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REVIEW OF THE INTERNATIONAL COMPENSATION REGIME

REVIEW OF THE OBJECTIVES AND PURPOSES OF THE CONVENTIONS ON LIABILITY AND COMPENSATION FOR OIL POLLUTION DAMAGE

Submitted by the Oil Companies International Marine Forum (OCIMF)

Summary:	See Executive Summary	
Action to be taken:	(a)	to note the original objectives of the liability and compensation regime
	(b)	to consider these objectives when revising the current regime

Executive Summary

The purpose of this paper is to analyse and review the existing liability and compensation regime in order to understand its objectives and purposes. It is also intended to provoke debate as to whether the existing regime meets the needs of modern-day society. The main body of the paper is attached at the Annex. The summary is below.

The 'founding fathers' of the liability and compensation regime had a number of objectives.

1 To ensure that adequate compensation was available for victims of oil pollution.

This was probably the most important principle of the regime and is reflected in the preamble of both the 1969 Liability and the 1971 Fund Conventions.

2 Most States were in favour of liability on the person in control of the vessel, being the person who could prevent pollution, i.e. the shipowner; and that, in order to benefit from the limitation, the shipowner should ensure that the vessel under his control is seaworthy.

This was by far the majority view of states at the 1969 Conference.

3 Some shipowning nations were concerned that the shipowner should not be too heavily burdened by the regime and this was connected with their concerns about the limited capacity in the insurance market.

Concerns by some ship-owning nations led to the compromise on limitation in 1969 in which a consensus was reached on shipowners' liability on the condition that a diplomatic conference would be held to set up a compensation fund to supplement the amount provided by the shipowner.

4 The fund was intended as a supplementary scheme to ensure that in the few incidents in which the costs of pollution damage exceeded the shipowners' liability, the fund would ensure that victims were fully compensated.

When the principle of shipowners' liability, with the compromise of a conference to create an international compensation fund, was agreed, it was expected that the fund would be supplementary in nature. It was also thought that a fund would only be called upon in the few very serious cases of oil-pollution damage. The delegate from Norway, at the 1969 conference, stated that even if the 1957 LLMC limits were used for shipowners' liability an international fund would only have been called upon to compensate in three cases in the previous nine years.

5 Many delegations were strongly in favour of constructing conventions that would encourage pollution prevention thereby reducing incidents.

At the 1969 and 1971 conferences many states were in favour of using the international liability and compensation regime as a mechanism to encourage high safety standards and pollution prevention among tankers, including Canada, Germany, France, USSR, UK, USA, Ireland, Norway, United Arab Republic, Brazil, Australia and Ghana. Indeed, shipowner relief (see paragraph 3.2 of Annex) under the 1971 Fund Convention was conditional upon the shipowner complying with certain safety standards.

Does the regime meet the needs of modern-day society?

1.1 If you ask this question to the victims of the *Prestige*, the *Erika*, the *Braer* and *Sea Empress* you would most likely get a resounding 'No'. As things stand it is unlikely that victims of the *Prestige* disaster will receive anything near adequate compensation. In addition, victims of the *Erika*, *Nakhodka*, *Nissos Amorgos*, *Sea Empress* and *Braer* were initially given pro-rata payments and, in some cases, governments and third parties agreed to stand 'last in the queue' in order to speed up payments to individuals.

1.2 In an attempt to speed up payment and increase payments to Spanish victims of the *Prestige*, the Spanish government presented a proposal to the 1992 Fund Assembly at its recent meeting in October 2003. This caused a number of Member States difficulties because of their interpretation of the Conventions. The real issue arising out of the debate was that Member States were attempting to find ways to help victims within the constraints of the Conventions.

1.3 Some may say that with the adoption of the Supplementary Fund Protocol (when it enters into force), with its increased limits of compensation, the regime will be 'fixed' so there is no need for change. However, one must still question whether it meets the expectations of victims and the international community as a whole. Prompt and adequate compensation of the victims is not the only concern. Protecting coastal states and their citizens from future potential incidents must also be of primary concern.

1.4 ITOPF (International Tanker Owners Pollution Federation) has, since 1974, compiled statistics on the numbers, types and causes of spills. Their statistics show that most small spills from tankers result from routine operations such as loading, discharging and bunkering occurring in ports or oil terminals. However, 63% of larger spills (of 700 tonnes or more) are caused by collision or grounding, 20% due to fire and explosion and hull damage, 6% during loading and discharging and the remaining 11% due to other/unknown causes.

1.5 The figures show that in nearly all cases of oil spills the cause is a ship-related factor, ie something under which the ship and her crew have control. Victims therefore question a system which allows a shipowner to limit its liability, in some cases at a relatively low percentage of the total costs of the pollution damage, particularly when in most cases the pollution is caused by the fault of the shipowner. If we want to prevent sea-borne oil pollution, and protect potential victims, we therefore need to encourage high standards of operation and maintenance.

1.6 Some may argue that a liability and compensation regime is not the place to deal with safety and pollution prevention, but the two cannot be divorced. They are inextricably linked. Doubters will argue that there are already existing conventions and safety measures in place under the auspices of the IMO. However, we all know that enforcement of existing international legislation is the main task that IMO Member States have yet to effectively achieve. The compensation regime, with the financial consequences that it entails, could be a powerful tool for improving ship safety and pollution prevention if Member States are willing to use it. It is inconceivable that Member States of the IMO would be willing to create a regime that is inconsistent with the principles of pollution prevention or even one that has the reverse effect. The forthcoming review of the regime in February 2004 is therefore an opportunity for Member States of the IOPC Funds to make the Conventions more consistent with the principles of pollution prevention. Failure to do so will be a missed opportunity to protect potential victims of future incidents.

1.7 At the time of the 1969 and 1971 conferences there was also real concern about insufficient capacity in the insurance market to significantly increase the liability limit for shipowners above the existing LLMC levels. Things have changed since then and there is now the capacity to provide insurance for shipowners at significantly increased levels.

1.8 The International Group of P&I Clubs currently make cover available for pollution risks up to U$ 1 billion per incident which is rarely, if ever, called upon.

1.9 We have already seen one state, the USA, introduce its own legislation because, following a significant incident, it felt that the existing IMO regime did not fulfil its needs. Instead it opted for a regime largely based on the 'polluter pays' principle.

1.10 More recently in Europe, we are seeing attempts to legislate in areas that conflict with international maritime conventions and specifically the Civil Liability and Fund Conventions. There are also loud calls within Europe for adoption of the 'polluter pays' principle in the international maritime field. The proposed European Directive on Environmental Liability (2002/0021) adopts the 'polluter pays' principle. In its current draft, pollution damage covered under the Civil Liability and Fund Conventions, HNS and Bunkers Conventions are excluded from the operation of the directive for a period of ten years. However, after this period there will be a review by the European Commission of the application of the international conventions to see whether they fulfil the needs of Europe.

1.11 The obvious fear is that without significant changes to the existing regime to encourage high standards of operation and maintenance and pollution prevention, regional solutions will be sought. This has the potential for the breakdown of maritime legislation in the international arena.

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ANNEX

ANALYSIS OF OBJECTIVES OF LIABILITY AND COMPENSATION REGIME

1 Introduction – Purpose and Scope

1.1 Following the adoption of the Supplementary Fund Protocol at the Diplomatic Conference in May 2003, the IMO adopted a Resolution (note) for review of the International Compensation Regime for Possible Improvement. This Resolution urges all States party to the 1992 Civil Liability and Fund Conventions to place a high priority on the ongoing work towards a comprehensive review of the 1992 Conventions.

1.2 In conducting a comprehensive review of any legislation whether on a domestic or international scale it is instructive, and some would say essential, to look back at the historic basis and principles enshrined within the existing legislation to understand, first of all, why the legislation was introduced and, secondly, how it came to exist in its current format.

1.3 The purpose of this paper, therefore, is to look back to the 1969, 1971, 1984 and 1992 Diplomatic Conferences through which the existing liability and compensation regime was developed. The aim is to initially set out the objectives and purposes of the Conferences followed by a general discussion of the general themes of primary concern to States throughout the Conferences. Examples of the concerns will be given using quotes from the IMO Official records of the Conferences. The discussion will also focus on the chronological sequence through which the adopted Conventions were reached so the reader can understand how the final compromise was achieved.

1.4 The paper is also intended to provoke debate and question whether the 1992 Conventions, in their current format, (including the Supplementary Fund Protocol of 2003 when in force) serve the needs of modern-day society, the international community, and more importantly the victims.

2 International Legal Conference on Marine Pollution Damage, 1969

2.1 The *Torrey Canyon* disaster of 1967 was the motivating force behind the International Legal Conference on Marine Pollution Damage in 1969. The vessel spilled 118 000 tonnes of oil and the pollution damage resulted in losses far exceeding the shipowner's limit of liability.

2.2 Following the incident the Council of IMCO (Inter-Governmental Maritime Consultative Organisation) remitted a number of issues to the newly established Legal Committee amongst which were:

(a) questions relating to the nature, extent and amount of liability for pollution damage;

(b) to make some form of insurance of the liability compulsory; and

(c) to make arrangements to enable governments and injured parties to be compensated for the damage due to the casualty and the costs incurred in combating pollution of the sea and cleaning polluted property.

2.3 The Conference was therefore convened to draw up a Convention to deal with the above issues.

Conference discussion

2.4 The Conference set up a 'Committee of the Whole II' to deal with the draft Articles, prepared by the Legal Committee, on Civil Liability for Oil Pollution Damage. That committee discussed the following main issues:

(1) scope of the Convention
(2) nature of liability
(3) on whom should liability be imposed
(4) damages to be covered
(5) limitation of liability
(6) compulsory insurance or financial guarantee
(7) inclusion or exclusion of public ships
(8) competent courts, arbitration / recognition of decisions

2.5 This section of the paper will focus on the most important issues discussed at the conference, namely items 2, 3 and 5 which are all inter-related.

(a) Initial debate

2.6 The debate on liability began with many States giving their views on which party should be liable and whether liability should be strict or fault-based.

(i) A majority of countries spoke in favour of liability on the ship, although opinion was divided as to whether it should be strict liability or fault based

2.7 The UK and Japan spoke in favour of liability on the ship based on fault.

'Mr KERRY (UK)
said that his country had a long and exposed coastline, a substantial merchant navy, and was a heavy importer of oil: his Government's conclusions represented a compromise between those various interests. Those conclusions were as follows: that liability should continue to be imposed on the ship owner, that it should still be based on fault and that the limits of liability should be raised.

The proposal to impose liability on the cargo owner [by Ireland] gave rise to further objections. Unlike the ship owner, the shipper and cargo owner could not exercise any control over the cargo while it was on the high seas.'

'Mr NOMURA (Japan)
said that sole liability should be imposed on the ship owner and that it should be based on fault. In the interest of potential victims the burden of proof should rest with the ship owner.'

2.8 Poland expressed a preference for strict liability on the operator because the operator organised the carriage.

'*Mr MATYSIK (Poland)*
was in favour of strict liability on the operator of the ship…In his opinion, cases of exoneration from liability should be clearly defined. Responsibility rested with the operator and not the ship owner, because it was the operator who organized carriage.'

2.9 The Federal Republic of Germany, like a number of delegations, showed concern that the person held liable should be the person who was in a position to minimise the risks ie prevent pollution.

'*Mr HERBER (Federal Republic of Germany)*
said that his delegation was in favour of strict liability… A risk run by third parties should be compensated by imposing on those by whom the goods were being carried, what, in the opinion of his delegation could only be strict liability.

With regard to the imposition of liability, his delegation was unhesitatingly in favour of liability on the ship and, more specifically, its operator. It was the latter who was in a position to preclude or reduce to a minimum the risks arising out of the carriage of goods;"

2.10 The representative for the United Arab Republic believed liability should be with the person in control of the vessel.

'*Mr MOHAMED (United Arab Republic)*

the main purpose of the Convention should be to compensate the victims of damage caused by pollution. The only effective way of achieving that purpose was to adopt the principle of strict liability…

Also the ship owner, and not the cargo owner should be held fully liable for damage caused by the oil which he had undertaken to carry. It was clear from the lengthy discussions in IMCO's Legal Committee that the ship's captain should be regarded as the charterer's agent and that the [cargo] owner would not be held liable, since he had no control over the actual operation of the ship…"

2.11 Liberia favoured liability on the ship based on fault but it also wished to ensure that the liable party must be able to obtain sufficient insurance to cover its liability.

'*Mr WHITE (Liberia)*

said that the Convention should both safeguard the interests of ship owners and lay down obligations which all could accept.

The only acceptable idea was liability based on fault, a concept which had proved satisfactory for a long time in traditional maritime law. Like the UK delegation, the Liberian delegation considered that it would be unfair to hold the ship owner wholly liable. The insurance aspect of the matter should not be forgotten either, for the Convention should not only enable victims to seek a remedy but also, and more important, provide an assurance that they would be compensated if their claims were upheld. Consequently, it was essential that the party liable should be able to find insurance cover, and that would be difficult if the basis of strict liability were adopted.'

2.12 The Brazilian delegate said he fully agreed with the views of the UK, while Australia favoured strict liability on the shipowner because they had accepted the risks of the operation.

'*MR MENZIES (Australia)*

…the principle of strict liability …was the only acceptable notion within the framework of the proposed Convention; for it seemed unfair to give anyone who had undertaken to carry enormous quantities of oil, and had thereby accepted the risks of the operation, the chance of claiming that the damage had been caused by circumstances beyond his control…'

2.13 The USA considered which party was best able to prevent or minimise pollution, as well as what was the best way of ensuring adequate compensation for victims.

'*Mr NEUMAN (USA)*

…Having considered who should be held liable for possible damage… caused by the carriage of oil in bulk and which party was better able to prevent or minimise pollution and, finally, which party should be expected or was best able to obtain insurance, the US delegation had reached the conclusion that the only way of assuring compensation for victims was to adopt strict liability.With regard to the location of liability…the only unchanging point of reference was the ship owner."

2.14 USSR, following a number of other States, believed that liability should be based on fault and lie with the operator of the ship, because most incidents were caused by the fault of the shipowner/operator.

'*Mr MAKOVSKI (USSR)*

For practical and theoretical reasons liability should be based on fault. The practical reasons included the need to raise the limits of the ship owner's liability in the interests of victims, for most incidents which had caused damage by pollution were the result of fault on

the part of the ship owner or operator. Concerning the theoretical reasons, it should be remembered that the main aim of the Convention under consideration was to ensure compensation for material damage, whereas the rules of international maritime law and of aerial navigation which accepted the principle of strict liability were mainly concerned with the risks of physical injury.
Neither the cargo nor the ship could be held liable for damage so liability should lie with the operator.'

2.15 Singapore and Yugoslavia favoured strict liability on the ship owner whereas Portugal and Finland favoured fault-based liability on the ship owner.

2.16 Norway were concerned with the victims and shipowner's needs. In addition, they stated that any liability must be insurable and liability should be limited to the available coverage.

'*Mr BROCH (Norway)*
… The Norwegian Government was guided by the two-fold wish to compensate the victims and to consider the needs of tankers. There was one imperative argument, and that was that responsibility by the ship owner must be insurable.

The insurance market was very restricted and insurance was hard to get. The liability on a ship owner must therefore be limited to his available coverage.…They were in favour of liability based on fault but also interested in the Irish proposal that liability should be borne by the shipper.'

2.17 Spain expressed a preference for strict liability on the shipowner to ensure proper compensation for the victims.

2.18 Belgium favoured liability on the shipowner but also made reference to an alternative proposal, which was to be discussed in greater detail later in the conference, and ultimately led to a discussion of an international compensation fund. It should be noted that the draft Articles prepared for the Conference by the Legal Committee dealt with a draft convention on civil liability only. It was only part way through the conference that mention of a compensation fund was made.

'*Mr CUVELIER (Belgium)*
.. liability should rest on the ship owner; but they were prepared to accept any solution which would provide maximum protection for victims. They wanted a realistic solution which would be agreed by a majority of the countries with the largest tanker fleets. Unless substantial support were forthcoming for the solution already proposed, Belgium would submit another solution which might break the deadlock."

(ii) Ireland, Greece, Denmark, Netherlands and Sweden were among those who spoke in favour of strict liability on the cargo.

'*Mr MCGOVERN (Ireland)*
… the task before the Conference was to ensure that adequate compensation was provided for victims of oil pollution. At the moment liability was based on fault, but the tanker might not always be to blame and, where no fault was involved, the victim had no remedy. Or again, it might happen that the tanker belonged to a company which had only one ship, and after the casualty nothing might be left with which to pay compensation. Another problem was that a ship might have been pursued all round the world before its liability could be legally established.

If the new Convention was to give adequate protection to coastal States there would have to be strict liability, and that could not be imposed on the ship, but would have to be imposed on one of the other interests involved. In the opinion of his country, form the point of view of both expedience and of principle liability should be on the cargo. It was the cargo which caused the damage and not the ship, as was clear from the "TORREY CANYON" case. If the

liability were imposed on the ship, many anomalies would arise. The question of limitation would be a major problem, as would jurisdiction since liability for collision, pollution and personal injury might have to be dealt with by the courts of different countries.'

2.19 Greece began by summarizing its position on liability. Because of concerns about shipowners avoiding liability by seeking refuge under other flags, Greece also made a suggestion for establishing an international compensation fund.

'*Mr SPILIOPOULOS (Greece)*

said that so far two solutions had been put forward..; liability on the ship (strict liability or fault liability with possible reversal of the burden of proof), and liability on the cargo. Both solutions were founded on existing law: the former was the usual solution, the carrier being liable for goods for which he had assumed responsibility, and the latter was adopted in every case where damage would occur without fault on the part of the carrier, from the mere fact that the goods transported were, by their very nature, noxious or dangerous……The danger was that if too severe conditions were imposed, directly or indirectly, on ships or their owners, the latter would seek, and find refuge under other flags…Perhaps the answer might be to consider the establishment of an international compensation fund, in the form of a co-operative with a capital of between 30 and 40 million dollars by means of a very small levy on every ton of oil… Once the total capital had been raised, levies would cease until a disaster made it necessary to rebuild the fund.'

2.20 Denmark and the Netherlands also preferred to impose liability on the cargo.

'*Mr Philip (Denmark)*

… his government was anxious to protect its coastline and its merchant navy..[and] he was in favour of strict liability on the cargo, since insurance costs already amounted to between 12 and 30 per cent of a ships operating costs… The notion of liability based on fault was a principle of law from which there should be no departure without valid reason. Maritime transport was not dangerous in itself: it was only dangerous if the goods carried were dangerous and it was therefore necessary to impose liability on the cargo for any damage caused to a third party. The industry which made a profit from that business should also accept the risks entailed.'

'*Mr SCHEFFER (Netherlands)*

… Automation in.. ships and the increased likelihood of casualties on the one hand called for reconsideration of the notion of "fault" and, on the other, it was only recently that the possibility of damage caused by the goods transported had emerged, since under maritime law liability for damage caused to a third party had always been imposed on the ship… It was with those considerations in mind that …the Government of the Netherlands had opted for imposition on the cargo, that was to say, on the oil companies.'

2.21 Sweden also followed the theme adopted by Ireland, Greece and others that the cargo should be strictly liable on the grounds that it was the cargo that caused the pollution.

'*Mr NORDENSSON (Sweden)*

Oil pollution was not a typical maritime risk, it was one created by the vices of the product itself. An industrial plant involving risks of that kind had an absolute liability. For that reason, liability for oil pollution should be absolute and should be borne by the oil industry itself.'

(iii) Canada suggested a scheme of joint strict liability on the ship and cargo with the first liability up to a fixed amount on the ship and the remaining liability on cargo. Indonesia also spoke in favour of this proposal

'*Mr LEAVEY (Canada)*

…Canada had suggested that the ship and cargo should be liable on a shared basis. They felt that was a reasonable and acceptable compromise because it was based on the principle of

joint responsibility for those jointly engaged on a maritime venture.'

'*Mr KUSUMA ATMADJA (Indonesia)*

..its primary interest was.. that of a likely victim. His delegation was attracted to the Canadian proposal that liability should be shared between the ship owner and shipper.'

(b) <u>Belgian proposal for an international fund</u>

2.22 After the initial debate, Belgium produced a proposal, based on the idea of an international fund previously mentioned by Greece. The main proposal was that an international fund should be constituted by a levy on the carriage of oil, raised by annual contributions assessed on the quantity of oil carried.

'*Mr CUVELIER (Belgium)*

…a solution based on joint liability of ship and cargo, in a ratio which would be difficult to determine satisfactorily, would just not be practicable. That was why it still believed that conventional liability of the ship should be maintained since it covered most cases of pollution damage, but for serious cases where the damages were high or the ship found to be at fault, there should be an international fund to cover all or part of the costs…'

2.23 The Norwegian representative, a managing director of a Norwegian P&I club, discussed a paper in which he had provided statistics on the costs of oil pollution damage. If shipowner liability limits were held at the 1957 LLMC levels, he said that an international fund would only have been called to compensate 3 cases in the previous nine years.

'*Mr POULSSON (Norway)*

noting that many delegations seemed to consider that, with the latest Irish idea of a compromise solution along the lines of the Canadian proposal, the ship owner would get off too lightly in the event of an oil pollution disaster, referred to the statistics he had submitted as managing director of a Norwegian P&I club… From the figures [quoted], and including the "TORREY CANYON" case, it could be seen that over the 1960 – 68 period ship owners, on the basis of the 1957 LLMC, would have paid a little over US$ 9 million as compensation, whereas cargo proportion under a combined solution would have been somewhat over US$ 4 million. Furthermore, during those years there were only three cases where the damages assessed exceeded the 1957 limit of liability. Even with the reversal of the burden of proof, he was convinced by long experience that there would be in the future extremely few liability cases where no fault could be proved. He therefore maintained that there was no real need either to raise the upper limit of the ship owner's liability, or to change his liability to strict if an international fund was established to cover the extra costs in the few exceptional cases…"

(c) Emphasis on creating a Convention to encourage reduction of risks and pollution prevention

2.24 Following the introduction of the Belgium paper a number of delegations intervened to express their preference to continue working on the existing IMCO draft as the priority over other proposals. The UK and other delegations (including France and USSR) also commended the benefits of the existing IMCO draft for pollution prevention and encouraging the shipowner to take due care.

"*Lord DEVLIN (UK)*

… In his opinion, what was needed was the most convenient means of ensuring that pollution victims received compensation which in the last analysis would always be paid by the consumer. ***The best channel for providing for compensation was one which was simple in application, made use of existing procedures and offered an incentive to prevent casualties.*** *The Irish proposal did not provide the simplest channel. The easily identifiable ship owner was replaced by the shipper, whom the ship owner would be required to identify. More than one person had to insure (the shipper for his liability under the convention and the ship owner both for his normal liability and also against default by the shipper). It made no use of the*

well tested machinery of the P&I clubs and offered no incentive, as did fault liability on the ship owner, for the master of the ship and her crew to take due care…."

"*Mr DOUAY (France)*

France had already pronounced itself in favour of strict liability, which seemed to be the only way of ensuring optimum compensation for the victims by placing liability on the party causing the pollution, he thought that the ship owner should still be considered the liable party in cases of pollution damage, as set out in the IMCO draft. It was true that the system finally decided upon had raised many difficulties. Certain delegations had therefore been led to devise a different system in which liability would lie with the cargo owner – considered to be the person most solvent since he had the backing of the oil industry – and pollution would be considered to be a risk inherent in the goods and not in their carriage.

In fact since the risk derived from both the nature of the goods and from the particular carriage used, the problem needed restating. Once the principle of strict liability was accepted, the party which would have to be considered liable was the party responsible for the goods during their transport on the high seas – i.e. the carrier, who was the only person who could prevent casualties and, should a casualty occur whether or not due to a fault on his part, the only person who could prevent pollution from occurring…

Ship owner's strict liability would be in accordance with the ordinary law applied to carriage and with ordinary maritime law and would enable the Convention under consideration and the 1957 and 1924 Conventions to be applied simultaneously in cases where pollution damage was accompanied by ordinary damage…"

"*Mr ZHUDRO (USSR)*

stressed the advantages of the IMCO draft, which was the outcome of joint endeavours by IMCO and CMI and in which eminent jurists representing different legal systems had participated. In the first place the draft was intended to encourage ship owners to do all in their power to prevent disasters comparable with that of the "TORREY CANYON". Most of the disasters in recent years had been the result of negligence by persons responsible for the operation of the ships rather than of "natural causes". The principle of liability based on fault was the most suitable remedy for that situation."

2.25 The USA again stressed its preference for strict liability. It also stated that the most important principle was the avoidance of oil pollution.

"*Mr NEUMAN (USA)*

***The most important principle for the United States delegation was the avoidance of oil pollution to the detriment of innocent countries**. He was somewhat puzzled by the arguments of those opposed to the idea of strict liability – that it would be an innovation in maritime law, that it would be inequitable and that it would raise insurance difficulties. He could see no reason in law or equity for basing the provision on fault of the ship combined with strict liability of the cargo, and would welcome any justification for such a proposal."*

(d) <u>Voting</u>

2.26 Following further discussions it was agreed that delegations would vote on their first and second preferences. The four choices proposed by the chairman were (i) strict liability of the ship, (ii) liability of the ship based on fault, (iii) strict liability of the cargo and (iv) joint strict liability on ship and cargo with first liability up to a fixed amount on ship and remaining liability on cargo. Although the voting showed a majority in favour of liability on the ship, there was no clear consensus for any one of the four options.

2.27 The Chairman then summed up the current impasse and invited the committee to vote on three issues:

(i) whether liability should rest on the ship or on the cargo;

(ii) whether liability on the ship should be combined with liability on a fund;

(iii) whether there should be strict liability on the ship or liability based on fault

2.28 The results of the vote were:

1. Whether liability should rest on the ship or on the cargo

Number of delegations present and voting	38
Number of votes for liability on ship	25
Number of votes for liability on cargo	13

It was therefore decided that liability should rest on the ship

2. Whether liability on the ship should be combined with liability on the fund

Number of delegations present and voting	39
Number of votes in favour	25
Number of votes against	13
Number of abstentions	7

It was therefore decided that there should be combined liability.

3. Whether there should be a strict liability on the ship or liability based on fault

Number of delegations present and voting	42
Number of votes in favour of strict liability	22
Number of votes in favour of fault based liability	13
Number of abstentions	3

The principle of strict liability was therefore adopted

2.29 A working group was then set up to work on the proposal of setting up a fund. The working group majority decision had been that the victim should apply in the first instance to the ship, and, if the sum recovered was not sufficient, he could have recourse to the fund.

(e) <u>Compromise proposal</u>

2.30 The UK delegation then presented a compromise proposal for ship owner's liability based on a limit of liability of US$ 125/ton with a total limit of US$ 14 million representing Poincare francs 1900 and 210 million respectively. The proposal was also based on IMCO beginning work on a supplementary Convention for an international fund.

"*Lord DEVLIN (UK)*

drew careful attention to the UK proposal… which was based, after taking due account of the possibilities of compromise, on the principle of strict liability of the ship, on compulsory insurance and on the very highest limit of liability that was insurable. His delegation's proposal would afford protection against all the risks which the insurance market would cover and up to the absolute limit of its capacity; he understood, however, that some delegations would consider that the insurance thus provided would not be sufficient either in scope or amount, to cover all contingencies. It was therefore an essential part of the British proposal to request that IMCO should start the preparatory work at once for a supplementary convention based on the formation of an international compensation fund."

2.31 Many States agreed with the compromise suggested by the UK including Germany, France, Ghana, Ireland, India, Italy, Netherlands, Spain and the USA. However, some Scandinavian States said they could only accept the compromise if a resolution was adopted for IMCO to produce a draft for a Convention based on the existence of an international fund. After some debate the compromise was accepted on the basis that the resolution would also be adopted. The resolution called for a Diplomatic Conference to set up an international fund in order to ensure that:

(a) victims should be fully and adequately compensated under a system based upon the principle of strict liability; and

(b) the fund should relieve the ship owner of the additional financial burden imposed by the 1969 Convention.

3 Conference on the Establishment of an International Compensation Fund for Oil Pollution Damage, 1971

3.1 Following the adoption of the Liability Convention at the 1969 Conference and its resolution a Conference was convened in 1971 to establish an international compensation fund to complement the Liability Convention. The working group of the Legal Committee, assisted by CMI and OCIMF, produced draft Articles for the Conference.

3.2 This section of the paper will concentrate on the main issues of the maximum limit of liability and the question of shipowner relief, together with any conditions to be attached to such relief. (Shipowner relief in the format introduced in the 1971 Fund Convention was a system whereby the Fund "paid back" some of the liability imposed on the shipowner under the Liability Convention. The relief was conditional on the owner complying with certain safety standards.)

(a) General debate

3.3 In the general debate a number of delegations expressed their views on liability limits and ship owner relief. The UK along with a number of other delegations questioned the need to provide relief to the shipowner. If shipowner relief were to be adopted, the majority was in favour of making it conditional on the shipowner complying with safety standards. This was intended to have the effect of reducing risks and encouraging pollution prevention.

"*Mr BRIGSTOCKE (UK)*

The UK Government considered that it would not be justifiable for the oil industry to take over the additional burden imposed on the ship owner by the 1969 Convention, but if discussion at the Conference showed that there was a general wish for the oil industry to provide such relief, it would be prepared to reconsider the matter.

With regard to the suggestion that relief should be made conditional on compliance by the owner with certain IMCO recommendations, it doubted whether it would be possible to devise a scheme on such a basis which would have a real effect in reducing accidents"

"*Mr RIJN VAN ALKEMADE (Netherlands)*

As regards the question whether such compensation should be limited, it had been proposed in 1969 that the limit should be fixed at US$ 30 million, but tin the Legal Committee of IMCO voices had been raised in favour of increasing that limit. The Netherlands Government was not opposed to an increase, but felt it must be justified by facts and figures.

As regards the function of the Fund to provide relief for ship owners, the Netherlands Government had some doubts… The question now to be decided by the Conference was whether it was necessary in the mixed liability construction of the 1969 Convention combined with the Fund, to shift the lines between the ship's part and that of the cargo. If it was found possible to dispense with the relief section, the Netherlands Government would support that simplification……If the relief provisions were likely to be conducive to the production of a viable Convention and not just a piece of paper, it would support this. However, a realistic figure of relief should be found."

3.4 Germany was also sceptical about shipowner relief but could accept it if it was conditional on compliance with minimum safety requirements.

"*(Federal republic of Germany)*

…It had no reservations concerning the first aim of granting compensation to victims of oil pollution to a greater extent than provided for in the 1969 Convention, but had some hesitation with regard to the second aim, namely the relief of ship owners, since that would mean the introduction of a special legal system and a possibly expensive administration. It thought that the insurance market itself could more easily organize the appropriate distribution of costs. It would accept the second aim, however, if it was desired by the majority of States and ***provided that provision was made for a minimum of safety requirements****…."*

3.5 Liberia favoured the relief of shipowners.

"*Mr WHITE (Liberia)*

…It felt it was essential to include both aims called for in 1969. Relief of the ship owners was of particular importance as it should help remove the doubts of some of those who had been disturbed by certain of the provisions of the 1969 convention, both those who were anxious to secure greater relief for victims of oil pollution, and the ship owners who felt that too great a burden had been laid upon them. The proposed new Convention should not only be acceptable in itself, but should make the 1969 Convention more attractive to all States…"

3.6 Ghana said it supported the 1969 Resolution and that it also wanted stress laid on pollution prevention.

"*Mr QUARTEY (Ghana)*

said that his Government had supported the 1969 Resolution. It was, however, anxious that the proposed Fund should play an active part in the prevention of on shore pollution.. At the time he was speaking, a cargo vessel containing 600 tons of oil was stranded near the coast of Ghana and in danger of breaking up, but his Government had neither men nor material to deal with the situation. If stress was laid on prevention, the Fund would be able to avoid compensation payments."

3.7 Norway favoured shipowner relief but also thought that making it conditional on compliance with safety standards would help to encourage owners to apply minimum safety standards.

"*Mr BROCH (Norway)*

*His delegation attached great importance to the relief of the burden placed on the ship owners by the 1969 Convention, chiefly as a pre-requisite for the widest possible acceptance of that Convention and of the supplementary Convention to be concluded. Moreover, the scheme as mooted would be the cheapest way of achieving the purpose, which in itself was an important consideration since in any case the economic burden would ultimately be passed on to the consumer…****Lastly, the provision could help in encouraging ship owners to apply minimum safety standards****, since the possibility then arose to grant relief only in such cases where such standards were applied."*

(b) <u>Specific debate on ship owner relief</u>

3.8 In the more detailed debate specifically on shipowner relief there was clear support by many delegates for making relief conditional on compliance with safety standards and ensuring that the 1969 and 1971 Conventions were consistent with the principles of pollution prevention. Canada was strongly in favour of these principles.

"*Mr LANGLEY (Canada)*

observed that the Conference was now embarking on consideration of the second main question remitted to it by the 1969 Brussels Resolution, namely that of relief in principle to the ship owner in respect of the additional burden imposed on him by the 1969 Liability Convention.

It had been made abundantly clear that his Government's main concern lay with the plight of the innocent victim of oil pollution. And, in the face of recent experience in Canada of incidents damaging the living resources of the sea, disrupting the amenities of the shore and even posing a health hazard in the coastal areas affected, the proposition that there could be no such person as an innocent victim would certainly not be accepted by the blameless citizens suffering as a result. Nor would that argument be any more acceptable elsewhere in face of similar frightful experiences, such as would inevitably occur unless effective measures were taken to combat the pollution risk arising out of ill-found and ill-manned tankers.

The outcome of the present discussion was therefore especially important to his delegation for, although supporting relief of the ship owner in principle, it considered that the provision of such relief, to be socially responsible, must be linked with the application of safety standards. ***The oil companies of the world should not be expected to subsidise the ship owner who permitted an unfit and improperly manned vessel, constituting, so to say, a time bomb, to sail the seas.*** *The intent underlying his delegation's proposal was to so reduce the probability of a major spillage that the amount of compensation provided for under the Fund would be full and adequate to cover all victims.*"

3.9 Ireland followed Canada's line. It did not favour relief for the negligent shipowner.

"Mr MCGOVERN (Ireland)

…There was much to be said for providing relief to the ship owner in the case where no blame rested on him for pollution damage. On the other hand, ***there should be no relief whatsoever for the negligent ship owner****…*"

3.10 The USA was also concerned with eliminating or reducing pollution incidents.

"*Mr HALLBERG (USA)*

Article 5 would have the effect of reducing the financial burden imposed on ship owners by the 1969 Convention. ***Since it was widely believed that owners might exercise less care if their liability was reduced, it was important to induce owners to take the necessary care by other means.***

The whole purpose of his delegation's proposal was to eliminate or reduce pollution incidents, which would mean that the Fund would in fact have to bear fewer costs.."

3.11 Japan, however, did not believe that the Fund was the appropriate Convention to deal with safety matters.

"*Mr NOMURA (Japan)*

…Regarding the proposal to deny benefits to owners whose ships did not meet safety requirements, ships of countries which were contracting parties to the Fund Convention should of course comply with the requirements of other Conventions in the field of maritime safety. However, it should not be the task of the Fund Convention to deal with safety matters…"

3.12 The Chairman summarised the debate.

"*…there seemed to be general agreement on the provision of relief for the ship owner under the 1969 Convention. It must be recognized that some delegations had doubts regarding the validity of the principle but, in the spirit of co-operation, were prepared to accept it.*

There appeared, however, to be more serious divergences of opinion on the details. The draft text proposed relief ranging between 1000 francs and 2000 francs, but some suggestions had been made for a lesser extent of relief. Some delegations considered that no relief should be provided to a ship owner if there were fault or privity, thereby extending the concept of wilful misconduct.

As regards the question of requiring compliance with certain safety standards, a majority of those who had spoken seemed to consider that something on those lines should be included. Some thought such provisions were highly desirable, others felt hesitation concerning their practicability, while others again considered that only internationally recognised standards should be contemplated. He suggested the establishment of a small working party to consider the question, comprising the delegations which, at the outset, had mentioned the idea and those which had made suggestions as to how it could be incorporated in the convention…."

3.13 A Working Group was therefore set up to make recommendations on conditions for shipowner relief, which it duly did.

3.14 **It was ultimately agreed** by the Committee of the Whole and in plenary that the amount of relief granted to the shipowner should be any liability under the 1969 Liability Convention between 1,500 and 2,000 francs per ton and the maximum amount between 125 million francs and 210 million francs. It was also agreed **that such relief would be conditional on compliance with safety standards in certain conventions** .

3.15 The total aggregate limit for the Fund for any one incident was agreed at 450 million francs (approx US$ 30 million)

Summary

3.16 As well as ensuring that sufficient funds would be available to victims, many States were concerned to ensure that the 1969 and 1971 Conventions were consistent with and indeed encouraged improved safety standards on tankers and served to prevent pollution.

3.17 States therefore adopted provisions within the 1971 Fund, which made financial relief for the shipowner conditional upon compliance with minimum safety requirements. Article 2 paragraph 1(b) provides that:

"…The Fund, is hereby established with the following aims:

to give relief to shipowners in respect of the additional financial burden imposed on them by the liability Convention, **such relief being subject to conditions designed to ensure compliance with safety at sea and other conventions;**"

4 International Conference on Liability and Compensation for Damage in Connection with the Carriage of Certain Substances by Sea, 1984

4.1 By 1984, following a number of incidents of pollution damage in which the amount available for victims under the Liability and Fund Conventions was insufficient, it was clear that the limits needed to be amended. This was the main and most important purpose of the 1984 Conference. The limits of liability were also tied in with the question of relief for ship owners and the test for breaking the ship owners limit of liability under the Liability Convention. It should be noted that the draft Articles presented to the Conference by the Legal Committee included a revised test for breaking the shipowner's limit of liability. This significantly changed the test from one where, in order to break the limits, only "fault or privity" of the shipowner had to be shown to one where "intention to cause damage or recklessness with knowledge that damage would probably occur" had to be shown. In effect this test makes the limit unbreakable.

4.2 In the initial general discussion most delegates focused on the issue of limits of liability and shipowner's relief.

(a) <u>Proposal to increase limits in line with inflation</u>

4.3 Japan introduced a proposal based on increasing the limits in line with the average rate of inflation, which was sponsored, by Cyprus, Greece, India, Italy, Poland, Korea and China.

"*Mr TANIKAWA (Japan)*

The States concerned believed that adjustment should be done in such a way as to reflect the average rate of inflation since the adoption of the two conventions, namely 1969 and 1971 respectively. The average rate had been calculated as approximately three times the original figure. The average inflation rate was considered as a basic element for adjustment of limits of liability in both the CLC and Fund Conventions, and ***hence the balance struck between ship owners liability under the CLC and compensation amount under the Fund, should be maintained****.*

He drew attention to paragraph 2 of the paper, which stressed that in seeking to establish new limits of liability, four factors should be borne in mind. The levels chosen should provide adequate compensation for victims, should not harm the shipping interests of participating countries, should not impose and undue burden on economics, and should not add to the general costs of transportation, with repercussions on the cost of living…."

4.4 Many States also emphasized the need not to depart too far from the original concept of the Civil Liability and Fund Conventions.

(b) <u>Emphasis on pollution prevention</u>

4.5 Brazil agreed with this and also focused in on increasing CLC limits in order to encourage higher standards of operation and maintenance of ships.

"*Mr D'OLIVEIRA (Brazil)*

said that the Committee should concentrate its efforts on the updating of both the CLC and Fund limits. ***Higher CLC limits would have only a minor impact on insurance costs, if account was taken of the paramount importance of better compensation for the victims of oil pollution, and the consequent encouragement of higher standards of operation and maintenance of ships****…*"

4.6 IAPH also emphasized the principles of reduction of risks and pollution prevention by increasing the CLC liability limits.

"*Mr PAGES (IAPH)*

recalled that more than 90% of all spillages occurred when ships were in operation in ports and so the port authorities were amongst the prime victims of oil pollution. Thus IAPH was keenly interested in the question of liability limits. It was true that the cost of carriage by sea should be kept to a minimum, but the cost of insurance was often wrongly represented as the component to which all efforts to achieve savings should be directed, whereas in fact it merely reflected the costs of incidents and their consequences. Setting the liability limits too low would mean that part of the costs of incidents would fall on innocent parties, without reducing overall costs to the international community. What was needed was to reduce the risks. In that respect, IMO was carrying out useful work with ship owners' organizations, shipyards, registration societies and port authorities. Insurance organs could also contribute towards improving safety, by gearing their premiums to the operating record of the company in question. Only in that way could the frequency and average seriousness of the incidents diminish, involving a reduction in cost of insurance…"

4.7 Finland was in favour of higher limits and believed that the insurance market now had much greater capacity.

"*Mr MUTTILAINEN (Finland)*

attached great importance to the fixing of sufficiently high limits for small ships, as the only means of guaranteeing that the ship owner was liable in minor cases of pollution, with the IOPC Fund intervention only in serious cases, thus limiting the outgoings from the Fund. *However, the delegation of Finland would be prepared to raise the gross tonnage limit beyond which a ship was no longer considered as a small ship to 10,000 tons. The need to maintain a balance between the liability of the shipper and ship owner had been widely*

discussed, but there was still a more important aspect – the increased capacity of insurance markets, which provided new possibilities that did not exist in 1969 and 1971. ***In respect of the economic consequences of increased limits of liability, much had been said about the economic burden which would devolve on the ship owner. However, all the studies carried out seemed to indicate that the burden was minimal; furthermore in the final analysis, it was always the consumer who bore the burden in the form of freight rates….***"

(c) <u>Proposals for higher limits including minimum limits for small ships</u>

4.8 Canada, when discussing the liability limits, called for a minimum liability for small ships between US$ 15 and 20 million plus deletion of the relief (known as roll-back or indemnification) function of the Fund towards ship owners.

"*Mr POPP (Canada)*

*…**A satisfactory threshold must be introduced for small ships,** i.e. for ships up to 30,000 tons, and his Government would like to see a minimum liability of between US$ 15 and 20 million; thereafter it would like a tonnage-related progression, with an upper limit of around US$ 70 million. For the International Fund, it would favour an upper limit of between US$ 200 and 225 million…His Government would also like to see the deletion of the indemnification [relief] function of the Fund…*"

4.9 On the specific discussions on limitation amounts, as one would expect, there was a lengthy debate.

4.10 The UK began the debate by saying that any new limits should be without "roll-back" and that the owner should retain the main responsibility as provided for under the existing Civil Liability Convention.

"*Mr PERRETT (UK)*

*…**Any new limits decided upon should maintain a balanced approach, preferably without roll-back or indemnification…He agreed that the owner should retain the main responsibility as was the position at present under the existing CLC Convention, which provided the first tranche of liability.***

..The effects of inflation meant that significant increases in amounts were called for, and experience had shown that increases were also needed, mainly for very large spills and small tankers. He felt that such increases were justified by the significant increase in the capacity of the insurance market, together with the changes proposed in regard to the owner's right to establish limitation and in regard to channelling. However, the limits decided upon should not either be too high or too low if they were to command wide support…

4.11 INTERTANKO said they could agree to the abolition of the "roll-back" system plus an increase in line with inflation since 1969 and 1971.

4.12 France, however, proposed significantly increasing the limits with a special minimum liability regime for small ships.

"*Mr DOUAY (France)*

..it proposed that the level of liability be increased to US$ 60 million for owners and US$120 million for the oil industry. On the question of minimum limits, his delegation favoured the establishment of a special regime for very small ships, that was to say those with a tonnage of less than 2000 tonnes for which the minimum limit should be US$ 5 million. That figure would be increased to US$ 8 million for vessels with a tonnage equal to or in excess of 2000 tonnes, and for each additional tonne over that limit liability would be increased by US$ 893 up to a maximum of US$ 100 million for ships whose tonnage was equal to or in excess of 105,000 tonnes, the maximum tonnage envisaged under the 1969 Convention. With regard to the Fund Convention, the ceiling would be US$ 250 million, although that figure could be reduced to US$ 180 million for small ships…"

(d) Chairman's summary

4.13 The Chairman then summarised the discussion stating that there was still a large divergence of views with regard to the limitation figures.

"*CHAIRMAN*

said that the discussion had brought to light profound divergences of view both in regard to the limitation amounts, varying from US$ 30 million to US$ 100 million for the CLC Convention and from US$ 120 million to US$ 300 million for the Fund Convention, and in regard to the minimum liability for small ships, which ranged from US$ 3 million to US$ 15 million, the limit below which ships were regarded as small itself varying from 5,000 tons to 30,000 tons…"

4.14 Following further consultations the USA introduced a compromise paper supported by Canada, France, Gabon, Federal Republic of Germany, Ireland, Malaysia, Netherlands and Zaire. This proposal was for:

- minimum limits of 6 million SDRs for small ships up to 10,000 GRT
- maximum limits of 600 SDRs per GRT, to a maximum of 60 million SDRs for ships of 100,000 GRT and above
- 'basic coverage' supplied by the Fund up to 150 million SDRs
- 'expanded coverage' supplied by the Fund up to 200 million SDRs after such time as the contributing oil in three member States totalled at least 600 million tons.

4.15 Unfortunately agreement could not be reached on this proposal and, after further consultations, the Chairman produced a compromise proposal for consideration.

(e) Chairman's compromise proposal

"*CHAIRMAN*

…The main points of the proposal were that it set the maximum tonnage for small ships at 5,000 GRT and the maximum liability of such ships at 3million SDRs. Above that limit, maximum liability would be increased by 420 SDR per ton up to a maximum of 59.7 million SDR at 140,000 GRT. For the fund Convention, it was proposed that there should be a two-tier system under which the basic coverage, including the liability of the ship owner, should be 135 million SDR, while the expanded coverage, which would come into effect when the total quantities of contributing oil received in three contracting States equalled 600 million tones, should be 200 million SDR, including the liability of the ship owner…"

4.16 Many delegations expressed some concerns that the compromise was not entirely satisfactory to them but they felt they could accept it as a compromise package.

4.17 The representative from OCIMF argued that the majority of contributors to the IOPC Fund represented a low accident risk and that the shipowner should bear primary liability. He expressed concern at the use of the word "sharing" in the preamble to the Protocol, which in his view was a major amendment. He also stated that in view of the increased scope of the Convention and strengthening of the shipowner's right to limit liability it was necessary to substantially increase the limits under CLC.

"*Mr BLACKWOOD (OCIMF)*

recalled that OCIMF and CRISTAL represented… oil companies and, as owners of almost half the world's oil tankers, provided a substantial portion of the funds for the 1969 convention and also the larger part of the contributions to the IOPC Fund and that account should therefore be taken of their point of view.

He also recalled that the IOPC Fund was primarily financed by a small number of States, which, for the most part, represented a low accident risk, and that, according to OCIMF,

primary liability for oil pollution should lie with the ship, and finally, that limits should be sufficiently high to prevent their being eroded before the Protocol could even enter into force.

*…**In respect of "cost sharing", which had been mentioned, he pointed out that the word "shared" appeared for the first time in the preamble to the [draft] Protocol to the Fund Convention. In his opinion that was a major amendment.** As certain delegations had realised, increasing the scope of the Conventions, broadening the definition of pollution damage, strengthening the ship owner's right to limit liability all explained the need to increase substantially the limits provided for in the 1969 Convention in order to provide compensation in all cases.*

If the Conference was to produce ratifiable protocols, he strongly urged recognition of the points he had stated. Should such recognition not be forthcoming, he foresaw that the limited number of States necessary to ensure entry into force of the Protocol to the Fund Convention would have to reconsider whether it would be wise to accept such a financial burden…"

4.18 In the end, however, the Chairman's compromise was accepted.

Summary of the 1984 Conference

4.19 The primary aim of the 1984 Conference was to increase the CLC and Fund Limits, which had become outdated. The scope of the Conventions was also increased in terms of the geographical application and pollution damage covered. In addition, the limits reached were accepted as a package in which roll-back (or ship owner relief) was removed and shipowners were given a regime in which, in practical terms, the limits could not be broken. It should be noted that shipowner relief or roll-back was deleted because it was felt that there was now sufficient insurance available in the market and it was no longer necessary for the shipowner to be relieved of part, or any, of its burden under the liability convention.

4.20 The Conference therefore achieved a broadening of the scope of the Conventions plus increased limits. Some of the principles raised in the 1969 and 1971 Conferences were raised, such as ensuring adequate compensation for victims, producing a regime consistent with the principles of pollution prevention and discussing the capacity of the insurance market. One of the main themes, however, was to keep the founding principles of the 1969 and 1971 Conventions (see Executive Summary).

5 International Conference on the Revision of the 1969 Civil Liability Convention and the 1971 Fund Convention, 1992

Unfortunately, the entry into force requirements embodied in the 1984 Protocols were such that without US participation they would be very difficult to achieve. This was recognised and a Diplomatic Conference was held in November 1992. This Conference adopted the substantive provisions of the 1984 protocols but with lower entry into force provisions. There were no other substantial changes from the 1984 Conference.