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Compensation Funds**

**The International Regime for Compensation
for Tanker Oil Spills
Summer Academy
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Relevant provisions on pollution in UNCLOS

- Provisions on
 - pollution prevention
 - criminal sanctions
 - state responsibility
 - civil liability and compensation only in art. 235
- Art. 235 contains no substantive provisions on liability and compensation
- These issues are governed by other treaties.

Relevant treaties on liability and compensation

- Civil Liability and Fund Conventions
- Bunkers Convention
- HNS Convention
- Nairobi Wreck Removal Convention
- Athens Convention (carriage of passengers)



Torrey Canyon 18 March 1967

- led to 1969 CLC and 1971 Fund Convention

Issues arising from *Torrey Canyon*

- Public law
 - the legal right of a state to intervene outside its territorial waters in response to an incident affecting its coastline
- Private law (focusing on right to compensation)
 - subject(s) liable
 - right to limitation of liability
 - types of damage recoverable
 - insurance issues
 - applicable law
 - jurisdiction

IMO Council decision May 1997

- Council decided to study
 - all questions **relating to the liability** of the owner or operator of the ship or the owner of the cargo **for damage caused by** the discharge of **persistent oil or other hazardous substances**,
 - the extent to which a State directly threatened or affected by a casualty which takes place outside its territorial waters should be enabled to take measures to protect its coastline, territorial sea and amenities.
- The Council also set up a legal committee to study these issues.

Work 1967-1969

- Preparatory work 1967-1969 by
 - IMO Legal Committee
 - Comité Maritime International (CMI)
- Proposals considered by Diplomatic Conference in November 1969
 - Controversial issues
 - Basis of liability
 - Compulsory insurance
 - Limitation of liability
- 1969 Conference adopted
 - 1969 Intervention Convention
 - clarified the rights of States to intervene outside their territorial waters
 - 1969 Civil Liability Convention (CLC)

Development 1969-1971

- 1969 CLC imposed additional burden on shipowner
 - strict liability
 - higher limits
- Agreement at the 1969 Conference that a supplemental fund should be established which should
 - relieve shipowners of this additional burden
 - be financed by the owners of oil cargoes
- Conference in 1971 adopted Fund Convention
 - establishing an international fund financed by oil cargo interests
 - to provide additional funds when compensation under the CLC insufficient
 - to relieve shipowners of part of the additional burden



—Amoco Cadiz, 1978 - led to review of 1969 CLC and 1971 FC



Development of the regime

- Diplomatic Conference in 1984 to revise 1969 and 1971 Conventions
 - Protocols adopted
 - Did not enter into force
- The original Conventions revised in 1992 by two Protocols
 - 1992 Civil Liability Convention
 - 1992 Fund Convention
- In 2003, Protocol adopted to the 1992 Fund Convention
 - creating the Supplementary Compensation Fund

International Compensation Regimes

Old Regime

1969 Civil Liability Convention
1971 Fund Convention

- 1971 Fund



New Regime

1992 Civil Liability Convention
1992 Fund Convention

- 1992 Fund

2003 Supplementary Fund Protocol

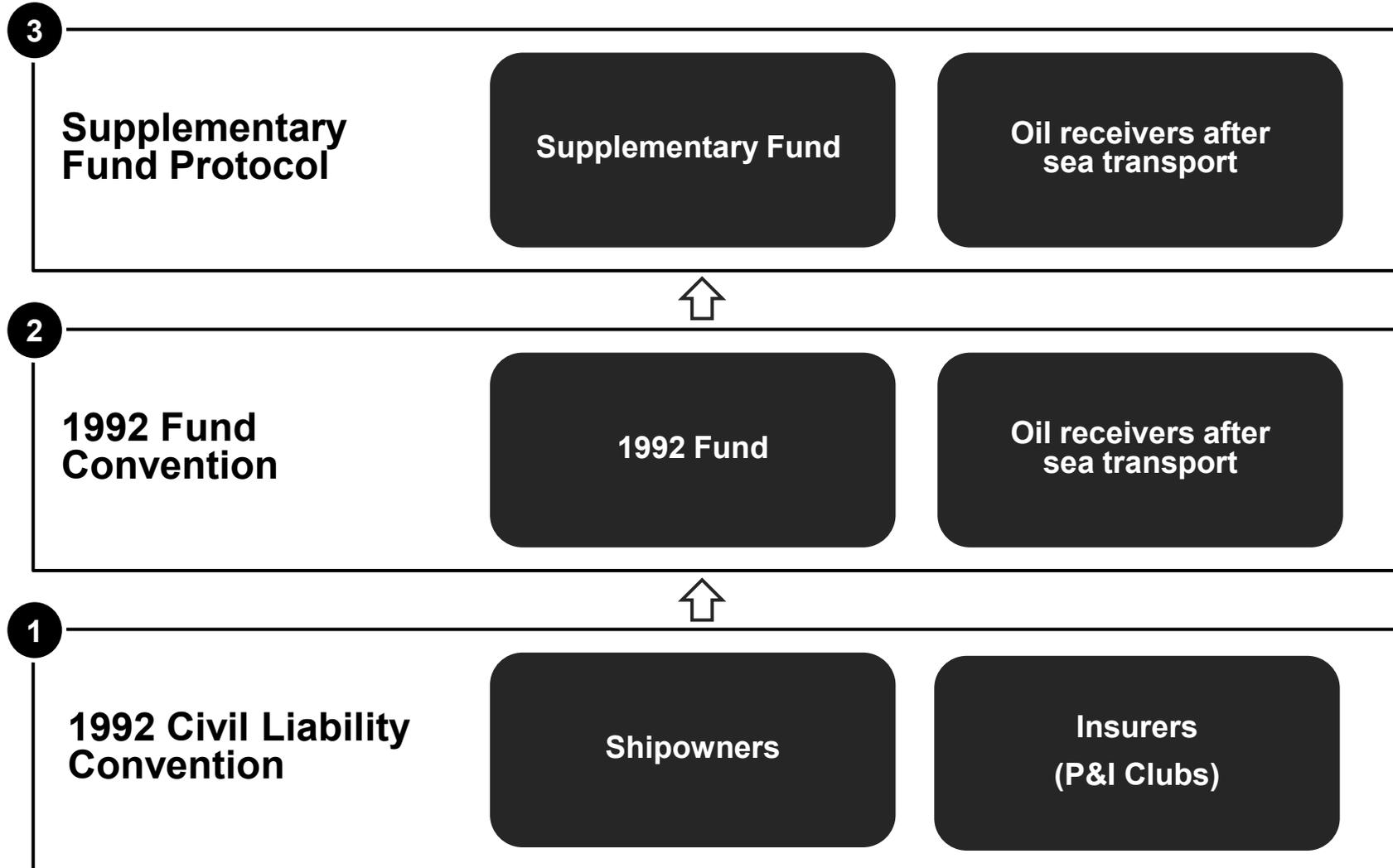
- Supplementary Fund



International Treaties

- 1992 Civil Liability Convention
138 States Parties
- 1992 Fund Convention
116 States Parties
- 2003 Protocol to 1992 Fund Convention
32 States Parties
- 1971 Fund Convention ceased to be in force on 24 may 2002.
 - The 1971 Fund wound up 31 December 2014

The Three Tier System



1992 Conventions apply to

- Pollution damage caused by
 - Spills of persistent oil from laden tankers
 - Bunker spills from unladen tankers with oil residues from previous voyage on board
- In the territory, territorial sea and EEZ or equivalent area
- Pollution damage includes preventive measures
 - Preventive measures: any reasonable measures to prevent or minimize pollution damage

Main Features under Civil Liability Convention

- Strict liability of registered owner
- Special regime for limitation of liability
- Compulsory insurance and direct action
 - for ships carrying more than 2 000 tonnes of persistent oil as cargo
- Channelling of liability
- Jurisdiction and enforcement of judgements

Limitation of liability

- Regime for limitation of liability
 - limitation amount reserved for pollution damage claims
 - shipowner (or insurer) has to establish a limitation fund
- Limitation lost
 - if the pollution damage resulted from 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
- Expected that the 1992 CLC limitation would be practically unbreakable

Compulsory insurance

- Insurance covering limitation amount
- Direct action against insurer
- Insurer may not invoke defences under policy
- Insurer may invoke defence of shipowner's wilful misconduct
- Insurer is entitled to limitation, even if the shipowner is not
 - not respected by the Spanish Supreme Court in the *Prestige* case



Protection & Indemnity Associations (P&I Clubs)

- Descendants of mutual hull insurance clubs created in 18th century
- Shipowners dissatisfied with insurance cover available came together to share their hull risks
- Clubs providing cover for third party liabilities formed in 19th century, the first one in 1855

Characteristics of P&I insurance

- P&I Clubs are mutual insurers
 - shipowners are both insurers and insured
- Members share each others risk for third party liabilities
- The Club Boards consist of shipowners elected among the members
- Clubs are non-profit organisations

P&I cover is an indemnity cover

- Clubs insure their members' risks and liabilities
- Principle of “pay to be paid” – Clubs only indemnify their members for what the Members have paid.
- If Member is bankrupt usually nothing for Club to pay
- Exceptions where claims can be made directly against the Club by the claimant and the Club cannot invoke defences under insurance policy
 - Civil Liability Conventions
 - Bunkers Convention
 - HNS Convention
 - 2002 Athens Convention (carriage of passengers).
 - 2007 Nairobi Wreck Removal Convention

Characteristics of P&I insurance

- Members do not pay a premium but Clubs are financed by “calls”
- Club members contribute to the Club’s common pool
- If pool is insufficient, there will be a further call
- If pool in surplus, there will be reduced call for next year
- The insurance cover is for a very high amount;
 - for oil pollution there is a limit of \$1 000 million per ship per event

P&I insurance covers

third party liabilities in respect of :-

- loss or damage to cargo
- injury, illness or loss of life of passengers
- injury, illness or loss of life of crew
- **pollution damage**
- collision
- property damage
- fines

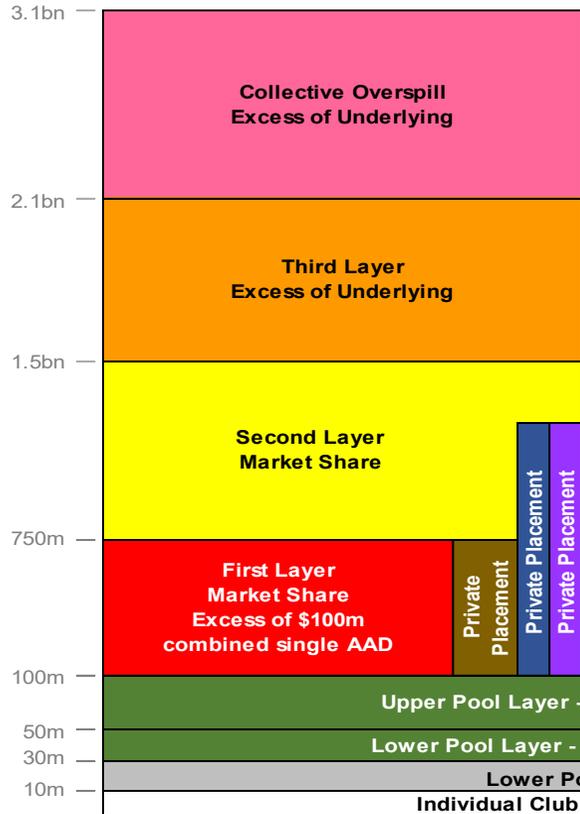
Pollution cover

- Typical rule for pollution cover:
 - “liabilities, losses, damages, costs and expenses incurred in consequence of the discharge or **escape** from an entered ship **of oil or any other substance** or the threat of such discharge or escape...”
- Cover for liabilities incurred under approved agreements, such as STOPIA and TOPIA
- Cover for fines imposed for accidental discharges

International Group of P&I Clubs

- 13 Clubs in the International Group
- Cover more than 90% of the world oceangoing tonnage
- The Group Clubs pool claims above a certain level (over \$10 million up to \$100 million per event)
- The Group Clubs reinsure their liabilities above a certain level (over \$100 million per event) up to \$3 100 million
 - for oil pollution only up to \$1 000 million
- A number of Clubs/insurers outside the Group, e.g.
 - British Marine
 - Chinese Club
 - Korean Club
 - Ingosstrakh (Russia)

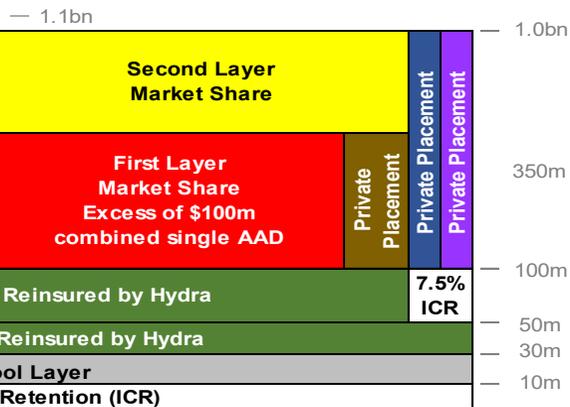
P&I



International Group of P & I Associations
 Pool and General Excess of Loss Reinsurance Contract Structure
 Owned and Chartered Entries
12 Months at Noon GMT 20th February, 2019

On the first GXL layer, a single AAD of \$100m is applicable to all claims otherwise recoverable (Owned or Chartered Entries, P&I, Oil Pollution)

Oil Pollution



P&I and Oil Pollution



International Group – principal members

- American Steamship Owners Mutual Protection and Indemnity Association, Inc
- Assuranceforeningen Gard
- Assuranceforeningen Skuld
- The Britannia Steam Ship Insurance Association Limited
- The Japan Ship Owners' Mutual Protection & Indemnity Association
- The London Steam-Ship Owners' Mutual Insurance Association Limited
- The North of England Protection and Indemnity Association Limited
- The Shipowners' Mutual Protection and Indemnity Association (Luxembourg)
- The Standard Steamship Owners' Protection and Indemnity Association (Bermuda) Limited
- The Steamship Mutual Underwriting Association (Bermuda) Limited
- The Swedish Club
- United Kingdom Mutual Steam Ship Assurance Association (Bermuda) Limited
- The West of England Ship Owners Mutual Insurance Association (Luxembourg)

EU competition law and International Group's arrangements

- International Group had been given an exemption by European Commission for its claims sharing and reinsurance arrangements
- Under EU law as amended such exemptions no longer possible
- European Commission reviewed these arrangements 2010-2012
- Review was closed in July 2012

Double retention

- Concept of ‘designated vessels’
- Used where ship in unacceptable “condition”
- “Unacceptability” determined through inspection by independent committee
- Double retention to risks of a designated vessel
 - ... for each claim, insuring Club takes \$20 million for its own account before it can pool (instead of \$10 million)
- No pooling for a vessel continuously designated for more than 12 months
- Mechanism for owner to reverse designation by making demonstrable changes to condition of ship

Compulsory insurance; certification

- Club issues “blue card” to the shipowner
 - not blue
 - not a card
 - today often in electronic form
- Competent authority of State of the ship’s registry issues insurance certificate on the basis of the “blue card”
- Certificate must be carried on board the ship
- Certificate must be recognised by all other States parties

Verification of solvency of insurer

- Flag States supposed to verify solvency of insurer
- Legal Committee Guidelines (May 2014) for accepting documentation addressed to States parties to the 1992 CLC
- States recommended
 - to accept documentation from International Group P&I Clubs
 - they should when receiving documentation from insurers or financial security providers outside the International Group verify the financial standing and solvency of such insurers or providers.

Sanctions against States and P&I cover

- Sanctions against States (UN, EU, USA) cause complications for P&I insurance
- Prohibition against providing financial services (including insurance) in certain cases

Sanctions and P&I cover

- Sanctions legislation does not affect the validity of CLC certificates
- P&I Clubs could be affected by sanctions in oil pollution cases
- *Nesa R3* incident (Oman, 2013); ship transported bitumen from Iran
 - insurer prevented from paying compensation
 - 1992 Fund paid to victims in Oman
- IOPC Funds in principle not affected by the sanctions
 - Liability to victims under the Fund Convention/Supplementary Fund Protocol remains
 - However, certain financial transactions prohibited which could make it impossible for the Funds to pay

Channelling of liability

No compensation claims against the shipowner outside the Convention

No compensation claims, under the Convention or otherwise, against

- (a) crew members, servants or agents of the shipowner
- (b) pilots or persons carrying out services for the ship
- (c) charterers, managers or operators of the ship
- (d) salvors or persons taking preventive measures
- (e) the servants or agents of groups (c) and (d)

unless the pollution damage resulted from the personal act or mission, committed with the intent to cause pollution damage, or recklessly and with knowledge that such damage would probably result.

Court judgement on channelling

French State and others v owner of the *Erika* and others
French Court of Cassation, September 2012

Total SA (de facto charterer, the charterer being a subsidiary)
representative of the shipowner
president of management company
classification society



Channelling of liability; *Erika*

- Court of Cassation:
 - All defendants covered by channelling provisions
 - Total, de facto charterer
 - representative of the shipowner
 - president of management company
 - classification society
 - However, due to their actions they could not benefit from channelling protection

Channelling of liability; charterer

- European Court of Justice in *Commune de Mesquer v. Total France SA and Total International Ltd* relating to the *Erika* incident
- Directive 75/442/EC on waste
 - Strict unlimited liability on holder, previous holder or producer of waste for costs of disposing thereof
 - No exception for CLC/Fund regime
- European Court of Justice
 - Heavy fuel oil accidentally spilled from a ship is either in itself or when mixed with seawater and sediments waste within the meaning of Directive
 - Charterer could be regarded as the producer and thereby as previous holder
 - He could be held liable if having contributed to the pollution occurring
 - Some statements which appear to recognise the international regimes

The Fund Convention/Supplementary Fund Protocol

Apply:

- Shipowner exempt
- Shipowner financially incapable of meeting his obligations and insurance is insufficient
- Damage exceeds the shipowner's liability limit under the Civil Liability Convention
 - provided the shipowner is entitled to limitation of liability
- Supplementary Fund intervenes when compensation amounts under 1992 Conventions insufficient

Exemptions

Shipowner exempt:

- Damage **resulted from** an act of war, hostilities, civil war, insurrection or a natural phenomenon of an exceptional, inevitable and irresistible character, or
- Damage **was wholly caused** intentionally by a third party, or
- Damage **was wholly caused** by negligence of public authorities in maintaining navigational aids.

Fund exempt:

- Damage **resulted from** an act of war, hostilities, civil war or insurrection

Victim's contributory negligence

- Pollution damage resulting from intentional act or negligence of person suffering damage
- The shipowner and the IOPC Funds may be exonerated wholly or partially from liability to that person
 - provided that this defence may not be invoked by the Funds as regards preventive measures



Suspected pirates keep their hands in the air

Compulsory insurance – acts of terrorism

- For many years P&I cover included acts of terrorism
- After attack on World Trade Center acts of terrorism excluded from P&I cover
 - covered by owner's war risks insurance
- P&I Clubs difficulty certifying cover is in place as required by Conventions
- P&I Clubs nevertheless decided to issue certificates under Civil Liability Convention including liabilities for acts of terrorism
 - provided shipowner has war risks insurance
- Will P&I Clubs cover HNS Convention liabilities for acts of terrorism? not resolved; cf. 2002 Athens Convention

Compulsory insurance – acts of piracy

Acts of piracy not excluded from P&I cover

- except if caused by the use of mines, torpedoes, bombs, rockets, shells, explosives or other similar weapons of war,
- in which case to be covered by shipowner's war risks policy

Time bar

- 3 years from date of damage
- In any event, 6 years from date of incident
- Not normal prescription but extinction of rights

Jurisdiction and Enforcement of Judgements

- Courts in the State where damage occurred have exclusive jurisdiction
- Judgements rendered by courts competent under the 1992 Conventions to be recognised and enforced in all States Parties, except
 - if due process not respected
 - if judgement obtained by fraud

Jurisdiction and Enforcement of Judgements

- Venezuela (*Plate Princess* incident, 1997):
 - 1971 Fund refused to recognise a judgement by Venezuelan Supreme Court on the grounds
 - judgment obtained by fraud
 - principles of due process not followed
 - principle of equal treatment of claimants not respected
 - Enforcement of the judgement a problem

Jurisdiction and enforcement of judgements

- Exclusive EU competence
- EU law based on Regulation adopted in December 2000 (replaced in 2012)
- Regulation respects older treaties (e.g. 1992 Conventions) to the extent in force in December 2000
- EU Member States becoming parties to 1992 Conventions after December 2000 need authorisation by European Council
- EU Member States required to make a declaration on ratification that they will apply EU law on this subject

1992 Civil Liability Convention

Limits of shipowner's liability

GT	SDR	US \$
≤ 5000	4 510 000	6.3 million
per additional GT up to 140 000	631	876
$GT \geq 140 000$	89 770 000	125 million

Maximum amount of compensation

1992 CLC/Fund Conventions

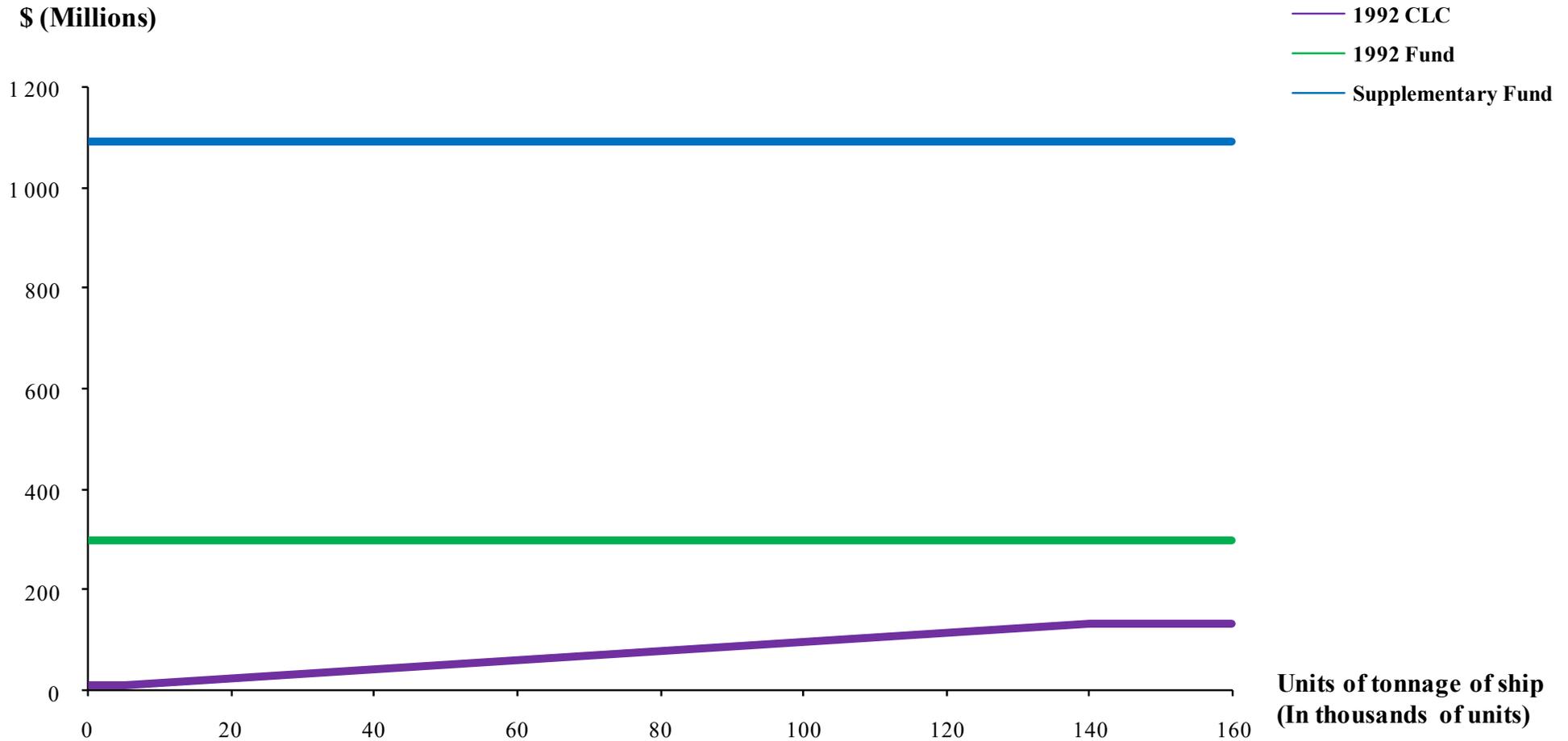
203 million SDR (US\$ 282 million)

2003 Supplementary Fund Protocol

750 million SDR (US\$ 1 040 million)

Problem when the aggregate amount of claims exceed, or risk to exceed, the amount available for compensation

Limits laid down in the Conventions



Review of compensation regime 2001-2005

- Question: Did the 1992 Conventions meet the needs of the 21st century?
- Limits
 - increased by IMO Legal Committee by 50.37% by tacit acceptance procedure (in force 2003)
- Creation of Supplementary Fund March 2005
- Dispute on the distribution of the financial burden between shipping and oil industries
- No agreement on a revision of the 1992 Conventions

Supplementary Fund

- Supplementary Fund established in March 2005
- Maximum compensation 750 million SDR (US\$ 1 040 million), including amounts payable under 1992 Conventions
- Contributions to Supplementary Fund payable by oil receivers in Member States of that Fund

STOPIA 2006

- Voluntary increase to 20 million SDR (US\$28 million) of limitation amount for ships up to 29 548 gross tonnage
- 1992 Fund indemnified by shipowner for difference between convention limit and 20 million SDR

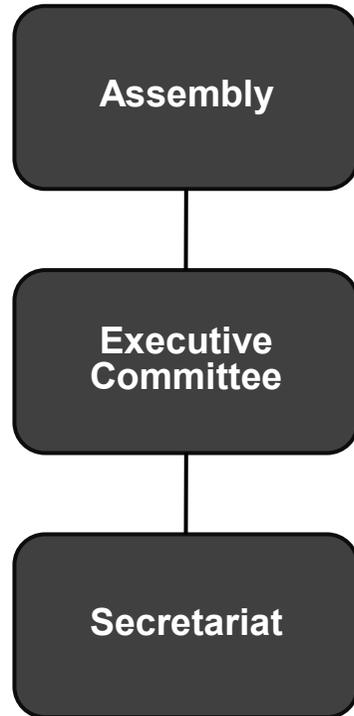
TOPIA 2006

- Supplementary Fund indemnified by shipowner for 50% of the compensation it has paid to claimants,
 - except where the pollution damage was caused by an act of terrorism.

Amounts available under the Conventions; tanker of 50 000 GT

- Spill in United Kingdom
 - 1992 CLC, 1992 Fund, Supplementary Fund
 - US\$ 1 040 million
- Spill in Uruguay
 - 1992 CLC, 1992 Fund
 - US\$ 282 million
- Spill in Egypt
 - 1992 CLC
 - US\$ 47 million

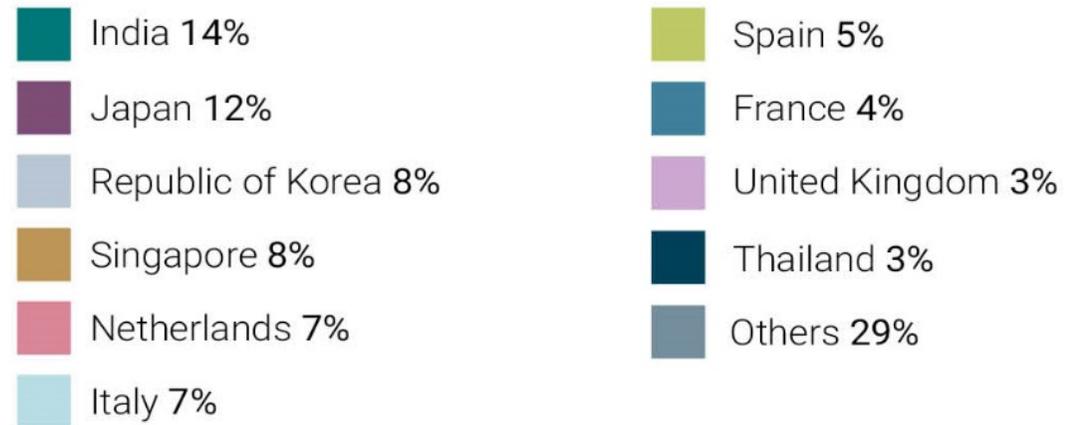
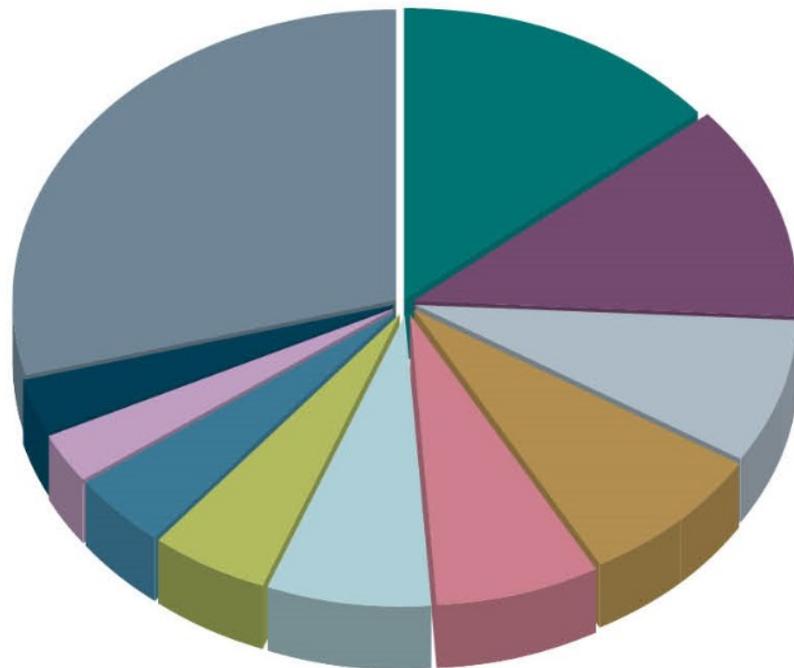
Structure of 1992 Fund



Who contributes to the Fund?

- Persons receiving >150 000 tonnes of contributing oil/year after sea transport
- Contributing oil = crude oil and heavy fuel oil
- Contributions decided by Fund Assembly
- Oil receivers pay, not governments

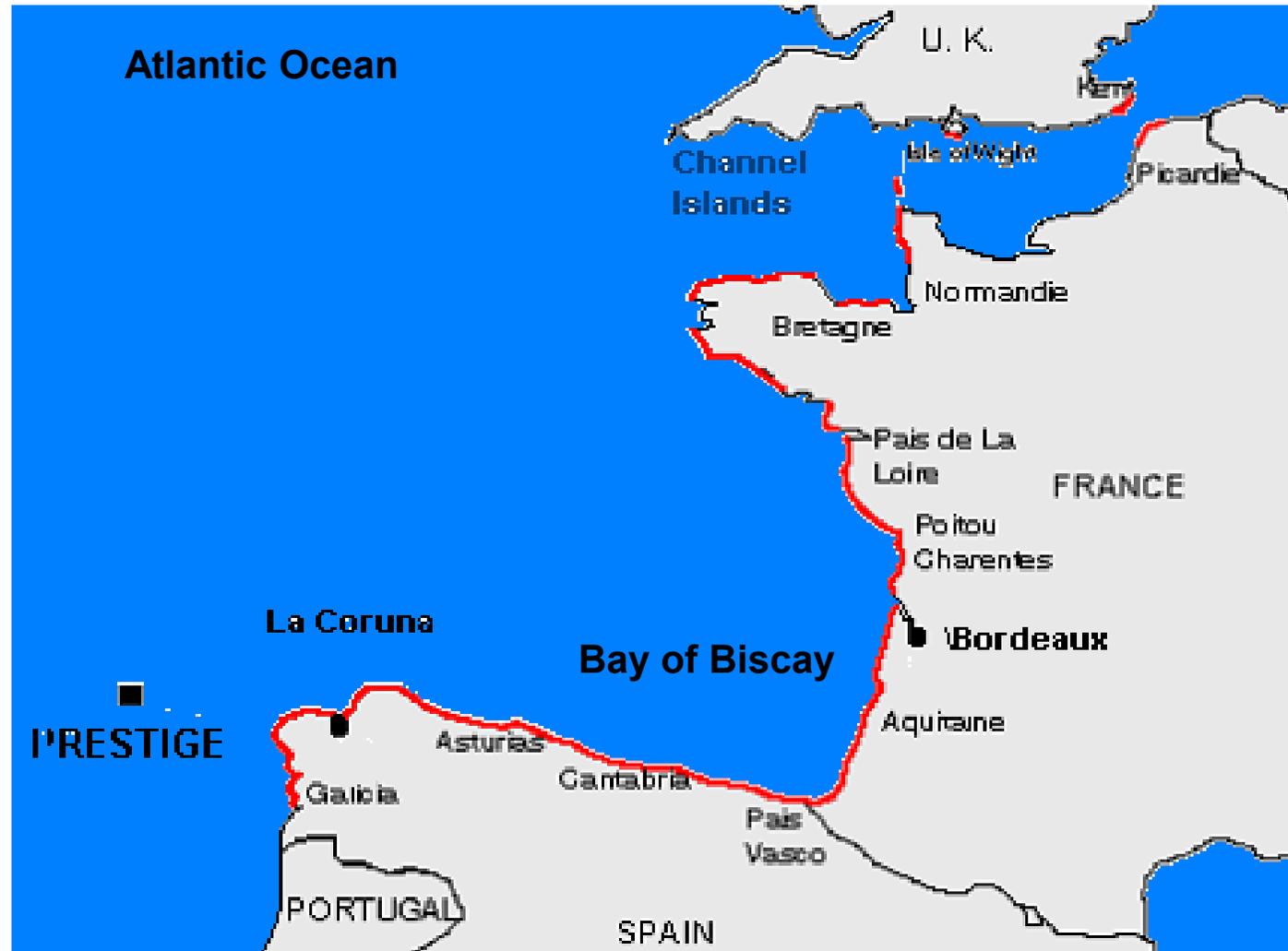
Shares of contributions to the 1992 Fund in respect of Member States based on oil receipts in 2017



Prestige, Spain, 2002

Affected States

- Spain
- France
- Portugal
- United Kingdom



Handling of incidents

- Co-operation between IOPC Funds and P&I Clubs
 - Memorandum of Understanding with International Group
- 1992 Fund and shipowners' insurer jointly appoint experts
- Experts role on-site is advisory
- Experts give objective, technical advice on most appropriate response
- Experts give information on Funds' admissibility criteria
- Experts assist Fund and insurer assess compensation claims
- Establishment of Local Claims Offices in major oil spills

Fund publications

- Annual Reports
- Claims Manual
- Guidelines for presenting claims in different sectors
 - tourism, fisheries, clean-up, environmental damage
- Technical Guidelines for assessing fisheries sector claims
 - for Fund experts
- Guidance for Member States,
 - measures to facilitate the claims handling process
 - management of fisheries closures and restrictions following an oil spill
 - consideration of the definition of 'ship'

Co-operation between P&I Clubs and IOPC Funds

- Co-operation between IOPC Funds and P&I Clubs of crucial importance
- Problem of interim payments
- 2016 Agreement between the International Group and the IOPC Funds on standard terms relating to interim payments

Winding up of the 1971 Fund

- 1971 Fund Convention ceased to be in force in 2002
- Before winding up all outstanding cases had to be resolved
- Two cases especially difficult
 - *Plate Princess* and *Nissos Amorgos* in Venezuela
- 1971 Fund had no obligation to pay compensation in respect of these cases
 - *Plate Princess*: judgement obtained by fraud, due process had not been respected
 - *Nissos Amorgos*: remaining claims not admissible; shipowner not entitled to limit his liability
- *Nissos Amorgos*: P&I insurer (Gard Club) faced significant claims; took legal action against the 1971 Fund in London, but lost

Winding up of the 1971 Fund

- Winding up controversial
- Strong opposition from shipping industry
 - ICS, P&I Clubs, Intertanko etc
- Opinions among Member States divided
- October 2014: Winding up decided by a vote in the 1971 Fund Administrative Council
 - 29 States voted in favour of winding up
 - 14 States voted against
 - 3 States abstained
- 1971 Fund dissolved on 31 December 2014



Tourism



Fishery



Leisure



Environment



Aquaculture



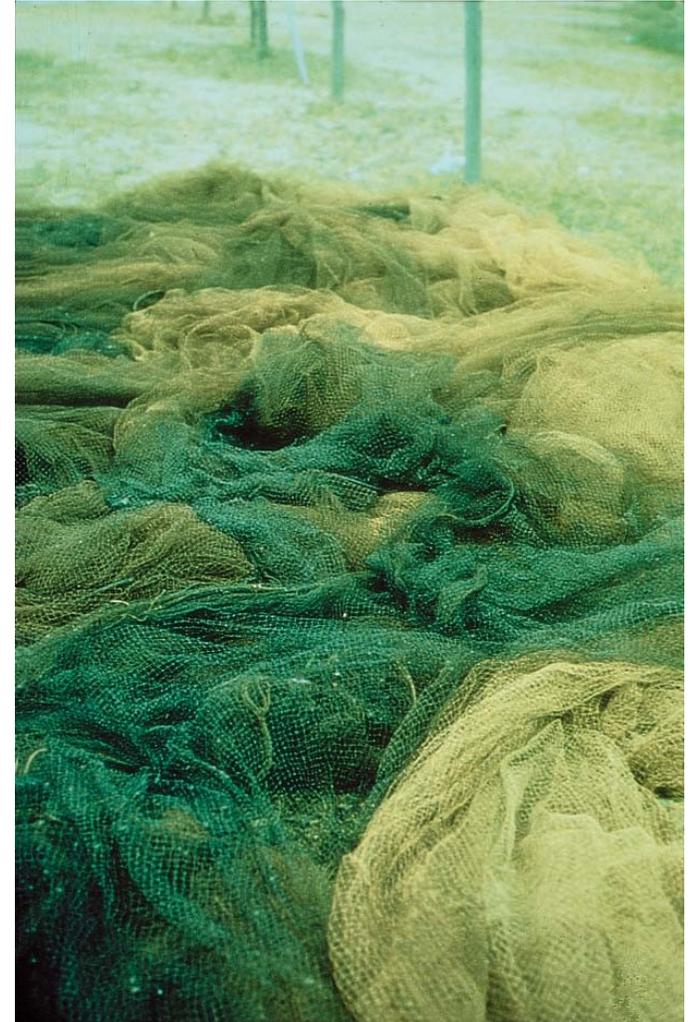
Cooling intakes

Main Types of Claim

- Property damage
- Clean-up operations and preventive measures
- Losses in fishery, mariculture and tourism:
 - Consequential loss
 - Pure economic loss
- Environmental damage

Property Damage

- Cleaning costs including costs of material and manpower
- Replacement
- Diminution of value
- Loss / damage caused by clean-up operations



Clean-up and Preventive Measures

- Clean-up at sea
- Shoreline clean-up
- Salvage operations
- Disposal of oil and oily wastes
- Cleaning of animals

Clean-up vs. Preventive Measures

- Clean-up normally considered as preventive measures
- Preventive measures: *any reasonable measures to prevent or minimise pollution damage*

At Sea Response



Clean-up Operations at Sea



Common Problems as Regards at Sea Response

- Excessive use of aircraft for surveillance
- Excessive use of oil recovery vessels
- Failure to recognise limitations of response techniques
- Failure to monitor/control operations



Hebei Spirit, December 2007

Shoreline Clean-up Methods

Sorbents



Vacuum



Debris removal



Sediment Reworking / Tilling



On Shore Clean-up



Beach Clean-up



Common Problems as Regards Shoreline Clean-up

- Excessive use of manpower & equipment
- Excessive volumes of oil waste collected
- Failure to monitor/control operations
- Failure to consider net environmental and economic benefits of actions



Hebei Spirit, December 2007

Clean-up of Rocky Shoreline



Record Keeping

- What?
- Why?
- Where?
- When?
- By whom?
- What with?
- How much?

Admissibility Criteria for Clean-up and Preventive Measures

- Expense must actually be incurred
- Response measures should be reasonable and justifiable
- Both measures and costs must be reasonable
- Expense must be linked directly to the contamination
- Proportionality costs vs. benefits
- The fact that measures taken or ordered by a State or public authority does not in itself mean they are reasonable
- Reasonableness an objective, technical criterion

Additional Costs vs Fixed Costs

- Public sector personnel/equipment involved
- Additional cost = expenditure that would not have been incurred if no incident
- Fixed cost = expenditure that would have been incurred even if no incident
- In order to be admissible fixed costs
 - must correspond to actual period of response
 - only for personnel directly involved in response
 - not include remote overhead charges

Salvage and Preventive Measures

- Primary purpose test
- Dual purpose operations
- Compensation limited to costs and a reasonable profit i.e. no 'salvage award'



Sea Empress, 1996

Removal of oil from sunken ships

- *Prestige* incident (Spain, 2002)
- *Solar 1* incident (Philippines, 2006)

Consideration of admissibility criteria for preventive measures after the *Prestige*

- Social and political considerations not to be taken into account
- Criterion *objectively and technically* reasonable maintained
- The potential environmental damage that could be caused if the measures were not taken should be taken into account.

Impact on fishing and mariculture

- Damage to fishing gear and consequential economic losses
- Contamination of wild stocks
- Contamination of mariculture facilities (fish cages, shellfish rafts, onshore tanks and ponds)
- Contamination of mariculture stocks (tainting, mortality)
- Fishing and harvesting bans
- Supply shortages may affect related industries
- Market effects

OS X Updates Available
 Your computer will restart to complete these updates.
 Details Restart



Mac OS X dock containing various application icons: Safari, Mail, iPhoto, iMovie, iCal, iTunes, System Preferences, Wacom Tablet Properties, PDFelement, and a trash can.

Impact on tourism industry

- Hotels
- Restaurants
- Shops
- Ice cream sellers on beaches
- Museums and other attractions
- Other local businesses dependent on tourism

Consequential and pure economic loss

- *Consequential economic loss*: economic loss suffered by a person as a consequence of his property having become polluted
 - admissibility not controversial
- *Pure economic loss*: economic loss suffered by a person whose property has not become polluted
 - admissibility a difficult issue

Pure Economic Loss

- Countries with legal system based on common law
 - Pure economic loss claims in principle not admissible
- Many countries of the continental law (civil law) system
 - Pure economic loss not a separate type of damage; admissibility depends on link of causation

Pure Economic Loss – Fund policy

- To qualify for compensation there must be a sufficiently close link of causation between the contamination and the loss
- Starting point is the contamination, not the incident



Pure Economic Loss

Fund Admissibility Criteria

Account is taken of the following factors

- Geographic proximity between claimant's activity and the contamination
- Claimant's economic dependence on the affected resource
- Alternative sources of supply or business opportunities
- Extent to which the business forms an integral part of the economic activity within the area affected.
- In the case of a marketing campaign, the costs must relate to actual targeted markets

Pure Economic Loss

Second degree claims

- Persons who sell products or services directly to tourists
 - e.g. hotels, campsites, bars, restaurants
- Persons who provide goods or services to other businesses in the tourist industry but not directly to tourists
 - e.g. wholesalers, manufacturers of souvenirs and postcards, hotel launderers
- Claims in the second group (second degree claims) normally not admissible due to lack of sufficiently close link of causation

Claims from employees who have suffered reduction in wages, been placed on part time work or made redundant

- Up to 2017 such claims in principle not admissible; considered one step further removed from the pollution
- In 2018 the 1992 Fund Assembly decided that such claims should be admissible under certain circumstances:
 - The period of claimant's compensation cannot exceed that for which his employer could get compensation
 - Claimant must have a concluded contract of employment
 - Claimant must have suffered an economic loss as a result of the incident
 - Claimant must try to mitigate his loss by applying for alternative employment
 - Claimant must disclose any compensation received from social security or any other source paid to him relating to his loss

Pure Economic Loss; assessment

- Assessment of pure economic loss claims
 - fishery sector
 - tourism sector
- Special procedures for handling claims for small amounts

Environmental Damage

Admissible claims:

- Economic losses which can be quantified in monetary terms
- Costs of reasonable measures to reinstate contaminated environment
- No compensation paid for claims based on an abstract quantification of damage using theoretical models
- No punitive damages



Environmental Damage

Reinstatement of the environment

- Clean-up
- Sand replacement following clean-up
- Replanting of mangrove saplings
- Replanting of marsh vegetation

In order to qualify for compensation:

- Measures should accelerate natural recovery process
- Measures should not cause further damage
- Measures should not degrade other habitats or adversely effect other natural economic resources
- Measures should be technically feasible
- Costs should not be disproportionate to extent and duration of damage and the likely benefits

Post Spill Studies

- Studies may be required to establish nature and extent of environmental damage and whether reinstatement necessary and feasible
- Studies not required after all oil spills
- Fund may contribute to the cost of studies provided they relate to pollution damage
- Studies should be carried out with scientific rigour and objectivity
- Studies should not repeat work already done

1992 Conventions vs. Directive 2004/35/EC on environmental liability

- Directive covers
 - certain types of environmental damage
 - preventive measures and remedial measures
- Exclusion in the Directive for environmental damage resulting from an incident in respect of which liability or compensation falls within the scope of the following treaties (to the extent in force for the EU Member State concerned)
 - **1992 Civil Liability Convention**
 - Bunkers Convention
 - HNS Convention

Uniform Application of the Conventions

- Essential for the functioning of the regime
- Equal treatment of claimants
- Development of international law
- UNCLOS Article 235

Environmental damage

- CLC art. I.6:
 - 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
- Environmental damage
 - Qualify for compensation
 - economic losses which can be quantified in monetary terms
 - costs of reasonable measures to reinstate contaminated environment
 - Not admissible for compensation
 - damage to the ecosystem as such
 - claims based on an abstract quantification of damage using theoretical models
 - punitive damage

Environmental damage; *Erika* case

- In 2012 French Court of Cassation awarded in the *Erika* case compensation for
 - ecological damage
 - loss of image,
 - moral damage
 - damage to reputation
- Breach of 1992 Conventions?

Environmental damage; *Erika* case

- The French Court of Cassation's judgement was based on French domestic law
 - was not against shipowner/insurer (1992 Fund not party to the proceedings)
 - but against four persons other than the registered owner
 - Total SA (de facto charterer, the charterer being a subsidiary)
 - the representative of the shipowner
 - the president of management company
 - the classification society
- Consequently, no breach of 1992 Conventions

Admissible damage; *Prestige* case

- Spanish Supreme Court of Cassation
 - held that compensation for damage not exactly contemplated in the 1992 Conventions was not necessarily excluded
 - recognised the possibility to award compensation for moral damage
 - including for feelings of anger, worry and frustration derived from the *Prestige* oil spill and the perception that catastrophes of this kind could occur in the future

Admissible damage; *Prestige* case

- Spanish Supreme Court awarded Spanish State (December 2018)
 - material damages €803 million (assessed by 1992 Fund at €300 million)
 - pure environmental damage €241 million (30% of material losses)
 - moral damages €313 million (30% of material damage + pure environmental damage)
- Shipowner/insurer were held liable for all the damages, including moral and pure environmental damages
- Supreme Court accepted that moral and pure environmental damages were not recoverable from the 1992 Fund

Conclusions: regime relating to tanker oil spills

- The international compensation regime under 1992 Conventions has in general worked well
- Continuous increase in Member States
- 150 incidents in 40 years
- GBP 684 million (US\$ 865 million) paid by 1971 and 1992 Funds to victims
- Claims have generally been settled without litigation
- Used as model in other fields
 - HNS Convention
 - Nuclear liability conventions



The *Haven* incident, Italy, 1991