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Hamburg Studies on Maritime Affairs
Volume 16

Edited by

Jürgen Basedow • Ulrich Magnus
Rüdiger Wolfrum
(Editors)

The Hamburg Lectures on Maritime Affairs 2007 & 2008

Springer

Editors
Professor Dr. Jürgen Basedow
Max Planck Institute for Comparative
and International Private Law
Mittelweg 187
20148 Hamburg
basedow@mpipriv.de

Professor Dr. Ulrich Magnus
University of Hamburg
Law Faculty
Schlüterstraße 28
20146 Hamburg
u-magnus@jura.uni-hamburg.de

Professor Dr. Rüdiger Wolfrum
Max Planck Institute for Comparative
Public Law and International Law
Im Neuenheimer Feld 535
69120 Heidelberg
wolfrum@mpil.de

ISSN 1614-2462 e-ISSN 1867-9587
ISBN 978-3-642-04063-4 e-ISBN 978-3-642-04064-1
DOI 10.1007/978-3-642-04064-1
Springer Heidelberg Dordrecht London New York

Library of Congress Control Number: 2009935693

Cover design: WMXDesign GmbH, Heidelberg

Printed on acid-free paper

Springer is part of Springer Science+Business Media (www.springer.com)

Preface

In April 2002 the International Max Planck Research School for Maritime Affairs at the University of Hamburg was established as a joint venture of the University of Hamburg and three Max Planck Institutes, in particular the Max Planck Institute for Comparative and International Private Law (Hamburg), the Max Planck Institute for Comparative Public Law and International Law (Heidelberg) and the Max Planck Institute for Meteorology (Hamburg). The Research School has set up a unique interdisciplinary PhD programme. The researchers and their respective topics cover the legal, economic, ecological and geophysical aspects of the use, protection and organisation of the oceans. From the very beginning, the school has been in close contact with the International Tribunal for the Law of the Sea (ITLOS).

A close cooperation of the two institutions has been established in several fields. One of them is the organisation of the Hamburg Lectures on Maritime Affairs which started in 2007. These lectures are meant to contribute to the top level education of the scholars of the Research School and of the trainees that take part in an internship program offered by the International Tribunal for the Law of the Sea and funded by the Nippon Foundation. While the latter group is mainly composed of junior government officials, the scholars of the Research School are young academics. Both groups are recruited from all over the world and represent the global spirit of maritime policy.

This volume publishes seven papers which were presented as Hamburg Lectures in the years 2007 and 2008. All of them deal with legal aspects of maritime affairs, focusing on issues of transport law, on the pollution of the marine environment, and on dispute settlement. While some of the topics relate to private law, others form part of public international law. These collected papers are published in the book series Hamburg Studies on Maritime Affairs edited by the Directors of the above mentioned Research School.

The editors of this volume gratefully acknowledge the editorial assistance of Dr. Anatol Dutta and of Ingeborg Stahl in preparing this volume and the language editing of the papers by Michael Friedman.

Hamburg, May 2009

Jürgen Basedow
Ulrich Magnus
Rüdiger Wolfrum

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Contributors

Jürgen Basedow

Dr. iur., Dr. h.c., LL.M. (Harvard), is Professor at the Law Faculty of the University of Hamburg and since 1997 director of the Max Planck Institute for Comparative and International Private Law in Hamburg. He is a member of various governmental advisory committees in the field of transport, insurance and competition law and speaker of the International Max Planck Research School for Maritime Affairs at the University of Hamburg. His key research areas are international economic law, the law of transport, shipping and insurance, private international law and comparative law.

Carlos Esplugues Mota

Dr. iur. (Univ. Valencia), LL.M. (Harvard), MSc (Edinburgh), is Professor of Private International Law at the School of Law of the University of Valencia (Spain). He has been Visiting Professor at different universities in Europe and Latin America. He is member to the Editorial Board of several national and international Law Journals and an arbitrator in various Arbitration Institutions of the world. He has coordinated several international research projects in the field of Private International Law and International Business Transactions. His key research areas are international trade law, international bankruptcy law, international commercial arbitration, international family law and international private law. He has published and edited, among others: *La quiebra internacional* (Barcelona, 1993), *Contratación internacional* (Valencia, 1999), *Derecho del comercio internacional: Mercosur-UE* (Montevideo/Madrid, 2005); *Derecho del comercio internacional* (Valencia, 2006), *Arbitraje marítimo internacional* (Pamplona, 2007), *Derecho de los contratos internacionales: Latinoamérica, Portugal y España* (Montevideo/Madrid, 2008) and *Derecho internacional privado* (Valencia, 2008).

Lucius Caflisch

Licence en droit, doctorate in law (Geneva); MA (Columbia), Dr. h.c. Professor of International Law (em.), The Graduate Institute of International and Development Studies, Geneva; former judge, European Court of Human Rights, Strasbourg; former legal advisor, Swiss Federal Department of Foreign Affairs, Berne. Lecturer at the University of Fribourg. Member of the International Law Commission of the United Nations.

Sergio M. Carbone

Prof. Avv., is Professor at the Law Faculty and Director of the Institute of International and Maritime Law at the University of Genoa since 1979. He has been lecturer at the Hague Academy of International Law in 1990 and 2009. Since 1977 he is admitted to plead before the Supreme Court of Cassation (Italian Supreme Court). He is a member of the Governing Council of Unidroit. His key research areas are international trade, public and private international law, European Union law, international shipping and ocean carriage law.

Krijn Haak

Krijn Haak has been a professor of Private and Commercial Law at the Erasmus University Rotterdam since 1991. Following his law study at the University of Utrecht (1969−1973), Krijn Haak received his doctorate in 1984. In addition to his academic work he is also a judge in the District Court of Rotterdam and in the Court of Appeal in Arnhem. Krijn Haak is a member of the editorial boards of several legal journals, including "Nederlands Tijdschrift voor Burgerlijk Recht" (NTBR), "Schip en Schade" and "Nederlands Juristenblad" (NJB). He heads the Scientific Working Party on Lex Mercatoria (Commerce and Transport) of the Erasmus University Rotterdam. His list of publications reflects his expertise in the area of carrier liability, freightforwarding and logistics, Transport and Maritime Law and Commercial Law in general.

Ulrich Magnus

Dr. iur., is Professor at the Faculty of Law at the University of Hamburg; Chair for civil law, private international law and comparative law; Judge (part-time) at the Court of Appeal of Hamburg; Executive Vice-director of the European Centre for Tort and Insurance Law in Vienna; Germany's National Correspondent at UNCITRAL; Co-speaker of the International Max Planck Research School for Maritime Affairs at the University of Hamburg; Member of the German Council for Private International Law, of the European Group on Tort Law and of the European Acquis Group.

Thomas A. Mensah

Judge of the International Tribunal for the Law of the Sea, from 1996 to 2005, the first President of the Tribunal from 1996 to 1999. Prior to his election to the Tribunal, Lecturer of Law University of Ghana and Dean of the Faculty of Law, Associate Legal Officer at the International Atomic Energy Agency, Vienna and Assistant Secretary-General and Director of Legal Affairs and External Relations at the International Maritime Organization (IMO); Cleveringa Professor of Law at Leiden University and Professor of Law and Director, Law of the Sea Institute at the University of Hawaii; from 1995 to 1996 High Commissioner (Ambassador) of Ghana to the Republic of South Africa and Chairman of the F4 (Environmental Claims) Panel, United Nations Compensation Commission (UNCC), Geneva from 2000 to 2005. Since 1989 a Member of the "Institut de Droit International",

Titular Member of the "Comité Maritime International" (CMI) and Member of the Advisory Council of the British Institute of International and Comparative Law.

Erik Røsæg

Dr. jur., Professor of Commercial Law, University of Oslo, Scandinavian Institute of Maritime Law. He has been advising the Norwegian Government in the IMO Legal Committee when the Athens Convention was negotiated, and was the coordinator of the IMO intersessional correspondence groups on the matter. Main areas of interest include maritime law as well as third party relations in private law (bankruptcy, mortgages etc).

Lorenzo Schiano di Pepe

Dottore in giurisprudenza (Genoa 1997), LL.M. in International Business Law (London 1999) and in International Legal Studies (Georgetown 2000), dottore di ricerca in diritto internazionale (Milan 2004), he is a researcher at the Faculty of Law of the University of Genoa, where he teaches European Union Law. His fields of expertise include international and European transport law, international and European environmental law and international law of the sea. Among his recent publications are a monograph on ship-source pollution and coastal States' powers and an essay on the law applicable to environmental damage according to the so-called "Rome II" regulation.

Frank Smeele

Was born in 1966, has a Master in Law and a Master in Arts (European Studies) both from University of Amsterdam (1991), and a PhD from Erasmus University Rotterdam School of law (1998). Also in 1998 he was admitted as an attorney-at-law to the Rotterdam Bar and joined Van Traa Advocaten at Rotterdam , where he made partner in 2004. In 2005, he was appointed part-time Professor of Maritime Law at Erasmus University and in 2007 he was appointed full-time Professor of Commercial Law. His key research areas are: shipping, transport and maritime law, private international law and comparative law.

Rüdiger Wolfrum

Dr. iur., is Professor for national public and international public law at the Law Faculty of the Ruprecht-Karls-University of Heidelberg and since 1993 director and scientific member of the Max Planck Institute for Comparative Public Law and International Law, former President of the International Tribunal for the Law of the Sea (2005-2008), "Honorarprofessor" of the University of Hamburg, former President of the German Society for International Law (Deutsche Gesellschaft für Völkerrecht, 2005-2009), Director of the Rhodes Academy Ocean Law and Policy. He has published widely in various fields of international public law, thereby focusing on the law of the sea, the law concerning Antarctica, environmental law as well as on human rights and United Nations issues.

Part I:

The Hamburg Lectures 2007

Civil Liability and Compensation for Environmental Damage in the 1982 Convention on the Law of the Sea

Thomas A. Mensah

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I. State Responsibility under the 1982 Convention

The provisions of the United Nations Convention on the Law of the Sea on the protection and preservation of the marine environment, as contained in Part XII of the Convention, are in the main addressed to States. The articles set out the obligations and rights of States, particularly with respect to legislative and other measures that States are permitted or required to take in areas within their jurisdiction to prevent, reduce and control pollution of the marine environment from the various sources of pollution, as enumerated in paragraph 3 of article 194 of the Convention, namely, pollution from land-based sources, pollution from or through the atmosphere, pollution from dumping, pollution from vessels, pollution from installations and devices used in exploration and exploitation of natural resources of the sea-bed and subsoil, and pollution from other installations and devices operating in the marine environment.

The Convention also spells out the nature and extent of the obligations of States to other States in this field, and it affirms that failure by a State to discharge its obligations may entail liability to other States who suffer damage as a result of the failure. As stated in article 235, paragraph 1, of the Convention,

J. Basedow et al. (eds.), *The Hamburg Lectures on Maritime Affairs 2007 & 2008*,
Hamburg Studies on Maritime Affairs 16,
DOI 10.1007/978-3-642-04064-1_1, © Springer-Verlag Berlin Heidelberg 2010

> "States are responsible for the fulfillment of their international obligations concerning the protection and preservation of the marine environment. They shall be liable in accordance with international law"

Indeed, failure by a State to discharge its obligations in this field could lead to a claim that may be brought before one or other of the dispute settlement procedures specified in Part XV of the Convention. Article 297, paragraph 1(c), of the Convention states that a case may be brought against a State Party to the Convention (before one of the courts and tribunals specified in article 287) if it is alleged that the State has failed to comply with "international rules and standards for the protection and preservation of the marine environment".

Similarly, a State may incur liability to other States or persons if it acts in excess of the powers or rights granted to it under the Convention and if such action causes damage to the States or persons concerned. Thus article 232 of the Convention declares: "States shall be liable for damage or loss attributable to them arising from measures taken pursuant to section 6 (dealing with enforcement of laws for the protection and preservation of the marine environment) when such measures are unlawful or exceed those reasonably required in the light of available information".

II. Liability beyond State Responsibility

But the provisions of the Convention on liability for damage to the marine environment are not restricted to cases involving the responsibility of States. In addition to liability for damage that arises from the wrongful acts or omissions of States, the Convention also deals with damage resulting from acts which are not attributable to a State or which may not constitute violation of the Convention or any rules of international law. In other words, the Convention deals also with liability for damage or loss from pollution of the marine environment even if the act that caused the damage was not wrongful. Article 229 of the Convention states that

> "Nothing in this Convention affects the institution of civil proceedings in respect of any claims for loss or damage from pollution of the marine environment"

And, with a view to facilitating such civil proceedings, paragraph 2 of article 235 provides that States shall "ensure that recourse is available in accordance with their legal systems for prompt and adequate compensation or other relief in respect of damage caused to the marine environment by *natural or juridical persons* within their jurisdiction" (emphasis supplied).

Article 235 also calls for the development and improvement of mechanisms to ensure the availability of compensation for damage to the marine environment. In particular, paragraph 3 of the article states:

> "To assure prompt and adequate compensation in respect of all damage caused to the marine environment, states shall cooperate in the implementation of existing international law and the further development of international law relating to responsibility and liability, for the assessment of and compensation for damage, and the settlement of

related issues as well as, where appropriate, development of criteria and procedures for payment of adequate compensation such as compulsory insurance and compensation funds".

The approach reflected in these provisions is commonly referred to as the "civil liability" approach. This is an alternative to an approach based on "state responsibility" under which responsibility for damage is placed primarily on the State under whose authority or within whose jurisdiction the activity causing the damage was undertaken. In general, state responsibility is based on the principle that a State has failed to discharge its legal duties in relation to activities that were undertaken under its control or within its jurisdiction. On the other hand, civil liability is intended to provide compensation to a person who suffers damage as a result of the activities of another person, even if the activities involved were not contrary to any law and the person undertaking the activity was not guilty of any fault or negligence. Furthermore, under a civil liability regime, the obligation to compensate does not lie on a State or governmental authority, as such. Rather, the obligation falls on the person or entity that was actually responsible for the activity that caused the damage. Such a person may be a State or a public body; but could also be a private person or corporate entity. However, civil liability does not seek to displace the responsibility of the State where this exists. Rather it may in fact be a supplement to the responsibility of the state in some cases. Its principal purpose is to provide a means for the victim of the damage to obtain compensation in the cases where it may not be possible or easy for that person to obtain redress by recourse to state responsibility.

III. The Rationale of the Civil Liability Approach

The civil liability approach recognizes that damage is not always the result of governmental action or inaction. For there are many cases where damage is caused as a result of the activities of persons and entities who have little or no connection at all with a State or a governmental agency. And it is also a fact that the direct victims of pollution damage may in fact be persons or entities other than the State, and the damage caused may affect purely personal or commercial interests of the persons or entities concerned, as opposed to the interests of the State, as such.

In the cases where the damage suffered is not attributable to a State or where the person or entity suffering the damage is a non-State entity, civil liability may have a number of advantages over an approach that relies solely or predominantly on state responsibility.

First, civil liability offers a more convenient and effective means for a victim of damage to obtain compensation in cases where the person suffering damage is a private individual or entity or where the damage does not arise from the acts or omissions of a State agent or from acts or omissions that may properly be attributed to a State. In such a situation, reliance on state responsibility may not offer a realistic possibility that compensation will be obtained. For one of the conditions for obtaining compensation from a State is the ability to prove that the act or omission that caused the damage may properly be attributed to the State, and it

may not always be possible or easy to prove this. Furthermore, where damage has been suffered by a non-state entity, a claim for compensation for the damage will almost invariably require intervention by the State of nationality of the person who suffered the damage. As is well known, State authorities may in some cases not be too keen to bring claims, or take related measures, against other States. This reluctance may be the result of political, diplomatic or economic considerations. But even when a state may be willing to bring a claim on behalf of a national who has suffered damage, the procedures of inter-state negotiation and litigation may make the claim process so protracted that the eventual outcome does not offer much practical benefit to the person who suffered the damage. Civil liability, on the other hand, permits the person who has suffered damage to seek compensation, without having to rely on decisions to be taken by governmental authorities or state officials.

Another advantage of civil liability is that it targets the person or entity that was actually responsible for the damage. For that reason, it may be said that civil liability facilitates the effective application of the "polluter pays principle", since it imposes the sanction on the person or entity whose acts or omissions were the direct cause of the damage, regardless of whether that party is a state, a corporate person or natural person.

It is also arguable that the civil liability approach provides a greater incentive to the potential polluter, whether a public body or a private entity, to make greater efforts to comply with applicable standards and procedures and to take more care to avoid damage and, thereby, reduce the risk of being called upon to pay compensation for damage resulting from the activity. In this regard, it is worth noting that reliance on state responsibility alone may not always be effective in ensuring that actors and operators will in fact comply with the required safety and environmental standards and procedures. This is particularly the case in developing countries where the administrative machinery for enforcing environmental standards may be either non-existent or not sufficiently effective.

But civil liability is not without its own disadvantages. A major drawback is the absence of a widely recognized judicial system to deal with conflicting claims from victims of different nationalities. Civil liability conventions generally reserve jurisdiction over disputes under the conventions to the national courts of the States Parties to the conventions. This means that important issues, such as the existence or otherwise of liability for damage and the level of compensation that is appropriate for the damage, are left for final determination by the courts of the country or countries in which the damage was caused or in the State in which the claimant chooses to bring the claim for compensation. As a general rule, decisions of the competent national courts on these issues are final and are not subject to appeal in any other forum. This can create problems in the application of the Convention.

First, a regime that gives exclusive jurisdiction to national courts to determine issues of liability (as well as the compensation payable) may result in unequal treatment of different claimants, especially in cases where damage from the same incident has occurred in different states and claims for compensation are brought before the courts of different countries. In this regard it is pertinent to note that the rulings of national courts may not always be sufficiently impartial, particularly

when the courts have to adjudicate between the interests of their national claimants as opposed to the interests of claimants from other States. Thus, where an incident causes catastrophic damage in a state, the courts of that state may feel tempted to be more generous in deciding on the levels of compensation to be paid to the claimants in that State, as compared with claimants from other States.

It is also possible that, because of differences in cultural, economic, legal and judicial traditions, courts in different countries will adopt very different approaches to issues of liability and the assessment of compensation for environmental damage. This could lead to varying interpretations and application of provisions that are expected to be applied in a uniform manner.

IV. The Use of Civil Liability in International Instruments relating to Damage to the Marine Environment

The civil liability approach that is envisaged in Articles 229 and 235 of the Law of the Sea Convention has been used with a measure of success in a number of international agreements dealing with pollution of the marine environment. Many of these agreements deal with marine pollution caused by substances transported in ships. Among these the most important are the following:

1. The 1969 Convention on Civil Liability for Oil Pollution Damage, as amended by the Protocol of 1992;
2. The Convention relating to Civil Liability in the Field of Maritime Carriage of Nuclear Substances, 1971
3. The 1996 Convention on Civil Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea
4. The International Convention on Civil Liability for Bunker Oil Pollution Damage, 2001

Another convention dealing with oil pollution damage (but not involving carriage by sea) is the Convention on Civil Liability for Oil Pollution Damage Resulting from Exploration and Exploitation of Seabed Mineral Resources, 1977. This instrument has not entered into force and is not expected to enter into force.

The civil liability approach has been used, at least in part, in the scheme of the Convention on the Regulation of Antarctic Resource Activities (CRAMRA). Annex VI to the Protocol on Environmental Protection (Liability Arising from Environmental Emergencies) incorporates elements of civil liability.

The civil liability approach has also been used in a number of conventions relating to environmental damage outside the marine area. Among these are:

a. The 1989 ECE Convention on Civil Liability for Damage caused during Carriage of Dangerous Goods by Road, Rail and Inland Navigation Vessels (CTRD)
b. The 1993 Convention on Civil Liability for Damage Resulting from Activities Dangerous to the Environment (LUGANO CONVENTION)

c. The 1999 Protocol to the 1989 Basel Convention on Prohibition of Transboundary Transport of Dangerous Wastes and Other Matter (Protocol on Liability and Compensation for Damage Resulting from Transboundary Movement of Hazardous Wastes and Their Disposal).

V. An Example of the Civil Liability Approach: The 1969 Convention on Civil Liability for Oil Pollution Damage

The 1969 Convention on Civil Liability for Oil Pollution Damage was the first international treaty to address the issue of liability and compensation for damage to the marine environment from vessel source pollution. The Convention was developed in the aftermath of the "*Torrey Canyon*" accident in 1967. This accident resulted in the discharge of a large amount of crude oil that caused massive pollution to the coastline of the United Kingdom. One of the principal legal issues raised by the accident was the question of liability for damage caused by such an accident and how compensation might be made available to those who suffered damage. The 1969 Civil Liability Convention was adopted to deal specifically with this issue. The purpose of the 1969 Convention differed from previous treaties in one important respect. For contrary to what had happened previously, the issue of liability and compensation was not considered in terms of the obligation of one State to make reparations to another State for a breach of a legal obligation. Rather the Convention deals with how a person (State or private entity) who had suffered damage as a result of the activities of another person is to be compensated for damage, regardless of whether or not the damage had been caused by a wrongful act or breach of a legal duty by the actor concerned. Prior to the 1969 Convention the issue of liability and compensation in respect of damage arising in connection with maritime transport was dealt with reference either to the responsibility of the flag State towards other States or the rights and obligations of the owner of the ship *vis a vis* owners of cargoes on board the ship or other carriers and operators.

The 1969 Civil Liability Convention was supplemented by the 1971 Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage (the Fund Convention). These two instruments were subsequently revised in 1992.

Subsequently, other instruments have been adopted to extend the application of the same principles of liability and compensation to damage caused by other substances transported by sea. Examples are the 1996 Convention on Civil Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea and the 2001 International Convention on Civil Liability for Bunker Oil Pollution Damage.

New Developments in the Field of Transport of Dangerous Goods: Presence and Prospects of the CRTD Convention

Krijn Haak

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One of the main functions of law is that it should reflect the social and economic reality of daily life. It is the same in international law. In this regard, let us speak plainly. Oil and other potentially troublesome substances are still the driving forces behind worldwide economics, and hence play a pivotal role in shaping modern society. However, we dislike the risks associated with international commercial transactions since they are the results of technical deficiencies and human failures. The question is: how do we deal with these risks from a judicial point of view?

Before emphasising new developments regarding the CRTD Convention (civil liability regarding the inland carriage of dangerous goods),[1] it is first necessary to examine the historical legal background of the transport of hazardous goods.

I. Oil Pollution Damage: CLC and IFC

Liability for the carriage of oil and dangerous substances became an internationally recognised issue when the Liberian oil tanker *Torrey Canyon* ran aground on the rocks of the Scilly Islands in 1967. Since then, the Torrey Canyon incident

[1] Geneva Convention on Civil Liability for Damage Caused during Carriage of Dangerous Goods by Road, Rail and Inland Navigation Vessels of 10 October 1989, <www.unece.org>.

J. Basedow et al. (eds.), *The Hamburg Lectures on Maritime Affairs 2007 & 2008*,
Hamburg Studies on Maritime Affairs 16,
DOI 10.1007/978-3-642-04064-1_2, © Springer-Verlag Berlin Heidelberg 2010

has become a legal milestone. The International Convention on Civil Liability for Oil Pollution Damage (CLC, Brussels 29 November 1969)[2] was drawn up quickly by the board of IMCO (now IMO, International Maritime Organisation[3]) in 1969, followed in 1971 by the supplementary International Convention on the establishment of an International Fund for Compensation for Oil Pollution Damage (Fund Convention, Brussels 18 December 1971).[4] The CLC creates a risk liability for owners of tankers that spill oil, which results in compensation that is primarily linked to the gross tonnage of the ship. In favour of the persons who suffered damage caused by the oil pollution, the ship-owners' liability is covered by compulsory insurance that provides the possibility of a direct action against the insurer. As a second tier, the supplementary Fund Convention can compensate above the thresholds of the CLC those who have suffered damage caused by oil that spilled from the tanker. The Fund is furnished by contributions from the oil industry. The 'old' regime of the CLC and IFC combination has been replaced by the London Protocols of 1992, which entered into force in 1996. The liability limits in the aforementioned Conventions were raised significantly, as a result of the shipping disasters known worldwide, such as the Amoco Cadiz (1978), the Aegean Sea (1992) and the Erika (1999). The amendment of the 1992 Protocols stemming from 2000, which entered into force in 2003, has raised the compensation limits to 90 Million SDR for the ship-owner under the CLC and to the amount of 200 Million SDR under the IFC. The latter includes the sum actually paid by the ship-owner or to his P&I club. After the accident involving the tanker *Prestige* in 2002,[5] the Supplementary Fund Protocol, which provides a third tier of compensation of up to 750 Mio SDR, was adopted in May 2003 and entered into force in 2005.[6]

Moreover, since 1969 the voluntary agreements Tovalop (Tanker Owners Voluntary Agreement Concerning Liability for Oil Pollution) and Cristal (Contract Regarding a Supplement to Tanker Liability for Oil Pollution) have been established by tank owners as supplementary instruments to the CLC and the IFC. However, the voluntary agreements have not been renewed since the 1992 Protocols.

Later, in 2006, voluntary but legally binding agreements were established by the ship-owners' P&I clubs in order to address the imbalance of the financial burden created by the establishment of the Supplementary Fund: these were the Small Tanker Oil Pollution Indemnification Agreement (STOPIA) and the Tanker Oil Pollution Indemnification Agreement (TOPIA). Through these agreements, the 1992 Fund may be reimbursed up to a certain amount for incidents involving

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2 Tractatenblad van het Koninkrijk der Nederlanden (Trb). 1970, 196; Trb. 1971, 77.

3 Website: <www.imo.org>.

4 Trb. 1970, 196; Trb.1971, 77.

5 Cf. about the *Prestige* disaster, *Pulido*, in: Pollution of the Sea: Prevention and Compensation, ed. by Basedow/Magnus (Hamburg 2007) p. 151.

6 For the integrated texts and last developments of the 1992 Protocols, cf. the Explanatory Note of the IOPC Fund of January 2008, available at <www.iopcfund.org>.

small oil tankers, while the 2003 Supplementary Fund may be reimbursed for up to half of the compensation paid for claims by the Supplementary Fund.[7]

More than 100 States are party to both the CLC and the IFC. As a result, this compensation system in the case of oil pollution caused by oil tankers seems to operate worldwide in practice. Its two-tier system – and since 2005 even a third-tier system, a genuine package deal between operational carriers and the oil industry apportioning the risks of oil pollution – creates a fair balance by spreading the risks of oil transport by sea between the ship-owners and the oil industry. The system as such has been strongly inspired by economical and practical considerations rather than by justice.

The comprehensive and uncomplicated system is based on four legal pillars of private law: risk liability, channelling of liability, limitation of liability and compulsory insurance. This transparent construction has been functioning for more than 30 years and in that time has managed to raise both the amounts of compensation owed by the ship-owner as well as those owed by the Fund in order to keep them in accordance with the growing market economy and the increase of transport volumes. This has been a considerable feat.

II. Hazardous and Noxious Substances: HNS

It is generally known that oil pollution is a severe disaster, with dire and prolonged consequences for the marine environment; oil, however, is unfortunately only one of many substances that pollute. The list linked to the HNS Convention[8] numbers over a hundred products, amongst them liquid substances, liquefied gases, and dangerous, hazardous and harmful materials carried in packaged form or in bulk, like oils and chemical products. The HNS Convention, also founded by IMO, is based upon the CLC and the IFC system and also employs the two-tier system, albeit within the same Convention.[9] The HNS Convention covers both pollution damage and the risks of fire and explosion (also in relation to persistent oils), including the loss of life or personal injury as well as the loss of or damage to property.

The following types of damage are covered by the HNS Convention:

- Loss of life or personal injury on board or outside the ship;
- Loss of or damage to property outside the ship;

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7 Cf. on the Funds in more detail, *Jacobson*, The International Oil Pollution Compensation Funds and the International Regime of Compensation for Oil Pollution Damage, in: Pollution of the Sea: Prevention and Compensation, ed. by Basedow/Magnus (Hamburg 2007) p. 137.

8 International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea, London, 3 May 1996, <www.ecolex.org>.

9 For a recent publication on the HNS, *Güner-Özbek*, The Carriage of Goods by Sea (Hamburg 2008) p. 241 et seq.

- Economic loss resulting from contamination of the environment in the fishing, mariculture and tourism sectors;
- Costs of preventive measures like clean-up operations at sea and on shore;
- Costs of reasonable measures for restoration of the environment.

The liability of the ship-owner is strict-based, the compensation limit runs towards 100 Mio SDR and insurance is compulsory. The amount of the HNS Fund is 250 Mio SDR. Contributions to be made to the HNS Fund are split into several accounts relating to specific substances: a general account, an oil account, and LNG and LPG accounts. These contributions are to be paid by the first (physical) receivers (mostly chemical goods terminals) of hazardous and noxious substances.[10] Parties who physically receive hazardous and noxious substances on behalf of a third party, storage companies for instance, are allowed to designate that third party as the receiver in their place.[11] In addition, States are allowed to establish their own definition of a receiver under national law as an alternative if the total of contributions paid equals the amount of the contributions that would have been paid under the Convention definition of the physical receiver by a State making use of this option. This grants States the flexibility to implement the HNS Convention in conjunction with the existing national law, without giving any State the possibility of obtaining an unfair commercial advantage.

The liability exceptions have also been derived from the CLC, with the important addition that the owner shall also be exonerated from liability and the obligation to pay compensation under the HNS Convention if the shipper or any other person failed to inform the carrier of the hazardous and noxious nature of the substances to be carried. In the event that the ship-owner is exonerated, the HNS Fund will pay compensation, except when the damage resulted from an act of war, hostilities or civil war. The pillars of the CLC have also been incorporated into the HNS system: the channelling of strict-based but limited liability and compulsory insurance.

Thus, the HNS Convention is largely modelled on the existing CLC system and the IFC 1992 system. Generally speaking, one can even say that the HNS Convention is a copy of those systems. Unlike the CLC and the IFC, however, after 10 years the HNS Convention has still not entered into force. Becoming operative requires ratification by at least 12 States, under the condition that four States must each have a registered ship's tonnage of at least 2 Mio units of GT and contributors from States that have ratified the Convention must receive more than 40 Mio tonnes of cargo and/or bulk under HNS provisions. Thus far, only nine States, not being member signatory States, have ratified the HNS Convention.[12] Another three ratifications are required for its entry into force. Moreover, four of the 12 ratifying States need to receive at least 2 Mio units of gross tonnage of hazardous and noxious goods.

One of the major problems concerns the contributions of the receiving chemical industry**,** mainly because there are difficulties in creating a well-founded, practical

[10] Art.1.4 (a) HNS.
[11] Art.1.4 (b) HNS.
[12] See <www.hnsconvention.org>.