

IOI Training Module:
Law of the Sea and Principled Ocean Governance
Solutions Centre, UWI, Cave Hill
May 17-21, 2010

Polluter Pays Principle

Liability and compensation for vessel-source pollution damage

Compensation for pollution damage caused by oil spills from tankers

The present international regime, which mutualizes the risk of damage caused by oil pollution from oil tankers, is based on two conventions adopted at the IMO. These are known as the 1992 Civil Liability Convention (1992 CLC) and the 1992 Fund Convention. Additionally, the 2003 Supplementary Fund Protocol (Supplementary Fund) came into force in 2005.¹

These Conventions apply to pollution damage in the territory or territorial sea or exclusive economic zone (EEZ) or equivalent area of a State Party to the respective Conventions, regardless of the polluting vessel's flag state or its owner's state.

The Conventions apply only to spills of persistent cargo and fuel (bunker) oil from sea-going tankers. The Conventions do not apply to spills of bunker oil from ships other than tankers.

An important question may be the application of the Conventions to Floating storage Units (FSUs) and Floating Production, Storage and Offloading Units (FPSOs). Also, whether the Conventions apply to permanently and semi-permanently anchored vessels engaged in ship to ship (STS) oil transfer operations. The 1992 Fund's governing bodies' policy statements in this regard, emphasizes that in any event the decision as to whether the 1992 Conventions applied to a specific incident would be taken in the light of the particular circumstances of that case.² In this respect the Conventions' current definition of "ship" is problematic.³ Thus ultimately, in accordance with the Conventions, such questions may come down to a judgement of a Court in a State Party.⁴

1992 CLC

The 1992 CLC applies the principle of 'strict liability' for damage from pollution; proof of negligence is not required. But such liability is channelled only to the registered owners of the polluting vessel. Claims under the Convention are prohibited against the servants or agents of the owner, the charterer (including a bareboat charterer), manager or operator of the ship, and others. The Convention requires compulsory liability insurance for tankers carrying more than 2 000 tonnes of persistent oil in bulk or cargo. Uniquely,

claims for pollution damage and clean-up costs for which the tanker owner would be liable under the Convention may be brought directly against the insurer.

Tanker owners will normally be entitled to limit their liability to an amount based on the gross tonnage of the tanker involved in the incident. Currently under the 1992 CLC the maximum amount payable by the owner and his insurer (involving a ship of 140 000 units of gross tonnage or more) is some 89.8 million SDR (US\$ 134.8 million). For a smaller ship it would be a lesser amount, depending on the ship's size. For example, ships up to 5000 gross tons the amount would be some US\$ 6.8 million.

Note: Conversions of Special Drawing Rights (SDR) in this paper are as of May 4, 2010 (1 SDR = US\$ 1.501460) as defined by the International Monetary Fund (IMF). To update conversion rates see: www.iopcfund.org/SDR.htm .

1992 Fund Convention

Additional compensation may be available under the 1992 Fund Convention when the compensation available from the tanker owner and his insurer is insufficient to meet all valid claims.

The 1992 Fund will not pay compensation if the damage occurred in a state which was not a Party to the 1992 Fund Convention.

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 after sea transport, collected retrospectively. In other words, there is no regular levy or fixed premiums which would lead to the establishment of a large standing fund. For more on how this works see: www.iopcfund.org/ (click on (1) "About the IOPC Funds," (2) "FAQ's" and (3) "Finance"). For total amounts of contributions from "persons" to the Funds calculated per State Party see: www.iopcfund.org/ (click on (1) "About the IOPC Funds," (2) "Annual Report" and (3) in the Annual Report 2008 go to Annexes XXII and XXIII at pages 180-181).

Currently the maximum compensation payable by the 1992 Fund is 203 million SDR (US\$ 304.8 million) – whatever the size of the ship. This maximum amount includes the sum actually paid by the shipowner or his insurer under the 1992 CLC.

Supplementary Fund

The 'optional' Supplementary Fund provides for additional compensation. The total amount payable, in any one incident, for damage in a state that is a Party to the Supplementary Fund Protocol is 750 million SDR (US\$ 1 126.1 million) including the amounts payable under the 1992 CLC and the 1992 Fund Convention.

Pro rata distribution

If the total amount of valid claims exceeds the total amount of compensation available under the Conventions, the compensation paid to each claimant will be reduced proportionately.

Pollution damage covered

The main types of ‘pollution damage’ covered are: (1) Property damage; (2) The costs of clean-up and preventative measures at sea or on shore; (3) Compensation payable for loss of earnings suffered by the owners of property contaminated by oil as a result of a spill (consequential loss); (4) Compensation payable for loss of earnings caused by oil pollution suffered by persons whose property has not been polluted (pure economic loss); (5) Compensation payable for the costs of reasonable reinstatement measures aimed at accelerating natural recovery of environmental damage.

Claims Manual

The 1992 Fund’s Claims Manual, December 2008 Edition, is a practical guide to presenting claims against the Fund. See: www.iopcfund.org/ (click on: (1) “Information Resources,” (2) “Publications” and (3) “Claims Manual – 2008 Edition”).

Party states to the Conventions

To determine what states are party to the respective Conventions – it makes a difference in terms of available compensation - see: www.iopcfund.org/ (click on: (1) “About the IOPC Funds” and (2) “Facts and Figures.”)

Conventions texts

See: www.iopcfund.org/npdf/Conventions%20English.pdf .

Complete information on the international regime is also available in French and Spanish. See www.iopcfund.org/ (click on “Espanol” or “Francais”).

Compensation of damage caused by bunker oil spills from non-tankers

The International Convention on Civil Liability for Bunker Oil Pollution Damage (Bunker Convention) was adopted at IMO on March 23, 2001. The Convention entered into force on November 21, 2008.

The present international regime (for tankers) does not include spills of oil carried as fuel in bunkers of ships other than oil tankers.

The Bunker Convention covers some of that gap. It applies to pollution damage caused outside the ship by contamination resulting from the escape or discharge of bunker oil from the ship. For the purposes of the Convention a “ship” is broadly defined as including “any seagoing vessel and seaborne craft, of any type whatsoever”. As expected the Bunker Convention does not apply to pollution damage defined by the 1992 CLC (respecting tankers).

Under the Bunker Convention, the ‘shipowner’ (defined broadly to embrace “the owner, including the registered owner, bareboat charterer, manager and operator of the ship”) will be liable to pay compensation for ‘pollution damage’ caused in the territory, territorial sea and exclusive economic zone of a State Party. (‘Pollution damage’ accords with the definition of same found in the 1992 CLC.)

The Convention applies the principle of strict liability, and claims for compensation for pollution damage may also be brought directly against an insurer.

It should be noted that the obligation to obtain insurance rests upon the registered owner to the exclusion of the other persons who come within the definition of ‘shipowner’ in Article 1(3) of the Convention. It will be compulsory for the registered owner of a ship having a gross tonnage greater than 1000 registered in a State Party to maintain insurance or other financial security, to cover the liability of the registered owner for pollution damage. Nevertheless, the Convention allows that a State Party may declare that this requirement does not apply to ships operating exclusively within the territory or territorial sea of that State Party.

The Bunker Convention preserves the right of the shipowner and insurer to limit liability under any applicable national or international regime, such as the Convention on Limitation of liability for Maritime claims, 1976 (LLMC 1976), as amended.

Unlike the 1992 CLC for oil tankers, the Bunker Convention does not provide for a separate free standing limitation fund provided by shipowners to be exclusively available to satisfy bunker pollution damage claims. Thus bunker pollution damage claimants will have to prove their claims against any available limitation fund alongside other ‘property’ claims arising out of the same incident. It should be noted, there is no additional compensation internationally (like that available for tanker spills under the 1992 Fund Convention) when compensation under the Bunker Convention is inadequate.

Convention text

See: www.skuld.com/templates/Page.aspx?id=1392 (scroll down to “Convention text”).

For commentary see: www.bmla.org.uk/documents/imo-bunker-convention.htm .

Note: The Bunker Convention is accompanied by a Resolution (Annex 1) which urges all States to ratify or accede to the 1996 Protocol to the LLMC 1976 thus increasing the fund available for bunker pollution claims. Funds available for all claims (including those for bunker pollution damage) are greater under the 1996 LLMC Protocol than under LLMC 1976.

The Convention on Limitation of Liability for Maritime Claims, 1976, as amended by the Protocol of 1996 to amend the Convention on Limitation of Liability for Maritime Claims, 1976 (1996 LLMC Protocol)

Under the international 1996 LLMC Protocol (which entered into force in 2004) the limit of liability for bunker pollution damage claims for ships not exceeding 2 000 gross tons is 1 million SDR (US\$ 1.5 million).

For larger ships, the following additional amounts are used in calculating the limitation amount:

For each ton from 2,001 to 30,000 tons, 400 SDR (US\$ 601)

For each ton from 30,001 to 70,000 tons, 300 SDR (US\$ 450)

For each ton in excess of 70,000 tons, 200 SDR (US\$ 300)

Other players in the international regime

The International Tanker Owners Pollution Federation (ITOPF) often advises a shipowner's insurer (normally a P&I Club) and the IOPC Funds on the technical merits of claims for compensation. ITOPF has compiled oil spill statistics up to 2009. These may be of interest as well as the useful 2010 edition of the ITOPF Handbook. See: www.itopf.com/news-and-events/ and www.itopf.com/information-services/data-and-statistics/.

The Oil Companies International Forum (OCIMF) is an association of oil companies having an interest in the shipment of crude oil and oil products. It pursues, before IOPC Funds governing bodies and elsewhere, the interests of "persons" receiving oil and liable to make contributions to the IOPC Funds. OCIMF promotes the safe operation of oil tankers and terminals. See: www.ocimf.com.

The International Group of P&I Clubs promotes shipowners' interests in relation to their liability under the 1992 CLC and otherwise. The Group speaks collectively for Clubs before IOPC Funds governing bodies and elsewhere. See: www.igpandi.org.

Compensation of damage caused by hazardous and noxious substances spills from ships

The International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea, 1996 (HNS Convention) was adopted at IMO in 1996. It is not yet in force.

The Convention is modelled on the international compensation regime for oil pollution from tankers in many respects. However, the HNS Convention covers many more substances.

Under the Convention, HNS includes bulk solids, liquids including oils, liquid gases such as liquefied natural gases (LNG) and liquefied petroleum gases (LPG), and packaged substances. Some bulk solids such as coal and iron ore are excluded. Loss or damage caused by non-persistent oil is covered as is non-pollution damage caused by persistent oil. Pollution damage caused by persistent oil spills from tankers is excluded since such damage is already covered by the existing international regime. for oil tankers. Loss or damage caused by radioactive materials is also excluded.

The HNS Convention establishes a ‘two tier’ compensation regime. The first tier is provided by the individual shipowner and his insurer, and the second tier by the International Hazardous and Noxious Substances Fund (HNS Fund). This Fund is financed by contributions from individual receivers of HNS after sea transport in all States Parties to the Convention.

The shipowner is ‘strictly liable’ for damage caused by HNS in connection with their carriage by sea on board the ship. However, the shipowner can limit his liability based on the tonnage of his ship, up to a maximum (for ships more than 100 000 units of gross tonnage) of 100 million SDR (US\$ 150 million). Compulsory insurance and direct action against insurers is provided for under the Convention.

The HNS Fund will provide additional compensation up to a maximum of 250 million SDR (US\$ 375 million), including the amount paid by the shipowner and his insurer.

The Convention covers the following ‘damage’ resulting from the carriage of HNS by sea: (a) loss of life or personal injury on board or outside the ship; (b) loss of, or damage to, property outside the ship; (c) loss or damage caused by contamination of the environment (principally, compensation for environmental damage is limited to costs of reasonable measures of reinstatement actually undertaken); and (d) the costs of preventive measures taken by any person after an incident has occurred to prevent or mitigate damage. All or some damages are covered depending on where they occur geographically.

The Legal Committee of the IMO has working recently on a draft Protocol to the HNS Convention designed to address practical problems said to have prevented States from ratifying the original Convention. See: www.imo.org/Newsroom/mainframe.asp?topic_id=1773&doc_id=11250

A Protocol to the HNS Convention aimed at bringing that Convention into force has been adopted at an IMO convened Diplomatic Conference in London, 26-30, April, 2010.

The United States Experience

Prior to the *Exxon Valdez* incident in March 1989, there was movement within the United States toward ratification of the two 1984 protocols that amended the international 1969

CLC and 1971 Fund Convention. The Oil Pollution Act of 1990 (OPA '90) signed into US law on August 18, 1990, rejected the efforts towards the international conventions.

OPA '90 instituted new rules related to oil tanker safety. It mandated many changes within the oil industry. The Act applies to both tank and non-tank vessels. It applies to any person owning, operating or chartering by demise a vessel. Under the Act there may be more than one responsible party in a single incident. The vessel owner is strictly liable for costs and damages resulting from oil spills. Normally the owner will respond to the spill and his insurance (\$1 billion cover for pollution is required). Failing that, the \$1 billion Oil Spill Liability Trust Fund (OSLTF) provides federal resources for a rapid and effective response but has recourse against the vessel owner to recover any expenditure.

OPA '90 has been very successful because it provides a comprehensive and far reaching legislative package that addresses all of the issues and, because it is rigorously and consistently enforced by the US Coast Guard (USCG), an Agency which is well trained and has the necessary resources.

The enforcement program uses both inducements and sanctions to engender compliance. Inducements include waiver of penalties and a reduction in regulatory burdens for responsible shipowners. Sanctions include administrative, civil and criminal penalties to deter negligence or intentional misconduct. It is these sanctions, coupled with an effective enforcement programme, which have the most significant deterrent effect on potential polluters. The USCG enforcement regime is recognized worldwide as being effective, professional, properly resourced and consistently applied. The end result is that there is nowhere in the US for substandard vessels to hide and owners know it. Shipowners also know that, in the event of a spill in US waters, they will be identified and will be held strictly liable for costs and damages resulting from oil spills, with the possibility of unlimited liability in the most serious cases.

Structurally, the US and international regimes are similar, yet they are far apart with respect to key issues of when the right of a shipowner to limit its liability may be lost, and the scope and extent of compensable damages (particularly in the area of natural resource damages). (Also noteworthy is the international regime's lack of a separate limitation fund, as well as no supplementary compensation, for bunker pollution damage claims involving non-tank vessels, given the risk of very significant bunker oil spills from non-tankers in light of industry trends.)

Both the 1992 CLC and OPA '90 have limits of liability for shipowners. OPA '90's is easier to break. Also, in the US it would be a rare incident where responsible parties are deemed to have a complete defence. In OPA '90 the emphasis is on ensuring that, in the final analysis, it is the polluter who pays for damages caused. Under the 1992 CLC test (which differs from the 1969 CLC test) it is practically impossible for a shipowner to be deprived of his right to limit liability. The international regime provides more protection than deterrence.

The international oil pollution liability and compensation Conventions provide: “...*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...*” On the other hand, OPA '90 provides for payment of natural resource damage claims from the OSLTF.

The technically justified reasonable cost for reinstatement/restoration measures, for which compensation is available under the international regime, might equate to primary restoration under the US Natural Resource Damage Assessment (NRDA) regulations. However, the further measure of OPA '90 NRDA is: (1) The diminution in values of those natural resources pending restoration plus, (2) The reasonable cost of assessing those damages. The international Conventions do not cover this latter sort of compensation provided by the NRDA regulations.

In summary, OPA '90 focuses on five areas of emphasis namely: (1) Prevention (through crew competence, double hulls, etc.); (2) Preparedness (contingency plans, vessel response plans and exercises, qualified individuals and oil spill response organizations); (3) Response (USCG is responsible for ensuring a safe and effective response); (4) Liability (that serves as a real deterrent) and Compensation; and (5) Research and development (into response and prevention techniques and hardware).

More detailed information on the Act and associated regulations can be obtained from the US Coast Guard's National Pollution Funds Center. See: www.uscg.mil/npfc/About_NPFC/osltf.asp

Note OPA '90 does not prevent individual States in the USA from implementing their own more stringent oil spill laws. Generally, in the regulation of international shipping national laws take precedence. However, OPA '90 does not name cargo owners as a responsible party, and the laws of several US coastal states name the cargo owner as a potentially liable party for spills within state territorial waters.

Developments within the European Union

In the aftermath of the *Erika* incident (France, 1999), the European Commission (EC) made various proposals to the European Parliament and the Council for legislative change within the European Union (EU) including, penal sanctions as a deterrent (not related to compensation) against any person who has caused a pollution incident through gross negligence.

Also in 2000, the EC's Erika 1 and Erika 2 packages of proposals included: (1) The proposed amending of the international regime aimed at restricting the right of ship owners to limit their financial liability if accidents are due to their actual fault, as well as proposals aimed at removing the *de facto* immunity of other key players (such as the

charterer, operator, or manager of the ship) from compensation claims; (2) The EC's view that the international regime does not provide for adequate compensation for damages to the environment, and that further measures may be necessary in this regard, and; (3) The proposed establishment of the European COPE Fund should the then proposed international Supplementary Fund prove inadequate.

In January, 2002, the EC issued a proposal for a Directive on environmental liability, covering damage to biodiversity, soil pollution and damage to waters covered by the Water Framework Directive. Striking is the similarity between the EC's proposed damage assessment rules and the US NRDA regulations employed in the US for estimating damages for injuries to natural resources.

From EC/EU perspectives, the *Prestige* incident (Spain, November, 2002) appeared to have confirmed that the measures proposed by the EC in its Erika 1 and 2 packages were well founded.

In November 2005, the EC proposed a third package of legislative measures (Maritime Safety Package 3), including a proposal for a Directive on the civil liability and financial securities of shipowners.

Here, the EC's concern is for improvements to the international 1992 CLC, such as removing the ceiling on civil liability. It is considered that the international regime for civil liability and compensation, in the event of pollution, must be improved so that operators in the maritime transport chain ensure oil is only transported on board tankers of the highest standard. The Directive would incorporate the international 1996 Protocol to LLMC 1976 into Community (EU) law. It would be compulsory for all shipowners to cover their civil liability for an amount no less than double the limitation amounts laid down in LLMC 1996. The EC advised that it would seek a mandate for negotiating within the IMO a revision of the LLMC 1996 for the purpose of reviewing the test for ship owners losing the right to limit liability.

The action taken within the EU bodies has galvanized the IMO into rapid reaction to improve the regulation of ship safety and the international liability and compensation regimes. It is reasoned that such changes in the international regimes will preclude all, or most of what otherwise might prove to be, in effect, a 'EurOPA' that would threaten the continued viability of the international regimes. While the *Exxon Valdez* was the catalyst for major legislative and regulatory changes in the United States, it remains to be seen if the *Erika* and *Prestige* incidents prove to be the European equivalents.

Update

In 2008 the EU Council of Ministers from EU member states rejected the EC's proposed Directive on civil liability for shipowners. Whether this is a fatal setback for this EC proposal, or not, remains to be seen. Certainly, another serious oil pollution incident off the west coast of France would add fuel to this policy debate within the EU governing bodies which has been going on since the *Erika* (France, Dec. 1999).

Positive developments since then, including within the international liability and compensation regime have undoubtedly assisted some EU member states in their opposition to the proposed EC directive: (1) As noted above in this paper, an optional third tier of compensation from a new international Supplementary Fund is now available to 1992 Fund Convention Party states that want it. (2) As well, in February, 2006, the International Group of P&I Clubs had presented to the 1992 Fund a revised Small Tanker Oil pollution Indemnification Agreement (STOPIA 2006) and a new Tanker Oil Pollution Indemnification Agreement (TOPIA 2006). Under STOPIA 2006, the limitation amount applicable to small tankers would, on a voluntary basis, be increased to 20 million SDR (US\$ 30,029,200) for tankers of 29 548 gross tonnage or less for pollution damage in all 1992 Fund Party states. TOPIA 2006 would result in the shipowner indemnifying, on a voluntary basis, the Supplementary Fund for 50 percent of the compensation amounts paid by it. These agreements, while not contracts, are unilateral offers by shipowners which confer on the respective Fund the right of enforcement. So it was that the 1992 Fund Assembly decided at its October 2005 session not to re-open the 1992 CLC and the 1992 Fund Convention to adjust the shipowner's limit of liability. Alternatively, at their February/March 2006 sessions, the Assemblies of the 1992 Fund and the Supplementary Fund, in effect accepted the International group's proposals for a STOPIA 2006 and TOPIA 2006.

¹The framework of 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 revised by Protocols in 1976, 1985 (this never came into force) and 1992 and an Amendment in 2000 (in force November 1, 2003). A further protocol to the 1971 Fund Convention was concluded by the IMO in 2003. The 2003 Supplementary Fund Protocol is designed to supplement both the 1992 CLC and the 1992

Fund Convention on an optional basis with participation open to all states parties to the 1992 Fund Convention.

² IOPCF, *Annual Report 1999* (London: IOPCF, 2000) pp. 34-36; IOPCF, *Annual Report 2006* (London: IOPCF, 2007) pp. 29-30. See also *Marine Liability Act*, S.C. 2001, c.6, Part 7, s. 101 .

³ For the purposes of the 1992 Conventions: “ ‘Ship’ means any sea-going vessel and seaborne craft of any type whatsoever constructed or adapted for the carriage of oil in bulk as cargo, provided that a ship capable of carrying oil and other cargoes shall be regarded as a ship only when it is actually carrying oil in bulk as cargo and during any voyage following such carriage unless it is proved that it has no residues of such carriage of oil in bulk aboard.”

⁴ 1992 Fund Convention, art. 7.

THE END/FIN