THE INTERNATIONAL LIABILITY AND COMPENSATION REGIME

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Introduction

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

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

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

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

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

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

As at 31 August 2004, 102 States were Parties to the 1992 Civil Liability Convention, and 90 States were Parties to the 1992 Fund Convention.

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

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

The international compensation regime

Substantive provisions

Scope of application

The 1969 and 1971 Conventions apply to pollution damage caused by spills of persistent oil from tankers and suffered in the territory (including the territorial sea) of a State Party to the respective Convention. Under the 1992 Conventions, however, the geographical scope is wider, with the cover extended to pollution damage caused in the exclusive zone (EEZ) or equivalent area of a State Party. 'Pollution damage' includes the cost of 'preventive measures', ie measures to prevent or minimise pollution damage, as well as loss or damage caused by preventive measures.

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

The 1969 Civil Liability Convention and the 1971 Fund Convention apply only to measures taken after oil has escaped or been discharged. These Conventions therefore do not apply to pure threat removal
measures, ie preventive measures which are so successful that there is no actual spill of oil from the tanker involved. Under the 1992 Conventions, however, expenses incurred for preventive measures are recoverable even when no spill of oil occurs, provided that there was a grave and imminent threat of pollution damage.

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

**Shipowner's liability**

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

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

Under certain conditions the shipowner is entitled to limit his liability to an amount which is linked to the tonnage of the vessel. The limit of the shipowner's liability under the 1969 Civil Liability Convention is the lower of 133 Special Drawing Rights (SDR)\(^{1}\) (US$195) per ton of the ship's tonnage or 14 million SDR (US$21 million). Under the 1992 Civil Liability Convention, the limits for incidents occurring before 1 November 2003 were:

(a) for a ship not exceeding 5 000 units of gross tonnage, 3 million SDR (US$4.4 million);  
(b) for a ship with a tonnage between 5 000 and 140 000 units of tonnage, 3 million SDR (US$4.4 million) plus 420 SDR (US$617) for each additional unit of tonnage; and  
(c) for a ship of 140 000 units of tonnage or over, 59.7 million SDR (US$88 million).

In October 2000, the Legal Committee of IMO adopted a resolution, pursuant to a special procedure laid down in the Convention, increasing the limits contained in 1992 Civil Liability Convention. The amendments entered into force on 1 November 2003 and apply to incidents occurring on or after that date. The increased limits of the shipowner's liability are as follows:

(a) for a ship not exceeding 5 000 units of gross tonnage, 4 510 000 SDR (US$6.6 million);  
(b) for a ship with a tonnage between 5 000 and 140 000 units of tonnage, 4 510 000 SDR (US$6.6 million) plus 631 SDR (US$927) for each additional unit of tonnage; and  
(c) for a ship of 140 000 units of tonnage or over, 89 770 000 SDR (US$132 million).

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

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\(^{1}\) The unit of account in the Conventions is the Special Drawing Right (SDR) as defined by the International Maritime Organization. In this paper, the SDR has been converted into Euros at the rate of exchange applicable on 1 July 2004, ie 1 SDR = US$1.468840.
**Compulsory insurance**

The owner of a tanker carrying more than 2,000 tonnes of persistent oil as cargo is obliged to maintain insurance to cover his liability under the applicable Civil Liability Convention. Tankers must carry a certificate on board attesting the insurance coverage. When entering or leaving a port or terminal installation of a State Party to the 1969 or 1992 Civil Liability Convention, such a certificate is required also for ships flying the flag of a State which is not Party to that Convention.

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

**Channelling of liability**

Claims for pollution damage under the Civil Liability Conventions can be made only against the registered owner of the ship concerned. This does not preclude victims from claiming compensation outside the Conventions from persons other than the owner. However, the 1969 Civil Liability Convention prohibits claims against the servants or agents of the shipowner. The 1992 Civil Liability Convention prohibits not only claims against the servants or agents of the owner, but also claims against the pilot, the charterer (including a bareboat charterer), manager or operator of the ship, or any person carrying out salvage operations or taking preventive measures.

**Recourse actions**

The provisions in the 1992 Civil Liability Convention are without prejudice to the shipowner’s right of recourse against third parties.

Under the 1992 Fund Convention, as regards any amount paid by the 1992 Fund in compensation, the 1992 Fund acquires by subrogation the right of the person so compensated against the shipowner and his insurer. The provisions in the Fund Convention are without prejudice to any right of subrogation which the Fund may have against persons other than the shipowner and his insurer, and the Fund’s right to subrogation against such persons shall not be less favourable than that of an insurer of the person compensated by the Fund.

The 1971 Fund and the 1992 Fund have in a number of cases taken recourse actions against various parties resulting in the recovery of significant amounts in out of-court settlements,

**The 1992 Fund’s obligations**

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

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

The 1992 Fund does not pay compensation if:

(a) the damage occurred in a State which was not a Member of the 1992 Fund; or
(b) the pollution damage resulted from an act of war, hostilities, civil war or insurrection or was caused by a spill from a warship; or
(c) the claimant cannot prove that the damage resulted from an incident involving one or more ships as defined in the 1992 Civil Liability Convention, ie a seagoing vessel or seaborne craft of any type whatsoever constructed or adapted for the carriage of oil in bulk as cargo.
The compensation payable by the 1971 Fund in respect of an incident was limited to an aggregate amount of 60 million SDR (US$88 million), including the sum actually paid by the shipowner (or his insurer) under the 1969 Civil Liability Convention.

The maximum amount payable by the 1992 Fund in respect of incidents occurring before 1 November 2003 is 135 million SDR (US$200 million), including the sum actually paid by the shipowner (or his insurer) under the 1992 Civil Liability Convention.

In October 2000 the Legal Committee of IMO adopted, pursuant to a special procedure laid down in the 1992 Fund Convention, a Resolution increasing the amount by some 50.37% to 203 million SDR (US$300 million). The amendment entered into force on 1 November 2003 and the increased limits apply to incidents occurring on or after that date.

**Distribution of the amount available for compensation**

Difficulties have arisen in some incidents involving the 1971 Fund and the 1992 Fund where the total amount of the claims arising from a given incident exceeded the total amount available for compensation or where there was a risk that this might occur. Under the Fund Conventions, the Funds are obliged to ensure that all claimants are given equal treatment. The Funds have to strike a balance between the importance of paying compensation to victims as promptly as possible and the need to avoid an over-payment situation. In a number of cases the Funds therefore have had to limit payments to victims to a percentage of the agreed amount of their claims. In most cases it eventually became possible to increase the level of payments to 100% once it was established that the total amount of admissible claims would not exceed the amount available for compensation.

**Time bar**

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

**Jurisdiction and enforcement of judgements**

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

If the same incident causes damage in more than one State Party to the respective Convention, any action for compensation for damage arising out of the incident can be brought in the courts of any of these States.

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

**Organisation of the IOPC Funds**

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

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

The 1992 Fund and the 1971 Fund have a joint Secretariat. The Secretariat is headed by a Director and has at present 27 staff members.
The Director has been granted extensive authority to approve claims for compensation.

**Financing of the 1992 Fund**

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

**Basis of contributions**

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

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

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

**Payment of contributions**

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

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

The Japanese oil industry is the major contributor to the 1992 Fund, paying 18% of the total contributions. The Italian oil industry is the second largest contributor paying 10%, followed by the oil industries in the Republic of Korea (9%), the Netherlands (8%), France (7%), India (7%), United Kingdom (5%), Singapore (5%) and Spain (5%).

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

**Termination of the 1971 Fund Convention**

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

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

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

Claims Settlement

Claims experience

Since their establishment, the 1971 and 1992 Funds have been involved in approximately 130 incidents and have made compensation payments totalling some US$855 million.

In the great majority of these incidents, all claims have been settled out of court. So far, court actions against the Funds have been taken in respect of only seven incidents.

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

<table>
<thead>
<tr>
<th>Incident</th>
<th>Payments to claimants</th>
</tr>
</thead>
<tbody>
<tr>
<td><em>Aegean Sea</em> (Spain, 1992)</td>
<td>US$61 million</td>
</tr>
<tr>
<td><em>Braer</em> (United Kingdom, 1993)</td>
<td>US$83 million</td>
</tr>
<tr>
<td><em>Sea Empress</em> (United Kingdom, 1996)</td>
<td>US$56 million</td>
</tr>
<tr>
<td><em>Nakhodka</em> (Japan, 1997)</td>
<td>US$197 million</td>
</tr>
<tr>
<td><em>Erika</em> (France, 1999)</td>
<td>US$91 million</td>
</tr>
<tr>
<td><em>Prestige</em> (Spain, 2002)</td>
<td>US$71 million</td>
</tr>
</tbody>
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Admissibility of Claims for Compensation

General considerations

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

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

The IOPC Funds have acquired considerable experience with regard to the admissibility of claims. In connection with the settlement of claims they have developed certain principles as regards the meaning of the definition of 'pollution damage', which is specified as 'damage caused by contamination'. In 1994 a Working Group of the 1971 Fund examined in depth the criteria for the admissibility of claims for compensation within the scope of the 1969 Civil Liability Convention, the 1971 Fund Convention and the 1992 Protocols. The Report of the Working Group was endorsed by the Assembly of the 1971 Fund. The Assembly of the 1992 Fund has adopted a Resolution to the effect that this Report shall form the basis of its policy on the criteria for the admissibility of claims.

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

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

The 1992 Fund has published a Claims Manual which contains general information on how claims should be presented and sets out the general criteria for the admissibility of various types of claims.

**Property damage**

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

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

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

Claims for measures to prevent or minimise pollution damage are assessed on the basis of objective criteria. The fact that a government or other public body decides to take certain measures does not in itself mean that the measures are reasonable for the purpose of the Conventions. The technical reasonableness is assessed on the basis of the facts available at the time of the decision to take the measures. However, those in charge of the operations should continually reappraise their decisions in the light of developments and further technical advice.

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

Measures taken to prevent or minimise pollution damage ('preventive measures') are compensated by the 1992 Fund. Measures may have to be taken to prevent oil which has escaped from a ship from reaching the coast, eg by placing booms along the coast which is threatened. Dispersants may be used at sea to combat the oil. Costs for such operations are in principle considered as costs of preventive measures. It must be emphasised, however, that the definition only covers costs of reasonable measures.

Salvage operations may in some cases include an element of preventive measures. Such operations can be considered as preventive measures only if the primary purpose is to prevent pollution damage. If the operations have another purpose, such as salving hull and cargo, the costs incurred are not admissible under the 1992 Conventions. If the activities are undertaken for the purpose of both preventing pollution and salving the ship and cargo, but it is not possible to establish with any certainty the primary purpose of the operations, the costs are apportioned between pollution prevention and other activities. The assessment of compensation for activities which are considered to be preventive measures is not made on the basis of the criteria applied for assessing salvage awards; the compensation is limited to costs, including a reasonable element of profit.
**Fixed costs**

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

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

**Consequential loss and pure economic loss**

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

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

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

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

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

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

**Measures to prevent pure economic loss**

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

- the cost of the proposed measures is reasonable
- the cost of the measures is not disproportionate to the further damage or loss which they are intended to mitigate
- the measures are appropriate and offer a reasonable prospect of being successful
- in the case of a marketing campaign, the measures relate to actual targeted markets.

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

**Environmental damage**

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

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

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

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

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

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

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

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

The scale of the studies should be in proportion to the extent of the contamination and the predictable effects. On the other hand, the mere fact that a post-spill study demonstrates that no significant long-term environmental damage has occurred or that no reinstatement measures are necessary, does not by itself exclude compensation for the costs of the study.
The Fund should be invited at an early stage to participate in the determination of whether or not a particular incident should be subject to a post-spill environmental study. If it is agreed that such a study is justified the Fund should then be given the opportunity of becoming involved in the planning and in establishing the terms of reference for the study. In this context the Fund can play an important role in helping to ensure any post-spill environmental study does not unnecessarily repeat what has been done elsewhere. The Fund can also assist in ensuring that appropriate techniques and experts are employed. It is essential that progress with the studies is monitored, and that the results are clearly and impartially documented. This is not only important for the particular incident but also for the compilation of relevant data by the Fund for future cases.

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

**Uniform applications of the Conventions**

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

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

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

**Review of the adequacy of the international compensation regime**

**1992 Fund Working Group**

In April 2000, the 1992 Fund Assembly set up a Working Group to examine the adequacy of the international compensation regime established by the 1992 Civil Liability Convention and the 1992 Fund Convention. The point was made that although the system had worked well on many occasions, there were inadequacies in the system.

The Working Group has held seven meetings, the most recent from 25 to 28 May 2004. The next meeting will take place in February 2005.

**Supplementary Fund**

During the discussions in the Working Group a number of Member States maintained that in order for the international compensation system to retain credibility, the maximum compensation levels should be sufficiently high to ensure full compensation to victims even in the most serious oil spill incidents. Other Member States, however, did not see the need to increase the maximum level of compensation over and above the increases adopted within the IMO in October 2000 referred to above which brought the total
amount available from 1 November 2003 to 203 million SDR (US$300 million). In the light of the difference in views, the Working Group decided to work towards the creation of an optional third tier of compensation.

A Diplomatic Conference was held under the auspices of IMO in London from 12 to 16 May 2003 to consider the creation of a Supplementary Compensation Fund. After difficult negotiations, a Protocol was adopted creating such a Supplementary Fund. The main elements of the Protocol are as follows:

- The total amount of compensation available for pollution damage in the States that become Parties to the Protocol will be 750 million SDR (US$1 100 million), including the 203 million SDR (US$300 million) available under the 1992 Conventions.
- The Supplementary Fund will be financed by contributions payable by oil receivers in the States which ratify the Protocol.
- The Protocol contains a provision for so-called “capping” of contributions, ie that the aggregate amount of contributions payable in respect of contributing oil received in a particular State during a calendar year should not exceed 20% of the amount of contributions levied. The capping provision applies until the total amount of contributing oil received in the States Members of the Supplementary Fund has reached 1 000 million tonnes or for a period of 10 years from the date of the entry into force of the Protocol, whichever is the earlier.
- For the purposes of contributions, it will be considered that there is a minimum aggregate quantity of 1 million tonnes of contributing oil received in each Member State of the Supplementary Fund.
- The Protocol will enter into force three months after it has been ratified by at least eight States in which has been received a combined total of 450 million tonnes of contributing oil in a calendar year.
- The Protocol only applies to incidents which occur after its entry into force.

So far Denmark, Finland, France, Ireland, Japan and Norway have ratified the Protocol. It is likely that several other States will ratify it later in 2004. It is expected, therefore, that the Protocol will enter into force early in 2005.

**Sharing of the financial burden between shipowners and the oil industry**

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

Representatives of shipowners and their insurers took the view that that the issues relating to shipowners’ liability should not be reopened since to do so would be detrimental to the position of victims of oil pollution. It was suggested that the 1992 Conventions were intended to create an efficient compensation regime and had not been intended to ensure the quality of shipping or to punish the guilty party. It was further suggested that any amendments to the provisions relating to shipowners’ liability would give rise to serious treaty law problems. It was emphasised that it was of paramount importance to maintain the equitable balance between the burdens imposed on the two industries involved, ie those of the shipping and cargo interests.

Representatives of the oil industry maintained that the international compensation regime should ensure that persons suffering oil pollution damage were compensated promptly but also be consistent with the general objective to improve maritime safety and reduce the number of oil spills. It was emphasised that it was the sole responsibility of the shipowner to maintain a safe and seaworthy ship. It was suggested that the latter objective might be compromised by the establishment of the Supplementary Fund in so far as it was funded only by oil receivers. In addition, the point was made that a Supplementary Fund financed permanently by oil receivers would only distort the balance between the shipowners’ and oil receivers’ contributions to the regime. It was the oil industry’s view that the Supplementary Fund would also shield low quality shipowners from the consequences of their actions and would therefore not provide any incentive to improve the quality of their ships or the standards of their operations.
Several Member States expressed the view that increasing the financial burden on shipowners beyond those already envisaged by the 50% increase that came into effect in November 2003 and the proposed voluntary increase for small ships was not justified.

At the request of the Working Group, the Director carried out an independent study of the costs of oil spills in relation to past, current and future limitation amounts of the relevant Conventions (1969 Civil Liability Convention and 1971 Fund Convention and 1992 Civil Liability and Fund Conventions) and the voluntary industry schemes (TOVALOP and CRISTAL). The study, which was presented to the Working Group in May 2004, showed that on the basis of the financial limits of the applicable compensation regime the shipping industry had contributed 45% and oil cargo interests 55% of the total costs of 5,802 incidents that had occurred world-wide (except in the United States of America) in the 25-year period 1978–2002. The study also showed that the sharing of the financial burden varied considerably with different size ranges of ships, with oil cargo interests contributing considerably more to the costs of incidents involving ships up to 20,000 gross tonnes, an equal sharing of the costs between oil cargo interests and the shipping industry in respect of incidents involving ships between 20,000 and 80,000 gross tonnes, and the shipping industry contributing considerably more to the costs of incidents involving ships greater than 80,000 gross tonnes. When the costs of past incidents were inflated to 2002 and predicted 2012 monetary values the relative contribution of oil cargo interests to the costs of oil spills increased considerably.

At the Working Group’s meeting in May 2004, several options were put forward relating to the equitable sharing of the financial burden resulting from oil spills between shipowners and the oil industry.

Some delegations stated that none of the proposals for revision would result in more compensation becoming available to victims of pollution damage, that the only issues that needed to be resolved were the sharing of the financial burden between the shipping industry and oil cargo interests and the problem of substandard shipping and that both these issues were best addressed through industry initiatives.

Other delegations expressed the view that although the Conventions had worked well in the past, there were serious deficiencies that went beyond financial considerations and the sharing of the financial burden, such as the need to ensure a quorum at meetings of the Fund’s governing bodies, an effective means of enforcing oil reporting requirements and the uniform application of the Conventions. Those delegations therefore considered that a revision of the system was necessary and urgent. The point was also made that liability and compensation for oil pollution damage were matters of important policy considerations, which had to be governed by legislation.

**Shipowner’s right to limit his liability and channelling of liability**

The Working Group has also considered a proposal to develop new criteria governing the shipowner’s right to limitation of liability so as to make it easier to break that right. The view was expressed that the virtually unbreakable right of limitation of shipowners under the 1992 Civil Liability Convention had hampered the 1992 Fund from taking recourse actions against owners of sub-standard ships. A number of States expressed the view, however, that it was inappropriate to lower the threshold for breaking the shipowner’s right to limit liability as means of trying to improve the overall quality of shipping, and that in those States’ view this objective was best dealt with through other international Conventions, which attached punitive sanctions to non compliance.

Furthermore, the Working Group has considered a proposal that the present provisions on channelling of liability, which precluded claims for compensation being pursued against a number of parties (eg the charterer), should be amended so as to revert to the channelling provisions in the 1969 Civil Liability

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Footnote: The Tanker Owners Voluntary Agreement Concerning Liability for Oil Pollution (TOVALOP) and the Contract Regarding an Interim Supplement to Tanker Liability for Oil Pollution (CRISTAL), which were broadly similar in scope to the 1969 Civil Liability Convention and the 1971 Fund Convention respectively, were introduced by the shipping and oil industries prior to the entry into force of those Conventions. In 1987 the voluntary schemes were amended to introduce levels of compensation similar to those available under the 1984 (subsequently the 1992) Protocols to the 1969 Civil Liability Convention and the 1971 Fund Convention.
Convention, which barred only claims against the servants or agents of the shipowner. A number of delegations considered that the benefit to victims afforded by the current channelling provisions was of paramount importance, but supported exploring further a proposal put forward at a previous meeting of the Working Group to include charterers’ (usually cargo owners) liability in the compensation regime.

**Substandard transportation of oil and the right of the shipowner to limit liability**

In May 2004 the Working Group considered several proposals for dealing with the substandard transportation of oil.

The intention of these proposals was to provide disincentives to shipowners to use certain ships by imposing higher limits of liability. Under one proposal there would also be a liability on the cargo owner for pollution damage caused by certain ships. Another proposal would deprive the shipowner of his right to limit his liability if the incident had resulted from structural defects of the ships (ie defects due to decay or lack of maintenance).

**Compulsory insurance**

The Working Group considered a proposal that all vessels that carried oil in bulk as cargo should be required to maintain insurance or other financial security in accordance with Article VII.1 of the 1992 Civil Liability, ie that the exemption for ships carrying less than 2 000 tonnes of oil should no longer apply.

There was considerable support for widening the compulsory insurance obligation to include all vessels carrying oil in bulk as cargo, since experience had shown that vessels carrying less than 2 000 tonnes of oil were capable of causing serious pollution damage and that the IOPC Funds had on a number of occasions been the only source of compensation as a result of the shipowner having had neither the insurance cover nor the financial capability to pay claims.

**Other issues**

The Working Group is also considering other issues such as merging the 1992 Civil Liability Convention and the 1992 Fund Convention into one Convention, the refinement of the contribution system, problems caused by States not submitting oil reports, the definition of ‘ship’ and uniform application of the 1992 Conventions.

**HNS Convention**

As mentioned above, the 1992 Civil Liability Convention and the 1992 Fund Convention only apply to spills of persistent oil from oil tankers.

In 1996 a Diplomatic Conference held under the auspices of IMO adopted the Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea (HNS Convention). The Convention, which is not yet in force, deals with spills of noxious and hazardous substances (including oil) and is not limited to pollution damage. The HNS Convention does not, however, apply to pollution damage as defined in the 1992 Civil Liability Convention, ie pollution damage caused by spills of persistent oil from tankers.

The HNS Convention will establish a regime corresponding to that created by the 1992 Civil Liability Convention and the 1992 Fund Convention, ie a first layer of compensation to be paid by the shipowner or his insurer and a second layer payable by an international fund (the HNS Fund).

The HNS Convention will enter into force 18 months after ratification by 12 States provided that in these States there have been received certain minimum quantities of cargos to which the Convention applies. So far five States (Angola, Morocco, Russian Federation, Samoa and Tonga) have ratified the Convention In accordance with a European Council Decision, all European Union Member States should ratify the Convention by June 2006. It is expected that the HNS Convention will enter into force at the beginning of 2008.
The IOPC Funds’ Director has been instructed to prepare the setting up of the HNS Fund. The assumption is that the HNS Fund will have a joint Secretariat with the IOPC Funds in London but the final decisions on this point will be made by the HNS Fund Assembly. The Fund Secretariat has developed a system to identify and report contributing cargo which will include a database of all substances qualifying as hazardous or noxious substances.

**Bunkers Convention**

The 1992 Conventions do not apply to spills of bunkers from ships other than oil tankers. In 2001 a Diplomatic Conference adopted the International Convention on Civil Liability for Bunker Oil Pollution Damage (Bunkers Convention). This Convention, which is not yet in force, deals with the liability of the shipowner and his insurer. The concept of “shipowner” includes the bareboat charterer, manager and operator of the ship. The Convention does not provide for any supplementary compensation from an international fund. The limitation of liability is not dealt with in the Bunkers Convention but is governed by any applicable national and international regime, eg the 1976 Convention on Limitation of Liability for Maritime Claims. There are provisions on compulsory insurance similar to those in the 1992 Civil Liability Convention. The grounds for exoneration of the shipowner are also similar to those in the 1992 Civil Liability Convention. The channelling provisions in the Bunkers Convention are, however, different from those in the 1992 Conventions in that they do not exclude claims against salvors or persons taking preventive measures.

**Concluding remarks**

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

During the period 1978-1996, ie until the 1992 Fund Convention entered into force, the number of 1971 Fund Member States increased from 14 to 76. In the years since entry into force of the 1992 Conventions, the number of 1992 Fund Member States has increased from nine to 90. It is expected that a large number of States will ratify the 1992 Protocols in the near future. It is interesting to note that many States which have ratified the 1992 Conventions in the last few years were not previously parties to the 1969 and 1971 Conventions. This increase in the number of Member States appears to indicate that the Governments have in general considered the international compensation regime to be working well. This explains why the regime based on the 1992 Conventions has served as a model for the creation of liability and compensation systems in other fields, such as the carriage of hazardous and noxious substances by sea.

Although the Conventions were revised in 1992, the main features of the regime were decided in the late sixties and early seventies. It is not surprising therefore that the Contracting States have found that the regime needs to be revisited for modifications in the light of experience, so as to enable the regime to adapt to the changing needs of society and to ensure the regime's survival by remaining attractive to States. The first steps to that effect have been taken by the increases in the limits of liability and compensation which entered into force on 1 November 2003, by the adoption in May 2003 of the Protocol establishing a Supplementary Fund and by amendments to the Claims Manual in respect of the cost of post-spill studies and the costs of reinstatement of the polluted environment. The review of the 1992 Conventions continues.

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**ANNEX**

**Annex**

States Parties to both the
1992 Protocol to the Civil Liability Convention and the
1992 Protocol to the Fund Convention
as at 31 August 2004

<table>
<thead>
<tr>
<th>86 States for which Fund Protocol is in force (and therefore Members of the 1992 Fund)</th>
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<tbody>
<tr>
<td>Algeria</td>
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<td>Angola</td>
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<td>Antigua and Barbuda</td>
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<td>Argentina</td>
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<td>Cape Verde</td>
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<td>Portugal</td>
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<td>Qatar</td>
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<td>Saint Vincent and the Grenadines</td>
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4 States which have deposited instruments of accession, but for which the Fund Protocol does not enter into force until date indicated

<table>
<thead>
<tr>
<th>Country</th>
<th>Date of Entry into Force</th>
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<tbody>
<tr>
<td>Saint Lucia</td>
<td>20 May 2005</td>
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<tr>
<td>Malaysia</td>
<td>9 June 2005</td>
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<tr>
<td>Tuvalu</td>
<td>30 June 2005</td>
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<tr>
<td>Estonia</td>
<td>6 August 2005</td>
</tr>
</tbody>
</table>
States Parties to the 1992 Protocol to the Civil Liability Convention
but not to the 1992 Protocol to the Fund Convention
as at 31 August 2004
(and therefore not Members of the 1992 Fund)

8 States for which Protocol to Civil Liability Convention is in force

| Chile | Egypt | Indonesia | Switzerland |
| China | El Salvador | Romania | Vietnam |

4 States which have deposited instruments of accession, but for which the Protocol to the Civil Liability Convention does not enter into force until date indicated

| Bulgaria | 28 November 2004 |
| Kuwait | 16 April 2005 |
| Solomon Islands | 30 June 2005 |
| Azerbaijan | 16 July 2005 |

States Parties to the 1969 Civil Liability Convention
as at 31 August 2004

44 States Parties to the 1969 Civil Liability Convention

| Albania | Georgia | Mongolia |
| Benin | Ghana | Nicaragua |
| Brazil | Guatemala | Peru |
| Cambodia | Guyana | Portugal |
| Chile | Honduras | Saint Kitts and Nevis |
| Colombia | Indonesia | Sao Tomé and Principe |
| Costa Rica | Jordan | Saudi Arabia |
| Côte d’Ivoire | Kazakhstan | Senegal |
| Dominican Republic | Kuwait | Serbia & Montenegro |
| Ecuador | Latvia | South Africa |
| Egypt | Lebanon | Syrian Arab Republic |
| El Salvador | Luxembourg | Tuvalu |
| Equatorial Guinea | Malaysia | United Arab Emirates |
| Estonia | Maldives | Yemen |
| Gambia | Mauritania |

1 State which has deposited instruments of accession, but for which the Convention will enter into force on the date indicated

| Azerbaijan | 14 October 2004 |

3 States which have deposited instruments of denunciation which will take effect on date indicated

| Malaysia | 9 June 2005 |
| Tuvalu | 30 June 2005 |
| Estonia | 6 August 2005 |

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