

LIABILITY AND COMPENSATION FOR OIL POLLUTION DAMAGE: AN EXAMINATION OF IMO CONVENTIONS

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The universal regime addressing the issues of ship-source oil spill liability and compensation are primarily governed by International Maritime Organization ('IMO') conventions. The IMO regime imposes liability on the shipping industry based on the principle that the polluter must pay. The civil liability conventions lay down the principle of strict liability for ship owners and create a system of compulsory liability insurance. Claims for compensation for oil pollution damage (including clean-up costs) may be brought against the owner of the tanker which caused the damage or directly against the owner's Protection & Indemnity ('P&I') insurer. The ship owner is normally entitled to limit his liability to an amount which is linked to the tonnage of his ship. This paper gives an overview of the international liability and compensation regime for oil pollution damage and the modus operandi to deal with the claims for compensation. This article argues that even though the conventions provide for a comparatively straightforward claims' procedure, claimants are less likely to be able to obtain adequate compensation in the event of a catastrophic oil spill and the oil industry is thus under less pressure to prevent oil spills. However the system set up by IMO met with response to in the international community which is apparent from the adoption of the system is on the increase.

I. INTRODUCTION

The main concern with oil pollution is due to the fact that today it is one of the greatest causes of marine environmental damage due to the very large amounts of oil spilled. Typically the causes of oil spills are shipping accidents and casualties and as well as cleaning operations of vessels. The importance of the subject matter of compensation for oil pollution damage has been recognized for a long period of time particularly since the *Torrey Canyon* oil spill in 1967 and the other classic oil spills like the *Amoco Cadiz*, *Exxon Valdez*, *Braer*, *Sea Empress*, *Erika* and recent incidents such as *Prestige* (2002) and *Hebei Spirit* (2007).¹

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¹ *The International Oil Pollution Compensation Funds, Incidents*, available at <http://www.iopcfund.org/> (Last visited on October 14, 2010).

The consequences of an oil spill may involve immense problems in so far as assessment and quantification of damages are concerned. Damage takes a variety of forms, including physical damage and economic loss. It affects specific individuals and the society at large. It affects business enterprises, and most importantly the environment. For example, the adverse impact of a catastrophic oil spill on fishing or tourism industries is considerable. If there is inadequate compensation, the effect on the local economy may result in substantial indirect costs for the State through reduced tax revenue and increased welfare provisions and indeed the social responsibility for the clean up cost. Therefore, the examination of the law relating to liability and compensation for oil pollution damage is significant.

Two conventions, namely, the International Convention of Civil Liability for Oil Pollution Damage, 1969 ('1969 CLC') and the International Convention on the Establishment of an International Fund for Oil Pollution Damage, 1971 ('1971 Fund Convention') provide for a comprehensive two-tier system of compensation for those who suffered loss as a result of oil spills within the jurisdictions of member-states. Both the conventions were revised by protocols adopted in 1992. The conventions were reconstituted and are now referred to as the 1992 Liability Convention ('1992 CLC') and the 1992 Fund Convention respectively. In 2000, the Legal Committee of IMO has adopted amendments to raise by 50% the limits of compensation payable to victims of pollution by oil from tankers. In 2003 a Supplementary ('third tier') Fund was established at the IMO through a new protocol that increases the amount of compensation in States that ratify it, to about US\$ 1.2 million. The current regimes of IMO covering oil spill do not include bunker oil spills from vessels other than tankers. Therefore in March 2001, IMO adopted a new International Convention on Civil Liability for Bunker Oil Pollution Damage, 2001 which ascertained a liability and compensation regime for oil spills, when carried as fuel in ships' bunkers.

The objective of this article is to provide an outline of the provisions contained in these legal instruments and while sketching out the provisions, this paper will identify the existing lacunae in the same. Part II of the paper highlights the problem of marine environmental damage and discusses the importance of oil pollution damage compensation. At the same time as the paper progresses to trace the impact of the Liability Convention (CLC) by providing an insight into maritime compensation jurisprudence in terms of its territorial scope, liability and limitations thereof. Part III of the paper examines the provisions of the Fund Convention with regard to compensation in and the procedure associated therewith in details. Part V delves into the problem of Bunker Oil Pollution and analyses the Convention relating to payment of compensation for the same. Simultaneously, while discussing the liability and compensation system of IMO, this paper checks out the whether it provides for a straightforward claims' procedure or not, and whether all claimants are able to obtain adequate compensation in the event of a catastrophic oil spills.

II. THE CLC 1969-1992

The primary rule of the Convention makes available 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 the ship as a result of the incident”.² Consequently the ship owner is strictly liable for oil pollution damage. Such liability covers issues such as the costs of clean up, loss to fishermen, and measures taken to prevent or minimize the damage.

A. GEOGRAPHICAL SCOPE

The Convention applies exclusively to pollution damage in the territory, the territorial sea and in the Exclusive Economic Zone (EEZ) of a state-party to the convention.³ In case an EEZ has not been established, the application of the Convention will extend to no more than 200 nautical miles i.e., if any particular State has not established such a zone it should be taken to be an area beyond and adjacent to the territorial sea of that State, determined by that State in accordance with international law and exceeding not more than 200 nautical miles from the baselines from which the breadth of its territorial sea is measured. The geographical scope has been expanded to broaden the powers of coastal state to intervene in the areas outside the territorial waters for the purpose of undertaking adequate measures of environmental protection. As a result the regime includes damaging events occurring in all maritime zones. Thus, there is no doubt that shipowners can now be liable in respect of oil spills in archipelagic waters and much further out on the High Seas. Furthermore, the Convention applies to preventive measures whenever taken, to prevent or minimize such damage.⁴

B. SCOPE OF APPLICATION

1. Ship

The CLC defines ship as any “sea-going vessel and any sea borne craft of any type whatsoever, actually carrying oil in bulk as cargo”.⁵ It specifies that vessels, exclusively used for carrying oil in lakes or rivers and oil rigs fixed or mobile are excluded. Furthermore, tankers on ballast voyages, even if they are carrying bunkers and slops, are excluded.

It is relevant to examine the application of the Convention when a ship is connected with the refinery or a single mooring buoy (‘SMB’) through

² Article III(1) of the CLC 1969, as amended by Article IV(1) of the 1992 Protocol.

³ Article II of 1969 CLC as replaced by Article 3 of the 1992 Protocol.

⁴ *Id.*

⁵ Article I(1) of the CLC 1969.

flexible pipes and the oil spilled through a burst in the pipe. The Convention is applicable if the pipes are considered part of the ship. If the pipes are part of the SMB, the Convention will not apply to the pollution damage.⁶ The Convention does not apply to war ships or vessels owned or operated by a State for non-commercial purposes.⁷

The 1992 Protocol brought some changes to the definition of ‘ship’ to mean “any sea-going vessel and 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 abroad”.⁸ This definition of a ‘ship’ includes unladen tankers in ballast after carrying crude oil provided that it has no residues. The definition also applies to combination carriers engaged in the carriage of crude oil in bulk. Consequently, the application of CLC 1969 and its 1992 Protocol is limited to spills by tankers and oil-combined tankers. Persistent oil, in the form of ships, bunkers, may also be spilled from ships, which are not bulk oil carriers. Such spills fall outside both the 1969 and 1992 CLC regimes.

The question whether Floating Storage Units (‘FSUs’) and Floating Production, Storage and Offloading Units (‘FPSOs’) constitute a ‘ship’ within the meaning of CLC. 1969 CLC will apply only if the unit is actually carrying oil in bulk as cargo. The Convention contains no definition of ‘cargo’, and different views exist as to whether the phrase refers only to goods which are transported from one port to another, as distinct from those which are simply held in storage afloat for trans-shipment into shuttle tankers. Under 1992 CLC, there is greater scope for argument that an offshore unit is covered. The issue was debated by the 1992 Fund Assembly in 1998 in response to concerns by some member-states that the position be clarified. Doubts were expressed as to whether a capability to carry oil in bulk as cargo would be sufficient unless such carriage was the purpose for which the unit had been constructed or adapted. Another suggested approach was to consider FSUs and FPSOs as falling within the definition of ‘ship’ only when they are disconnected from exploitation and production facilities and when they move off station with significant quantities of oil on board.⁹

2. Oil

Article I (5) of the 1969 CLC defines oil.¹⁰ It was redefined by 1992 Protocol as “any persistent hydrocarbon mineral oil such as crude oil, fuel oil,

⁶ SAMIR MANKABADY, *INTERNATIONAL SHIPPING LAW: IMO RULES VOL.1* 280 (1991).

⁷ Article XI of the CLC 1969.

⁸ Article II(1) of the 1992 Protocol.

⁹ IMO Doc. 92FUND/WGR.2/6.

¹⁰ “Any persistent oil such as crude oil, fuel oil, lubricating oil and whale oil, whether carried on board a ship as cargo or in bunkers of such a ship”.

heavy diesel oil and lubricating oil, whether carried onboard a ship as cargo or in the bunkers of such a ship".¹¹ The 1992 Protocol is clear that it covers only persistent hydrocarbon mineral oil.¹² A spill of bunkers is now covered by the Convention provisions. There is a difficulty in clearly distinguishing between persistent and non-persistent oils. However, it was maintained that non-persistent oils were unlikely to cause real damage to the marine environment and could, at any rate, be covered by the Limitation of Liability for Maritime Claims, 1976.

3. Pollution Damage

The CLC establishes the liability of the owner of a ship for pollution damage caused by oil escaping from the ship as a result of an incident¹³ on the territory of a state-party (including its territorial sea), and covers preventive measures to minimize such damage.¹⁴ The Convention provides compensation only for 'pollution damage' which is defined as follows:¹⁵

- (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 losses 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 oil must have escaped or been discharged from the ship; then both accidental and intentional discharge are covered. In case there was a grave and imminent threat of pollution damage to be prevented at considerable costs, the provisions of the Convention would not be applicable because of actual escape or discharge.¹⁶

¹¹ Article II(2) of the 1992 Protocol. Whilst the term persistent oil is not precisely defined in any of the conventions, the IOPC Fund has developed guidelines which have been widely accepted. Under these guidelines, an oil is considered non-persistent if at the time of shipment at least 50 per cent of the hydrocarbon fractions, by volume, distill at a temperature of 340 °C (645 °F), and at least 95 per cent of the hydrocarbon fractions, by volume, distill at a temperature of 370 °C (700 °F), when tested in accordance with the American Society for Testing and Materials' Method D86/78 or any subsequent revision thereof. Oils which are normally classified as persistent include crude oils, fuel oils, heavy diesel and lubricating oils. Non-persistent oils include gasoline, light diesel oil and kerosene. Available at <http://www.itopf.org> (Last visited on October 10, 2010).

¹² Whale oil and non-persistent hydrocarbons are excluded.

¹³ 'Incident' is defined as "any occurrence, or series of occurrences having the same origin, which causes pollution damage". See Article I(8) of the CLC1969.

¹⁴ PHILLIPE SANDS, *PRINCIPLES OF INTERNATIONAL ENVIRONMENTAL LAW* VOL.1 658 (1995).

¹⁵ Article I(6) of CLC 1969 as amended by Article II(6) of the 1992 Protocol.

¹⁶ MANKABADY, *supra* note 6, 281.

Clearly the exclusion of the pre-spill preventive measures from the scope of the Convention is not in line with its objective. 1992 Protocol attempts to remedy this deficiency by covering ‘threat’ situation so long as it is serious or is regulated as ‘grave and imminent’. ‘Incident’ is redefined as “any occurrence, or series of occurrences, having the same origin, which causes pollution damage or creates a grave and imminent threat of causing such damage”.¹⁷

The costs of preventive measures incurred by public authorities, the victims or the ship owners are liable to be compensated as part of pollution damage. The Convention does not cover damage caused by substances other than oil, such as chemical substances. Also the damage which does not result from pollution by oil is not covered. Hence no compensation is payable under the convention for damage caused by oil catching fire or exploding.¹⁸ The Convention does not provide compensation for damage to the environment, i.e. impairment of environment, except for the costs incurred in restoring damaged environment, such as clean-up costs or other measures of restoration. No compensation is payable for ‘unquantified damage’ i.e. damages which cannot be repaired, quantified and are therefore irreparable.¹⁹ The 1969 CLC applies to personal damage to property, if the damage is caused by pollution by oil discharged or escaping from ship.

An uncertainty is noticeable whether the damage includes psychological conditions such as stress, anxiety and depression. There is no clear answer in the CLC regime. However, the Scotland Court in *Black v. The Braer Corporation* observed that damage includes physical injuries and psychological conditions such as stress, anxiety and depression.²⁰

¹⁷ Article II(4) of 1992 Protocol.

¹⁸ Damages by substances other than oil and damage from fire and explosion involving oil is covered by 1996 HNS Convention.

¹⁹ This approach is different from what is adopted in other environmental conventions, e.g., the 1993 Lugano Convention on Civil Liability for Damage Resulting from Activities Dangerous to the Environment defines ‘environment’ to include “property which forms part of the cultural heritage and the characteristic aspects of the landscape”. See Article III(10). For the text of the Convention refer *International Legal Materials*, Vol. 32 480 (1993). See also the draft of the proposed Annex on liability and compensation to the Protocol on Environment Protection to the Antarctic Treaty refers to “any harmful impact on the ... environment and associated ecosystem”.

²⁰ Following the pollution caused by the *Braer* when it went aground off the Shetland Islands, a farmer, claimed damages on account of the stress, anxiety and depression caused to him by the contamination. The Scotland Court observed that damage within the definitions of the Merchant Shipping (Oil Pollution) Act 1971 and of the Merchant Shipping Act 1974 includes physical injuries and psychological conditions such as stress, anxiety and depression; Outer House 30 July 1998, SCOTS LAW TIMES, Issue 39, December 3, 1999 & 2000 Dir. Mar. 999 available at http://www.comitemaritime.org/jurisp/ju_clc.html#Anchor-13507 (Last visited on October 5, 2010).

4. Tonnage

The ship's tonnage referred to in the Convention is the gross tonnage calculated in accordance with the tonnage measurement regulations contained in Annex I of the International Convention on Tonnage Measurement of Ships, 1969.²¹

C. LIABILITY

The options considered for the parties liable for damage are the owner of the ship, the operator of the ship or charterer or the owner of oil which caused the damage. As a compromise, the 1969 CLC places liability on the owner of the ship at the time of accident, which causes the damage.²² Subject to a number of specific exceptions, the liability is strict on the owner of the ship from which the polluting oil escaped or was discharged. It is the duty of the owner to prove in each case that any of the exceptions should in fact operate.

1. Channeling

The liability is attributed to the owner i.e. only the owner can be held liable under the convention. No other person, such as the master and crew, operator or salvor, can be held liable, except where such person causes damage wilfully or recklessly. The following wide range of persons is generally exempted from liability:

- a) the servant or agents of the owner or the members of the crew;
- b) the pilot or any other persons who, without being a member of the crew, performs services for the ship;
- c) any charterer (howsoever described, including a bare boat 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 authority;
- e) any person taking preventive measures;
- f) all servants or agents of persons mentioned in sub- paragraphs (c), (d) and (e);

These people are the sort of persons who one might expect could be connected or somehow involved with the vessel when incident involving oil spill might occur. The motive to afford protection to such sort of persons is to avoid those persons from taking an insurance policy.

As to those who perform salvage operations, it can only be right and just that they should not be held legally accountable under the provisions of the Convention. Salvors are generally volunteers, called on in times of real danger in

²¹ Article V(10) of the CLC 1969, as amended by Article VI(5) of the 1992 Protocol.

²² Article III(1) of the 1969 CLC, as amended by Article IV of the 1992 Protocol.

emergency to attempt to or to avert catastrophe. The law admittedly says that salvors can be answerable for damage caused by their negligence, but short of more extreme conduct, salvors are rightly cloaked with immunity from liability from pollution.²³

Article III paragraph 4(b) of the CLC 1992 i.e. “the pilot or any other persons who, without being a member of the crew, performs services for the ship”, raises a doubt whether this clause includes the classification societies. In “*The Erika*,” the tribunal of France held that: “the services performed for the ship reference to which is made in Article III paragraph 4 (b) of the CLC 1992 are services performed by persons who participate directly in the maritime operations and cannot include classification societies.”²⁴ On the contrary a United States court declared that “a classification society is a person who, without being a member of the crew, performs services for a ship within the meaning of Article III paragraph 4 (b) of CLC 1992.”²⁵

There was nothing in the CLC, however, to prevent a claim in negligence from being made against a third party outside those listed above. Recourse actions by the ship owner against third parties are expressly preserved.²⁶

2. Defences

The ship owner is allowed to escape liability if he could prove that the discharge or escape resulted from one of the following three causes:²⁷

- a) It resulted from an act of war, hostilities, civil war, insurrection or a natural phenomenon of an exceptional, inevitable and irresistible character;²⁸
- b) It was wholly caused by an act or omission committed with intent to cause damage by a third party;²⁹ or
- c) It was wholly caused by the negligence or other wrongful act of any government or authority responsible for the maintenance of lights or other navigational aids in the exercise of its function.³⁰

²³ CHRISTOPHER HILL, *MARITIME LAW* 440 (1998).

²⁴ The “*Erika*”, Tribunal de Grande Instance de Paris – XI Chambre Correctionnelle January 16, 2008.

²⁵ *Reino de España v. The American Bureau of Shipping*, 2008 WL 36797 (S.D.N.Y.), available at <http://folk.uio.no/erikro/WWW/HNS/prestige.pdf> (Last visited on November 23, 2010).

²⁶ Article III(5) of the CLC: “Nothing in this Convention shall prejudice any right of recourse of the owner against third parties”.

²⁷ Article III(2) of the CLC 1969.

²⁸ Earthquake is an example for a natural phenomenon of unexceptional character.

²⁹ This clause covers acts by terrorist groups.

³⁰ For example negligence in marking a wreck or marking a channel.

In respect of (ii) and (iii) the word ‘wholly’ is particularly important. If the shipowner can prove that the damage fell partly within the events listed, it would be unable to claim the exemption.³¹ A possible inadequacy in the wording of the exception was highlighted by the Swedish pollution incident involving the vessel *Tessis*, a Soviet tanker which, in 1977, struck a submerged rock whilst under the charge of a pilot within Swedish territorial waters. This ripped a length of its bottom out resulting in the spilling of oil. The rock had not been marked on the relevant chart. Sweden has adopted the CLC by way of an Oil Liability Act which provides that a shipowner shall be free of liability if he can show that the damage was caused by the fault or neglect of any Swedish or foreign authority in the fulfillment of a duty to maintain lights or other aids of navigation. The question of where fault lay, whether on Sweden or on the ship, went up on appeal to the Swedish Supreme Court which finally found the State to be at fault, not the ship, thus allowing the shipowner to bring the matter within the exception and escape liability. But the further question was whether the chart was an ‘other aid to navigation’ within the wording of the exception and whether failure to maintain a chart thus caught by this exception.³²

Liability was also excluded in respect of any war ship or any ship for the time being used by the government of any State for purposes other than commercial.³³ Where an oil spill occurred from two or more ships, the resultant damage cannot be separately apportioned to each owner. The CLC imposes joint and several liability on each of the owners.³⁴

D. PERSONS ENTITLED TO CLAIM COMPENSATION FOR POLLUTION DAMAGE

Any natural or juridical person who has suffered damage, including state authorities who undertake cleanup operations or preventive measures, companies and private individuals who suffer personal injury, property damage, or loss of income or profit as a result of pollution damage can bring a claim for compensation.

³¹ SIMON BAUGHEN, SHIPPING LAW 307 (1990).

³² HILL, *supra* note 23, 425.

³³ Article XI of the CLC 1969.

³⁴ *Id.*, Article IV:

“When oil has escaped or has been discharged from two or more ships, and pollution damage results there from, 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.”

The above Article has been replaced by the following text in the Article 5 of the 1992 Protocol:

“When an incident involving two or more ships occurs and pollution damage results, there from, 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.”

The amounts of compensation under CLC 1969 were denominated in gold francs (Poincare francs) and converted into national currencies by referring to the official value of gold.³⁵ However, with the disappearance of the gold exchange standard later replaced by the Special Drawing Rights (SDR's) for the purposes of IMF transactions, it was considered more convenient to denominate the amounts by reference to the SDRs.³⁶

E. LIMITATION OF LIABILITY

The CLC establishes its own separate system of limitation, with limits higher than those in force under the 1957 and 1976 Limitation Conventions, which were expressly excluded from operating in respect of CLC claims.³⁷ As was the case under the 1957 Convention, CLC limits could be broken if the discharge or escape occurred with the actual fault or privity of the ship owner. These limits initially expressed in gold francs, were 133 SDRs per ton subject to a global maximum of 14 million SDRs.³⁸ These were revised by the 1992 Protocol. Now there is a flat rate of 3 million SDRs for vessels whose gross tonnage does not exceed 5,000 tons. For vessels whose gross tonnage exceeds 5,000 tons but does not exceed 140,000 tons, the figure is 3 million SDRs plus 420 SDRs for each additional ton over 5,000 tons. For vessels whose tonnage exceeds 140,000 tons the figure is a flat rate of 59.7 million SDRs.³⁹

The maximum amount of compensation payable by the shipowner under 1969 Convention was the equivalent of US \$ 19 million. This is increased to US \$ 80 million under the 1992 Protocol.⁴⁰ The limitation amount can be updated to take account of developments including inflation.⁴¹

³⁵ *Id.*, Article V(9).

³⁶ SDRs are a unit of value used by the International Monetary Fund (IMF) to its member countries in proportion to each country's quota and are used, as in the rest of the quota, to acquire other national currencies, when needed for balance of payment reasons. SDR's are therefore a universally recognized claim on national currencies and thus have the effect, although not yet all the characteristics, of a new currency. See GRAHAM BANNOCK & WILLIAM MANSES, INTERNATIONAL DICTIONARY OF FINANCE 290 (1995).

³⁷ Article III(b) of International Convention on Limitation of Liability for Maritime Claims, 1976 specifically exempts claims on oil pollution damage. It stipulates that claims for oil pollution damage within the meaning of the International Convention on Civil Liability for Oil Pollution Damage, dated 29 November 1969 or of any amendment or Protocol thereto which is in force. For the text of the Convention see *International Legal Materials*, Vol. 15 606 (1977).

³⁸ Article V(1) of the CLC 1969 as replaced by the text in Article II of 1976 CLC Protocol.

³⁹ Article VI(1) of the 1992 Protocol.

⁴⁰ Article V of the 1969 CLC as amended by Article VI of the 1992 Protocol.

⁴¹ Article XV of the 1992 Protocol.

In 2000, IMO has adopted amendments to raise by 50% the limits of compensation payable to victims of pollution by oil from tankers. The compensation limits set by the 2000 amendments are as follows:⁴²

- a) For a ship not exceeding 5,000 gross tonnage, liability is limited to 4.51 million SDR (US\$5.78 million).
- b) For ship of 5,000 to 140,000 gross tonnage: liability is limited to 4.51 million SDR (US\$5.78 million) plus 631 SDR (US\$807) for each additional gross ton over 5,000.
- c) For a ship over 140,000 gross tonnage: liability is limited to 89.77 million SDR (US\$115 million).

Under the 1969 CLC, the owner is not entitled to limit his liability if the incident occurred as a result of his actual fault or privity.⁴³ The old ‘fault’ or ‘privity’ test has since been replaced by the 1992 Protocol. Now the liability ceiling does not apply in respect of the ship owner, “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”.⁴⁴ The language of the 1992 Protocols refers to the ‘personal’ acts or omissions of the ship owner. This word is omitted from the act, which adds ‘any’ to the words ‘such damage’ which appear in the Protocols. It is probable that these linguistic differences between the Convention and Protocols will not prove significant.⁴⁵

The owner must establish 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.⁴⁶ The distribution of the amount should be strictly on *pro rata* basis proportionate to the individual established claims, if in totality, they together exceed the total liability ceiling.⁴⁷

Any claim by the owner himself, expenses or sacrifices reasonably made with a view to prevention or minimizing of pollution shall rank at par with others against the constituted fund. For instance, if an owner (or his servant or agent) has paid up a claim prior to the owner constituting his limitation fund, he may be subrogated for that amount as against the constituted fund.

The Convention stipulates very significantly that the fund of an owner if and when constituted would be the sole source of satisfaction for claims. No other asset of the owner may be approached or interfered with.⁴⁸ Any ship or other

⁴² IMO, *2000 Amendments to CLC 1969*, available at <http://www.imo.org/Conventions/contents.asp> (Last visited on July 1, 2010).

⁴³ Article V(2) of the 1969 CLC.

⁴⁴ See Article VI(2) of 1992 Protocol.

⁴⁵ BAUGHEN, *supra* note 31, 310-11.

⁴⁶ Article V(3) of the CLC 1969 as amended by Article VI(3) of 1992 Protocol.

⁴⁷ Article V(4) of the CLC 1969.

⁴⁸ *Id.*, Article VI(1)(a).

property to which that owner has title and which may already have been arrested, must be released by an order of a competent court as authority of the relevant State as must also be any alternative security already placed.⁴⁹

The insurer is entitled to constitute its own fund notwithstanding that the owner is entitled to form his own fund. However, if this happens it must not prejudice a claimant's right of compensation against the owner.

F. COMPULSORY INSURANCE

The Convention requires the ship owner carrying 2000 tons or more oil as cargo to carry insurance or other financial security up to the limit of liability applicable to the ship i.e. compulsory insurance. A certificate of insurance is to be carried on board at all times, and the ship will not be allowed to trade or enter or leave the ports of Contracting States if it does not carry a certificate of insurance.⁵⁰ As a consequence, the duty to provide an insurance policy or financial security arises only when the ship is carrying more than 2,000 tons of oil in bulk as cargo. Therefore where a tanker is on a ballast voyage carrying 2,000 tons of bunkers or more, the owner is not required to have such insurance.

A certificate is issued to the vessel by the appropriate authority of the Contracting State if the authority has satisfied itself that adequate insurance or alternative security is in place. Such insurance will normally be provided by P&I clubs and ordinarily include third party risk cover, oil pollution to the extent and limit of the Conventions provisions.

The person suffering damage can have direct recourse to the person providing insurance (i.e. the insurer of the ship owner) for compensation without having to go to the ship owner.⁵¹ Thus the insurer becomes guarantor and is exposed to direct action. He may, however, in his own right limit his liability regardless of whether the ship owner himself has lost or retained his own right to limit. The insurer is entitled to have all the defences, which the owner could have invoked against the assured. Furthermore, the insurer may raise the defence that the pollution damage resulted from the wilful misconduct of the owner.⁵²

The 1992 Protocol permits a State-party to the 1992 Protocol to issue certificates to ships registered in states which are not party to the 1992 Protocol.⁵³ The intention of this consent is to facilitate a ship owner to get certificates to both the 1969 and 1992 CLC, even when the ship is registered in a country which has not yet ratified the 1992 Protocol. This is imperative because a ship which has

⁴⁹ *Id.*, Article VI(1)(b).

⁵⁰ Article VII of the 1969 CLC as amended by Article VII of the 1992 Protocol.

⁵¹ Article VII(8) of the CLC 1969.

⁵² *Id.*

⁵³ *See* Article VII of the 1992 Protocol.

only a 1969 CLC may find it difficult to do business with a country which has ratified the 1992 Protocol, since it establishes higher limits of liability.

G. JURISDICTION

Claims for compensation may be brought before the courts of any State-party within the jurisdiction of which damage has been suffered,⁵⁴ i.e. a State-party must bring proceedings in connection with pollution damage to its coasts only in its own courts. In view of that, a United States district court, in *Reino de España v. The American Bureau of Shipping – The “Prestige”*⁵⁵ held that a court of the United States has no jurisdiction to hear a claim of Spain against a United States company allegedly liable for such pollution damage.⁵⁶

Article IX(1) of CLC 1992 provides 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 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.” It must be interpreted in the sense that the exclusive jurisdiction of the courts of the State in whose territory, territorial sea or area as indicated in Article II pollution damage has occurred, is not limited to cases where actions are brought against the owner of the ship or its insurer, but exists whoever is the person against whom actions for compensation are brought.⁵⁷

Each State is required to ensure that its courts have competence to deal with such claims. Except in specified cases, a decision of a competent court in a Contracting State must be recognized and enforced by the courts of other Contracting States.⁵⁸

⁵⁴ Article IX of CLC 1969 as amended by the Article 8 of the 1992 Protocol.

⁵⁵ 2008 WL 36797 (S.D.N.Y.).

⁵⁶ *United States District Court – Southern District of New York*, January 2, 2008, reported at CMI, available at http://www.comitemaritime.org/jurisp/ju_clc.html (Last visited on October 5, 2010).

⁵⁷ *International Oil Pollution Compensation Fund 1992 v. RINA S.p.A. and Others – Total Fina Elf S.A. and Others v. RINA S.p.A. and Others – French State v. RINA S.p.A. and Others – m/t “Erika”* 2003 Dir. Mar.139.

⁵⁸ The specified cases are

- (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. See Article X of CLC 1969.

H. TIME LIMITS FOR BRINGING ACTION

The claims must be made no later than three years from the date on which the cause of action arose, nor later than six years after the occurrence or first of the occurrence resulting in the discharge or escape by reason of which liability was incurred.⁵⁹ It denotes that the time starts to run when the damage first occurred. Any claim under the Convention has to be brought within 3 years and in any event within six years of the damage first occurring. It is understandable that the 1969 CLC is endowed with an extinguishing time bar: the claim is extinguished after three years. If the claim is not enforced by an action within this time limit the claim is wholly lost, and the court has no discretion whatsoever to entertain it.⁶⁰

A question of two alternative time bar periods would arise if the claims would become time-barred three years from the date on which the claim emerged, viz. the date of the oil spill itself, and that the six year time limit applied only to claims that arise more than three years after the first occurrence resulting in the discharge or escape of oil. In *Stephen Gray and Stanley Gray v. The Braer Corporation and Assuranceforeningen Skuld*⁶¹, by the Court of Session of Scotland clarified that:

Article VIII of the 1969 Convention does not create two alternative time bar periods. The Convention applies one period of three years applicable to all claims, with a long-stop provision that after the elapse of six years from the date of the relevant occurrence no action can be brought to enforce any claim whether for losses already sustained or for losses apprehended.

To be timely, any action must meet two requirements. The claim must be raised within three years from the date on which the claim first arose; and in any event it must be raised within six years of the date of the first discharge or escape of oil. These requirements are cumulative and not optional. Article VIII of the 1969 Convention envisages a single date as beginning the time bar period – the date “when the damage first occurred.

There is no prescribed time limit for the submission of late claims. In case of such late claims claimants may only share the balance of the limitation fund after the satisfaction of claimants who have timely submitted their claims.⁶²

⁵⁹ *Id.*, Article VIII.

⁶⁰ *Eunson v. The Braer Corporation and Assurance for eningen Skuld, The CLC 1969-1992*, reported at CMI, available at http://www.comitemaritime.org/jurisp/ju_clc.html #Anchor-Time-1659 (Last visited on October 5, 2010).

⁶¹ *Id.*

⁶² *Venha Maritime Ltd., The United Kingdom Mutual Steamship Assurance Association (Bermuda) Ltd. and the 1971 IOPCF v. Mauro Pesca S.r.l. and Others - The “Haven”*, 2005 Dir. Mar. 193, reported at CMI, available at http://www.comitemaritime.org/jurisp/ju_clc.html#limitation (Last visited on October 5, 2010).

I. TRANSITIONAL PERIOD

From May 16, 1998, Parties to the 1992 Protocol ceased to be Parties to the 1969 CLC due to a mechanism for compulsory denunciation of the 'old' regime established in the 1992 Protocol. However, for the time being, the two regimes co-exist, since there are a number of States which are Party to the 1969 CLC and have not yet ratified the 1992 regime – which is intended to eventually replace the 1969 CLC.

III. THE FUND CONVENTION 1971-1992

The Fund Convention was adopted to provide additional compensation for victims of oil pollution and to transfer some of the economic consequences of the damage to the owners of oil cargo, as well as the shipowners. The 1971 Fund Convention has been amended in 1976, 1984 and 1992. Due to denunciations of the 1971 Fund Convention, the 1971 Fund Convention ceased to be in force on May 24, 2002.

A. SCOPE OF APPLICATION OF THE FUND

The Fund is to be recognized in each Contracting State as a legal entity capable of suing and being sued, having rights and liabilities. The Director of the Fund is its legal representative.⁶³ The definition of damage and other terms in the 1992 Convention are the same as the corresponding definitions in the 1969 CLC and its Protocols. The scope of application of the Fund Convention is identical with that of the 1969 CLC, as amended by the 1992 Protocol. It encompasses damage caused in the Exclusive Economic Zone.⁶⁴ The Fund may also be used to compensate those who may have taken preventive or other measures to minimize pollution damage.⁶⁵

The provision on damage deals with two types of damage:⁶⁶

⁶³ Article II(2) of the 1971 Fund Convention.

⁶⁴ Article IV of the 1992 Protocol to the Fund Convention.

⁶⁵ *Id.*

⁶⁶ Under the text of the 1969 and 1971 Conventions as they originally stood, it was not clear whether damage to the natural resources of the marine environment is to be compensated, nor was it explicitly stated whether costs of restoration of the marine environment are compensable. Under the Conventions this would be a matter for the national courts, which would have to interpret the notion of pollution damage as laid down in the conventions. The new definition of 1992 Protocols clarifies this very important and controversial issue. They make it clear that claims for damage to the marine environment as such are not admissible, on the other hand, the costs incurred in restoring the marine environment after incidents of pollution are compensable under the conventions. One can find the difference by looking into the provisions Article I(6) of the 1969 CLC, Article II(3) of the 1984 Protocol to the 1969 CLC and Article II(3) of the 1992 Protocol to the 1969 CLC.

- a) damage to the environment as such; and
- b) pure economic loss.

The definition of the damage clearly rules out compensation based on theoretical calculation of damage caused to the marine environment by oil without actual proof of the costs of reinstatement. It is obvious from the definition that the payment should only be made if the reason for those measures not having been already undertaken is a lack of funds on the part of the claimant. The claimant would have to present detailed plans of the measures to be undertaken. It is plausible that payment of compensation by the International Oil Pollution Compensation Fund ('IOPC') or the ship owner or his insurer for such costs could be made on the condition that the money would actually be used for payment of the measures indicated by the claimant in support of his claim. A further key point is that only costs of reasonable measures are recoverable. This was considered a necessary restriction. It should be noted that measures of restoration of the environment are not always clearly distinguishable from preventive measures as defined in the Convention. For this reason, it is an advantage that the same qualification of reasonableness applies to both the notions.⁶⁷

The new definition is also of great significance in respect of another important issue, i.e., of consequential damage. The new provision makes it clear that loss of profit from impairment of the environment is recoverable under the Conventions.⁶⁸ In the case of pollution affecting a coastline, hoteliers, shopkeepers and others who earn their income from tourists at seaside resorts will thus be able to recover loss of income caused by the reduction in tourism resulting from the oil pollution. The same applies to fishermen who are able to prove that they have suffered loss of profit as a result of such impairment.⁶⁹

B. THE FUND'S LIABILITY

Under the 1992 Compensation Fund it is obligatory to pay compensation to a victim of pollution damage if the victim does not obtain full compensation under the 1992 CLC. The Fund would pay out to any claimant who suffered damage in three situations:⁷⁰

- a) Where no liability arose under CLC i.e. the shipowner is exempt from liability under the 1992 CLC because he can invoke one of the exemptions under that Convention

⁶⁷ M. Jacobsson & Norbert Trotz, *The Definition of Pollution Damage in the 1984 Protocols to the 1969 Civil Liability Convention and the 1971 Fund Convention*, 17 JOURNAL OF MARITIME LAW AND COMMERCE, 467-91(1986).

⁶⁸ Article I, ¶ 6 of the CLC 1969 as amended by Article II(3) of the 1992 Protocol.

⁶⁹ *Id.*

⁷⁰ Article IV(1) of 1 the 1971 Fund Convention as amended by Article VI(1) of the 1992 Protocol.

- b) Where a shipowner was incapable of meeting his 1992 CLC obligations or where his insurance covers, and or financial security were themselves inadequate;
- c) Where the value of the damage exceeded the vessel owner's liability under 1992 CLC.

A few defences are available to the 1992 Fund. The Fund does not pay compensation if the damage has occurred in a State which was not a member of the 1992 Fund. The 1992 Fund is also not obliged to pay compensation if the pollution damage resulted from an act of war, hostilities, civil war or insurrection or was caused by a spill from a warship; or if the claimant cannot prove that the damage resulted from an incident involving one or more ships as defined in the 1992 Civil Liability Convention.⁷¹ The Fund may be exonerated wholly or partially if it proves that the damage resulted from an act or omission committed with the intent to cause damage by the person who suffered the damage or the negligence of that person.⁷²

C. THE COMPENSATION LIMITS

The compensation payable by the Compensation Fund is limited for each incident. Under the 1971 Convention the maximum amount payable was 60 million SDRs (US\$81 million). This has been raised by the 1992 Fund Protocol to 135 million SDRs (US\$182 million) and the maximum amount of compensation has raised to 200 million SDR.⁷³ Again this has been raised by the amendments in 2000 to 203 million SDR (US\$260 million). However, if three States contributing to the Fund receive more than 600 million tonnes of oil per annum, the maximum amount is raised to 300,740,000 SDR (US\$386 million), up from 200 million SDR (US\$256 million).⁷⁴ A Supplementary Fund i.e. a third tier of compensation was established by 2003 Protocol. The total amount of compensation payable for any one incident will be limited to a combined total of 750 million SDRs (just over US\$1,000 million) including the amount of compensation paid under the existing CLC/Fund Convention.⁷⁵

When the aggregate of claims against the Fund which have arisen from any one incident exceeds the maximum amount payable, there shall be a *pro rata*⁷⁶ distribution of the amount so that no one single claimant gets less than the due proportional share.⁷⁷ The conversion of units of account into any particular

⁷¹ Article IV of 1971 Fund Convention. as amended by Article VI of the 1992 Protocol.

⁷² Article IV(3) of the 1971 Fund Convention as amended by Article VI(2) of the 1992 Protocol.

⁷³ Article VI(3) of 1992 Protocol.

⁷⁴ *Id.*

⁷⁵ Article IV(2) (a) of the 2003 Protocol.

⁷⁶ The amount will be distributed in such a manner that the proportion between any established claim and the amount of compensation actually recovered by the claimant will be the same for all claimants.

⁷⁷ Article IV(5) of 1971 Fund Convention as amended by Article VI(4) of the 1992 Protocol.

national currency is effected by reference to the SDRs on the date of the decision of the Assembly of the Fund as to the first date of payment of compensation.⁷⁸

In exceptional cases, the Assembly of the Fund may decide that compensation will be paid to the victims despite the fact that the owner has failed to constitute a fund in accordance with the CLC.⁷⁹ On payment of the compensation, the Fund acquires by the right of subrogation all the rights against the owner or his guarantor.⁸⁰ The Fund's rights of subrogation can now come into existence before any judgment is passed against the ship owner.

D. TIME LIMITS

The claims must be made no later than three years from when the claims first arose, or no later than six years from the date of the incident which caused the damage.⁸¹ The expiry of this time bar period is only prevented by an action being brought against the Fund and to this effect it is irrelevant that the Fund is a party to the limitation proceedings in which the claim of the claimants has been filed.⁸²

E. JURISDICTION

The courts in a State or States where the pollution damage occurs have exclusive jurisdiction over actions for compensation under the 1992 Fund Convention against the ship owner, his insurer and the 1992 Fund.⁸³ The 1992 Fund Convention also sets forth rules concerning the effect of judgements on the Fund,⁸⁴ the recognition and enforcement of judgements,⁸⁵ and rights of recourse and subrogation.⁸⁶

⁷⁸ Article VI(3) of the 1992 Protocol.

⁷⁹ *Id.*, Article VI(5).

⁸⁰ Article IX(1) of the 1971 Fund Convention as amended by Article XI of the 1992 Protocol.

⁸¹ Article VI of the 1971 Fund Convention as amended by Article 8 of the 1992 Protocol.

⁸² *Mauro Pesca S.r.l. and Others v. Venha Maritime Ltd., The United Kingdom Mutual Steamship Assurance Association Ltd. and International Oil Compensation Fund – The “Haven” Tribunal of Genoa*, April 21, 2007, reported at CMI, available at http://www.comitemaritime.org/jurisp/ju_fund.html (Last visited on October 10, 2010).

⁸³ Articles VII and VIII of the 1971 Fund Convention as amended by Articles 9 and 10 of the 1992 Protocol.

⁸⁴ Article VII(6) of the 1971 Fund Convention.

⁸⁵ Article VIII of the 1971 Fund Convention as amended by 1992 Protocol.

⁸⁶ Article IX of the 1971 Fund Convention as amended by Article XI of 1992 Protocol.

F. THE IOPC FUND

1. Structure

The International Oil Pollution Compensation Fund (‘IOPCF’) is an international organization with juridical personality. It consists of three organs: an Assembly, an Executive Committee, and a Secretariat.⁸⁷ Currently two Funds i.e. 1971 Fund established in 1978 by the 1969 CLC and 1971 Fund Conventions and 1992 Fund established by 1992 Protocols are administered by a joint Secretariat headed by one Director.

2. Handling the Claims

The IOPCF entertains in principle the claims of damage to property and costs of cleanup operations on shore and at sea and takes measures to prevent or minimize pollution damage. It also considers the consequential loss like loss of earnings suffered by the owners or users of property which have been contaminated as a result of the spill. In addition, the IOPCF reflects on loss of earnings by persons whose property has not been polluted i.e. pure economic loss on certain conditions.⁸⁸

In order for a claim to be accepted by the IOPCF, 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 following general criteria apply to all claims:⁸⁹

- a) any expense/loss must actually have been incurred;
- b) any expense must relate to measures which are deemed reasonable and justifiable;
- c) a claimant’s expense/loss or damage is admissible only if and to the extent that it can be considered as caused by contamination;

⁸⁷ Article XXIX of the 1971 Fund Convention as amended by Article XXI of the 1992 Protocol.

⁸⁸ Claims for pure economic loss are admissible only if they are for loss or damage caused by contamination. The starting point is pollution not the incident it self. When considering whether the criterion of reasonable proximity is fulfilled, the following elements are taken into account:

1. Geographic proximity between the claimants activity and the contamination;
2. Degree to which a claimant is economically dependant on an affected source;
3. Extent to which a claimant has alternative sources of supply or business opportunities;
4. Extent to which a claimant’s business forms an integral part of the economic activity within the area affected by the spill.

See ¶6 of *Guidelines on Oil Pollution Damage*, available at <http://www.comitemaritime.org/cmidsocs/rulesoil.html> (Last visited on October 14, 2010).

⁸⁹ IMO, *Claims Manual of International Oil Pollution Compensation Fund* 1992 13 (1998).

- d) there must be a link of causation between the expense/loss or damage covered by the claim and the contamination caused by the spill;
- e) a claimant is entitled to compensation only if he has suffered a quantifiable economic loss;
- f) a claimant has to prove the amount of his loss or damage by producing appropriate documents or other evidence.

However, the above criteria are merely a reference to deal with the claims and not binding on the courts. It was clarified by the French Court of Appeal in *IOPCF v. M. Gouzer, Tevere Shipping and Steamship Mutual Underwriting*⁹⁰, The Court apprehended that the courts are fully competent for the interpretation and application of the legal concept of pollution damage under the IMO regime and the criteria established by the IOPCF for the settlement of pollution claims are not binding on them, but may only constitute a reference of indicative values.⁹¹

The IOPCF has decided that in order for claims for the cost of measures to reinstate the marine environment to be admissible for compensation, the cost of the proposed measures must be reasonable. The appraisal for reasonableness would create some disputes practically. Such a situation was faced by Japan when the oil discharged from a Korean Tanker stranded within the territorial waters of Korea reached the coast of the Japan. The Self Defence Force and the Japan Coast Guard undertook measures to prevent pollution damage and incurred costs in the amount of 50,755,568 Japanese Yen. There was no financial security for the stranded tanker because the tonnage of the tanker was 786 tons. As the owner of the ship was insolvent, the Japanese government claimed compensation for the above costs from the IOPCF. The Fund disputed the reasonableness of some of the measures taken by the Self Defence Force. The Nagasaki District Court held that:⁹²

- a) Reconnoitering by airplanes on the day after the oil reached the coast was reasonable as a preventive measure, there being no evidence that prevention of oil pollution would have been possible to the same extent without the reconnoitering.
- b) Taking photographs of the site was reasonable as a measure to ascertain the situation easily and accurately.
- c) Search by naval vessels of the Self Defence Force was reasonable even though it was undertaken simultaneously with the activities by the Coast Guard.

⁹⁰ 2006 DMF 1014.

⁹¹ *Id.*

⁹² Japan v. 1971 IOPCF, Nagasaki District Court, December 6 2000, HANREI TIMES no.1101, 228 available at CMI, http://www.comitemaritime.org/jurisp/ju_clc.html (Last visited on October 5, 2010).

Another related issue is the damage to wildlife, as it is difficult to assess the damage and there are no proprietary interests involved. In reality, two problems have to be worked out. Primarily the ownership of wildlife has to be appraised.⁹³ Secondly, the compensation has to be assessed. It is difficult to evaluate damage to wildlife in terms of money. An American court could not see such difficulty and in *Commonwealth of Puerto Rico et al v. S.S. Zoe Colocotron*⁹⁴, it was held that the ship owner would be liable for 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 feasible without grossly disproportionate expenditures.⁹⁵

3. Contributions to the IOPC Fund

The IOPC Funds are financed by contributions paid by any person who has received in the relevant calendar year in excess of 1,50,000 tonnes of crude oil or heavy fuel oil in ports or terminal installations in a State which is a member of the relevant fund, after carriage by sea. The levy of contributions is based on reports on oil receipts in respect of individual contributors which are submitted to the Secretariat by the governments of the member-states. Contributions are paid by the individual contributors directly to the IOPC Funds. Governments are not responsible for these payments, unless they have voluntarily accepted such responsibility.⁹⁶

The Compensation Fund is made of contributions made by persons who received oil transported by sea to the State-parties to the 1971 Convention.⁹⁷ The Assembly of the Fund assesses the amount of contributions to be paid.⁹⁸ Each Contracting State is required to ensure that contributors in its territory fulfil their obligation to pay their contributions.⁹⁹ A Contracting State may decide, in its own discretion, to assume the obligation of a person who is liable within its territory to contribute to the Compensation Fund.¹⁰⁰

The assessment of each person's annual contribution which may be needed to balance the budget comprises a proportion of the total amount of contributions required by the Fund to fulfill its estimated annual expenditure.¹⁰¹

⁹³ *Id.*, 293.

⁹⁴ (1980) 628 Fed: R.2d.652, US Court of Appeal, 1st Circuit.

⁹⁵ *Id.*

⁹⁶ IMO, IOPC FUND ANNUAL REPORT, 29 (1999).

⁹⁷ Article X of the 1971 Fund Convention as amended by Article XII of the 1992 Protocol.

⁹⁸ Articles XI and XII of the 1971 Fund Convention as amended Articles XIII and XIV of 1992 Protocol.

⁹⁹ See Articles XIII and XV of the 1971 Fund Convention as amended by Articles 15 and 16 of the 1992 Protocol.

¹⁰⁰ Article XIV of the 1971 Fund Convention.

¹⁰¹ Article XII(2) and (3) of the 1971 Fund convention as amended by Article XIV of the 1992 Protocol.

The 1992 Protocol would establish transitional provisions governing contributions and place a limit, for up to five years, on the contribution of any one party to a maximum of twenty-seven and one-half percent of the total contributions of the Fund.¹⁰²

IV. INTERNATIONAL CONVENTION ON CIVIL LIABILITY FOR BUNKER OIL POLLUTION DAMAGE, 2001

The Bunkers Convention, 2001 covers pollution damage and is modeled on CLC, 1969. The Convention covers only pollution damage in the territory, territorial sea and exclusive economic zone of a State-party.¹⁰³ A prerequisite of the Convention calls for the registered owner of a vessel to maintain compulsory insurance cover. The Convention requires ships over 1,000 gross tonnage to maintain insurance or financial security such as the guarantee of a bank or similar financial institution. This stipulation is to cover the liability of the registered owner for pollution damage in an amount equal to the limits of liability under the applicable national or international limitation regime. However, in all cases not exceeding an amount calculated in accordance with the Convention on Limitation of Liability for Maritime Claims, 1976 as amended. Another significant proviso is the obligation of direct action, which would allow a claim for compensation for pollution damage to be brought directly against an insurer.¹⁰⁴

V. CONCLUSION

The international compensation regime for damage caused by spills from oil tankers was primarily governed by the two IMO Conventions – the 1969 CLC and the 1971 Fund Convention. These Conventions were amended in 1992 by the two Protocols, which amplified the compensation limits and expanded the span of the previous conventions. In 2000, an agreement was accomplished on raising the limits of the 1992 CLC and Fund Convention. The Supplementary Fund established in 2003 increases the amount of compensation in States that ratify it to about US\$1.2 million.

The IMO regime lays down the principle of strict liability for tanker owners and creates a system of compulsory liability insurance. It covers pollution damage but environmental damage compensation (other than for loss of profit from impairment of the environment) is limited to costs incurred for reasonable measures to reinstate the contaminated environment. Expenses incurred for preventive measures are recoverable even when no spill of oil occurs, provided there was grave and imminent threat of pollution damage. Claims for compensation

¹⁰² Article XXVI of 1992 Protocol.

¹⁰³ Article II of the Bunkers Convention, 2001.

¹⁰⁴ *Id.*, Article VII(10).

for oil pollution damage (including clean-up costs) may be brought against the owner of the tanker which caused the damage or directly against the owner's P&I insurer. The tanker owner is normally entitled to limit his liability to an amount which is linked to the tonnage of the tanker causing the pollution. Oil receivers in countries that are party to the Fund Convention are liable for the payment of supplementary compensation through the IOPC Fund.

The environmental loss and economic losses suffered by the oil spills must be adequately compensated. It is submitted that the relevant provisions of the CLC and Fund Conventions are somewhat disappointing on this aspect. Although the Conventions provide for a comparatively straightforward claims procedure, claimants are less likely to obtain adequate compensation in the event of a catastrophic oil spills and the oil industry is put under less pressure to prevent oil spills.

The liability and compensation system set up by both the Conventions met with response in the international community. As the Fund Convention succeeded in securing quick proceedings for the payment of compensation, the ratification status of the Conventions by states is on the rise, which shows the way to the harmonization of the law and practice of liability and compensation system for oil pollution damage. The States, which had adopted both conventions, a fair coverage of damage were achieved. The liability and compensation system have worked remarkably well until now. Except in a few cases, the States, which had adopted both conventions, have achieved a fair coverage of damage. On the contrary, in States, which had adopted only the CLC, the amounts payable under this Convention or under national laws, barely covered the damage sustained.

The liability and compensation system set up by the IMO Conventions must be met with complete uniformity and full reciprocity between States. States have to be ready to give up some of their sovereign rights in consideration of the expectation of some greater protection of their own interests in some other State's jurisdiction.

