THE INTERNATIONAL REGIME FOR COMPENSATION FOR OIL POLLUTION DAMAGE

1 Introduction

Compensation for pollution damage caused by spills from oil tankers is governed by an international regime elaborated under the auspices of the International Maritime Organization (IMO). The framework for the regime was originally the 1969 International Convention on Civil Liability for Oil Pollution Damage (1969 Civil Liability Convention) and the 1971 International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage (1971 Fund Convention). This 'old' regime was amended in 1992 by two Protocols, and the amended Conventions are known as the 1992 Civil Liability Convention and the 1992 Fund Convention. The 1992 Conventions entered into force on 30 May 1996.

Due to a number of denunciations of the 1971 Fund Convention, this Convention ceased to be in force on 24 May 2002. A large number of States have also denounced the 1969 Civil Liability Convention. Therefore this note deals primarily with the 'new regime', ie the 1992 Civil Liability Convention and the 1992 Fund Convention.

The **1992 Civil Liability Convention** governs the liability of shipowners for oil pollution damage. The Convention lays down the principle of strict liability for shipowners and creates a system of compulsory liability insurance. The shipowner is normally entitled to limit his liability to an amount which is linked to the tonnage of his ship.

The **1992 Fund Convention**, which is supplementary to the 1992 Civil Liability Convention, establishes a regime for compensating victims when the compensation under the applicable Civil Liability Convention is inadequate. The **International Oil Pollution Compensation Fund 1992,** generally referred to as the **IOPC Fund 1992** or the **1992 Fund** was set up under the 1992 Fund Convention. The 1992 Fund is a worldwide intergovernmental organisation established for the purpose of administering the regime of compensation created by the 1992 Fund Convention. By becoming Party to the 1992 Fund Convention, a State becomes a Member of the 1992 Fund. The Organisation has its headquarters in London.

As at 1 September 2007, 117 States had ratified the 1992 Civil Liability Convention, and 101 States had ratified the 1992 Fund Convention. The States Parties are listed in the Annex.

2 1992 Civil Liability Convention

2.1 Scope of application

The 1992 Civil Liability Convention applies to **oil pollution damage** resulting from spills of **persistent** oil from **tankers**.

The 1992 Civil Liability Convention covers pollution damage suffered in the **territory, territorial sea or exclusive economic zone (EEZ)** or equivalent area of a State Party to the Convention. The flag State of the tanker and the nationality of the shipowner are irrelevant for determining the scope of application.

'**Pollution damage**' is defined as loss or damage caused by contamination. In the case of environmental damage (other than loss of profit from impairment of the environment) compensation is restricted to costs actually incurred or to be incurred for reasonable measures to reinstate the contaminated environment.

The notion of pollution damage includes measures, wherever taken, to prevent or minimise pollution damage in the territory, territorial sea or EEZ or equivalent area of a State Party to the Convention ('**preventive measures**'). Expenses incurred for preventive measures are recoverable even when no spill of oil occurs, provided that there was a grave and imminent threat of pollution damage.

The 1992 Civil Liability Convention covers spills of **cargo and/or bunker oil** from laden, and in some cases unladen sea-going vessels constructed or adapted to carry oil in bulk as cargo (but not to dry cargo ships).

Damage caused by **non-persistent oil,** such as gasoline, light diesel oil, kerosene etc, is not covered by the 1992 Civil Liability Convention.

2.2 Strict liability

The owner of a tanker has strict liability (ie he is liable also in the absence of fault) for pollution damage caused by oil spilled from his tanker as a result of an incident. He is exempt from liability under the 1992 Civil Liability Convention only if he proves that:

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

2.3 Limitation of liability

The shipowner is normally entitled to limit his liability under the 1992 Civil Liability Convention. The limits were increased by some 50.37% on 1 November 2003 as follows. The increased limits apply to incidents occurring on or after that date:

a) for a ship not exceeding 5 000 units of gross tonnage, 4 510 000 Special Drawing Rights (SDR) (US$7 million);
b) for a ship with a tonnage between 5 000 and 140 000 units of tonnage, 4 510 000 SDR (US$7 million) plus 631 SDR (US$967 for each additional unit of tonnage; and
c) for a ship of 140 000 units of tonnage or over, 89 770 000 SDR (US$138 million)[<1>].

If it is proved that the pollution damage resulted from the shipowner's personal act or omission, committed with the intent to cause such damage, or recklessly and with knowledge that such damage would probably result, the shipowner is deprived of the right to limit his liability.

2.4 Channelling of liability

Claims for pollution damage under the 1992 Civil Liability Convention can be made only against the registered owner of the tanker concerned. This does not preclude victims from claiming compensation outside this Convention from persons other than the owner. However, the Convention prohibits claims against the servants or agents of the owner, members of the crew, the pilot, the charterer (including bareboat charterer), manager or operator of the ship, or any person carrying out salvage operations or preventive measures. The owner is entitled to take recourse action against third parties in accordance with national law.

[<1>] The unit of account in the 1992 Conventions is the Special Drawing Right (SDR) as defined by the International Monetary Fund. In this document, the SDR has been converted into US dollars at the rate of exchange applicable on 3 September 2007, ie 1 SDR = US$1.532020.

2.5 Compulsory insurance

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

Claims for pollution damage under the 1992 Civil Liability Convention may be brought directly against the insurer or other person providing financial security for the owner's liability for pollution damage.

2.6 Competence of courts

Actions for compensation under the 1992 Civil Liability Convention against the shipowner or his insurer may only be brought before the Courts of the State Party to that Convention in whose territory, territorial sea or EEZ or equivalent area the damage occurred.

2.7 Claims for environmental damage

Under the 1992 Conventions, compensation for impairment of the environment (other than loss of profit from such impairment) is limited to costs of reasonable measures of reinstatement actually undertaken or to be undertaken.

An examination was made of what could be achieved within the present definition of 'pollution damage' as regards the admissibility of claims for reinstatement of the environment and for cost of environmental impact studies. The 1992 Fund Assembly approved in October 2002 a revised text of the relevant sections of the Claims Manual, the purpose of which was to clarify the criteria to be applied in respect of such claims, within the legal framework of the definition of "pollution damage" in the 1992 Conventions. These criteria can be summarized as follows.

Claims for the costs of measures of reinstatement of the environment will only be considered admissible if the following criteria are fulfilled:

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

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

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

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

The Fund may contribute to the cost of such studies provided that they concern damage, which falls within the definition of pollution damage in the Conventions, including reasonable measures to reinstate a damaged

environment. In order to be admissible for compensation it is essential that any such post-spill studies are likely to provide reliable and usable information. For this reason the studies must be carried out with professionalism, scientific rigour, objectivity and balance. This is most likely to be achieved if a committee or other mechanism is established within the affected member nation to design and co-ordinate any such studies, as well as reinstatement measures.

3 1992 Fund Convention

3.1 Supplementary compensation

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

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

In order to become Parties to the 1992 Fund Convention, States must also become Parties to the 1992 Civil Liability Convention.

The 1992 Fund does not pay compensation if:

a) the damage occurred in a State which was not a Member of the 1992 Fund; or
b) the pollution damage resulted from an act of war or was caused by a spill from a warship; or
c) the claimant cannot prove that the damage resulted from an incident involving one or more ships as defined (ie a sea-going vessel or seaborne craft of any type whatsoever constructed or adapted for the carriage of oil in bulk as cargo).

3.2 Limit of compensation

The 1992 Conventions apply to ships that actually carry oil in bulk as cargo, i.e. generally laden tankers, as well as to bunker spills from unladen tankers in certain circumstances. The Conventions do not apply to bunker spills from ships other than tankers.

The limits of the shipowner's liability under the 1992 Civil Liability Convention are:

(a) for a ship not exceeding 5 000 units of gross tonnage, 4.51 million Special Drawing Rights (US$7.0 million)*;

(b) for a ship with a gross tonnage between 5 000 and 140 000, 4.51 million SDR (US$6.9 million) plus 631 SDR (US$977.5) for each additional unit of tonnage; and

(c) for a ship with a gross tonnage of 140 000 or more, 89.77 million SDR (US$139.0 million).

The compensation payable by the 1992 Fund in respect of an incident is limited to an aggregate amount of 203 million SDR (US$310.2 million), including the sum actually paid by the shipowner (or his insurer) under the 1992 Civil Liability Convention.

* Exchange rates as of 15 October 2007

3.3 Competence of courts

Actions for compensation under the 1992 Fund Convention against the 1992 Fund may only be brought before the Courts of the State Party to that Convention in whose territory, territorial sea or EEZ or equivalent area the damage occurred.

Experience in past incidents has shown that most claims are settled out of court.

3.4 Organisation of the 1992 Fund

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

The 1992 Fund shares a Secretariat with the 1971 Fund and the Supplementary Fund (see sections 4 and 6.2 below). The joint Secretariat is headed by a Director, and has at present 27 staff members.

3.5 Financing of the 1992 Fund

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

Basis of Contributions

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

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

Payment of Contributions

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

The Director issues an invoice to each contributor, following the decision taken by the Assembly to levy annual contributions. A system of deferred invoicing exists whereby the Assembly fixes the total amount to be levied in contributions for a given calendar year, but decides that only a specific lower total amount should be invoiced for payment by 1 March in the following year, the remaining amount, or a part thereof, to be invoiced later in the year if it should prove to be necessary.

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

Level of Contributions

Payments made by the 1992 Fund in respect of claims for compensation for oil pollution damage may vary considerably from year to year, resulting in fluctuating levels of contributions. The following table sets out the contributions levied by the 1992 Fund during the period 1996-2006.

Annual contributions	**Date due**	**Total contribution £**	**Contribution per tonne of contributing oil £**
1996	01.02.1997	4 000 000	0.0110440
	01.09.1997	10 000 000	0.0188066
1997	01.02.1998	9 500 000	0.0114295
	Maximum deferred levy	30 000 000	*(No deferred levy made)*
1998	01.02.1999	28 200 000	0.0400684
	01.09.1999	9 000 000	0.0134974
1999	Credit: 01.03.2000	-3 700 000	-0.0056367
	01.09.2000	53 000 000	0.0552651
2000	01.03.2001	49 500 000	0.0545770
	Maximum deferred levy	43 000 000	*(No deferred levy made)*
2001	01.03.2002	41 000 000	0.0428439
	Maximum deferred levy	21 000 000	*(No deferred levy made)*
2002	01.03.2003	31 000 000	0.0274518
2003	01.03.2004	82 000 000	0.0052994
	Maximum deferred levy	40 500 000	*(No deferred levy made)*
2004	01.03.2005	37 800 000	0.0273362
2005	01.03.2006	0	
	Maximum deferred levy	5 500 000	*(No deferred levy made)*
2006	01.03.2007	3 000 000	0.0020156

4 International Oil Pollution Compensation Supplementary Fund

On 3 March 2005 a third tier of compensation was established by means of a Supplementary Fund under a Protocol adopted in 2003. So far 21 States have ratified the Protocol.

The Supplementary Fund provides additional compensation over and above that available under the 1992 Fund Convention for pollution damage in the States that become Parties to the Protocol. As a result, the total amount available for compensation for each incident for pollution damage in the States which become Members of the Supplementary Fund is 750 million SDR (US$1 149 million), including the amounts payable under the 1992 Civil Liability Convention and the 1992 Fund Convention, 203 million SDR (US$311 million).

The Supplementary Fund only pays compensation for pollution damage for incidents which occur after the Protocol has entered into force for the State concerned.

Membership of the Supplementary Fund is optional and any State which is a Member of the 1992 Fund may join the Supplementary Fund.

Annual contributions to the Supplementary Fund will be made in respect of each Member State by any person who, in any calendar year, has received total quantities of oil exceeding 150 000 tonnes after sea transport in ports and terminal installations in that State. However, the contribution system for the Supplementary Fund differs from that of the 1992 Fund in that, for the purpose of paying contributions, at least 1 million tonnes of contributing oil will be deemed to have been received each year in each Member State.

No incidents have occurred which have involved the Supplementary Fund. The following table sets out the

contributions levied in 2006 to meet the Supplementary Fund's administrative expenses:

Annual contributions	Date due	Total contribution £	Contribution per tonne of contributing oil £
2006	01.03.2007	1 400 000	0.0017223

The Supplementary Fund, which is administered by the 1992 Fund Secretariat (see section 3.4), has its own Assembly composed of representatives of its Member States.

5 STOPIA 2006 and TOPIA 2006

The two-tier international compensation regime created by the 1992 Civil Liability and Fund Conventions was intended to ensure an equitable sharing of the economic consequences of marine oil spills from tankers between the shipping and oil industries. In order to address the imbalance created by the establishment of the Supplementary Fund, which will be financed by the oil industry, the International Group of P&I Clubs (a group of 13 mutual insurers that between them provide liability insurance for about 98% of the world's tanker tonnage) has introduced, on a voluntary basis, a compensation package consisting of two agreements, the Small Tanker Oil Pollution Indemnification Agreement (STOPIA) 2006, and the Tanker Oil Pollution Indemnification Agreement (TOPIA) 2006. These contractually-binding agreements entered into force on 20 February 2006.

The 1992 Fund and the Supplementary Fund will in respect of incidents covered by STOPIA 2006 and TOPIA 2006 continue to be liable to compensate claimants in accordance with the 1992 Fund Convention and the Supplementary Fund Protocol respectively. The Funds will then be indemnified by the shipowner in accordance with STOPIA 2006 and TOPIA 2006. Under STOPIA 2006 the limitation amount is increased on a voluntary basis to 20 million SDR (US$32 million) for tankers up to 29 548 gross tonnage for damage in 1992 Fund Member States. Under TOPIA 2006, the Supplementary Fund is entitled to indemnification by the shipowner of 50% of the compensation payments it has made to claimants if the incident involved a ship covered by the agreement.

STOPIA 2006 and TOPIA 2006 also provide that a review should be carried out after 10 years of the experience of pollution damage claims during the period 2006-2016, and thereafter at five-year intervals.

7 Conclusions

The advantages for a State being Party to the 1992 Civil Liability Convention and the 1992 Fund Convention can be summarised as follows. If a pollution incident occurs involving a tanker, compensation is available to governments or other authorities which have incurred costs for clean-up operations or preventive measures and to private bodies or individuals who have suffered damage as a result of the pollution. For example, fishermen whose nets have become polluted are entitled to compensation, and compensation for loss of income is payable to fishermen and to hoteliers at seaside resorts. This is independent of the flag of the tanker, the ownership of the oil or the place where the incident occurred, provided that the damage is suffered within a State Party.

As mentioned above, the 1969 Civil Liability Convention and the 1971 Fund Convention have been denounced by a number of States, and the 1971 Fund Convention ceased to be in force on 24 May 2002. Moreover, the 1992 Civil Liability Convention and the 1992 Fund Convention provide a wider scope of application on several points and much higher limits of compensation than the Conventions in their original versions. For these reasons, it is recommended that States which have not already done so should accede to the 1992 Protocols to the Civil Liability Convention and the Fund Convention (and not to the 1969 and 1971 Conventions) and thereby become Parties to the Conventions as amended by the Protocols (the 1992 Conventions). The 1992 Conventions would enter into force for the State in question 12 months after the deposit of its instrument(s) of accession.

States which are already Parties to the 1969 Civil Liability Convention are advised to denounce that Convention at the same time as they deposit their instruments in respect of the 1992 Protocols, so that the denunciation of that Convention would take effect on the same day as the 1992 Protocols enter into force for that State.

As regards the Supplementary Fund Protocol, a State will have to consider whether, in the light of its particular situation, ratification of the Protocol is in the interests of that State.

Capt Patrick Joseph
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15 October 2007

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States Parties to both the
1992 Civil Liability Convention and the
1992 Fund Convention
as at 1 September 2007
(and therefore Members of the 1992 Fund)

98 States for which 1992 Fund Convention is in force

Albania		
Algeria		Panama
Angola	Germany	Papua New Guinea
Antigua and Barbuda	Ghana	Philippines
Argentina	Greece	Poland
Australia	Grenada	Portugal
Bahamas	Guinea	Qatar
Bahrain	Iceland	Republic of Korea
Barbados	India	Russian Federation
Belgium	Ireland	Saint Kitts and Nevis
Belize	Israel	Saint Lucia
Brunei Darussalam	Italy	Saint Vincent and the Grenadines
Bulgaria	Jamaica	
Cambodia	Japan	Samoa
Cameroon	Kenya	Seychelles
Canada	Latvia	Sierra Leone
Cape Verde	Liberia	Singapore
China (Hong Kong Special Administrative Region)	Lithuania	Slovenia
	Luxembourg	South Africa
	Madagascar	Spain
	Malaysia	Sri Lanka
Colombia	Maldives	Sweden
Comoros	Malta	Switzerland
Congo	Marshall Islands	Tonga
Croatia	Mauritius	Trinidad and Tobago
Cyprus	Mexico	Tunisia
Denmark	Monaco	Turkey
Djibouti	Morocco	Tuvalu
Dominica	Mozambique	United Arab Emirates
Dominican Republic	Namibia	United Kingdom
Estonia	Netherlands	United Republic of Tanzania
Fiji	New Zealand	
Finland	Nigeria	Uruguay
France	Norway	Vanuatu
Gabon	Oman	Venezuela
Georgia		

3 States which have deposited instruments of accession, but for which the 1992 Fund Convention does not enter into force until date indicated

Kiribati	5 February 2008
Cook Islands	12 March 2008
Hungary	30 March 2008

States Parties to the Supplementary Fund Protocol
as at 1 September 2007
(*and therefore Members of the Supplementary Fund*)

20 States Parties to the 2003 Supplementary Fund Protocol		
Barbados	Greece	Norway
Belgium	Ireland	Portugal
Croatia	Italy	Slovenia
Denmark	Japan	Spain
Finland	Latvia	Sweden
France	Lithuania	United Kingdom
Germany	Netherlands	
1 State which has deposited an instrument of accession but for which the Protocol does not enter into force until date indicated		
Hungary		30 March 2008

States Parties to the 1992 Civil Liability Convention
but not to the 1992 Fund Convention
as at 1 September 2007
(and therefore not Members of the 1992 Fund)

16 States for which 1992 Civil Liability Convention is in force			
Azerbaijan	Indonesia	Republic of Moldova	Solomon Islands
Chile	Kuwait	Romania	Syrian Arab Republic
China	Lebanon	Saudi Arabia	Viet Nam
Egypt	Pakistan		
El Salvador	Peru		
1 State which has deposited an instrument of accession, but for which the 1992 Civil Liability Convention does not enter into force until date indicated			
Yemen			20 September 2007

States Parties to the 1969 Civil Liability Convention
as at 1 September 2007

38 States Parties to the 1969 Civil Liability Convention		
	Georgia	
Azerbaijan	Ghana	Mauritania
Benin	Guatemala	Mongolia
Brazil	Guyana	Nicaragua
Cambodia	Honduras	Peru
Chile	Indonesia	Saint Kitts and Nevis
Costa Rica	Jordan	Sao Tomé and Principe
Côte d'Ivoire	Kazakhstan	Saudi Arabia
Dominican Republic	Kuwait	Senegal
Ecuador	Latvia	Serbia
Egypt	Lebanon	Syrian Arab Republic
El Salvador	Libyan Arab	United Arab Emirates
Equatorial Guinea	Jamahiriya	Yemen
Gambia	Maldives	

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