

## THE INTERNATIONAL LIABILITY FUNDS IN THE MARITIME FIELD

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*This Paper aims to explore the current system of the international liability funds in the maritime field. Through the systematic economical, legal and political analysis of the current and envisaged international, regional and national liability funds connected to the pollution of the seas, an overview of the function, efficiency and critical considerations of the chosen liability funds will be presented. A comparison between the international system of the compensation for the oil pollution damage (and the pending hazardous and noxious substances compensation model), and that of the United States is necessary, in order to determine a difference in approaches these two systems use to tackle the burning issues of oil (and hazardous and noxious substances) spills. A special consideration will be devoted to the questions of limited or unlimited liability, scope and strength of the Protection & Indemnity insurance and reinsurance market, problems of the channeling of the liability, moral hazard of the financial caps, and the general lack of the liability funds in the maritime field. Finally, an attempt will be made to consolidate the difference in opinions regarding the previously mentioned issues, and to predict the possible routes of changes awaiting the fund compensation systems.*

**Key words:** CLC, OPA 90', maritime liability funds, limitation of liability, P&I.

## INTRODUCTION

The shipping industry has since time immemorial enjoyed the privileged status when it comes to the questions of responsibility and liability. The interests of the carriers and other persons involved in the carriage by sea have always been well observed and respected when drafting different types of contracts, rules and conventions. And throughout maritime history, from what is known from the European past, and about to be learned from the Chinese historical maritime experience, there are numerous examples of maritime trade being favoured amongst others. The impact of the shipping industry to the World trade is enormous. Our way of life very much depends on the capability of the shipping industry to respond to our demands. Parallel to this, a ship sinking in the English Channel can have dire effects on the other side of the Globe, as the recent example of MSC Napoli has shown. Thus, it comes as no great surprise that the big maritime countries, and in the last 40 years the international community as a whole, have devised different methods of supporting the industry, not only with harmonizing the national maritime laws and bringing certain rules and principles under the international legal umbrella, but also through financial support when claims for compensation start climbing hardly imaginable, yet existing figures. This last method, the international liability funds in the maritime field, will be the core of the research, with the goal of addressing a number of questions like: what sort of liabilities do the funds cover and who is contributing to them?; are the funds a better way to resolve the liability issues than the market insurance or Protection & Indemnity insurance (in further text: P&I Insurance)?; what is the impact of the existing funds in the practice?; why is there a parallel existence of funds covering the same issues?; and, is there a lack of liability funds, and if yes, why is this so?

To begin with, one has to look at the meaning of the word “*fund*” in the maritime field. According to the Black’s Law Dictionary, a fund is “*A sum of money or other liquid assets established for a specific purpose*”<sup>1</sup>. Funds in the maritime field comprise of those in connection with the shipping industry and the protection of the marine environment, primarily with the aim of serving as a source of payment when it comes to the cases of compensation for damages and restoration<sup>2</sup>. An individual maritime fund is a liability scheme set up by an international treaty or/and a national (maritime) law, and formulated as a fund in court<sup>3</sup> after the accident occurs, in

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1 Garner, B.A. (ed.), “*Black’s Law Dictionary*”, Seventh Edition (West Group, St. Paul, Minnesota, 1999), pp. 682/683.

2 They can be also founded for other purposes, such as, e.g., for funding the development of the navigational infrastructure (as we shall see in one of the examples later on); however, this Paper will focus on the predominant ones that cover liability issues primarily.

3 “*Money deposited to pay a contingent liability*”, Garner, B.A. (ed.), *footnote 1*, pp. 682.

order to invoke the rules of the limitation of liability<sup>4</sup>. A mutual fund, defined as “A *pool of investments owned in common and managed for a fee*”<sup>5</sup>, in the maritime sense is a fund with more than one contributor, established before the accident occurs. It is normally founded in an international, regional or national legal regime, in connection to an existing system of liability (the individual fund liability scheme), where it is believed that an additional element of financial security is necessary as to have a successful compensation for the costs of damages and efforts to remove the negative effects of those damages. Thus, mutual maritime funds usually come into play when: a) a person designated to be liable cannot be held liable; b) a person designated to be liable is financially incapable to compensate the claims, and c) the total amount of damage exceeds the limits of liability. Usual contributors in the maritime field can be found among: a) member states to an international treaty establishing an international fund; b) shipping, oil, insurance and other types of industries, and in some cases (as we shall see in the United States - in further text: US - example); c) a contribution from a specially formulated tax law. This goes to show that the risks of the enterprise tend to be shared among all those who receive a certain benefit from a successful conclusion of the same. It however does not indicate that they are assuming liability; it only portrays the importance of the regular flow of goods over oceans, and the willingness of all the interested parties to voluntarily participate in the compensation scheme (in order to protect the interest of the parties held liable (the shipping industry), and at the same time try to satisfy the claims of the victims of the accident). The same kind of reasoning can be applied to the environment protection, with the clear goal of protecting the nature that is a part of our common heritage. A special type of a maritime mutual fund is the P&I insurance offered by the Protection & Indemnity Clubs (in further text: P&I clubs), that are defined as “A *mutual association of shipowners to protect themselves against those risks for which they are not covered under ordinary marine insurance*”<sup>6</sup>. Although they do not fit into the category of the funds discussed in further text, P&I clubs play a significant role in the maritime field, and it would

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4 A relevant document is the: “*Convention on Limitation of Liability for Maritime Claims*”, 1976, London, 19 November 1976, as amended by the “*Protocol of 1996 to amend the Convention on Limitation of Liability for Maritime Claims of 19 November 1976 London*”, 2 May 1996, Chapter III: The Limitation Fund, Art. 11-14, available at: [www.admiraltylawguide.com](http://www.admiraltylawguide.com).

5 Garner, B.A. (ed.), *footnote 1*, pp. 683.

6 Branch, A. E., “*Dictionary of Shipping International Trade Terms and Abbreviations*”, 3<sup>rd</sup> Edition (Witherby, London, 1986), pp. 396; The definition further continues: “*In particular third party liability which is not covered by the usual hull and cargo policies obtained in the marine insurance markets... These include personal injury to passengers and crew, damage to or loss of cargo, claims arising from another ship or other object, removal of wreck and so on*”. As a point of reference, the marine insurance is defined as: “*An agreement to indemnify against injury to a ship, cargo, or profits involved in a certain voyage or for specific vessel during a fixed period*”, Garner, B.A. (ed.), *footnote 1*, pp. 806.

be virtually impossible not to incorporate them into the overall discussion of the topic. As the goal of this Paper is to examine the international system of liability funds, we shall only focus on the mutual maritime funds established or proposed by various international treaties and documents (with an exception of the US system).

## THE INTERNATIONAL REGIME ON LIABILITY AND COMPENSATION FOR OIL POLLUTION DAMAGE

The most renowned international liability regime today (in connection with our topic) is the existing International Regime on Liability and Compensation for Oil Pollution Damage (in further text: International regime), consisting of the 1992 International Convention on Civil Liability for Oil Pollution Damage (in further text: 1992 CLC), the 1992 International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage (in further text: 1992 Fund), as well as the 2003 International Oil Pollution Compensation Supplementary Fund (in further text: 2003 Supplementary Fund). As a point of reference, the 1992 CLC and 1992 Fund are preceded by the 1969 International Convention on Civil Liability for Oil Pollution Damage (entered into force in 1975) and the 1971 International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage (entered into force in 1978 and ended in 2002, involved in 100 incidents, around £329 million of compensation payments). They however lost their practical meaning when majority of the Member States decided to denounce them and join the 1992 CLC and the 1992 Fund, with only 38 States still holding the 1969 Convention in force, and only 3 major claims related to the old Fund still pending for completion – Vistabella, Nissos Amorgos and Ponotoon 300<sup>7</sup>.

Ever since the first major tanker incidents occurred<sup>8</sup>, the international community came to realize that the changes are necessary in order to better protect the environment, the shipping industry, and the victims of the pollution. Since a spill of oil can create a significant harm to the marine environment, a set

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7 A source of the given data, with the additional detailed information on the 1969 and 1971 Conventions, can be found in: “*The IOPC Fund’s 25 Years of Compensating Victims of Oil Pollution Incidents*”, International Oil Pollution Compensation Funds; “*Annual Report 2007*”, International Oil Pollution Compensation Funds; available at: [www.iopcfund.org](http://www.iopcfund.org); or additionally: Jacobsson, M., “*The International Liability and Compensation Regime for Oil Pollution from Ships – International Solutions for a Global Problem*”, *Tulane Maritime Law Journal*, vol. 32, , no. 1, 2007, pp. 1-33.

8 For a short overview, see: Pavliha, M., Grbec, M., “*The 2003 Supplementary Fund Protocol: An Improvement to the International Compensations System for Oil Pollution Damage*”, *Zbornik Pravnog fakulteta u Zagrebu*, vol. 58, br. 1-2, pp. 308-312.

of international regulations were prepared to prevent or minimize a possibility of an oil spill<sup>9</sup>. The effect resulting from a spill creates enormous monetary claims, thus placing the owner of the tanker into a great jeopardy of insolvency. Finally, the victims of oil pollution, the coastal states, people living by the coast and their respectful business, suffer significant damages and setbacks, especially if the shipowner has no available funds for compensation. Therefore, it was decided to set up a scheme where the maritime community would share a part of the burden that the shipowners bear, in order to try to resolve the issues named, and at the same time keep the transportation of oil going<sup>10</sup>.

The 1992 CLC and 1992 Fund entered into force in 1996, and by the end of the 2008 will have a total of 102 Members<sup>11</sup>. They come into play in cases of spill of persistent oil from a tanker in the territory, territorial sea, EEZ or an equivalent area of a Member State<sup>12</sup>. The Conventions create the so-called “*Three Tier Liability System*”. In the first instance (1992 CLC) a shipowner is made liable up to a maximum amount of 89.77 million SDR (£71 million or US\$140 million). A limitation of liability system is adopted, depending on the gross tonnage of the ship,<sup>13</sup> and up to the mentioned cap, in order to protect the shipowners of having to pay major claims on their own and therefore suffer the consequences (insolvency, or a major setback in the investment and business strategy). Additionally, insurance is made compulsory for all vessels carrying over 2.000 tones of persistent oil as cargo, and the institute of strict liability is introduced<sup>14</sup>. In practice, it is the P&I clubs who are paying according to the insurance policy. In the second instance (1992 Fund) the First International Fund (in further text: Fund) is created, with the obligation to pay in cases where the shipowner is exempt, financially incapable (and insurance

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9 For more on this subject, see: Ehlers, P., “*Origins and Compensation of Marine Pollution*”, in: Basedow, J., Magnus, U. (ed.), “*Pollution of the sea – Prevention and Compensation*”, Hamburg Studies on Maritime Affairs, vol. 10 (Springer, Berlin, 2007), pp. 113-128.

10 For a critical view on the separation of liabilities, see: Seward, R.C., “*The Insurance Viewpoint*”, in: “*The Limitation of Shipowners’ Liability: The New Law*”, (Sweet and Maxwell, London, 1986), pp. 183-184.

11 All the data and information is derived from the same source as in the *footnote 7*.

12 Main types of claims: property damage, clean-up operations and preventive measures, losses in fishery, mariculture and tourism sectors, consequential loss, pure economic loss, environmental damage (reasonable measures of reinstatement undertaken or to be undertaken).

13 5.000 gross tonnage – 4.51 million SDR (£3.6 million or US\$7 million); 5.000 - 140.000 gross tonnage – previous amount plus 631 SDR (£499 or US\$983) for every additional unit of tonnage; over 140.000 gross tonnage – 89.77 mil SDR (£71 mil or US\$140 mil).

14 Exceptions: act of war, hostilities, civil war, insurrection, grave natural disaster, sabotage by a third party, negligence of the public authority.

insufficient), or the damage exceeds the shipowner's liability<sup>15</sup>. The Fund is financed by the oil receivers with more than 150.000 tons of crude or heavy fuel oil after sea transport in one calendar year (mainly big oil companies and oil trading companies). A limitation cap is set to 203 million SDR (£161 million or US\$316 million), including the first instance amount. So far, the Fund has been involved in 33 incidents with £231.5 million (or US\$461 million) paid in compensation. Finally, in the third instance (2003 Supplementary Fund), a Second International Fund is created (in further text: Supplementary Fund), again financed by the oil receivers under the same conditions as with the Fund<sup>16</sup>. Maximum amount of the compensation is 750 million SDR (£594 million or US\$1168 million), including the amount of the first two instances. So far, no incidents have occurred involving the Supplementary Fund.

During the course of time, it was realized that there is an obvious disproportion between the contribution of the smaller tankers and the oil receivers. Thus, the International Group of P&I Clubs (in further text: International Group) has proposed a voluntary scheme known as the Small Tanker Pollution Indemnification Agreement (in further text: STOPIA 2006)<sup>17</sup>, by which vessels up to 29.548 gross tons voluntarily increased their liability up to 20 million SDR, thus making the P&I clubs obliged to indemnify the Fund for the difference between the 1992 CLC limit and the voluntary increase. Additionally, the contributors to the Supplementary Fund had felt too exposed to the compensation amounts, which has resulted in another voluntary scheme, the Tanker Oil Pollution Indemnification Agreement (in further text: TOPIA 2006), where the shipowners, or P&I clubs, to be more precise, agreed on indemnifying the Supplementary Fund for the 50% of the compensation amount. A voluntary scheme to replace the formal redrafting of a convention is a relatively novel approach to the creation of an international ruling, but reflects the needs and interests of the practice. As well as the 2003 Supplementary Fund, these two schemes were created in order to respond to the growing concern of the parties involved and address the imbalance in the shipping industry (more on this later). What is perhaps most interesting about their appearance, as far as the topic of this Paper is concerned, is the fact that they testify to, from one side, the economical strength that the P&I clubs and the International Group possess, but also, the influence of the International Group in the international maritime law area (without their cooperation, it is hard to imagine that a similar pair of schemes

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15 The Fund will not be obliged to pay if: a damage occurs in a Non-Member State, damage is caused by an act of war, hostilities, civil war, insurrection or a spill from a warship, and, a claimant is unable to fit the facts of the case under the scope of the definitions of the ships.

16 With a special provisions regarding the possibility of the Member States having to contribute, for more on this see: "The Annual Report 2007", footnote 7, pp. 37.

17 Preceded by the STOPIA agreement.

would come into force, thus opening a variety of problems). Without a proper insurance, nobody is willing to go into a serious shipping business, the market insurance is often too expensive when it comes to certain number of policies, and thus the P&I clubs are the only solution. Without their support and will to insure, it is hard to envisage much of the existing and planned transport of people and goods over oceans. That goes to show how much actual influence do the shipowners (members of the P&I clubs) hold when it comes to decide upon important issues such as a creation of new conventions, a question of the limitation of liability, or other similarly important issues connected to the shipping.

Another interesting question that arises is whether a fund related to the oil pollution is necessary any more, at least in the current form. If the P&I clubs are prepared to compensate the oil receivers for 50% of their contribution in a case of a claim before the Supplementary Fund, then one can ask if it would be reasonable to leave the compensation system to the P&I clubs all together (in connection with this, if they are capable of covering a half of the Supplementary Fund, surely they would be capable to compensate the amount of the Fund as well). So far, the Supplementary Fund has not been put in use, and in a case of an oil spill it is still hard to imagine an occurrence where an overall consumption of the Supplementary Funds' assets would occur (especially due to the extended regulation of the safety and security of the shipping, ever improving salvage capabilities, and better and safer ship designs and crew education)<sup>18</sup>. As the ideas of the unlimited liability were emerging, with constant urging for higher compensation levels, the Supplementary Fund was introduced to tackle the issues and modernize the International regime, but also to keep the same in life. Probably to further support this initiative, P&I clubs decided to involve themselves even more by offering the above mentioned voluntary schemes. Obviously, due to the strength of their mutual funds (which cover, as said before, all sorts of risks, including the oil pollution, and are capable of individually handling all claims up to the amount of US\$7 million), the risk calculations and the mutual reinsurance (the so called Pool, from US\$7 million up to about US\$ 5.4 billion) as well as the market reinsurance capabilities (from US\$50 million up to US\$2.5 billion), the P&I clubs<sup>19</sup> are now in a position to offer greater coverage and broaden their policies (something the market insurance would not do, or would, but with unacceptably high premiums). Thus, in practice, the system would not change significantly if the P&I clubs would offer their members, in a case of an oil pollution, a compensation policy that would comprise of the initial

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18 Although, the case of Exxon Valdez, with billions of US\$ of claims, led to separate system of an oil compensation; a fact that goes to prove that accidents of such a magnitude are still possible and important to address (more on this in the US section of the Paper).

19 The above mentioned data and other information on P&I clubs can be found on: <http://www.igpandi.org/The+Group+Agreements/Pool+reinsurance+programme>.

value of 89,77 million SDR (current first instance), plus 203 million SDR (current second instance), plus 375 million SDR (current half value of the third instance). This idea needs further investigation. First of all, the shipowners should not feel any significant difference, as they are already contributing to the P&I clubs' mutual funds, with perhaps a slight rise in premium due to the incorporation of the Fund compensation value<sup>20</sup> (as an additional support to this claim, the minimal changes in the P&I insurance premiums in the US example are to be taken into consideration). Second of all, the oil receivers would feel a relief, as now a significant amount of assets can be used for other purposes. Thirdly, the victims of the oil pollution should feel no additional difficulty, as the method of claims would simply be extended to the above stated values (in most cases, in first instance or all together, it is the P&I clubs who are dealing with the claims anyways). And finally, an international fund would still exist, although one can think of different ways to constitute it. On one hand, it could remain as it is, covering the value above the proposed P&I cover (and therefore having just one fund in existence), with a possibility of making the cap value even higher (due to the fact that the oil receivers now feel a significant relief of their duties). On the other hand, one could abolish the international fund as a fund created before the accident arises, but rather constitute it as post factum fund, coming into play where the compensation figures go beyond the covered value. In such a case, a methodology of the existing funds would come into play, with the same scope of duties and rules. Although the current system of the International regime performs to full satisfaction of all the concerned parties, this change would perhaps simplify the procedure between the funds and the P&I clubs (elimination of the voluntary schemes), open the way to higher compensations limits, and perhaps make the International regime more attractive to the countries that are not participating in it (most notably, US and People's Republic of China).

But, in order to address the issues of a uniformed system of oil liability and compensation regimes on a global scale, one first has to look at a number of issues where, to begin with, the International regime is criticized, and then after, where the US system differs. The rationale behind the decision of the international community to share a part of a burden lies in the fact that the transport of oil is vital to the World economy and everyday life. Since everybody enjoys benefits, an equal distribution of risk should be made. The shipowners are therefore, as we have seen, liable up to a certain amount, wherefrom the oil receivers contribute

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20 Should this however turn out to a bit more expensive than anticipated, one can always assume that the 50% value of indemnification in the Supplementary Fund could be lowered to fit the desired amount. It is however important to note that the recent significant rise in premiums of some P&I Clubs (Steamship and Japan Shipowners'), due to the current turbulence in the market (significant downturn of the freight rates, piracy and other factors that put an uneasy question mark on an overall shipping industry) shows that it is perhaps still too early to consider any major changes in the system, for more on this, visit: <http://www.lloydslist.com/ll/home/index.htm>.

to the two International funds created to provide an additional financial coverage of claims. This in the end reflects on the price of refined oil at the gas stations and households, thus encompassing a large body of contributors, as envisaged. The reasons for having two funds instead of one is explained through the fact that the conditions on the market change; with more expensive oil and bigger ships, the claims tend to get higher, thus placing the victims of the pollution in an unfavorable position. As mentioned previously, after being subjected to a lot of criticism, with the appearance of a US national fund for a similar purpose, and the emergence of calls for a regional European fund, the response came in a form of a Supplementary Fund, offering greater coverage, and thus satisfying the need, at least for the time being. Whereas some of the issues mentioned will receive a separate attention later in the text, a short summary of criticism addressed to the international regime will be presented, as a way of introduction to the US national system. This only serves as a reminder of the different ways that the funds can be set up, and not as an attempt to research additional issues.

## CRITICISM

A fair amount of criticism reflects to the claim that the financial caps raise a question of the moral hazard of shipping<sup>21</sup>. If a shipowner knows the limits in advance, he might be less encouraged to invest into the quality and safety of his ships (by calculating the odds between the investment on one hand and the risk of a liability on the other), thus creating a phenomenon known as sub-standard shipping<sup>22</sup>. Whereas the limitation is seen as an instrument of making the risks insurable, if the above mentioned de-responsibilization is a state of fact, limitation may well lead to the under-deterrence and the increase of a risk probability. This, among other things, would bring more strain to the insurance market, shipowners, and finally, the effects would be felt on the shipping market as well. As the oil receivers are normally found among big, multinational oil companies, that usually own tankers of their own, the same sort of argumentation, if valid, could be

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21 More on the issue, see: Faure M., Wang H., "The International Regimes for the Compensation of Oil Pollution Damage: Are they effective?", Review of European Community & International Environmental Law, vol. 12, issue 3, 2003, pp. 244-251.

22 Faure warns that this could have a negative impact for the victims who are acting as a third party, unable to bargain for a better standing position (like the Coase theorem suggests). However, he emphasizes that: "The risk of under-deterrence may therefore only arise in those (catastrophic) cases where the amount of the damage actually was higher than the cap", and that the liability rules are only supplementary to the overall regulation concerning the safety of shipping. More on these arguments see: Faure, M., Hui, W., "Financial caps for oil pollution damage: A historical mistake?", Marine Policy, vol. 32, issue 4, 2008, pp. 594-595; Citation from pp. 599.

presented regarding them as well. On the other hand, speaking strictly from the International funds contributors' point of view, if the above occurrence is a reality, then one could question the purpose of a fund that is created to take care of somebody else's misconducts. To conclude on this issue, although the search of profit can, and sometimes does lead through a field of illegality, one would have to compile a fair amount of case law, evidence and testimony before sanctioning the financial caps system on the mentioned grounds.

Channeling of the liability is a legal instrument that excludes a certain number of persons from liability. The main idea is to shorten the procedure, prevent duplication of the proceedings and quickly settle the claims by clearly establishing who is to be held liable and on what claims. As a result, a major principle of the maritime law, the so called "polluter pays" principle, has been over-run. Whereas some criticize this, seeing no reasons why certain people currently excluded<sup>23</sup> should not be held liable if, for instance, proved with negligence, others claim that the system was drawn to satisfy a number of interests. First of all, the shipowner being strictly liable and the ability of the victim of the pollution to make a direct claim from the P&I clubs makes things far more clear and simple. Secondly, the International funds are created to continue with the compensation after the first instance limits are reached, thus further encouraging the victim's effort to receive compensation. Furthermore, since the shipowner has a P&I cover, he may well feel reassured that his business will not suffer an irrecoverable loss. Finally, the fact that, for instance, salvors and charterers are excluded, apart from going directly to their favor (salvors due to the fact that they will not be able to get a P&I policy that would cover an oil spill, the market insurance would be way too expensive, and that a possible claim in full against them might result in a bankruptcy; charterers due to the fact that they can not become members of the P&I club, which would lead to the same effects as with the salvor), it also seems to favor the shipowners, since the salvors tend to prevent the accidents from occurring in the first place, and charterers without having to buy expensive market insurance policies, are able to pay more for the charter. However, one can question why, for example, a salvor, being a professional, and having paid accordingly, should be left out in a case of professional (gross) negligence. As a signal of this reasoning, the new Bunker Convention<sup>24</sup> shortens the list of the exclusions (the salvors are not included).

Finally, perhaps the most disputed and contested issue today regarding the liability is the question of breaking the limits of liability. To begin with, a major

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23 Servants or agents of the owners, the crew, the pilot, the charterer (including the bareboat charterer), manager or operator of the ship, or any person carrying out salvage operations or taking preventive measures.

24 For more on the Bunker Convention, see: Zhu, L., "Compulsory Insurance and Compensation for Bunker Oil Pollution Damage", Hamburg Studies on Maritime Affairs, vol. 5 (Springer, Berlin, 2007); especially pp. 27-28.

criticism addresses the fact that so far, the International regime has failed to fully compensate three major oil spill cases, Nakhodka, Erika and Prestige. Although this number seems small in comparison with all the cases 1992 Fund had to deal with, it serves as an indicator that even with the Supplementary Fund in place, a time may come, keeping in mind the fact that the ships are getting bigger all the time, when even the current maximum figure will not be enough. Although the International regime seems to keep a rather successful reactive feature, with constant rising and adjustments of liability caps, one may question the rationale of keeping the liabilities limited, if this leads to the constant raise of the limits. Additionally, and what is perhaps the most significant breaking point between the International and US regimes, the definition of the institute of the loss of liability, in the International regime is set in a way to be virtually unbreakable<sup>25</sup>, thus, keeping the limits firm and clear. When looking back to the historical perspective of the limitation of liability, Faure reasons that the limitation institute was pushed forwards to encourage shipping as well as to promote the national merchant fleets. Arguments coming out of a more recent times include a fair risk distribution (shared between all who benefit from the activity), protection of the carrier and those who benefit from the shipping industry (keeping the insurance premiums as low as possible (thus making the freight costs lower) and minimizing the chance of a bankruptcy due to the damages incurred by an accident, thus keeping the world fleet in high numbers), and the ability of the insurance industry to offer acceptable rates of premiums<sup>26</sup>. The main supportive argument for this reasoning comes from the fact that it is believed that only a limited, fixed value can be insured, whereas unlimited liability might lead to uninsured risks, therefore creating instability on the market. Following this presumption, Faure argues that if the owner's loss of the right of limitation leads to the loss of liability insurance cover, the "... claimants would be discouraged from challenging the shipowner's right of limitation of liability..." in order to avoid confronting "... a defendant without insurance cover"<sup>27</sup>. For instance, a single-ship company, with low or no assets, and insolvency about to be pronounced, might become even more dangerous should the negligence be proven, for that could give an insurer the right to cancel the insurance policy. As a contra argument, the same author suggests that the argument of predictability of the insurable liability can be overcome by making the liability "*unlimited while*

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25 "The owner shall not be entitled to limit his liability under this Convention if it is proved that the pollution damage resulted from his personal act or omission, committed with the intent to cause such damage, or recklessly and with knowledge that such damage would probably result", Art. 6, paragraph 2, footnote 3.

26 Faure, M., Hui, W., footnote 22, pp. 594-595.

27 Faure, M., Hui, W., *ibid.*

*the amount of insurance can be restricted to a certain amount*<sup>28</sup>. Another author that contradicts the overall acceptance of the liability is Gauci, who comments the following:

*“Investment in shipping may be considered as widespread enough not to require any discriminatory stimulant. A limitation statute can also produce grotesque results, as in the case of the Torrey Canyon 17 where the limitation ceiling was US\$50 as salved value, i.e. the value of one lifeboat, is Moreover, the widespread use of insurance and particularly third party insurance considerably reduces any possible risk”*<sup>29</sup>.

Commenting the argument of insurable risks, Gauci states that:

*“Prima facie this seems to be a very reasonable argument; however, one can also validly argue that in the case of unlimited liability allocated against a shipowner, there is nothing to prevent the underwriter from protecting himself by inserting in the insurance policy a ceiling beyond which claims cannot proceed”*<sup>30</sup>.

Furthermore, he quoted prof. Wetterstein, who stated that:

*“The role played by insurance costs in competition . . . seems to have been exaggerated in international discussion. The introduction of unlimited liability would mean only a marginal - if even that - increase in costs. I cannot accept insurance costs as a key argument for limitation of maritime liability. Such arguments are not normally acceptable in other fields and, furthermore, there exist other means to give favourable treatment to national merchant fleets and to improve their international competitiveness. This should not be at the expense of the injured party/ies”*<sup>31</sup>.

Finally, this system neglects the possibility of negligence as a way of a loss of liability, a fact that supports the moral hazard argument.

In order to avoid the danger of a purely theoretical struggle in determining which principle offers a better and a more coherent approach to the issue of the oil pollution, now follows a short overview of the US regime on the oil liability and compensation, with the appropriate remarks on where the US regime differentiates from the International one.

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28 Faure, M., Hui, W., *ibid*, pp. 598-599.

29 Gauci, G., “*Limitation of liability in Maritime Law: an anachronism*”, Marine Policy, vol. 19, issue 1, 1995, pp. 66.

30 Gauci, *ibid*.

31 Gauci, *ibid*, pp. 66-67.

## THE UNITED STATES SYSTEM

The US have decided not to become a part of the International regime, and instead devised a separate system. Among the variety of reasons<sup>32</sup>, one can distinguish the following ones: a) liability limits were too low (at the time, the 1969 Convention was in force, with the compensation coverage that did not successfully counterpart the rise of costs in reality); b) problem was too urgent (with the Exxon Valdez incident in 1989, and a few other accidents happening at the same time, the US feared that until the world community agrees on a new convention, too much time would be wasted); c) strong economic position of the US (it was believed that the US market is strong enough to sustain all compensations on its own), and; d) the necessity of an individual state approach (and old American argument supporting the sovereignty of states when it comes to the situations where a state and international law might differ, combined with the idea that an individual state can better recognize its' own special circumstances, conditions and proper methods for protection and compensation, and thereby establish an effective policy in environmental matters). As a result, one can note significant structural and principal differences between the International regime and the US system.

Prior to 1990, with multiple state law regulation, the US also had a significant amount of federal law focused on the protection of the environment and regulation of the flow of oil and hazardous and noxious substances (in further text: HNS). Regarding oil, a number of regulations were present from the 50-ies onwards, including: the 1953 Outer Continental Shelf Lands Act (which constituted the Offshore Oil Pollution Compensation Fund with the US\$200 million cap), the 1973 Trans-Alaska Pipeline Authorization Act (Trans-Alaska Pipeline Liability Fund, US\$100 million cap), the 1974 Deepwater Port Act (amended by the 2002 Maritime Transportation Security Act, Deepwater Port Liability Fund with minimum balance of US\$4 million), and the 1977 Clean Water Act (CWA, a revolving fund, US\$35 million, preceded by the 1970 Federal Water Quality Improvement Act). All the named funds are today incorporated into the 1990 Oil Spill Liability Trust Fund (in further text: OF)<sup>33</sup>, established by the 1990 Oil Pollution Act (in further text: OPA 90)<sup>34</sup>, main legislation covering all issues regarding the liability and responsibility in a case of oil pollution<sup>35</sup>. The shipowner's liability is established for the vessels over 300 gross tons, with detailed provisions regarding tankers

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32 For a detailed overview of the background for the US decision, see: De La Rue, C., Anderson, C. B., "*Shipping and the Environment*", (LLP, London, 1998), pp. 58-66.

33 For an overview of the OF and the text, visit: [www.uscg.mil/npfc/About\\_NPFC/osltf.asp](http://www.uscg.mil/npfc/About_NPFC/osltf.asp).

34 For an overview of the OPA 90 and the text, visit: [www.uscg.mil/npfc/About\\_NPFC/opa.asp](http://www.uscg.mil/npfc/About_NPFC/opa.asp).

35 Scope of application – navigable waters, adjoining shoreline, EEZ, deep ocean waters.

and other vessels and facilities<sup>36</sup>. The first visible difference from the International regime is the inclusion of vessels other than tankers and offshore facilities into the liability scheme (something that has only been recently tackled with the Bunker convention, regarding vessels other than tankers). Breaking of the limitation is made relatively easy, as the unlimited liability is set to come into force should a spill occur “... *due to the gross negligence, willful misconduct, or violation of any federal operating or safety regulation*”<sup>37</sup>. Therefore, the cases of unlimited liability occur often in the US regime. Another important factor to be considered with the noted breach of limitation possibility is the fact that the OPA 90’ does not pre-empt state legislation, thus creating the multiplicity of claims. These two factors significantly differ from the founding principles of the International regime. During the drafting of the international legislation it was feared that the implementation of such two elements would quite possibly endanger the position of the shipowners, insurers and victims, as portrayed in the previous section (it will be interesting to see how the US regime functioned since its adoption, more on this later). Going back to the overview of the US system, the OF today amounts to a sum of a maximum of US\$2.7 billion (latest increase due to the 2005 Energy Policy Act), almost three times the value the international system has to offer. It consists of two parts: The Emergency Fund (used for a quick response to discharges and initiation of natural resources damage assessments, up to a US\$100 million per year), and the Principal Fund (for removal costs, natural resource damages and restoration and other purposes<sup>38</sup>). The contribution comes from various sources, the main being the 5-cent-per-barrel tax<sup>39</sup> (again, a point of differentiation with the International regime).

Regarding the implementation of the OF in practice, a number of issues has arisen from the very start, some of which we shall mention. Many companies, out of a fear of the unlimited liability, decided to leave the US waters altogether, or at least become charterers, as to avoid the liability scheme. Many foretold the 30% to 50% rise of the P&I insurance for tankers and other vessels entering the OPA 90’ scope of application. Also, many found the system of certificates for financial responsibility

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36 Tankers - less than 3.000 gross tonnage – US\$ 1200 per ton or US\$ 2 million (which is greater); over 3.000 gross tonnage - US\$ 1200 per ton or US\$ 10 million (which is greater); other vessels - US\$ 600 per ton or US\$500,000 (which is greater); offshore facilities up to US\$75 million, onshore facilities and deepwater ports up to US\$350 million.

37 “*Oil Pollution Act 1990*”, Title 33: Navigation and Navigable waters, Chapter 40: Oil Pollution, Subchapter I: Oil Pollution Liability and Compensation, Section 2704: Limits on Liability, c) Exceptions, 1) Acts of responsible party, *footnote 34*.

38 Available for: removal costs resulting from discharge/threat of discharge from a foreign offshore unit, uncompensated removal costs, and federal costs.

39 Others include: fines, penalties, cost recoveries, transfers from previous funds, barrel tax and interests.

to be too demanding and complicated. Finally, a lot of concern was devoted to the question of how long and how complicated would the actual proceedings be, having in mind the multiplicity of charges available. The last concern has proven to be correct, at least when it comes to the major cases. The Exxon Valdez case is a good example on how long a case can last<sup>40</sup>. The insurance issue has been resolved, with only minimal adjustments to the P&I premiums<sup>41</sup>. Companies that have left American waters came back, probably after realizing that even with the unlimited liability, the risk of too high a compensation claim is not a determining issue after all. Additionally, studies show that in the last 15 years the number of oil accidents has decreased, thus, especially having in mind the double hull requirement<sup>42</sup>, it would seem that the OPA 90' is having a positive effect<sup>43</sup>.

Another relevant piece of legislation is the 1980 Comprehensive Environmental Response, Compensation and Liability Act (in further text: CERCLA), accompanied by the 1986 Superfund Amendments and Reauthorization Act (in further text: SARA). The mentioned legislation is also known as the Superfund, with the purpose of collecting tax from chemical and petroleum industries in order to clean up hazardous sites (it covers all the HNS pollution not covered by the OPA 90')<sup>44</sup>. The functioning and the scope of this legislation might provide useful information and ideas when trying to resolve some issues related to the implementation of similar regulation on the international level.

From what is known of the US approach to (not) ratifying the international conventions (although they usually participate with laudable contribution), it is hard to imagine that the US Congress would ever accept to change their own system in favor of the International regime as it is today. The still present case of the great Alaskan spill would cause too much negative publicity should any congressman try to propose adopting the system where the responsibility for negligence (something very important in the US liability law) is non-existent. So the current status quo remains. Whereas this causes a lot of eyebrows rising in favor of establishing a

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40 For more information on the case, visit: <http://www.evostc.state.ak.us/>.

41 Kiern L.I., "Liability, Compensation and Financial Responsibility under the Oil Pollution Act of 1990: A Review of the First Decade", 24 Tulane Maritime Law Journal, 2000, pp. 33-38.

42 For the comparison of the level of protection of the environment in the International and US system, see: La Fayette, L. A. de, "Compensation for Environmental Damage in Maritime Liability Regimes", in: Kirchner A. (ed.), "International Maritime Environmental Law" (Kluwer Law International, 2004, UK), pp. 231-265.

43 For the figures, see: "The U.S. Coast Guard under The Oil Pollution Act of 1990: National Response Structure, the New Carissa, and Enforcement", available at: <http://www.uscg.mil/>; also: Homan, A. C., Steiner, T., "OPA 90's Impact at Reducing Oil Spills", Marine Policy, vol. 32, issue 4, 2008, pp. 711-718.

44 For more information on the Superfund, visit: <http://www.epa.gov/superfund/index.htm>.

unified system, one could debate on which system offers better protection to whom. Should however a melting of the rules one day occur, it would play a significant role, not just in simplifying the life of shipowners, but also in compelling other countries that are not a member of any regime (a good example would be China, that even hasn't got a proper regime of its own) to become one. It would also serve as a good starting point in bringing the US, and other countries, closer to ratifying other important international maritime law instruments.

## HNS CONVENTION

As the US system together with the oil pollution additionally covers the damages for the HNS pollution, it is opportune at this point to briefly describe the attempt to regulate the same issue on an international level. The 1996 International Convention on the Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea (in further text: HNS Convention)<sup>45</sup> is a convention not yet in force, and with a dubious probability of a success<sup>46</sup>. It establishes the International Hazardous and Noxious Substances Fund (in further text: HNS Fund) and creates the Two Tier Liability System. In the first instance, the shipowner is made liable up to a maximum amount of 100 million SDR, again, as in the International regime, depending on the gross tonnage<sup>47</sup>. Norms on compulsory insurance, strict liability and loss of limitation are also taken from the International regime. In the second instance, the HNS Fund compensates up to a maximum of 250 million SDR, in cases when: the amount exceeds the shipowner's liability; the shipowner is exonerated or financially incapable of meeting the obligations. Reflecting on the fact that HNS come in many types and forms, the HNS fund consists of four separate Accounts: oil, liquefied natural gas, liquefied petroleum gas, and a general account, divided into bulk solids and other HNS. Receivers

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45 Types of damage covered: loss of life or personal injury on board or outside the ship carrying the HNS, loss of or damage to property outside the ship, economic losses resulting from contamination of the environment, e.g. in the fishing, mariculture and tourism sectors, costs of preventive measures, e.g. clean-up operations at sea and onshore, costs of reasonable measures of reinstatement of the environment. It shall not apply to a pollution damage caused by persistent oil, as to avoid any clash with the 1992 CLC. Additionally, the HNS Convention shall also not be applied in cases of non-pollution damage, damage caused by radioactive materials, and claims arising from contracts of carriage.

46 For more information, visit: <http://www.hnsconvention.org/en/>.

47 Under 2.000 gross tonnage – 10 million SDR; 2.001 to 50.000 gross tonnage – additional 1.500 SDR per unit of tonnage; over 50.000 gross tonnage – additional 631 SDR per unit of tonnage.

of the HNS, individuals or companies, are to contribute to the HNS fund, depending on the quantities of cargo received, above certain thresholds<sup>48</sup>.

As stated above, the Convention is presently not in force, and as for now, the 1996 Convention on Limitation of Liability for Maritime Claims is the governing regulation for this area. The reasons for drafting are pretty straightforward: potential massive claims for environmental damage by non-oil pollutants, damage other than pollution, packaged dangerous cargo washed up on beaches and other. Although the international community expressed a will to resolve these and other issues by constructing an according international regime, problems occurred, especially when regarding the proposed HNS fund. Unlike the International regime funds, the contributors in the HNS fund would consist of small or medium sized companies that have no previous responsibility for the carriage of their cargo and no influence over the quality of the ships carrying the cargo. Also, when Exxon Mobil, in the example of the Exxon Valdez case, paid vast amounts of compensation money, it did so to preserve a good image of the company, although some authors doubt whether this could be attributed to the companies in question<sup>49</sup>. Additionally, as very little is known on the possible damages resulting from an average or a major spill of HNS, it is difficult to make a proper risk calculation, which puts into a question the willingness of the P&I clubs to providing proper insurance rates. And as we have seen previously, without their cooperation, it is unlikely that the HNS Convention will come into force. With the trade of chemicals and other HNS in constant rise<sup>50</sup>, it is however imperative that the Convention sees the light of the day, despite the mentioned difficulties.

## OTHER PROPOSED OR ABANDONED FUNDS

Apart from the oil and HNS regimes, there exists a variety of other fund proposals that might come to the existence, never came to the existence, or were never seriously contemplated. In order to address the final question posed at the beginning of the Paper, the apparent lack of liability funds in the maritime field, and to try to provide an answer on why is this so, a quick survey of the additional

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48 Persistent oil: 150.000 tons, non-persistent oil: 20.000 tons, liquefied petroleum gas: 20.000 tons, liquefied natural gas: no minimum quantity, bunker oil and other H&N substances: 20.000 tons.

49 More on these arguments, see: Güner, M.D., "Transport of Hazardous and Noxious Goods by Sea – The IMDG Code", in: Basedow, J., Magnus, U. (ed.), "Pollution of the sea – Prevention and Compensation", Hamburg Studies on Maritime Affairs, vol. 10 (Springer, Berlin, 2007), pp. 105.

50 For data, see: Lewis, A., "Availability of data on HNS Transport by Sea", IOPC Funds Study, available at: [www.hnsconvention.org/en/](http://www.hnsconvention.org/en/); for opinions of the industry, see: "The Ratification of the HNS Convention – the Perspective of the Chemical Industry", CEFIC, available at: [www.hnsconvention.org/en/](http://www.hnsconvention.org/en/).

fund plans will be delivered. One of the abandoned projects is the *European Fund for Compensation of Oil Damage in European Waters and Related Measures* (in further text: COPE)<sup>51</sup>. As a result of major spills of oil in European waters, the EU Commission, unsatisfied with the International regime, proposed a setting up of a regional fund, with up to €1 billion available for compensation. Severe penalties would have been imposed on polluters, not just oil polluters, but also bunker oil, chemicals and other. Financial penalties would have been set for gross negligent behavior. These measures reflected the findings of the Commission: although the promptness of the compensation is satisfactory, a number of issues arise: amounts of limitation are too low, channeling of liability is too exclusive, loss of liability (solely calculated on the basis of the size of the ship) is too hard to achieve, incentive for employing a good standard of shipping is too low, and the definition of environmental damage is too narrow<sup>52</sup>. As we can see, such findings and suggestions depart from the principles of the International regime, and encompass certain provisions of the US regime, most significantly, the unlimited liability and gross negligence factors. Obviously, there was an incentive in Europe to break some of the concepts of the International regime, and thus create an opening for a harmonization of the two separate systems. The International regime responded promptly, to evade a creation of yet another separate fund, and created the Supplementary Fund. Although regarding the loss of liability nothing changed, the EU Commission dropped the proposal, obviously settled with the increase of the coverage. This occurrence, however, indicates that there is an understanding among at least some Members<sup>53</sup> of the International regime that some provisions of the system are a subject of a possible change in the future.

Another interesting proposal introduces the *International Convention for Liability and Compensation relating to Non Toxic Pollution from Shipping*<sup>54</sup>. The Convention tries to deal with the claims arising out of pollution not related to the toxic elements, recognizing the fact this area is considered to be a loop in the overall cover of pollution from shipping, that so far it is the Governments who are

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51 For more information on the subject, see: "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", COM (2000) 802 final - Official Journal C 120 E, 24 April 2001.

52 More on this and other issues related to the COPE, see: Faure, M., Wang, H., "Liability for Oil Pollution: Recent Damages", *Environmental Liability*, vol. 12, issue 2, 2004, pp. 55-67.

53 As an example of a country outside of Europe that also asked for an unlimited liability, Pavliha reminds that: "Some states, including Japan, advocated unlimited liability, but this proposal was ultimately rejected" Pavliha, M., Grbec, M., footnote 7, pp. 320.

54 More information on the subject can be found in: "A Background Document for the Development of a International Convention for Liability and Compensation relating to Non Toxic Pollution from Shipping (NTS Convention)", KIMO, available at: [www.kimointernational.org](http://www.kimointernational.org).

responsible for cleanup and damage costs of such incidents, and finally, that victims of this sort of pollution are unable to receive a full and prompt compensation. What is of interest for our topic is the fact that the potential risk and compensation levels are too small to require a creation of a special fund<sup>55</sup>. This goes to demonstrate that in many occasions a normal market or P&I insurance is sufficient in providing the necessary coverage for potential claims, and that there is no need to accumulate additional funds and put them aside.

Following example is an international document that does provide a fund, but with a questionable utility. The *Annex VI to the Protocol on Environmental Protection to the Antarctic Treaty* (in further text: Madrid Protocol), concerned with the issues of liability arising from environmental emergencies, establishes an International fund that would serve for “reimbursement of the reasonable and justified costs incurred by a Party or Parties in taking response action”<sup>56</sup>. A further provision states that any State or person may voluntarily contribute to the International fund. It is highly questionable whether such a fund, where a contribution is defined on a strictly voluntary basis, could serve any realistic purpose. One of the possible explanations may be that there is no necessity for obligatory contributions, as the current needs of the Antarctic area do not require a constant assets-full fund. In a low probability case of an accident, an international solidarity, it is assumed, would come into place, such like in the example of the Lebanon spill<sup>57</sup> (during the recent outbreak of the hostilities). A lesson that can be taken from this example is that a fund with obligatory compensation should be formed in cases when it is really necessary to have one: otherwise, the assets that have to be kept intact and unutilized, are wasted.

Another example, the *Protocol on Liability and Compensation for Damage Resulting from Transboundary Movements of Hazardous Wastes and Their Disposal* (in further text: Basel Protocol), following the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal<sup>58</sup>, will be shortly reviewed. Although advocated by many, including UNEP and many of the developing countries, the existence of a fund is still debated. The developed countries question the need for such fund, obviously not willing to contribute. The problem is obviously still observed as a local one (whereas for instance in the oil pollution case, the effects of a major spill are likely an international phenomena). However, the waste and waste disposal problems can only become a bigger problem, and the

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55 KIMO, *ibid*, pp. 8.

56 “Annex VI to the Protocol on Environmental Protection to the Antarctic Treaty - Liability Arising From Environmental Emergencies”, Art. 12 – The Fund, available at; [www.ats.aq/](http://www.ats.aq/).

57 For more information on this issue, see: Kerambrun, L., Poncet, F., “Lebanon Oil Spill”, Spillcon 2007, available at [www.cedre.fr](http://www.cedre.fr).

58 For more information on the Convention and the Protocol, visit: [www.basel.int](http://www.basel.int).

sooner the international community recognizes this as a serious question, the better will the nature be protected. This example goes to show how sometimes political issues (not enough international understanding, a fear of losing political points for devoting a part of a budget for hardly tangible purposes) can serve as a significant deterrent in accomplishing a successful establishment of an international liability fund where it is potentially needed.

On the other hand, very recently, another voluntary fund has been established that, even though wavering at the start, might prove to be very successful in the future, thus opening a whole new specter of international maritime funds activities (as noted in the introductory part). In April of 2008, the *Malacca-Singapore Aids to Navigation Fund* was established, with a goal of maintaining the navigational safety in the named Straits (maintaining buoys and other navigational aids). The first interesting thing to note is that the founding members include, together with the littoral countries of Malaysia, Indonesia and Singapore, an international non-governmental organization called Nippon Foundation<sup>59</sup>, which deals with shipping for decades. It is currently also the major contributor to the funds' assets (initial contribution of \$1.35 million, \$2.5 million for the next year). This goes to signify how much influence an NGO can play in the international community. Second, and the most interesting attribute is the fact that the users are now expected to contribute to the Fund. According to the Lloyd's List<sup>60</sup>, Greece and the Middle East Navigation Aids Service (MENAS)<sup>61</sup> each plan to contribute \$1 million, followed up by the Japanese Shipowners' Association with \$700.000. Much is also expected from the so-called "Round Table" of shipping organizations (International Chamber of Shipping and the International Shipping Federation, Bimco, Intercargo and Intertanko)<sup>62</sup>, thus opening the gate for the industry contribution. The main argument that calls for the users' contribution has been summarized by stating that "*with many of the 90,000 vessels that pass through the straits merely in transit and of no benefit to the coastal nations there has been a push for users and user states to contribute*"<sup>63</sup>. Some even went on to suggest that the final beneficiaries of the trade conducted through the Straits should also be made to participate<sup>64</sup>. There is

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59 For more information on the Nippon Foundation, visit: [www.nippon-foundation.or.jp/eng/index.html](http://www.nippon-foundation.or.jp/eng/index.html).

60 "*Malacca Strait navigation fund falls \$2.1m short*", at: [www.lloydlist.com/ll/home/index.htm](http://www.lloydlist.com/ll/home/index.htm).

61 More on MENAS and their services, visit: <http://www.menas.org/index.htm>.

62 For more information on the Round Table, visit: [www.marisec.org/shippingfacts/home/roundtable?SID=21e48fef07f4ca9cc31c00411b9c068b](http://www.marisec.org/shippingfacts/home/roundtable?SID=21e48fef07f4ca9cc31c00411b9c068b).

63 "*Malacca Strait navigation fund falls \$2.1m short*", footnote 60; For estimates on the number of vessels expected in the future, visit: [www.nippon-foundation.or.jp/eng/news/2008/20080508MalaccaFundStarts1.html](http://www.nippon-foundation.or.jp/eng/news/2008/20080508MalaccaFundStarts1.html).

64 "*Malacca Strait navigation fund falls \$2.1m short*", footnote 60.

evidence to contemplate some larger undergoing in the law of the sea and maritime law, as some talk of “*efforts that break free from the traditional concept that the seas may be used free of charge*”<sup>65</sup> as the Fund administration plans to “*seek contributions to this fund as part of the corporate social responsibility of companies, such as shipping firms*”<sup>66</sup>. However, such a contribution is still contemplated as a voluntary one, whereas the founding member-States have the obligation of compensating any shortages to the Funds’ budget (in which case the voluntary contribution from the States becomes a compulsory one, a method that could prove to be very effective, not only in obtaining the contributions, but also in steering up the lobbying of the States (that have financial obligations) to incorporate into the financial scheme as many other entities as possible). Although going out of the scope of the definition of the international liability maritime funds, there is a number of characteristics that make this Fund extremely interesting to observe. What will be the reaction of the shipping industry? If they agree to step in here, how will they be able to divert their responsibility in areas described earlier? What is the role of the coastal state that seems to be more and more interested in putting pressure on those sectors that have so far only served as beneficiaries? Is the move to securing the navigational equipment by involving the financial contribution of all the interested parties only a prelude to a more complex fund systems, that would consider paying for the protection against piracy (an issue that has troubled some parts of the World for quite a number of years, only to be revived very recently with the violent occurrences in Somalia, this time possibly effecting World as a whole, as it disturbs the regular flow of oil), ensuring that the salvage service is ever-present on a stationery basis (something that only a handful of States have secured so far, in their own territorial waters), and thus pave the way for the more complex liability schemes, some of which have been mentioned previously? As the growing demand of States tightens, it will be interesting to observe the reaction of the industry, especially with the decline of freight rates and the necessity of cutting off the number of vessels on order, in mind.

## CONCLUSION

As we have seen, the number of the existing liability funds in the maritime field can be recounted with the fingers of one hand, whereas the actual need of the same is somewhat larger. Whether it is the political (political points, lack of international understanding, difference in general policy), economical (a question

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65 “Towards an “Aids to Navigation Fund” in the Malacca and Singapore Straits”, The Nippon Foundation Blogzine, at: <http://blog.canpan.info/tnf/archive/53>.

66 *Ibid.*

of the budget and additional taxes, funds that are simply stocked and not utilized) or legal (different definitions and understandings of the same term, different core principles, different approach towards the relationship between the national and international law) reasoning, there seems to be in existence a number of deterrents towards a more broader and accepted usage of international liability funds. A major explanatory point for this state of affairs can be found in a simple fact that the countries are usually not too anxious to give away their money, especially if this money isn't put in immediate use, but rather placed on hold in a case it is needed. Other contributors are more likely to participate (such as the oil industry for example), providing that it is they who are dictating the terms, with a clear goal of improving their public image and trying to get as much as possible of the given assets back. The insurance and reinsurance market seems to be able to cover large insurance policies, and thus offer enough security to promote different types of enterprises. The core reason of employing a liability fund scheme can be found in the cases where huge amounts of money are deemed to be asked if something should go wrong, and where insurance companies are simply not willing to invest due to a high risk factor. Today this is the ocean trade and nature protection. Tomorrow it could be high orbit/space transportation and alternative energy projects. All of them have one thing in common: State support and funding. And regarding questions of international value, the analog international support and funding. It is highly commendable that the international community has come up with the International regime scheme. Although differences remain, and the division is clear, it is a good sign that in the future more understanding will be shown in trying to resolve the mentioned issues, or those which are only yet to present themselves.

## LITERATURE

### Books, Conventions and Articles:

1. Garner, B.A. (ed.), *Black's Law Dictionary*, Seventh Edition (West Group, St. Paul, Minnesota, 1999).
2. *Convention on Limitation of Liability for Maritime Claims*, 1976, London, 19 November 1976, as amended by the *Protocol of 1996 to amend the Convention on Limitation of Liability for Maritime Claims of 19 November 1976 London*, 2 May 1996, [www.admiraltylawguide.com](http://www.admiraltylawguide.com).
3. Branch, A. E., *Dictionary of Shipping International Trade Terms and Abbreviations*, 3<sup>rd</sup> Edition (Witherby, London, 1986).

4. “*The IOPC Fund’s 25 Years of Compensating Victims of Oil Pollution Incidents*”, International Oil Pollution Compensation Funds, [www.iopcfund.org](http://www.iopcfund.org).
5. “*Annual Report 2007*”, International Oil Pollution Compensation Funds, [www.iopcfund.org](http://www.iopcfund.org).
6. Jacobsson, M., “*The International Liability and Compensation Regime for Oil Pollution from Ships – International Solutions for a Global Problem*”, *Tulane Maritime Law Journal*, vol. 32, no. 1, 2007, pp. 1-33.
7. Pavliha, M., Grbec, M., “*The 2003 Supplementary Fund Protocol: An Improvement to the International Compensations System for Oil Pollution Damage*”, *Zbornik Pravnog fakulteta u Zagrebu*, vol. 58, br. 1-2, pp. 307-332.
8. Ehlers, P., “*Origins and Compensation of Marine Pollution*”, in: Basedow, J., Magnus, U. (ed.), “*Pollution of the sea – Prevention and Compensation*”, *Hamburg Studies on Maritime Affairs*, vol. 10 (Springer, Berlin, 2007), pp. 113-128.
9. Seward, R.C., “*The Insurance Viewpoint*”, in: “*The Limitation of Shipowners’ Liability: The New Law*”, (Sweet and Maxwell, London, 1986), pp. 161-186.
10. Faure M., Wang H., “*The International Regimes for the Compensation of Oil Pollution Damage: Are they effective?*”, *Review of European Community & International Environmental Law*, vol. 12, issue 3, 2003, pp. 242-253.
11. Faure, M., Hui, W., “*Financial caps for oil pollution damage: A historical mistake?*”, *Marine Policy*, vol. 32, issue 4, 2008, pp. 592-606.
12. Zhu, L., “*Compulsory Insurance and Compensation for Bunker Oil Pollution Damage*”, *Hamburg Studies on Maritime Affairs*, vol. 5 (Springer, Berlin, 2007).
13. Gauci, G., “*Limitation of liability in Maritime Law: an anachronism*”, *Marine Policy*, vol. 19, issue 1, 1995, pp. 65-74.
14. De La Rue, C., Anderson, C. B., “*Shipping and the Environment*”, (LLP, London, 1998).
15. “*Oil Pollution Act 1990*”, [www.uscg.mil/npfc/About\\_NPFC/opa.asp](http://www.uscg.mil/npfc/About_NPFC/opa.asp).
16. Kiern L.I., “*Liability, Compensation and Financial Responsibility under the Oil Pollution Act of 1990: A Review of the First Decade*”, *24 Tulane Maritime Law Journal*, 2000, 1-84.
17. La Fayette, L. A. de, “*Compensation for Environmental Damage in Maritime Liability Regimes*”, in: Kirchner A. (ed.), “*International Maritime Environmental Law*” (Kluwer Law International, 2004, UK), pp. 231-265.
18. “*The U.S. Coast Guard Under The Oil Pollution Act of 1990: National Response Structure, the New Carissa, and Enforcement*”, <http://www.uscg.mil/>.

19. Homan, A. C., Steiner, T., “*OPA 90’s Impact at Reducing Oil Spills*”, Marine Policy, vol. 32, issue 4, 2008, pp. 711-718.
20. Güner, M.D., “*Transport of Hazardous and Noxious Goods by Sea – The IMDG Code*”, in: Basedow, J., Magnus, U. (ed.), “*Pollution of the sea – Prevention and Compensation*”, Hamburg Studies on Maritime Affairs, vol. 10 (Springer, Berlin, 2007), pp. 95-109.
21. Lewis, A., “*Availability of data on HNS Transport by Sea*”, IOPC Funds Study, available at: [www.hnsconvention.org/en/](http://www.hnsconvention.org/en/).
22. “*The Ratification of the HNS Convention – the Perspective of the Chemical Industry*”, CEFIC, [www.hnsconvention.org/en/](http://www.hnsconvention.org/en/).
23. “*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*”, COM (2000) 802 final - Official Journal C 120 E, 24 April 2001.
24. Faure, M., Wang, H., “*Liability for Oil Pollution: Recent Damages*”, Environmental Liability, vol. 12, issue 2, 2004, pp. 55-67.
25. “*A Background Document for the Development of a International Convention for Liability and Compensation relating to Non Toxic Pollution from Shipping (NTS Convention)*”, KIMO, [www.kimointernational.org](http://www.kimointernational.org).
26. “*Annex VI to the Protocol on Environmental Protection to the Antarctic Treaty - Liability Arising From Environmental Emergencies*”, [www.ats.aq/](http://www.ats.aq/).
27. Kerambrun, L., Poncet, F., “*Lebanon Oil Spill*”, Spillcon 2007, [www.cedre.fr](http://www.cedre.fr);

**Web sites** (last visited on the 25<sup>th</sup> of November, 2008):

28. <http://www.igpandi.org/The+Group+Agreements/Pool+reinsurance+programme>.
29. [http://www.uscg.mil/npfc/About\\_NPFC/osltf.asp](http://www.uscg.mil/npfc/About_NPFC/osltf.asp).
30. [http://www.uscg.mil/npfc/About\\_NPFC/opa.asp](http://www.uscg.mil/npfc/About_NPFC/opa.asp).
31. <http://www.evostc.state.ak.us/>.
32. <http://www.epa.gov/superfund/index.htm>.
33. <http://www.hnsconvention.org/en/>.
34. [www.basel.int](http://www.basel.int).
35. <http://www.lloydslist.com/ll/home/index.htm>.
36. [www.nippon-foundation.or.jp/eng/index.html](http://www.nippon-foundation.or.jp/eng/index.html).
37. <http://www.menas.org/index.htm>.
38. <http://blog.canpan.info/tnf>.

## **Sažetak:**

### **MEĐUNARODNI POMORSKI FONDOVI ZA ODGOVORNOST**

*Cilj rada je istražiti trenutačno stanje, kompleksnost i međusobno djelovanje nacionalnih, regionalnih i međunarodnim pomorskih fondova za odgovornost. Raspravlja se o njihovoj ekonomskoj pozadini i novčanoj vrijednosti, političkom značaju i važnosti, te pravnoj formi i problemima koji ih prate. Nužna usporedba radi se između CLC i HNS sustava s jedne, te OPA 90' i CERCLA sustava SAD-a s druge strane, kako bi se utvrdile ključne točke razmimoilaženja, njihova vrijednost i utjecaj na praksu, istovremeno razmišljajući o mogućnosti približavanja udaljenih filozofija djelovanja. Ujedno, kratko se razmatraju pitanja ograničenja odgovornosti, utjecaja P&I klubova, usmjeravanja odgovornosti ("channeling of liability") te moralnog rizika zloupotrebe brodarstva. Poseban osvrt koncentrirana se na predloženi Europski fond, Konvenciju o neškodljivom onečišćenju, Madridskom protokolu, Bazelskom protokolu te Fondu za navigacijsku opremu u Malacca-Singapur prolazu. Svaki od navedenih dokumenata ili ima utemeljen fond koji djeluje više ili manje djelotvorno, s više ili manje šanse za uspjeh, ili uopće ne treba fond, shvaćanje čega pomaže prilikom određivanja uvjeta koje osnivanje fonda mora zadovoljiti. Konačno, daje se nekoliko zaključnih razmišljanja u svezi opće korisnosti navedenih fondova, s nekoliko predviđanja za budući razvoj događaja.*

**Ključne riječi:** CLC, OPA 90', pomorski fondovi za odgovornost, ograničenje odgovornosti, P&I.