought against an owner or his guarantor before a competent court in a Contracting State, each party to the proceedings shall be entitled under the national law of that State to notify the Fund of the proceedings. Where such notification has been made in accordance with the formalities required by the law of the court seized and in such time and in such a manner that the Fund has in fact been in a position effectively to intervene as a party to the proceedings, any judgment rendered by the court in such proceedings shall, after it has become final and enforceable in the State where the judgment was given, become binding upon the Fund in the sense that the facts and findings in that judgment may not be disputed by the Fund even if the Fund has not actually intervened in the proceedings.

Article 8

Subject to any decision concerning the distribution referred to in Article 4, paragraph 5, any judgment given against the Fund by a court having jurisdiction in accordance with Article 7, paragraphs 1 and 3, shall, when it has become enforceable in the State of origin and is in that State no longer subject to ordinary forms of review, be recognized and enforceable in each Contracting State on the same conditions as are prescribed in Article X of the Liability Convention.

Article 9

1. Subject to the provisions of Article 5, the Fund shall, in respect of any amount of compensation for pollution damage paid by the Fund in accordance with Article 4, paragraph 1, of this Convention, acquire by subrogation the rights that the person so compensated may enjoy under the Liability Convention against the owner or his guarantor.

2. Nothing in this Convention shall prejudice any right of recourse or subrogation of the Fund against persons other than those referred to in the preceding paragraph. In any event the right of the Fund to subrogation against such person shall not be less favourable than that of an insurer of the person to whom compensation or indemnification has been paid.

3. Without prejudice to any other rights of subrogation or recourse against the Fund which may exist, a Contracting State or agency thereof which has paid compensation for pollution damage in accordance with provisions of national law shall acquire by subrogation the rights which the person so compensated would have enjoyed under this Convention.

Contributions

Article 10

1. Contributions to the Fund shall be made in respect of each Contracting State by any person who, in the calendar year referred to in Article 11, paragraph 1, as regards initial contributions and in Article 12, paragraphs 2 (a) or (b), as regards annual contributions, has received in total quantities exceeding 150,000 tons:

- (a) in the ports or terminal installations in the territory of that State contributing oil carried by sea to such ports or terminal installations; and
 - (b) in any installations situated in the territory of that Contracting State contributing oil which has been carried by sea and discharged in a port or terminal installation of a non-Contracting State, provided that contributing oil shall only be taken into account by virtue of this sub-paragraph on first receipt in a Contracting State after its discharge in that non-Contracting State.
2. (a) For the purposes of paragraph 1, where the quantity of contributing oil received in the territory of a Contracting State by any person in a calendar year when aggregated with the quantity of contributing oil received in the same Contracting State in that year by any associated person or persons exceeds 150,000 tons, such person shall pay contributions in respect of the actual quantity received by him notwithstanding that that quantity did not exceed 150,000 tons.
- (b) "Associated person" means any subsidiary or commonly controlled entity. The question whether a person comes within this definition shall be determined by the national law of the State concerned.

Article 11

1. In respect of each Contracting State initial contributions shall be made of an amount which shall for each person referred to in Article 10 be calculated on the basis of a fixed sum for each ton of contributing oil received by him during the calendar year preceding that in which this Convention entered into force for that State.

2. The sum referred to in paragraph 1 shall be determined by the Assembly within two months after the entry into force of this Convention. In performing this function the Assembly shall, to the extent possible, fix the sum in such a way that the total amount of initial contributions would, if contributions were to be made in respect of 90 per cent of the quantities of contributing oil carried by sea in the world, equal 75 million francs.

3. The initial contributions shall in respect of each Contracting State be paid within three months following the date at which the Convention entered into force for that State.

Article 12

1. With a view to assessing for each person referred to in Article 10 the amount of annual contributions due, if any, and taking account of the necessity to maintain sufficient liquid funds, the Assembly shall for each calendar year make an estimate in the form of a budget of:

(i) *Expenditure*

- (a) costs and expenses of the administration of the Fund in the relevant year and any deficit from operations in preceding years;
- (b) payments to be made by the Fund in the relevant year for the satisfaction of claims against the Fund due under Article 4 or 5, including repayment on loans previously taken by the Fund for the satisfaction of such claims, to the extent that the aggregate amount of such claims in respect of any one incident does not exceed 15 million francs;
- (c) payments to be made by the Fund in the relevant year for the satisfaction of claims against the Fund due under Article 4 or 5, including repayments on loans previously taken by the Fund for the satisfaction of such claims, to the extent that the aggregate amount of such claims in respect of any one incident is in excess of 15 million francs;

(ii) *Income*

- (a) surplus funds from operations in preceding years, including any interest;
- (b) initial contributions to be paid in the course of the year;
- (c) annual contributions, if required to balance the budget;
- (d) any other income.

2. For each person referred to in Article 10 the amount of his annual contribution shall be determined by the Assembly and shall be calculated in respect of each Contracting State:

- (a) in so far as the contribution is for the satisfaction of payments referred to in paragraph 1(i)(a) and (b) on the basis of a fixed sum for each ton of contributing oil received in the relevant State by such persons during the preceding calendar year; and
- (b) in so far as the contribution is for the satisfaction of payments referred to in paragraph 1(i) (c) of this Article on the basis of a fixed sum for each ton of contributing oil received by such person during the calendar year preceding that in which the incident in question occurred, provided that State was a Party to this Convention at the date of the incident.

3. The sums referred to in paragraph 2 above shall be arrived at by dividing the relevant total amount of contributions required by the total amount of contributing oil received in all Contracting States in the relevant year.

4. The Assembly shall decide the portion of the annual contribution which shall be immediately paid in cash and decide on the date of payment. The remaining part of each annual contribution shall be paid upon notification by the Director.

5. The Director may, in cases and in accordance with conditions to be laid down in the Internal Regulations of the Fund, require a contributor to provide financial security for the sums due from him.

6. Any demand for payments made under paragraph 4 shall be called rateably from all individual contributors.

Article 13

1. The amount of any contribution due under Article 12 and which is in arrear shall bear interest at a rate which shall be determined by the Assembly for each calendar year provided that different rates may be fixed for different circumstances.
2. Each Contracting State shall ensure that any obligation to contribute to the Fund arising under this Convention in respect of oil received within the territory of that State is fulfilled and shall take any appropriate measures under its law, including the imposing of such sanctions as it may deem necessary, with a view to the effective execution of any such obligation; provided, however, that such measures shall only be directed against those persons who are under an obligation to contribute to the Fund.
3. Where a person who is liable in accordance with the provisions of Articles 10 and 11 to make contributions to the Fund does not fulfil his obligations in respect of any such contribution or any part thereof and is in arrear for a period exceeding three months, the Director shall take all appropriate action against such person on behalf of the Fund with a view to the recovery of the amount due. However, where the defaulting contributor is manifestly insolvent or the circumstances otherwise so warrant, the Assembly may, upon recommendation of the Director, decide that no action shall be taken or continued against the contributor.

Article 14

1. Each Contracting State may at the time when it deposits its instrument of ratification or accession or at any time thereafter declare that it assumes itself obligations that are incumbent under this Convention on any person who is liable to contribute to the Fund in accordance with Article 10, paragraph 1, in respect of oil received within the territory of that State. Such declaration shall be made in writing and shall specify which obligations are assumed.
2. Where a declaration under paragraph 1 is made prior to the entry into force of this Convention in accordance with Article 40, it shall be deposited with the Secretary-General of the Organization who shall after the entry into force of the Convention communicate the declaration to the Director.
3. A declaration under paragraph 1 which is made after the entry into force of this Convention shall be deposited with the Director.
4. A declaration made in accordance with this Article may be withdrawn by the relevant State giving notice thereof in writing to the Director. Such notification shall take effect three months after the Director's receipt thereof.
5. Any State which is bound by a declaration made under this Article shall, in any proceedings brought against it before a competent court in respect of any obligation specified in the declaration, waive any immunity that it would otherwise be entitled to invoke.

Article 15

1. Each Contracting State shall ensure that any person who receives contributing oil within its territory in such quantities that he is liable to contribute to the Fund appears on a list to be established and kept up to date by the Director in accordance with the subsequent provisions of this Convention.

2. For the purposes set out in paragraph 1, each Contracting State shall communicate, at a time and in the manner to be prescribed in the Internal Regulations, to the Director the name and address of any person who in respect of that State is liable to contribute to the Fund pursuant to Article 10, as well as data on the relevant quantities of contributing oil received by any such person during the preceding calendar year.

3. For the purposes of ascertaining who are, at any given time, the persons liable to contribute to the Fund in accordance with Article 10, paragraph 1, and of establishing, where applicable, the quantities of oil to be taken into account for any such person when determining the amount of his contribution, the list shall be *prima facie* evidence of the facts stated therein.

Organization and Administration

Article 16

The Fund shall have an Assembly, a Secretariat headed by a Director and, in accordance with the provisions of Article 21, an Executive Committee.

Assembly

Article 17

The Assembly shall consist of all Contracting States to this Convention.

Article 18

The functions of the Assembly shall, subject to the provisions of Article 26, be:

1. to elect at each regular session its Chairman and two Vice-Chairmen who shall hold office until the next regular session;
2. to determine its own rules of procedure, subject to the provisions of this Convention;
3. to adopt Internal Regulations necessary for the proper functioning of the Fund;
4. to appoint the Director and make provisions for the appointment of such other personnel as may be necessary and determine the terms and conditions of service of the Director and other personnel;
5. to adopt the annual budget and fix the annual contributions;
6. to appoint auditors and approve the accounts of the Fund;
7. to approve settlements of claims against the Fund, to take decisions in respect of the distribution among claimants of the available amount of compensation in accordance with Article 4, paragraph 5, and to determine the terms and conditions according to which provisional payments in respect of claims shall be made with a view to ensuring that victims of pollution damage are compensated as promptly as possible;
8. to elect the members of the Assembly to be represented on the Executive Committee, as provided in Articles 21, 22 and 23;
9. to establish any temporary or permanent subsidiary bodies it may deem necessary.

10. to determine which non-Contracting States and which inter-governmental and international non-governmental organizations shall be admitted to take part, without voting rights, in meetings of the Assembly, the Executive Committee, and subsidiary bodies;
11. to give instructions concerning the administration of the Fund to the Director, the Executive Committee and subsidiary bodies;
12. to review and approve the reports and activities of the executive Committee;
13. to supervise the proper execution of the Convention and of its own decisions;
14. to perform such other functions as are allocated to it under the Convention or are otherwise necessary for the proper operation of the Fund.

Article 19

1. Regular sessions of the Assembly shall take place once every calendar year upon convocation by the Director; provided, however, that if the Assembly allocates to the Executive Committee the functions specified in Article 18, paragraph 5, regular sessions of the Assembly shall be held once every two years.
2. Extraordinary sessions of the Assembly shall be convened by the Director at the request of the Executive Committee or of at least one-third of the members of the Assembly and may be convened on the Director's own initiative after consultation with the Chairman of the Assembly. The Director shall give members at least thirty days' notice of such sessions.

Article 20

A majority of the members of the Assembly shall constitute a quorum for its meetings.

Executive Committee

Article 21

The Executive Committee shall be established at the first regular session of the Assembly after the date on which the number of Contracting States reaches fifteen.

Article 22

1. The Executive Committee shall consist of one-third of the members of the Assembly but of not less than seven or more than fifteen members. Where the number of members of the Assembly is not divisible by three, the one-third referred to shall be calculated on the next higher number which is divisible by three.
2. When electing the members of the Executive Committee the Assembly shall:
 - (a) secure an equitable geographical distribution of the seats on the Committee on the basis of an adequate representation of Contracting States particularly exposed to the risks of oil pollution and of Contracting States having large tanker fleets; and

- (b) elect one half of the members of the Committee, or in case the total number of members to be elected is uneven, such number of the members as is equivalent to one half of the total number less one, among those Contracting States in the territory of which the largest quantities of oil to be taken into account under Article 10 were received during the preceding calendar year, provided that the number of States eligible under this sub-paragraph shall be limited as shown in the table below:

Total number of Members on the Committee	Number of States eligible under sub-paragraph (b)	Number of States to be elected under sub-paragraph (b)
7	5	3
8	6	4
9	6	4
10	8	5
11	8	5
12	9	6
13	9	6
14	11	7
15	11	7

3. A member of the Assembly which was eligible but was not elected under sub-paragraph (b) shall not be eligible to be elected for any remaining seat on the Executive Committee.

Article 23

1. Members of the Executive Committee shall hold office until the end of the next regular session of the Assembly.
2. Except to the extent that may be necessary for complying with the requirements of Article 22, no State Member of the Assembly may serve on the Executive Committee for more than two consecutive terms.

Article 24

The Executive Committee shall meet at least once every calendar year at thirty days' notice upon convocation by the Director, either on his own initiative or at the request of its Chairman or of at least one-third of its members. It shall meet at such places as may be convenient.

Article 25

At least two-thirds of the members of the Executive Committee shall constitute a quorum for its meetings.

Article 26

1. The functions of the Executive Committee shall be:
 - (a) to elect its Chairman and adopt its own rules of procedure, except as otherwise provided in this Convention;
 - (b) to assume and exercise in place of the Assembly the following functions:
 - (i) making provision for the appointment of such personnel, other than the Director, as may be necessary and determining the terms and conditions of service of such personnel;

- (ii) approving settlements of claims against the Fund and taking all other steps envisaged in relation to such claims in Article 18, paragraph 7 ;
 - (iii) giving instructions to the Director concerning the administration of the Fund and supervising the proper execution by him of the Convention, of the decisions of the Assembly and of the Committee's own decisions; and
- (c) to perform such other functions as are allocated to it by the Assembly.
2. The Executive Committee shall each year prepare and publish a report of the activities of the Fund during the previous calendar year.

Article 27

Members of the Assembly who are not members of the Executive Committee shall have the right to attend its meetings as observers.

Secretariat

Article 28

1. The Secretariat shall comprise the Director and such staff as the administration of the Fund may require.
2. The Director shall be the legal representative of the Fund.

Article 29

1. The Director shall be the chief administrative officer of the Fund and shall, subject to the instructions given to him by the Assembly and by the Executive Committee, perform those functions which are assigned to him by this Convention, the Internal Regulations, the Assembly and the Executive Committee.
2. The Director shall in particular:
 - (a) appoint the personnel required for the administration of the Fund;
 - (b) take all appropriate measures with a view to the proper administration of the Fund's assets;
 - (c) collect the contributions due under this Convention while observing in particular the provisions of Article 13, paragraph 3;
 - (d) to the extent necessary to deal with claims against the Fund and carry out the other functions of the Fund, employ the services of legal, financial and other experts;
 - (e) take all appropriate measures for dealing with claims against the Fund within the limits and on conditions to be laid down in the Internal Regulations, including the final settlement of claims without the prior approval of the Assembly or the Executive Committee where these Regulations so provide;
 - (f) Prepare and submit to the Assembly or to the Executive Committee, as the case may be, the financial statements and budget estimates for each calendar year;
 - (g) assist the Executive Committee in the preparation of the report referred to in Article 26, paragraph 2;
 - (h) prepare, collect and circulate the papers, documents, agenda, minutes and information that may be required for the work of the Assembly, the Executive Committee and subsidiary bodies.

Article 30

In the performance of their duties the Director and the staff and experts appointed by him shall not seek or receive instructions from any Government or from any authority external to the Fund. They shall refrain from any action which might reflect on their position as international officials. Each Contracting State on its part undertakes to respect the exclusively international character of the responsibilities of the Director and the staff and experts appointed by him, and not to seek to influence them in the discharge of their duties.

Finances

Article 31

1. Each Contracting State shall bear the salary, travel and other expenses of its own delegation to the Assembly and of its representatives on the Executive Committee and on subsidiary bodies.
2. Any other expenses incurred in the operation of the Fund shall be borne by the Fund.

Voting

Article 32

The following provisions shall apply to voting in the Assembly and the Executive Committee:

- (a) each member shall have one vote;
- (b) except as otherwise provided in Article 33, decisions of the Assembly and the Executive Committee shall be by a majority vote of the members present and voting;
- (c) decisions where a three-fourths or a two-thirds majority is required shall be by a three-fourths or two-thirds majority vote, as the case may be, of those present;
- (d) for the purpose of this Article the phrase "members present" means "members present at the meeting at the time of the vote", and the phrase "members present and voting" means "members present and casting an affirmative or negative vote". Members who abstain from voting shall be considered as not voting.

Article 33

1. The following decisions of the Assembly shall require a three-fourths majority:
 - (a) an increase in accordance with Article 4, paragraph 6, in the maximum amount of compensation payable by the Fund;
 - (b) a determination, under Article 5, paragraph 4, relating to the replacement of the Instruments referred to in that paragraph;
 - (c) the allocation to the Executive Committee of the Fund of the

2. The following decisions of the Assembly shall require a two-thirds majority:
 - (a) a decision under Article 13, paragraph 3, not to take or continue action against a contributor;
 - (b) the appointment of the Director under Article 18, paragraph 4;
 - (c) the establishment of subsidiary bodies, under Article 18, paragraph 9.

Article 34

1. The Fund, its assets, income, including contributions, and other property shall enjoy in all Contracting States exemption from all direct taxation.
2. When the Fund makes substantial purchases of movable or immovable property, or has important work carried out which is necessary for the exercise of its official activities and the cost of which includes indirect taxes or sales taxes, the Governments of Member States shall take, whenever possible, appropriate measures for the remission or refund of the amount of such duties and taxes.
3. No exemption shall be accorded in the case of duties, taxes or dues which merely constitute payment for public utility services.
4. The Fund shall enjoy exemption from all customs duties, taxes and other related taxes on articles imported or exported by it or on its behalf for its official use. Articles thus imported shall not be transferred either for consideration or gratis on the territory of the country into which they have been imported except on conditions agreed by the Government of that country.
5. Persons contributing to the Fund and victims and owners of ships receiving compensation from the Fund shall be subject to the fiscal legislation of the State where they are taxable, no special exemption or other benefit being conferred on them in this respect.
6. Information relating to individual contributors supplied for the purpose of this Convention shall not be divulged outside the Fund except in so far as it may be strictly necessary to enable the Fund to carry out its functions including the bringing and defending of legal proceedings.
7. Independently of existing or future regulations concerning currency or transfers, Contracting States shall authorize the transfer and payment of any contribution to the Fund and of any compensation paid by the Fund without any restriction.

Transitional Provisions

Article 35

1. The Fund shall incur no obligation whatsoever under Article 4 or 5 in respect of incidents occurring within a period of one hundred and twenty days after the entry into force of this Convention.
2. Claims for compensation under Article 4 and claims for indemnification under Article 5, arising from incidents occurring later than one hundred and twenty days but not later than two hundred and forty days after the entry into force of this Convention may not be brought against the Fund prior to the elapse of the two hundred and fortieth day after the entry into force of this Convention.

Article 36

The Secretary-General of the Organization shall convene the first session of the Assembly. This session shall take place as soon as possible after entry into force of this Convention and, in any case, not more than thirty days after such entry into force.

Final Clauses

Article 37

1. This Convention shall be open for signature by the States which have signed or which accede to the Liability Convention, and by any State represented at the Conference on the Establishment of an International Fund for Compensation for Oil Pollution Damage, 1971. The Convention shall remain open for signature until 31 December 1972.
2. Subject to paragraph 4, this Convention shall be ratified, accepted or approved by the States which have signed it.
3. Subject to paragraph 4, this Convention is open for accession by States which did not sign it.
4. This Convention may be ratified, accepted, approved or acceded to, only by States which have ratified, accepted, approved or acceded to the Liability Convention.

Article 38

1. Ratification, acceptance, approval or accession shall be effected by the deposit of a formal instrument to that effect with the Secretary-General of the Organization.
2. Any instrument of ratification, acceptance, approval or accession deposited after the entry into force of an amendment to this Convention with respect to all existing Contracting States or after the completion of all measures required for the entry into force of the amendment with respect to those Parties shall be deemed to apply to the Convention as modified by the amendment.

Article 39

Before this Convention comes into force a State shall, when depositing an instrument referred to in Article 38, paragraph 1, and annually thereafter at a date to be determined by the Secretary-General of the Organization, communicate to him the name and address of any person who in respect of that State would be liable to contribute to the Fund pursuant to Article 10 as well as data on the relevant quantities of contributing oil received by any such person in the territory of that State during the preceding calendar year.

Article 40

1. This Convention shall enter into force on the ninetieth day following the date on which the following requirements are fulfilled:
 - (a) at least eight States have deposited instruments of ratification, acceptance, approval or accession;

- (b) the Secretary-General of the Organization has received information in accordance with Article 39 that those persons in such States who would be liable to contribute pursuant to Article 10 have received during the preceding calendar year a total quantity of at least 750 million tons of contributing oil.
2. However, this Convention shall not enter into force before the Liability Convention has entered into force.
3. For each State which subsequently ratifies, accepts, approves or accedes to it, this Convention shall enter into force on the ninetieth day after deposit by such State of the appropriate instrument.

Article 41

1. This Convention may be denounced by any Contracting State at any time after the date on which the Convention comes into force for that State.
2. Denunciation shall be effected by the deposit of an instrument with the Secretary-General of the Organization.
3. A denunciation shall take effect one year, or such longer period as may be specified in the instrument of denunciation, after its deposit with the Secretary-General of the Organization.
4. Denunciation of the Liability Convention shall be deemed to be a denunciation of this Convention. Such denunciation shall take effect on the same date as the denunciation of the Liability Convention takes effect according to paragraph 3 of Article XVI of that Convention.
5. Notwithstanding a denunciation by a Contracting State pursuant to this Article, any provisions of this Convention relating to the obligations to make contributions under Article 10 with respect to an incident referred to in Article 12, paragraph 2(b), and occurring before the denunciation takes effect shall continue to apply.

Article 42

1. Any Contracting State may, within ninety days after the deposit of an instrument of denunciation the result of which it considers will significantly increase the level of contributions for remaining Contracting States, request the Director to convene an extraordinary session of the Assembly. The Director shall convene the Assembly to meet not later than sixty days after receipt of the request.
2. The Director may convene, on his own initiative, an extraordinary session of the Assembly to meet within sixty days after the deposit of any instrument of denunciation, if he considers that such denunciation will result in a significant increase in the level of contributions for the remaining Contracting States.
3. If the Assembly at an extraordinary session convened in accordance with paragraph 1 or 2 decides that the denunciation will result in a significant increase in the level of contributions for the remaining Contracting States, any such State may, not later than one hundred and twenty days before the date on which that denunciation takes effect, denounce this Convention with effect from the same date.

Article 43

1. This Convention shall cease to be in force on the date when the number of Contracting States falls below three.
2. Contracting States which are bound by this Convention on the date before the day it ceases to be in force shall enable the Fund to exercise its functions as described under Article 44 and shall, for that purpose only, remain bound by this Convention.

Article 44

1. If this Convention ceases to be in force, the Fund shall nevertheless
 - (a) meet its obligations in respect of any incident occurring before the Convention ceased to be in force;
 - (b) be entitled to exercise its rights to contributions to the extent that these contributions are necessary to meet the obligations under sub-paragraph (a), including expenses for the administration of the Fund necessary for this purpose.
2. The Assembly shall take all appropriate measures to complete the winding up of the Fund, including the distribution in an equitable manner of any remaining assets among those persons who have contributed to the Fund.
3. For the purposes of this Article the Fund shall remain a legal person.

Article 45

1. A Conference for the purpose of revising or amending this Convention may be convened by the Organization.
2. The Organization shall convene a Conference of the Contracting States for the purpose of revising or amending this Convention at the request of not less than one-third of all Contracting States.

Article 46

1. This Convention shall be deposited with the Secretary-General of the Organization.
2. The Secretary-General of the Organization shall:
 - (a) inform all States which have signed or acceded to this Convention of:
 - (i) each new signature or deposit of instrument and the date thereof;
 - (ii) the date of entry into force of the Convention;
 - (iii) any denunciation of the Convention and the date on which it takes effect;
 - (b) transmit certified true copies of this Convention to all Signatory States and to all States which accede to the Convention.

Article 47

As soon as this Convention enters into force, a certified true copy thereof shall be transmitted by the Secretary-General of the Organization to the Secretariat of the United Nations for registration.

Article 48

This Convention is established in a single original in the English and French languages, both texts being equally authentic. Official translations in the Russian and Spanish languages shall be prepared by the Secretariat of the Organization and deposited with the signed original.

IN WITNESS WHEREOF the undersigned plenipotentiaries* being duly authorized for that purpose have signed the present Convention.

DONE at Brussels this eighteenth day of December one thousand nine hundred and seventy-one.

PROTOCOL TO THE INTERNATIONAL CONVENTION ON THE ESTABLISHMENT OF AN INTERNATIONAL FUND FOR COMPENSATION FOR OIL POLLUTION DAMAGE, 1971

THE PARTIES TO THE PRESENT PROTOCOL,

HAVING CONSIDERED the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, done at Brussels on 18 December 1971;

HAVE AGREED AS FOLLOWS:

Article I

For the purpose of the present Protocol:

1. "Convention" means the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, 1971.
2. "Liability Convention" has the same meaning as in the Convention.
3. "Organization" has the same meaning as in the Convention.
4. "Secretary-General" means the Secretary-General of the Organization.

Article II

Article 1, paragraph 4 of the Convention is replaced by the following text:

"Unit of Account" or "Monetary Unit" means the unit of account or monetary unit as the case may be, referred to in Article V of the Liability Convention, as amended by the Protocol thereto adopted on 19 November 1976.

Article III

The amounts referred to in the Convention shall wherever they appear be amended as follows:

(a) Article 4:

- (i) "450 million francs" is replaced by "30 million units of account or 450 million monetary units";
- (ii) "900 million francs" is replaced by "60 million units of account or 900 million monetary units".

(b) In Article 5:

- (i) "1,500 francs" is replaced by "100 units of account or 1,500 monetary units";
- (ii) "125 million francs" is replaced by "8,333,000 units of account or 125 million monetary units";
- (iii) "2,000 francs" is replaced by "133 units of account or 2,000 monetary units";
- (iv) "210 million francs" is replaced by "14 million units of account or 210 million monetary units".

- (c) In Article 11, "75 million francs" is replaced by "5 million units of account or 75 million monetary units".
- (d) In Article 12, "15 million francs" is replaced by "1 million units of account or 15 million monetary units".

Article IV

1. The present Protocol shall be open for signature by any State which has signed the Convention or acceded thereto and by any State invited to attend the Conference to Revise the Unit of Account Provisions in the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, 1971, held in London from 17 to 19 November 1976. The Protocol shall be open for signature from 1 February 1977 to 31 December 1977 at the Headquarters of the Organization.
2. Subject to paragraph 4 of this Article, the present Protocol shall be subject to ratification, acceptance or approval by the States which have signed it.
3. Subject to paragraph 4 of this Article, this Protocol shall be open for accession by States which did not sign it.
4. The present Protocol may be ratified, accepted, approved or acceded to by States Parties to the Convention.

Article V

1. Ratification, acceptance, approval or accession shall be effected by the deposit of a formal instrument to that effect with the Secretary-General.
2. Any instrument of ratification, acceptance, approval or accession deposited after the entry into force of an amendment to the present Protocol with respect to all existing Parties or after the completion of all measures required for the entry into force of the amendment with respect to all existing Parties shall be deemed to apply to the Protocol as modified by the amendment.

Article VI

1. The present Protocol shall enter into force for the States which have ratified, accepted, approved or acceded to it on the ninetieth day following the date on which the following requirements are fulfilled:
 - (a) at least eight States have deposited instruments of ratification, acceptance, approval or accession with the Secretary-General, and
 - (b) the Secretary-General has received information in accordance with Article 39 of the Convention that those persons in such States who would be liable to contribute pursuant to Article 10 of the Convention have received during the preceding calendar year a total quantity of at least 750 million tons of contributing oil.
2. However, the present Protocol shall not enter into force before the Convention has entered into force.
3. For each State which subsequently ratifies, accepts, approves or accedes to it, the present Protocol shall enter into force on the ninetieth day after deposit by such State of the appropriate instrument.

Article VII

1. The present Protocol may be denounced by any Party at any time after the date on which the Protocol enters into force for that Party.
2. Denunciation shall be effected by the deposit of an instrument with the Secretary-General.
3. Denunciation shall take effect one year, or such longer period as may be specified in the instrument of denunciation, after its deposit with the Secretary-General.

Article VIII

1. A conference for the purpose of revising or amending the present Protocol may be convened by the Organization.
2. The Organization shall convene a Conference of Parties to the present Protocol for the purpose of revising or amending it at the request of not less than one-third of the Parties.

Article IX

1. The present Protocol shall be deposited with the Secretary-General.
2. The Secretary-General shall:
 - (a) inform all States which have signed the present Protocol or acceded thereto of:
 - (i) each new signature or deposit of an instrument together with the date thereof;
 - (ii) the date of entry into force of the present Protocol;
 - (iii) the deposit of any instrument of denunciation of the present Protocol together with the date on which the denunciation takes effect;
 - (iv) any amendments to the present Protocol;
 - (b) transmit certified true copies of the present Protocol to all States which have signed the present Protocol or acceded thereto.

Article X

As soon as this Protocol enters into force, a certified true copy thereof shall be transmitted by the Secretary-General to the Secretariat of the United Nations for registration and publication in accordance with Article 102 of the Charter of the United Nations.

Article XI

The present Protocol is established in a single original in the English and French languages, both texts being equally authentic. Official translations in the Russian and Spanish languages shall be prepared by the Secretariat of the Organization and deposited with the Secretary-General.

DONE AT LONDON this nineteenth day of November one thousand nine hundred and seventy-six.

IN WITNESS WHEREOF the undersigned* being duly authorized for that purpose have signed the present Protocol.

*Signatures omitted.

INTERNATIONAL CONVENTION ON CIVIL LIABILITY FOR OIL POLLUTION DAMAGE

The States Parties to the present Convention,

CONSCIOUS of the dangers of pollution posed by the worldwide maritime carriage of oil in bulk,

CONVINCED of the need 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,

DESIRING to adopt uniform international rules and procedures for determining questions of liability and providing adequate compensation in such cases,

HAVE AGREED as follows:

Article I

For the purposes of this Convention:

1. "Ship" means any sea-going vessel and any seaborne craft of any type whatsoever, actually carrying oil in bulk as cargo.
2. "Person" means any individual or partnership or any public or private body, whether corporate or not, including a State or any of its constituent subdivisions.
3. "Owner" means the person or persons registered as the owner of the ship or, in the absence of registration, the person or persons owning the ship. However in the case of a ship owned by a State and operated by a company which in that State is registered as the ship's operator, "owner" shall mean such company.
4. "State of the ship's registry" means in relation to registered ships the State of registration of the ship, and in relation to unregistered ships the State whose flag the ship is flying.
5. "Oil" means any persistent oil such as crude oil, fuel oil, heavy diesel oil, lubricating oil and whale oil, whether carried on board a ship as cargo or in the bunkers of such a ship.
6. "Pollution damage" means 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.
7. "Preventive measures" means any reasonable measures taken by any person after an incident has occurred to prevent or minimize pollution damage.

8. "Incident" means any occurrence, or series of occurrences having the same origin, which causes pollution damage.
9. "Organization" means the Inter-Governmental Maritime Consultative Organization.

Article II

This Convention shall apply exclusively to pollution damage caused on the territory including the territorial sea of a Contracting State and to preventive measures taken to prevent or minimize such damage.

Article III

1. Except as provided in paragraphs 2 and 3 of this Article, the owner of a ship at the time of an incident, or where the incident consists of a series of occurrences at the time of the first such occurrence, shall be liable for any pollution damage caused by oil which has escaped or been discharged from the ship as a result of the incident.
2. No liability for pollution damage shall attach to the owner if he proves that the damage:
 - (a) resulted from an act of war, hostilities, civil war, insurrection or a natural phenomenon of an exceptional, inevitable and irresistible character, or
 - (b) was wholly caused by an act or omission done with intent to cause damage by a third party, or
 - (c) was wholly caused by the negligence or other wrongful act of any Government or other authority responsible for the maintenance of lights or other navigational aids in the exercise of that function.
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.
4. No claim for compensation for pollution damage shall be made against the owner otherwise than in accordance with this Convention. No claim for pollution damage under this Convention or otherwise may be made against the servants or agents of the owner.
5. Nothing in this Convention shall prejudice any right of recourse of the owner against third parties.

Article IV

When oil has escaped or has been discharged from two or more ships, and pollution damage results therefrom, the owners of all the ships concerned, unless exonerated under Article III, shall be jointly and severally liable for all such damage which is not reasonably separable.

Article V

1. The owner of a ship shall be entitled to limit his liability under this Convention in respect of any one incident to an aggregate amount of 2,000 francs for each ton of the ship's tonnage. However, this aggregate amount shall not in any event exceed 210 million francs.
2. If the incident occurred as a result of the actual fault or privity of the owner, he shall not be entitled to avail himself of the limitation provided in paragraph 1 of this Article.
3. For the purpose of availing himself of the benefit of limitation provided for in paragraph 1 of this Article the owner shall constitute a fund for the total sum representing the limit of his liability with the Court or other competent authority of any one of the Contracting States in which action is brought under Article IX. The fund can be constituted either by depositing the sum or by producing a bank guarantee or other guarantee, acceptable under the legislation of the Contracting State where the fund is constituted, and considered to be adequate by the Court or another competent authority.
4. The fund shall be distributed among the claimants in proportion to the amounts of their established claims.
5. If before the fund is distributed the owner or any of his servants or agents or any person providing him insurance or other financial security has as a result of the incident in question, paid compensation for pollution damage, such person shall, up to the amount he has paid, acquire by subrogation the rights which the person so compensated would have enjoyed under this Convention.
6. The right of subrogation provided for in paragraph 5 of this Article may also be exercised by a person other than those mentioned therein in respect of any amount of compensation for pollution damage which he may have paid but only to the extent that such subrogation is permitted under the applicable national law.
7. Where the owner or any other person establishes that he may be compelled to pay at a later date in whole or in part any such amount of compensation, with regard to which such person would have enjoyed a right of subrogation under paragraphs 5 or 6 of this Article, had the compensation been paid before the fund was distributed, the Court or other competent authority of the State where the fund has been constituted may order that a sufficient sum shall be provisionally set aside to enable such person at such later date to enforce his claim against the fund.
8. Claims in respect of expenses reasonably incurred or sacrifices reasonably made by the owner voluntarily to prevent or minimize pollution damage shall rank equally with other claims against the fund.
9. The franc mentioned in this Article shall be a unit consisting of sixty-five and a half milligrams of gold of millesimal fineness nine hundred. The amount mentioned in paragraph 1 of this Article shall be converted into the national currency of the State in which the fund is being constituted on the basis of the official value of that currency by reference to the unit defined above on the date of the constitution of the fund.

10. For the purpose of this Article the ship's tonnage shall be the net tonnage of the ship with the addition of the amount deducted from the gross tonnage on account of engine room space for the purpose of ascertaining the net tonnage. In the case of a ship which cannot be measured in accordance with the normal rules of tonnage measurement, the ship's tonnage shall be deemed to be 40 per cent of the weight in tons (of 2240 lbs) of oil which the ship is capable of carrying.

11. The insurer or other person providing financial security shall be entitled to constitute a fund in accordance with this Article on the same conditions and having the same effect as if it were constituted by the owner. Such a fund may be constituted even in the event of the actual fault or privity of the owner but its constitution shall in that case not prejudice the rights of any claimant against the owner.

Article VI

1. Where the owner, after an incident, has constituted a fund in accordance with Article V, and is entitled to limit his liability;

- (a) no person having a claim for pollution damage arising out of that incident shall be entitled to exercise any right against any other assets of the owner in respect of such claim;
- (b) the Court or other competent authority of any Contracting State shall order the release of any ship or other property belonging to the owner which has been arrested in respect of a claim for pollution damage arising out of that incident, and shall similarly release any bail or other security furnished to avoid such arrest.

2. The foregoing shall, however, only apply if the claimant has access to the Court administering the fund and the fund is actually available in respect of his claim.

Article VII

1. 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 pollution damage under this Convention.

2. A certificate attesting that insurance or other financial security is in force in accordance with the provisions of this Convention shall be issued to each ship. It shall be issued or certified by the appropriate authority of the State of the ship's registry after determining that the requirements of paragraph 1 of this Article have been complied with. This certificate shall be in the form of the annexed model and shall 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.

3. 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.

4. The certificate shall be carried on board the ship and a copy shall be deposited with the authorities who keep the record of the ship's registry.

5. An insurance or other financial security shall not satisfy the requirements of this Article if it can cease, for reasons other than the expiry of the period of validity of the insurance or security specified in the certificate under paragraph 2 of this Article, before three months have elapsed from the date on which notice of its termination is given to the authorities referred to in paragraph 4 of this Article, unless the certificate has been surrendered to these authorities or a new certificate has been issued within the said period. The foregoing provisions shall similarly apply to any modification which results in the insurance or security no longer satisfying the requirements of this Article.

6. The State of registry shall, subject to the provisions of this Article, determine the conditions of issue and validity of the certificate.

7. Certificates issued or certified under the authority of a Contracting State shall be accepted by other Contracting States for the purposes of this Convention and shall be regarded by other Contracting States as having the same force as certificates issued or certified by them. A Contracting State may at any time request consultation with the State of a ship's registry should it believe that the insurer or guarantor named in the certificate is not financially capable of meeting the obligations imposed by this Convention.

8. Any claim for compensation for pollution damage may be brought directly against the insurer or other person providing financial security for the owner's liability for pollution damage. In such case the defendant may, irrespective of the actual fault or privity of the owner, avail himself of the limits of liability prescribed in Article V, paragraph 1. He may further avail himself of the defences (other than the bankruptcy or winding up of the owner) which the owner himself would have been entitled to invoke. Furthermore, the defendant may avail himself of the defence that the pollution damage resulted from the wilful misconduct of the owner himself, but the defendant shall not avail himself of any other defence which he might have been entitled to invoke in proceedings brought by the owner against him. The defendant shall in any event have the right to require the owner to be joined in the proceedings.

9. Any sums provided by insurance or by other financial security maintained in accordance with paragraph 1 of this Article shall be available exclusively for the satisfaction of claims under this Convention.

10. A Contracting State shall not permit a ship under its flag to which this Article applies to trade unless a certificate has been issued under paragraph 2 or 12 of this Article.

11. Subject to the provisions of this Article, each Contracting State shall ensure, under its national legislation, that insurance or other security to the extent specified in paragraph 1 of this Article is in force in respect of any ship, wherever registered, entering or leaving a port in its territory, or arriving at or leaving an off-shore terminal in its territorial sea, if the ship actually carries more than 2,000 tons of oil in bulk as cargo.

12. If insurance or other financial security is not maintained in respect of a ship owned by a Contracting State, the provisions of this Article relating thereto shall not be applicable to such ship, but the ship shall carry a certificate issued by the appropriate authorities of the State of the ship's registry stating that the ship is owned by that State and that the ship's liability is covered within the limits prescribed by Article V, paragraph 1. Such a certificate shall follow as closely as practicable the model prescribed by paragraph 2 of this Article.

Article VIII

Rights of compensation under this Convention shall be extinguished unless an action is brought thereunder within three years from the date when the damage occurred. However, in no case shall an action be brought after six years from the date of the incident which caused the damage. Where this incident consists of a series of occurrences, the six years' period shall run from the date of the first such occurrence.

Article IX

1. Where an incident has caused pollution damage in the territory including the territorial sea of one or more Contracting States, or preventive measures have been taken to prevent or minimize pollution damage in such territory including the territorial sea, actions for compensation may only be brought in the Courts of any such Contracting State or States. Reasonable notice of any such action shall be given to the defendant.

2. Each Contracting State shall ensure that its Courts possess the necessary jurisdiction to entertain such actions for compensation.

3. After the fund has been constituted in accordance with Article V the Courts of the State in which the fund is constituted shall be exclusively competent to determine all matters relating to the apportionment and distribution of the fund.

Article X

1. Any judgment given by a Court with jurisdiction in accordance with Article IX which is enforceable in the State of origin where it is no longer subject to ordinary forms of review, shall be recognized in any Contracting State, except:

(a) where the judgment was obtained by fraud; or

(b) where the defendant was not given reasonable notice and a fair opportunity to present his case.

2. A judgment recognized under paragraph 1 of this Article shall be enforceable in each Contracting State as soon as the formalities required in that State have been complied with. The formalities shall not permit the merits of the case to be re-opened.

Article XI

1. The provisions of this Convention shall not apply to warships or other ships owned or operated by a State and used, for the time being, only on government non-commercial service.

2. With respect to ships owned by a Contracting State and used for commercial purposes, each State shall be subject to suit in the jurisdictions set forth in Article IX and shall waive all defences based on its status as a sovereign State.

Article XII

This Convention shall supersede any International Conventions in force or open for signature, ratification or accession at the date on which the Convention is opened 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 to non-Contracting States arising under such International Conventions.

Article XIII

1. The present Convention shall remain open for signature until 31 December 1970 and shall thereafter remain open for accession.

2. States Members of the United Nations or any of the Specialized Agencies or of the International Atomic Energy Agency or Parties to the Statute of the International Court of Justice may become Parties to this Convention by:

- (a) signature without reservation as to ratification, acceptance or approval;
- (b) signature subject to ratification, acceptance or approval followed by ratification, acceptance or approval; or
- (c) accession.

Article XIV

1. Ratification, acceptance, approval or accession shall be effected by the deposit of a formal instrument to that effect with the Secretary-General of the Organization.

2. Any instrument of ratification, acceptance, approval or accession deposited after the entry into force of an amendment to the present Convention with respect to all existing Contracting States, or after the completion of all measures required for the entry into force of the amendment with respect to those Contracting States shall be deemed to apply to the Convention as modified by the amendment.

Article XV

1. The present Convention shall enter into force on the ninetieth day following the date on which Governments of eight States including five States each with not less than 1,000,000 gross tons of tanker tonnage have either signed it without reservation as to ratification, acceptance or approval or have deposited instruments of ratification, acceptance, approval or accession with the Secretary-General of the Organization.
2. For each State which subsequently ratifies, accepts, approves or accedes to it the present Convention shall come into force on the ninetieth day after deposit by such State of the appropriate instrument.

Article XVI

1. The present Convention may be denounced by any Contracting State at any time after the date on which the Convention comes into force for that State.
2. Denunciation shall be effected by the deposit of an instrument with the Secretary-General of the Organization.
3. A denunciation shall take effect one year, or such longer period as may be specified in the instrument of denunciation, after its deposit with the Secretary-General of the Organization.

Article XVII

1. The United Nations, where it is the administering authority for a territory, or any Contracting State responsible for the international relations of a territory, shall as soon as possible consult with the appropriate authorities of such territory or take such other measures as may be appropriate, in order to extend the present Convention to that territory and may at any time by notification in writing to the Secretary-General of the Organization declare that the present Convention shall extend to such territory.
2. The present Convention shall, from the date of receipt of the notification or from such other date as may be specified in the notification, extend to the territory named therein.
3. The United Nations, or any Contracting State which has made a declaration under paragraph 1 of this Article may at any time after the date on which the Convention has been so extended to any territory declare by notification in writing to the Secretary-General of the Organization that the present Convention shall cease to extend to any such territory named in the notification.
4. The present Convention shall cease to extend to any territory mentioned in such notification one year, or such longer period as may be specified therein, after the date of receipt of the notification by the Secretary-General of the Organization.

Article XVIII

1. A Conference for the purpose of revising or amending the present Convention may be convened by the Organization.
2. The Organization shall convene a Conference of the Contracting States for revising or amending the present Convention at the request of not less than one-third of the Contracting States.

Article XIX

1. The present Convention shall be deposited with the Secretary-General of the Organization.
2. The Secretary-General of the Organization shall:
 - (a) inform all States which have signed or acceded to the Convention of:
 - (i) each new signature or deposit of instrument together with the date thereof;
 - (ii) the deposit of any instrument of denunciation of this Convention together with the date of the deposit;
 - (iii) the extension of the present Convention to any territory under paragraph 1 of Article XVII and of the termination of any such extension under the provisions of paragraph 4 of that Article stating in each case the date on which the present Convention has been or will cease to be so extended;
 - (b) transmit certified true copies of the present Convention to all Signatory States and to all States which accede to the present Convention.

Article XX

As soon as the present Convention comes into force, the text shall be transmitted by the Secretary-General of the Organization to the Secretariat of the United Nations for registration and publication in accordance with Article 102 of the Charter of the United Nations.

Article XXI

The present Convention is established in a single copy in the English and French languages, both texts being equally authentic. Official translations in the Russian and Spanish languages shall be prepared and deposited with the signed original.

IN WITNESS WHEREOF the undersigned* being duly authorized by their respective Governments for that purpose have signed the present Convention.

DONE at Brussels this twenty-ninth day of November 1969.

PROTOCOL TO THE INTERNATIONAL CONVENTION ON CIVIL LIABILITY FOR OIL POLLUTION DAMAGE, 1969

THE PARTIES TO THE PRESENT PROTOCOL,

BEING PARTIES to the International Convention on Civil Liability for Oil Pollution Damage, done at Brussels on 29 November 1969;

HAVE AGREED AS FOLLOWS:

ARTICLE I

For the purpose of the present Protocol:

1. "Convention" means the International Convention on Civil Liability for Oil Pollution Damage, 1969.
2. "Organization" has the same meaning as in the Convention.
3. "Secretary-General" means the Secretary-General of the Organization.

ARTICLE II

Article V of the Convention is amended as follows:

- (1) Paragraph 1 is replaced by the following text:

"The owner of a ship shall be entitled to limit his liability under this Convention in respect of any one incident to an aggregate amount of 133 units of account for each ton of the ship's tonnage. However, this aggregate amount shall not in any event exceed 14 million units of account."

- (2) Paragraph 9 is replaced by the following text:

9(a) The "unit of account" referred to in paragraph 1 of this Article is the Special Drawing Right as defined by the International Monetary Fund. The amounts mentioned in paragraph 1 shall be converted into the national currency of the State in which the fund is being constituted on the basis of the value of that currency by reference to the Special Drawing Right on the date of the constitution of the fund. The value of the national currency, in terms of the Special Drawing Right, of a Contracting State which is a member of the International Monetary Fund, shall be calculated in accordance with the method of valuation applied by the International Monetary Fund in effect at the date in question for its operations and transactions. The value of the national currency, in terms of the Special Drawing Right, of a Contracting State which is not a member of the International Monetary Fund, shall be calculated in a manner determined by that State.

9(b) Nevertheless, a Contracting State which is not a member of the International Monetary Fund and whose law does not permit the application of the provisions of paragraph 9(a) of this Article may, at the time of ratification, acceptance, approval or accession to the present Convention, or at any time thereafter, declare that the limits of liability provided for in paragraph 1 to be applied in its territory shall, in respect of any one incident, be an aggregate of 2,000 monetary units for each ton of the ship's tonnage provided that this aggregate amount shall not in any event exceed 210 million monetary units. The monetary unit referred to in this paragraph corresponds to sixty-five and a half milligrammes of gold of millesimal fineness nine hundred. The conversion of these amounts into the national currency shall be made according to the law of the State concerned.

9(c) The calculation mentioned in the last sentence of paragraph 9(a) and the conversion mentioned in paragraph 9(b) shall be made in such a manner as to express in the national currency of the Contracting State as far as possible the same real value for the amounts in paragraph 1 as is expressed there in units of account. Contracting States shall communicate to the depositary the manner of calculation pursuant to paragraph 9(a), or the result of the conversion in paragraph 9(b) as the case may be, when depositing an instrument referred to in Article IV and whenever there is a change in either.

ARTICLE III

1. The present Protocol shall be open for signature by any State which has signed the Convention or acceded thereto and by any State invited to attend the Conference to Revise the Unit of Account Provisions of the Convention on Civil Liability for Oil Pollution Damage, 1969, held in London from 17 to 19 November 1976. The Protocol shall be open for signature from 1 February 1977 to 31 December 1977 at the Headquarters of the Organization.

2. Subject to paragraph 4 of this Article, the present Protocol shall be subject to ratification, acceptance or approval by the States which have signed it.

3. Subject to paragraph 4 of this Article, this Protocol shall be open for accession by States which did not sign it.

4. The present Protocol may be ratified, accepted, approved or acceded to by States Parties to the Convention.

ARTICLE IV

1. Ratification, acceptance, approval or accession shall be effected by the deposit of a formal instrument to that effect with the Secretary-General.

2. Any instrument of ratification, acceptance, approval or accession deposited after the entry into force of an amendment to the present Protocol with respect to all existing Parties or after the completion of all measures required for the entry into force of the amendment with respect to all existing Parties, shall be deemed to apply to the Protocol as modified by the amendment.

ARTICLE V

1. The present Protocol shall enter into force for the States which have ratified, accepted, approved or acceded to it on the ninetieth day following the date on which eight States including five States each with not less than 1,000,000 gross tons of tanker tonnage have deposited instruments of ratification, acceptance, approval or accession with the Secretary-General.
2. For each State which subsequently ratifies, accepts, approves or accedes to it, the present Protocol shall enter into force on the ninetieth day after the deposit by such State of the appropriate instrument.

ARTICLE VI

1. The present Protocol may be denounced by any Party at any time after the date on which the Protocol enters into force for that Party.
2. Denunciation shall be effected by the deposit of an instrument to that effect with the Secretary-General.
3. Denunciation shall take effect one year, or such longer period as may be specified in the instrument of denunciation, after its deposit with the Secretary-General.

ARTICLE VII

1. A Conference for the purpose of revising or amending the present Protocol may be convened by the Organization.
2. The Organization shall convene a Conference of Parties to the present Protocol for the purpose of revising or amending it at the request of not less than one-third of the Parties.

ARTICLE VIII

1. The present Protocol shall be deposited with the Secretary-General.
2. The Secretary-General shall:
 - (a) inform all States which have signed the present Protocol or acceded thereto of:
 - (i) each new signature or deposit of an instrument together with the date thereof;
 - (ii) the date of entry into force of the present Protocol;
 - (iii) the deposit of any instrument of denunciation of the present Protocol together with the date on which the denunciation takes effect;
 - (iv) any amendments to the present Protocol;
 - (b) transmit certified true copies of the present Protocol to all States which have signed the present Protocol or acceded thereto.

ARTICLE IX

As soon as the present Protocol enters into force, a certified true copy thereof shall be transmitted by the Secretary-General to the Secretariat of the United Nations for registration and publication in accordance with Article 102 of the Charter of the United Nations.

ARTICLE X

The present Protocol is established in a single original in the English and French languages, both texts being equally authentic. Official translations in the Russian and Spanish languages shall be prepared and deposited with the signed original.

DONE AT LONDON this nineteenth day of November one thousand nine hundred and seventy-six.

IN WITNESS WHEREOF the undersigned* being duly authorized for that purpose have signed the present Protocol.

* *Signatures omitted.*

TOVALOP

THE TANKER OWNERS VOLUNTARY AGREEMENT CONCERNING LIABILITY FOR OIL POLLUTION

(Incorporating amendments as at February 20th, 1994)

Administered By

THE INTERNATIONAL TANKER OWNERS POLLUTION FEDERATION LIMITED

STAPLE HALL

STONEHOUSE COURT

87-90 HOUNDSDITCH

LONDON EC3A 7AX

Tel: 071-621 1255 Fax: 071-621 1783 Telex: 887514 TOVLOP G

THE TANKER OWNERS VOLUNTARY AGREEMENT CONCERNING LIABILITY FOR OIL POLLUTION (“TOVALOP”)

STANDING AGREEMENT

Introduction

The Parties to this Agreement are Tanker Owners and Bareboat Charterers.

By means of the Tanker Owners Voluntary Agreement concerning Liability for Oil Pollution dated January 7th, 1969, as amended, (hereinafter called “TOVALOP”) the Parties took constructive measures to mitigate and provide compensation for damage by oil pollution from Tankers.

Pending the widespread application of the International Convention on Civil Liability for Oil Pollution Damage, 1969 and the Protocols thereto, the Parties have from time to time amended TOVALOP to enhance the benefits and protection available to persons sustaining Pollution Damage.

Accordingly, the Parties, and such other Tanker Owners and Bareboat Charterers as may hereafter become Parties, in consideration of their mutual promises, have agreed with one another and do hereby agree as follows:

I. Definitions

Whenever the following words and phrases appear in the Introduction and other Clauses hereof, they shall have the meaning indicated below:

- (a) “Bareboat Charterer” means the Person(s) who has chartered a Tanker upon terms which provide, among other things, that the Charterer shall have exclusive possession and control of the Tanker during the life of the charter.
- (b) “Cost” or “Costs” means reasonable cost or costs, respectively.
- (c) The “Federation” means The International Tanker Owners Pollution Federation Limited, a Company limited by guarantee and formed pursuant to the laws of England for the purpose of administering this Agreement.
- (d) “Incident” means any occurrence, or series of occurrences having the same origin, which causes Pollution Damage, or which creates the Threat of an escape or discharge of Oil.
- (e) “Liability Convention” means the International Convention on Civil Liability for Oil Pollution Damage, 1969, including the 1976 Protocol thereto and legislation and regulations implementing the provisions thereof which are enacted from time to time by any Contracting State thereunder.
- (f) “Oil” means any persistent hydrocarbon mineral oil such as crude oil, fuel oil, heavy diesel oil and lubricating oil whether or not carried as cargo.

- (g) "Owner" means the Person or Persons registered as the owner of the Tanker or, in the absence of registration, the Person or Persons owning the Tanker. However, in the case of a Tanker owned by a State and operated by a company which in that State is registered as the Tanker's operator, "Owner" shall mean such company. Notwithstanding the foregoing, in the case of a Tanker under bareboat charter, "Owner" means the Bareboat Charterer.
- (h) "Participating Owner" means the Owner of a Tanker who is a Party.
- (i) "Party" means a Party to this Agreement.
- (j) "Person" means any individual or partnership or any public or private body, whether corporate or not, including a State or any of its constituent subdivisions.
- (k) "Pollution Damage" means loss or damage caused outside the Tanker by contamination resulting from the escape or discharge of Oil from the Tanker, wherever such escape or discharge may occur, provided that the loss or damage is caused on the territory, including the territorial sea, of any State and includes the costs of Preventive Measures, wherever taken, and further loss or damage caused by Preventive Measures but excludes any loss or damage which is remote or speculative, or which does not result directly from such escape or discharge.
- (l) "Preventive Measures" means any reasonable measures taken by any Person after an Incident has occurred to prevent or minimise Pollution Damage.
- (m) "Protocol" means the 1992 Protocol to the Liability Convention.
- (n) "Tanker" means any sea-going vessel and any sea-borne craft of any type whatsoever, designed and constructed for carrying Oil in bulk as cargo, whether or not it is actually so carrying Oil.
- (o) "Threat of an escape or discharge of Oil" means a grave and imminent danger of the escape or discharge of Oil from a Tanker which, if it occurred, would create a serious danger of Pollution Damage, whether or not an escape or discharge in fact subsequently occurs.
- (p) "Threat Removal Measures" means reasonable measures taken by any Person after an Incident has occurred for the purposes of removing the Threat of an escape or discharge of Oil.
- (q) A Tanker's "Tonnage" shall be the net tonnage of the Tanker with the addition of the amount deducted from the gross tonnage on account of engine room space for the purpose of ascertaining the net tonnage. In the case of a Tanker for which this Tonnage cannot be ascertained, the Tanker's Tonnage shall be deemed to be 40 per cent. of the weight in tons of 2,240lbs. of Oil which the Tanker is capable of carrying.
- (r) "Ton" means a ton of a Tanker's Tonnage.

II. General Conditions

(A) Upon acceptance by the Federation of an application by an Owner in the form annexed hereto as Exhibit "A", that Owner shall become a Party and a member of the Federation.

(B) Each Party shall:

- (1) make the terms of this Agreement applicable to all Tankers of which he is or becomes Owner;
- (2) at all times be the Owner of a Tanker to which the terms of this Agreement are applied;
- (3) establish and maintain his financial capability to fulfil his obligations under this Agreement to the satisfaction of the Federation;
- (4) dispose of all valid claims against him arising under this Agreement as promptly as is practicable;
- (5) become a member of the Federation and, subject to the Articles of Association of the Federation, remain a member thereof so long as he continues to be a Party hereto;
- (6) abide by the Memorandum and Articles of Association of the Federation and all rules and directives of the Federation; and
- (7) fulfil all his other obligations under this Agreement.

(C) A Party shall forthwith notify the Federation if he shall fail to perform or observe any of the conditions specified in Clause II(B).

(D) A Party shall forthwith cease to be a Party if he shall fail to perform or observe any of the conditions specified in Clause II(B), but without, however, affecting his rights and obligations accrued at the time of such cessation (including his obligation under Clause II(C)) and without limitation to his right at any time thereafter to become a Party.

(E) Without prejudice to the foregoing provisions of this Clause or to the generality of Clause IX the Federation may at any time by notice in writing require a Party to inform it whether or not that Party has failed to perform or observe any of the conditions specified in Clause II(B) and if that Party shall fail to respond to such request within 28 days after the date of that notice, then that Party shall thereupon forthwith cease to be a Party.

III. Duration

(A) This Agreement may be terminated by Special Resolution adopted at a General Meeting of the members of the Federation convened and conducted in accordance with the Articles of Association of the Federation upon a poll vote in which at least 75 per cent. of the votes cast are in favour of the said Resolution.

(B) A Party may withdraw from this Agreement on any date by giving at least six months prior written notice of withdrawal to the Federation, or in accordance with Clause X.

(C) The withdrawal of a Party from this Agreement under Clause III, or under Clause X, or termination of this Agreement by the Parties shall not affect any rights and obligations of any Party then accrued under this Agreement.

(D) Upon termination of this Agreement the Federation shall continue in existence for such reasonable period as is necessary to wind up its affairs.

IV. Responsibility

(A) Subject to the terms and conditions of this Agreement, the Participating Owner of a Tanker involved in an Incident agrees to assume responsibility hereunder in respect of Pollution Damage caused by Oil which has escaped or which has been discharged from the Tanker, and the Cost of Threat Removal Measures taken as a result of the Incident.

(B) No responsibility for Pollution Damage or for the Cost of Threat Removal Measures shall be assumed if the Incident:

- (a) caused Pollution Damage anywhere in the world for any part of which liability is imposed under the terms of the Liability Convention or the Protocol, or
- (b) resulted from an act of war, hostilities, civil war, insurrection or a natural phenomenon of an exceptional, inevitable and irresistible character, or
- (c) was wholly caused by an act or omission done with intent to cause damage by a third party, or
- (d) was wholly caused by the negligence or other wrongful act of any Government or other authority responsible for the maintenance of lights or other navigational aids in the exercise of that function.

(C) If Pollution Damage or the circumstances which gave rise to Threat Removal Measures resulted wholly or partially from the negligence of the Person who sustained the Pollution Damage or who took the Threat Removal Measures, the Participating Owner shall be exonerated wholly or partially from any responsibility he would otherwise have to such Person under this Agreement.

V. Responsibility for Pollution Damage Where Two or More Tankers are Involved

When Oil has escaped or been discharged from two or more Tankers of Participating Owners and causes Pollution Damage, the Participating Owners concerned, except as exonerated by reason of Clause IV, shall be jointly and severally responsible hereunder in respect of all such Pollution Damage which is not reasonably separable.

VI. Preventive Measures and Threat Removal Measures by the Participating Owner

A Participating Owner of a Tanker involved in an Incident shall exercise his best efforts to take such Preventive Measures and/or Threat Removal Measures as are practicable and appropriate under the circumstances. The taking of such Measures shall not constitute an admission of liability or of responsibility under this Agreement.

Each Participating Owner shall in connection with the establishment and maintenance of financial capability referred to in Clause II(B)(3) make appropriate provision for the reimbursement of the Cost of such Measures.

VII. Limits of Financial Responsibility

(A) The maximum financial responsibility under this Agreement of a Participating Owner in respect of any one Incident shall be One Hundred and Sixty U.S. Dollars (US\$160.00) per Ton of each of his Tankers involved in the Incident, or Sixteen Million Eight Hundred Thousand U.S. Dollars (US\$16,800,000.00), whichever is less.

(B) When the aggregate of the established claims hereunder exceeds the maximum financial responsibility specified in Clause VII(A), the Participating Owner(s) shall pay that proportion of each of those established claims as the said maximum financial responsibility bears to the total amount of those established claims.

(C) If, before the Participating Owner has satisfied in full his financial responsibility under this Agreement, he or any Person falling within the definition of Owner hereunder or any Person providing the Participating Owner or such Person insurance or other financial security has, as a result of the Incident in question, paid compensation for Pollution Damage and/or for the Costs of Threat Removal Measures, then

- (a) the amount of that payment shall be taken into account in assessing the aggregate of established claims under this Agreement in respect of that Incident; and
- (b) the Participating Owner or other such Person making such payment shall, to the extent of that payment, be in the same position as the Person to whom that sum was paid would have been.

(D) Costs incurred in taking Preventive Measures and/or Threat Removal Measures by the Participating Owner or any Person falling within the definition of Owner hereunder or any Person providing the Participating Owner or such Person insurance or other financial security shall be treated as if they were claims by Persons other than the Participating Owner and

- (a) the amount of those Costs shall be taken into account in assessing the aggregate of established claims under this Agreement in respect of that Incident; and
- (b) the Participating Owner or other such Person incurring such Costs shall, to the extent of those Costs, be in the same position as if he were any other Person with a claim under this Agreement.

(E) When a Participating Owner establishes that the aggregate of claims in respect of an Incident may exceed his maximum financial responsibility hereunder, he or any Person providing him insurance or other financial security may in his sole discretion make partial payment to claimants until the full extent of all claims is determined.

VIII. Procedure and Miscellaneous

(A) The Parties hereto authorise the Federation to provide Persons concerned with the escape or discharge of Oil or the Threat thereof with a copy of this Agreement and confirmation that the Owner was, at the time of such escape or discharge or Threat, a Participating Owner.

(B) A Participating Owner may require that any payment hereunder to a Person by him, or on his behalf by anyone providing him insurance or other financial security, shall be conditional upon either that Person assigning to that Participating Owner his right of action, or authorising him to proceed in the name of that Person, in each case up to the amounts paid or to be paid to that Person in relation to the Incident in question.

(C) No responsibility shall arise under this Agreement unless written notice of claim is received by the Participating Owner within two years of the date of the Incident.

(D) Unless otherwise agreed in writing, any payment to a Person by or on behalf of a Participating Owner shall be in full settlement of all said Person's claims against the Participating Owner, the Tanker involved, its master, officers and crew, its charterer(s), manager or operator and their respective officers, agents, employees and affiliates and underwriters, which arise out of the Incident.

(E) Persons making claims hereunder may, in the event of a dispute with a Participating Owner concerning same, commence arbitration proceedings, in accordance with Clause VIII(F) hereof, within three years of the date of the Incident, and these proceedings shall be the exclusive means for enforcing a Participating Owner's responsibility hereunder. Each Participating Owner by becoming a Party to this Agreement, and so long as he remains bound hereby, shall be deemed irrevocably to have offered to any such Person to submit all such disputes to arbitration as provided in said Clause VIII(F).

(F) All claims by any Person or Persons under this Agreement shall, if not otherwise disposed of, be finally settled under the rules of conciliation and arbitration of the International Chamber of Commerce by one or more arbitrators appointed in accordance with said rules. In any such proceeding the Person allegedly having the claim shall have the burden of proving that Oil discharged from the Tanker caused him Pollution Damage or that the Threat thereof necessitated his taking Threat Removal Measures.

(G) Except as provided by Clause V, no Participating Owner shall be responsible under this Agreement in respect of an escape or discharge of Oil or the Threat thereof from the Tanker of another Participating Owner.

(H) This Agreement does not create any rights against the Federation and the Federation shall have no liability hereunder or otherwise to any Person.

(I) No rights or obligations created hereunder or connected herewith may be assigned or transferred except as provided in Clause VIII(B).

(J) No payment made hereunder shall be deemed (i) an admission of, or evidence of liability on the part of the Participating Owner in any proceeding or to any Person, or (ii) submission to any jurisdiction on the part of the Participating Owner for any purpose whatsoever.

(K) Nothing in this Agreement shall prejudice the right of recourse of a Participating Owner against third parties or vessels.

IX. Interpretation

The Federation shall have the right to make rules and directives from time to time with respect to the interpretation and administration of this Agreement.

X. Amendments

This Agreement may be amended by Special Resolution adopted at a General Meeting of the members of the Federation convened and conducted in accordance with the Articles of Association of the Federation upon a poll vote in which at least 75 per cent. of the votes cast are in favour of said Resolution. A Party who votes against such Resolution shall thereupon have the option, to be exercised by written notice served upon the Federation within sixty days of the date of said Special Resolution, to withdraw from this Agreement, without, however, affecting his rights and obligations accrued at the time of his withdrawal.

XI. Law Governing

This Agreement shall be governed by the laws of England. However, anything herein to the contrary notwithstanding, a Participating Owner shall not be required:

- (a) to incur any obligation or take any action, with respect to any Incident in which his Tanker is involved, which would violate the laws or government regulations of the flag State of the Tanker; or
- (b) to incur any obligation or take any action which would, if a majority of the stock of the Participating Owner is owned, directly or indirectly by another corporation, partnership or individual, violate any laws or government regulations which may apply to said other corporation, partnership or individual.

SUPPLEMENT

Introduction

The Parties recognise that (i) while the Standing Agreement (as hereinafter defined) has provided constructive measures to mitigate and provide compensation for Pollution Damage, it does not now provide, in all respects, adequate compensation for all legitimate claims for Pollution Damage, (ii) while the Liability Convention has established, in many jurisdictions, a legal system providing for the compensation of persons who sustain Pollution Damage, it does not provide for compensation of Costs incurred to remove a Threat of an escape or discharge of Oil from a Tanker where no pollution occurs, nor does it provide, in all respects, adequate compensation for all legitimate claims for Pollution Damage and (iii) it will require some time before the Protocol to the Liability Convention will come into force in a substantial number of jurisdictions.

Accordingly, the Parties decided to amend TOVALOP pursuant to Clause X thereof effective from February 20th, 1987 by the adoption of this Supplement (as subsequently amended) so as to provide in respect of an Applicable Incident (as hereinafter defined) enhanced compensation for Pollution Damage and Costs incurred to remove a Threat of an escape or discharge of Oil, but without affecting the provisions of the Standing Agreement which alone shall continue to apply to any Incident which is not an Applicable Incident.

1. Definitions and Interpretation

(1) Whenever the following words and phrases appear in the Introduction to and other Paragraphs of this Supplement, they shall have the meaning set forth below:

- (A) "Applicable Incident" means any occurrence or series of occurrences, having the same origin, which causes Pollution Damage by, or which creates the Threat of an escape or discharge of, Oil when the cargo in the Tanker is "owned", as defined in CRISTAL, by an Oil Company Party to CRISTAL.
- (B) "CRISTAL" means the Contract Regarding a Supplement to Tanker Liability for Oil Pollution dated January 14th, 1971, as the same has been and may from time to time be amended.
- (C) "Cristal Limited" means Cristal Limited, a company organised and existing under the Laws of Bermuda.
- (D) "Fund" means the International Oil Pollution Compensation Fund established under the Fund Convention.
- (E) "Fund Convention" means the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, 1971, as amended from time to time, including the 1976 and 1992 Protocols thereto.
- (F) "Pollution Damage" means (i) physical loss or damage caused outside the Tanker by contamination resulting from the escape or discharge of Oil from the Tanker, wherever such escape or discharge may occur, including such

loss or damage caused by Preventive Measures, and/or (ii) proven economic loss actually sustained, irrespective as to accompanying physical damage, as a direct result of contamination as set out in (i) above, including the Costs of Preventive Measures, and/or (iii) Costs actually incurred in taking reasonable and necessary measures to restore or replace natural resources damaged as a direct result of an Applicable Incident, but excluding any other damage to the environment.

- (G) "Preventive Measures" means any reasonable measures taken by any Person after an Applicable Incident has occurred to prevent or minimise Pollution Damage.
 - (H) "Special Drawing Right" or "SDR" means a Special Drawing Right as defined by the International Monetary Fund.
 - (I) "Standing Agreement" means the Tanker Owners Voluntary Agreement concerning Liability for Oil Pollution dated January 7th, 1969, as the same has been and may from time to time be amended, but excluding the provisions of this Supplement thereto.
 - (J) "Tanker" means any sea-going vessel and any sea-borne craft of any type whatsoever, designed and constructed for carrying Oil in bulk as cargo, and actually so carrying Oil.
 - (K) "Threat Removal Measures" means reasonable measures taken by any Person after an Applicable Incident has occurred for the purposes of removing a Threat of an escape or discharge of Oil.
 - (L) "Ton" means a ton of a Tanker's gross tonnage calculated in accordance with the tonnage measurement regulations contained in Annex I of the International Convention on Tonnage Measurement of Ships, 1969 whether or not that Convention is in force and applicable to the Tanker in question.
- (2) (A) Insofar as they are not varied by this Paragraph 1, words and phrases shall have the same meanings as defined in Clause I of the Standing Agreement whenever they appear in this Supplement.
- (B) References in this Supplement to Clauses I to XI are references to those Clauses in the Standing Agreement, and references to Paragraphs 1 to 5 are references to those Paragraphs in this Supplement.
 - (C) References in the Standing Agreement to "this Agreement" shall, where the context permits, apply also to the provisions of this Supplement.
 - (D) The Standing Agreement alone shall apply to an Incident (as defined in Clause I(d) thereof) which is not an Applicable Incident and shall remain in full force and effect in respect of each such Incident. This Supplement shall not apply to any Incident which is not an Applicable Incident.
 - (E) The provisions of this Supplement shall apply to an Applicable Incident in substitution for and to the exclusion of Clauses IV, V and VII of the Standing Agreement. The provisions of all other Clauses of the Standing Agreement shall apply to an Applicable Incident except where those provisions are inconsistent with this Supplement, in which event this Supplement shall prevail.

2. Duration

(A) This Supplement shall apply to Applicable Incidents occurring at or after 12.00 hours G.M.T. on February 20th, 1994 and shall cease to apply to Applicable Incidents occurring after 12.00 hours G.M.T. on February 20th, 1997, it being understood that nothing set forth herein shall affect the obligations of a Participating Owner with respect to an Applicable Incident which shall have occurred prior to 12.00 hours G.M.T. on February 20th, 1994.

(B) Upon termination of this Supplement the existence of the Federation shall not be affected, its continued existence being governed by the terms of the Standing Agreement.

3. Financial Responsibility for an Applicable Incident

(A) If an Applicable Incident occurs which does not cause Pollution Damage in a jurisdiction where the provisions of the Fund Convention are in force (but irrespective as to whether or not the provisions of the Liability Convention or any other applicable domestic laws are in force) the Participating Owner of a Tanker involved in that Applicable Incident shall, subject to the provisions of Paragraph 3(C), take such Preventive Measures and/or Threat Removal Measures as are practical and appropriate under the circumstances and, subject as aforesaid and in the following order of priority —

- (1) pay such amount(s) to such Person(s) as may be necessary to fulfil his obligations under the Liability Convention, the Protocol and domestic legislation giving effect thereto or any other applicable domestic law together with any Costs incurred by the Participating Owner in taking Preventive Measures and/or Threat Removal Measures; and
- (2) compensate any Person who would otherwise remain uncompensated and who (i) sustains Pollution Damage and/or (ii) incurs Costs in taking Preventive Measures and/or Threat Removal Measures.

(B) If an Applicable Incident occurs which causes Pollution Damage in a jurisdiction where the provisions of both the Liability Convention and Fund Convention are in force, the Participating Owner of a Tanker involved in that Applicable Incident shall, subject to the provisions of Paragraph 3(C), take such Preventive Measures and/or Threat Removal Measures as are practical and appropriate under the circumstances and, subject as aforesaid and in the following order of priority —

- (1) pay such amount(s) to such Person(s) as may be necessary to fulfil his obligations under the Liability Convention, the Protocol and domestic legislation giving effect thereto or any other applicable domestic law together with any Costs incurred by the Participating Owner in taking Preventive Measures and/or Threat Removal Measures;
- (2) compensate Cristal Limited in an amount equal to the amount that the Fund has assessed against Oil Company Parties to CRISTAL as a result of the Applicable Incident; and
- (3) compensate any Person who would otherwise remain uncompensated and who (i) sustains Pollution Damage and/or (ii) incurs Costs in taking Preventive Measures and/or Threat Removal Measures.

(C) The responsibilities which a Participating Owner has assumed, pursuant to Paragraphs 3(A) and (B), shall be subject to the following terms and conditions:

- (1) A Participating Owner shall not be obligated to take Preventive Measures or Threat Removal Measures or pay Costs or make any compensation to a Person if the Applicable Incident (i) resulted from an act of war, hostilities, civil war, insurrection or a natural phenomenon of an exceptional, inevitable and irresistible character, or (ii) was wholly caused by an act or omission done with intent to cause damage by a third party or (iii) was wholly caused by the negligence or other wrongful act of any Government or other authority responsible for the maintenance of lights or other navigational aids in the exercise of that function. Notwithstanding the foregoing provisions of this sub-paragraph (1), a Participating Owner shall (irrespective as to whether he bears or would bear any liability under the Liability Convention with respect to the Applicable Incident) compensate Cristal Limited pursuant to Paragraph 3(B)(2) except when the Applicable Incident (i) resulted from an act of war, hostilities, civil war or insurrection or (ii) was wholly caused by an act or omission done with intent to cause damage by a third party.
- (2) If Pollution Damage or the circumstances which gave rise to Preventive Measures or Threat Removal Measures resulted wholly or partially either from an act or omission done with intent to cause damage by, or from the negligence of, the Person who sustained the Pollution Damage and/or who took the Preventive Measures and/or Threat Removal Measures, the Participating Owner shall be proportionately exonerated from any responsibility he would otherwise have to such Person.
- (3) The maximum amount of Costs to be incurred in respect of Preventive Measures and Threat Removal Measures and compensation to be paid by a Participating Owner under Paragraph 3(A) or (B) in respect of each of his Tankers involved in any one Applicable Incident, shall not exceed an amount equal, in the case of a Tanker of Five Thousand (5,000) Tons or less, Three Million SDRs (SDR 3,000,000) and for a Tanker in excess of Five Thousand (5,000) Tons, Three Million SDRs (SDR 3,000,000) plus an additional Four Hundred and Twenty SDRs (SDR 420) for each Ton in excess of said Five Thousand Tons, subject to a maximum of Fifty-Nine Million Seven Hundred Thousand SDRs (SDR 59,700,000).
- (4) When Oil has escaped or been discharged from two or more Tankers of Participating Owners and/or there is a Threat of an escape or discharge of Oil from two or more Tankers of Participating Owners, the Participating Owners concerned, subject to the other provisions of Paragraph 3(C), shall be jointly and severally responsible for all said Costs and compensation under Paragraphs 3(A) and (B) which are not reasonably separable.
- (5) If the maximum sum that can be paid by a Participating Owner within the provisions of Paragraph 3(C)(3), after deducting all payments made or to be made together with all Costs incurred under Paragraph 3(A)(1) or, as the case may be, 3(B)(1) and (2), is insufficient to meet all established claims in respect of an Applicable Incident under Paragraphs 3(A)(2) or (B)(3), then the Participating Owner shall pay that proportion of each of those established claims as the available balance of that maximum sum bears to the total amount of those established claims.

4. Special Provisions

(A) If, before the Participating Owner has satisfied in full his financial responsibility under this Supplement, he or any Person falling within the definition of Owner hereunder or any Person providing the Participating Owner or such Person insurance or other financial security has, as a result of the Applicable Incident in question, made payment pursuant to Paragraphs 3(A) or (B), then

- (1) the amount of that payment shall be taken into account in assessing the aggregate of established claims under this Supplement in respect of that Applicable Incident; and
- (2) the Participating Owner or other such Person making such payment shall, to the extent of that payment, be in the same position as the Person to whom that sum was paid would have been.

(B) When a Participating Owner establishes that the aggregate of claims in respect of an Applicable Incident may exceed the available balance of his maximum financial responsibility hereunder, he or any Person providing him insurance or other financial security may in his sole discretion make partial payment to claimants until the full extent of all claims is determined.

(C) For the purpose of determining the extent to which a Participating Owner has discharged his financial responsibility the amount of any payment made by a Participating Owner under this Supplement in a national currency shall be converted into Special Drawing Rights on the basis of the value of a Special Drawing Right by reference to that national currency on the date of such payment, except when a limitation fund is established under the provisions of the Liability Convention or the Protocol when the conversion shall be on the basis of the value of a Special Drawing Right to that national currency on the date that the limitation fund is established. The value shall be calculated in accordance with the method of valuation applied by the International Monetary Fund in effect on the date in question for its operations and transactions. In the case of a currency for which no such valuation exists, the amount of any payment in said currency shall be converted to United States Dollars at the buy rate of exchange for said currency to United States Dollars as quoted by the National Westminster Bank Plc on the date in question and the resulting United States Dollar amount shall be converted into Special Drawing Rights on the basis and in accordance with the method of valuation aforesaid.

5. Procedure and Miscellaneous

(A) The provisions of Clauses VIII(B), (D) and (E) of the Standing Agreement shall apply to this Supplement as if references in those Clauses to the Incident were to the Applicable Incident.

(B) No financial responsibility shall arise under Paragraph 3(A) or (B) unless written notice of claim is received by the Participating Owner within two years of the date of the Applicable Incident giving rise thereto, it being understood that this provision shall not apply to the Participating Owner's obligation to compensate Cristal Limited under Paragraph 3(B)(2) which obligation shall not arise unless written notice of claim is received by Cristal Limited from an Oil Company Party and notified in writing to the Participating Owner within one year after the date that payment of the contribution under Article 10 of the Fund Convention is to be made.

(C) In the event that during the period of this Supplement there shall be any change to any oil pollution compensation regime, including CRISTAL, which, in the opinion of the Board of Directors of the Federation, is or may be material to the Parties' obligations hereunder, then the said Board shall further consider the same with a view to making such recommendation to Parties in that regard as it thinks fit.



**CONTRACT REGARDING A SUPPLEMENT
TO TANKER LIABILITY FOR OIL POLLUTION**

As amended February 20, 1994

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CONTRACT REGARDING A SUPPLEMENT TO TANKER LIABILITY FOR OIL POLLUTION

PREAMBLE

The Parties to this Contract are various Oil Companies and Cristal Limited (hereinafter referred to as "CRISTAL"), a Company organised and existing under the laws of Bermuda.

The Parties recognize that (i) Tankers carrying bulk Oil cargoes may cause substantial Pollution Damage as a result of the escape or discharge of Oil into the sea, and (ii) Persons who have sustained Pollution Damage are sometimes unable to recover adequate compensation.

Therefore, the Parties have decided by means of this Contract to (i) provide supplemental compensation to such Persons and (ii) reimburse Oil Company Parties their contributions to the Fund, when cargoes are "owned" by Oil Company Parties, all in accordance with the terms and conditions set forth herein.

Clause I.

Definitions

For the purpose of this Contract (including the Preamble):

(A) "Bareboat Charterer" means the Person (or Persons) who has chartered a Tanker upon terms which provide, among other things, that the charterer shall have exclusive possession and control of the Tanker during the life of the charter.

(B) "Cost" or "Costs" means reasonable cost or costs, respectively.

(C) "Fund" means the International Oil Pollution Compensation Fund established under the Fund Convention.

(D) "Fund Convention" means the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, 1971, including any amendments thereto in force from time to time.

(E) "Incident" means any occurrence, or series of occurrences having the same origin, which causes Pollution Damage, or which creates the Threat of an escape or discharge of Oil.

(F) "Liability Convention" means the International Convention on Civil Liability for Oil Pollution Damage, 1969, including any amendments thereto in force from time to time.

(G) "Oil" means any persistent hydrocarbon mineral oil including, but not limited to, crude oil, fuel oil, heavy diesel oil and lubricating oil whether carried on board a Tanker as cargo or in the bunkers of such a Tanker.

(H) "Oil Company" means any Person (i) engaged in the production, refining, marketing, storing, trading or terminaling of Oil, or any one or more of whose affiliates are so engaged or (ii) that receives Oil in bulk for its own consumption or use.

(I) "Oil Company Party" means an Oil Company which is a Party to this Contract.

(J) "Owner" means the Person or Persons registered as the owner of the Tanker or, in the absence of registration, the Person or Persons owning the Tanker. However, in the case of a Tanker owned by a State and operated by a company which in that State is registered as the Tanker's operator, "Owner" shall mean such company. Notwithstanding the foregoing, in the case of a Tanker under bareboat charter, "Owner" means the Bareboat Charterer or any other Person deemed to be an owner under the laws applicable to the Incident.

(K) "Person" means (i) an Owner and (ii) any individual or partnership or any public or private body, whether corporate or not, including a State or any of its constituent subdivisions.

(L) "Preventive Measures" means any reasonable measures taken by any Person after an Incident has occurred to prevent or minimise Pollution Damage.

(M) "Pollution Damage" means (i) physical loss or damage caused outside the Tanker by contamination resulting from the escape or discharge of Oil from the Tanker, wherever such escape or discharge may occur, including such loss or damage caused by Preventive Measures, and/or (ii) proven economic loss actually sustained, irrespective as to accompanying physical damage, as a direct result of contamination as set out in (i) above, including the Costs of Preventive Measures, and/or (iii) Costs actually incurred in taking reasonable and necessary measures to restore or replace natural resources damaged as a direct result of an Incident, but excluding any other damage to the environment.

(N) "Tanker" means any seagoing vessel and any seaborne craft of any type whatsoever, designed and constructed for carrying Oil in bulk as cargo, and actually so carrying Oil.

(O) "Threat of an escape or discharge of Oil" means a grave and imminent danger of the escape or discharge of Oil from a Tanker, which, if it occurred, would create a serious danger of Pollution Damage, whether or not an escape or discharge in fact subsequently occurs.

(P) "Threat Removal Measures" means reasonable measures taken by any Person after an Incident has occurred for the purposes of removing the Threat of an escape or discharge of Oil.

(Q) "Ton" means a ton of a Tanker's gross tonnage calculated in accordance with the tonnage measurement regulations contained in Annex I of the International Convention on Tonnage Measurement of Ships, 1969 whether or not that Convention is in force and applicable to the Tanker in question.

(R) "Special Drawing Right" or "SDR" means a Special Drawing Right as defined by the International Monetary Fund."

Clause II.

General Conditions

(A) Any Oil Company may become an Oil Company Party to this Contract and a Member of CRISTAL upon acceptance by CRISTAL of an application in the form attached hereto as "Exhibit A".

(B) The obligations of an Oil Company Party under this Contract shall extend solely to CRISTAL and to the other Oil Company Parties hereto. The obligations of CRISTAL under this Contract shall extend solely to the Oil Company Parties hereto.

Clause III.

Effective Date

(A) This Contract shall be applicable to Incidents which shall have occurred at or after 12.00 hours G.M.T. on February 20, 1994, (the "Effective Date"), and shall no longer be applicable to Incidents occurring after 12.00 hours G.M.T. on February 20, 1997; it being understood that nothing set forth herein shall affect the obligations of CRISTAL with respect to an Incident which occurred prior to the Effective Date.

(B) An Oil Company Party may withdraw from this Contract at any time following the Effective Date, provided that it gives at least six (6) months prior written notice of withdrawal to CRISTAL and such withdrawing Oil Company Party shall have no rights hereunder as of the date of withdrawal; however any such withdrawal shall not affect the obligations of the withdrawing Oil Company Party with respect to Incidents which occurred prior to the said date of withdrawal, which obligations shall be satisfied as set forth in Paragraph (C) of this Clause III.

(C) An Oil Company Party shall satisfy its obligations under Paragraph (B) of this Clause III by either (i) paying a release assessment calculated by CRISTAL in a manner set forth in the Rules to this Contract or (ii) at CRISTAL's option, contributing to Periodic Calls made after the aforesaid date of withdrawal in accordance with terms and conditions set forth in the Rules to this Contract.

Clause IV.

Compensation and Payments

(A) If an Incident does not cause Pollution Damage in a jurisdiction where the provisions of the Fund Convention are in force, but irrespective as to whether the provisions of the Liability Convention or any applicable domestic law are in force, CRISTAL shall, subject to the conditions and in the amounts set forth in Paragraphs (D) and (E) of this Clause IV, compensate any Person who (i) sustains Pollution Damage or (ii) incurs Costs in taking Threat Removal Measures.

(B) If an Incident causes Pollution Damage in a jurisdiction where the provisions of both the Liability Convention and the Fund Convention are in force CRISTAL shall, subject to the conditions and in the amounts set forth in Paragraphs (D) and (E) of this Clause IV:

- (1) pay an Oil Company Party an amount equal to the contribution assessed by the Fund or made to the Fund by such Oil Company Party under Article 10 of the Fund Convention, with respect to the amount that the Fund intends to pay or did pay as compensation as a result of an Incident; and
- (2) compensate any Person who (i) sustains Pollution Damage or (ii) incurs Costs in taking Threat Removal Measures and who would otherwise remain uncompensated.

(C) For the purpose of Paragraphs (A) and (B) of this Clause IV, Pollution Damage and Costs of Threat Removal Measures shall include amounts paid by a Person to compensate another Person for Pollution Damage or Costs of Threat Removal Measures, but shall exclude amounts paid by a fund established and/or maintained by means of assessments against Oil Companies to compensate another Person for Pollution Damage or Costs of Threat Removal Measures.

(D) No payment or compensation shall be made under either Paragraphs (A) or (B) of this Clause IV except subject to and in accordance with the terms and conditions set forth herein.

- (1) It shall be a condition precedent to CRISTAL's obligation to make any payment whatsoever that, at the time of the Incident, the Oil involved in the Incident be "owned" by an Oil Company Party, as provided in Clause V.
- (2) No compensation shall be paid to a Person, under either Paragraph (A) or (B) (2) of this Clause IV, if the Incident (i) resulted from an act of war, hostilities, civil war, insurrection or a natural phenomenon of an exceptional, inevitable and irresistible character, or (ii) was wholly caused by an act or omission done with intent to cause damage by a third party, or (iii) was wholly caused by the negligence or other wrongful act of any Government or other authority responsible for the maintenance of lights or other navigational aids in the exercise of that function.

Notwithstanding the foregoing provisions of this Subparagraph (2) CRISTAL shall compensate Oil Company Parties under Paragraph (B) (1) of this Clause IV except when the Incident resulted from an act of war, hostilities, civil war or insurrection, or was wholly caused by an act or omission done with intent to cause damage by a third party.

- (3) If Pollution Damage or the taking of Threat Removal Measures resulted wholly or partially either from an act or omission done with intent to cause damage by, or from the negligence of the Person who sustained the Pollution Damage or who took the Threat Removal Measures, any payment or compensation that would otherwise be payable by CRISTAL to that Person, under either Paragraphs (A) or (B) (2) of this Clause IV, shall be denied or reduced proportionately to the extent of that Person's negligence; however, nothing set forth in this Subparagraph shall affect CRISTAL's obligations under Paragraph (B) (1) of this Clause IV, or to the Owner in respect of an Incident which does not result from the wilful misconduct of the Owner or from the unseaworthiness of the Tanker where this occurs with the privity of the Owner.
- (4) No payment or compensation shall be made or paid under Paragraphs (A) and (B), of this Clause IV, until evidence, satisfactory to CRISTAL, has been presented demonstrating that claims for Pollution Damage or Costs of Preventive Measures or Threat Removal Measures (including payments made by the Owner to CRISTAL, as agent for Oil Company Party(ies)), and payments or costs incurred by the Owner as a result of the application of the Liability Convention, applicable domestic laws or otherwise have been paid by, or on behalf of, the Owner equal, in the case of a Tanker of Five Thousand (5,000) Tons or less to Three Million SDR (3,000,000 SDR) and for a Tanker in excess of Five Thousand (5,000) Tons Three Million SDR (3,000,000 SDR) plus Four Hundred and Twenty SDR (420 SDR) for each Ton in excess of said Five Thousand (5,000) Tons, subject to a maximum of Fifty-Nine Million Seven Hundred Thousand SDR (59,700,000 SDR).
- (5) (a) The aggregate amount to be paid by CRISTAL, under Paragraph (A), (B) and (D)(8) of this Clause IV, in respect of any one incident, shall not exceed, after taking into account payments made under Subparagraph (4) of this Clause IV (D) an amount equal to Thirty Two Million SDR (32,000,000 SDR) for a Tanker of Five Thousand (5,000) Tons or less and for a Tanker in excess of Five Thousand (5,000) Tons Thirty Two Million SDR (32,000,000 SDR) plus Six Hundred and Fifty Two SDR (652 SDR) for each Ton in excess of said Five Thousand (5,000) Tons, subject to a maximum of One Hundred and Twenty Million SDR (120,000,000 SDR).

(b) In the event more than one Tanker discharges Oil or poses a Threat of an escape or discharge of Oil in respect of any one Incident, the aggregate amount to be paid by CRISTAL under Subparagraph (5) (a) of this Clause IV (D) shall be established by reference to the tonnage of the largest of said Tankers. For the purpose of establishing under Subparagraph (4) of this Clause IV (D) whether payment or compensation shall be made or paid, payments or Costs incurred by or on behalf of the Owners of all the said Tankers shall be taken into account.

- (6) If the maximum amount that can be paid by CRISTAL, pursuant to Paragraph (D) (5) of this Clause IV, is insufficient to reimburse an Oil Company Party(ies), pursuant to Paragraph (B) (1) of this Clause IV, and meet in full all other claims, approved under Paragraphs (A) and (B) (2) of this Clause IV, then CRISTAL shall prorate the amount available among all claims.
- (7) No payment or compensation shall be made or paid to a Person entitled, under Paragraphs (A) and (B)(2) of this Clause IV, to make a claim with respect to an Incident, if that Person prosecutes a claim for Pollution Damage or the Cost of Preventive Measures or Threat Removal Measures against any fund established and/or maintained by means of assessments against Oil Companies, irrespective as to whether any said Person is entitled to either indemnification or compensation under the terms of any such fund; provided that nothing set forth herein shall prevent such a Person from asserting and settling a claim against any said fund for those amounts not satisfied pursuant to this Contract or under either (i) the Liability Convention or (ii) against the Fund under the Fund Convention, or both, if, or to the extent, they are applicable. For the purposes of this Subparagraph (7) "prosecutes a claim" shall not mean taking steps, under the law or regulations applicable to said fund, designed to preserve said Person's rights against said fund, but shall mean receiving any payment from such a fund for Pollution Damage or the Cost of Preventive Measures or Threat Removal Measures prior to receiving any payment from CRISTAL.
- (8) No compensation (except any payment to be made pursuant to Paragraph (B) (1) of this Clause IV) shall be made or paid to a Person until such Person has taken all reasonable steps to obtain full compensation for Pollution Damage or for the Cost of Preventive Measures or Threat Removal Measures or any element thereof from any Person, but not including the Owner unless the Pollution Damage or Costs resulted from the wilful misconduct of the Owner or from the unseaworthiness of the Tanker where this occurs with the privity of the Owner, or ship (which shall include but not be limited to a Tanker or any other vessel or ship) liable therefor, and from any other source of compensation available under convention, law or regulation (except for funds established and maintained by means of assessments against Oil Companies as referred to in Subparagraph (7) of this Clause IV (D)); provided, however, that CRISTAL may, in its sole discretion and to the extent permitted under applicable law, advance monies to said Person to partially or fully compensate for the Costs said Person might incur in taking reasonable steps to obtain full compensation as set forth in this Subparagraph (8).
- (9) (a) In the event that CRISTAL should determine that it is unreasonable for a Person to take steps or further steps, pursuant to Subparagraph (8) of this Clause IV (D), CRISTAL may require, prior to compensating said Person under Paragraphs (A) or (B) (2) of this Clause IV, that it receive, in a form acceptable to it, documentation or other instrument(s) executed by said Person (but without prejudice to the rights of the Fund under the Fund

Convention if it has made a payment to said Person under the Fund Convention (i) transferring, or assigning, to CRISTAL any and all rights of any nature or kind said Person has, or might have, to seek compensation from any third party (including a government or governmental agency, but excluding the Fund) for the compensation to be paid by CRISTAL to said Person for either Pollution Damage and Costs of Preventive Measures or Threat Removal Measures; (ii) granting irrevocable authority to CRISTAL to institute, in the name of any said Person, legal, equitable or administrative proceedings in any jurisdiction whatsoever to perfect and exercise the aforesaid rights, and if any judgment, award, decision or decree is secured to collect the same, in the name of any said Person, and when collected to endorse and negotiate any cheque, money order, bill of exchange, promissory note, transfer or similar instrument so that the proceeds of such judgment, award, decision or decree shall be the sole property of CRISTAL; and/or (iii) establishing any other condition which, in the sole discretion of CRISTAL, is designed to preserve CRISTAL's ability to seek compensation from such a third party and to preserve any evidence or secure the cooperation of any person necessary to seek such compensation; and (b) no payment shall be made under Paragraph (B) (1) of this Clause IV until CRISTAL has received, in a form acceptable to it, a document or other instrument evidencing settlement in part or in full, as the case may be, the obligations of CRISTAL pursuant to Paragraph (B) (1) of this Clause IV.

- (10) For the purposes of Paragraph (D) (3) and (8) of this Clause IV the terms "wilful misconduct", "privity" and "unseaworthiness" shall have the same meaning as they have under the Marine Insurance Act 1906 as interpreted by the English Courts under English Law.

(E) For the purposes of determining the amount of any payments or compensation to be paid by CRISTAL hereunder, CRISTAL shall:

- (1) Convert any losses or Costs constituting Pollution Damage, Preventive Measures or Threat Removal Measures either incurred or suffered by a Person or any payment made by or on behalf of an Owner, for the purposes of Paragraph (D)(4) and (5) of this Clause IV, from the currency or currencies in which they were incurred or paid into Special Drawing Rights on the basis of the value of a Special Drawing Right by reference to that currency or those currencies on the dates of payment by or on behalf of an Owner or by CRISTAL, as the case may be, calculated in accordance with the method of valuation applied by the International Monetary Fund in effect for its operations and transactions on the date or dates in question; except where a limitation fund is established under the provisions of the Liability Convention when the conversion as aforesaid for payment(s) made by or on behalf of an Owner from a currency or currencies in which they were incurred or paid into Special Drawing Rights shall be on the basis of the value of a Special Drawing Right on the date that the limitation fund is established.

In the case of a currency or currencies for which no such valuation exists, the amount of any payment in said currency or currencies shall be converted to United States Dollars at the buy rate of exchange for said currency or currencies as quoted by the National Westminster Bank Plc on the applicable dates as aforesaid and the resulting United States Dollar amount shall be converted into Special Drawing Rights on the basis and in accordance with the applicable method of valuation as aforesaid.

- (2) Convert any payments to be made to an Oil Company Party, pursuant to

Paragraph (B) (1) of this Clause IV, if incurred in a currency(ies) other than United States Dollars, to United States Dollars at the buy rate of exchange for said currency(ies) to United States Dollars as quoted by the National Westminster Bank Plc in London on the date that the Fund shall have demanded payment by the Oil Company Party.

- (3) The amount of all losses or Costs constituting Pollution Damage, Preventive Measures or Threat Removal Measures shall be determined by CRISTAL in the currency of the jurisdiction where the incident has occurred or the Costs were incurred by a Person. All payments in compensation therefore made pursuant to Paragraphs (A) or (B) (2) of this Clause IV shall be made by CRISTAL in such currency(ies). If on the date payment of said claim(s) is (are) to be made, an expenditure (after considering all payments to be made under Paragraph (B)(1) of this Clause IV) is required by CRISTAL in excess of the provisions of Paragraph (D)(5) of this Clause IV, the provisions of Paragraph (D)(6) of this Clause IV shall be applicable.

Clause V. Ownership of Shipments

(A) A particular shipment of Oil shall be considered "owned" by an Oil Company Party for the purpose of Clause IV (D) (1) and Clause VII if at the time of the Incident title to the shipment is in either:

- (1) said Oil Company Party, or
- (2) a Person not an Oil Company Party to whom said Oil Company Party has transferred the shipment, or
- (3) a Person not an Oil Company Party but the shipment is being carried by a Tanker owned by or under charter to an Oil Company Party or one of its affiliates, or
- (4) a Person not an Oil Company Party who, prior to any Incident involving said shipment, contracted to transfer said shipment to an Oil Company Party, or
- (5) a Person not an Oil Company Party who, prior to any Incident involving said shipment, contracted for delivery to, storage, processing or transshipment at or shipment from a terminal or other facility owned, operated, managed, leased, hired or otherwise controlled by an Oil Company Party or in which an Oil Company Party has an interest and an Incident occurs or Pollution Damage is caused in a geographic area within 250 nautical miles in any direction from a point at the geographic centre of said terminal or other facility.

(B) For the purposes of Clause V(A)(2) and (3) such Oil shall be deemed to be so "owned" by an Oil Company Party provided that prior to any Incident involving said shipment of Oil, and in accordance with the Rules of CRISTAL, said Oil Company Party has advised CRISTAL in writing that it elects to be considered the "owner" thereof.

(C) For the purposes of Clause V(A)(5) terminal or other facility shall mean any property, fixed or floating, from which Oil can be unloaded from or discharged into a Tanker including, but not limited to, oil terminals, tank farms, refineries, single point moorings, floating storage or offshore discharging or loading vessels.

(D) For the purpose of Clause IV (A) and (B) only, segregated slops of a Tanker carrying any shipment so owned, and bunker oil and lubricating oil intended for use in said Tanker's operation shall be deemed included in such shipment.

Clause VI.

Subrogation

(A) CRISTAL shall, in respect of any amount of compensation paid in accordance with Clause IV (A) and (B) (2), acquire by subrogation the rights that the Person so compensated may enjoy under applicable legislation, law, convention or otherwise against the Owner or its insurers.

(B) Nothing herein shall prejudice any right of recourse or subrogation of CRISTAL against Persons other than those referred to in the preceding Paragraph. In any event, the right of CRISTAL to subrogation against such Person shall not be less favourable than that of an insurer of the Person to whom compensation has been paid.

Clause VII

The CRISTAL Fund

(A) (1) CRISTAL, in order to assure its financial capability to

- (i) make payments in accordance with Clause IV;
- (ii) meet its administrative expenses; and
- (iii) meet any other expenses which CRISTAL shall incur by contract, or otherwise,

shall maintain and administer an account to be known as the "CRISTAL Fund," contributions to which shall be made by each Oil Company Party.

(2) Contributions to the CRISTAL Fund shall be calculated on the basis of the Crude/Fuel Oil Receipts of the Oil Company Parties. For the purpose of this Clause VII, Crude/Fuel Oil Receipts means

- (i) crude oil and fuel oil received at an installation or terminal by an Oil Company Party which has been transported all or part of the way to such installation or terminal by Tanker (excluding any crude oil which is received solely for transshipment for onward transportation by Tanker to an installation or terminal for receipt by an Oil Company Party) and which at the time of receipt is "owned" by an Oil Company Party,
- (ii) crude oil and fuel oil not so received but with respect to which an Oil Company Party has elected, pursuant to Clause V, to be considered the "owner",
- (iii) crude oil and fuel oil owned by an Oil Company Party but with respect to which title was transferred at destination to a Person not an Oil Company Party,
- (iv) crude oil and fuel oil at the time when it has been retained on board a Tanker for a period of six (6) months and which at that time is owned by an Oil Company Party, together with any such crude oil and fuel oil retained on board such Tanker on the last day of each ensuing calendar year thereafter which, at that time, is owned by an Oil Company Party,

- (v) that portion of all crude oil and fuel oil received at a terminal or other facility, defined in Clause V(A) (5) and (C), in which an Oil Company Party has an equity interest, equal to that Oil Company Party's proportional equity interest in said terminal or other facility, as compared to the equity interest(s) of all Oil Company Parties in that terminal or other facility and which is not otherwise either reported or to be reported in the Crude/Fuel Oil Receipts of the Oil Company Party or any other related or affiliated Oil Company Party, and
- (vi) crude oil and fuel oil, transported by Tanker, in which an Oil Company Party had title at some point after loading and prior to discharge from the Tanker and which (i) is not included in the Crude/Fuel Oil Receipts of that Oil Company Party or any other related or affiliated Oil Company Party by reason of any other provision of this Paragraph, and/or (ii) had not been sold to another Oil Company Party.

(B) (1) CRISTAL shall from time to time estimate amounts (hereinafter referred to as a "Periodic Call") required to assure the capability of the CRISTAL Fund to make payments in accordance with Clause IV and to meet expenses as described in Paragraph (A)(I) of this Clause VII.

(2) Contributions to a Periodic Call shall be calculated by dividing the amount of the Call by the total of the Crude/Fuel Oil Receipts of all the Oil Company Parties as at the date of the Periodic Call during the calendar year preceding the year in which the Periodic Call is made, and multiplying the figure so calculated by the Crude/Fuel Oil Receipts of each Oil Company Party for such preceding year. For the purpose of these calculations the Crude/Fuel Oil Receipts shall be the total of the crude oil and fuel oil as defined in Paragraphs (A)(2)(i), (ii), (iii), (iv), (v) and (vi) of this Clause VII.

(3) However, notwithstanding the foregoing provisions of this Paragraph (B)(1) and (2) of this Clause VII:

- (i) each such Oil Company Party (whether or not it had any Crude/Fuel Oil Receipts during such preceding calendar year) shall pay no less than a minimum Charge determined by CRISTAL to be reasonable under the circumstances, and
- (ii) no Oil Company Party shall be liable to contribute to any payment of compensation by CRISTAL in respect to any Incident which occurred before it became a Party to this Contract, and
- (iii) any Oil Company Party which becomes a Party hereto shall pay a contribution to any Periodic Call made in the calendar year of joining, subject to the provision of Paragraph (B)(3)(ii) of this Clause VII, and in no event less than the minimum sum referred to in Paragraph (B)(3)(i) of this Clause VII.

(C) Upon the Oil Company Parties deciding on a date beyond which claims will not be accepted under this Contract, any amounts remaining in the CRISTAL Fund, after the settlement or other disposition of all claims arising from Incidents occurring before the said date and the settlement of all costs and expenses relating to the winding up of CRISTAL, shall be equitably distributed among the Oil Companies that are Parties at the date when CRISTAL is finally dissolved.

Clause VIII.

Notice of Claim

No liability shall arise under Clause IV (A) or (B) (2) unless written notice of claim is received by CRISTAL within two (2) years of the date of the Incident giving rise thereto. In the case of a payment to be made under Clause IV (B) (1) no liability shall arise unless written notice of claim is received by CRISTAL from an Oil Company Party within one year of the date that payment of the contribution under Article 10 of the Fund Convention is to be made.

Clause IX.

Rules and Directives

In fulfilling its obligations, in accordance with the terms of this Contract, CRISTAL shall be the ~~sole judge~~ in accordance with these terms of the validity of any claim made hereunder, except that CRISTAL, for the purposes of Clause IV (B) (1), will accept the validity of any request for a contribution made by the Fund. CRISTAL shall also have the right to make rules and directives from time to time with respect to interpretation and administration of this Contract.

Clause X.

Amendment

This Contract may be amended by resolution adopted at any Regular or Special Meeting of the Members of CRISTAL upon a vote in which at least seventy five percent (75%) of the votes cast are in favour of said resolution. Amendments to this Contract shall apply only in respect of Incidents which occur after 12.00 hours G.M.T. on the date on which said amendment is adopted by the Members of CRISTAL.

Clause XI.

Law Governing

(A) This Contract shall be construed and shall take effect in accordance with the Laws of England; the Courts of England shall have exclusive jurisdiction over any matter arising therefrom.

(B) This Contract shall not be construed as creating a trust.

(C) A Party hereto shall not be required to incur any obligation or take any action which would violate any laws or government regulations which apply to it or, in the event its stock or shares are owned by another Person, which would violate any laws or government regulations which apply to said Person.

IN WITNESS WHEREOF, the Parties have entered into this Contract upon January 14, 1971, or upon such later date as their applications to become Parties are accepted by CRISTAL.