International Foundation for the Law of the Sea
Summer Academy 2019

Promoting Ocean Governance and Peaceful Settlement of Disputes

THE INTERNATIONAL REGIME FOR COMPENSATION FOR TANKER OIL SPILLS

Måns Jacobsson
Former Director
International Oil Pollution Compensation Funds

9 August 2019

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). These Conventions entered into force in 1975 and 1978 respectively.

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 provide higher limits and an enhanced scope of application. The 1992 Conventions entered into force on 30 May 1996.

The Civil Liability Conventions govern the liability of shipowners for oil pollution damage. The Conventions lay down the principle of strict liability for shipowners and create a system of compulsory liability insurance. Shipowners are normally entitled to limit their liability to an amount which is linked to the tonnage of the 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.

A third tier of compensation in the form of a Supplementary Fund was established on 3 March 2005 by means of a Protocol adopted in 2003.

Each of the Fund Conventions and the Supplementary Fund Protocol established an intergovernmental organisation to administer the compensation regime created by the respective treaty, the International Oil Pollution Compensation Funds 1971 and 1992 and the Supplementary Fund (IOPC Funds). The Organisations have their headquarters in London.

The 1971 Fund Convention ceased to be in force on 24 May 2002. Before the 1971 Fund could be wound up, all pending compensation claims resulting from incidents occurring prior to that date had to be settled. The 1971 Fund was liquidated with effect from 31 December 2014.

As at 1 July 2019, 138 States were Parties to the 1992 Civil Liability Convention, and 116 States were Parties to the 1992 Fund Convention. Thirty-two States had ratified the Supplementary Fund Protocol. There were still 34 States that remained parties to the 1969 Civil Liability Convention.

The 1969 and 1971 Conventions have been largely replaced by the 1992 Conventions. This note therefore deals primarily with the 'new' regime, i.e. the 1992 Civil Liability Convention, the 1992 Fund Convention and the Supplementary Fund Protocol.

Information on the international compensation regime and the IOPC Funds is available on the Funds' web site at: **http://www.iopcfund.org,** which contains a list of the States Parties to the 1992 Conventions, the 1969 Civil Liability Convention and the Supplementary Fund Protocol.

The international compensation regime

Scope of application

The 1992 Conventions and the Supplementary Fund Protocol apply to pollution damage caused by spills of persistent oil from tankers and suffered in the territory (including the territorial sea) of a State Party to the respective treaty, or in the

exclusive economic zone (EEZ) or equivalent area of such a State. 'Pollution damage' includes the cost of 'preventive measures', i.e. reasonable measures to prevent or minimise pollution damage, as well as loss or damage caused by preventive measures. Expenses incurred for preventive measures are recoverable even when no spill occurred, provided there was a grave and imminent threat of pollution damage.

Damage caused by non-persistent oil is not covered by the Conventions and the Protocol. Spills of gasoline, light diesel oil, kerosene, etc. therefore do not fall within the scope of the treaties.

The treaties apply to ships which actually carry oil in bulk as cargo, i.e. generally laden tankers, and to spills of bunker oil from unladen tankers provided there are residues of a cargo of persistent oil from a previous voyage on board. They do not apply to spills of bunker oil from ships other than tankers (i.e. dry cargo ships) or to unladen tankers having no residues of a cargo of persistent oil from a previous voyage on board.

Shipowner's liability

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

(a) the damage resulted from an act of war, hostilities, civil war, insurrection or a natural phenomenon of an exceptional, inevitable and irresistible character, or
(b) the damage was wholly caused intentionally by a third party, or
(c) the damage was wholly caused by the negligence of public authorities in maintaining lights or other navigational aids.

Under certain conditions shipowners are entitled to limit their liability to an amount which is linked to the tonnage of the vessel and which – after increases by some 50% with effect from 1 November 2003 – is as follows [<1>]:

(a) for a ship not exceeding 5 000 units of gross tonnage, 4 510 000 SDR (US$6.3 million);
(b) for a ship with a tonnage between 5 000 and 140 000 units of tonnage, 4 510 000 SDR (US$6.3 million) plus 631 SDR (US$876) for each additional unit of tonnage; and
(c) for a ship of 140 000 units of tonnage or over, 89 770 000 SDR (US$125 million).

Under the 1992 Civil Liability Convention, shipowners are deprived of the right to limit their liability 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.

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 the 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 Convention, such a certificate is required also for ships flying the flag of a State which is not Party thereto.

[<1>] The unit of account in the Conventions and the Protocol is the Special Drawing Right (SDR) as defined by the International Monetary Fund. In this paper, the SDR has been converted into United States dollars at the rate of exchange applicable on 1 July 2019**,** **i**.e. 1 SDR=US$1.388090.

Claims for pollution damage under the 1992 Civil Liability Convention may be brought directly against the insurer of the owner's liability for pollution damage. If such an action is brought the insurer may not invoke defences that he would have been entitled to invoke in proceedings brought by the shipowner against him.

Unlike the Bunkers Convention there is no provision in the 1992 Civil Liability Convention allowing States to delegate the issuance of insurance certificates to an institution or organisation. The IMO Assembly has however adopted a Resolution to the effect that such delegation is possible also under the Civil Liability Convention.

Channeling of liability

Claims for pollution damage under the 1992 Civil Liability Convention can be made only against the registered owner of the ship concerned and his insurer. Claims may not be pursued against the shipowner otherwise than in accordance with the Convention. This does not in principle preclude victims from claiming compensation outside the Convention from persons other than the owner, but such claims will not be based on the Convention but on the applicable national law.

However, the Convention prohibits claims against the servants or agents of the shipowner as well as claims against the pilot or any other person who, without being a member of the crew, performs services for the ship. It also prohibits claims against any charterer (including a bareboat charterer), manager or operator of the ship, against any person performing salvage operations with the consent of the shipowner or on the instructions of a competent public authority, and against any person taking preventive measures, as well as claims against the servants or agents of any of these persons. This prohibition does not apply if the damage resulted from the personal act or omission of the person concerned, committed with the intent to cause such damage, or recklessly and with knowledge that such damage would probably result.

The Funds' obligations

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 in the following cases:

(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.

The 1992 Fund is only obliged to pay compensation under item c) if the shipowner is entitled to limit his liability

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, hostilities, civil war or insurrection 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 in the 1992 Civil Liability Convention, i.e. a seagoing vessel or seaborne craft of any type whatsoever constructed or adapted for the carriage of oil in bulk as cargo.

The maximum amount payable by the 1992 Fund in respect of any one incident is 203 million SDR (US$282 million).

The Supplementary Fund makes additional compensation available so that the total amount payable for any one incident for pollution damage in a State that is a Member of that Fund is 750 million SDR (US$ 1 040 million), including the amount payable under the 1992 Civil Liability and Fund Conventions.

Simplified procedure for increase of limitation amounts

The 1992 Conventions provide for a simplified procedure for amendments to the limits laid down in the treaties (known as "the tacit acceptance procedure"). Under that procedure amendments to these limits may be decided by the IMO Legal Committee by a two-thirds majority, and such an amendment is deemed to have been accepted unless within a period of 18 months (for the Supplementary Fund Protocol 12 months) at least one quarter of the States parties communicate their objection to IMO. An amendment deemed to have been accepted enters into force for all States parties, also for those that have opposed the amendment, 18 months (for the Supplementary Fund Protocol 12 months) after its acceptance.

There are certain restrictions on the amendments that may be made to the limits. Firstly, no amendments may be considered less than five years (for the Supplementary Fund Protocol three years) from the date of the entry into force of the previous amendment. Secondly, no limit may be increased so as to exceed an amount which corresponds to the original limit increased by 6% per year calculated on a compound basis from the date when the respective treaty was opened for signature. Finally, no limit may be increased so as to exceed the original limit multiplied by three.

This procedure was used in 2000, resulting in an increase of the limitation amounts in the 1992 Civil Liability and Fund Conventions by 50.37 % with effect from 1 November 2003. The amounts set out above for these Conventions are the amounts as increased in 2000.

Recourse actions

The provisions in the 1992 Civil Liability Convention are without prejudice to the shipowner's right of recourse against third parties.

Under the 1992 Fund Convention, as regards any amount paid by the 1992 Fund in compensation the 1992 Fund acquires by subrogation the right of the person so compensated against the shipowner and his insurer. The provisions in the Fund Convention are without prejudice to any right of subrogation which the Fund may have against persons other than the shipowner and his insurer, and the Fund's right to subrogation against such persons shall not be less favourable than that of an insurer of the person compensated by the Fund. Corresponding provisions apply to the Supplementary Fund.

The 1971 Fund has in a number of cases taken recourse actions against various parties resulting in the recovery of significant amounts in out out-of-court settlements,

Time bar

Claims for compensation under the 1992 Civil Liability and Fund Conventions are time-barred (extinguished) unless legal action is brought against the shipowner and his insurer and against the 1992 Fund within three years of the date when the damage occurred and in any event within six years of the date of the incident. The three-year time bar period under the Fund Convention may also be interrupted by a formal notification to the 1992 Fund of a legal action by the claimant against the shipowner or his insurer.

As regards pollution damage in a Supplementary Fund Member State, a claim against the 1992 Fund is regarded as a claim against the Supplementary Fund. Rights to compensation from the Supplementary Fund are therefore extinguished only if they are extinguished against the 1992 Fund.

Jurisdiction and enforcement of judgements

The courts in the State or States where the pollution damage occurs have exclusive jurisdiction over actions for compensation under the Conventions and the Protocol against the shipowner, his insurer and the Funds.

A judgement that has been rendered by a court competent under the applicable treaty and which is enforceable in the State of origin and is in that State no longer subject to ordinary forms of review, shall be recognised and enforceable in the other Contracting States. This does not apply where the judgement was obtained by fraud or where the defendant was not given reasonable notice and a fair opportunity to present his case.

Organisation of the IOPC Funds

The 1992 Fund has an Assembly, which is composed of representatives of all Member States. The Assembly is the supreme organ governing the 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 Supplementary Fund has its own Assembly composed of representatives of its Member States.

The 1992 Fund and the Supplementary Fund have a joint Secretariat which is headed by a Director and has some 30 staff members. Up to 31 December 2014 that Secretariat administered also the 1971 Fund.

Financing of the Funds

The Funds are financed by contributions levied on any person who has received in the relevant calendar year more than 150 000 tonnes of crude oil and heavy fuel oil (contributing oil) in ports or terminal installations in a State which is a Member of the respective Fund after carriage by sea.

Basis of contributions

The levy of contributions is based on reports of oil receipts in respect of individual contributors. A State shall communicate every year to the Fund Secretariat 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 who have received more than 150 000 tonnes of contributing oil in the relevant year should be reported.

Contributing oil is counted for contribution purposes each time it is received at ports or terminal installations 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.

A major problem has been caused by a number of Member States not fulfilling their obligations under the respective Fund Convention to submit oil reports to the Fund Secretariat. A number of States have outstanding oil reports for several years. The governing bodies have repeatedly expressed their serious concern as regards the non-submission of oil reports, since these reports are crucial to the proper functioning of the Funds. In the light of this situation, a provision was inserted in the Supplementary Fund Protocol to the effect that compensation under the Protocol will be denied temporarily or permanently in respect of pollution damage in States that have failed to submit their oil reports.

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 respective Assembly.

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

The Indian oil industry is the major contributor to the 1992 Fund, paying in 2018 14% of the total contributions, followed by the oil industries in Japan (12%), Republic of Korea (8%), Singapore (8%), the Netherlands (7%), Italy (7%), Spain (5%), France (4%), the United Kingdom (3%) and Thailand (3%).

Payments made by the Funds in respect of claims for compensation for oil pollution damage may vary considerably from year to year, resulting in fluctuating levels of contributions.

Special provision relating to contributions to the Supplementary Fund

The contribution system for the Supplementary Fund differs from that of the 1992 Fund in that if the total quantity of contributing oil actually received in a Member State is less than 1 million tonnes, that State will itself be liable to pay contributions for a quantity of contributing oil corresponding to the difference between 1 million tonnes and the aggregate quantity of actual oil receipts reported in respect of that State.

Proportional reduction of compensation payments

Difficulties have arisen in some incidents involving the 1971 Fund or the 1992 Fund where the total amount of the claims arising from a given incident exceeded the amount available for compensation under the applicable Conventions or where there was a risk that this would occur. Under the Fund Conventions, the Funds are obliged to ensure that all claimants are given equal treatment.

The Funds have to strike a balance between the importance of paying compensation to victims as promptly as possible and the need to avoid an over-payment situation. In a number of cases the Funds have therefore had to limit payments to victims to a percentage of the agreed amount of their claims (so called “pro-rating”). In most cases it eventually became possible to increase the level to 100%, once it had been established that the total amount of admissible claims would not exceed the amount available for compensation. In some cases the delay in payment of part of the compensation caused financial hardship to victims, for example to fishermen and small businesses in the tourism industry, and this has sometimes given rise to considerable frustration on the part of claimants.

The 2003 Protocol has greatly improved the situation for victims in States becoming parties to it. In view of the very high amount available for compensation of pollution

damage in these States, it should in practically all cases be possible to pay all established claims in full from the outset.

STOPIA 2006 and TOPIA 2006

The two-tier compensation regime created by the 1992 Civil Liability and Fund Conventions was intended to ensure an equitable sharing of the economic consequences of oil spills from tankers between the shipping and oil industries. In order to address the imbalance between the payments made over the years by these two industries and in particular the imbalance created by the establishment of the Supplementary Fund, which is financed by the oil industry, the International Group of P&I Clubs (a group of 13 mutual insurers which between them provide liability insurance for about 98% of the world's tanker tonnage) 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 voluntary but contractually binding agreements entered into force on 20 February 2006.

The limitation amount applicable to small ships under the 1992 Civil Liability Convention is very low, starting at 4.51 million SDR (US$6.3 million) for ships up to 5 000 gross tonnage. Under STOPIA 2006, the limitation amount applicable to ships up to 29 548 gross tonnage is increased on a voluntary basis to 20 million SDR (US$28 million) for damage in 1992 Fund Member States. The 1992 Fund will continue to be liable under the 1992 Fund Convention to compensate the victims to the extent that the total damage exceeds the limitation amount applicable to the ship under the 1992 Civil Liability Convention. The 1992 Fund will, however, pursuant to STOPIA 2006 be reimbursed by the shipowner/P&I Club for the difference between that limitation amount and the total amount of the admissible claims or 20 million SDR, whichever is the less.

The Supplementary Fund's obligation to compensate victims pursuant to the Supplementary Fund Protocol remains, but the Supplementary Fund is under TOPIA 2006 entitled to reimbursement by the shipowner/P&I Club of 50% of the compensation payments that Fund has made to claimants if the incident involved a ship covered by the agreement.

Claims Settlement

Claims experience

Since their establishment, the 1971 and 1992 Funds have been involved in some 150 incidents. Some of these incidents have given rise to thousands of compensation claims. For instance, the *Erika* incident (France, 1999) resulted in over 7 000 compensation claims, the *Solar 1* incident (the Philippines, 2006) gave rise to some 32 000 claims, and the *Hebei Spirit* incident (Republic of Korea, 2007) resulted in some 128 000 claims. In many cases the governing bodies of the Funds had to take position to the interpretation of certain provisions in the Conventions.

In the great majority of these incidents, all claims have been settled out of court. Court actions against the Funds have been taken in respect of only a very low number of incidents.

So far the Supplementary Fund has not been involved in any incidents.

The 1971 and 1992 Funds have made compensation payments totalling some $865 million.

Claims Handling

In the handling of claims the IOPC Funds co-operate closely with the shipowner and his insurer, who in nearly all major cases is one of the Protection and Indemnity Associations (P&I Clubs) belonging to the International Group of P&I Clubs.

Since the IOPC Funds have a small Secretariat, they normally use external experts to assist the permanent staff to monitor the clean-up operations and to examine and assess claims, at least in respect of major incidents. The external experts are usually appointed jointly by the IOPC Funds and the P&I Club concerned.

In some cases claims are channelled through the office of a designated local surveyor. When an incident gives rise to a large number of claims, the IOPC Funds and the P&I Club have in many cases jointly set up a local claims office so that claims may be processed more easily. Neither designated local surveyors nor local claims offices decide on the admissibility of claims. The role of the experts is always only that of advisers. The decisions are taken by the respective Fund and P & I Club.

As regards the Funds, decisions on the admissibility of claims and the admissible quantum are taken by the Director or the governing bodies of the IOPC Funds. In order to expedite the payment of compensation the Director has been given extensive authority to settle and pay compensation claims.

Admissibility of claims for compensation

General considerations

The Funds can pay compensation to claimants only to the extent that their claims are justified and meet the criteria laid down in the Fund Convention. To this end, claimants are required to prove their claims by producing explanatory notes, invoices, receipts and other documents to support the claim.

For a claim to be accepted by the Funds, the claim must be based on a real expense actually incurred or a loss actually suffered, and there must be a casual link between the loss or expense and the incident. Any expense claimed should have been made for reasonable purposes.

The IOPC Funds have acquired considerable experience with regard to the admissibility of claims. In connection with the settlement of claims they have developed certain principles as regards the meaning of the definition of 'pollution damage', which is specified as 'damage caused by contamination'.

The Funds consider each claim on the basis of its own merits, in the light of the particular circumstances of the case. Whilst criteria for the admissibility of claims have been adopted, certain flexibility is nevertheless allowed, enabling the Funds to take into account new situations and new types of claims. Generally, the Funds follow a pragmatic approach, so as to facilitate out-of-court settlements.

In a number of incidents giving rise to large number of compensation claims the Funds and the P&I Clubs have encountered difficulties in assessing the claims without undue delay. In 2012 the 1992 Fund introduced procedures for the purpose of facilitating the assessment of claims for relatively small amounts, in particular where claimants could not prove their losses. In cases where insufficient documentary evidence is provided to support a claim and it is unjustified to request or expect additional data, compensation may be paid on the basis of an estimate of losses calculated from a recognised and reliable economic model. Any such model must be derived from actual data closely associated with the loss claimed and taken from the relevant sector or industry.

A “fast track” assessment of small claims was also introduced. In order to avoid undue delay in the settlement of small claims the 1992 Fund Executive Committee could decide, on a case-by-case basis, after considering the cost effectiveness and merits of assessing large numbers of small claims, to approve the use of “fast track” assessment for a particular incident and set the quantum of “small” claims for that incident. Such assessment will be made on the basis of a brief investigation by the Fund and its experts of the circumstances of the loss but must include confirmation that such losses did actually occur and that there was a clear link of causation with the incident. Alternatively, claimants may prefer to await a settlement based on an in-depth, comprehensive assessment which will inevitably take longer. Claimants who disagree with the settlement offer under a “fast track” assessment will only have the assessment of their claim reconsidered based on the provision of new information proving their loss. Such a reassessment may result in higher or lower assessment than that offered under the “fast-track” process.

The 1992 Fund has published a Claims Manual that contains general information on how claims should be presented and sets out the general criteria for the admissibility of claims for compensation. Guidelines for presenting claims in the fisheries, mariculture and fish processing sector and Guidelines for presenting claims in the tourism sector have also been published as well as Guidelines on the presentation of claims for clean-up and preventive measures and Guidelines for presenting claims for environmental damage. A Guide setting out measures which Member States could take to facilitate claims handling has also been published. These publications are available on the IOPC Funds’ website at www.iopcfunds.org.

The Funds have established a database containing practically all decisions on claims and claims related issues taken by the governing bodies. The database is available on the Funds’ website.

Property damage

Pollution incidents often result in damage to property: the oil may contaminate fishing boats, fishing gear, yachts, beaches, piers and embankments. The Funds accept costs for cleaning polluted property. If the polluted property (e.g. fishing gear) cannot be cleaned, the Funds compensate the cost of replacement, subject to deduction for wear and tear. Measures taken to combat an oil spill may cause damage to roads, piers and embankments and thus necessitate repair work, and reasonable costs for such repairs are accepted by the Funds.

Clean-up operations on shore and at sea, and preventive measures

Clean-up operations at sea or on shore have generally been considered as preventive measures. Operations at sea may relate to the deployment of vessels, the salaries of crew, the use of booms and the spraying of dispersants. Onshore clean-up may result in major costs for personnel, equipment, absorbents and disposal of collected oily waste.

Measures taken to prevent or minimise pollution damage ('preventive measures') are compensated by the Funds. Measures may have to be taken to prevent oil which has escaped from a ship from reaching the coast, e.g. by placing booms along the coast which is threatened. Dispersants may be used at sea to combat the oil. Oil remaining in a sunken ship may have to be extracted. Costs for such operations are in principle considered as costs of preventive measures. It must be emphasised, however, that under the definition of “preventive measures” compensation is only paid for costs of *reasonable* measures.

Claims for preventive measures are assessed on the basis of objective criteria. The fact that a government or other public body decides to take certain measures does not in itself mean that the measures are reasonable for the purpose of the Conventions. The technical reasonableness is assessed on the basis of the facts available at the time

of the decision to take the measures. However, those in charge of the operations should continually reappraise their decisions in the light of developments and further technical advice.

Claims for costs are not accepted when it could have been foreseen that the measures taken would be ineffective. On the other hand, the fact that the measures prove to be ineffective is not in itself a reason for rejection of a claim for the costs incurred. The costs incurred, and the relationship between those costs and the benefits derived or expected, should be reasonable. In the assessment, the Funds take account of the particular circumstances of the incident.

Consequential loss and pure economic loss

The Funds accept in principle claims relating to loss of earnings suffered by the owners or users of property which had been contaminated as a result of a spill (consequential loss). One example of consequential loss is a fisherman's loss of income as a result of his nets becoming polluted.

An important group of claims comprises those relating to *pure economic loss*, i.e. loss of earnings sustained by persons whose property has not been polluted. A fisherman whose boat and nets have not been contaminated may be prevented from fishing for some time because the area of the sea where he normally fishes is polluted and he cannot fish elsewhere. Similarly, an hotelier or restaurateur whose premises are close to a contaminated public beach may suffer loss of profit because the number of guests falls during the period of pollution.

Claims for pure economic loss are admissible only if they are for loss or damage caused by contamination. The starting point is the pollution, not the incident itself.

In order to qualify for compensation the basic criterion is that a sufficiently close link of causation exists between the contamination and the loss or damage sustained by the claimant. A claim is not admissible on the sole criterion that the loss or damage would not have occurred but for the oil spill in question. When considering whether the criterion of a sufficiently close link of causation is fulfilled, the following elements are taken into account:

- the geographic proximity between the claimant's activity and the contamination
- the degree to which a claimant is economically dependent on an affected resource
- the extent to which a claimant has alternative sources of supply or business opportunities
- the extent to which a claimant's business forms an integral part of the economic activity within the area affected by the spill

Account is also taken of the extent to which a claimant can mitigate his loss.

Measures to prevent pure economic loss

Claims for the cost of measures to prevent pure economic loss may be admissible if they fulfil the following requirements:

- the cost of the proposed measures is reasonable
- the cost of the measures is not disproportionate to the further damage or loss which they are intended to mitigate
- the measures are appropriate and offer a reasonable prospect of being successful
- in the case of a marketing campaign, the measures relate to actual targeted markets.

To be admissible, the costs should relate to measures to prevent or minimize losses which, if sustained, would qualify for compensation under the Conventions. Claims for the cost of marketing campaigns or similar activities are accepted only if the activities undertaken are in addition to measures normally carried out for this purpose. In other words, compensation is granted only for the additional costs resulting from the need to counteract the negative effects of the pollution.

Environmental damage

In the 1992 Conventions and the Supplementary Fund Protocol "pollution damage" is defined as damage caused by contamination. The definition contains a proviso to the effect that 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. The proviso was inserted in the Civil Liability and Fund Conventions by the 1992 Protocols for the purpose of clarifying that no compensation may be awarded for damage of a non-economic nature.

Claims for damage to the marine environment *per se* are therefore not admissible under the Conventions, but only claims for the economic consequences of such damage, for instance losses suffered by fishermen or businesses in the tourism sector resulting from damage to the environment. The Funds will not entertain claims for environmental damage based on an abstract quantification calculated in accordance with theoretical models. The claimant must have suffered economic losses that can be quantified in monetary terms. The proviso also excludes damage of a punitive nature on the basis of the degree of fault of the wrong-doer.

The Funds have decided that in order for claims for the cost of measures to reinstate the marine environment to be admissible for compensation, the measures should fulfil the following criteria:

- 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.

Compensation is paid only for reasonable measures of reinstatement actually undertaken or to be undertaken.

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.

Uniform application of the Conventions

The 1971 and 1992 Fund Assemblies have expressed the opinion that a uniform interpretation of the definition of 'pollution damage' is essential for the functioning of the regime of compensation established by the Conventions. The IOPC Funds' position in this regard applies not only to questions of principle relating to the admissibility of claims but also to the assessment of the actual loss or damage where

the claims do not give rise to any question of principle.

Concluding remarks

The international compensation regime established under the Civil Liability and Fund Conventions is one of the most successful compensation schemes in existence over the years. Most compensation claims have been settled amicably as a result of negotiations.

When the 1971 Fund was set up in 1978 it had only 14 Member States. Over the years the number of 1992 Fund Member States has increased to 116. It is expected that some other States will ratify the 1992 Conventions in the near future. This increase in the number of Member States appears to indicate that the Governments have in general considered the international compensation regime to be working well. This explains why the regime based on the 1992 Conventions has served as a model for the creation of liability and compensation systems in other fields, such as the carriage of hazardous substances by sea.

References

Colin de la Rue and Charles B. Anderson: Shipping and the Environment Law and Practice, 2nd ed, Informa London 2009

Note: Very comprehensive dealing with all legal aspects of marine pollution

M Jacobsson: The IMO, Liability, Compensation and Global Ocean Governance, in *The IMLI Treatise on Global Ocean Governance*, Vol. III: IMO and Global Ocean Governance, Chapter 3 (2018).

M Jacobsson: Liability and Compensation for Ship-source Pollution, *The IMLI Manual on International Maritime Law*, Volume III, Marine Environmental Law and Maritime Security Law, Chapter 9 (2016)

M Jacobsson: The *Torrey Canyon* fifty years on, the legal legacy, *Journal of International Maritime Law* 2017 p. 20

M Jacobsson: To what extent do international treaties result in the uniformity of maritime law?, *Journal of International Maritime Law* 2016 p. 94

M Jacobsson: How clean is clean? The concept of 'reasonableness' in the response to tanker oil spills, in *Scritti in Onore di Francesco Berlingieri*, special issue of *Il Diritto Marittimo,* 2010 p. 565

M Jacobsson: Perspective of the Global Compensation Regimes; The Relationship beteen EU Legislation and Maritime Liability Conventions, *European Journal of Commercial Contract Law,* 2012 p. 63

M Jacobsson: The French Court of Cassation and the *Erika* case, *Journal of International Maritime Law* 2014 p. 18

M Jacobsson: I'importance du sinistre du *Torrey Canyon* 50 ans après, Le Droit Maritime Français 2018 p. 592

M Jacobsson: L'expérience française du FIPOL, *Le Droit Maritime Français*, 2007 p. 968

M Jacobsson: L'indemnisation des dommages résultant des atteintes à l'environnement dans le cadre du régime international CLC/FIPOL, *Le Droit Maritime Français,* 2010 p. 463

M Jacobsson: Los regímenes internacionales de responsabilidad e indemnización de daños debidos a la contaminación marina, problemas políticos y legales, *Actas de l'Academia Nacional de Derecho y Ciencias Sociales de Buenos Aires*, Numero 48 2010

M Jacobsson: El Régimen Internacional de Responsabilidad e Indemnización de Daños Debidos a la Contaminación por Hydrocarburos: Evolución Reciente; *Revista de estudios marítimos*, published by Asociación Argentina de Derecho Marítimo, 2005

Documents published by the IOPC Funds (in English, French and Spanish), available at www.iopcfunds.org:

Annual Report 2018 of the International Oil Pollution Compensation Funds

Claims Manual, 7th ed. (2019)

Guidelines for presenting claims in the fisheries, mariculture and fish processing sector (2019 ed.)

Guidelines for presenting claims in the tourism sector (2019 ed.)

Guidelines for presenting claims for clean-up and preventive measures (2015 ed.)

Guidelines for presenting claims for environmental damage (2018 ed.)

Claims for environmental damage: An overview (2019 ed.)

Guidance for Member States, Measures to facilitate claims handling process (2014 ed.)

Guidance for Member States, Consideration of the Definition of 'Ship' (2016 ed.)

Guidance for Member States, Management of Fisheries Closures and Restrictions Following an Oil Spill (2016 ed.)