Article

INTERNATIONAL CONVENTION AND COMPENSATION THE MARINE POLLUTION

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Abstract: Today, the growing development has different dimensions especially the economic in world, so the all transportation paths have developed including the marine transport. This caused the pollution of seas and oceans using some pollutants such as the delivery of oil and its products from the sea which caused the long lasting damages in the marine environment. The marine accidents will enhance the factor risk of marine pollution in recent decades. So the international convention considered some initiatives to prevent and decrease this risk, especially by the establishing an international fund to compensate the oil pollution damages, because this pollutant matter can remain the catastrophic damages in the marine environment. This compensation procedure has required some correction to be more realistic, so some limits considered for this compensation. This effort needs to be supported more countries so that be successful in world, but sadly not supported more countries yet.

I. INTRODUCTION

Thus, on the initiation and strong arguments of the United States2, in 1984, Protocols were negotiated with the prime object of making the limits of compensation and the procedure more realistic, but that effort failed to attract the required number of states for coming into force. This happened so because after the Exxon Valdez incident, United States, which was one of the initial negotiators, became one of the biggest critics of the Protocols, which probably became instrumental in generating the sense of doubts about it resulting in irresistible opposition to the Protocol. To deal with such situations, United States enacted the Oil Pollution Act in 1990. On the other hand, in 1992, to give effect to the proposed provisions of the 1984 amendments to the CLC and FC (hereinafter 92 CLC and 92 FC), two new Protocols were negotiated, which have come into force.3 To make the limits realistic and meet the costs of damage in cases of large scale oil spills, the limits of compensation prescribed in the 92 CLC and 92 FC have further been revised by the Legal Committee of the IMO in its 82nd session dated 16-20 October 2000. This was done to meet the challenges

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3 The names of the Protocols are: Protocol to Amend the International Convention on Civil Liability for Oil Pollution Damages, 1992 and Protocol to Amend the International on the Establishment of an International Fund for Compensation for Oil Pollution Damages, 1992. The consolidated texts of the Conventions are hereinafter referred to as 92 CLC and 92 FC. For the texts of the Conventions, see E. D. Brown, The International Law of the Sea (Darmouth, Singapore, 1984), vol. II, pp. 244 and 260.
posed by Nakhodka incident of 1997 off the Japan coast and the Erika disaster off the coast of France, which caused an extensive damage.⁴ The significance of the 1992 CLC and FC has increased with the expiry of the Tanker Owners Voluntary Agreement Concerning Liability for Oil Pollution, 1969 (TOVALOP)⁵ and the Contract Regarding an Interim Supplement to Tanker Liability for Oil Pollution, 1971 (CRISTAL). There were already some issues, which were demanding amicable solutions, the advent of the Protocols of 1992 has added some more issues. Now, there are four categories of states: states that have acceded to the Protocols, like the United Kingdom; states which have accepted only the CLC⁶; and states which are still sticking to the original CLC and FC, like Malaysia; and states that have their own law, like the United States. This has resulted in multiplicity of laws and issues related to them.⁷

For a long period, to compensate damages of the marine environment and the coastline, including economic loss, by hazardous substances other than oil due to vessel source, remained out of the arena of international law. Thus, in 1996, with the finalization of the International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea 1996 (hereinafter HNS Convention), which has rules of compensation similar to CLC and FC, has widened the scope of the compensation regime pertaining to the vessel source marine pollution. Looking at the disinterest of the world community towards HNS, it can be said that the coming into force of this Convention is in the garb of obscurity. This unfortunate Convention along with the recent International Convention on Civil Liability for Bunker Oil Pollution Damage, 2001 (hereinafter Bunker Oil Pollution Convention) also poses the same unanswered or inappropriately answered questions. Still there are certain areas, which are out of the ambit of the compensation regime, e.g., pollution by substances such as coal and other substances. There is, therefore, a need to widen the scope of the regime further to the possible extent in order to make it a comprehensive legal regime.

Preventive measures constitute a big part in the international regime of marine pollution. There is a great deal of treaty norms and soft laws to prevent spills from ships and to ensure more effective responses to spills once they occur.⁸ Although the preventive measures have shown a mark decrease in the area of the vessel source marine pollution, total restraint seems to be far. The sign of total success can be seen

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⁴ Among these, the Erika incident, which occurred on 12 December 1999, spilled some 19,800 tonnes of heavy fuel oil along the French coast, is more serious.
⁵ TOVALOP was established by the tanker industry to provide compensation to states which were not parties to the 69 CLC. At the CLC level, CRISTAL was funded by the oil industry itself, administered by Oil Companies International Marine Forum, and provided limits similar to the 71 FC.
⁶ Until 30th December 1998, Singapore was a member of the CLC only. Now Singapore is parly to both the 92 CLC and 92 FC.
only in the area of carriage of nuclear wastes through the sea, but it is not a guarantee for the future. It is necessary, therefore, to thoroughly examine the treaty norms and soft laws and to make efforts to rationalize them so that they work as a foolproof regime.

The purpose of this paper is to critically examine the compensation regime and preventive norms and to offer suitable suggestions to make them more effective, meaningful and acceptable. For the convenience, the compensation regime pertaining to oil pollution by oil tankers will be dealt with first, and the law related to pollution by hazardous and noxious substances and oil pollution by bunkers will follow. In the course of discussion. For a comparative assessment, special mention about the law of the United Kingdom, by which the 92 CLC and FC have been implemented, and the Oil Pollution Act 1990 of the United States will be made. The local legislation of Malaysia and Singapore will also be critically examined.

II. COMPENSATION MECHANISM FOR OIL POLLUTION DAMAGE

Torrey Canyon disaster off the cost of England in 1967 sparked the debate on civil liability of ship owners in case of big oil spills at the sea. Prompted by this disaster, in April 1967, the British Government submitted a note to the Inter-Governmental Maritime Consultative Organization, calling for changes in the international law governing liability for pollution by oil, and possibly other hazardous and noxious substances. This move got support from a number of countries. With the result of that 69 CLC came into existence. It was supplemented in 1971 with 71 FC. Although as a supplement to each other both the Conventions were jointly operative, they did not have the same number of members. However, under the compensation scheme provided by them, countless incidents of oil pollution have successfully been settled.

As stated above, the liability and compensation scheme of the two Conventions is based on a two tier system: one is ship owners liability, and the other one is cargo financial responsibility to be borne by paying additional amount of money by the “IOPC Fund” to the sufferer from the “Fund” created on the basis of fixed contributions of the oil importing countries. The 69 CLC imposed a strict liability on the owners of the sea going ships actually carrying oil in bulk as cargo, the liability is limited (the amount of liability depends on the size of the ship) and is backed by a compulsory insurance. The 71 FC thus provided, a supplementary compensation scheme borne by receivers of crude oil and heavy fuel oil in the circumstances where the actual damage resulting from a tanker incident exceeded the limits of ship owner’s liability under the 69 CLC or if there was no owner’s liability or the owner was incapable of meeting his liability. In case of oil escaped or discharged from more than one ships, there were joint and several liability of the owners. So as to impute the element of justice, there were the following exceptions to the liability: acts of war, exceptional and irresistible natural phenomena, damage caused wholly by act or


10 Until the negotiation of the 1992 Protocols to these Conventions, there were 100 members with the 69 CLC and only 70 members supported 71 FC. This difference is not understandable.
omission of a third party acting with intent to cause damage or by the negligence or other wrongful act of any government or other authority responsible for the maintenance of lights or other navigational aids in the exercise of that function.

Throughout the operation of this compensation scheme, two issues received attention of the parties the most — insufficiency of the maximum limits, and the scope of pollution damage. Although there was no restriction on the member states or individuals through the states, who had suffered damage, on claiming additional compensation for the total recompense under the appropriate local legislation, the limits prescribed under the compensation schemes were rightly criticized for not being meaningful and just.11 Because of this, some countries, including the United States, enacted local legislation and did not accede to the aforesaid treaties.

“Pollution damage” was defined in the 69 CLC as “loss or damage caused outside the ship carrying oil by contamination resulting from the escape or discharge of oil from the ship, wherever such escape or discharge may occur, and includes the cost of preventive measures and further loss or damage caused by preventive measures.”12 The wordings seem to cover damage to property (boats, fishing gear, beaches, embankments etc.), expenses incurred in clean up operations, damages suffered in such operations and consequential economic losses. Also, cases of loss of life and injuries may be covered — although such incidents are relatively rare in the oil pollution cases.13 The 69 CLC and 71 FC did not provide a common definition of “pollution damage” but left its interpretation to the lex fori. The consequence of this was that countries which did not recognize the concept of compensable damage to the marine environment were, nevertheless, forced to contribute to the compensation of claimants in those countries which did recognize such damage as compensable.

We have noted above that “pollution damage” will include all kinds of pure economic loss suffered by individuals, governmental undertakings or purely governmental bodies. It is better, according to the author, that the job of quantification of pure economic loss, as done by local courts, is continued to be done so by them.14 The solicitude of the IOPC Fund in this regard may be a guide to local courts. Moreover, the definition as given in the 69 CLC did not clear the question

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11 The 1984 Protocols, which did not come into force, and the Protocols of 1992 will be dealt with at a later stage.
12 Art. 1.6 and Art. 1.7 define “preventive measures” in the following words: “ Preventive measures means any reasonable measure taken by any person after an incident has occurred to prevent or minimize pollution damage”. According to Art. 1.8 “incident” means any occurrence, or series of occurrences having the same origin, which causes pollution damage. Art. 2 of the Proposed Draft Amendment to the Emergency Protocol to the Barcelona Convention appropriately enumerates consequences of oil pollution incident in three segments: (i) Identification Element — the pollution incident constitutes an occurrence or series of occurrences having the same origin which result or may result in discharge of oil, or in a discharge, release or emission of other harmful substances. (ii) Situation Element — the pollution incident poses or may pose a danger or a threat to the marine environment, or to the coastline or related interests of one or more states. (iii) Action Element — the pollution incident requires emergency action or other immediate response. This is in line with the definition of “oil pollution incident” given in the 1990 International Convention on Oil Pollution Preparedness, Response and Cooperation (OPRC Convention). See Evangelos Raftopoulos, “Relational Governance for Marine Pollution Incidents in the Mediterranean: Transformations, Developments and Prospects”, 16 International Journal of Maritime and Coastal Law, (2001), p. 41.
13 So far, in one case a person who suffered personal injury while engaged in cleaning up activities received cost of medical treatment. See M. Jacobsson and N. Trotz, “The Definition of Pollution Damage in the 1984 Protocols to the 1969 Civil Liability Convention and the 1971 Fund Convention”, 17 J.L.M.C., (1986), p. 471. It may be noted here that there was no substantial deviation from the definition in the 1984 Protocols. The National Academy of Science had concluded in its 1995 report that there was no relationship between human health and marine contamination by oil pollution. See Forum, Oil Pollution – A Short Term Ecological Problem, The Scandinavian Shipping Gazette, No. 6 and 7, Feb. 1993, p. 45.
14 The IOPC Fund in some cases has considered the question of pure economic loss. According to it, the losses will include losses suffered by persons who depend directly on earnings from coastal or sea related activities and by hoteliers, restaurateurs and shopkeepers at seaside resorts. See Peter Wetterstein, “Trends in Marine Environmental Impairment Liability”, Lloyd’s Maritime and Commercial Law Quarterly, (1995) p. 230. Hereinafter L.M.C.L.Q.
pertaining to the pure impairment of the marine environment and wildlife depending on it due to oil pollution. Such claims have been rejected by 71 IOPC Fund. It has refused to pay for loss of fish or other marine resources. The author feels that this is a wrong approach. On the contrary, it will be appropriate to compensate such losses to the marine environment by which coastal states economically suffer. In situations where direct relationship between the oil spill and the loss cannot be established, the claim should not be granted, because if such claims are also entertained, there will be no end of it. The author, therefore, is of the opinion that the direct relationship approach is correct. On this basis, local courts can be the appropriate body to decide about this. But the problem is that for this purpose there are very few states that have specific legislation. It is, therefore, suggested that the member states of the 92 CLC and 92 FC should have specific rules based on common acceptable principles. This may be noted here that the legislation of Russia and judicial practice in the United States support payment of compensation in cases of impairment of the marine environment. Their practices may be of great help in enacting rules by the member states.

In spite of the fact that a large number of states had taken compensation under the scheme of the 69 CLC and 71 FC, there had been a widespread dissatisfaction about the maximum limits of compensation and sluggish procedure. Because of this, some countries, including the United States, preferred to deal with it on the basis of their own appropriately designed legislation. The author is of the opinion that the American practice is not a preferable approach. If every state has its own local legislation, there will be multiplicity in norms, there will be no certainty in amounts of compensation, and no uniform practice in procedure and determination of compensations will exist.

It may be noted here that once America was the front runner in preparation of the 1984 Protocols, but when it came for signing, it backed out with an excuse that although the limits prescribed in the Protocols were considerably more than the original limits, they could not meet certain damages caused by major oil pollution accidents. This shift in the American attitude probably was due to the Exxon Valdez incident. However, this act of the United States generated doubts in the minds of many countries because it is one of the biggest importers of crude oil and developing countries look at it before determining their practices in the international arena.

Another point to be discussed here is the two-tier system of payment of compensation under two different legal instruments, 69 CLC and 71 FC. Although the
two Conventions were complementary to each other and in major accident cases, under the given circumstances, the 71 FC became operative; some states became members of 69 CLC only, and some other states acceded to the 71 FC alone. It is very difficult to understand such decisions. If those states have a separate system of maintaining the American type fund, created on the basis of levy on imports of crude oil and other types of oils, then one can understand such policies. It is humbly submitted that that the two Conventions should have been related in such a manner that ratifying one of them would have resulted in becoming a party to the other one also. Had this been the policy, such strange practice would not have occurred.

The 1976 International Convention on Limitation of Liability for Maritime Claims (hereinafter LLMC) restricts shipowners’ liability in case of absence of their fault. This is to lessen the unbearable burden on ship owners. LLMC has given a turn to the right of the shipowner to limit his liability. Under the 1924 and 1957 Conventions a successful claimant could get full reimbursement in case of failure on the part of the shipowner in proving before the court that there was no fault or privity on his part. The 1976 Convention entitles the paying party to limit his liability unless the claimant proves that the ship owner is guilty of “conduct barring limitation”. The 1976 Convention, in spite of the suggested changes brought about in the 1957 Convention, could not become popular for long. Even now, its membership is not encouraging. The reason is that the world opinion is in favour of fixing liability on shipowners rather than protecting them. Some countries, including the United States, follow their own legislated law, and some others follow the 1957 Conventions. The law of the United States is enshrined in the U. S. Oil Pollution Act 1990 and the U. S. Limitation Act 1990. The LLMC has wide application. Contrary to this, the U. S. Limitation Act, in spite of comparatively lower limits, is not so popular. This is because the U.S. legislation is optional. According to the data compiled by the Maritime Law Association, limitations under the LLMC have been granted only in about 1/3 of the cases in which limitations were pleaded. By 2002, virtually all seagoing merchant vessels will be required to comply with the International Safety Management Code, a sweeping new mandate for vessel owners and managers to implement vessel safety management and environmental compliance system. This will further reduce the chances of applicability of the LLMC and the U. S. Limitation Act.

In ICL Shipping v. Chin Tai Steel Enterprise Co. Ltd., known as The ICL Vikraman case - where as a result of collision in the Straits of Malacca, ICL Vikraman suffered damage and for that ICL Raja Mahendra was arrested in

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18 Maritime Law Association Document No. 729 (May 2 1997). pp. 10527 - 10536. This is because the LLMC denies limitation if the loss resulted from the personal act or omission by the party seeking limitation, committed with the intent to cause such loss, or recklessly and with knowledge that such loss would probably result. Contrary to this, the U. S. Act denies limitation if any causative fault occurred with the owner’s privity or knowledge. A person who has a personal injury or fatal accident claim against a ship owner who is entitled to limit his damages under the Limitation Convention can claim against both “personal injury fund” and “property fund” under it, even if there are no property claims. Although the contrary arguments has at times been raised in the past, it cannot be supported either by the plain words of the Convention or by looking at the intention behind the Convention. See Grahm Aldous, “Claims by Personal Injury and Fetal Accident Claimants on Property Funds in Limitation Proceedings, L.M.C.L.Q. (2001)”. 150. For a contrary view, see P. Griggs and R. Williams, Limitation of Liability for Maritime Claims, (LLP, London, 1998), p.38.
Singapore and a case was filed in the United Kingdom which was disputed by the owner of the ICL Raja Mahendra - Colman J of the House of Lords deliberated on questions pertaining to jurisdiction in limitation action, geographical limit on the power to release security, and when is a fund actually available. On the first question, he ruled that the shipowner was entitled to constitute a limitation fund in England. For the second question he opined that the Singapore court had the jurisdiction to decide over the release of security. For the third question the court said that the power to release the security only arose if the limitation was "actually available" within the meaning of Article 13.3 of the Convention; and until a limitation decree was granted, the fund would not actually be available.20

III. THE PROTOCOLS OF 1984

Experience gathered in the initial years of practice relating to the two Conventions showed that although the system worked very well, certain adjustments, specifically with regard to limits, had to be made in order to keep the Conventions in line with the worldwide inflation, which had increased the amount of recompense and the cost of clean up operations.21 Accordingly, at a 1984 diplomatic conference, a number of amendments were adopted with respect to these Conventions, without disturbing the basic compensation scheme.22 These were collectively put in the form of the 1984 Protocols (hereinafter 84 Protocols).

The main amendments proposed to be brought about by the 84 Protocols were as follows:
1. Extension of the scope of application (coverage of unladen tankers; inclusion of preventive measures before or without an actual spill of oil; extension to the exclusive economic zone as established by the UN Convention on the Law of Sea 1982);
2. New definition of "pollution damage";
3. The term "incident" was clarified to include an occurrence which creates a grave and minimum threat of causing pollution damage;
4. Increase in the maximum limits of compensation amounts23;
5. Procedure of rapid amendments in the limitation amounts;
6. Deletion of owner’s entitlement to “indemnification” by the IOPC Fund;
7. Setting up a new organization (the “Fund 1984”) with certain amendments to the administrative structure of the Fund.

The proposed amendments were lucrative. It was thought that since they reflected the spirit of the comments made from time to time by the member states on the 69 CLC and 71 FC, they would be acceptable to them. But to the surprise of all the experts in the area, the proposed Protocols did not come into force. The failure

21 It was argued by almost all member states that the limits prescribed by the conventions due to inflation and increase in the cost of cleaning up operations have rendered the conventions unable to serve the purpose. It was also forcefully argued that there should be minimum liability limits for small vessels. See Z. Bordecki, “Compensation in the Light of the 1984 Protocols to Revise the 1969 CLC and 1971 Fund Conventions (unpublished paper), p. 16; Peter Wetterstien, n. 16, at p. 235.
22 Reinhard H. Ganten, “HNS and Oil Pollution Developments in the Field of Compensation for Damage to the Marine Environment”, 27/4 Environmental Policy and Law, [1997], p. 310.
23 The shipowner’s liability was limited to a maximum of SDR 59.7 million and the Fund’s maximum amount was raised to SDR 135/200 million. A minimum liability limit for oil pollution caused by small vessels was also introduced.
may be attributed to the following three factors: First, the United States did not support them and in 1990 enacted its own law. Japan also showed its reluctance. Since these two countries are the major importers of oil, their refusal generated a sense of doubt in minds of other states. Moreover, the refusal these two countries rendered the Protocols of no value. Second, the entry-into-force provisions of the Protocols were too stringent. Third, states, which were against the proposed amendments and involved in the arguments against the United States, did not show any interest in them.

During the making of the Protocols, apart from the limits of compensation, the definition of “pollution damage” was the most contentious aspect. We have noted above that the definition of “pollution damage” in the compensation regime was framed in loose wordings, which gave much power to courts to determine its scope on the basis of the principle of proximate cause, foreseeability and remoteness of the law of torts. This resulted in lack of uniformity in the definition. It was, therefore, demanded that to bring about certainty in the scope of the definition, it should have definite wordings so that the definition becomes precise. It was also considered important that the definition should deal explicitly with the problem of compensation for damage to the marine environment as such.24

Keeping this in mind the Committee of Whole, considered two definitions, considered, one proposed by the Legal Committee and the other one jointly proposed by the U.K. and Poland.25 In the first definition, the user of the words “actually incurred”, “actually sustained” and “direct result” were significant. It was pleaded that the user of these words would bring the definition closer to the actual damage and the amount of compensation would then be determined on the basis of the widely accepted principles of “causation and remoteness” under the law of torts. But those who opposed the definition pleaded that these qualifications would not be of much assistance to the courts and, therefore, would not contribute to the unification of interpretation of this definition. Rather, they might lead to divergent interpretations. Moreover, some delegations from civil law countries pleaded that in their jurisprudence “direct result” meant immediate physical damage. These arguments were not understandable to many. The supporters of the other definition pleaded that the original wordings of the definition should be maintained to the greatest possible extent because after laps of time a definite interpretation of the words used in the definition had already taken shape. They pleaded that there was a need for clarification of the definition only as regards damage to the marine environment. They appreciated the retention of the original text and the proposed addition of a proviso, which clarified that compensation for

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24 In the Legal Maritime Conference the Legal Committee suggested the following definition: “ ‘pollution damage’ means: (a) loss or damage caused out side the ship carrying oil by contamination resulting from the ship, wherever such escape or discharge may occur, provided that compensation for impairment of the environment shall not exceed the aggregate of the costs of reasonable measures of impairment actually undertaken or to be undertaken and economic loss sustained in direct relation to the exploitation of the environment; (b) the costs of preventive measures and further loss or damage caused by preventive measures, irrespective of the results thereof.” The United Kingdom in conjunction with Poland suggested another definition in the following words: “ ‘pollution damage’ means: (a) loss or damage caused out side the ship carrying oil by contamination resulting from the escape or discharge of oil from the ship, wherever such escape or discharge may occur; provided that compensation for impairment of the environment other than loss of profit from such impairment shall be limited to costs of reasonable measures of reinstatement actually undertaken or to be undertaken; (b) the costs of preventive measures and further loss or damage caused by preventive measures.” The second definition was adopted by the conference, because it received 28 votes; the first definition received only 19 votes. 57 states voted for the replacement of the definition contained in the existing compensation regime. See LEG/CONF. 6/57; LEG/CONF. 6.C 2/W.P. 21.

25 Ibid.
impairment of the environment, other than loss of profit from such impairment, should be limited to the cost of reasonable measures to restore the polluted environment.\(^{26}\)

However, the definition approved the following claims for payment of compensation: (a) loss of life, personal injury and damage to property (damnum emergens), including the environment; (b) loss of profit or income (lucrum cessance)\(^{27}\); and (c) cost of reinstatement or preventive measures.

As stated above, the proviso to the clause (a) of the definition allowed payment for impairment of the environment. But the payment will be limited to costs of reasonable measures of reinstatement actually undertaken or to be undertaken. It may be noted here that the user of “to be undertaken” covers payments for future reinstatement activities, because the word “cost” does not denote to the word “undertaken” only.\(^{28}\) This has brought in the element of justice into the system because in certain situations one may lack money, and the state may decide to defer the reinstatement activities. This interpretation is correct because the word “costs” relates to both the situations, reinstatement “undertaken” and “to be undertaken”.\(^{29}\) It may also be noted here that the state or the individual, as the case may be, in order to get compensation for the impairment of the environment, will have to prove that the costs incurred were actual and not speculative. The case is the same pertaining to future reinstatement activities. It may be noted here that if the payment of compensation is being made now and reinstatement activities will be carried out in future, how will actual costs be determined? It is bound to be some sort of speculation, even if actual practice in such situations is followed or experts’ opinions are taken. The author is, therefore, of the opinion that so as to bring about uniformity in the practice and impute the element of justice, certain devices should be developed. On the contrary, courts in respective states will have liberty to determine its scope and then the object for maintaining certainty in the practice will vanish. Jacobsson & Tortz are of the opinion that while determining the meaning of the term “reasonable”, account must be taken of the capacity of the marine environment to restore itself.\(^{30}\) We feel that the user of the word “reasonableness” here will help alleviate arbitrary and speculative claims but cannot fully eliminate them.

There was no mention in the Protocols about the damage to the marine environment as such. Although it can be pleaded that the expression “impairment of the environment” is all encompassing, this would include damage to the marine environment also. However, it was felt by some of the delegates, including that of


\(^{27}\) Malaysian delegation raised a valuable question whether the definition should use words “loss of income” or “loss of profit” and supported the second one, which was accepted by other fellow delegates. It can be said here that the expression “loss of profit” was also meant to cover “loss of income”, even if it does not give rise to any profit.

\(^{28}\) The International Convention on Civil Liability for Bunker Oil pollution Damage, 2001 also provides that compensation for impairment of the environment other than loss of profit from such impairment shall be limited to costs of reasonable measures of reinstatement actually undertaken or to be undertaken; and the costs of preventive measures and further loss or damage caused by preventive measures.

\(^{29}\) This interpretation was approved by the Committee of the Whole and in the Plenary. In the Committee of the Whole, two delegations (Federal Republic of Germany and the United States) firmly stressed this interpretation. In the plenary, the observer delegation of the International Group of P & I Associations made an imperative statement to this effect. There were no objections against this interpretation. See LEG/CONF. 6/SR. 4, p.4; LEG/CONF.6/SR.4, p.5.

\(^{30}\) See n. 14, at p. 489.
Poland, at the initial stage, that there should be specific mention about impairment of the marine environment.\textsuperscript{31}

The new proviso is also of great significance in respect of another important issue pertaining to consequential damage. In the new definition, reference has been made to compensation for impairment of the environment “other than loss of profit from such impairment”. This may be noted that unless the loss is related to damage to property, it will be difficult to ascertain it.\textsuperscript{32} This situation also warrants certain guidelines so that loss could be ascertained in all types of cases with the maximum degree of certainty and uniformity. We are of the opinion that the previous practice of the IOPC Fund in this matter may be the basis for formulating such guidelines.

Under the definition, compensation for lost use values\textsuperscript{33} and costs of assessing natural resource damages can also be claimed. In addition to these, the costs of preventive measures too can be claimed. It was suggested by the Polish delegation that the phrase “threat of pollution” instead of “threat of damage’ will be a better choice. The reason given was that on the contrary there could be no compensation whatsoever under the compensation scheme. This was accepted. One question in relation to which is yet to be answered is: Where expenses were incurred in view of the threat to pollution but pollution did not take place, can this be claimed as compensation within the definition? We feel that this can be claimed because the simple meaning of the expression “the costs of preventive measures” covers this expenditure also. This gets strength from the fact that in many cases because of preventive measures probable threat of accidents and their consequential damage are averted. So, the payment of such expenditures is in the interest of the environmental protection and in line with the spirit of the compensation scheme.

\textbf{IV. THE PROTOCOLS OF 1992}

The 1992 Protocols retained most of the substantive provisions of the 1984 Protocols. In fact, the object of the 1992 Protocols was to give effect to the 1984 Protocols with less stringent entry-into-force provisions. Because of this the Protocols came into force in a comparatively shorter time on 30\textsuperscript{th} May 1996.\textsuperscript{34} The 1992 compensation scheme became more popular when the voluntary industry scheme of compensation under the TOVAPLOP and CRISTAL ceased to cover pollution incidents.\textsuperscript{35} It is now hoped that the 92 CLC and 92 FC will have wide acceptance. The important features of the 92 Protocols are the following: (i) There is a limited shipowners’ liability backed by compulsory insurance. The limitation amounts depend on the size of the ship. The maximum amount is nearly 60 million Special

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\textsuperscript{31} This may be noted that Article 235 (3) of the United Nations Convention on the Law of the Sea 1982 (UNCLOS) provides that: “With the objective of assuring prompt and adequate compensation in respect of all damage caused by pollution of the marine environment states shall cooperate in the implementation of existing international law and the further international law relating to the responsibility and liability for the assessment of and compensation for damage and settlement of related disputes...”

\textsuperscript{32} It may be noted that in the first proposal, mentioned above, the expression “loss of profit actually sustained as a direct result of contamination” was used. For some, this would have been a better choice. But for the reasons mentioned above this expression would have to other problems.

\textsuperscript{33} The lost use values include various types of uses of marine ecosystem. The scope of it is not static. It might increase with the increase of the use of the ecosystem.

\textsuperscript{34} As at 31st July 2001, the Protocol to the CLC had 70 contracting states, and the Protocol to the FC had membership of 66 states. After coming into force of the two Protocols, the two Conventions are better known as 92CLC and 92 FC.

\textsuperscript{35} These schemes were established in 1969 and 1971 to cover for an interim period those pollution incidents that were not by then covered by the 69 CLC and 71 FC.
Drawing Rights (SDR), the equivalence of that is about 82 million U. S. Dollars. The IOPC Fund covers damage up to 135 million SDR including the shipowner’s liabilities, if any. This total amount is available irrespective of the size of the ship. (ii) Compensation has to be paid whenever damage occurs in the territory of the state party to the 92 F C, including the territorial sea and the Exclusive Economic Zone (EEZ), irrespective of the nationality of the owner of the ship and of whether the ship is flying a flag of a contracting party. (iii) Expenses incurred for preventive measures are recoverable irrespective of the fact whether an actual spill of oil has occurred, provided that there was grave and imminent threat of pollution damage. Reinhard H. Ganten has noted that from 1979 to the end of 1996 the IOPC Fund was utilized in settlements of 75 incidents. By and far most of the settlements were satisfactorily reached, there were very few that went to the court.

This may be noted that after the revision of the maximum limits and induction of provisions for an easy procedure for future revision of them, it is said that major oil accidents can also be settled under the 92 CLC and 92 FC compensation scheme. In spite of this, some countries opposed the scheme. They are of the opinion that it will be erroneous to say that the scheme is competent enough to meet the compensation of major oil spill incidents, which may cause widespread and long-lasting damage involving payment of huge money as compensation. But their doubts are far from reality. Even in a case where the limits do not cover the damage, the owner of the ship is not exonerated from the liability. He can be brought for payment of the extra amount of compensation in a local court under a suitable legislation of the state. This is because owner’s liability will remain even when the payment of compensation under the IOPC Fund has been made.

Here the following questions arise: Who can bring the case for restoration of the environment after its impairment due to oil pollution? Can an appropriate government authority bring it? Can individual(s) bring it? We are of the opinion that it can be brought by both. There can be another mode, e.g., individuals can bring only through the appropriate authority of the government. There is a move to allow non-governmental organizations (NGOs) to bring representative petitions because they, according to them, are guardians of the public. The author feels that NGOs should be allowed to file representative petitions only on a written permission of the individual(s), who are entitled to bring the case.

In order to avoid the complexity of application of provisions of 69 CLC/ 71 FC and 92 CLC and 92 FC, the 92 FC’s Article 31 provides that each state which has deposited an instrument of ratification, acceptance, approval or accession, should denounce the 71 FC and 69 CLC six months after the fulfillment of the following requirements: (i) membership of at least eight states (by deposit of instruments of ratification, acceptance, approval or accession with the Secretary General of IMO),

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36 This may be noted here that the 92 CLC and 92 FC have a reformulated form of the concept of “pollution damage”. Now, compensation for impairment of the environment other than loss of profit for such impairment will be limited to costs of reasonable measures of reinstatement actually undertaken or to be undertaken. Hence, compensation will not be payable for pure ecological damage to the marine environment as a result of oil pollution damage.

37 See footnote 22, at p. 311.

and (ii) at least 750 million tonnes of oil was received by those who are or would be liable to contribute to the 92 FC. Article 34.5 states that any contracting state to the 1992 Protocol, which has not denounced the 1971 FC and 1969 CLC, will be deemed to have denounced the 92 Protocol to the 92 FC itself; moreover, any party to the 1992 Protocol to the 92 FC which ratifies, accepts, accedes or approves to the 69 CLC will be treated as having denounced 1992 Protocol to the 92 FC as well. As a consequence, those states joining the 92 FC, before its entry into force at an international level but falling short of depositing the appropriate instrument with the Secretary General of the IMO before 15 May 1997 will still be considered members of the 71 FC only.\(^39\) This can be understood from an illustration given by Lorenzo Schiano di Pepe: On 15th November, the Netherlands deposited an instrument of accession to the 92 FC Protocol and this triggered the requirements for the compulsory denunciation of the 71 Convention. According to the relevant provisions of the Convention, all states that had acceded to the new agreements had also deposited instruments of denunciation by 15th November 1997, as required by the 1992 Protocol itself. These denunciations took effect after 12 months; the result was a period of time (from 30th May 1996 to 15 May 1998) in which both sets of Conventions were applicable in respect of all states, which were parties to the new agreement as well as to the old agreement. Although the Protocols attempted to resolve the membership problems, there remained scores of questions, which cannot even now be satisfactorily answered.\(^40\)

During the transition period, both the sets of compensation schemes remained applicable. In 1996, crude oil was discharged from a Russian ship and caused damage to the German islands. Germany had already ratified the 92 Protocols, whereas the tanker was registered in Russia, a non-member of the Protocols. The shipowner was determined to be liable to pay compensation under the 69 CLC, 71 FC and 92 FC. But he was entitled to claim limitation under the 69 CLC.\(^41\)

During the transition period, the schemes of 69 CLC, 71 FC, and 92 CLC and 92 FC and their Protocols, were applicable. After the expiry of the transit period, one of the two schemes depending on the membership to the Conventions is applicable because to continue with one scheme is to surrender the other scheme. But where one state follows one scheme and the other state follows the other scheme, any of the two will be applicable. If the tanker is registered in a state, which has ratified the 92 Protocols, but the state that has suffered damage endorses the older scheme, the owner of the tanker will be liable to pay compensation under the new compensation scheme with the new limitations also. Contrary to this, if the tanker is registered in a state, which endorses the old scheme and the state that has suffered damage has acceded to the new compensation scheme, payment of compensation will be under

\(^{39}\) Lorenzo Schiano di Pepe, "The International Oil Pollution Compensation Fund: The Transitional Period and Beyond", *Env. Liability*, (1983) p. 85. Also see the document 71 FUND/EXC.52/10 (10th February 1997). On 15 November 1996, the Netherlands deposited an instrument of accession to the 92 FC Protocol and this triggered the requirements for the compulsory documentation of the 71 Convention. According to the provisions of the Protocol, all states, which had acceded to the new agreements, had also deposited instruments of denunciation by 15 November 1997, as required by the 1992 Protocol itself. These documentations were to take effect after 12 months; the result was a period of time (from 30th May to 15th May 1998) in which both sets of Conventions were applicable in respect of all the states, which were parties to the new as well as to the old agreements. See the document 71 Fund/EXC.52/12 (8th January 1997).

\(^{40}\) The Director General of the IMO has pointed out these issues. See Lorenzo Schiano di Pepe, n. 34, at p. 88.

the new scheme but with limitation of the old scheme. It may be noted here that the state, which has not ratified the new scheme, will have to pay under the new compensation scheme if the ship is registered in a state adhering to the new compensation scheme. And if it suffers damage, payment of compensation and applicability of limitations will depend on the membership of the state where the ship is registered. There will be no problem if both the states, the flag state and the state that has suffered damage, belong to the same scheme.\textsuperscript{42}

But in all cases, continuation of both the schemes is not in the interest of countries and oil importing companies situated in them. The reason is that the division of membership means less mobilization of financial resources in the Funds, and applicability of the old compensation scheme means applicability of the lower limitation, stringent procedure for revision of the limits, sluggish procedure and no payment of compensation for damage to the marine environment. We have already pleaded above that there should be uniform practice and a greater degree of international cooperation in the area of vessel source marine pollution. Multiplicity of law is not warranted because it would create confusion in applicability of law and difficulty in bringing about improvement on it. The owner of the tanker will have to keep recourse of laws with the change of country. It will cause tremendous amount of difficulty to him. For these reasons there should be only one scheme of compensation, preferably the new one. States that do not wish to subscribe to the scheme should be free to develop their own law.

We have noted above that in the new compensation scheme there exists simple and fast procedure about the payment from the Fund. The practice of the IOPC Fund in the post transition period reveals that to get money from the 92 Fund is comparatively easier.\textsuperscript{43} However, efforts should be made to make it even faster. It is possible by having area wise database and persuading the state that has suffered damage to accept that. Increase in the cleaning up charges, hike in restoration charges and general inflation with the lapse of time render the limits of payment of compensation meaningless. In other words, with the lapse of time if limits are not revised, the element of recompense ceases to exist. Therefore, to make the compensation scheme close to the damages by pollution, timely revision is necessary. It will also help generating interest among the non-member states to become member of the scheme. They will not think of going independently. At the end of the century 2000, there was a strong demand that in view of the piled up inflation the limits given in the 92 CLC and 92 FC should be revised. Perhaps, in view of this and the Erika incident, the Legal Committee in its 82\textsuperscript{nd} session dated 16-20 October 2000 revised the existing limits with effect from January 2003. The revised compensation limits will be:

a. For a ship not exceeding 5,000 gross tonnage, liability is limited to 4.51 million SDR (US Dollar 5.78 million).\textsuperscript{44}

b. For a ship 5,000 to 140,000 gross tonnage, liability is limited to 4.51 million SDR plus 631 SDR for each additional gross tonne over 5,000.\textsuperscript{45}

\textsuperscript{42} For these issues, see G. Gauchi, \textit{Oil Pollution at Sea}, (Chichester, New York, 1997).

\textsuperscript{43} For an easy and amicable disposal of claims and for convenience of claims, the IOPC Fund sets up claim offices near the place of incident. Every affected person has an easy access to the office. Until now some 4000 claims have been presented before the Erika Claims Handling Office, situated in France.

\textsuperscript{44} Under the 92 Protocol, the limit was 3 million SDR.
c. For a ship over 140,000 gross tonnage, liability is limited to 89.77 million SDR.\footnote{Under the 92 Protocol, the limit was 3 million SDR plus 420 SDR for each additional gross tonne.}

The IOPC Fund amendments raise the maximum amount of compensation payable from the IOPC Fund for a single incident, including the limit established under the CLC amendments, to 203 million SDR, up from 135 million SDR. However, if three states contributing to the Fund receive more than 600 million tones of oil per annum the maximum amount is raised to 300,740,000 SDR, up from 200 million SDR.

The amended amounts are quite enough to cover the Erika incident type disasters. In future also if warranted by circumstances, the limits may further be revised. It is for this reason that the 92 FC and 92 CLC are getting response faster than the 69 CLC and 71 FC.\footnote{Under the 92 Protocol, the limit was 59.7 million SDR.}

V. HNS CONVENTION

Of course, not only the marine transport of oil or nuclear material raises questions of civil liability. Of no less concern is the maritime transport of other dangerous substances\footnote{As of 10th April 2001, there are 55 members of the 92 FC and another 9 will join by 10th April 2002. Contrary to this, 71 FC has only 32 members and 6 of them are leaving by 10th April 2002.} However, the question of payment of compensation for damage arising out of the carriage of hazardous and noxious substances other than oil at the sea, in absence of a global convention, was governed generally by local legislation. The regulations at the international level were considered as piecemeal, anachronistic and in comparison with CLC and FC unsatisfactory. It was, therefore, felt that there should be a regime to meet the challenges of marine pollution by this source. After a long discussion, a Draft Convention was negotiated. On 3rd May 1996, the Draft Convention was adopted by the IMO. The International Convention on Liability and Compensation for damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea 1996 (HNS Convention) is now open for signing and ratification, which might take years because the response is not encouraging.\footnote{John G. Lammers, n. 17, at p. 95.}

The HNS Convention is in line with the compensation scheme contained in the CLC and FC: There is strict liability on the ship owner; the ship owner is obliged to get the ship ensured; the situations under which the ship owner is exonerated from the liability are the same; it contains maximum limits\footnote{Only 8 countries signed the Convention, and as on May 21, 2001 there are only two members, Russia and the United Kingdom. The Convention will enter into force after 18 months after the fulfillment of the following conditions: (a) 12 states have accepted the Convention, 4 of which have not less than two million units of gross tonnage; and (b) provided that persons in these states who would be responsible to pay contributions to the general account have received a total quantity of at least 40 million tonnes of contributing cargo in the preceding calendar year. The United Kingdom is keen for the enforcement of the Convention and trying to persuade other states to be its members. See <http://www.imo.org/newsroom/contents.asp?topic_id=514> dated, 5.1.2001.}, and there is a two tier system of compensation. But there are some distinguishing points also: Firstly, the definition of hazardous and noxious substances is much more wide to include the maximum number of such substances; Secondly, it covers not only

\footnote{The owner’s limitation amounts are higher as compared to the 92 CLC and 92 FC. The limits can be calculated on the basis of the following points: (a) 10 million units of account (SDR) for ship not exceeding 2000 tonnage; and (b) For a ship with a tonnage in excess thereof the following amount in addition to that mentioned in (a): For each unit of tonnage from 2001 to 50,000 units of tonnage, 1500 units of account for each unit in excess of 50,000 units of tonnage, 360 units of account provided, however, that this aggregate amount shall not in any event exceed 100 million unit of account.}
pollution damage but also loss of life and personal injury as well; it has two tier system, but under single legal instrument; 3. The ship owner is exonerated from the liability if he was not informed by the shipper about the nature of the substances and this failure became the reason of the damage or lead the owner not to ensure the cargo; 4. States may declare that the Convention does not apply to ships not exceeding 200 tons, carrying hazardous and noxious substances only in packaged form and being engaged on voyages between ports of that state or between two states that have agreed to make a declaration to this effect. Finally the HNS Fund is divided into four different accounts, namely a general account, the oil account, the liquid gas (LNG) account and the liquid petroleum (LPG) account.

In spite of certain shortcomings, the HNS Convention fulfills the need of the time\textsuperscript{51}. It is a good step in the right direction. The procedure is simple, the liability is graduated, the limits are high which can easily be revised and it carries genuine sharing of burden. Although there has not been any large-scale destruction due to incidents where substances other than oil caused deleterious effects on the environment, the HNS Convention is going to be a useful legal instrument.

A critical examination of the HNS Convention reveals the some deficiencies, which can be taken care of in future. Article 1.5 of the Convention defines the term “hazardous and noxious substances” on the basis of the codes and conventions made for the purposes other than liability for marine pollution. Reinhard H. Ganten finds it a useful definition. He writes\textsuperscript{52}, “The main benefit of this approach lies in the fact that ship owners, insurers, cargo agents and mariners generally were already familiar with these conventions and codes and used to dealing with the substances covered by them as hazardous and noxious. The liability provisions follow specific provisions regarding the handling of such cargo. There is no need for a specific body to be set up to monitor new chemical in order to ascertain whether they should be included in the HNS Convention. In addition, the adoption of a freestanding list would have caused considerable problems in respect of the system of contributions to the HNS Fund.” He has written this because there was a move mooted by the IUCN that there should a schedule of hazardous and noxious substances and the definition should simply state that hazardous and noxious substances would mean those substances, which are enlisted in the schedule. We feel that this would have been a better choice for the following reasons: (a) It would have provided some sort of flexibility in determining hazardous and noxious substances; (b) It would have been in line with the Basel Convention (Convention on Transboundary Movement of Hazardous and Noxious Substances 1989); and (c) It would have given a clear picture about the substances to the states, shippers and ship owners. The other course would have been to give a general definition and to give local courts bower to determine its scope at the time of its enforcement. But had this been accepted, it would have been the worst situation.

Another major issue is whether wastes carried on board a ship for the purpose of dumping are included in the scope of the HNS Convention. There have been two


\textsuperscript{52} See n. 22, at p.311.
views on this issue. One group backed by the IUCN favoured to include them within the scope of the Convention, but the other group opposed it and suggested to deal with this problem under a separate Protocol to the HNS Convention, which ultimately got through.

One of the most controversial questions during the debates and possibly the main issue leading to the failure of the 1984 conference was whether the Convention should be restricted to cargo carried in bulk. The 1996 conference agreed on the inclusion of packaged cargo, but as a compromise it was decided to allow states to make a reservation to the effect that the Convention does not apply to ships not exceeding 200 gross tonnage and carrying hazardous and noxious substances only in packaged form if these ships are engaged on voyages between ports and facilities of that state or of neighbouring states that have agreed to make a reservation to this effect. This reservation takes account of the fact that there are states in which numerous small ships trade within the state with small quantities of such substances and thus there is no need for an international liability regime for them. Moreover, the control of the carriage of these substances would cause a disproportionately heavy administrative burden. This situation applies in particular to Japan.53

To keep the 1976 Convention on Limitation of Liability for Maritime Claims (LLMC), which allows shipowners to limit their liabilities for maritime claims in general, including claims arising out of HNS Convention, a Protocol in 1996 has been negotiated. By virtue of this Protocol, states ratifying the HNS Convention will be obliged to ratify the Protocols also, which authorizes them to make a reservation that the Limitation Convention will not govern HNS claims. We feel that this mechanism will ensure compensation even in case of most of the possibly anticipated incidents. It may be noted here that until now there has not been any disastrous accident. Even if in future it occurs, the limits provided in the HNS Convention itself would be enough to compensate all possible damage.54

Professor Edger Gold is of the opinion that the HNS Convention is a very complex instrument, which will undoubtedly have many problems of interpretation as it combines carrier, manufacturer, shipper and state interests in one single instrument for the first time55. He is right to say that for the first time such a wide coverage has been given to a civil liability convention on marine pollution, but its comprehensiveness is warranted to give it a wider application and to avoid multiplicity of law. If any problem in respect to its interpretation arises at any point of time, it can be resolved. Such a statement, given by an eminent scholar in the subject will create doubts in the minds of states, and will adversely affect the popularity of the Convention.

One thing important to mention here is that the popularity of the Convention will depend on its acceptance by developed countries, especially the United States. But its acceptance by the United States is doubtful because it already has the Comprehensive Environmental Response, Compensation and Liability Act 1980, which deals, among other things, with the liability for marine pollution by hazardous

53 Reinhard H. Ganten, n. 22, at p.313.
54 “Damage”, in line with the 69 CLC and 71FC, is defined to include loss of life or personal injury on board or outside the ship and loss of and damage to property outside the ship. Provision is also made for damage caused by contamination of the environment. See Article 1.6 (a), (b), (c) and (d).
substances from any facility or any vessel. The Act empowers the U. S. Coast Guards and the Environment Protection Agency to respond to such a situation. Although the “Super Fund” specially created for this purpose generally meets the expenses, responsible parties can be held liable and be asked to compensate the damages. The liability is strict but subject to certain limits, which will be available to the owner or operator of the ship on fulfillment of certain conditions. Other provisions and procedure are not innovative. The Act provides numerous enforcement options.\(^\text{56}\)

The Protocol on Preparedness, Research and Co-operation to Pollution Incidents by Hazardous and Noxious Substances, 2000 (HNS Protocol), which has not come into force\(^\text{57}\), like the International Convention on Oil pollution Preparedness, Response and Co-operation, 1990 (OPRC), aims to provide a global framework for international co-operation in combating major incidents or threats of marine pollution by establishing measures in co-operations with other countries. Ships will be required to carry a shipboard pollution emergency plan to deal specifically with incidents involving HNS Convention. When the HNS Protocol comes into force, it will certainly ensure that ships carrying hazardous and noxious liquid substances are covered, or will be covered, by regimes similar to those already in existence for oil incidents. But the difficulty is that states are not showing enthusiasm to the Protocol. It is thus also suffering from the fate like HNS Convention.

VI. CONVENTION ON LIABILITY AND COMPENSATION FOR POLLUTION FROM SHIP’S BUNKERS

A great deal of pollution is caused by the heavy fuel oil from ordinary cargo ships. During the discussions of making the HNS Convention, it was mooted that this area of marine pollution should be included within the HNS Convention, but ultimately it was rightly decided that this area of marine pollution should remain out of the ambit of this Convention.\(^\text{58}\) Since the existing compensation regime does not cover this source of marine pollution, a separate convention to cover this situation was proposed to be made. Towards this end, the International Convention on Civil Liability for Bunker Oil Pollution Damage (Bunker Oil Pollution Convention) was adopted on 23rd March 2001.\(^\text{59}\) The Convention applies to damage caused on territories, including territorial seas and exclusive economic zones of the member states. It provides a freestanding instrument covering pollution damage only. The Bunker Oil Pollution Convention is modeled on the 69 CLC. With a need for registered owners of vessels to have compulsory insurance cover, under this Convention action can directly be brought against the insurer, as it requires ships over 1000 gross tonnage to maintain insurance or other financial security to cover the liability of registered owners for pollution damage in an amount equal to the limits of the liability under the applicable national or international regime. It may be noted that

\(^{56}\) Ibid at pp.152-153.
\(^{57}\) Entry into force will be twelve months after ratification by not less than fifteen states.
\(^{58}\) Nicolas Gaskell, “Developments in International Maritime Law”, 28/3-4 Environmental Policy and Law, [1998].
\(^{59}\) It will enter into force 12 months following the date on which 18 states, including 5 states each with ships whose combined gross tonnage is not less than 1 million gt have either signed it without reservation as to ratification, acceptance or approval or have deposited instruments of ratification, acceptance, approval or accession with the IMO Secretary General. The Convention applies to damage caused on the territory, including the territorial sea and exclusive economic zones of States Parties.
in the bunker oil pollution regime, there is no two-tier system of compensation. This is because in this regime no cargo is involved. However, in the situation where the ship owner is unable to pay for any reason, the charterer, manager of the ship or both can be held liable. Since only the registered owner would be required to hold insurance to cover its liability, there is no guarantee that compensation will be forthcoming, for it is possible that none of the other persons liable would have the necessary funds available for him.\(^{60}\) In other words, this regime lacks guarantee about the payment of compensation fully, or in some cases even partially. In case of a disaster, the matter becomes more doubtful.

Furthermore, unlike the 92 CLC and 92 FC, the Bunker Oil Pollution Convention does not contain its own freestanding provisions on limitation of liability. Instead, the liability of the ship owner will be limited in accordance with the provisions of the national or international liability regime in any particular circumstance. Nevertheless, the amount of liability cannot be higher than the limits prescribed in the 1996 Protocol to the LLMC.\(^{61}\) This is because the limits in some national and international regimes are generally very low and the Convention does not provide guarantee for payment of all the claims. In addition, if a national limit is higher than the LLMC, the higher limit cannot be applied.\(^{62}\) We are of the opinion that for making the Convention just and in line with the existing compensation regimes, some adjustments should be made therein.

For facilitating its just and meaningful enforcement the Conference, which adopted the Bunker Oil Pollution Convention also adopted the following three resolutions: Resolution one urges to accede to the Protocol to the LLMC. The second resolution requests all IMO members in co-operation with the IMO and others to promote and provide directly, or through IMO, support to states that require technical assistance for- (i) the assessment of the implications of ratifying, acceding, approving or accepting and complying with the Convention, (ii) the development of national legislation to give effect to the Convention, and (iii) the introduction of other measures for, and the training of personnel charged with the effective implementation and enforcement of the Convention. The third resolution urges for considering the need to introduce legal provision for protection for persons taking measures to prevent or minimize the bunker oil pollution.

We, appreciates the efforts of the IMO and hope that the world community will accede to the Bunker Oil Pollution Convention, because this Convention makes the compensation regime pertaining to vessel based marine pollution a comprehensive legal framework (The Convention should be considered a supplement to the 92 CLC and 92 FC).

We have noted above that the definition of “pollution damage” given in the 92 CLC and 92 FC is ambiguous and misleading. The best course would have been if an all-encompassing list of pollution damage had been given with the possibility of minor adjustments if demanded by circumstances. The same mistake was committed while defining the “hazardous and noxious substances” in the HNS Conventions. To

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\(^{61}\) The Convention urges for ratification of the 1996 Protocol to the LLMC.

\(^{62}\) Ibid, p. 58.
say that the definitions given in the said Conventions were already understood in that sense by those who are involved in such activities is nothing but an excuse. These definitions, in some cases, might lead to uncertain situations. The same mistake has been committed in the Bunker Oil Pollution Convention about the definition of “pollution damage”. It has given a descriptive definition. This might yield the same result. Instead, it would have been a wise decision, had the definition proposed by the IUCN been accepted. The proposed definition contained a detailed list of possible damages. This would have brought about certainty in the law and its application.

In the existing schemes of civil liability in cases of damage of marine environment pollution. It has been provided that persons taking measures to prevent or mitigate pollution in certain circumstances may claim immunity from suits filed against them. This has been abandoned in the Bunker Oil Pollution Convention. It has been remarked by some experts that this course has been adopted for facilitating these people.\(^63\) Now they will be sure that in case they undertake or engage in any preventive activities, they will not be debarred on the basis of the immunity clause. It is humbly submitted that the suggested legal position is a welcome feature.\(^64\)

**VII. LEGISLATION FOR ENFORCING COMPENSATION REGIMES**

It may be noted at the outset that there are some states like Malaysia, which have accepted 69 CLC and 71 FC but have not yet become party to their new versions. On the other hand, some states like Singapore, which have accepted only 69 CLC, have now accepted its new version with or without 92 FC\(^65\). Contrary to these, there are some states like the United Kingdom, which have accepted the wholesome of the compensation scheme, including the HNS Convention except the Bunker Oil Pollution Convention. The United States has been unique for not accepting the new scheme of compensation. Almost all states have made local legislation for fixing liability in case of oil pollution damage by tanker. Those who are members of one or both of these Conventions have made legislation to give effect to the provisions of the Convention or Conventions, as the case may be, with some suitable variations. The United States has its independent legislation. It is said that the U. S. legislation is comparatively a better regime, as it is competent enough to meet all disastrous incidents resulting in large-scale oil spills and consequential environmental damage.\(^66\)

It will be pertinent here to have a brief account of the legislation made for giving effect to Convention or Conventions in addition to other enactments made for abatement and control of marine pollution, and compare them with the legislation of the United States. The United Kingdom has played a leading role in making and implementing the HNS Convention. It had already implemented the 92 CLC and 92 FC by the Merchant Shipping Act 1995 (the 95 Act). In order to implement the HNS Convention this Act was amended by the Merchant Shipping and Maritime Act

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\(^{61}\) IUCN, the International Tanker Owners Pollution Federation and Protection and Indemnity Clubs (P & I Clubs) were prominent among them.

\(^{62}\) For the opposite view see Louise de Fayette, n. 60, at p 58.

\(^{63}\) This may be noted that Singapore has accepted both 92 CLC and 92 FC.

\(^{64}\) The year 2000 amendments to the 92 CLC and 92 FC have considerably increased the limits of compensation, yet they are not enough to cover some cases of large scale damage. It may also be noted that pertaining to the Erika incident the Executive Committee at its January 2001 session limited the payment up to 60 per cent only. It was said that in the next session the percentage of payment would be revised. But one should not be confident about the one hundred per cent payment.
The 95 Act generally follows the important substantive provisions of the compensation scheme provided in the 92 CLC and 92 FC. The following are the notable features of the 95 Act: First, the 95 Act provides for compensation to be paid as a matter of strict liability for pollution damage, for damage in course of prevention and minimization costs, and pre-emptive action taken in case of grave and imminent threat of damage. The liability is generally subject to exemptions provided in the Conventions. Secondly, it makes full provisions for the limitation of the liability with the exception pertaining to full liability. In the case of seeking unlimited liability, burden of proof is on the plaintiff. Thirdly, there are additional complications facing the plaintiff. Some arise from inconsistencies in the drafting of 95 Act vis-à-vis the corresponding provisions of the 92 CLC. For example, the 92 CLC makes provisions for imposition of unlimited liability for damage caused by the personal act or omission of the owner, whereas the 95 Act does not. It is also difficult in the case of a corporate owner to assess where in the company hierarchy the intent or recklessness must exist before liability for damage will become unlimited. In addition to the general liability, the 95 Act provides for payment of compensation for damage to the environment. But it is limited to any environmental damage, which results in loss, and the cost of any reasonable measures of reinstatement actually taken or to be taken. It may be noted here that the 95 Act has not repealed the existing statutes, including the statutes made by some state governments, and does not exclude the remedy available in the law of torts under the head negligence. The effect of this is that in any disastrous incident, even of greater magnitude than the Exxon Valdez spill, compensation under the existing regime of the United Kingdom is expected to be full.

As has been stated above, the 95 Act follows the procedure prescribed under the 92 CLC and 92 FC and fixes liability on strict liability basis. It also accepts the scheme of limitation of liability as contained in the 92 Liability Convention, but puts the burden of proving on the claimant. He will have to prove that the owner of the ship was reckless for claiming the unlimited liability. Here it is notable that the 95 Act gives a tough meaning to the term “reckless”. According to the Act the plaintiff will have to prove that the owner acted in the knowledge that the damage or cost would probably result. Moreover, in case of deliberate oil spills, the 92 CLC prescribes unlimited liability. But the 95 Act is silent on this. Probably, this difference has been made to impose more sanctions on the part of shipowners so that they take more precautions.

There are clear and real difficulties before the court in determining liability for pure economic loss under the 95 Act. For example, remoteness and extent of damage may involve difficult questions of degree for the court. Nonetheless, courts are functionally well equipped to answer questions of liability after considering the

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67 Section 14 of the Act introduced three new sections into the 95 Act. The Convention has been transposed directly into the schedule 5A of the 95 Act.
68 See Gavin Little and Jenny Hamilton, n. 51, at p.391.
70 See sections 153 and 156 of the Act.
71 In this case the damage was of around $ 5 Billion. See, Washington Post, 17 September 1994.
evidence and the merits of each claim. Some environmentalists have not appreciated this.72

We have noted above that the United States has been instrumental in negotiating the 1984 amendments to the 69 CLC and 71 FC. It, in fact, mooted the amendments so that compensations to be paid under these Conventions could be made meaningful and payments were made under a faster procedure. But when the Protocols took the final shape, it backed out and73 enacted its own law in the form of Oil Pollution Act 1990 (hereinafter OPA). The reason for backing out was the Exxon Valdez disaster, which seriously and extensively damaged the U. S. coastline and the marine environment. This disaster developed a strong feeling that in case of disastrous oil spills, like this one, the international compensation regime is not competent enough to fully compensate sufferers of the spills. Some environmental groups pleaded that there should be total and unlimited liability based on “polluter pays” principle. There was also opposition from several U. S. states on the basis that a global agreement would pre-empt the rights of states to take their own action against polluting vessel owners. It can be said that instead of going back, the United States could have insisted for increase of the limits so that Exxon Valdez type disasters could also be covered under the proposed amendments to the 69 CLC and 71 FC. Moreover, instead of discarding the proposed Protocol it would have enacted a supplementary local legislation.74 This act of the United States has shaken the confidence of some of the member states of the international compensation regime for oil pollution damage contained in the 92 CLC and 92 FC. This has also generated a sense of reluctance in some states, which were already members of the old scheme. Also, this act has generated doubts in the minds of some countries, which had not accepted the old compensation scheme and are still evaluating the new compensation scheme. Since there is no limitation in the OPA, the shipowner can be held liable for the total compensation amount as determined by the court.

The OPA imposes strict liability75. This liability is joint and several. Owner, demise charterer and operator/manager are jointly and severally liable. There are differences to liability, but only where the sole cause is an act of God, or an act of war, or an act or omission of a third party, which does not include an employee or an agent or a responsible party or some one “whose act or omission occurs in connection with any contractual relationship with the responsible party”. This implies that in case the ship was grounded due to gear failure or other such mechanical defects, for which builder is responsible, the owner can not escape the liability if he ordered the vessel direct from the yard provided he had taken due care and normal precautions.
warranted in the circumstances.\textsuperscript{76} We can note here that under the OPA liability is strict, but the grounds for exoneration from the liability are extremely limited.\textsuperscript{77}

Basically, the OPA does not provide any limit where the incident was proximately caused by gross negligence or willful misconduct, or by a violation of the federal safety, construction or operation regulations by the responsible party, its agent, employee or person acting pursuant to a contract with the responsible party. Thus, the limitations provided to the responsible party are available as a reward for applying all prescribed safety measures. It can be said here that the availability of liability limitation is conditional, which might not be available in many cases. Some have termed this as a harsh law but have welcomed it for it will generate a sense of responsibility on the part of the shipowner and others that can be held responsible. Contrary to this, as we have noted above the provisions provided in the 95 Act are mainly based international law, and are not so harsh. The only check is that for an unlimited liability, the plaintiff will have to prove that the owner acted with the knowledge that the damage would probably result.\textsuperscript{78}

The extent of liability prescribed in the OPA is wider than the 95 Act. It covers the following damages: (1) The first head is damage or injury to, destruction of, loss of, or loss of use of natural resources, including the reasonable cost of assessing the damage. This will include (a) cost of restoring, rehabilitating, replacing, or acquiring the equivalent of the damaged natural resources, (b) the diminution in value of those natural resources pending restoration, and (c) the reasonable cost of assessing those damages. (2) The second head is injury to or economic losses resulting from destruction of real or personal property by a person who owns or leases that property. This will include pure economic losses, or economic losses can be recovered independently in case where there is no physical loss. (3) The third head is unique in the sense that it covers the loss of subsistence of those who do not have ownership in the property damaged. (4) In addition to the above fishermen or hotelier etc. can also claim damages. (5) The Federal Government can recover for loss of revenue. (6) The cost of providing increased or additional public services for averting the effect of damage. It is worth referring here that under the OPA the impairment of earning capacity, arising out of damage to the environment can also be compensated. For example, employees of companies, which have sustained a downturn because of the damage to the natural resources, and whose livelihood has thereby suffered, prima facie have the option of raising a claim for impairment of earning capacity. Although the 95 Act puts it beyond doubt that British hotel owners and fishermen are able to claim for loss of profits caused, on the balance of probability, by an oil spill and the resultant impairment of the environment, it is contended that the OPA has the potential to enable a much wider range of claimants to recover damages for a

\textsuperscript{76} It may be noted here that the defence will not be available to the responsible party if it fails or refuses: to report about the incident to the appropriate body; to provide reasonable assistance requested by a responsible official in connection with removal activities; or to comply with an order issued under FWPCA provisions without sufficient cause.

\textsuperscript{77} The difficulties faced by an owner who seeks to avoid charges of willful misconduct and hence hold his right to limit is well illustrated by the case of The Ocean Prince, 1978 AMC 1786, (U.S. C.A.). In this case, a tug caused a barrage, which it was pushing to ground and spilled oil in the Hudson River. The tug owners were denied the right to limit on the ground of willful misconduct because while their dispatcher had appointed two highly qualified pilots to the tug, he had failed to designate which was to be the master and the only one with experience of the Hudson was off duty at the time of the spill.

\textsuperscript{78} It may be noted here that the owner will be fully liable under international law if the spill of oil was his intentional act.
downturn in tourism and business generally, and even for the loss of the area’s image.\textsuperscript{79}

The OPA has a special provision that grants compensation for the diminution of the value of the environment pending the restoration. Contrary to this, 95 Act provides for compensation in respect of reasonable costs incurred in the course of restoration. It is recognized that putting a value on the environment had caused difficulties in the past, and this is one of the reasons why the 1992 Protocols and the 95 Act sought to avoid the issue. In some cases, where attempts were made to assess compensation using an abstract qualification of damage calculated by theoretical models, they have cast long shadows.\textsuperscript{80} The U. S. has embarked on the ambitious process of regulating the assessment of damage following the decisions of the Federal Court of Appeal in Ohio v. Dept. of the Interior\textsuperscript{81} and Colorado v. Dept. of the Interior.\textsuperscript{82} It has thus been recognized that damage to the environment causes loss to the state other than the purely monetary loss involved in the clean up and restoration operations, and that the public interest requires the loss to be compensated. The fact that ascertaining the nature and value of the loss is extremely difficult, and that it is unpopular with the oil and shipping industries, were not taken to mean that the issue should be ignored. Sadly, the 95 Act has taken the line of least resistance: diminution in the value of natural resources pending restoration will not qualify for compensation in the United Kingdom.\textsuperscript{83}

The United States, like the United Kingdom follows a two-tier system of payment of compensation. The Oil Spill Liability Trust Fund (OSLTF) has power to spend one billion per incident, with an extra payment of 500 million for natural resource damage payments. This fund has better capacity of resource mobilization that the IOPC Fund because OSLF has more and definite sources from which it gets money regularly. Every ship passing through the American waters will have to pay five percent levy. This generates a large amount of money in the fund. The fund is used for the following predetermined activities: (i) payment of removal cost; (b) payment of cost for assessing natural resource damage; (iii) removal costs and damages resulting from oil spill; (iv) payment of claims for uncompensated removal costs and damage; and (v) payment of Federal Administrative, operational and personal costs and expenses in connection with the act.

It is rightly said that the claims procedure as provided in the OPA is smoother and faster than the procedure prescribed in the 95 Act. The procedure prescribed in the OPA is fast but complicated. Also, there can be multiplicity of cases against persons responsible for pollution. There is a unique feature that in case of an oil spill, the President designates the source of the oil spill and the 'responsible persons of the designation'. After the President has made the designation, within five days, the party has to deny or confirm the designation. In case of denial or the discharge source is a public vessel, or the President is unable to designate the source the President will notify the claim procedures against the OSLTF. In this case the OSLTF meets the claims. Where the responsible party accepts the designation, the claimant may put his

\textsuperscript{79} See Gavin Little and Jenny Hamilton, n. 51, at p. 400.
\textsuperscript{80} P. Wilkinson, n. 72, at pp. 83-84.
\textsuperscript{81} (1989) 880 F. 2d 432 (D. C. Cir.).
\textsuperscript{82} (1998) 800 F. 2d 481 (D. C. Cir.).
\textsuperscript{83} See Gavin Little and Jenny Hamilton, n. 51, at p. 401.
claims before him. If he denies the claims, or the claims are not settled within 90 days, the other party can go to the court, or may seek payments from the OSLTF. Where the OSLTF has made the payment, the claim is subrogated and it is able to pursue all the courses of action that were open to the compensated claimant. It may be noted here that no claim is approved by the OSLTF during the pendency of any action to recover costs included in the claims. Following the payment by the OSLTF to the claimant, the Attorney General, at the request of the Secretary of Transportation, must proceed to recover all compensation paid by it, including interest on it, administrative and adjudicative costs and Attorney’s fees. Such an action may be against the responsible party, the guarantor, or any other person liable to the claimant or the OSLTF pursuant to any law.84

Under the OPA the Federal District Courts have jurisdiction in respect to all controversies arising under the Act. It also provides jurisdiction to the State Courts. It means cases can be filed in two sets of courts. This will certainly give rise to multiplicity of litigation and will definitely lead to harassment of the responsible party. So far this part of the procedure is concerned, the 95 Act can be appreciated. But the 95 Act does not have any accelerated procedure, e.g., provision for settling the claims out side the court.85 In the United States, in cases of catastrophic damages, the provision of settling the matter of claims in 90 days has been very helpful, as it has provided compensation, partially or fully, to sufferers without any undue delay. Contrary to this, under the 95 Act claims can be put forth under the normal procedure within three days but not later than six months.

While the OPA deliberately allows claimants to pursue other remedies available under the Federal law, the law of individual states and the law of negligence, 95 Act specifically provides that those seeking a remedy for damage must raise their actions under the Act. It is not, therefore, possible for victims of a spill to raise an action under the common law of negligence. While it is accepted that there is a clear and relatively simple appeal procedure which is uniform throughout the Conventions’ member states, and that this should meet with approval, it is worth noting that the OPA adds to the remedies which were already available to those who have suffered loss in order to increase the pressure on the industry to ensure that there are no oil spills. The lack of such pressure in the U. K. law is to be regretted, but it is acknowledged that the benefit of a single, uniform appeal procedure would be lost if it were to be the case.86

From the above discussion it is evident that the compensation scheme provided in the OPA is just, realistic and based on a speedy procedure. It also provides protection to those who comply with the provisions of the Act by limiting the liability at low level. Lazy, corrupt and errant polluters have to pay a large amount of damages. In contrast, the 95 Act follows the traditional method of fixing the liability. It is also easier for the errant party to limit his liability. Limitation of liability under it is a routine matter; it is not given as a reward for compliance of the law. The OSLTF has sufficient money to meet the challenges of any eventuality, whereas the IOPC Fund has failed to mobilize enough money to meet the situations of catastrophic oil

84 See Thomas J. Wagner, n. 74, at p. 572.
85 Parties under the OPA can settle the dispute pertaining to claims for compensation arising out of the oil pollution damages.
86 Gavin Little and Jenny Hamilton, n. 51, at p. 404.
spills. Moreover, due to existence of the sets of conventions, the 69 CLC and 71 FC / 92 CLC and 92 FC, member states are divided. With the result of that, there will be even less resource mobilization. The scheme provided in the 95 Act does not adequately compensate damage to the environment and pure economic loss. So is the case of loss of earning capacity. In fact, in the 95 Act this does not qualify for compensation. The 95 Act suffers from these deficiencies because it has to comply with the internationally accepted principles.

We reiterate that there should be a single comprehensive compensation scheme based on a speedy procedure to meet the challenges of catastrophic oil pollution incidents. The present situation of multiplicity of law on several conventions, is not warranted. It may be argued here that oil pollution is different from pollution by other hazardous and noxious substances. They pose different types of pollution damage, which demand differential treatment. But this argument is not tenable because the ultimate result in all cases is damage to the environment, damage to properties and other facilities along the shore, pure loss of income, and in some cases loss of earning capacity. All of them can well be compensated if we have a unified compensation mechanism supported with a unified and elastic fund. Sane the provision of multiplicity of cases. We can take benefit in developing such a compensation mechanism from the American practice. Instead of provision of multiplicity of cases to be filed in the Federal Court under the OPA and in the State Court under the state law, in member states there can be a supplementary legislation made by the Central Government (in a federal form of government) so that in case of insufficiency of payment of compensation under the main legislation, action for extra payment of compensation may be taken under that legislation. But he author is of the opinion that even in respect to a supplementary legislation, there should be uniformity and for this purpose a protocol under the 92 CLC and 92 FC should be negotiated. In addition to this, a parallel remedy should be made available under the common law of negligence. If this remedy is available, in small matters, those who have suffered damage will prefer to settle the matter outside the court, or in the court on the well-settled principles of negligence of the law of torts.

As already noted, there are states like Malaysia, which are members of the old Conventions and have not yet accepted the 92 Protocols. It will be appropriate to discuss here the Malaysian law of compensation as provided in the Merchant Shipping (Oil Pollution) Act 1994 and the Exclusive Economic Zone Act 1984.

In Malaysia, the Merchant Shipping (Oil Pollution) Act 1994 gives full effect to the 69 CLC and 71 FC. It, therefore, prescribes strict liability against the owner or any other person responsible for the pollution damage caused by the oil spill incident and prescribes limits of the liability on the basis of tonnage of the ship. The maximum limit does not apply in case of deliberate or intentional act of spillage of oil. The Act provides for compulsory insurance. The owner is exonerated under

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87 *Erika* incident claims may be referred. So far, there are about four thousand applications for compensation but the Executive Committee at the moment has decided to give only sixty per cent of all the claims.

88 Elasticity here means existence of a base which can easily be expanded.

89 The word “pollution damage” has the same meaning as contained in the original law. It means damage to the environment and includes the cost of preventive measures and further loss of damage caused by preventive measures. It does not include pure loss of profit, physical injury and impairment or earning capacity.

90 This is in accordance with the Treaty law.
certain circumstances.\textsuperscript{91} The Act also provides for application of limitation to the satisfaction of the court and states that on deposit of the determined amount, the ship and other confiscated things may be released.\textsuperscript{92} In the situations as discussed above, a claim can be presented before the IOPC Fund.\textsuperscript{93} The procedure is almost the same as set forth in 95 Act of the United Kingdom. The High Court has been given jurisdiction. The Director of the Marine Department has been designated to carry out power and duties under the Act and regulations made under it. This is a unique feature of the Act that it prescribes under the Reciprocal Enforcement of Judgments Act 1958 about the enforcement of judgment given by the court of a member state of the CLC or FC as the case may be. It can be noticed that the provisions of the Act are limited to give effect to the provisions of the 69 CLC and the 71 FC without any innovative provisions. It is needless to say that in view of the worldwide inflation the reversal cost of damage, clearing cost and other expenses, the limits prescribed in the Act have become inappropriate. We have noticed above that due to multiplicity of the conventions, the capacity of IOPC Fund has considerably gone down. In view of this, it can be concluded that in order to make the provisions of the Act a meaningful remedy for oil pollution damage, a supplementary compensation scheme has to be provided in any other suitable Federal legislation, and the availability of common law remedy in the form of “negligence” has to be fostered. Alternatively, the 92 CLC and 92 FC should be accepted. Even in this situation, the common law remedy will have significance.

Basically, the Exclusive Economic Zone Act 1984\textsuperscript{94} has penal provisions for various pollution related offences in the exclusive economic zone of Malaysia. In addition to this, it fixes liability on the owner and the master of the vessel or any other person responsible for removing, dispersing, destroying or mitigating the damage or threat of damage, and provides that costs of such operations will be a charge on their properties or interests held by them. It further provides that if any damage is caused to any person, any property, or damage to the environment or related interests, there will be liability of the person or persons, as the case may be.\textsuperscript{95} The liability extends to any damage caused to any person, vessel, gear, facility or structure used in any activity, including fishing and related activities, connected with the exercise of the rights of the Government of Malaysian and Malaysian nationals, and of other persons where such rights are exercised with the consent of the Government. It further provides that compensation will be paid for policing and surveillance activities and for the protection of the environment and shipping necessitated by the damage.

So far vessel source oil pollution is concerned, this Act is a supplement to the Merchant Shipping (Oil Pollution) Act 1994. Persons responsible can also be sued under this Act. Since the Act neither fixes any limitation, nor does it provide right to limit the liability to the owner of the ship, total compensation, as calculated by the

\textsuperscript{91} The circumstances are: (a) war, hostility, civil war, insurrection or a natural phenomenon of an exceptional, inevitable and irresistible character; (b) an act or omission of a third party done with intention to cause damage; or (c) negligence or wrongful act of a government or other authority responsible for the maintenance of lights or other navigational aids in the exercise of that function.

\textsuperscript{92} It may be noted here that the limitation amount may include the liability arising out of the spill in another member country.

\textsuperscript{93} The modality for this is the same as stated in the international regime.

\textsuperscript{94} The Act extends to the Malaysian Exclusive Economic Zone and Continental Shelf. Its scope is wide to cover marine pollution by all possible sources.

\textsuperscript{95} Where more than one persons are responsible, the liability will be joint and several.
court of appropriate jurisdiction, may be realized. Probably, existence of this Act is
detering the Malaysian Government from accepting the 92 CLC and 92 FC. Nevertheless, we feel that the new scheme along with this Act provides a better
option.

In Singapore, for giving effect to the 69 CLC, the Merchant Shipping Act 1981
was passed. The Act was amended in 1998 when Singapore acceded to the 92 CLC.\textsuperscript{96} The provisions of the Act are in line with the amended version of the CLC. The
nature and scope of liability, the provision for liability, costs of remedial measures
and compulsory insurance are similar to that of the English law discussed above. The
Act does not have any innovative provisions. The Act has further been amended to
give effect to the 92 FC. Thus, Singapore now subscribes to the total and new version
of the oil pollution compensation regime.

For implementing the International Convention for the Prevention of Pollution
from Ships (MARPOL 73/78),\textsuperscript{97} original Sea Pollution Act was repealed by its new
version in 1990. Since the primary object of the Act is to implement the MARPOL
73/78, it has provisions in respect to “prohibition on discharge of oil from land or
apparatus”, “prohibition on throwing pollutants in Singapore waters”, “prohibition on
discharge of dangerous pollutants, oil and noxious liquid substances from ships”,
“notification requirements in case of imports and exports of noxious liquid
substances”, “reporting requirements in case of discharge of pollutants”, and
“recovery of clean-up costs”.\textsuperscript{98} Thus, the main object of the Act is to prescribe penal
provisions in respect of various pollution acts in line with the MARPOL 73/78. In
addition to this, it also provides inter alia for the recovery of costs of clean-up
operations, undertaken by the authorities, from the owner of the ship.

In respect to civil liability, the Exclusive Economic Zone Act 1984 of Malaysia
has wider application and contains better provisions. Probably, for this reason, in
spite of persuasions by Prof. Edger Gold and others, Malaysia did not accept the
MARPOL 73/78. In view of this, it can be pleaded that Singapore should widen the
scope of its Sea Pollution Act in line with the Malaysian Act, so that the Act in
addition to implementing the provisions of the MARPOL 73/78 also serves as a
meaningful supplement to the 92 CLC. It may be suggested that along with such
legislation, for realization of full compensation and better international cooperation,
Malaysia also should become member of both the Conventions, namely the 92 CLC
and the 92 FC.\textsuperscript{99}

Local legislation can cover those areas to which the existing international
compensation regime, discussed above, does not apply. Prominently, as pointed out
above, these areas are: incidents involving non-persistent oil and claims against the
parties in respect to pollutants not specified in the existing Conventions. The liability
in these cases may be determined under locally enacted law and common law
developed by courts. The Malaysian law can deal with these situations more

\textsuperscript{96} With effect from 31 December 1998, the 69 CLC is no longer applicable in Singapore.
\textsuperscript{97} This Convention is commonly known as MARPOL 1973. After its amendment by its 1978 Protocol, it is known as MARPOL
73/78
\textsuperscript{98} The Act has a number of regulations with the object to give effect to the annexes of the MARPOL 73/78. See Kala Anadaraja,
“Environmental Protection in the New Millennium Maritime Pollution: The Remedies Available to Littoral States”, paper
presented at the 12th Commonwealth Conference on Law and Society in 21st Century, 13-16 September, 1999, Petaling Jaya,
Malaysia
\textsuperscript{99} Singapore is the member of both the Conventions, while Malaysia does not endorse any of them.
efficiently than the Singaporean legislation. In law of torts, the prominent case law pertaining to these situations is Esso Petroleum Co. Ltd v. Southport Corporation. In this case an oil tanker was stranded in a river. It released oil for preventing greater amount of damage. The act so released caused damage to the coastline owned by the plaintiff. The case thoroughly discussed issues pertaining to the tort of negligence, nuisance and trespass. There are other cases also. The law is almost settled. But, due to technicalities appended to the tort of negligence and trespass and exceptions available to the defendant, the law of torts is not very helpful in such situations.

CONCLUSION
The existing Conventions, including the HNS Convention and the Bunker Oil Pollution Convention, provide a workable regime in respect of vessel source marine pollution. But the multiplicity of law might generate uncertainty and confusion at the implementation stage. States can easily be persuaded to become parties to efforts these conventions. In our considered view efforts should be made to have a unified legal framework. This will have greater degree of co-operation in the area of resource mobilization and technical co-operation, especially in the area of cleaning up operation and rehabilitation of the damaged environment. The International Maritime Organization (IMO) should be made responsible for holding Conference of Parties (COPs), disseminating relevant information received from member states, transferring financial resources and technological expertise and ascertaining and ensuring payments of compensation. The IOPC Fund and other such funds will become part of the IMO. It can provide a model to be followed by member states. Member states can receive guidance from the IMO as and when they need.

Alternatively, there can be one regime for oil pollution, including oil pollution by ship’s bunkers. It means there should be a composite law including provisions of the 92 CLC, 92 FC and that of the Ship’s Bunker Oil Pollution Damage Convention. To accommodate the oil pollution by ship’s bunkers, there can be a separate part in the 92 CLC. This will give rise to a greater degree of certainty in treaty norms and foster a meaningful cooperation among member states. The HNS Convention can deal with the problem of pollution by hazardous and noxious substances other than oil, like nuclear wastes, but its shortcomings should be removed. States will have to work jointly to make it acceptable to all countries. Likewise, efforts should be made for acceptance of the Bunker Oil Pollution Convention. But it is reiterated that it should be made a part of the 92 CLC and 92 FC.

SUGGESTIONS
The American attitude of dealing with vessel source marine pollution independently on the basis of local legislation can be beneficial to it, but it has shaken the confidence of many countries. Had the U. S. A. accepted the 92 CLC and 92 FC, there would have been a greater degree of support for them. It appears that it is going
to do the same with the HNS Convention, because the United States already has a Federal legislation to deal with such situations. It is significant to mention here that in the area of vessel source marine pollution, countries like the United States of America, the United Kingdom and Japan must play a leading role in strengthening of the international shipowner's liability formarine pollution regime.