Recent Developments at the IMO Legal Committee and International Oil Pollution Compensation Funds

CMLA Annual Seminar
Fairmont Waterfront Hotel
Vancouver, British Columbia
May 12, 2012

Gillian Grant
Senior Counsel, Transport Canada Legal Services
Introduction

In addition to its participation in the technical work of the International Maritime Organization (IMO) and the International Labour Organization, Canada is an active member of two bodies that address legal issues related to maritime transportation. These are the Legal Committee of the IMO and the Assemblies of the International Oil Pollution Compensation Funds. This paper will provide an overview of both organizations in addition to a summary of issues that they are currently addressing.

IMO Legal Committee

Overview of the IMO’s Legal Committee:

The IMO’s Legal Committee consists of representatives from all member states and is empowered to deal with any legal matters within the scope of the organization. Up until the late 1960s, the IMO or the Intergovernmental Maritime Consultative Organization (IMCO), as it was then known, was concerned primarily with developing technical standards to improve the safety of ships. The Organization was dominated by major flag states who advocated for the freedom of the high seas and the sovereignty of states over ships flying their flags. IMCO had little appetite to develop an international legal framework that would limit the ability of flag states to act unilaterally. Instead, the development of international maritime law treaties was left largely to the Comité Maritime International (CMI), an organization set up by the Belgian government in 1897 with the task of promoting uniformity in maritime law through international conventions. The CMI then, as today, worked largely to harmonize the private law aspects of maritime trade.¹

The Legal Committee was created in response to the Torrey Canyon incident. This calamity sparked public outrage and highlighted a number of weaknesses in the public and private international law dealing with environmental disasters. The Torrey Canyon was a Liberian

registered ship owned by an American company, chartered to British Petroleum under the command of an Italian master. On March 18, 1967 she grounded on a reef between England and France, broke up and discharged some 120,000 tonnes of crude oil. The incident occurred in what were considered international waters. Despite the tremendous damage, the Governments of France and the United Kingdom quickly realized they had few legal tools to intervene, to hold the responsible parties liable for the incident or to recover the costs of their clean up and recovery operations. In light of this, they became convinced of the need to engage the international community.  

The United Kingdom appealed for help to IMCO pointing out that:

International law governing such matters does not adequately take into account the interests of countries which may have no direct interest in the ship or its cargoes but the territory of which may be affected by an accident to the ship. In future accidents it may well be that, in order to protect its coasts from pollution, the Government of the Coastal State may wish to take certain measures which might cut across the rights of owners, salvors and insurers and indeed the Government of the flag vessel.

The United Kingdom also noted that the increase in the size of tankers raised questions concerning the liability for damage caused to third parties. This in turn led to questions of whether the normal rules of liability should apply in such incidents.

In response to these concerns and others, the IMCO Council created an ad hoc legal committee to consider the public and private law implications of ship source pollution damage. The Council asked the committee to consider and provide advice on the introduction of a compulsory insurance scheme that would compensate governments and other injured parties for damages arising out of the discharge at sea of persistent oils or other noxious and hazardous substances.

The Committee worked swiftly to address the issues at hand. Because of the experience of the CMI in private international law matters, it was invited to develop a civil liability regime for the Committee’s consideration. Government negotiators focused more particularly on the issues

---

2 Ibid.
3 IMO Document: C/ES 111/3, para 14(1).
4 Ibid., para. 14(2).
5 IMO Document: C/ES/5[16].
related to the rights of coastal states to intervene in international waters in order to protect their coastlines.\textsuperscript{6}

The work of the two groups merged into two international conventions: The \textit{Convention on Intervention on the High Seas in case of Oil Pollution Casualties} (Intervention Convention) and the \textit{Convention on Civil Liability for Oil Pollution Damage, 1969}. This was followed in 1971 by the \textit{Convention for the Establishment of an International Fund for Compensation of Oil Pollution Damage} that aimed to provide an additional level of compensation for major oil pollution incidents through an international insurance regime funded by cargo interests. These conventions have been tremendously successful and transformed the Legal Committee from an \textit{ad hoc} advisory group to one of the IMO’s principal working bodies.\textsuperscript{7} Since 1971, the Committee has developed international conventions relating to liability and compensation for damages from tankers, bunkers and hazardous and noxious substances, as well as regimes for wreck removal and passenger claims. It has also developed conventions addressing marine security issues, as well as pollution response.\textsuperscript{8}

The Legal Committee meets once or twice a year to further its work. Alfred Popp was chair of the Committee from 1993-2005. The current chair, Kofi M’Biah of Ghana, also has a Canadian connection as he completed post-graduate studies at Dalhousie University’s law school.\textsuperscript{9} Canada is typically represented by a lawyer from the Department of Justice with expertise in maritime law and an analyst from Transport Canada’s International Marine Policy Unit. Other experts may attend as required by the Committee’s agenda. Members of the CMLA have attended meetings and diplomatic conferences in the past, particularly where the Committee has engaged in discussions that touch on the commercial or private law aspects of shipping.

\textsuperscript{6} Popp, \textit{supra.}, p. 21

\textsuperscript{7} The Government of the Netherlands passed a successful motion for the \textit{ad hoc} legal committee to be given a more lasting mandate to advise the IMCO Council on problems of a legal character. See Balkin, \textit{supra} at pp 296-97.

\textsuperscript{8} For example, the \textit{International Convention for the Suppression of Unlawful Acts at Sea, 1988}; \textit{International Convention on Oil Pollution Preparedness, Response and Cooperation, 1990}.

**Work at the 99th Session of the Legal Committee:**

The 99th session of the Legal Committee (LEG 99) took place from April 16-20 at the IMO’s headquarters in London. The agenda included consideration of the following items:

- Amendments to the limits of liability under the *Limitation of Liability for Maritime Claims Convention*;
- Liability and compensation for trans-boundary pollution damage caused by offshore exploration and exploitation;
- Collation and preservation of evidence following a serious crime on board a ship;
- Monitoring the implementation of the HNS Convention.

**Amendment to LLMC 96**

In response to several high profile bunker oil pollution incidents off its coasts and concerns regarding increased commercial traffic through the Great Barrier Reef, Australia proposed that the Legal Committee use the tacit acceptance procedure in the 1996 Protocol to the *Convention on Limitation of Liability for Maritime Claims, 1976* (LLMC 96), in order to increase the limits of liability for non-passenger claims.\(^{10}\) The proposal was first mooted at the 97th session of the Committee. At that time there was support to move forward with the amendment but little agreement on the quantum of the increase.

**Overview of the LLMC 96 Tacit Acceptance Procedure:**

The Tacit Acceptance Procedure (TAP) is an IMO invention that allows limits of liability in a convention to be increased without formally amending the Convention through a protocol. The procedure effectively creates a reverse onus. Instead of requiring that an amendment enter into force after being accepted by, for example, two thirds of the parties to a convention, the TAP provides that an amendment shall enter into force at a particular time unless before that date, objections to the amendment are received from a specified number of Parties.

---

\(^{10}\) In other words the general limits of liability set out at Art. 6 of the Convention. Passenger claims are covered by Art. 7 of LLMC.
The LLMC 96 TAP is set out at Article 8 of the Protocol. The article specifies that a proposal must be circulated at least six months in advance of being considered and voted on at the Legal Committee.\textsuperscript{11} If a proposal is adopted by at least two thirds of members states present and voting at the session of the Legal Committee where it is considered, it will come into force eighteen months later unless less than half of the state parties to LLMC 96 were in attendance at the meeting where the amendment was considered or the amendment is formally objected to by one quarter of member states within the eighteen month period.\textsuperscript{12} All contracting states are bound by an amendment brought into effect through the TAP unless they denounce the Protocol at least six months before the amendments enter into force. The denunciation takes effect at the time the amendments enter into force.\textsuperscript{13}

Paragraphs five and six of Article 8 set out factors that must be taken into account when an amendment to the limits is being considered. Article 8(5) states that the Committee must consider the experience with incidents, and in particular, the amount of damages resulting therefrom, changes in monetary value and the effect of the proposed amendment on the cost of insurance. Article 8(6) (a) specifies that no increase may be considered less than five years from the date on which the Convention was open for signature nor less than five years from the date of entry into force of a previous amendment using the TAP. Article 8(6)(b) states that the limits may not be increased by more than 6\% per annum compounded on an annual basis. Finally, Article 8(6)(c) says that no increase may result in an amount that is more than three times the existing limits.

\textit{TAP at LEG 99}

Australia and 19 other states, including Canada, circulated a proposal to increase the general limits of liability under Article 6 of LLMC 96 for consideration at LEG 99.\textsuperscript{14} Australia initially promoted increasing the limits by the maximum amount of six percent per annum compounded annually from 1996, however, it did not get the necessary support from other sponsoring states.

\textsuperscript{11} LLMC 96 Art 8(2).
\textsuperscript{12} LLMC 96, Arts 8(4) and (7).
\textsuperscript{13} LLMC 96, Art. 8(9).
\textsuperscript{14}IMO Document:, LEG 99/4/.
As a result, the proposal was silent on the amount by which the limits should be increased which became the main subject of debate at LEG 99.\textsuperscript{15}

Prior to the meeting, papers were circulated by Australia\textsuperscript{16}, Japan,\textsuperscript{17} the International Group of P & I Clubs (IG P&I) and the International Chamber of Shipping (ICS) to help guide the discussion.\textsuperscript{18} The papers considered an increase in the limits through an analysis of the three part test set out in Article 8(5). All agreed that the third factor to be considered, namely the effect of the increased limits on the cost of insurance, was not significant and therefore not relevant to the Committee's deliberation. As a result the analyses in the papers focused on the remaining two factors in Article 8(5).

IG P&I Clubs and ICS provided data on maritime claims exceeding the LLMC 1996 limits. The data showed that from 2000 until 2011, a total of ten bunker related maritime claims and seven non-bunkers exceeded the limits. The claims are listed below along with the estimated cost of each claim exceeding the limit:

<table>
<thead>
<tr>
<th>Incident</th>
<th>Date</th>
<th>Location</th>
<th>Estimated Costs</th>
<th>Applicable Limit</th>
<th>Excess</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Bunker Oil Pollution</strong></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Gold Leader</td>
<td>05.03.08</td>
<td>Japan</td>
<td>US$ 60,000,000</td>
<td>US$ 1,642,516</td>
<td>3553%</td>
</tr>
<tr>
<td>Vicuna</td>
<td>15.11.04</td>
<td>Brazil</td>
<td>US$ 31,500,000</td>
<td>US$ 7,378,688</td>
<td>327%</td>
</tr>
<tr>
<td>Sea Diamond</td>
<td>05.04.07</td>
<td>Greece</td>
<td>US$ 37,313,239</td>
<td>US$ 13,921,331</td>
<td>168%</td>
</tr>
<tr>
<td>Server</td>
<td>12.01.07</td>
<td>Norway</td>
<td>US$ 35,309,997</td>
<td>US$ 12,333,351</td>
<td>186%</td>
</tr>
<tr>
<td>Maersk Holyhead</td>
<td>06.11.05</td>
<td>Venezuela</td>
<td>US$ 32,500,000</td>
<td>US$ 11,235,840</td>
<td>189%</td>
</tr>
<tr>
<td>Pacific</td>
<td>11.03.09</td>
<td>Australia</td>
<td>AUD</td>
<td>AUD</td>
<td>99%</td>
</tr>
</tbody>
</table>

\textsuperscript{15}IMO Document:, LEG 99/4
\textsuperscript{17}IMO Document:, LEG 99/4/1.
\textsuperscript{18}IMO Document:, LEG 99/4/6 and LEG 99/4/7.
The IGP&I and ICS papers also highlighted the lack of express guidance in Art. 8(5) regarding assessing changes in monetary value. The IGP&I and ICS urged the Committee to ensure that any increases were based on principle and justifiable in order to avoid setting a precedent for arbitrary increase in the future, particularly since LEG 99 represented the first time that the TAP in LLMC 96 was being used. In considering experience with incidents and changes in monetary value together, the IGP&I and ICS argued that the Japanese proposal for an increase of 45% made the most sense if any increase was to be contemplated.

The Japanese paper dismissed the experience of incidents factor based on the relatively small number of claims that the IGP&I reported had exceeded the existing limits. The paper stated that a change in monetary value (i.e. inflation) was the only factor that the Committee should take into account. The paper presented an analysis of changes to the Consumer Price Index (CPI) and Gross Domestic Product (GDP) Deflator for the parties to LLMC 96 based on a “trimmed weighted average” for the period of 1996 to 2010. The weighting was based on each state’s share of the total GDP for the LLMC 96 countries each year. Japan “trimmed” the data to eliminate outliers resulting in indices that suggested increases in the CPI of 47.7% and GDP
deflator of 43.7% over the 1996-2010 period. Based on this, Japan concluded that an increase of no more than 45% over this period was justified.

The Australian papers stressed that Article 8(5) referred expressly to the amount of damages resulting from incidents. Australia agreed that the number of incidents exceeding the existing limits was small. However, the amounts by which the limits were exceeded in those cases were significant and represented either losses to claimants or to governments, particular in incidents involving bunker spills. Australia argued that this should be taken into account in applying the factor. The papers stressed the importance of the “polluter pays” principle arguing that the principle would be undermined to the benefit of shipowners and their insurers at the detriment of private claimants and their governments if the limits were not increased. The papers posited that the LLMC limits needed to be adjusted to meet the expectation of modern society otherwise there was a risk of states taking unilateral action to ensure that victims and their interests were adequately protected. ¹⁹

With respect to changes in monetary values, the Australian papers presented the results of a study commissioned from KPMG. The study suggests that based on Consumer Price Index (CPI) data for the states that are party to LLMC 96, inflation had diminished the value of the limits by 41%-54% from 1996 to 2015. The study suggested that an increase ranging from 3.1% to 4.1% compounded annually was needed to restore the limits to their 1996 levels. The papers also argued that the Committee should consider a further increase for future inflation to account for the fact that the new limits decided upon at LEG 99 in 2012 would not come into effect until 2015 and were unlikely to be adjusted for some time after that. ²⁰

Finally, the papers argued that CPI may not be the most appropriate indicator when measuring the impact of inflation on clean up costs from pollution incidents. Australia suggested that factors more salient to maritime claims such as changes in commodity prices, length of coastline,  

¹⁹ For example Norway has taken a reservation under Article 2(d) of LLMC 96 and has domestic limits for bunker incidents involving wrecks that exceed the LLMC limits.

²⁰ Recall that Art. 8(6)(a) of LLMC 96 only permits the use of the TAP after limits have been in place for a minimum of 5 years, thus the soonest the limits could be adjusted if the TAP were used in 2012 would be 2019.
cost of pollution remediation, number of registered ships or volume of maritime trade be used instead.

Australia relied on these arguments to urge the Committee to increase the limits by the maximum 6% per annum allowed by the Convention. Australia further argued that the 6% increase should apply from 1996 until the time the new limits would come into force in 2015 to ensure that they would not be immediately undermined by inflation from 2012-2015.

*Debate at LEG 99*

Most delegations that took the floor supported an increase in the limits. There was agreement that the Committee should calculate the amount of the increase from 1996 until 2012, the latter being the date that the new limits would be adopted. This approach was consistent with what was done when the TAP was used to increase the limits of shipowner liability under the 1992 Civil Liability Convention in 2000. Finally, the Committee agreed with the papers that an increase in limits using the TAP was not likely to have an effect on the cost of insurance. As a result, debate focused on the remaining two factors in Article 8(5). Unsurprisingly, the debate was guided by the positions set out in the Australian and Japanese papers and submissions.

In all, eight state parties to LLMC 96 supported the Australian proposal for the maximum increase. A further five state parties supported an increase somewhere between the Australian and Japanese proposals. The remainder supported the Japanese proposal with a small number advocating an increase smaller than Japan. States that were not party to LLMC 96 also expressed their opinion. The majority of these states favoured the Japanese proposal.

With respect to these factors, states that supported a high increase argued *inter alia* that:

- The focus should be on the amount of damage rather than the number of incidents;
- Although limitation of liability is a longstanding principle in maritime law and desirable from the point of view of creating a predictable and stable business environment for shipping, it was a privilege and not a right;
• The “polluter pays” principle is a well established rule affirming that the costs of pollution should be covered by those who pollute. This principle was in danger of being undermined if the limits were not increased significantly;
• The limits should therefore be increased to an amount that would adequately compensate victims and coastal states for costs incurred in combating pollution damage from bunker spills;
• If the LLMC regime does not provide limits that are adequate, coastal states may be tempted to take unilateral action outside of the international regime;
• Article 8(5) does not indicate the method that should be used to calculate changes in monetary value. Relying solely on the consumer price index and GDP as Japan had done may not adequately reflect the costs of maritime claims (e.g. remediating pollution incidents) that the limits are supposed to cover;
• The Japanese proposal, while intuitively easy to understand, lacked transparency regarding how the numbers had been derived. In particular, information regarding the extent to which data were trimmed or weighted and the impact of the trimming or weighting were not available.

States that supported a more modest increased argued *inter alia* that:
• Existing experience with incidents did not justify the maximum permissible increase;
• The limits of liability should not be set at such a level as to negate the concept of limitation of liability;
• Taking into account changes in monetary values, the Japanese calculation was reasonable, and supported by the approach used in other international conventions.

**Outcome of LEG 99**

In the end, the Committee decided to increase the limits by 52% which represented the Japanese proposal updated to reflect inflation between 2010 and 2012. The Committee noted that the decision taken at the 99th session affected only the general limits of liability at Article 6 of the
The Committee did not consider the limits of passenger liability in Article 7 of the Convention or the limits for states that are not members of the IMF and which rely on the Gold Franc as opposed to SDRs. States were invited to submit proposals on these Articles for consideration at future sessions.

The Australian delegation was not happy with this outcome and made a statement raising concerns about the way in which the debate was handled. In particular, the voice given to states that were not party to LLMC 96. To address these concerns, Australia recommended that the Committee formally clarify the role of non-contracting states when amendments to the limits are being considered in the future.

Finally, several delegations including Japan suggested that the debate had demonstrated that the principal problems with the 1996 limits were related to bunker oil pollution damage. As result, it was suggested that the Committee should consider the linkage between the Bunkers Convention and LLMC 96 in the future with a view to creating separate and higher limits for Bunker claims.

Collation and Preservation of Evidence and the Provision of Pastoral Care Following a Serious Crime on board a Ship:

The United Kingdom, Philippines and Cruise Lines International Association submitted a paper urging the Committee to develop guidelines to assist masters and crew with the collation and preservation of evidence and the provision of pastoral care following a serious crime on board a ship. The paper was motivated by two recent cases involving the disappearance of a passenger from a Bahamian registered passenger ship and the disappearance of a cadet from a United Kingdom registered cargo ship. The paper argued that guidance from the Legal Committee would be of assistance due to the overlapping legal jurisdictions that could come into play in investigating and prosecuting such crimes. More practically, guidance would assist since most

---

21 Note this Article is a reference to the consolidated text of the Convention on the Limitation of Maritime Claims 1976, as amended by the 1996 Protocol. The corresponding Article of the 1996 Protocol is Art. 4.
22 Note this Article is a reference to the consolidated text of the Convention on the Limitation of Maritime Claims 1976, as amended by the 1996 Protocol. The corresponding Article of the 1996 Protocol is Art. 5.
23 See LLMC 96 Art. 5 and the Consolidated LLMC 76/96 Art. 8.
24 IMO Document:: LEG 99/WP.1 paragraph 4.17
ship’s officer and crew do not have formal training in law enforcement and it can sometimes take several days for a vessel to arrive at a port where an investigator from the relevant authority can board the vessel. In the intervening time, crucial evidence could be lost and the rights and needs of both victims and possible accused could be negatively impacted.25

The Committee agreed to take on the work noting that it would need to involve experts in law enforcement; that the guidelines would have to be practical as they would have to be implemented by people not used to dealing with such issues and that care would be taken to respect the legal jurisdiction of flag states, coastal states and the state of the victim and the accused as well as the rights of both victims and suspects. Finally, concern was expressed that the Guidelines not become mandatory because of the complex international law issues and because there was fear that masters, officers and crew could be held to account if evidence was found to be lacking or contaminated through their inexperience.26

Liability and Compensation for Trans-boundary Oil Pollution Damage Resulting from Offshore Oil Exploration and Exploitation:

In response to an incident that occurred in August 2009 at the Montara platform located in Australia’s EEZ that resulted in a significant amount of oil crossing into Indonesian waters, Indonesia proposed that the Legal Committee develop an international convention to address liability and compensation for trans-boundary pollution caused by offshore exploration and exploitation activities. Indonesia suggested that the convention be modeled on the regime in place for tankers under the Civil Liability and Fund Conventions.

The issue was considered at the 97th and 98th sessions of Legal Committee.27 In both instances the Committee was divided on whether this issue required an international convention or whether it was better resolved at the national level or through bilateral or regional treaties. In addition, several delegations questioned the IMO’s competence in this area, particularly with respect to fixed structures that are clearly not ships.

25 See IMO Documents: LEG 99/11/1 and LEG 99/INF.3 and also IMO Assembly Resolution A.1058(27).
27 See IMO Documents: LEG 97/WP.1 and LEG 98/WP.1.
At its 98th session in 2011, the Legal Committee decided to analyze offshore liability and compensation issues through an informal working group chaired by Indonesia, and to undertake a more detailed study if approved by the IMO’s governing bodies. The issue came to a head when the IMO’s Governing Council was asked to confirm the Committee’s decision to amend one of the Organization’s Strategic Directions in order to allow the Committee to more formally work on the issue. Several delegations at the Council meeting objected to the amendment and requested that the Legal Committee further consider the legal ramifications of the IMO working in this area.\(^{28}\) This formed the background of the debate at LEG 99.

Prior to the meeting, Brazil submitted a paper arguing both that bi-national and regional agreements were best suited to deal with trans-boundary pollution damage from offshore installations and questioning the IMO’s jurisdiction in this area.\(^{29}\) Indonesia submitted a paper making the case for including the item on the Legal Committee’s work program.\(^{30}\)

The positions set out in these papers were picked up in the Committee’s discussion with those in favour of an international convention arguing, *inter alia*, that:

- The IMO has previously adopted instruments that deal with offshore drilling platforms, including fixed platforms, notably with the 1990 OPRC Convention\(^ {31}\) 2005 SUA Protocols.\(^ {32}\)
- The United Nations Convention on the Law of the Sea (UNCLOS) did not preclude IMO jurisdiction;
- In the absence of any other competent organization, the IMO should take up the issue;
- IMO had in the past taken on issues that were not explicitly mentioned in the IMO Convention (such as piracy and maritime security) and the lack of a reference under

\(^{28}\) See IMO Document: C 106/D.
\(^{29}\) IMO Document: LEG 99/13/1.
\(^{30}\) IMO Document: LEG 99/13/2.
\(^{31}\) *International Convention on Oil Pollution Preparedness and Response Cooperation, 1990.*
UNCLOS was not itself a barrier which prohibited the Organization from evolving to address new problems.

While those opposed:

- Cited the lack of any reference to offshore activities in the IMO Convention and argued that this indicated a lack of competence;
- Argued that UNCLOS did not clearly vest the IMO with jurisdiction in this area since UNCLOS seemed to restrict the IMO’s competence relating to offshore platforms to their impacts on navigation;
- Argued that the IMO should not duplicate for the offshore sector the liability rules applicable to oil leaks caused by ships since offshore oil exploration activities only exceptionally have an international impact while shipping normally involves many jurisdictions and may potentially affect any country;
- Argued that it would be dangerous to regulate one aspect of offshore exploration and exploitation activities, namely liability and compensation, in isolation. If the IMO were to assume jurisdiction over offshore activities it needed to do so in a comprehensive fashion taking into account safety and environmental response in addition to liability and compensation. To do this would be a substantial expansion of the Organization’s mandate which required careful consideration;
- Argued that the issue of trans-boundary pollution damage arising from offshore activities would be better addressed through bilateral or regional arrangements.

The Committee remained divided on this issue, in particular the question of the IMO’s jurisdiction to regulate pollution from offshore installations. Following a lengthy, and at times contentious, debate the Committee agreed that there was no compelling need to develop an international instrument to address liability and compensation for pollution damage caused by offshore activities; and that these issues were better dealt with bi-nationally or regionally. However, the Committee recognized that some states would benefit from the experiences and best practices in other jurisdictions. As a result, there was support for the Committee to develop
guidance documents or a model agreement that could be used to assist States in entering into bi-
national or regional agreements. The Committee further agreed that this work could be
undertaken informally without the need to get permission to expand the Organization’s mandate
from its governing bodies. The Government of Indonesia volunteered to continue to coordinate
an informal consultation group and to report back to the next session of the Committee.

Monitoring the Implementation of the HNS Convention:

In his opening address to the Committee at LEG 99, the Secretary General of the IMO urged
states to ratify the 2010 HNS Convention\(^{33}\) which creates an international liability and
compensation regime for damages caused by the transport of hazardous and noxious substances
by ship. To assist with this task, the IMO Secretariat and IOPC Compensation Funds Secretariat
have developed a number of tools for states seeking to implement the 2010 HNS Convention.
These include a consolidated version of the 1996 HNS Convention and 2010 Protocol, an
Overview of the Convention as amended by the Protocol, a model reporting form on receipts of
contributing cargo, and a searchable list of hazardous and noxious substances covered by the
2010 HNS Convention (the HNS Finder).\(^{34}\)

Canada, along with seven other states, has signed the Convention indicating the intention to give
the instrument favourable consideration. Transport Canada has released and received wide
support for a policy paper recommending that Canada ratify the Convention. The Convention
was tabled the Convention in Parliament in November 2011. The next step in this process would
be amendments to the *Marine Liability Act*\(^{35}\) to implement the Convention in Canadian law.

**International Oil Pollution Compensation Funds**

**Overview of the International Oil Pollution Compensation Funds:**

\(^{33}\) *International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea, 2010.*

\(^{34}\) The tools can be accessed at the following web site: [http://www.hnsconvention.org/Pages/Home.aspx](http://www.hnsconvention.org/Pages/Home.aspx);

\(^{35}\) S.C. 2001, c. 6.
The International Oil Pollution Compensation Funds (IOPC Funds) operate under the framework of international conventions negotiated at the IMO - specifically the 1969 and 1992 Civil Liability Conventions (CLC)\(^{36}\), the 1971 and 1992 Fund Conventions\(^{37}\) and the 2003 Supplementary Fund Protocol.\(^{38}\)

The IOPC Funds are effectively an international insurance regime for oil pollution damage resulting from spills of persistent oil from tankers funded by cargo interests. The IOPC Funds provide compensation for victims who suffer damage within the territory, territorial sea or exclusive economic zone of contracting states, but who do not obtain full relief from the shipowner under the CLC either because it is unable to pay, it meets one of the exceptions to liability in the Convention, or the limit of its liability under the CLC is exceeded.\(^{39}\) The IOPC Funds are financed by contributions paid by entities that receive certain types of oil by sea in member states.\(^{40}\)

Funds established under each convention are governed by an Assembly made up of representatives of contracting states to the convention. The Funds Assemblies meet at least once a year to provide guidance to the Director and Secretariat, who look after the day-to-day administration of the Fund, with respect to paying claims and also on broader policy questions that arise in the administration of the Funds’ constituting conventions.\(^{41}\) Canada is usually represented at these meetings by a member of Transport Canada’s International Marine Policy Group, along with experts in maritime law from the Department of Justice and the Administration of the Ship Source Oil Pollution Fund. Large incidents currently being addressed by the IOPC Funds include the Erika, Prestige and Hebei Spirit.

Recent Issues Before the IOPC Funds:


\(^{39}\) 1992 Fund Art. 4(1); 2003 Supplementary Fund Art. 4.

\(^{40}\) 1992 Fund Art. 10. Note, however, that State Parties can assume this obligation as Canada has by virtue of Art. 14.

\(^{41}\) 1992 Fund Arts 16-20.
At their recent April 2012 meeting the IOPC Funds Assemblies considered the following items:

- The Plate Princess claim;
- The impact of a European Council Regulation concerning restrictive measures against Iran; and,
- Interim payments.

**Plate Princess**

The Plate Princess is an interesting smaller claim currently before the 1971 Fund Assembly. The vessel discharged three tonnes of oil during a deballasting operation in Puerto Miranda, Venezuela in May 1997.\(^{42}\) The discharge was reported to Venezuelan authorities the day after the incident. The authorities conducted an investigation and concluded that boats, nets and equipment of several fishers had been contaminated by oil from the Plate Princess. However, an international expert who attended the site 11 days later was not able to find any evidence of oil pollution damage.\(^{43}\)

In June 1997, two trade unions representing local fishers presented claims against the shipowner and master of the Plate Princess for an estimated $30 million (USD) for damages suffered as a result of the incident. The claims did not provide details of the losses. The unions stated that the overall amounts were included for procedural purposes to ensure that they complied with the requirements of Venezuelan law. In their claims, the unions asked the Court to officially notify the Director of the IOPC Funds of the action so that the requirements of Article 7(6) of the 1971 Fund Convention would be met. This was not done.

The file lay dormant for eight years. In October 2005 and again in March 2007, the IOPC Funds received official notification\(^{44}\) of the court actions. In May 2006 the 1971 Fund’s Assembly

\(^{44}\) i.e. in accordance with the requirements of Art. 7(6) of the 1971 Fund Convention.
reviewed the details of the incident and concluded that any claim against the Fund were time barred since it was neither sued nor officially notified of the damage within three years of the date the damage occurred and no action was brought against it within six years of the incident as required by Article 6 of the 1971 Fund Convention.⁴⁵

In April 2008, one of the unions amended its claim to set out the nature and extent of the losses suffered by its members. The union claimed $12.5 million USD to cover the cost of cleaning 849 boats and replacing 7814 packs of nets and two outboard motors. The claim also alleged that 1153 fishers suffered a total loss of income for six months as a result of being unable to fish.⁴⁶ The union submitted a large number of documents to substantiate the damages allegedly suffered by its members. However, because of resource problems at the registry of the court hearing the case, the IOPC Fund did not get access to the documents until approximately two months after its statement of defence was due.⁴⁷ The Venezuelan courts refused the Fund’s motion for an extension of time to review the documents. Thus, notwithstanding the missing documentation, and the improper notice, the IOPC Fund filed a statement of defence as required to preserve its rights to appear as a party under Venezuelan law. The Fund pled, inter alia, that the claim against it was time barred as a result of Article 6 of the 1971 Fund Convention.

After receiving and reviewing the plaintiffs’ documents, the IOPC Fund submitted further pleadings in November 2008. The Fund argued that the documentation provided by the claimants did not demonstrate that the damage allegedly suffered by the fishers had been caused by the Plate Princess. In particular the Fund questioned how three tones of oil could have caused $12.5 million of losses. The IOPC Fund further pled that the documentation provided in support of the claim was of doubtful accuracy and had, in many instances, been falsified by the Union on behalf of individual claimants and produced for the purpose of making the claim.⁴⁸ To support its accusations, the IOPC Fund asked the Court to admit a report prepared by an expert it had

⁴⁵ 1971 Fund Convention Art. 6(1).
engaged. The Court rejected this request reasoning that the report had not been submitted within the time-limit provided for by Venezuelan law.\(^{49}\)

The trial court hearing the matter rejected all of the Fund’s arguments and found in favour of the union. The Fund was ordered to pay damages determined by court appointed experts.\(^{50}\) The Fund’s appeal of this judgment were refused.\(^{51}\)

The shipowner and the Fund next experienced several problems relating to the selection of the experts and with their assessment of the quantum of damages for individual victims. For example, all of the experts proposed by the shipowner and the Fund were rejected by the Court. Second, the experts assessed total damages in excess of the amount claimed by the victims. The experts concluded that the three tonnes of oil had caused approximately $220 Million (USD) in damages. Since the limits of liability for both the shipowner and the Fund under the CLC and 1971 Fund Conventions is $120 Million (USD), the experts determined that both the shipowner and the Fund should pay up to the limit of their respective liabilities. Appeals by the shipowner, its insurer and the IOPC Fund on this aspect of the case were also rejected by the Venezuelan courts.\(^{52}\) The appeals process with respect to the claim of the first union is now almost exhausted,\(^{53}\) and thus the Fund will be faced with a formal demand to pay its share of the claim.

And now we get to the interesting part of the case from an international law perspective. Article 8 of the 1971 Fund Convention holds each contracting state to the Fund Convention liable to pay compensation once a judgment against the Fund is enforceable in the State where proceedings have occurred and all ordinary forms of review within that state have been exhausted. This requirement is subject two exceptions. Compensation is not payable if the judgment was obtained by fraud or where the Fund was not given reasonable notice and a fair opportunity to present its case.\(^{54}\)

\(^{50}\) The reasoning of the Venezuelan courts can be found at in the full text of the English Translation of the Venezuela Maritime Court of Appeal judgment of 24 September 2009, IOPC Document: IOPC/Oct10/3/4.
\(^{51}\) See chronology of the litigation at IOPC Document: IOPC/APR12/3/2/Rev. 1.
\(^{52}\) Ibid.
\(^{53}\) The status of the second union’s claim is unclear at the moment. To simply the analysis I have not considered it here.
\(^{54}\) See 1971 Fund Convention Art. 8 and 1969 CLC Art. X.
The governing bodies of the Funds are considering whether they should deny payment for the Plate Princess on the grounds that it was not given reasonable notice and a fair opportunity to present its case. The Funds only received formal notice of the claim after the limitation period in the convention had expired. Moreover, the Director argues that the Funds was denied due process by the courts in that it received no information about the nature and extent of the losses until the first union’s amended statement of claim was filed in April 2008 and then it was required to submit their statement defence before being given an opportunity to review all of the evidence. The 1971 Fund Assembly is also considering whether the fraud exception would apply given that analysis by the Fund’s experts and testimony by claimants suggests that several claims were based on fabricated evidence.

If the 1971 Fund Assembly refuses to compensate the victims of the Plate Princess it will not be respecting a decision of the courts of a sovereign state, or the provisions of an international convention that expressly relied upon such decisions. In other words, it will be violating international law. The Venezuelan and Panamanian delegations have already issued a statement condemning this outcome. If, on the other hand, the 1971 Fund Assembly respects a decision of the Venezuelan courts that is clearly flawed, it risks undermining confidence in the integrity of the international compensation regime which may cause other state parties to re-evaluate whether remaining in and paying contributions to the international regime makes sense.

The 1971 Fund Assembly had a full discussion of the issue at its April 2012 meeting. While most delegations raised concern about whether or not the Fund had been properly notified of the claim, concern was expressed regarding denying payment on the basis of fraud. No final decision was made with respect to payment and the Director of the Fund was asked to conduct a further legal analysis of Article 8 of the 1971 Fund Convention and Article X of the 1969 CLC to provide further insight on the ramification of denying payment. The 1971 Fund is being wound down and has few assets in Venezuela. If the Fund decides not to pay the claim, the claimants

---

56 Ibid.
and Venezuelan government would have to apply to have the judgment of its courts enforced in a jurisdiction where the Fund does have assets. The United Kingdom would be the most likely jurisdiction for such proceedings. Should this happen, the issues currently being discussed by the Funds will receive judicial consideration which could set an important precedent not just for the CLC/Fund Regime, but also possibly for the interpretation of international conventions more generally.

*Impact of a European Council Regulation Concerning Restrictive Measures Against Iran*

In March 2012 the European Council passed EU Regulation 276/2012 which prohibits entities incorporated, domiciled or regulated in the European Union (EU) from executing contracts relating to the purchase, import and transport of crude oil, petroleum and petrochemical products originating in Iran. The Regulation also prohibits the provision of insurance or reinsurance, including property and third party liability cover such as P & I by any EU based insurer in respect of any vessel that carries bunker fuel or crude or other petroleum products originating in Iran whether loaded in or outside of Iran and whether destined for delivery or use within or outside the EU.58

As of July 1, 2012, these sanctions will apply to oil imported into the EU, ships carrying this oil - be they flagged by an EU member state or owned by an EU national- and to the provision of insurance or re-insurance by an EU-based insurer. The International Group of P & I Clubs presented a paper at the April 2012 meeting of the IOPC Funds Assemblies to inform member states of these developments and to highlight their concerns.59 The concerns are specifically related to how the sanctions could affect the clubs that are members of the International Group and their ability to insure ships that lawfully carry Iranian oil to states that are outside the EU.

The paper also addresses the impact of the Regulation on shipowners and on states that are parties to the 1992 Civil Liability and Fund Conventions and the 2003 Supplementary Fund Protocol.

---

58 IOPC Document: IOPC/APR12/9/1 paras 1.1-1.3.
59 Ibid.
In brief, ships flagged in EU states or owned by entities incorporated, domiciled or regulated in the EU will be prohibited from transporting Iranian oil or using Iranian bunkers anywhere in the world. Ships not flagged in the EU or not owned by entities incorporated, domiciled or regulated in the EU will be prohibited from transporting Iranian oil to an EU port, but will not be prevented from transporting Iran oils to non-EU destinations or from using Iranian bunkers. However, non-EU ships not trading at EU ports will not be able to obtain insurance from an EU based insurer. This includes nine of the thirteen International Group clubs that insure 95% of the world’s ocean going tankers.

The four International Group P&I Clubs that are based outside the EU can continue to insure ships that carry Iranian oil as cargo or bunkers, however they will not be able to benefit from the International Group’s pooling arrangement for incidents causing damages over $8 million (USD) or the International Group’s re-insurance agreement which would involve all thirteen Clubs. Nor will they be able to engage the Group’s voluntary supplementary payment agreements STOPIA and TOPIA. As a result, none of the non-EU based P&I Clubs will likely be willing to insure a tanker that lawfully carries Iranian oil after the measures enter into force. Ships carrying such oil will need to make alternate insurance arrangements in order to meet the requirements of the 1992 CLC and the 2001 Bunkers Convention.

The Regulation will also cause problems for state parties to the 1992 CLC and Fund Conventions, the 2003 Supplementary Fund Convention and the 2001 Bunkers Convention. In particular, Article VII of the 1992 CLC requires vessels over 2000 tonnes that carry oil in bulk as cargo to carry insurance covering their liability under the Convention. Article 7 of the Bunkers Convention contains a similar provision for vessels over 1000 tonnes that carry bunker oil to be used for their propulsion or operation. Vessels must carry a certificate issued by a State party indicating that they comply with the compulsory insurance requirement. In most cases the

---

60To ease the burden on oil receivers, a voluntary agreement has been reached amongst owners of small tankers indemnified through members of the International Group of P&I Clubs to introduce the Small Tanker Oil Pollution Indemnification Agreement (STOPIA 2006). Under the terms of STOPIA 2006 the liability in respect of incidents involving tankers up to 29,548 GT is increased to 20 million SDR - about $33 million. STOPIA 2006 applies to incidents involving participating tankers in all 1992 Fund Member States. A second agreement known as the Tanker Oil Pollution Indemnification Agreement (TOPIA 2006) provides for indemnification of the Supplementary Fund for 50% of the amounts paid in compensation by that Fund in respect of incidents involving tankers entered in one of the P&I Clubs which are members of the International Group.
certificate is issued following the vessel providing proof of insurance. If the vessel is insured by an EU based insurer and it transports Iranian oil or uses Iranian bunkers once the EU regulation is in force, its insurance coverage will be voided even though it may have been in place at the time the certificate of insurance was issued. These developments undermine the direct action provision at Article VII(8) of the CLC and Article 7(10) of the Bunkers Convention and mean that states and victims of oil spills will be at risk of the shipowner not being able meet its obligations under the conventions since these obligations will not be backed by insurance.

The EU regulation could also have a significant impact on the 1992 Fund and 2003 Supplementary Fund member states, including Canada since, in absence of adequate insurance, the international funds and their contributors in member states could become liable for oil pollution damage from the ground up as opposed to being able to rely on the first tier of compensation being provided by the shipowner and/or its insurer through the 1992 CLC, STOPIA or TOPIA. In the worst case scenario, the International Funds and their contributors could be liable for the approximately $1.1 Billion (USD) of compensation provided for in the 2003 Supplementary Fund. Canada is a large contributor to the International Funds. An incident by a ship which is affected by these sanctions could therefore be a significant liability for the Canadian Ship-Source Oil Pollution Fund (SOPF) which pays Canada’s contributions. The SOPF would also be affected in the case of a bunker spill if the shipowner did not have adequate insurance.

The International Group has raised this issue with the officials from the European Commission and EU member states, as well as with member states to the 1992 Fund Convention, 2003 Supplementary Fund Convention and the Director of the IOPC Funds. The International Group is lobbying the European Commission to exempt the provision of third party insurance or re-insurance under the compulsory insurance requirements of the 1992 CLC and 2001 Bunkers Convention from the measures. It is not clear that there is a political will to do so at this point. The issue was discussed at the April 2012 meeting of the IOPC Funds Assemblies and the Director was requested to continue monitoring the situation and to report back at the October 2012 meeting.

**Interim Payments**

The International Group of P & I Clubs has raised concerns that some national courts may not recognize that payments should be made to compensate victims quickly. In particular it is concerned that absent a formal provision in the CLC, some national courts may not recognize that payments made to victims following an incident should be set off against the shipowner’s limitation fund required by Article V(3) of the 1992 CLC. This could result in the clubs paying twice for the same liability. To protect themselves against this possibility insurers could deposit their limitation fund with the relevant court and wait for the court distribute it. Such an approach, while consistent with a strict reading of the Convention, could significantly delay relief for victims which is an important underlying goal of the CLC/Fund regime.

The International Group has proposed various solutions to this problem, none of which have been endorsed by the Director of the IOPC Funds. The Director has expressed concern that the proposals are outside the scope of the Conventions and could result in the IOPC Funds and their contributors bearing a risk that was properly the shipowner’s. The matter has been referred to a Consultation Group consisting of Canada, Denmark, France, Japan, Philippines, the Republic of Korea, the Comité Maritime International, the International Group of P&I Clubs and the IOPC Funds’ Secretariat for further consideration.

As a first step, a study was commissioned from Mr. Mans Jacobsson, former Director of the IOPC Funds and Mr. Richard Shaw, Comité Maritime International. The study considered:

a) the practice that has been followed by the P&I Clubs and the IOPC funds in making the interim payments under the 1992 Civil Liability Convention and the 1992 Fund Convention, and previously under the 1969 Civil Liability Convention and the 1971 Fund Convention;

b) the problems faced by the P&I Clubs when making interim payments; and
c) the possible solutions to the problems identified in (b) above.

---

62 IOPC Document: IOPC/APR12/10/1.
The study concludes that there is no legally binding solution to this problem within the framework of the present text of the Conventions, but recognizes the importance of interim payments to the CLC / Fund regime. It recommends that the current practice of the shipowners, P&I Clubs and Funds in making interim payments be recorded in a Memorandum of Understanding to be approved by the 1992 Fund Assembly in an appropriately worded Resolution. This Memorandum could, if thought appropriate, be laid by the shipowner/P&I Club concerned before the court administering the limitation fund as authoritative evidence of the existing practice to help ensure that the interim payments were recognized and set off against the shipowner’s limitation fund.

While there was general agreement that the current practice with respect to interim payments should be continued, delegations at the April 2012 meeting of the IOPC Funds were not comfortable with the wording of the Assembly Resolutions proposed by the International Group. In addition it was felt that there were additional legal issues to resolve, including those related to the right of insurers and the IOPC Fund to be subrogated under the CLC and Fund Conventions. As a result, the International Group and the IOPC Funds were asked to continue to work together to refine the issues and the Resolution. It remains to be seen whether this discussion will resolve the issue to the satisfaction of both the International Group, the Director of the IOPC Funds and member states to the Fund Conventions.