THE INTERNATIONAL REGIME ON LIABILITY AND COMPENSATION FOR OIL POLLUTION DAMAGE

"OLD" PRACTICE; RECENT DEVELOPMENTS; NEW CASES

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INTRODUCTION

The international regime for the compensation of pollution damage caused by oil spills from tankers is based on two treaties adopted under the auspices of the International Maritime Organization (IMO), the 1992 International Convention on Civil Liability for Oil Pollution Damage (1992 Civil Liability Convention) and the 1992 International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage (1992 Fund Convention). These Conventions replace two corresponding Conventions adopted in 1969 and 1971 respectively.

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. Shipowners are normally entitled to limit their liability to an amount which is linked to the tonnage of their ship.

The 1992 Fund Convention, which is supplementary to the 1992 Civil Liability Convention, set up an intergovernmental organisation, the International Oil Pollution Compensation Fund 1992 (1992 Fund), which provides additional compensation to victims when the compensation under the 1992 Civil Liability Convention is inadequate. By becoming party to the 1992 Fund Convention, a State becomes a member of the 1992 Fund. The Organisation has its headquarters in London.

The 1992 Fund succeeds a previous organisation, the 1971 Fund, which is at present being wound up.

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.

On 21 November 2006, 114 States had ratified the 1992 Civil Liability Convention, and 98 States had ratified the 1992 Fund Convention. The Supplementary Fund Protocol had been ratified by 20 States.

The States which are parties to the 1992 Conventions and the Supplementary Fund Protocol are listed in the Annex.

MAIN FEATURES OF THE 1992 CONVENTIONS

The 1992 Conventions and the Supplementary Fund Protocol apply to pollution damage suffered in the territory (including the territorial sea) and the exclusive economic zone (EEZ) or equivalent area of a State party to the respective Conventions. 'Pollution damage' is defined as damage caused by contamination and includes the cost of 'preventive measures', i.e. measures to prevent or minimise pollution damage.

The treaties apply to ships which actually carry oil in bulk as cargo, i.e. generally laden tankers, as well as to spills of bunker oil from unladen tankers in certain circumstances.

The liability rests on the registered owner of the ship from which the oil originated. Shipowners have strict liability for pollution damage (with very limited defences) and are obliged to cover their liability by insurance. Shipowners are normally entitled to limit their liability to an amount which is calculated on the basis of the tonnage of the ship, and which ranges from 4.51 million SDR (US$6.7 million) for small ships to 89.77 million SDR (US$133 million) for large tankers[<1>].

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.
Claims for pollution damage under the 1992 Civil Liability Convention can be made only against the registered owner of the ship concerned. The Convention prohibits claims against the servants or

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<1> The unit of currency 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 applicable on 29 January 2007, ie 1 SDR = US $1.48945.

agents of the owner, the crew, the pilot, the charterer (including a bareboat charterer), manager or operator of the ship, or any person carrying out salvage operations or taking preventive measures.

The compensation payable by the 1992 Fund in respect of an incident is limited to an aggregate amount of 203 million SDR (US$301 million), including the sum actually paid by the shipowner (or the shipowner's insurer) under the 1992 Civil Liability Convention.

The 1992 Fund is financed by contributions levied on any entity which has received in one calendar year more than 150 000 tonnes of crude or heavy fuel oil ("contributing oil") in a State party to the 1992 Fund Convention after sea transport. Member States are obliged to submit annually to the Fund reports on the quantities of contributing oil received.

The Japanese oil industry is the major contributor to the 1992 Fund, paying 18% of the total contributions. The Italian oil industry is the second largest contributor paying 10%, followed by the oil industries in the Republic of Korea (9%), the Netherlands (8%), France (7%), India (7%), United Kingdom (5%), Singapore (5%) and Spain (5%).

The Supplementary Fund has available an amount of 547 million SDR (U$812 million), in addition to the amount of 203 million SDR (US$301 million) available under the 1992 Conventions. As a result, the total amount available for compensation for each incident for pollution damage in the States which are Members of the Supplementary Fund will be 750 million SDR (US$1 114 million).

The 1992 Fund has an Assembly, which is composed of representatives of all 1992 Fund Member States. The Assembly is the supreme organ governing the 1992 Fund, and it holds regular sessions once a year. The 1992 Fund also has an Executive Committee composed of 15 Member States elected by the Assembly. The main task of the Committee is to approve compensation claims to the extent that the Director has not been given the authority to do so. The Supplementary Fund has its own Assembly composed of representatives of all Member States.

The 1992 Fund, the 1971 Fund and the Supplementary Fund have a joint Secretariat. The Secretariat is headed by a Director and has at present 27 staff members.

The IOPC Funds have a trilingual website (http://www.iopcfund.org) containing information on the international compensation regime and the activities of the IOPC Funds.

CLAIMS SETTLEMENT

Claims experience

Since their establishment, the 1971 and 1992 Funds have been involved in approximately 135 incidents and have made compensation payments totalling some US$1 060 million. The Supplementary Fund has so far not been involved in any incidents.

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

The cases involving the largest total payments so far are as follows:

Incident	*Payments to claimants*
Antonio Gramsci (Sweden, 1979)	US $18 million
Tanio (France, 1986)	US $36 million
Haven (Italy, 1991)	US $58 million
Aegean Sea (Spain, 1992)	US $65 million
Braer (United Kingdom, 1993)	US $87 million
Keumdong N° 5 (Republic of Korea, 1993)	US $21 million
Sea Prince (Republic of Korea, 1995)	US $40 million
Yuil N° 1 (Republic of Korea, 1995)	US $30 million
Sea Empress (United Kingdom, 1996)	US $60 million
Nakhodka (Japan, 1997)	US $212 million
Nissos Amorgos (Venezuela, 1997)	US $21 million
Osung N° 3 (Republic of Korea, 1997)	US $16 million
Erika (France, 1999) (so far)	US $145 million
Prestige (Spain, France, Portugal, 2002) (so far)	US $154 million

A major oil spill can give rise to a large number of claims. The *Erika* incident resulted in over 6 900 compensation claims, of which over 50% were presented by businesses in the tourism sector and 27% originated from the fishery and mariculture sectors. The Solar 1 incident, which took place on 11 August 2006, has so far resulted in more than 11 000 claims, the great majority being in relation to subsistence or other very small scale fishing activities. One can imagine that an incident like this is quite difficult to handle for a small secretariat like that of the IOPC Fund.

Admissibility of claims for compensation

The 1992 Fund and the Supplementary Fund can pay compensation to a claimant only to the extent that the claim meets the criteria laid down in the 1992 Fund Convention and the 2003 Protocol.

The 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'.

On the claimant rests a general obligation to take reasonable measures to mitigate his loss.

The 1992 Fund has published a Claims Manual which contains general information on how claims should be presented and sets out the general criteria for the admissibility of various types of claims. A revised version of the Claims Manual has been adopted by the Assembly and was published in May 2005.

Decisions on the admissibility of claims which are of general interest are reported in the Funds' Annual Report.

What are the main types of claim admissible under the international regime?

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 (eg 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

The Funds pay compensation for expenses incurred for clean-up operations at sea or on the shore. Operations at sea may relate to the deployment of vessels, the salaries of crew, the use of booms and the spraying of dispersants. In respect of onshore clean-up, the operations may result in major costs for personnel, equipment, absorbents etc.

Measures taken to prevent or minimise pollution damage ('preventive measures') are compensated under the 1992 Conventions and the Supplementary Fund Protocol. Measures may be taken to prevent oil which has escaped from a ship from reaching the coast, eg by placing booms along the coast which is threatened. Dispersants may be used at sea to combat the oil. Oil may be removed from a sunken vessel. Costs for such operations are in principle admissible as costs of preventive measures, provided the measures and costs are *reasonable*.

The admissibility of claims for preventive measures is decided 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 of preventive measures 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 proved to be ineffective is not in itself a reason for rejection of a claim for the costs incurred. There should be a reasonable balance between the costs incurred and the benefits derived or expected, taking into account 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*, ie 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 because the area of the sea where he normally fishes is polluted and he cannot fish elsewhere. Similarly, a hotel or restaurant which is located 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. 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

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) should be limited to costs of reasonable measures of reinstatement actually undertaken or to be undertaken.

The Funds governing bodies 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.

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 Funds will not entertain claims for environmental damage based on an abstract quantification calculated in accordance with theoretical models. They 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 Funds 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 competent committee or other mechanism is established within the affected Member State to design and co-ordinate any such studies, as well as reinstatement measures.

The scale of the studies should be in proportion to the extent of the contamination and the predictable effects. On the other hand, the mere fact that a post-spill study demonstrates that no significant long-term environmental damage has occurred or that no reinstatement measures are necessary, does not by itself exclude compensation for the costs of the study.

The Funds should be invited at an early stage to participate in the determination of whether or not a particular incident should be subject to a post-spill environmental study. If it is agreed that such a study is justified the Funds should then be given the opportunity of becoming involved in the planning and in establishing the terms of reference for the study. In this context the Funds can play an important role in helping to ensure any post-spill environmental study does not unnecessarily repeat what has been done elsewhere. The Funds can also assist in ensuring that appropriate techniques and experts are employed. It is essential that progress with the studies is monitored, and that the results are clearly and impartially documented. This is not only important for the particular incident but also for the compilation of relevant data by the Funds for future cases.

It should be emphasised that participation of the Funds in the planning of environmental studies does not necessarily mean that any measures of reinstatement later proposed or undertaken will be considered admissible.

Recent development: admissibility criteria relating to claims for costs of preventive measures

When the 1992 Fund Executive Committee, at its February/March 2006 session, considered the Spanish Government's claim for the costs of the operation to remove the oil from the wreck of the *Prestige*, many delegations expressed views on the policy of the Funds on the interpretation and application of the criteria for the admissibility of claims for the costs of preventive measures and on the desirability of changing that policy so as to make it more flexible. As a result of its consideration of this issue the Executive Committee instructed the Director to carry out an examination of the admissibility criteria relating to claims for costs of preventive measures, in particular for the extraction of oil from sunken vessels, with a view to enabling the Assembly at its October 2006 session to discuss possible alternatives for the existing criteria for admissibility within the framework of the 1992 Conventions.

The Assembly at its October 2006 session discussed documents 92FUND/A.11/24 (submitted by the Director) and 92FUND/A.11/24/1 (submitted by France and Spain) regarding a possible modification of the admissibility criteria relating to claims for costs of preventive measures.

The Fund's admissibility criteria in respect of claims for the costs of preventive measures are based on the definitions of 'pollution damage', 'preventive measures' and 'incident' as set out in Articles I.6, I.7 and I.8 respectively of the 1992 Civil Liability Convention, which are incorporated by reference in Article 1.2 of the 1992 Fund Convention and in Article 1.6 of the Supplementary Fund Protocol. It should be noted that preventive measures did not only refer to the removal of oil from wrecks, but include all measures to prevent pollution damage or to minimise it once a spill has occurred, such as clean-up operations.

The current criteria, which were contained in the 2005 edition of the 1992 Fund's Claims Manual, read as follows:

> Claims for the costs of measures to prevent or minimise pollution damage 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 compensation under 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 technical advice.
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> Claims for costs of response measures are not accepted when it could have been foreseen that the measures taken would be ineffective, for example if dispersants were used on solid or semi-solid oils or if booms were deployed with no regard to their ineffectiveness in fast flowing waters. On the other hand, the fact that the measures proved to be ineffective is not in itself a reason for rejection of a claim.
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> The costs incurred, and the relationship between those costs and the benefits derived or expected, should be reasonable. For example, a high degree of cleaning, beyond removal of bulk oil, of exposed rocky shores inaccessible to the public is rarely justified, since natural cleaning by wave action is likely to be more effective. On the other hand, thorough cleaning is usually necessary in the case of a public amenity beach, particularly immediately prior to or during the holiday season. Account is taken of the particular circumstances of an incident.

Costs of reasonable aerial surveillance operations to establish the extent of pollution at sea and on shorelines and to identify resources vulnerable to contamination are accepted. Where several organisations are involved in the response to an incident, aerial surveillance should be properly co-ordinated to avoid duplication of effort.

The Assembly recognised that it was important that the overarching criterion of reasonableness is the same for all types of preventive measures, ie whether the measures taken were objectively reasonable under the circumstances existing at the time they were taken.

When applying the test of reasonableness of preventive measures, an examination should be made of the relationship between the costs of the measures and the likely benefits in the form of the expected reduction in loss or damage that would have resulted from those measures.

The Assembly also decided that when considering whether the criterion of reasonableness was fulfilled, ie whether the costs were admissible, account should also be taken not only of the potential direct economic effects of not taking a particular preventive measure, but also of potential damage to the environment, which might have a direct or indirect economic effect; for example, where the oil in the sunken vessel posed a significant risk of causing substantial damage to the marine environment, even very high costs of a removal operation would normally not be considered disproportionate in relation to the potential environmental consequences of leaving the oil in the vessel.

It was noted that although the definition of 'pollution damage' limited compensation for impairment of the environment to losses of an economic nature and costs of reinstatement, practically all preventive measures taken to prevent environmental damage should be admissible in principle for compensation, since they would also have a direct or indirect economic benefit. It was decided to clarify the Claims Manual in this respect and the Director was instructed to develop a draft text for that purpose.

The Assembly also decided to determine specific sub-criteria to facilitate the consideration of the admissibility in terms of reasonableness of measures aimed at the extraction of oil from sunken vessels in the same way that sub-criteria had been developed for the purpose of considering the reasonableness of measures taken to prevent or mitigate pure economic loss (pages 29-30 of the Claims Manual), and determining whether there was a sufficiently close link of causation between the contamination and pure economic loss allegedly suffered as a result of the contamination (pages 25-26 and 28 of the Claims Manual).

Elements to be taken into account when considering the admissibility of costs of measures to extract oil from a sunken vessel could include:

(a) The extent to which the shoreline which is most likely to be affected by a release of the oil from the vessel is vulnerable to oil pollution, and the economic damage which is likely to occur if the remainder of the oil were to be released from the vessel;

(b) The likely damage to the environment from a release of the oil from the vessel, including the potential costs of post-spill studies and measures of reinstatement;

(c) The likelihood that oil will be released from the vessel within the foreseeable future and will reach the shore or other natural or economic resources, the quantity, type and characteristics of the oil which could be released and the likely rate at which a release might take place;

(d) The extent to which alternative methods of containing the oil on board the vessel for an indefinite period, or of rendering the remaining oil harmless, are possible and adequate;

(e) The likely cost of the extraction operation and the likelihood that the operation would be successful, taking into account the location of the vessel and its condition, the type of the oil and the characteristics of the area where the ship is located and other relevant circumstances;

(f) The likelihood that significant quantities of oil would be released during the extraction operation and the likely amount of damage that would be caused as a result of such a release.

The Assembly also discussed document 92FUND/A.11/24/1 submitted by the delegations of France and Spain. Those delegations had been thinking along the same lines as the Director in recommending sub-criteria to facilitate the consideration of reasonableness of operations undertaken to extract oil from a sunken wreck, but had proposed criteria which differed slightly from the one put forward by the Director, ie:

(a) Risks associated with the situation of the wreck: it will be necessary to take into account all the risks associated with the situation of the wreck, such as the instability of the sea bed (a factor which may give rise to structural collapse with the resulting general impact) and the proximity of areas vulnerable from different points of view (economic, environmental, etc.).

(b) Risks associated with the volume of oil contained in the wreck: the volume of oil contained measured with the maximum precision possible must be considerable and capable of producing general damage if the sunken structure collapses.

(c) Technical viability of the operation: the viability of the extraction must be assured because the wreck is within a range of depths where work is possible with sufficient guarantees of success.

(d) The cost of the operation must be reasonable taking into account the cost per unit of product recovered, which must be within the limits for past operations.

The Assembly decided to combine some of the criteria proposed by the Director with those proposed by the French and Spanish delegations, although a number of delegations expressed reservations as regards the criterion proposed by the French and Spanish delegations which took into account the cost per unit of oil recovered compared with the unit cost from past oil removal operations was not appropriate. The Director was instructed to develop such text in consultation with these delegations and present his recommendations to the Assembly at its next session.

The Assembly decided not to widen the Fund's admissibility criteria relating to costs of preventive measures so as to include social and/or political considerations.

REVIEW OF THE ADEQUACY OF THE INTERNATIONAL COMPENSATION REGIME

Increase in the limitation amounts available under the 1992 Conventions

When the 1992 Civil Liability and Fund Conventions were adopted, it was expected that the total amount available under these Conventions, at that time US $201 million, would be sufficient to compensate all victims in full, even in the most serious incidents. However, it became evident already in relation to the first major incident which occurred after the entry into force of the 1992 Conventions, namely the *Nakhodka* incident in Japan in 1997, that this was not the case. The inadequacy of that amount was demonstrated even more clearly in respect of the *Erika* incident in France in 1999.

In the light of this experience, a number of States took the view that it was necessary to increase significantly the amount of compensation available. A first step to this effect was taken in 2000 when the Legal Committee of IMO decided under a special procedure provided for in the Conventions (the

"tacit amendment" procedure), to increase the limits contained in 1992 Civil Liability Convention and the 1992 Fund Convention by some 50%. The amendment to the 1992 Fund Convention brought the total amount available under the 1992 Conventions to US $301 million. The increases entered into force on 1 November 2003, leading to the present liability and compensation limits of the regime

1992 Fund Working Group

Many States took the view, however, that the increase in the maximum compensation amount decided by the IMO Legal Committee was insufficient and the point was made that although the system had worked well in most cases, there were inadequacies in the system and it was therefore necessary to carry out a general revision of the 1992 Conventions. For this reason the 1992 Fund Assembly established in 2000 a Working Group open to all Member States to examine the adequacy of the international compensation regime established by these Conventions.

Supplementary Fund

During the discussions in the Working Group it was firstly decided to work towards the creation of an optional third tier of compensation and to prepare a draft Protocol providing for such a third tier by means of a Supplementary Fund. A Diplomatic Conference held under the auspices of the IMO in London in May 2003 adopted, after difficult negotiations, a Protocol creating such a Supplementary Compensation Fund. The Protocol entered into force on 3 March 2005.

The main elements of the Protocol are as follows:

- The Protocol established a new intergovernmental organisation, the International Oil Pollution Compensation Supplementary Fund 2003.

- Any State which is Party to the 1992 Fund Convention may become Party to the Protocol and thereby become a Member of the Supplementary Fund.

- The Protocol applies to pollution damage in the territory, including the territorial sea, of a State which is a Party to the Protocol and in the exclusive economic zone (EEZ) or equivalent area of such a State.

- The total amount of compensation payable for any one incident is 750 million SDR (US$1 114 million), including the amount payable under the 1992 Civil Liability and Fund Conventions, 203 million SDR (US$301 million).

- Annual contributions to the Supplementary Fund are to 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 at least 1 million tonnes of contributing oil will be deemed to have been received each year in each Member State for the purpose of paying contributions. That means that the Member State itself will 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.

- The Supplementary Fund only pays compensation for incidents which occur after the Protocol has entered into force for the affected State.

Difficulties have arisen in some incidents involving the 1971 and 1992 Funds where the total amount of the claims arising from a given incident exceeded the total amount available for compensation or where there was a risk that this might occur. Under the Fund Conventions and the Supplementary Fund Protocol, the Funds are obliged to ensure that all claimants are given equal treatment. In a number of cases the 1971 and 1992 Funds therefore have had to limit (pro-rate) payments to victims to a percentage of the agreed amount of their claims. In most cases it eventually became possible to increase the level of payments to 100% once it was established that the total amount of admissible

claims would not exceed the amount available for compensation, but in many cases the delay in payment of part of the compensation nevertheless caused financial hardship to victims, for example fishermen and small businesses in the tourism sector. The 2003 Protocol will greatly improve 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.

Consideration of a revision of the 1992 Conventions

In October 2005 the 1992 Fund Assembly considered the Working Group's final report on the question of whether the 1992 Conventions should be revised. The Working Group had been divided on the issue and had not been in a position to make a recommendation to the 1992 Fund Assembly. It was therefore for the Assembly to make a decision at this session on whether the revision should go ahead. Discussions that ensued reflected the continued division among Member States with one group supporting limited revision, and the other -- holding a slighter majority -- being strongly against revision and proposing to terminate the Working Group. The Assembly acknowledged that there was insufficient support to move forward with revision of the Conventions -- even if limited -- and therefore decided that the Working Group should be disbanded and that the revision of the Conventions should be removed from its agenda.

The deliberations in the Working Group had, in addition to the adoption of the 2003 Supplementary Fund Protocol, resulted in amendments of the 1992 Fund's Claims Manual in respect of the admissibility of claims for costs of reinstatement of the environment and costs of post spill studies.

The Working Group had also considered several proposals for dealing with the substandard transportation of oil. The intention of these proposals was to provide disincentives to shipowners to use substandard ships by imposing higher limits of liability on such ships. Under one proposal, there would also be a liability on the cargo owner for pollution damage caused by such ships. Another proposal would have deprived the shipowners of their right to limit their liability if the incident had resulted from structural defects of the ships (ie defects due to decay or lack of maintenance). No decision was taken on any of these proposals. Some States considered however that the issue of substandard shipping was not within the field of competence of the 1992 Fund but fell within the exclusive competence of the IMO and should be dealt with in the relevant IMO Conventions (SOLAS and MARPOL).

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$30 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.

Recent developments: application of 1992 Conventions to ship-to-ship oil transfer

At its October 2005 session the Assembly had considered the question of whether permanently anchored vessels engaged in ship-to-ship (STS) oil transfer operations fell within the definition of 'ship' under the 1992 Civil Liability and Fund Conventions, as interpreted by the Assembly, and whether contributing oil received by such vessels should be considered as received for the purpose of Article 10.1(a) of the 1992 Fund Convention and therefore be taken into account for the levying of contributions.

At that session the Assembly had not reached any decision on the application of the 1992 Conventions to these STS operations under consideration, but had instructed the Director to undertake an in-depth study of the issues involved and report to the Assembly at its next session (document 92FUND/A.10/37, paragraph 37.3.7).

The Director had then engaged an independent expert to carry out a detailed study to identify the worldwide locations where STS oil transfer operations were being carried out where one of the vessels involved was permanently anchored and to which oil was delivered by tankers and subsequently transferred to tankers for onward carriage.

The study identified 24 STS operations involving permanently or semi-permanently anchored vessels acting as floating storage units, 20 of which were located within the territorial waters of 1992 Fund Member States. They fell in two main categories. In the first category, crude oil was shipped from inland sources by small tankers to a location at sea where a vessel remained permanently at anchor and received these cargoes for storage and consolidation before subsequently discharging the consolidated cargo to other tankers, which transported the crude oil to its final destination. In the second category, which had been found to be very common in the bunker industry, fuel oil was received as cargo where the receiving vessel was used either temporarily or permanently to store or blend the received cargoes and subsequently discharge parcels of the stored or blended cargo onto other vessels which transport it to shore-based terminals or deliver it to other vessels as bunkers.

The vessels identified had a combined deadweight tonnage of 3.3 million tonnes and had an estimated total annual throughput of nearly 30 million tonnes of oil (crude oil and heavy fuel oil) annually, which corresponded to about 2% of the total quantity of contributing oil received in 1992 Fund Member States in 2004.

Applicability of the 1992 Civil Liability and Fund Conventions to permanently and semi-permanently anchored vessels

At its October 1999 session the Assembly of the 1992 Fund had decided to endorse the conclusions of the Working Group regarding the applicability of the 1992 Conventions to offshore craft that such craft should be regarded as 'ships' under the 1992 Conventions only when they carried oil as cargo on a voyage to or from a port or terminal outside the oil field in which they normally operated. The Assembly had emphasised that in any event the decision as to whether the 1992 Conventions applied to a specific incident would be taken in the light of the particular circumstances of that case and that the issue could be reconsidered if new information were to come to light (document 92FUND/A.4/32, paragraph 24.10).

At its October 2006 session the Assembly noted that in the light of the findings of the study it had become apparent that some of the vessels engaged in STS operations on a permanent or semi-permanent basis were capable of operating, and did operate on occasions, as normal trading tankers. It further noted that the Director was of the view, however, that when such vessels were engaged in STS operations whilst at anchor they functioned in much the same way as offshore craft, namely as floating storage units (FSUs) and floating production, storage and offloading units (FPSOs). It was

also noted that in accordance with the policy adopted by the Assembly in October 1999, the Director had concluded that permanently or semi-permanently anchored vessels engaged in STS oil transfer operations should be regarded as 'ships' under the 1992 Conventions only when they carried oil as cargo on a voyage to or from a port or terminal outside the location in which they normally operated.

The Assembly decided that permanently and semi-permanently anchored vessels engaged in STS oil transfer operations should be regarded as 'ships' only when they carried oil as cargo on a voyage to or from a port or terminal outside the location in which they normally operate, but that in any event the decision as to whether such a vessel fell within the definition should be decided in the light of the particular circumstances of the case.

Ship-to-ship transfers and contributing oil

Article 10.1 (a) of the 1992 Fund Convention provides that annual contributions to the 1992 Fund shall be made in respect of each Contracting State by any person who, in the relevant calendar year, had received in total, quantities of contributing oil exceeding 150 000 tonnes by sea in the ports or terminal installations in the territory of the State.

At its 1st extraordinary session in October 1980 the 1971 Fund Assembly had considered the circumstances under which contributing oil should be considered as 'received' and that it had approved the following interpretation of 'received' (document FUND/A/ES.1/13, paragraph 10).

(a) Discharge into a floating tank within the territorial waters of a Member State (including its ports) constitutes a receipt of oil, irrespective of whether the tank is connected with onshore installations via pipeline or not. Ships are considered to be floating tanks in this connection only if they are 'dead' ships, ie if they are not ready to sail.

(b) Traffic within a port area shall not be considered as carriage by sea.

(c) Ship-to-ship transfer shall not be considered as receipt, irrespective of where this transfer takes place (ie within a port area or outside the port but within territorial waters) and whether it is done solely by using the ships' equipment or by means of a pipeline passing over land. This applies for a transfer between two sea-going vessels as well as for a transfer between a sea-going vessel and an internal waterway vessel and irrespective of whether the transfer takes place within or outside a port area. When the oil, after having been transferred in this way from a sea-going vessel to another vessel, has been carried by the latter to an onshore installation situated in the same Member State or in another Member State, the receipt in that installation shall be considered as receipt of oil carried by sea. However, in the case where the oil passes through a storage tank before being loaded to the other ship, it has to be reported as oil received at that tank in that State.

The above interpretation is reflected in the explanatory notes attached to the 1992 Fund form for reporting contributing oil received (which constitutes an Annex to the Internal Regulations), the current version of which was approved by the 1992 Fund Assembly at its extraordinary session in March 2005 (document 92FUND/A/ES.9/28, paragraph 16.2).

The Assembly agreed with the Director's view that STS oil transfer operations involving permanently or semi-permanently anchored vessels were much the same as shore-based terminal operations in terms of the activities undertaken and the attendant pollution risks and that since all contributing oil – i.e. crude oil and heavy fuel oil – received by shore-based terminals in 1992 Fund Member States after sea transport was considered as received for the purpose of Article 10.1 (a) of the 1992 Fund Convention, all such oil received by permanently or semi-permanently anchored vessels in 1992 Fund Member States after sea transport should also be considered as received for the purpose of that Article.

The Assembly also noted that it would therefore be necessary to amend the wording relating to floating tanks in the explanatory note attached to the 1992 Fund form for reporting receipts of contributing oil and that the Director had proposed the following revised text for item (a), reproduced in paragraph 32.14 above, in the explanatory notes attached to the 1992 Fund's oil reporting form for consideration by the Assembly (additional text highlighted):

> Discharge into a floating tank within the territorial waters of the Member State (including its ports) constitutes a receipt, irrespective of whether the tank is connected with onshore installations via pipeline or not. Ships are considered to be floating tanks in this connection[<2>] **only** if they are 'dead' ships, ie if they are not ready to sail**, or if they are permanently or semi-permanently at anchor.**

New cases: *Solar 1*

On 11 August 2006 the Philippines registered tanker *Solar 1*, (998 GT), laden with a cargo of 2 081 tonnes of industrial fuel oil, sank in heavy weather in the Guimaras Straits, some 10 nautical miles south of Guimaras Island, Philippines (see map). The Republic of the Philippines is a party to the 1992 Civil Liability and Fund Conventions.

The vessel, which had departed from Bataan (Philippines) on 9 August 2006 bound for Zamboanga (Philippines) encountered heavy seas on 10 August and began to trim by the head. The vessel sought shelter to the north of Guimaras Island where an inspection by the crew revealed damage to the forecastle, resulting in an ingress of seawater in the motor room, cargo gear room, fore peak and chain locker. After temporary repairs had been carried out and all water removed from the flooded spaces the vessel resumed its passage on the same day. During the afternoon of 11 August the vessel encountered heavy seas and developed a 5° starboard list. The list worsened rapidly causing the vessel to capsize and the master ordered the crew to abandon ship. Eighteen of the 20-crew members survived the incident but two were lost at sea. The survivors reported seeing the vessel's bow slowly submerge and after a while only the stern and the propeller were visible before it too disappeared.

An unknown, but substantial quantity of oil was released from the vessel after it sank and the sunken wreck continued to release oil, albeit in ever decreasing quantities. The Philippines National Mapping and Resource Information Authority (NAMRIA) undertook a bathymetric survey of the area of the sinking and located the vessel in 630 metres of water, almost immediately below the location of surfacing oil.

The *Solar 1* was entered with the Shipowners' Mutual Protection and Indemnity Association (Luxembourg) (Shipowners' Club). The Shipowners' Club and the 1992 Fund jointly requested an expert from the International Tanker Owners Pollution Federation Limited (ITOPF) to travel to the Philippines.

The 1992 Fund engaged a lawyer in the Philippines to assist it in dealing with any legal issues which may arise from the incident.

Impact of the spill

Shoreline contamination

The Guimaras Straits contain a group of islands, the shorelines of which include sandy beaches, rocky shores, coral reefs, seagrass beds and mangroves. The south-west coast of Guimaras Island, the largest island in the Strait, contains a national marine reserve and an aquaculture research centre. The inshore waters of Guimaras Island support an important small-scale fishery with a large proportion of the coastal communities engaged in subsistence fishing. Coastal and onshore aquaculture is also widespread. There is a modest tourism industry on the island.

<2> The word 'only' deleted

Oil stranded on the south and south-west coasts of Guimaras Island and a number of small islets off the south-east coast. These coasts are dominated by mangrove forests, which are particularly vulnerable to the smothering effects of oil. Lesser quantities of oil also stranded on the east and north-east coasts of Panay in the vicinity of Iloilo and to the north of Ajuy Bay and the Conception Islands.

About 124 km of shoreline and around 500 hectares of mangrove were polluted to varying degrees. The Department of Environment and Natural Resources (DENR) and researchers from the University of the Philippines in Visayas embarked on a study of the short and long-term effects of the oil on the mangrove trees.

Fisheries and mariculture

The oil spill had a major impact on small scale fisheries on Guimaras Island, which fall broadly into two categories: a small boat fishery which uses a variety of fishing gears and a fixed trap fishery which uses large structures fixed to the seabed to trap the fish in compartments from which they are harvested. Around 7 000 individuals engaged in fishing were directly affected by the pollution either as a result of contamination of their fishing gear or the presence of oil in their fishing grounds. A further 4 000 individuals engaged in fishing off parts of the island that were not polluted reported experiencing difficulties in selling their catch due to public perception that all fish from Guimaras Island might be contaminated.

The spill also impacted aquaculture facilities, which primarily consist of brackish-water culture of milkfish in onshore ponds. Seawater is allowed into the ponds through sluices (intakes). The Bureau of Fisheries and Aquatic Resources reported that about 90 operators of fishponds were affected to varying degrees. Some operators decided to harvest their fish early due to fears of contamination, as a result of which, the fish had not reached their normal market size. There were a few reports of mortalities of fish. Heavy oiling of ponds was not widespread.

Significant areas of seaweed culture, in which the seaweed is attached to ropes suspended off the seabed on poles, were reported to have been affected by the oil. The seaweed is susceptible to environmental stress such as reduced salinity, heat and pollution. However, it appears that the oil from the *Solar 1* was responsible for most of the damage observed in crops in the polluted area.

A fishery expert and an aquaculture expert with experience of working in the Philippines were engaged by the Shipowners' Club and the 1992 Fund to attend on site to make an overall assessment of the losses and to assist claimants with the submission of claims.

Tourism

Guimaras Island is very dependent on its beaches to attract visitors, since there are very few alternative tourist attractions. As a consequence the spill had a major impact on tourist businesses. The majority of visitors make day excursions to the island (76%) and the remaining 24% are tourists staying overnight in Guimaras. Of the tourist visitors, an estimated 94% are domestic (ie Filipino nationals), while 6% are of foreign origin, mainly from Korea and Japan. The peak visitor season is April to June while the rest of the year has relatively constant monthly visitors.

The Shipowners' Club and the 1992 Fund engaged tourism experts who have been used by the Fund in previous incidents. These experts travelled to the affected area and met with many potential claimants to gain a better understanding of the nature of their businesses and the impact of the spill on their operations and to advise them on how to submit their claims for compensation.

There are about 80 tourist businesses on Guimaras Island and its surrounding islets. More than half of these are beaches and operations loosely referred to as beach resorts. About 25 were located in the polluted part of the island. However, in view of the small size of the island, resorts located outside the contaminated area were also affected by a downturn in visitors. The above businesses do not include restaurants, retailers and transport services, such as pleasure boat operators.

The beach resorts offer accommodation with two or more rooms, which vary from air-conditioned rooms with facilities to communal rooms with no facilities to open air spaces with umbrellas. They also provide restaurant and picnic services used by overnight guests and day excursionists. Most of these businesses are small, privately owned enterprises with relatively low revenue levels and many experienced considerable hardship. There are a few resorts located on small islets off Guimaras Island, which generally offer a better standard of facility that cater for a higher percentage of foreign markets and have a totally different operating profile to those located on Guimaras Island.

The Deputy Director/Technical Adviser and one of the Claims Managers together with a representative of the Shipowners' Club made two visits to the Philippines in September and October 2006 to conduct a series of claims workshops with representatives of central government, provincial governments and claimants. The meetings were arranged by representatives of Petron Corporation, the charterers of the *Solar 1*, who accompanied the Club and the Fund throughout their visit.

Clean-up operations

The Philippine Coast Guard, as the lead government agency for spill response in the Philippines, took overall control of the clean-up operations. The at sea response focused on the application of chemical dispersants to the freshly released oil using a light aircraft and vessels. Attempts were made to protect some sensitive sites using commercial booms and home made booms constructed from wire netting and indigenous materials such as banana leaves and coconut husks.

Petron Corporation assumed the responsibility for organising and managing the shoreline clean-up, which was largely undertaken by residents of affected villages recruited by Petron under a 'cash for work' programme. Around 1 500 individual residents participated in the shoreline clean-up at the height of the response and by the time that the operations were completed in early November 2006 a total of some 63 000 man-days had been expended in these operations.

Shoreline clean-up was undertaken using predominantly manual methods and primarily focused on sandy beaches on the south coast of Guimaras Island. About 2 100 tonnes of oily waste was generated from shoreline cleaning, which was collected from various sites and transported to a cement factory where it was used as an alternative fuel and raw material in the production of cement.

Proposed operation to remove the remaining cargo from the vessel

Underwater survey of the wreck

Shortly after the incident the Shipowners' Club contracted a Japanese salvage company to undertake an underwater survey of the vessel using a remotely operated vehicle (ROV). The purpose of the survey was to search for the vessel to confirm its location, depth and orientation and to assess the risk of further pollution. The Shipowners' Club and the 1992 Fund jointly appointed a marine casualty and salvage expert to attend on-site to supervise the under-water survey and to interpret the survey findings.

The vessel was found in an upright condition on a seabed slope of 6° and with a trim by the stern of about 10°. There was a build up of 6.5 metres of sediment at the aft end but none at the forward end. A triangular puncture type hole with base dimensions of about 28cm and height of about 15cm was found on the port side aft of the bulkhead between No.1 ballast tank and the port anchor chain locker. Both the port and starboard shell plating showed signs of crumpling neat the bottom of the vessel but there were no visible signs of cracks. There were no obvious signs of indentations, folds or cracks on the main deck. All lids of cargo tank hatches were found to be closed with the exception of No.4 port, the lid of which was partially ajar. No oil was seen emanating from this tank, which indicated that the entire contents were missing. Oil was found to be leaking to varying degrees from pipes and vents and the tank lid of No.2 port cargo tank. However, following the closure of a number of vent valves by the ROV the total leakage was reduced to roughly 20 litres per hour.

Future pollution risk posed by the wreck

The Shipowners' Club and the 1992 Fund requested experts from ITOPF and the marine casualty and salvage expert to assess the pollution risk posed by the wreck of the *Solar 1* and whether an operation to remove any remaining oil was technically justified.

The experts noted that the apparent lack of damage to the main deck and the upper hull of the wreck and the absence of visible oil staining or oil collections around the structure suggested that there had not been a major release of oil from the cargo tanks and that the majority of oil may still be on board. However, this was not entirely consistent with observations of the oil at sea shortly after the incident and the extent of shoreline contamination, which suggested that at least 50% of the cargo of 2 081 tonnes of oil had escaped. The experts stated that without knowing the circumstances under which the vessel had sunk it was impossible to assess what kind of hidden structural damage had occurred and whether this could have resulted in substantial amounts of cargo being released. The experts considered whether it would be possible to quantify the remaining oil in the wreck using non-intrusive neutron bombardment technology, but the technique would have necessitated the excavation of the sediment around the hull with the attendant risk of disturbing the vessel.

The experts considered that on the basis of the underwater survey the vessel appeared to be in a stable position and that under the prevailing conditions, movement of the vessel was unlikely. The experts noted, however, that the vessel was located in a seismically active area, having experienced two major seismic events in the last 50 years.

The experts were of the view that whilst the most likely outcome of leaving the oil in the vessel would be the gradual release of oil over many years through pinholes and cracks as a result of corrosion, a major release of oil due to the effects of a severe seismic event on the structure or stability of the vessel could not be ruled out.

The experts noted the sensitivity of Guimaras Island and its vulnerability to pollution from the wreck during the south-west monsoon as demonstrated by the oil released following the incident, which had had a significant effect on economic resources, although it was too early to say what the environmental consequences would be.

The experts concluded that provided that the costs of an operation to remove as much of the remaining cargo from the vessel as possible were not disproportionate to the risks of pollution damage resulting from the further release of oil, such an operation could, in their opinion, be justified.

Consideration by the 1992 Fund Executive Committee

At its October 2006 session the 1992 Fund Executive Committee considered the question as to whether an operation to remove the remaining oil from the wreck was technically justified and whether a claim for the cost of such an operation was admissible in principle.

The Committee noted that on the basis of the information available the Director was of the view that it could not be ruled out that a substantial quantity of oil remained in the wreck. It was noted that the Shipowners' Club and the Fund had explored the possibility of undertaking a study to measure the quantity of oil remaining on board using non-intrusive technology but that indications were that the cost of such a study would be in the region of US$3-4 million (£1.7-2.2 million). It was further noted that in order to measure the oil in the vessel it would be necessary to excavate the sediment in which the stern section was embedded and that this could destabilise the vessel with the attendant risk of a significant release of oil and that for these reasons the Director had taken the view that a study aimed at quantifying the remaining oil on board would not be justified.

The Committee noted that given the circumstances, in particular the likelihood that a significant quantity of oil remained on board and the fact that the vessel was located in a seismically active area and in close proximity to sensitive economic and environmental resources, the Director had agreed with the experts that provided the cost of an operation to remove as much of the remaining cargo as

possible was not disproportionate to the risks of pollution damage resulting from further releases of oil, such a removal operation would be reasonable and the cost of the operation would qualify for compensation.

It was noted that early indications were that the costs of operations to quantify and remove any remaining oil would be between US$8-12 million (£4.4-6.7 million) depending on the quantity of oil found on board. The Deputy Director stated, however, that on the basis of new proposals for the oil removal operation alone, that the final cost would be closer to US$8 million (£4.4 million), and possibly less.

The Committee noted that early estimates suggested that the level of the losses already sustained from the pollution from the *Solar 1* would be in the range US$5-8 million (£2.8-4.4 million), that pollution damage to aquaculture ponds had not been very severe as a result of earlier damage to the ponds caused by a passing typhoon, that the incident had occurred outside the peak tourism and fishing seasons and that a further substantial spill of oil would have the potential to cause at least as much pollution damage as had already occurred.

A large number of delegations supported the proposal by the Director that a claim for the cost of removing oil from the *Solar 1* was admissible in principle. The point was made by many delegations that given the likelihood that a significant quantity of oil remained in the wreck, and in view of the seismic activity in the vicinity of the wreck and its close proximity to sensitive economic and environmental resources, the indicative costs of removing the oil were not disproportionate to risks of pollution damage resulting from further releases of oil. The Executive Committee decided that the claim for the cost of removing the oil from the *Solar 1* was admissible in principle.

In November 2006 the Shipowners' Club signed a contract with Saipem Sonsub, an Italian company specialising in deep sea engineering projects using remotely operated vehicles to remove the remaining oil from the wreck of the *Solar 1*. The operation is due to commence in early March 2007.

The first STOPIA case

The limitation amount applicable to the *Solar 1* in accordance with the 1992 Civil Liability Convention is 4.51 million SDR (£3.6 million). However, the owner of the *Solar 1* was a party to the Small Tanker Oil Pollution Indemnification Agreement 2006 (STOPIA 2006) whereby the limitation amount applicable to the tanker under the Civil Liability Convention was increased, on a voluntary basis, to 20 million SDR (£15.8 million). However, the 1992 Fund continued to be liable to compensate claimants if and to the extent that the total amount of admissible claims exceeded the limitation amount applicable to the *Solar 1* under the Civil Liability Convention. The 1992 Fund, although not a party to STOPIA, has legally enforceable rights of indemnification from the shipowner of the difference between the limitation amount applicable to the tanker under the 1992 Civil Liability Convention and the total amount of admissible claims or 20 million SDR (£15.8 million), whichever is the less.

An agreement was reached between the Director and the Shipowners' Club that the 1992 Fund should assume responsibility for compensation payments once the Club had paid compensation up to the limitation amount applicable to the *Solar 1* under the 1992 Civil Liability Convention. The 1992 Fund would then seek regular reimbursements from the Club up to the STOPIA limit, payments to be made by the Club within two weeks of being invoiced by the Fund. As a result of this procedure it should not be necessary for the Fund to levy contributions unless the total amount of admissible claims exceeds the STOPIA 2006 limit of 20 million SDR (£ 15.8 million).

In October 2006 the Shipowners' Club informed the Director that on the basis of its investigations into the background of the incident, and in particular issues of causation, it had serious concerns over the shipowner's operation of the vessel, which would warrant the Shipowners' Club revoking insurance cover against the shipowner. The Shipowners' Club informed the Director that it had decided, however, not to attempt to avoid any liability pursuant to Article VII, paragraph 8 of the Civil Liability Convention, which provides, *inter alia*, that the insurer may avail himself of the defence that the pollution damage resulted from the wilful misconduct of the shipowner.

The Shipowners' Club informed the Director that it intended, however, to reserve its right under Article III, paragraph 3 of the Civil Liability Convention, to oppose claims from claimants whose negligence may have caused or contributed to the pollution damage, and that it did not intend to pay claims made by third parties where it saw evidence of contributory negligence.

Article III, paragraph 3 states:

> If the owner proves that the pollution damage resulted wholly or partially either from an act or omission done with intent to cause damage by the person who suffered the damage or from the negligence of that person, the owner may be exonerated wholly or partially from his liability to such person'.

It is understood that claims from such third parties are only likely to be in respect of preventive measures.

Article 4, paragraph 3, of the 1992 Fund Convention states:

> If the Fund proves that the pollution damage resulted wholly or partially either from an act or omission done with intent to cause damage by the person who suffered the damage or form the negligence of that person, the owner may be exonerated wholly or partially from his liability to such person. The Fund shall in any event be exonerated to the extent that the shipowner may have been exonerated under Article III, paragraph 3, of the 1992 Civil Liability Convention. However, there shall be no such exoneration of the Fund with regard to preventive measures.

In accordance with Article 4, paragraph 3, the 1992 Fund would however be liable to pay any claims for reasonable costs of preventive measures made by third parties even where the negligence of such parties may have caused or contributed to the pollution damage. If the Fund were to pay such claims, it would not, or at least not for the time being, be reimbursed by the Shipowners' Club under the terms of STOPIA 2006.

The 1992 Fund is not at present in a position to comment on the allegations by the Shipowners' Club of contributory negligence on the part of third parties. However, it intends to examine all the evidence available to establish whether there was contributory negligence on the part of any claimant who undertook preventive measures and to report its findings to the Committee.

Claims for compensation

Clean-up and preventive measures

By 31 December 2006 claims by three contractors totalling US$6.5 million (£3.4 million) in respect of costs of clean-up at sea had been assessed for a total of US$3.9 million (£2.1 million) and interim payments totalling US$2.4 million (£1.2 million) had been made.

A claim by Petron Corporation for PHP160 million (£1.6 million) for the costs of shoreline clean-up had been provisionally assessed for a total of PHP105 million (£1.1 million) and an interim payment of PHP60 million (£600 000) had been made. A further interim payment of PHP45 million (£450 000) would be made early in the New Year. The Shipowners' Club has alleged that Petron Corporation's negligence caused or contributed to the pollution damage and has therefore refused to pay compensation in accordance with the provisions of Article III, paragraph 3 of the Civil Liability Convention above. The 1992 Fund has therefore agreed to pay Petron Corporation's claim pending the outcome of its investigation into the cause of the incident, since the claim relates to the costs of preventive measures.

The Shipowners' Club paid £204 000 for the cost of the underwater survey of the wreck.

Fisheries and mariculture

In October 2006 the Shipowners' Club and the 1992 Fund received 13 535 claims from fisherfolk living in the five municipalities on Guimaras Island. Each claimant had indicated the type of fishing gear he or she employed, whether or not they owned a boat, and if so, whether it was powered or un-powered, information about the number of days they went fishing per month, the types of fish that were usually caught at the time of the oil spill, and typical market prices.

After the removal of some 2 174 duplicate claims the information from each of the remaining 11 361 claims were entered into a claims database for each of the municipalities. The data was then sorted into a number of different categories of fishing and average daily earnings for each category were computed. The daily earnings were compared with published records and information gathered by the fishery experts during their earlier field surveys. The computed average daily earnings were found to be broadly consistent with published data and were therefore used to assess individual losses of claimants according to the type of fishing activity they were engaged in. Losses for all claimants were assessed on the basis of 12 weeks interruption of normal fishing, which corresponded to the time taken to complete shoreline clean-up operations. The total losses of the 11 361 claimants were assessed at PHP120.3 million (£1.3 million). Over 98% of the claimants agreed to settle their claims on the basis of these assessments.

In view of the fact that the claimants were not represented by any fishery association or co-operative that could act on their behalf, the Shipowners' Club and the 1992 Fund decided to pay each claimant individually. Payments commenced on 14 December 2006 and by 31 December a total of 3 530 claimants in three of the five municipalities had been compensated. The remaining claimants will be paid by the end of January 2007.

In November 2006 the Shipowners' Club and the 1992 Fund received 77 claims from seaweed farmers for alleged damage to there crop caused by the oil. These claims, which total PHP725 000 (£7 544) are being assessed.

In December 2006 the Shipowners' Club and the 1992 Fund received 90 claims from fish pond operators. The nature of the losses differs among the claimants, with some alleging that oil entered their ponds through broken dykes or open sluices (gates) causing fish mortalities, others claiming losses due to their decision to harvest their fish early to avoid contamination and others claiming for losses due to a reduction in fish prices. The total amount claimed is PHP316 million (£3.3 million). These claims are being assessed.

Tourism

By 31 December 2006 the Shipowners' Club and the 1992 Fund had received 74 claims in the tourism sector, mainly owners of small resorts and tour boat operators. The total amount claimed was PHP108 million (£1.1 million). A total of 24 claims had been settled for a total of PHP594 000 (£6 180). A claim for PHP100 million (£1 million) for the alleged loss of investment in an island resort over a period of 25 years was rejected on the grounds that such a claim was inadmissible in principle.

It is likely that many of the resort owners will submit claims for further losses during 2007.

Post-spill studies and reinstatement measures

In November 2006 the Department of Environment and Natural Resources (DENR) submitted to the Shipowners' Club and the 1992 Fund its proposed financial requirements for undertaking a post-spill environmental monitoring programme and the rehabilitation of coastal natural resources. The proposal, the costs of which had been put at PHP130 million (£1.3 million), focused on the reinstatement of mangroves affected by the oil, including the establishment of a mangrove nursery to grow mangrove saplings for eventual transplantation in affected areas. The proposal also included various air, water and soil quality monitoring studies.

The Shipowners' Club and the Fund informed DENR that whilst it supported the proposal to monitor the effects of the oil on mangroves, it was too early to decide on the need for reinstatement measures or the establishment of nurseries. However, the Shipowners' Club and the Fund agreed in principle to the proposal to collect oiled and un-oiled debris from the tidal channels of eight mangrove sites in order to promote greater tidal exchange and flushing, which would help to reinstate mangrove trees that were under stress from the oil adhering to their root systems and the surrounding sediments. The Club and the Fund pointed out that DENR would have to provide the initial funding for these measures itself and then claim compensation for the costs after the work was completed. The Club and the Fund advised DENR that the proposed studies to measure air, water and soil quality were not, in their view, technically justified and that it was unlikely that claims for the costs of these programmes would meet the Fund's admissibility criteria.

THE FUTURE: THE HNS CONVENTION

The International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea, 1996 (HNS Convention) was adopted by a Diplomatic Conference held in May 1996 under the auspices of the IMO. The Convention aims to ensure adequate, prompt and effective compensation for damage to persons and property, costs of clean-up and reinstatement measures and economic losses caused by the maritime transport of hazardous and noxious substances (HNS). The HNS Convention is to a very large extent modelled on the 1992 Conventions.

HNS include bulk solids, liquids including oils, liquefied gases such as liquefied natural gases (LNG) and liquefied petroleum gases (LPG), and packaged substances. Some bulk solids such as coal and iron ore are excluded because of the low hazards they present. Loss or damage caused by non-persistent oil is covered as is non-pollution damage caused by persistent oil. Pollution damage caused by persistent oil is excluded since such damage is already covered by the existing regime on liability and compensation for oil pollution from tankers, ie the 1992 Civil Liability Convention, the 1992 Fund Convention and the Supplementary Fund Protocol. Loss or damage caused by radioactive materials is also excluded.

The HNS Convention establishes a "two tier" compensation regime. The first tier is provided by the individual shipowner and the insurer and the second tier by the International Hazardous and Noxious Substances Fund (HNS Fund), contributed to by receivers of HNS after sea transport in all States Parties to the Convention. The shipowner is liable up to the following limits: 10 million SDR (US$14.9 million) for ships up to 2 000 units of gross tonnage (GT), rising to 100 million SDR (US$149 million) for ships of 100 000 GT or over. The HNS Fund will provide additional compensation up to a maximum of 250 million SDR (US$371 million), including the amount paid by the shipowner and the insurer.

The HNS Convention will enter into force 18 months after ratification by at least 12 States, subject to the following conditions: in the previous calendar year a total of at least 40 million tonnes of cargo consisting of bulk solids and other HNS liable for contributions to the general account was received in States which have ratified the Convention; and four of these States each have ships with a total tonnage of at least 2 million GT.

As at 20 November 2006, eight States (Angola, Cyprus, Morocco, the Russian Federation, Saint Kitts and Nevis, Samoa, Slovenia and Tonga) had ratified the Convention.

CONCLUDING REMARKS

The international compensation regimes established under the Civil Liability and Fund Conventions are 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 98. It is expected that a number of 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 and noxious substances by sea.

As a result of recent major incidents, the compensation regime based on the 1992 Conventions became subject to criticism for not providing adequate protection to victims of oil pollution. The 1992 Fund's Member States have listened to this criticism and have taken it into account in a constructive way in the review of the adequacy of the regime which began in 2000. Steps to that effect were taken by the increases in the limits of liability and compensation which entered into force on 1 November 2003, by the adoption in May 2003 of the Protocol establishing a Supplementary Fund and by amendments to the Claims Manual in respect of the cost of post-spill studies and the costs of reinstatement of the polluted environment.

* * *

ANNEX

States Parties to both the
1992 Civil Liability Convention and the
1992 Fund Convention
as at 24 January 2007
(and therefore Members of the 1992 Fund)

98 States for which 1992 Fund Convention is in force		
Albania	Georgia	Panama
Algeria	Germany	Papua New Guinea
Angola	Ghana	Philippines
Antigua and Barbuda	Greece	Poland
Argentina	Grenada	Portugal
Australia	Guinea	Qatar
Bahamas	Iceland	Republic of Korea
Bahrain	India	Russian Federation
Barbados	Ireland	Saint Kitts and Nevis
Belgium	Israel	Saint Lucia
Belize	Italy	Saint Vincent and the Grenadines
Brunei Darussalam	Jamaica	
Bulgaria	Japan	Samoa
Cambodia	Kenya	Seychelles
Cameroon	Latvia	Sierra Leone
Canada	Liberia	Singapore
Cape Verde	Lithuania	Slovenia
China (Hong Kong Special Administrative Region)	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

States Parties to the Supplementary Fund Protocol
as at 24 January 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	

States Parties to the 1992 Civil Liability Convention
but not to the 1992 Fund Convention
as at 24 January 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 24 January 2007

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

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