Måns Jacobsson
Former Director,
International Oil Pollution Compensation Funds

How clean is clean?
The concept of reasonableness in oil pollution response
Scandinavian Institute of Maritime Law
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International Compensation Regimes

**Old Regime**
- 1969 Civil Liability Convention
- 1971 Fund Convention
  - 1971 Fund

**New Regime**
- 1992 Civil Liability Convention
- 1992 Fund Convention
  - 1992 Fund
- 2003 Supplementary Fund Protocol
  - Supplementary Fund

International Treaties

- 1992 Civil Liability Convention
  126 States Parties
- 1992 Fund Convention
  108 States Parties
- 2003 Protocol to 1992 Fund Convention
  27 States Parties

1971 Fund Convention ceased to be in force on 24 May 2002
1992 Conventions Apply to

- Pollution damage caused by
  - Spills of persistent oil from laden tankers
  - Bunker spills from unladen tankers with oil residues from previous voyage on board
- In the territory, territorial sea and EEZ or equivalent area
- Pollution damage includes preventive measures
Main Features under Civil Liability Convention

• Strict liability of registered owner
• Limitation of liability
• Compulsory insurance and direct action
• Channelling of liability
• Jurisdiction and enforcement of judgements

1992 Civil Liability Convention
Limits of Shipowner’s Liability

<table>
<thead>
<tr>
<th>GT</th>
<th>SDR</th>
<th>US $</th>
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<tr>
<td>≤ 5000</td>
<td>4 510 000</td>
<td>7 103 295</td>
</tr>
<tr>
<td>Per additional GT up to 140 000</td>
<td>631</td>
<td>993</td>
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<tr>
<td>GT ≥ 140 000</td>
<td>89 770 000</td>
<td>141 388 650</td>
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The Fund Conventions

Applies:

- Shipowner exempt
- Shipowner financially incapable of meeting his obligations
- Damage exceeds the shipowner’s liability limit

Exemptions

Shipowner exempt:

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

Fund exempt:

- Damage resulted from an act of war, hostilities, civil war or insurrection
Jurisdiction and Enforcement of Judgements

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

Maximum Amount of Compensation

1992 CLC/Fund Conventions
203 million SDR (US$ 320 million)

2003 Supplementary Fund Protocol
750 million SDR (US$ 1 180 million)
Limits Laid Down in the Conventions

Structure of 1992 Fund
Who Contributes to the Fund?

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

Contributions to 1992 Fund; 2009 figures

- Japan 15%
- India 11%
- Rep. of Korea 8%
- Spain 4%
- Italy 8%
- France 6%
- Singapore 6%
- Netherlands 6%
- Canada 5%
- United Kingdom 5%
- Others 24%
**Prestige, Spain, 2002**

Affected States

- Spain
- France
- Portugal
- United Kingdom

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Main Types of Claim

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

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

**Clean-up and Preventive Measures**

- Clean-up at sea
- Shoreline clean-up
- Disposal of oil and oily wastes
- Cleaning of equipment
- Cleaning of animals
### Factors Affecting Costs

- Type of oil
- Heavy fuel oil spills more expensive than crude oil spills
- Quantity of oil spilled
- Location of the incident
- Level of preparedness to combat pollution
- Media

### Clean-up, Preventive Measures and Reinstatement of Environment

- Clean-up normally considered preventive measures
- Preventive measures: *any reasonable measures to prevent or minimise pollution damage*
- Also admissible: *costs of reasonable measures of reinstatement of the polluted environment*
At Sea Response

Common Problems as Regards at Sea Response

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

Hebei Spirit, December 2007
Shoreline Clean-up Methods

Sorbents

Vacuum

Debris removal

Sediment Reworking / Tilling

On Shore Clean-up
On Shore Clean-up

Clean-up of Rocky Shoreline
Common Problems as Regards Shoreline Clean-up

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

Admissibility Criteria for Clean-up and Preventive Measures

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

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

Removal of oil from sunken ships

- Tanio incident (France, 1980)
- Rio Orinoco incident (Canada, 1990)
- Yuil No 1 incident (Republic of Korea, 1995)
- Osung No 3 incident (Republic of Korea, 1997)
- Prestige incident (Spain, 2002)
- Solar 1 incident (Philippines, 2006)
Consideration of Alternative Admissibility Criteria after *Prestige*

- Social and political considerations not to be taken into account
- Criterion *objectively and technically* reasonable maintained
- For removal of oil from sunken ships
  - Likelihood of release of sunken oil
  - Quantity and type of oil
  - Stability of the seabed
  - Likely pollution damage resulting from escape of remaining oil
  - Vulnerability of threatened area
  - Likely environmental damage resulting from escape of remaining oil
  - Technical feasibility of planned operation
  - Likelihood of release of oil during operation

Consequential and pure economic loss

- Consequential economic loss: economic loss suffered by persons whose property has become polluted
- Pure economic loss: economic loss suffered by persons whose property has not become polluted
Impact on Fishing

- Damage to fishing gear and consequential economic losses
- Effects on fishing
- Fishing bans
- Contamination of wild and captive stocks
- Supply shortages may affect related industries
- Market effects

Impact on Mariculture

- Contamination of facilities (fish cages, shellfish rafts, onshore tanks and ponds)
- Contamination of stocks (tainting, mortality)
- Harvesting bans
- Market effects
Pure Economic Loss

- To qualify for compensation there must be a sufficiently close link of causation between the contamination and the loss

- Starting point is the contamination, not the incident
Pure Economic Loss
Admissibility Criteria

Account is taken of the following factors

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

Destruction of Mariculture Products

Factors to be considered:

• Whether produce is contaminated
• Likelihood that contamination would disappear before normal harvesting time
• Whether retention of produce affects further production
• Likelihood of produce being marketable at normal harvesting time
Activities to counteract negative economic consequences of an oil spill

- Preventive measures probably intended to cover measures to prevent physical damage
- Funds have accepted measures taken to prevent pure economic loss in
  - fisheries
  - tourism
- Measures must prevent damage which if sustained qualifies for compensation
- Measures must be reasonable and proportionate to threatening damage

Environmental Damage

Admissible claims:

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

Reinstatement of the environment

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

In order to qualify for compensation:

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

Post Spill Studies

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

- The international compensation regime under 1992 Conventions has in general worked well
- Continuous increase in Member States (from 14 to 108)
- 140 incidents in 33 years
- US$ 950 million paid to victims
- Used as model in other fields
- Reviewed to ensure it meets the needs of society in the 21st century