STOCKHOLM CONVENTION WORKSHOP ON LIABILITY AND REDRESS

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IMO CONVENTIONS ON LIABILITY AND COMPENSATION FOR MARINE POLLUTION

Presented by

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Introduction

The sponsors of this Workshop have asked for an overview of the legal liability regimes established under the auspices of the International Maritime Organization. I am assuming that you are most interested in those conventions which concern liability and compensation for damage to the marine environment (rather than, for example, injury to passengers on passenger ships). I will therefore focus on the IMO treaties which concern liability for damage to the marine environment caused by spills of oil and other hazardous and noxious substances from ships.

Rather then give you a history of how these liability and compensation regimes have evolved over the last thirty years, I will focus on the elements of those systems which are currently in place, and indicate where some changes or adjustments are likely to be introduced in the future. In particular, I will be discussing two IMO conventions: The Civil Liability Convention for Oil Pollution, 1992 (1992 CLC) and the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, 1992 (1992 Fund Convention)[2].

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[2] The 1992 CLC and the 1992 Fund Convention are the Protocols of 1992 to the Civil Liability Convention for Oil pollution Damage, 1969 (1969 CLC) and to the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, 1971 (1971 Fund Convention). The system based on the 1969 CLC and 1971 Fund Conventions was replaced by the 1992 CLC and Fund Convention system on 24 May 2002.

I will also make reference to two other IMO liability conventions, which are not yet in force, but which would significantly extend the IMO liability and compensation regime. They are: The International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea (otherwise known as the HNS Convention), and the International Convention on Civil Liability for Bunker Oil Pollution Damage, 2001 (Bunkers Convention).

Key Elements

The key elements which are shared by the conventions in the current IMO systems of liability and compensation for damage to the marine environment include the following:

1. In principle, each of these systems is intended to provide a clear, uniform, and efficient means of compensating victims for pollution damage caused by ships. Before these systems were in place, the complexities of ship ownership and conflicting legal jurisdictions meant that victims had difficulty in identifying the responsible party, in determining what court would hear their claim, and in bearing the legal burdens of proof which were sometimes required to win a case. Not only was the process complex, but it was expensive and time-consuming – and, in the end, there was no guarantee that adequate funds would in fact be available to compensate the victims concerned: an uninsured ship owner might be outside the court's jurisdiction or might have gone bankrupt; or some victims might be compensated leaving no funds for compensation of other victims with equally valid claims. The IMO conventions are designed to remove these obstacles and make sure victims are compensated promptly and fairly, and without unnecessary legal procedures.

2. This objective is achieved firstly by imposing *strict liability* on the shipowner. The victim of pollution damage does not have to prove that the shipowner had caused the incident and

had been negligent in doing so. The transport of oil by sea is considered to be an inherently risky operation; and if an incident or accident happens which results in marine pollution damage, then the "polluter pays".

3. To guarantee that funds will be available to compensate victims of a pollution incident caused by a ship carrying oil, the IMO liability and compensation regime relies on a system of *compulsory insurance*. Shipowners are required to take out insurance before they can transport oil; and a *certificate of insurance* must be carried on board the tanker as evidence of such insurance coverage. To simplify the process for those who suffer a loss, the IMO liability conventions allow victims of pollution damage to proceed directly against the insurer. Victims are not required to proceed against the shipowner before applying to the insurer for compensation.

4. This system of *strict liability* backed up by *compulsory insurance* could not have been introduced, however, without the element of *limited liability*. Without a clear limit on the extent of financial liability, it would not be possible for a shipowner to know in advance what liabilities had to be covered by insurance, and the insurance market would not have been able to insure for unlimited liability. A system that guaranteed compensation to victims based on strict liability and compulsory insurance had to include a balancing element of limited liability. Therefore, liability is limited according to the formula prescribed in each of the conventions, and guaranteed compensation is available up to that stated amount for any particular incident, although *actual* damages might exceed that sum.

5. The IMO systems, however, do not ignore the fact that a limited liability system might in many cases leave victims of pollution damage *un*-compensated for a significant portion of that damage if the only source of compensation was the insurance coverage which was calculated and issued on the basis of a particular ship's limited liability. It was recognized in the

late 60's that a *complementary compensation regime* would be needed to ensure sufficient funds were available to compensate all claims. This complementary or second tier system is a Fund which is financed by a pooling of cargo interests. The object is to provide payment of compensation to a victim of pollution damage who is unable to obtain full and adequate compensation under the particular shipowner's insurance for limited liability. This second-tier Fund is paid for by contributions from persons who annually receive more than a certain quantity of oil. Contributions are assessed annually on the basis of projected expenditures of the Fund. In this way, the cost of oil pollution damage is shared by shipowners and oil importers. There are still limitations place on the Fund's ultimate liability, but these limits are substantially higher than those which apply to the shipowner alone. The complementary compensation Fund is managed by in intergovernmental organization called the International Oil Pollution Compensation Fund (IOPC).

One of the elements which has had to be adjusted from time to time, is the amount of the limitation to the shipowner's liability and to the liability of the complementary compensation fund. The limitation amounts are described in "SDR's" or Special Drawing Rights of the International Monetary Fund (IMF). The currency value of the SDR is determined daily by the IMF by averaging (in U.S. dollars, based on market exchange rates) of a basket of four major currencies—the euro, the Japanese yen, the pound sterling, and the U.S. dollar. As of August 31, the exchange rate was: 1 SDR=1.32 US dollars. (The daily conversion rate can be found at www.imf.org.) In 1969, the original limitation of liability for any one pollution incident was fixed at 133 SDR's (or $175) for each ton of the ship's tonnage, with a maximum liability of 14 million SDRs (or $18.4 million) per incident. The maximum amount payable under the original compensation Fund established in 1971 was 60 million SRDs (or $79 million). The amounts were substantially increased by a set of protocols in 1992. The maximum amount payable for a single incident was increased to 135 million SDRs (or $178 million). But these limitation

amounts were raised again following the *Erika* incident in December 1999. In October 2003, the maximum amount available will be 203 million SDRs (or $268 million).

Meanwhile, under at the initiative of the European Union, a *third tier* of compensation for oil pollution damage is being established. A working group of the IOPC Fund has prepared a draft protocol to the 1992 IOPC Fund Convention to provide additional compensation to victims of oil pollution damage in the event the damage claims exceed both the shipowner's insurance and the IOPC Fund limitations. The IMO Legal Committee has given its approval to the draft and a diplomatic conference will be convened by IMO in 2003 to consider the draft protocol. The new protocol will be voluntary, and the fund will be financed by contributions from companies which receive or import more than a certain amount of oil per year into countries which become Party to the Protocol. The specific limitations amounts to be included as limitations in the so-called third tier fund will be left open for decision by the conference.

Definition of Damage

One very important aspect of the IMO liability and compensation regime is the definition of pollution damage which is to be compensated. (I should note that the International Convention on Civil Liability for Pollution Damage, 1992 (1992 CLC)n applies to pollution damage which is caused in the territory or in the exclusive economic zone of a Party to the Convention.). The term *pollution damage* is defined in this Convention as: "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 shall be limited to costs of reasonable measures of reinstatement actually undertaken or to be undertaken; [as well as] the costs of preventative measures and further loss or damage caused by preventative measures."

As a practical matter, the IOPC Fund has had to develop criteria for the admissibility of claims which fall within this broad definition of pollution damage. These criteria are set out in the IOPC *Claims Manual* – the guidebook on how to present a claim to the Fund. The criteria are designed to achieve uniform treatment of claims, and to give due recognition to claims for environmental damage while at the same time circumscribing their scope by some kind of objective standard. Among the important criteria are the following:

1. Any expense or loss must actually have been incurred;
2. The expense or loss must be caused by contamination;
3. A claimant is entitled to compensation only if he/she has suffered "a quantifiable economic loss";
4. Clean-up operations on shore and at sea are considered as preventative measures in that they are intended to prevent or minimize pollution damage, and they will be compensated when they are determined to be reasonable based on the facts available at the time the decision was made to take the measures.
5. Expenses for studies are compensated if they are carried out as a direct consequence of a particular oil spill, and as part of the oil spill response or to quantify the level of loss or damage. Studies of a general or purely scientific character are not compensated.
6. To qualify for compensation for pure economic loss (such as loss of income), there must be a reasonable degree of proximity between the contamination and the loss or damage suffered by the claimant. For example, in the tourism sector, a claimant who sells goods or services *directly* to tourists and whose business is *directly* affected by a reduction in visitors to the area affected by the spill will be compensated for the loss; but those who provide goods or services to other businesses in the tourist industry but *not* directly to tourists will generally *not* be able to demonstrate a sufficient degree of proximity between the loss and the contamination to be compensated.

Further work is being undertaken by a working group of the IOPC Fund to develop additional criteria for determining pollution damage which is to be compensated by the Fund, for example in the area of what constitutes "reasonable measures of reinstatement" of the damaged environment – in other words, the cost of bringing the damaged site back to the same ecological state that would have existed had the oil spill not occurred. Ultimately, the work in this area may require not only revision of the Claims Manual, but perhaps even amendments to the Conventions.

HNS and Bunkers Conventions

Before concluding, I should mention two other IMO conventions which concern liability in the field of marine pollution. They are not yet in force, but the are both modelled on the 1992 CLC and Fund Conventions and contain the same basic elements. When they come into force, they will fill important gaps in the international regime.

The International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances (HNS Convention) was adopted in 1996. This convention concerns liability for damage caused by a ship carrying hazardous substances which are defined by reference to lists already contained in other international conventions or codes, like the International Maritime Dangerous Goods Code (IMDG). The HNS Convention covers these substances whether they are carried as bulk cargoes or as packaged goods (i.e., in containers).

Under the HNS Convention, the shipowner is liable for the loss or damage up to a certain amount, which is covered by insurance. When the victims do not obtain full compensation from the shipowner or his insurer, a compensation fund (the HNS Fund) will provide additional compensation (up to 250 million SDRs (or 330 US$) for any single incident). The HNS fund will be funded by those companies which *receive* HNS in a Member State, after sea transport, in

excess of thresholds laid down in the Convention. The HNS fund will operate with four accounts to respect different markets in these substances: oil (for oil spills which are not covered by the 1992 CLC and Fund regimes); Liqufied Natural Gas (LNS); Liquefied Petroleum Gas (LPG), and a general account with two sectors, one for bulk solids and one for other HNS substances.

Contributions to finance the HNS Fund accounts and compensation payments will be made "post-event" – in other words levies will be due only *after* an incident involving the HNS fund has occurred. A List of contributing companies which have received HNS will be provided annually by the Member States. The Fund will not become operational until the total quantity of contributing cargo received in Member States has exceeded certain minimum levels for each account. A special correspondence group has been developing guidance on the complexities of the HNS Convention to assist countries wishing to become Member States. (Only two countries have ratified the HNS Convention so far. Twelve ratifications (with a minimum tonnage and HNS cargo volume) are needed to bring it into force.)

I should mention one more IMO liability convention: The International Convention on Civil Liability for Bunker Oil Pollution Damage (Bunkers Convention) was adopted by a conference in March 2001. (Bunker oil is basically the ship's fuel; and for some large ships, the bunker capacity is larger than some tankers, and the oil is heavier, more persistent and can be more damaging to the marine environment than oil carried as cargo.) The Bunkers Convention imposes strict liability on the owner and has compulsory insurance when the ship is over 1000 gross tonnage. The limit of liability for the shipowner is determined by reference to other national or international regimes, such as the Convention on Limitation of Liability for Maritime Claims, 1976. There is no special Fund to supplement compensation under the Bunkers Convention. This Convention can only come into force after 18 States have become Party, including five States each with a registered fleet of ships with a combined tonnage of over 1 million. As of now, no State has yet deposited an instrument of ratification.

I hope this broad overview of IMO conventions on liability and compensation for marine pollution has been informative and will be helpful to your work.

Thank you for your attention.