

# Environmental Impairment Liability after the *Erika* and *Prestige* Accidents

Peter Wetterstein

<b>1</b>	<b>Points of Departure</b> .....	230
<b>2</b>	<b>The State of the Law at the Time of the <i>Erika</i> and <i>Prestige</i> Accidents</b> .....	231
<b>3</b>	<b>Developments within the EU and Current Proposals</b> .....	238
<b>4</b>	<b>Tort Law Assessment</b> .....	244
4.1	Oil Pollution Damage .....	245
4.1.1	The sufficiency of the compensation amounts .....	246
4.1.2	Bunker emissions .....	247
4.1.3	The channelling of liability .....	248
4.1.4	Loss of the right to limit liability .....	249
4.1.5	“Pollution damage” .....	250
4.1.6	Comparison with the OPA 1990 .....	253
4.1.7	The Difficulty in achieving global solutions .....	255
4.2	The HNS Convention .....	256

## 1 Points of Departure

Europe has rather recently suffered two serious tanker accidents. Those accidents have profoundly influenced EU discussions of environmental law. The work of the UN's International Maritime Organization (IMO) has also intensified. I am referring to the sinking of the *Erika* outside Brittany (12 Dec. 1999) and the *Prestige*-accident off the northwestern coast of Spain (13 Nov. 2002).<sup>1</sup>

The Maltese tanker *Erika* transported 31,000 tons of heavy fuel oil when it sunk. No less than 19,800 tons of oil leaked into the sea and polluted France's west coast from Quimper to La Rochelle. The accident caused large-scale environmental damage and economic losses for the fishing and tourist sectors.<sup>2</sup>

The Bahamas-registered oil tanker *Prestige*, which transported 76,972 tons of heavy fuel oil, became distressed off Galicia's coast on 13 November 2002, after which the vessel was towed 270 km. into the Atlantic where it broke apart on 19 November 2002 and sank 3,500 metres to the bottom. By January 2003 no less than 25,000 tons of oil had already leaked into the sea and the wrecked ship continues to discharge oil. Besides the Spanish coast, where 1,800 km. of the coast were polluted, oil pollution was also detected in France and Great Britain.<sup>3</sup>

This article will examine and assess the above developments from the standpoint of tort law, i.e., the overarching purpose of the analysis will be to satisfy the need for reparation.<sup>4</sup> How well do the applicable liability rules and compensation systems protect the victim's position when large-scale accidents of the aforementioned type occur? Is there a need to introduce reforms? Although oil pollution accidents are the basis of this examination, liability for the transport of hazardous substances, e.g., gases and chemicals, will also be

---

<sup>1</sup> Both vessels were 26-year-old single hull ships.

<sup>2</sup> See CMI News Letter No. 2/2000 p. 12 and IOPC Funds, Annual Report 2002 p. 95 ff.

<sup>3</sup> These facts are based on reports in the media and in Fairplay, November 28, 2002, p. 16. See also IOPC. 92FUND/EXC.20/5/1, 31 January 2003 and 92FUND/EXC.22/8, 7 October 2003.

<sup>4</sup> I am presently in the process of concluding a rather extensive work on the shipowner's environmental impairment liability, to be published in 2004 (below P. Wetterstein, 2004). That examination seeks, *inter alia*, to assess the shipowner's liability in light of modern trends within environmental liability law. The applicable liability rules, their content, purpose and effects are subjected to a critical examination with the overriding purpose being to meet the need for reparation. Although the examination proceeds from Finnish law, other Nordic law is also considered, as are the developments within the EU, the U.S. and various international conventions and convention processes. It is therefore natural that the present article is largely based on analyses and observations made in the upcoming publication.

addressed.<sup>5</sup> And in addition to the European perspective, global aspects will be considered.<sup>6</sup>

## 2 The State of the Law at the Time of the *Erika* and *Prestige* Accidents

Liability for *oil pollution damage* is mainly governed by the 1992 International Convention on Civil Liability for Oil Pollution Damage,<sup>7</sup> which entered into force on 30 May 1996. The EU countries, with the exception of Luxembourg and Austria,<sup>8</sup> have become parties to the Convention, the content of which will now be briefly outlined.

Article II provides that the Convention is applicable to “pollution damage”<sup>9</sup> which has arisen in a contracting State or within its economic zone (or within an area corresponding to such a zone) as a result of persistent oil<sup>10</sup> having leaked

---

<sup>5</sup> Accidents involving such substances have also occurred. The risk of personal injury is especially acute in the case of transport of other hazardous substances than oil. Persons can suffer injury, e.g., as a result of fire and/or explosions of hazardous substances or they can be poisoned by substances that have leaked from the transporting vessel. For example, 468 persons lost their lives and over 3,000 were injured when the French freighter *Grandcamp* caught fire and exploded during the loading of ammonium nitrate in Texas City on 28 April 1947. The accident also caused extensive material losses. See *The Safe Transport of Dangerous, Hazardous and Harmful Cargoes by Sea*, 25 European Transport Law 1990 p. 779.

<sup>6</sup> Cf. above note 4.

<sup>7</sup> Protocol of 1992 to Amend the 1969 International Convention on Civil Liability for Oil Pollution Damage. It was the 1967 *Torrey Canyon* accident off England’s southwest coast that sparked international efforts to elaborate new and uniform rules governing liability for oil pollution damage. The compensation rules applicable at the time of the said accident proved to be inadequate and unsatisfactory to settle the sizable claims lodged for compensation for oil pollution damage. Efforts undertaken by the then IMCO (Inter-Governmental Maritime Consultative Organization), presently the IMO, in cooperation with the CMI (Comité Maritime International) resulted in the previous oil pollution liability convention of 1969.

<sup>8</sup> The EU Council has however authorized Luxembourg and Austria to ratify, in the interests of the EU, the 1992 Oil Pollution Liability Convention (and the Fund Convention). See the Council’s resolution 14389/2/03 REV 2 of 11 December 2003.

<sup>9</sup> “Pollution damage” is defined in Art. I.6. as follows: “(a) loss or damage caused outside the ship 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”. Concerning the concept of pollution damage, see also below, Section 4.1.5.

<sup>10</sup> The Convention’s definition of “oil” reads as follows: “any persistent hydrocarbon mineral oil such as crude oil, fuel oil, heavy diesel oil and lubricating oil, whether carried on board a ship as cargo or in the bunkers of such a ship” (Art. I.5). Regarding this definition, see e.g., C. de la Rue & C. Anderson, *Shipping and the Environment: Law and Practice*, 1998, who have written the following regarding non-persistent oil (p. 86): “In practice this means that the following are to be regarded as non-persistent and therefore outside the scope of the Convention: gases (e.g.,LNG and LPG); gasolines; kerosenes (e.g.,aviation fuels); and distillates (such as gas oil and light diesel oils).”

from a ship that has been designed or adapted to transport persistent oil as bulk cargo, i.e., in tankers. Bunker oil from tankers is governed by the same rules. As to ships capable of transporting both persistent oil and other cargo (so-called combination carriers or oil/bulk/ore ships (OBOs)), the Convention's provisions only apply if the ship is transporting persistent oil as bulk cargo as well as during journeys that follow on such a transport, unless it is demonstrated that the ship has no residue on board from such a transport of persistent oil in bulk.<sup>11</sup> Whether "bunker spills" are covered by the rules will thus depend on the said question of proof.<sup>12</sup> The Convention also applies to damage and costs occasioned by preventive measures, wherever they are taken, designed to prevent or mitigate such damage through pollution, which due to the accident constitutes a threat to a contracting State or its economic zone.<sup>13</sup>

As to the subjects and basis of liability, it can be noted that the Oil Pollution Liability Convention channels liability for oil pollution damage to the *shipowner*, i.e., the party registered as the ship's owner or, if the ship is not registered, the party who owns the ship.<sup>14</sup> There is therefore no requirement that the shipowner be actively engaged in the ship's operation in order to be a liability subject.<sup>15</sup> Liability is strict, i.e., the shipowner incurs liability even in the absence of fault or neglect on his part or on the part of a person for whom the shipowner is liable. If the accident has resulted from a series of events of the same origin, liability will fall on the person who owned the vessel at the time of

---

<sup>11</sup> Art. I.1. The Convention's provisions do not apply to warships or other ships which at the time of the accident are owned or used by a State and that are used exclusively for other than commercial purposes (Art. XI.1.).

<sup>12</sup> See C. de la Rue & C. Anderson, 1998 p. 80.

<sup>13</sup> An apt example is the grounding of the Estonian tanker *Kihnu*, near Tallinn's harbour on 16 Jan. 1993. It has been assessed that *Kihnu* leaked some 100 tons of heavy heating oil and 40 tons of diesel oil. The Estonian authorities undertook certain preventive measures, and the Finnish authorities sent two oil control vessels and a helicopter to take part in the operation. The costs of this assistance were billed by the Finnish Government to the International Oil Pollution Fund (hereafter the IOPC Fund). The 1969 Liability Convention (above note 7) and the 1971 Fund Convention (International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, 1971) entered into force in Estonia on 1 March 1993, i.e., after the grounding. The IOPC Fund's executive committee considered that although the preventive measures had been taken on a non-convention state's territory, the purpose of the measures was to prevent oil pollution damage in Finland, which was a member of the international compensation regime. Therefore, the measures conducted by the Finnish authorities were governed by the 1969/1971 convention regime. The case is reported in IOPC Fund, Annual Report 1997 p. 66 f.

<sup>14</sup> In cases where a company has been registered as the operator of a ship belonging to the State, the company is deemed the owner (Art. I.3).

<sup>15</sup> Passive financiers can also incur liability. C. de la Rue & C. Anderson, 1998 p. 78 f. have written: "Under CLC the liability imposed on the owner is not confined to cases where he is actively operating the vessel concerned. The regime applies to any persons registered as the owner of the ship, including an owner with no more than a passive interest in the vessel, such as a financial lessor. Consequently, finance provided by methods such as sale and leaseback arrangements will expose lenders to liability under CLC, even when they play no part in the management or operation of the ship". Problems related to the channelling of liability are addressed below in Section 4.1.3.

the first of these events. Article III.2 stipulates however that the shipowner is exonerated from liability if he proves that the damage:

- (a) resulted from an act of war, hostilities, civil war, insurrection, or a natural phenomenon of an exceptional, inevitable and irresistible character, or
- (b) was wholly caused by an act or omission done with intent to cause damage by a third party, or
- (c) was wholly caused by the negligence or other wrongful act of any government or other authority responsible for the maintenance of lights<sup>16</sup> or other navigational aids in the exercise of that function.<sup>17</sup>

In addition, compensation can be adjusted after a reasonable assessment of whether the victim has contributed to the loss (Art. III.3).

The shipowner's strict liability is however mitigated by his right to limitation of liability. Liability is limited based on a minimum amount of 4,510,000 SDR (Special Drawing Rights), which increases thereafter in accordance with the ship's tonnage<sup>18</sup> to a maximum amount of 89,770,000 SDR.<sup>19</sup> The ship's tonnage refers to its gross tonnage calculated in accordance with Appendix I of the 1969 International Convention on Tonnage Measurement of Ships and the liability amount applies per "incident".<sup>20</sup> And under Article V.2., the shipowner loses his right of limitation if it is proved that he caused the oil pollution damage through intent or gross negligence and with the knowledge that such damage would probably result.<sup>21</sup> Another prerequisite for limitation of liability is that a limitation fund is established in an amount corresponding to the shipowner's liability (Art. V.3).

Finally, Article VII.1. of the Oil Pollution Liability Convention requires a shipowner, whose ship is registered in a contracting State and which transports more than 2,000 tons of persistent oil as bulk cargo, to obtain insurance or provide some other financial security to cover the shipowner's liability under the

---

<sup>16</sup> The formulation thus applies to *maintenance* and not to improvements or new-constructions as such. *See further e.g., C. de la Rue & C. Anderson, 1998 p. 91.*

<sup>17</sup> Regarding the above-mentioned liability exception, *see P. Wetterstein, 2004 Section 3.2.2.1.*

<sup>18</sup> For ships whose tonnage exceeds 5,000, the liability limit increases by 631 SDR for each additional tonnage unit.

<sup>19</sup> These liability amounts have come about through a simplified amendment procedure. Thus, the IMO's legal committee unanimously decided at its 82<sup>nd</sup> session of 18 Oct. 2000 to increase the liability amounts in the Oil Pollution Liability and Fund Conventions by 50.37 %. *See resolutions LEG.1 (82) and LEG.2. (82) (18 Oct. 2000).* The increases entered into force on 1 Nov. 2003.

<sup>20</sup> The convention text refers to "any one incident" (Art. V.1.). That formulation can be compared to the expression "any distinct occasion" (Art. 6.1.) of the 1976 Convention on Limitation of Liability for Maritime Claims, 1976). *See further P. Wetterstein, 2004 Section 6.2.3.1.1.*

<sup>21</sup> Regarding loss of the right of limitation, *see P. Wetterstein, 2004 Section 6.2.4. See also Section 4.1.4. below.*

Convention in the amounts stated in Article V.1.<sup>22</sup> The victim is entitled to a so-called direct action against the ship's insurer.<sup>23</sup>

As a supplement to the 1969 Oil Pollution Liability Convention,<sup>24</sup> the Fund Convention was adopted in 1971.<sup>25</sup> That Convention has since been replaced by the 1992 Oil Pollution Fund Convention,<sup>26</sup> which entered into force on 30 May 1996. That Convention too has been ratified by the EU countries (with the exception of Luxembourg and Austria<sup>27</sup>). The Fund pays compensation to parties suffering oil pollution damage in States Parties to the 1992 Fund Convention who do not receive full compensation under the 1992 Liability Convention. Compensation is paid in cases where:

- a) the shipowner has no liability for the oil pollution damage, since he is exonerated from liability under the Liability Convention,
- b) the shipowner is financially incapable of meeting his obligations under the Liability Convention and his insurance is insufficient, or
- c) the damage exceeds the amount of compensation under the Liability Convention.<sup>28</sup>

The Fund's obligation to pay compensation is limited to 203 million SDR per incident, including the compensation sums paid by the shipowner or his insurer under the Liability Convention.<sup>29</sup>

The IOPC Fund is financed through fees collected from persons who have, during the relevant calendar year, received more than 150,000 tons of crude oil or heavy fuel oil transported by sea ("contributing oil"<sup>30</sup>) in the harbours or terminals of a Member State.<sup>31</sup> The States ensure that information on oil received (and the recipients) in the country in question is transmitted to the

---

<sup>22</sup> Regarding the duty to insure, *see* P. Wetterstein, 2004 Section 8.4.1.1. Note that this duty does not apply to state-owned ships (cf. Art. VII.12.).

<sup>23</sup> *See* further P. Wetterstein, 2004 Section 8.2.2.3.

<sup>24</sup> *See* above note 7.

<sup>25</sup> International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, 1971.

<sup>26</sup> Protocol of 1992 to Amend the 1971 International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage.

<sup>27</sup> *See* above note 8.

<sup>28</sup> Regarding the IOPC Fund's obligation to pay compensation, *see* e.g., IOPC Funds, Annual Report 2002 p. 15 f.

<sup>29</sup> Other limitations also exist in the IOPC Fund's obligation to pay. Thus, the Fund does not pay compensation for oil pollution damage if a) the damage has occurred in a State that is not a party to the 1992 Fund Convention, b) the damage resulted from an act of war, hostilities, civil war or insurrection, or c) the victim cannot demonstrate that the oil pollution damage resulted from an event involving one or more ships which meet the criterion of ship under the Liability Convention.

<sup>30</sup> For the definition of "contributing oil", *see* Article 1.3. of the Fund Convention.

<sup>31</sup> *See* further, Art. 10 of the Fund Convention.

Fund's secretariat, which will thereafter request payment of the fees.<sup>32</sup> The member states have no responsibility for the payments unless they have voluntarily agreed to pay the fees.<sup>33</sup>

As mentioned, the international compensation regime only compensates to a limited extent oil pollution damage resulting from bunker emissions. To fill that gap, a convention was adopted within the IMO in 2001, governing liability for bunker oil pollution damage.<sup>34</sup> That convention expressly excludes pollution damage "as defined in the Civil Liability Convention, whether or not compensation is payable in respect of it under that Convention" (Art. 4.1). The convention thus governs mainly dry cargo ships and ships that transport HNS cargo (see below).<sup>35</sup> The Bunker Convention has not as yet entered into force internationally, but the EU Council has authorized the Member States to join it.<sup>36</sup>

The 2001 Bunker Convention contains a much broader concept of ship than the corresponding definition in Article I.1. in the 1992 Oil Pollution Liability Convention. Thus, Article 1.1 states that "'ship' means any seagoing vessel and seaborne craft, of any type whatsoever". The intention has been to include every type of floating craft with bunker oil on board.<sup>37</sup> Moreover, since bunker oil is defined as "any hydrocarbon mineral oil, including lubricating oil, used or intended to be used for the operation or propulsion of the ship, and any residues of such oil" (art. 1.5), the scope of the Bunker Convention is extensive. Also oil used "for the operation of the ship", and not merely for the ship's propulsion, is

---

<sup>32</sup> In 2002, the fees paid on the basis of imported oil, expressed as each country's percentage of the total, were as follows: Japan 20%, Italy 10%, Korea 10%, the Netherlands 8 %, France 8 %, United Kingdom 6%, Singapore 5%, Spain 5%, Canada 5% and other countries 23%. IOPC Funds, Annual Report 2002 p. 27. Since the compensation sums paid by the IOPC Fund vary significantly from year to year, the sums claimed by the Fund also vary. Regarding the duty of contribution to the Fund, see e.g., J. Bates & C. Benson, *Marine Environment Law*, 1993 para. 4.43-4.49.

<sup>33</sup> IOPC Funds, Annual Report 2002 p. 27.

<sup>34</sup> 2001 International Convention on Civil Liability for Bunker Oil Pollution Damage. Regarding that convention, see e.g., C. Wu, *Liability and Compensation for Bunker Pollution*, 33 *Journal of Maritime Law and Commerce*, No. 5, October, 2002 p. 553 ff.

<sup>35</sup> Military and other non-commercial State ships fall outside the scope of the Convention, but the convention states can decide that such ships shall be covered by the Convention (Art. 4.2-3).

<sup>36</sup> See Council Decision 2002/762/EC of 19 September 2002 authorizing the Member States, in the interest of the Community, to sign, ratify or accede to the International Convention on Civil Liability for Bunker Oil Pollution Damage, 2001 (OJ L 256, 25/09/2002 p. 7). The authorization granted to the Member States should be seen against the background that the EC possesses exclusive authority in questions governed by the Brussels I Regulation of 2001 (Council Regulation (EC) No. 44/2001 of 22<sup>nd</sup> December 2000 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters), which entered into force on 1 March 2002. For an illustrative and interesting analysis of the division of competence between the EC and the Member States regarding ratification of the 2001 Bunker Convention (and the 1996 HNS Convention), see H. Ringbom, *EU Regulation 44/2001 and its implications for the international maritime liability conventions*, to be published in *Journal of Maritime Law and Commerce*, January 2004.

<sup>37</sup> J. Hoftvedt, *Bunkersoljekonvensjonen: En sammenligning med sjøloven § 208*, *Marlus* Nr. 289, 2002 p. 19.

covered.<sup>38</sup> On the other hand, the pollution damage concept (Art. 1.9) squares with the corresponding formulation of the Oil Pollution Liability Convention.<sup>39</sup>

The shipowner's liability is strict and the liability exceptions are the same as in the Oil Pollution Liability Convention. But the shipowner is defined as "the owner, including the registered owner, bareboat charterer, manager and operator of the ship" (Art. 1.3). There are thus more subjects of liability and the liability is joint and several (see more under Section 4.1.3.). The Bunker Convention lacks provisions on limitation of liability but it does contain an article stipulating that the Convention does not prevent the application of national and international rules on limitation of liability (Art. 6).<sup>40</sup>

As to the duty to insure, Article 7.1 stipulates that the registered owner of a ship from a contracting State with a tonnage exceeding 1,000 gross tons, shall obtain insurance or provide some other financial guarantee that covers the shipowner's liability under the applicable national or international limitation rules, however not exceeding the amount stipulated in the 1976 Limitation Convention, as amended.<sup>41</sup> A provision governing direct claims against the insurer is included in Article 7.10.

Finally, it should be noted that there does not exist any supplementary compensation fund for bunker claims that would correspond to the IOPC Fund.

As appeared above, the 1992 Oil Pollution Liability Convention only applies to pollution damage ("loss or damage caused...by contamination") resulting from persistent oil, whereas the Bunker Convention covers pollution damage resulting from bunker emissions. Damage resulting from fires and explosions fall outside the scope of these conventions, not to mention damage caused by hazardous substances other than oils, e.g., gases and chemicals. The need has thus been expressed to produce a convention on liability for such damage as well. On 3 May 1996, a convention elaborated within the IMO was adopted on liability and compensation for damage in connection with the carriage of hazardous goods by sea, the so-called HNS Convention,<sup>42</sup> at a diplomatic conference in London. This Convention too has yet to enter into force, but the EU Council has authorized the Member States to become parties to it.<sup>43</sup>

---

<sup>38</sup> As an example of oil used for "operations", Hoftvedt, p. 19 cites "mobile oljerigger som trenger bunkersolje for å utvinne olje fra havbunnen".

<sup>39</sup> The Bunker Convention's geographical scope also corresponds to that of the Oil Pollution Liability Convention (Art. 3).

<sup>40</sup> Countries that have implemented the 1976 Limitation Convention (as amended) in their national legislation thus apply rules based on that convention with regard to bunker liability. It can also be noted that the Bunker Convention has been supplemented by a resolution urging the States to ratify the 1996 protocol to the Limitation Convention. See J. Hoftvedt, p. 41.

<sup>41</sup> Regarding these liability limits, see P. Wetterstein, 2004 Section 6.2.3.1.

<sup>42</sup> International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea, 1996.

<sup>43</sup> See Council Decision 2002/971/EC of 18 November 2002 authorising the Member States, in the interest of the Community, to ratify or accede to the International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea, 1996 (OJ L 337, 13/12/2002 p. 55). See also above note 36.



The HNS Convention thus governs the liability for damage resulting from hazardous substances carried by sea. The Convention, which is based on the shipowner's strict liability,<sup>44</sup> contains, as does the 2001 Bunker Convention, a broad formulation of the ships covered by the compensation regime: "ship" means any sea-going vessel and sea-borne craft, of any type whatsoever" (Art. 1.1). The hazardous substances covered by the Convention are defined through a reference to the existing IMO Conventions and Codes governing hazardous substances (Art. 1.5). The HNS Convention covers damage to persons, property and to the environment as well as the costs of preventive measures (Art. 1.6)<sup>45</sup> in accordance with geographical criteria (Art. 3).<sup>46</sup> Outside the Convention's scope falls damage arising out of any contract for the carriage of goods and passengers and pollution damage as defined in the 1969 International Convention on Civil Liability for Oil Pollution Damage, as amended<sup>47</sup> as well as damage caused by radioactive substances (Art. 4).<sup>48</sup> It follows from the definition of "carriage by sea" in the HNS Convention (Art. 1.9) that the Convention applies only if the hazardous substance was on board the ship at the time of the incident or on/in its equipment, e.g., its piping or crane. In cases where the ship's "equipment" is not used, the liability period is limited to the points in time at which the hazardous substances cross the ship's rail.<sup>49</sup>

The provisions on limitation of liability in the HNS Convention (Art. 9) essentially correspond to the provisions of the Oil Pollution Liability Convention. The liability amounts do however differ. The shipowner's liability

---

<sup>44</sup> The HNS Convention contains liability exceptions (Art. 7.2) corresponding to those of the 1992 Oil Pollution Liability Convention and the 2001 Bunker Convention. Furthermore, the HNS Convention contains an additional exception (Art. 7.2.(d)), i.e., that the shipowner shall be free from liability if he proves that the shipper (or other person) has failed to disclose the character of the hazardous goods and that this has caused the damage (in whole or in part) or resulted in the failure of the shipowner to obtain insurance under Art. 12. In addition, the shipowner (or "its servants or agents") shall reasonably have been without knowledge of the hazardous character of the goods shipped. For a commentary, see P. Wetterstein, *Reflektioner om HNS-konventionen* in Festskrift till Jan Sandström, 1997 p. 448.

<sup>45</sup> Regarding the compensable damage, see P. Wetterstein, 2004 Ch. 4.

<sup>46</sup> Under Art. 3, the HNS Convention covers any damage caused in the State Party's territorial land or sea (para. a). Damage by *contamination of the environment* caused in the exclusive economic zone of a State Party is also covered (para. b), as is damage, other than damage by *contamination of the environment*, caused outside the territory, including the territorial sea, of any State, if this damage has been caused by a ship registered in a State Party (para. c). Finally, the costs of preventive measures are covered regardless where the measures have been taken (para. d).

<sup>47</sup> The participants at the diplomatic conference in London did not succeed in reaching agreement on whether bunker oils were to be covered by the HNS Convention; instead, liability for damage caused by emissions of bunker oil were the object of specific convention treatment.

<sup>48</sup> See also M. Göransson, , *Liability for Damage to the Marine Environment* in A. Boyle & D. Freestone (eds.) *International Law and Sustainable Development*, 1999 p. 355 f. I have criticized the exclusion of radioactive substances from the scope of the HNS Convention and have argued that coal and similar solid bulk substances with a low risk potential/large volume (MHB substances) should also be covered by the HNS Convention. See P. Wetterstein, 1997 p. 445 f.

<sup>49</sup> Regarding this rather opaque condition, see P. Wetterstein, 2004 Section 3.2.4.

is limited “in respect of any one incident” and based on a minimum amount of 10 million SDR, which thereafter increases in accordance with the ship’s tonnage to a maximum amount of 100 million SDR.<sup>50</sup> The liability amounts are thus somewhat higher than the corresponding amounts for oil pollution liability.<sup>51</sup> And, as with oil pollution liability, HNS liability shall be insured with a right of direct action for victims. The duty to insure applies regardless of the size of the ship transporting the HNS substances (Art. 12).<sup>52</sup>

If the HNS damage exceeds the liability amounts or if the shipowner/insurer is deemed to be insolvent or non-liable, compensation can be paid from an international fund, i.e., the so-called HNS Fund (International Hazardous and Noxious Substances Fund). Compensation from the Fund is limited to 250 million SDR, including the shipowner’s liability (Art. 14).<sup>53</sup>

Through this regime, the HNS Convention closely resembles the liability and compensation regime applicable to oil pollution damage; that regime functions well on the whole. The HNS regime’s success will essentially depend on the smooth and effective administration of the fund and on the liability and compensation amounts being sufficiently high.<sup>54</sup> I will return to the last-mentioned issue below in Section 4.2.

### 3 Developments within the EU and Current Proposals

The EU has been highly active in the field of environmental liability. In November 1997, the EC Commission published a working paper on environmental liability, which presents the main features of a proposed directive on the subject.<sup>55</sup> The working paper was thereafter discussed and processed within the Commission. In February 2000, the Commission presented a White Paper on environmental liability containing views on how environmental

---

<sup>50</sup> For ships with a higher tonnage than 2,000, the liability amount increases by 1,500 SDR for each unit of tonnage from 2,001 to 50,000 and by 360 SDR for each unit of tonnage over 50,000. Liability shall not however in any case exceed 100 million SDR.

<sup>51</sup> The HNS amounts are also considerably higher than the amounts stipulated in the 1976 Limitation Convention, as amended. This applies particularly to smaller ships. Considering the damage that, e.g., gas or chemical tankers can cause, it is naturally important that the liability amounts are sufficiently high. A different matter is however whether even the HNS amounts are sufficient. That question is addressed below in Section 4.2.

<sup>52</sup> The ship shall however be registered in a contracting State.

<sup>53</sup> The HNS Fund is financed through fees levied on the amount (certain threshold values for activation of the duty to pay the fees are stipulated in the Convention) of hazardous goods received, i.e., by the importers, after an incident has occurred (“post-event contribution system”, Art. 16-19).

<sup>54</sup> A simplified procedure for inflation and other adjustments of the limitation amounts has also been included in the HNS Convention (Art. 48).

<sup>55</sup> European Commission, Working Paper on Environmental Liability, 17 November 1997. The working paper had been preceded by the Commission’s 1993 Green Paper on Remedying Environmental Damage, 14 May 1993, COM(93)47 final), a joint hearing together with the European Parliament the same year, a Parliamentary resolution containing a requirement of an EC Directive (Resolution of 20 April 1994) as well as a 1994 statement by the Economic and Social Committee (ESC opinion of 23 February 1994, CES 226/94).

liability could best be developed within the EC.<sup>56</sup> The White Paper examines various ways of establishing an EC-based environmental liability regime in order to expedite implementation of the EC Treaty's environmental principles; implement the EC's environmental legislation; and guarantee that a damaged environment is restored.<sup>57</sup> The White Paper has embraced, *inter alia*, the "polluter pays" principle<sup>58</sup> and is also more progressive than the above-mentioned international regime for compensation of oil pollution damage (liability is unlimited, the duty to compensate environmental damage is more extensive, liability is channelled to "the operator in control of the offending activity," etc.).<sup>59</sup> The White Paper was followed on 23 January 2002 by a draft directive on liability for environmental damage,<sup>60</sup> on which the EU Council adopted a common position on 18 September 2003.<sup>61</sup>

It is of course difficult to predict what, if any, direct relevance a future directive will have for maritime liability, but the directive draft contains exceptions for environmental damage (or the imminent threat thereof) caused by an event covered by the liability and compensation provisions of, *inter alia*, the 1992 Oil Pollution Liability and Fund Conventions, the 1996 HNS Convention and the 2001 Bunker Convention (Art. 4 and Annex IV).<sup>62</sup> The Conventions

<sup>56</sup> European Commission, White Paper on Environmental Liability, 9 February 2000, COM(2000)66 final.

<sup>57</sup> The purpose of the White Paper is described in the following fashion: (p. 9): "The purpose of this White Paper is to explore how the polluter pays principle can best serve these aims of Community environmental policy, keeping in mind that avoiding environmental damage is the main aim of this policy. Against this background, the paper explores how a Community regime on environmental liability can best be shaped in order to improve the application of the environmental principles of the EC Treaty and to ensure restoration of damage to the environment."

<sup>58</sup> Under that principle, it is most appropriate that the polluter bears the costs of the damage, since, *inter alia*, preventive considerations are best served if the party for whose economic advantage the activity is conducted is also made to bear the costs and expenses that the activity gives rise to. In that way, the market price of goods will more closely correspond to the societal cost of their production. The principle that the polluter pays has been adopted both by the OECD (1972) and the EU (Art. 130r of the European Uniform Act of 1987, Art. 130r.2 of the Maastricht Treaty of 1992 and Art. 174 of the Amsterdam Treaty of 1997). See further, e.g., M-L. Larsson, *The Law of Environmental Damage: Liability and Reparation*, 1999 p. 90 ff. and A. Kiss & D. Shelton, *Manual of European Environmental Law*, 1997 p. 43 f.

<sup>59</sup> For a commentary of the White Paper, see e.g., E. Rehbinder, *Towards a Community Environmental Liability Regime: The Commission's White Paper on Environmental Liability*, Env. Liability 3 (2000) s. 85 ff. and M. Faure, *The White Paper on Environmental Liability: Efficiency and Insurability Analysis*, Env. Liability 4 (2001) p. 188 ff.

<sup>60</sup> Proposal for a Directive of the European Parliament and of the Council on Environmental Liability with regard to the Prevention and Restoration of Environmental Damage, COM(2002)17 final.

<sup>61</sup> Common position adopted by the Council on 18 September 2003 with a view to the adoption of a Directive of the European Parliament and of the Council on environmental liability with regard to the prevention and remedying of environmental damage 10933/5/03 REV 5. In the Spring of 2004, the European Parliament and the Council will take a position on the draft with the aim of reaching agreement on the final directive.

<sup>62</sup> Nor shall the Directive affect "the operator's" right to limit liability in accordance with national legislation that has implemented the 1976 Limitation Convention, as amended (Art. 4.3).

should be in force in the Member States. It should however be noted that not all environmental damage that can arise in connection with the operation of a ship will be covered by the above-cited Conventions and that fixing the borderline between these conventions and other liability in the case of e.g., harbour functions, such as the loading and unloading of ships' cargo, could be problematical. This applies particularly to the HNS Convention.<sup>63</sup> But most importantly, the draft directive does not apply to personal injury, damage to private property or economic losses (Preamble (14)). The draft is concerned with "the prevention and remedying of environmental damage",<sup>64</sup> but without granting private victims any right of compensation.<sup>65</sup> That is a significant limitation of the directive's scope.

It seems that the EU's activities occasioned by the *Erika* and *Prestige* incidents are of greater relevance to the shipping sector. As a consequence of the *Erika* incident, the EC Commission issued two communications concerning the safety of maritime oil transports.<sup>66</sup> The subsequent communication includes a proposal on the establishment of a European compensation fund for oil pollution damage<sup>67</sup> and a discussion of the need to revise international oil pollution liability.

According to the EC Commission, the international regime for compensation of oil pollution damage (the 1992 Oil Pollution Liability and Fund Conventions) has some weaknesses and shortcomings – even though it has functioned

---

<sup>63</sup> Cf. Wetterstein, 2004 Section 3.2.4.

<sup>64</sup> "Environmental damage" covers damage to "protected species and natural habitats" and water and land areas. See further Art. 2.1(a)-(c).

<sup>65</sup> The draft directive thus appears to be concerned with protecting *public* (collective) interests and that protection covers claims by public authorities for compensation for preventive and restorative measures. Cf. P. Wetterstein, 2004 Section 4.6.

<sup>66</sup> Communications from the Commission to the European Parliament and the Council on a Set of Community Measures on Maritime Safety Following the Sinking of the Oil Tanker *Erika*, 21 March 2000, COM(2000)142 final and 6 December 2000, COM(2000)802 final. See also H. Ringbom, *The Erika Accident and Its Effects on EU Maritime Regulation* in M.H. Nordquist & J.N. Moore (eds.), *Current Marine Environmental Issues and the International Tribunal for the Law of the Sea*, 2001 p. 275 ff.

<sup>67</sup> Proposal for a Regulation of the European Parliament and of the Council on the Establishment of a Fund for the Compensation of Oil Pollution Damage in European Waters and Related Measures (see also Amended Proposal COM(2002)313 final). That proposal was "put on the shelf" pending the result of corresponding efforts conducted under the auspices of the IMO. Those efforts resulted in the adoption on 16 May 2003 of a protocol on establishment of a fund supplementing that of the 1992 Fund Convention (Protocol of 2003 to the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, 1992). See IMO LEG/CONF.14/20, 27 May 2003. On the basis of the protocol, a new international organization is founded, i.e., the International Oil Pollution Compensation Supplementary Fund. Member States of the 1992 Fund Convention may ratify the protocol and thereby become members of the Supplementary Fund. The criteria for compensation from the Supplementary Fund corresponds to those that apply to the 1992 Fund. What is more, contributions to the Supplementary Fund are collected in the same manner, except that each State Party is deemed to receive at least one million tons of contribution-based oil (Art. 14).

relatively well.<sup>68</sup> The Commission has set three criteria for a well-functioning compensation regime:

- “1) It should provide prompt compensation to victims without having to rely on extensive and lengthy judicial procedures.
- 2) The maximum compensation limit should be set at a sufficiently high level to cover claims from any foreseeable disaster occurring as a result of an oil tanker accident.
- 3) The regime should contribute to discouraging tanker operators and cargo interests from transporting oil in anything other than tankers of an impeccable quality.”<sup>69</sup>

Victims shall thus be granted full compensation, promptly and smoothly, for tanker accidents<sup>70</sup> and, in that connection, the Commission has stressed preventive considerations. The existing compensation regime does not fully satisfy these criteria. The rules should be discussed and reformed as follows:

1. *Compensation amounts.* The serious oil pollution accidents of recent times, mainly *Erika* (and later the *Prestige*<sup>71</sup>), have underscored the insufficiency of the IOPC Fund’s compensation capacity to compensate victims. Yet another problem is delay in payment of approved claims, since the IOPC Fund has to ensure that the total compensation ceiling is not exceeded<sup>72</sup> (cf. *pro rata* payment of damage claims in cases of liability limitations<sup>73</sup>). The Commission has thus deemed that a supplementary European compensation fund for oil pollution damage (the COPE Fund) should be established with a liability ceiling of 1 billion EURO.<sup>74</sup>

Since then, however, the issue has come into a new light after adoption in London on 16 May 2003 of a protocol on establishment of a fund supplementing

---

<sup>68</sup> The expectations existing when the compensation regime was created have for the most part been fulfilled. In most cases, of the roughly 130 dealt with by the IOPC Fund, the person suffering damage has obtained adequate compensation relatively fast. The compensation issues have usually been resolved out-of-court. Only about ten cases have given rise to issues concerning the sufficiency of the liability amounts and the smoothness of the compensation procedure. See also COM(2000)802 final p. 54 f.

<sup>69</sup> COM(2000)802 final p. 53.

<sup>70</sup> Cf. *The victim’s perspective*, P. Wetterstein, 2004 Section 1.2.

<sup>71</sup> Although the *Prestige* accident did take place after the Commission’s *Erika* communications, it provides a good example of the difficulties that arise when compensation claims exceed the IOPC Fund’s compensation ceiling. The Fund has effected a preliminary payment of only 15% of the claims lodged. See further IOPC 92FUND/EXC.22/8, 7 October 2003 p. 10 f.

<sup>72</sup> Cf. also Art. 4.5. of the 1992 Fund Convention.

<sup>73</sup> See P. Wetterstein, 2004 Sections 6.2.3.3. and 6.3.1.

<sup>74</sup> The Commission has stated, *inter alia*: “This limit is more consistent with the ceiling of the Oil Spill Liability Trust Fund established under federal laws in the United States and with existing insurance practices as regards shipowners’ third party liability cover for oil pollution, which may come into play if the limitation under the CLC is not applicable” (COM(2000)802 final p. 56).

that of the 1992 Fund Convention.<sup>75</sup> The Supplementary Fund constitutes a third “layer” in the international regime and its compensation ceiling is 750 million SDR per damaging event, including amounts stipulated in the 1992 Liability and Fund Conventions. The EU Council has since authorized the member states to ratify the said protocol in the interests of the European Union.<sup>76</sup> I will return to the Supplementary Fund below in Section 4.1.1.

2. *The Channelling of Liability.* The Commission has also criticised prevailing imbalances regarding liability for various actors (“operators”, “managers”, “charterers”, etc.) involved in the maritime transport of oil. Liability has been completely channelled to the registered shipowner, who often does not even have control over the transport. Compensation may not be claimed from other actors “unless the damage resulted from their personal act or omission, committed with the intent to cause such damage, or recklessly and with knowledge that such damage would probably result”.<sup>77</sup> Although such a channelling does have its advantages (e.g., clarity and the avoidance of multiple insurance coverage of the same liability risk), the Commission considers that the risks connected with oil transports ought to be better reflected in liability for other involved parties besides the shipowner.<sup>78</sup> The EC Commission has therefore proposed that it should be made possible to lodge a claim for oil pollution damage against “the charterer, manager and operator of the ship”.<sup>79</sup> The issue was accentuated further through the sinking of the *Prestige* on 13 November 2002.<sup>80</sup>

3. *The Concept of Oil Pollution Damage.* The definition of “pollution damage”<sup>81</sup> in the 1992 Oil Pollution Liability Convention does not provide sufficient compensation for damage to the environment. The applicable international liability regime and the IOPC Fund mainly address property damage and economic losses, i.e., they focus more on the protection of concrete and individual rights than on general interests.<sup>82</sup> And although claims for compensation for impairment of the environment can be lodged, compensation is

---

<sup>75</sup> See above note 67.

<sup>76</sup> Council Decision 14389/2/03 REV 2 of 11 December 2003. The Council has set as a goal the ratification by the Member States of the protocol by 30 June 2004. The protocol enters into force internationally three months after at least eight states have become parties to it and the aggregate amount of fee-based oil received by those countries is at least 450 million tons.

<sup>77</sup> Art. III.4. of the Oil Pollution Liability Convention. Regarding this provision, see P. Wetterstein, 2004 Section 6.2.4.

<sup>78</sup> In COM(2000)802 final p. 58, the EC Commission states, *inter alia* that: “such protection of key players is counterproductive with regard to its efforts of creating a sense of responsibility in all parts of the maritime industry. Therefore, it is of the opinion that the prohibition of claiming compensation from a number of key players involved in the transport of oil at sea should be removed from the CLC Convention.”

<sup>79</sup> See H. Ringbom, 2001 p. 275 f.

<sup>80</sup> See the EC Commission’s communication COM(2002)681 final p. 10.

<sup>81</sup> See above note 9.

<sup>82</sup> Concerning that distinction, see P. Wetterstein, *A Proprietary or Possessory Interest: A Conditio Sine Qua Non for Claiming Damages for Environmental Impairment* in P. Wetterstein (ed.), *Harm to the Environment. The Right to Compensation and the Assessment of Damages*, 1997 p. 30 ff.

expressly limited to “costs of reasonable measures of reinstatement actually undertaken or to be undertaken”.<sup>83</sup> That shortcoming has also been criticised to by the EC Commission.<sup>84</sup> In recent years, discussions have intensified concerning the need to provide compensation for costs exceeding the restoration of the environment to its original state.<sup>85</sup>

4. *The Right of Limitation.* Article 4 of the 1976 Limitation Convention contains a provision on breaking the right of limitation. The liable party loses the right to limitation if it is proved that he has caused the damage “with the intent to cause such loss, or recklessly and with knowledge that such loss would probably result”. It is however very difficult for the victim to break the right to limitation. That is exactly what was intended when the language of Article 4 was approved. There was a desire to make the right to limitation practically “unbreakable” in exchange for the ship owners approving the higher liability amounts.<sup>86</sup> Both as a matter of principle and in consideration of the applicable levels of the liability amounts,<sup>87</sup> such a high threshold for loss of the right of limitation is however questionable. Furthermore, the victim’s preparedness to try to break such a limitation might be reduced by the fact that liability insurance does not usually cover the above-cited type of reprehensible conduct.<sup>88</sup>

In its communication, the EC Commission has also criticised the said threshold. This is because the 1992 Oil Pollution Liability Convention<sup>89</sup> (and the Fund Convention) contain an identical provision on the loss of the right of limitation. The Commission considers that the threshold should be lowered and that at least the proven gross negligence of the liable party should result in unlimited liability.<sup>90</sup> In that way, the liable party’s conduct would be better reflected in the liability; preventive purposes would also be furthered.<sup>91</sup>

As a consequence of the *Prestige* sinking, the EC Commission issued yet another communication which a) stressed the need to fasten and tighten the measures referred to in the *Erika* communications; and b) contained proposals for new preventive measures.<sup>92</sup> Considering however current tort law reforms, this communication does not contain anything new.

---

<sup>83</sup> Regarding that limitation, see P. Wetterstein, 2004 Section 4.6.2.1.2.

<sup>84</sup> See COM(2000)802 final p. 53 ff.

<sup>85</sup> See P. Wetterstein, 2004 Section 4.6.2.2.

<sup>86</sup> See further P. Wetterstein, 2004 Section 6.2.4.

<sup>87</sup> See P. Wetterstein, 2004 Sections 6.2.3.1. and 6.2.6.

<sup>88</sup> See further P. Wetterstein, 2004 Section 8.2.2.4.

<sup>89</sup> See Art. V.2.

<sup>90</sup> As an example of the prevailing situation, the Commission mentions that the *Erika*’s owner can limit its liability to 13 million Euros with only an extremely small risk of losing this protection.

<sup>91</sup> See COM(2000)802 final p. 57.

<sup>92</sup> Communication from the Commission to the European Parliament and to the Council on Improving Safety at Sea in Response to the *Prestige* Accident, 3 December 2002, COM(2002)681 final. The Commission also stressed the vulnerability of the EU area considering that 90% of its oil supply is sea-borne. Regarding the EC’s program of measures, see also V. Power & D. Casey, *The Prestige: the European Union legal dimension*, 9 The Journal of International Maritime Law, 2003 p. 342 ff.

How then shall the needed reforms and proposals, briefly presented above, be assessed? In what way could the international regime for compensation of oil pollution damage be improved?<sup>93</sup> What are the implications of such an assessment for the 1996 HNS Convention and the Bunker Convention of 2001?

#### 4 Tort Law Assessment

Firstly, let me repeat that the splitting up of the maritime tort liability in several conventions ratified by different countries is hardly a happy state of affairs.<sup>94</sup> We presently have conventions governing nuclear liability, oil pollution liability, HNS liability, liability for bunker emissions, limitations on liability, etc.<sup>95</sup> This state of affairs has hindered efforts to reach uniform and optimally functional solutions. The fact that the conventions contain different liability amounts is a problem in itself.

For example, in a collision between a chemical tanker and an oil tanker, oil from the tanker can leak out and start burning and the chemical tanker's cargo can explode and the bunker oil can spill out. This can result in personal injuries, property damage and damage to the environment. The duty to take preventive measures and to remove shipwrecks may also arise. The conventions in question stipulate different liability amounts and it could be very difficult to establish which losses/costs are covered by which convention.<sup>96</sup>

Moreover, the requirement of various certificates for satisfaction of the insurance duty can result in administrative problems.<sup>97</sup> The efforts to effectively exploit the insurance market's capacity are also undermined by the multitude of conventions. It should be (should have been) possible to agree that only oil pollution liability, given its homogeneity and its well developed compensation regime, and nuclear liability, given its unique character, would be the subject of special regulation, whereas all other liability would be governed by the same

---

<sup>93</sup> It should also be noted that the IOPC Fund's Assembly established a working group in 2000 (IOPC Third Inter-sessional Working Group – WGR.3) to study the need to develop the international compensation regime. After the working group's active participation in the efforts to create a supplementary fund it now continues its work to develop the regime in the long term and to examine the distribution of liability between shipowners and the oil industry. See below Section 4.1.1.

<sup>94</sup> See e.g., P. Wetterstein, 1997 p. 451 f.

<sup>95</sup> It can be noted that the IMO is presently drafting a convention on the removal of wrecks (Draft Convention on Wreck Removal) in anticipation of a diplomatic conference in 2004-2005. See further IMO LEG 86/4, 25 February 2003.

<sup>96</sup> The difficulties are aptly illustrated by the IOPC Fund's Director M. Jacobsson in IOPC 92FUND/A.8/26, 10 October 2003, Annex I.

<sup>97</sup> See P. Wetterstein, 2004 Section 8.4.1.2. The difficulties associated with the existence of many conventions containing a duty to insure is also criticised by U.L. Rasmussen, *Tvungen forsikring af ansvar til søs* in *Festskrift i anledning af Den danske Søretsforenings 100 års jubilaum år 2000*, 2000 p. 147 f., who, *inter alia*, introduces the idea of an "umbrella convention" that would contain provisions on compulsory liability insurance and direct claims from the various liability conventions.



convention.<sup>98</sup> Such a convention would be based on strict liability, compulsory insurance and the highest liability amounts possible (or unlimited liability).<sup>99</sup>

Nevertheless, the fact remains that the maritime tort liability is split into several conventions and that the compensation regimes' "efficacy" is assessed on the basis of how well they compensate the victim in an accident case.<sup>100</sup> In my view, compensation regimes should be designed so as to secure full<sup>101</sup> compensation for the victim even in cases of large-scale maritime disasters.

#### 4.1 Oil Pollution Damage

Regarding *oil pollution damage*, the present compensation regime providing for strict liability with, *inter alia*, *force majeure* exceptions,<sup>102</sup> compulsory insurance with a right to "direct action" for the victim,<sup>103</sup> and the compensation-securing IOPC Fund financed by oil recipients, has mainly functioned well.<sup>104</sup>

As previously mentioned, the duty to insure applies to ships that transport more than 2,000 tons of persistent oil as bulk cargo. It can however be questioned whether that quantity of oil is an appropriate threshold for determining the duty to insure. After all, even smaller quantities of oil can cause substantial environmental damage<sup>105</sup> and, what is more, even smaller tankers have a substantial quantity of persistent oil as bunkers on board. On-board bunkers should perhaps be included in the calculation of the threshold quantity.<sup>106</sup> Regarding empty tankers, the question arises as to whether a certain number of bunkers should in itself constitute the basis for the duty to insure. After all, larger tankers in particular can have a quantity of bunkers on board that exceeds the aforementioned 2,000 tons of persistent oil.

---

<sup>98</sup> This appears however to have been "too much of a challenge" for the IMO's Legal Committee, see E. Røsaeg, *Compulsory Maritime Insurance*, Scandinavian Institute of Maritime Law, Yearbook 2000, Marlus No. 258, 2000 p. 180.

<sup>99</sup> Regarding this problem, see P. Wetterstein, *The Principles of Limitation and Sharing of Liability* in Legislative Approaches in Maritime Law, Marlus No. 283, 2001 p. 93 ff and *idem*, 2004 Section 6.2.6.

<sup>100</sup> Cf. the approach in my study of the shipowner's environmental impairment liability, P. Wetterstein, 2004 Section 1.2., where the reparative function of liability is stressed.

<sup>101</sup> Regarding "full" compensation, cf. P. Wetterstein, 2004 Section 4.1.

<sup>102</sup> See further P. Wetterstein, 2004 Section 3.2.2.1. where I however question the correctness of granting the maritime industry, with its insurance coverage, the right to such an exception from liability as is contained in the Oil Pollution Liability Convention, Art. III 2.c ("damage...was wholly caused 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").

<sup>103</sup> The oil damage liability is as a rule covered by P & I insurance. Regarding that insurance, see P. Wetterstein, 2004 Section 8.2.

<sup>104</sup> See also above note 68.

<sup>105</sup> In principle, all ships transporting persistent oil ought to be required to have insurance. In that way, the IOPC Fund's compensation burden would be reduced.

<sup>106</sup> For practical reasons, the ship's bunker capacity could be included in that calculation. See U.L. Rasmussen, 2000 p. 140.

Furthermore, a supplementary fund encompassing 750 million SDR was adopted on 16 May 2003. But the question can still be asked, does that protection suffice?

#### 4.1.1 The sufficiency of the compensation amounts

The question above has to be answered in the negative: Already in October 2003, the total bill for the accident of the *Prestige* was estimated at 1,100 million Euros,<sup>107</sup> i.e., more than the Supplementary Fund's compensation ceiling. And it should be borne in mind that the costs of, e.g., oil cleansing and preventive measures are constantly on the rise.<sup>108</sup> Furthermore, compensation rules are continually under development and, as mentioned above, there is also a certain pressure within the EU to improve the victim's position. All of this requires greater financial resources. And these already exist: The international P & I group's compensation capacity is currently USD 4.25 billion and for oil pollution damage the P & I insurance is limited to USD 1 billion,<sup>109</sup> which is more than ten times the maximum liability under the 1992 Liability Convention. Furthermore, the P & I club's compensation capacity is highly dynamic: It can easily be adapted to increased compensation needs.<sup>110</sup>

But there is also the issue of the distribution of risks between the shipowners and the oil industry. The Supplementary Fund is financed by the oil industry without any increase in shipowners' liability burden. That discrepancy should in my view be corrected as part of a future revision of the liability regime. Greater liability should be imposed on shipowners; there is no lack of funds for that purpose. After all, although oil is the polluting substance, most accidents are caused by human error in the operation of the ship.<sup>111</sup> Furthermore, the present regime results in oil importers in states belonging to the Fund being forced to pay an unreasonable portion of the damage caused during voyage in the case of, e.g., large transports of oil to the U.S. or to other countries that are not parties to the international regime.

---

<sup>107</sup> This calculation has been made by the IOPC Fund's Director, see IOPC 92FUND/EXC.22/8, 7 October 2003 p. 11 f.

<sup>108</sup> See e.g., IOPC 92FUND/WGR.3/14/2, 7 January 2003 p. 6 ff.

<sup>109</sup> See P. Wetterstein, 2004 Section 8.2.1.

<sup>110</sup> Cf. P. Wetterstein, 2001 p. 96 ff.

<sup>111</sup> According to an address by dipl. ing. J. Lehtonen, President of ILS Consulting, at Öljyalan ympäristöpäivä in Helsinki on 20 Sept. 2001, the causes of ship incidents break down as follows: human error 58%, structural errors 13%, mechanical failure 10%, equipment errors 10% and other causes 9%. In the document IOPC 92FUND/WGR.3/14/2, 7 January 2003 p. 10, the OCIMF (Oil Companies International Marine Forum) also states that serious oil accidents are usually due to "factors within the control of the shipowner or his servants". The said organisation stresses the preventive significance of compensation liability. The question of increased liability for shipowners has been addressed in discussions within the IOPC Fund, whose director has been given the task of studying the cost distribution between the shipowners and the oil industry based on previous oil incidents and against the background of the compensation amounts stipulated in the 1992 conventions, possible increases and inflationary factors. See IOPC FUND92/A/ES.7/6, 25 March 2003 p. 9 ff.

The compensation regime is so constructed that an increase in shipowners' liability amounts is of little direct relevance to victims of oil pollution. After all, what is involved is a shifting of compensation liability between shipowners and the IOPC Fund. And yet a sizeable increase in the shipowners' portion of liability can result in the oil industry increasing its portion of compensation (the Fund), with a favourable effect for victims. And from a *preventive* standpoint, an increase in the shipowners' portion of liability may have a positive effect. Shipowners would thereby be made to better observe and comply with international safety rules and standards.<sup>112</sup> And as I pointed out in various contexts,<sup>113</sup> a limitation of liability within a *functioning* compensation regime does not really give rise to any misgivings on grounds of principle. But the regime should secure the victims' right to full compensation.

The compensation ceiling in the supplementary fund should thus have been set much higher. Moreover, the compensation regime requires a prompter and smoother mechanism for regular inflation-related and other adjustments of the liability amounts ("tacit acceptance procedure") than is the case today. The amendment procedure is presently cumbersome and requires a long political process.<sup>114</sup> But these questions are linked to the more general problem of finding satisfactory solutions in liability and compensation conventions at the global level. I will return to that problem below.

#### 4.1.2 Bunker emissions

As to pollution damage caused by *bunker* emissions not covered by the 1992 Oil Pollution Liability Convention, the 2001 Bunker Convention lacks a compensation-securing fund regime. Although it is true that the last-mentioned convention contains provisions on the duty to insure and on direct claims against the insurer, the compensation cannot be obtained when the responsible party is financially unable to fulfill his duties and when that party's insurance is also insufficient. Yet another problem is that liability under the Bunker Convention will clearly be limited in accordance with general rules, i.e., the 1976 Limitation Convention, as amended. These limitation rules can also have the effect of denying victims full compensation. That cannot be right and reasonable. I have therefore proposed that the liability amounts be made the subject of additional (after the increase under the 1996 amending protocol) and substantial increases and that other revisions of the Liability Limitation Convention be undertaken as well.<sup>115</sup>

---

<sup>112</sup> Even if the question of the preventive effect of tort liability is controversial, *see* P. Wetterstein, Section 3.2.4., I think that such a presumption is to some extent justified.

<sup>113</sup> *See e.g.*, P. Wetterstein, 2004 Section 6.2.6.

<sup>114</sup> As an example of the slowness of the present amendment system, it can be mentioned that the following increase of the liability amounts after the increase in October 2000 (50.37%), which entered into force on 1 Nov. 2003, can take effect after 11 years. As to the procedure for amending the liability amounts, *see* Art. 15 of the Oil Pollution Liability Convention.

<sup>115</sup> *See further*, P. Wetterstein, 2004 Section 6.2.6.

The Bunker Convention too imposes liability on the shipowner for oil pollution damage (Art. 3). But unlike the Oil Pollution Liability Convention, this channelling of liability is not “unconditional”; instead, “the shipowner” is defined as “the owner, including the registered owner, bare boat charterer, manager and operator of the ship” (Art. 1.3.).<sup>116</sup> In cases where several persons are liable, liability is joint and several.

The term “operator of the ship” probably corresponds most closely to “redare” in Nordic terminology.<sup>117</sup> Liability has been extended to include “managers”, given that the operator often transfers important crew and technical maintenance functions to “ship management” companies.<sup>118</sup>

#### 4.1.3 The channelling of liability

I have previously criticised the imbalance in the liability applicable to various actors under the 1992 Oil Pollution Liability Convention<sup>119</sup> (cf. also the EC Commission’s view, referred to above). The risks associated with oil transports should be better reflected in liability for other participating actors than the shipowner. From that point of view, the Bunker Convention’s solution appears more nuanced.

For victims, the issue is mainly of *preventive* significance, given the oil pollution damage funds’ compensation-securing effect. The liability should therefore at least be imposed on the party possessing the operative control of the maritime transport, i.e., “the operator”.<sup>120</sup> This does not of course rule out that the shipowner too could continue to be a subject of liability in situations where these actors are different persons (cf. 2001 Bunker Convention and the solution of the OPA 1990 below).

It has also been discussed whether the charterers should lose their “channelling protection”.<sup>121</sup> As appeared above, the EC Commission proposed after the sinking of the *Erika* that it should be possible to lodge oil pollution claims against “the charterer, manager and operator of the ship”. The issue has

<sup>116</sup> According to information in CMI Newsletter, No. 1, January/April 2002 p. 3, the expansion of the subjects of liability was deemed desirable since the Bunker Convention lacked both its own liability amounts and a supplementary compensation fund.

<sup>117</sup> Regarding the ship operator concept, see P. Wetterstein, 2004 Section 2.2. The bare boat carrier usually also bears operator liability.

<sup>118</sup> See P. Wetterstein, 2004 Section 2.2.2.1.

<sup>119</sup> See further P. Wetterstein, 2001 p. 110, 113 f.

<sup>120</sup> According to the P & I clubs, such an extension of liability to, *inter alia*, “operators”, would mean increased litigation on the question of blame and thereby place the victim in a worse position. See IOPC FUND/WGR.3/8/3, 1 June 2001 p. 3. To this it can be said that a) liability is strict (and in the case of multiple liable parties, joint and several; cf. the Bunker Convention); and b) possible actions of recourse between the liable parties are of only secondary importance to victims.

<sup>121</sup> It can be mentioned for the sake of clarity that to the extent that charterers are also importers of oil, they can have a duty of contribution to the IOPC Fund. They thereby participate in the financing of the compensation regime.

also been accentuated by the accident of the tanker *Prestige* on 13 November 2002.<sup>122</sup>

I am however somewhat doubtful about imposing increased liability on charterers.<sup>123</sup> I take this view both because of the decreased control that the oil companies have of the tank tonnage through long-term charter parties and the companies' increased demands that so-called vetting clauses<sup>124</sup> be inserted in time and voyage charters.<sup>125</sup> Furthermore, the EC Commission has proposed penal sanctions for any person who intentionally or through gross negligence causes or contributes to pollution by ships. Charterers would thus be included.<sup>126</sup> Since the proposal has preventive aims,<sup>127</sup> a possible effect of liability is "consumed" in that respect. The Commission also intends to enter into negotiations with oil companies on a "code of conduct" for the oil transports'.<sup>128</sup>

#### 4.1.4 Loss of the right to limit liability

The EC Commission's proposal to lower the threshold for loss of the *right of limitation* in the 1992 Oil Pollution Liability Convention also has mainly preventive intentions – even if the IOPC Fund's recourse possibilities would thereby be improved. As mentioned above, I too am critical of the present state of the law. I have, with essentially the same arguments as those of the Commission, proposed a reduction of the "breaking threshold", even to the extent that a return to the "actual fault or privity" requirement (1969 Oil Pollution Liability Convention) could be considered.<sup>129</sup> Since modern transportation technology has made it possible for ship operators to monitor and

---

<sup>122</sup> See the EC Commission's communication COM(2002)681 final p. 10.

<sup>123</sup> We can here mention, *inter alia*, that C. de la Rue & C. Anderson, *Liability of Charterers and Cargo Owners for Pollution from Ships*, 26 Tulane Maritime Law Journal, 2001 p. 56 take a restrictive view of imposing increased liability on charterers.

<sup>124</sup> Those clauses are based on the owner agreeing that the ship is, and eventually will be kept, in such condition that the oil companies use it. The companies examine the ship and determine whether it can transport cargo for the oil company in question.

<sup>125</sup> See further P. Wetterstein, 2004 Section 3.2.4.

<sup>126</sup> See proposal for a Directive of the European Parliament and of the Council on ship-source pollution and on the introduction of sanctions, including criminal sanctions, for pollution offences. The proposed directive covers pollution caused by all ships and covers not only oil pollution but also unlawful emissions of hazardous fluid substances. As to penal sanctions for natural and legal persons, fines, forfeiture of the economic winnings of the crime, etc., shall be prescribed. It shall also be possible to sentence natural persons, in serious cases, to imprisonment. See Finland's Communication Ministry's memorandum EU/2003/0290 p. 3.

<sup>127</sup> See also H. Ringbom, 2001 p. 275.

<sup>128</sup> See COM(2002)681 final p. 16 regarding the agreement's possible contents.

<sup>129</sup> See P. Wetterstein, 2001 p. 102. Cf. also G. Gauci, *Oil Pollution at Sea. Civil Liability and Compensation for Damage*, 1997 p. 169 f. who ponders various solutions and mentions, *inter alia*, the possibility of binding the right of limitation to fulfillment of the ISM Code. On the other hand, C. de la Rue & C. Anderson, 2001 p. 57 f. are reserved in their view of a lowering the requirements for unlimited liability.

follow in real time the ship's nautical as well as its commercial activities, a return to the said rule could offer preventive benefits.

#### 4.1.5 "Pollution damage"

Perhaps the greatest need for revision concerns the provision on *pollution damage* in the Oil Pollution Liability Convention (Art. 16).<sup>130</sup> As mentioned, it does not satisfy modern environmental needs for protection. A more nuanced and extensive liability for damage to the environment is called for. In contrast to the older definition in the 1969 Convention,<sup>131</sup> compensation for damage to the environment other than loss of income<sup>132</sup> is expressly limited to the costs of reasonable measures for restoration of the environment (as well as future measures). The main purpose of this specification was to promote a uniform interpretation of the oil pollution damage concept. Government Bill 1995:26, in which the provisions of the Oil Pollution Liability Convention were incorporated into Finnish law (Maritime Act 674/1994 Ch. 10), stated the following:

"The definition of damage in the original convention had resulted in a fragmented case law regarding compensable environmental damage. The international oil pollution compensation fund has during its period of operations elaborated certain principles for compensation of environmental damage and these principles are taken into account in the protocols. One objective of the new definition is that the system shall not cover such claims for compensation of environmental damage that are solely based on theoretical models of calculation."<sup>133</sup>

As appears from the above statement, compensation shall be based on *actual* costs of restoration, i.e., speculative costs are not compensated. In addition, the undertaken (or planned<sup>134</sup>) measures shall be *reasonable*.

The above-quoted statement also refers to the IOPC Fund's case law. As early as 1980, the Fund (1971 Fund Assembly) adopted a resolution on compensation of environmental damage. The resolution notes that determination of compensation "... is not to be made on the basis of an abstract quantification

---

<sup>130</sup> See above note 9.

<sup>131</sup> The previous formulation read as follows: 'Pollution damage' means 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 costs of preventive measures and further loss or damage caused by preventive measures" (Art. I.6.). This language did not of course rule out an interpretation that grants compensation for restoration costs. Cf. also C. de la Rue & C. Anderson, 1998 p. 507.

<sup>132</sup> Regarding compensation for loss of income, see P. Wetterstein, 2004 Section 4.4.3.

<sup>133</sup> Reg. Prop. 1995:26 till Riksdagen med förslag till ändring av lagstiftningen om ansvarighet för oljeskador förorsakade av fartyg, p. 6. [Translation mine].

<sup>134</sup> The formulation "reasonable measures of reinstatement actually undertaken *or to be undertaken*" [italics mine] was inserted in the convention text to clarify that pre-payment of the restoration costs could be made. Situations can in fact arise where restoration of the environment requires such pre-payment. See also M. Göransson, 1999 p. 350. It should however be noted that the word "actually" appears to mean that the cost calculations should be rather detailed. Cf. C. de la Rue & C. Anderson, 1998 p. 511.

of damage calculated in accordance with theoretical models”.<sup>135</sup> The idea was that compensation would only be payable to a victim suffering measurable financial loss (in the form of restoration costs).<sup>136</sup> And the IOPC Fund’s *Claims Manual* (November 2002) describes what the Fund requires in order for it to approve a claim relating to the costs of restoring the marine environment. In order for such costs to be compensated, the measures should satisfy the following criteria:

- the measures should be likely to accelerate significantly the natural process of recovery
- the measures should seek to prevent further damage as a result of the incident
- the measures should, as far as possible, not result in the degradation of other habitats or in adverse consequences for other natural or economic resources
- the measures should be technically feasible
- the costs of the measures should not be out of proportion to the extent and duration of the damage and the benefits likely to be achieved”.<sup>137</sup>

The above criteria stress the measures’ restorational and damage-limiting effect but also the need for reasonable assessments and a kind of “cost/benefit” analysis. As to interpretation and application of the requirements, I will limit myself to providing a reference.<sup>138</sup>

I can subscribe to the EC Commission’s view that the definition of “pollution damage” is unsatisfactory. The term is insufficient in cases where restoration of the environment<sup>139</sup> is not possible or where it would appear to be unreasonably costly. Consequently, specifications should be included in the convention text. Like the Commission,<sup>140</sup> I have proposed that an explicit obligation should be

<sup>135</sup> Resolution No. 3 on Pollution Damage (1980). See also C. de la Rue & C. Anderson, 1998 p. 507 f.

<sup>136</sup> See M. Jacobsson, *The International Oil Pollution Compensation Funds and the International Regime of Compensation for Oil Pollution Damage*, written submission at seminar entitled Compensation for Oil Pollution – Today and Tomorrow, Helsinki 15 Nov. 2001 p. 10.

<sup>137</sup> *International Oil Pollution Compensation Fund 1992. Claims Manual*, November 2002 p. 29 f.

<sup>138</sup> See P. Wetterstein, 2004 Section 4.6.2.1.2.

<sup>139</sup> Conceptually, “restoration” extends further than to a mere removal of oil and other pollutants. Restoration embodies an effort to repair or replenish the environment to its previous state. See e.g., C. de la Rue & C. Anderson, 1998 p. 504. It should however be noted that it is not usually possible to fully restore the environment. The concept of “restoration” should not therefore be construed too narrowly. Cf. thereon B. Sandvik, *Miljöskadeansvar*, 2002 p. 338 ff.

<sup>140</sup> COM(2000)802 final p. 59. The Commission is also waiting to see what the above-

imposed on the shipowner to at least effect so-called alternative restoration, i.e., to acquire “equivalent resources and habitat”<sup>141</sup> when restoration of the environment is not possible.<sup>142</sup> In that way, preventive purposes too could be achieved in the form of various environmental protection measures.<sup>143</sup>

It can also be noted that the IOPC Fund has, *inter alia*, as a result of the EC Commission’s critical position, somewhat rewritten the requirements for compensation of restoration costs. The following is prescribed in the Fund’s Claims Manual (Nov. 2002 p. 29):

“The aim of any reasonable measures of reinstatement should be to bring the damaged site back to the same ecological state that would have existed had the oil spill not occurred, or at least as close to it as possible (that is to re-establish a biological community in which the organisms characteristic of that community at the time of the incident are present and are functioning normally). Reinstatement measures taken at *some distance from, but still within the general vicinity of, the damaged area may be acceptable, so long as it can be demonstrated that they would actually enhance the recovery of the damaged components of the environment* [italics mine.]. This link between the measures and the damaged components is essential for consistency with the definition of *pollution damage* in the 1992 Civil Liability and Fund Conventions.”

---

mentioned (Section III) efforts to produce an EC environmental damage directive will bring. *See* below note 142.

<sup>141</sup> This concept too is however a bit problematic to apply. What does “equivalent resource” mean? When has the alternative restoration been completed? Here we can refer to B. Sandvik, 2002 who submits (p. 390): “It is clear that the assessment of the resources’ equivalence and the extent of required subsidiary restorative measures must often depend on substantial discretion. As examples of other measures approved by case law as subsidiary restoration, the following can be mentioned: removal of barriers for fish migration, excavation and documentation of damaged ancient remains, creation of artificial reefs, the planting of a compensatory amount of seaweed in a different area than the polluted one, and arrangement of alternative access to drinking water”. [Translation mine].

<sup>142</sup> *See* P. Wetterstein, 2001 p. 111. Cf. Art. 2.8. in the 1993 European Convention (1993 Convention on Civil Liability for Damage Resulting from Activities Dangerous to the Environment). The Convention’s Explanatory Report (*See* Council of Eur. Doc. (DIR/JUR 92) 2 (1993)) states the following: (p. 28): “When it is impossible to restore or re-establish the environment, the measures of reinstatement may be in the form of the reintroduction of equivalent components into the environment. This applies for example in the case of the disappearance of an animal species or the irreparable destruction of a biotope. Such damage cannot be evaluated financially and any reinstatement of the environment is in theory impossible. Since such difficulties must not lead to a complete absence of compensation, a specific method of compensation has been introduced. This method of compensation is based on achieving an equivalent instead of an identical environment”. In the latest EU proposal for a directive governing liability for environmental damage (above note 61), it is specified (Art. 2.11) that “remedial measures” means “any action, or combination of actions, including mitigating or interim measures to restore, rehabilitate or replace damaged natural resources and/or impaired services, or to provide an *equivalent alternative to those resources or services as foreseen in Annex II* [italics mine.]. Remediation is divided into “primary remediation”, “complementary remediation” and “compensatory remediation”. The proposal appears to have been influenced by the state of the law in the U.S., especially the 1990 OPA. The complicated compensation methods do however give rise to certain misgivings. Cf. P. Wetterstein, 2004 Section 4.6.2.2.

<sup>143</sup> Cf. B. Sandvik, 2002 p. 401 ff.



This entails a minor extension in relation to the Claims Manual's previous text from the year 2000, but a real improvement requires a re-drafting of the pollution damage concept in the Oil Pollution Liability Convention.<sup>144</sup>

Some form of *pecuniary* compensation could also be considered in cases where restoration of the environment is not (technically or physically) possible<sup>145</sup> or when it is apparent that it would be unreasonably expensive. And even if restoration at a reasonable cost were to be possible, it could still be discussed whether there should be a duty for the shipowner to compensate the environmental values that are lost during the period of the restoration (which can be very time-consuming). I am not able in the present context to join that discussion; instead, I will provide a reference.<sup>146</sup>

#### 4.1.6 Comparison with the OPA 1990

A revision of the international compensation regime for oil pollution damage in line with the above-recommended guidelines would also bring that regime closer to the state of the law in the U.S., where tort liability is an important instrument for implementing environmental policy. The U.S. has not joined the international regime; instead, the Congress passed the Oil Pollution Act (OPA) in 1990.<sup>147</sup>

The liability provisions of the OPA govern oil spills in U.S. territorial waters or within its exclusive economic zone from "a vessel or facility". Liability is strict<sup>148</sup> and joint and several, and the subject of liability for vessels is stated to be "any person owning, operating, or demise chartering the vessel".<sup>149</sup> As to

---

<sup>144</sup> Since Art. 1.9 of the 2001 Bunker Convention has the same formulation of "pollution damage" as the Oil Pollution Liability Convention, the above-mentioned statement also applies to the Bunker Convention.

<sup>145</sup> It should however be noted that studies show that oil emissions seldom cause permanent damage to the marine ecosystems. Those systems have a substantial natural ability to recover. See further, e.g., C. de la Rue & C. Anderson, 1998 p. 378 ff., 511. The damage caused by oil emissions depends on such factors as the amount and type of spilled oil, weather conditions, tide and currents, and not least the damaged area's "ecological sensitivity" (note in that regard the shallow Baltic Sea with its brackish waters and its expansive archipelagoes). The problem of non-reparable damage can thus be more concrete in the case of emissions of other hazardous and polluting substances than oil. The HNS Convention contains a definition of "damage" which closely follows the corresponding language in the 1992 Oil Pollution Liability Convention (Art. 1.6.).

<sup>146</sup> See further, P. Wetterstein, 2004 Section 4.6.2.2.

<sup>147</sup> Pub. L. No. 101-380, 104 Stat. 484 (33 USC 2701-2761 (Supp. II 1990)). A factor that contributed to the adoption of the OPA was the grounding of the *Exxon Valdez* on 24 March 1989. Public opinion demanded stricter liability for the oil and tanker industry after the accident, which resulted in extensive damage to the environment. See further P. Wetterstein, *Environmental Impairment Liability in Admiralty. A Note on Compensable Damage under U.S. Law*, 1992 p. 75 ff. A detailed presentation of the OPA is also provided by L.I. Kiern, *Liability, Compensation, and Financial Responsibility Under the Oil Pollution Act of 1990: A Review of the First Decade*, 24 Tulane Maritime Law Journal, 2000 p. 481 ff.

<sup>148</sup> Regarding the liability exceptions, see P. Wetterstein, 1992 p. 80.

<sup>149</sup> 33 USC § 2701 (32)(A). Regarding this definition, see P. Wetterstein, 1992 p. 79.

compensable damage, the OPA covers: both pure economic loss<sup>150</sup> and damage to the environment. Especially in the last-mentioned respect, there exist substantial differences in relation to the international compensation regime.<sup>151</sup>

The OPA also contains provisions on the limitation of liability,<sup>152</sup> but even in that respect, the OPA differs greatly from the international regime. Thus, under the OPA, the possibilities of limitation of liability are very limited. The liability limits do not apply if the damage has been caused by “the responsible party’s gross negligence, willful misconduct, or a violation of an applicable federal safety, construction, or operating regulation”.<sup>153</sup> Furthermore, liability is unlimited if the responsible party does not report an emission or fails to cooperate and assist in the public authorities’ “removal order”.<sup>154</sup> And even more importantly, the OPA does not prevent states from adopting stricter rules for oil pollution liability or from even adopting unlimited liability.<sup>155</sup> Finally, the OPA also requires the providing of financial security (“evidence of financial responsibility”) for the liability amounts.<sup>156</sup>

In my view, the OPA legislation operates well and it has significantly reduced oil spills in the United States. Ships that traffic U.S. waters are modern and, according to statistics, emitted a volume of oil that was nearly 90% less between 1990-98.<sup>157</sup> It is however difficult to judge what significance the OPA’s *liability* rules<sup>158</sup> had for these positive developments. Notwithstanding this, and

---

150 The OPA’s provisions on compensation for pure economic loss, *see* P. Wetterstein, 1992 p. 88 ff., appear to be more extensive than the right to compensation for such damage under the international compensation regime. Both “subsistence users of natural resources” and others who suffer pure economic loss (“loss of profits or impairment of earning capacity”) are entitled to compensation under the OPA. Public authorities can recover lost tax revenues and costs for “additional public services”. Cf. also P. Wetterstein, 2004 Section 4.4.3.

151 The OPA does not merely compensate “costs of removal” but also “the costs of restoring, rehabilitating, replacing, or acquiring the equivalent of the damaged natural resources, plus the diminution in value of those resources, pending restoration” (33 USC § 2706 (d)(1)(A-C)). The damage calculation methods are however controversial. *See* further P. Wetterstein, 2004 Section 4.6.2.2. *See* also M. Nesterowicz’s comparison *Civil Liability for Oil Pollution Convention 1969 and 1992 and The Oil Pollution Act of the United States 1990 – the comparison of the definition of oil pollution damage*. Submission at seminar held on 24 March 2000 at the Institute of Maritime and Transportation Law at Stockholm University.

152 *See* P. Wetterstein, 1992 p. 81 f.

153 33 USC § 2704 (c). This requirement can be very burdensome for shipowners and operators, since in cases of oil spills, it is likely that Federal rules and directives have not been complied with.

154 *See* further P. Wetterstein, 1992 p. 85 f. and T.J. Schoenbaum, *Admiralty and Maritime Law*, Volume 2, 1994 p. 375.

155 Of the United States’ 24 coastal states, 13 have introduced strict and unlimited liability for “oil pollution damage and clean-up”. *See* E. Gold, *Gard Handbook on P&I Insurance*, 2002 p. 445. Nor is the Limitation of Liability Act, 1851, applicable. *See* 33 USC § 2718.

156 *See* further P. Wetterstein, 1992 p. 82.

157 *See* C. Anderson & W.A. Monson, *Controlling the costs of an oil spill in the US*, Beacon. Skuld newsletter, Number 2 July 2000 p. 13.

158 The OPA also contains requirements with regard to a ship’s design, penal responsibility and on establishment of an oil pollution compensation fund (Oil Spill Liability Trust Fund). *See* 33 USC § 2713 (d). That fund functions, *inter alia*, as a “last resort” for compensation of

considering that one-fourth of all seaborne oil goes to the U.S., it is important that the international compensation regime as far as possible resembles the OPA. Only then can we speak of a uniform compensation regime in the global sense.

#### 4.1.7 The difficulty in achieving global solutions

It can however be difficult to obtain the solutions sketched by me in this article within the IMO. The over 160 states presently represented in that organization differ substantially in their view of the development of environmental liability law, not to mention their differences in political, social and economic development. The compromises achieved at the diplomatic conferences often do not satisfy countries with a more progressive view of the need to develop the compensation regimes – this is the main reason why the United States has remained outside the international regime for compensation of oil pollution damage.

Consequently, one solution could be to strive for regional solutions, e.g., within the EU, unless functional and acceptable compensation regimes can be achieved internationally. The EC Commission has already signaled its readiness for such a solution (“a *Europe*-wide maritime pollution liability and compensation regime”) in the event that international efforts should fail.<sup>159</sup> Thereafter, other countries could, at a pace that suits them and according to their own priorities, follow the EU solutions (and the OPA) and in that way contribute to uniformisation. In time, this could affect the content of the international compensation regime.

For a more global solution, however, it is important that the oil industry participates to the greatest extent possible in the financing of the compensation regime. Cf. in this context the recently adopted fund supplementing the IOPC Fund, to which e.g., Japan’s oil industry is a significant contributor.<sup>160</sup> An EU regime would presumably be limited to oil damage on EU waters and be financed through fees on oil imported to the EU. Therefore, an approach similar to the one followed when the Supplementary Fund was adopted can be considered, i.e., the necessary amendments to the 1992 Liability Convention are made through a protocol which is later ratified by interested contracting States (The EU States among them). An adaptation of the fund regime would also be required.

An expanded liability regime would naturally also increase bureaucracy, but the advantage would be a modernized liability protocol to which an increased number of states could become parties. In that connection, it should also be

---

oil pollution damage under the OPA, i.e., compensation should first be claimed from the responsible parties and their insurers. For sums paid from the fund, the state obtains a right of recourse against the responsible parties. The Fund’s compensation ceiling is USD 1 billion per event and the Fund is financed through, *inter alia*, tax on oil imported to the U.S. See further, among others, P. Wetterstein, 1992 s. 83 f. and L.I. Kiern, *The Oil Pollution Act of 1990 and the National Pollution Funds Center*, 25 *Journal of Maritime Law and Commerce*, 1994 p. 489 ff.

<sup>159</sup> COM(2000)802 final p. 60 f.

<sup>160</sup> See above note 32.

noted that the EU, with its 25 Member States, will carry substantial weight in the IMO process of elaborating liability instruments and will thereby more easily present the “European view” of compensation issues. In that connection, the EC Commission is likely to have a central role as a coordinator and “instigator” – we can after all presume that the level of interest and preparedness to seek satisfactory solutions in the oil damage pollution field varies among the EU countries. Some of them do not even have coastal areas that can be threatened by oil emissions.

#### 4.2 *The HNS Convention*

Finally, some words remain to be spoken about the HNS Convention. As mentioned above (Section II), that convention is based on the same solutions as the ones included in the 1992 Oil Pollution Liability Convention. Consequently, it labours under the same shortcomings and weaknesses, i.e., the liability channelling to the shipowner, “unbreakable” liability amounts and a restrictive definition of “damage”. The biggest problem appears however to be the HNS Fund’s liability ceiling of 250 million SDR (set almost ten years ago), which is completely insufficient in cases of larger accidents. I am thinking of, e.g., an exploding gas/chemical tanker close to a densely populated area. The personal injuries and the material damage could be enormous.<sup>161</sup> The liability ceiling should therefore be raised (possibly with a supplementary fund) and the HNS Convention should also in other respects be amended according to the guidelines presented above in connection with the international regime for compensation of oil pollution damage. Proposals made above regarding possible solutions in the event that functional and acceptable solutions are not achieved more globally, naturally apply in this context as well.

---

<sup>161</sup> As an example can be mentioned the explosion of the French cargo ship *Grandcamp* in Texas City on 28 April 1947. See above note 5.