# TOVALOP and CRISTAL—a purpose fulfilled

*By* COLIN DE LA RUE*

On 20 February 1997, with the close of one P & I year and the start of another, an era comes to an end in the field of oil pollution from ships. Incidents occurring after that date are no longer covered by the compensation schemes TOVALOP and CRISTAL, first conceived nearly 30 years ago.

It is not every day that old laws are reviewed when so many new ones call out for attention. But then the whole point of the schemes is that they are not really laws at all, save as contracts among their shipping and oil industry sponsors. They were designed to provide voluntary payment of compensation to victims of pollution who could not obtain adequate legal remedies. So the question arises what the implications will be of the schemes passing away—will today's legal remedies adequately stop the gap which TOVALOP and CRISTAL were intended to fill?

Laws governing oil pollution from ships have developed in a piecemeal fashion, with changes often stimulated by major spills. The present picture may be seen more clearly with knowledge of the process which brought it about, and it is one in which the schemes played an important role. At first it may seem perplexing that two highly competitive industries, noted for the toughness of their commercial dealings, should altruistically offer more for pollution than the law required. It is therefore instructive to see, in retrospect, the effect which the schemes have had in shaping and supporting an international response to the problems, and for this reason too there is a tale to be told.

## TORREY CANYON

For many the story begins with the Suez Crisis of 1956, and the disruption of oil supplies from the Middle East to the western world via the Suez Canal. This brought the realisation that a safer alternative was needed on the longer route around the Cape of Good Hope, and that much bigger ships had to be built for oil to be carried this way on an economic scale. Soon the world's first 100,000 dwt tanker came into service, and by 1966 VLCCs of over 200,000 dwt were afloat. It was then only a matter of time before one of the new breed of supertankers would unleash pollution on a scale not previously seen from a ship, with far-reaching consequences for all involved.[1]

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1. For further details of the growth in size of tanker newbuildings over this period, see Smith, *Merchant Ship Design Since 1945* (1984), especially Chap. 4. For an account of relevant background developments in the history of the oil industry see Yergin, *The Prize* (1991), especially Chap. 24, and Mostert, *Supership* (1975), especially Chap. 2.

The ship destined for this role in history was the Liberian tanker *Torrey Canyon*. On her fateful last voyage she carried 120,000 tons of Kuwaiti crude oil for discharge at Milford Haven in Wales. On 18 March 1967, on her arrival at the Western Approaches, her master set a course between Land's End and the Scilly Isles in a bid to save time and avoid delay in berthing. She then struck the Seven Stones Reef at full speed, and soon it was apparent that thousands of tons of oil were escaping from her ruptured tanks. Salvage operations were abandoned when she broke up in three pieces, becoming the largest shipwreck the world had ever known.

The escaping oil polluted many coastal areas in the south-west of England, killing thousands of seabirds and fish, and threatening the livelihoods of many local people in the forthcoming tourist season. Later the drifting oil polluted beaches and harbours in the Channel Islands and Brittany. It was estimated that the entire clean-up operation cost some £3m.[2]

The incident quickly exposed a host of legal problems relating to compensation for pollution. Plainly the owners were liable for the master's imprudent navigation, but the only relevant precedent in the English courts—concerning a relatively small spill from a coastal tanker in 1950—showed how problems could arise in other cases in establishing claims.[3] Now it was also apparent what additional difficulties were posed by a spill in international waters, from a ship with multinational connections, causing damage in more than one country. Confusion reigned as to the law and jurisdiction applying to such a case, the types of recoverable claim, the right (if any) of the shipowners to limit their liability, and the prospects of valid claims being enforced against a one-ship company whose sole asset had been lost.

Although the British and French governments did in the event recover compromise settlements of their claims, it was evident that traditional legal principles were inadequate to deal with the consequences of pollution from ships, and that a new international system was urgently needed.[4]

## INTERNATIONAL RESPONSE TO THE TORREY CANYON

In response to the incident the British government urged the International Maritime Consultative Organisation (IMCO) to consider changes in international law governing liability for pollution from ships.[5] The IMCO Council agreed to study the subject and over the next two years proposals for a new international Convention were developed in co-operation with the Comité Maritime International (CMI). In the meantime the oil and shipping industries were actively considering their own response to the new challenges facing them after the *Torrey Canyon*.

2. For further details of the incident see Gill, Booker and Soper, *The Wreck of the Torrey Canyon* (1967).

3. See *Esso Petroleum Co. Ltd.* v. *Southport Corporation (The Inverpool)*, [1956] A.C. 211; [1955] 2 Lloyd's Rep. 655 (H.L.), where the plaintiffs were unable to prove negligence and alternative remedies—in the law of trespass, public and private nuisance—were all dismissed on legal grounds.

4. For further commentary on the legal problems highlighted by the *Torrey Canyon* case ([1969] 2 Lloyd's Rep. 591) see Sweeney, "Oil Pollution of the Oceans", 37 Fordham L. Rev. 155 (1968), and Brown, "Lessons of the *Torrey Canyon*", 21 *Current Legal Problems* 113 (1968).

5. "Lessons Arising from the Incident of the *Torrey Canyon*", 18 April 1967, IMCO Doc. C/ES, III 3. IMCO was the forerunner of the International Maritime Organization (IMO) and the principal agency for intergovernmental relations in the maritime sector.

## TOVALOP

Soon after the incident the new problems of pollution were debated among the seven major oil companies, which not only owned a high proportion of oil cargoes but also operated a significant part of the world's tanker fleet. They devised the idea of an industry scheme in which tanker owners undertook voluntary liability to pay compensation for oil pollution damage. The scheme was designed to have an impact on world opinion, and to relieve political pressure on national governments to introduce their own unilateral solutions. It was intended to play a part in shaping the pattern of the proposed new international laws, to improve the prospects for their adoption worldwide, and to secure the advantages of a uniform system.

The scheme was to be set out in an agreement known as the Tanker Owners Voluntary Agreement concerning Liability for Oil Pollution (TOVALOP) and it was to be administered by a new entity established for the purpose, the International Tanker Owners Pollution Federation Ltd (ITOPF), also known simply as "the Federation".

From the beginning it was recognised that for TOVALOP to have the desired impact it would need to be supported by the owners of at least 80 per cent of the world's tanker tonnage. It could not therefore operate without the participation of the independent (i.e. non-oil company) tanker owners, and their traditional liability insurers, the P & I clubs.

Initially there were misgivings whether the clubs would be prepared to cover the new "voluntary liabilities" proposed for their members, but they were persuaded of the longer-term benefits and were also attracted by the prospect of the Federation establishing a technical department, able to provide expert advice and assistance in the response to oil spills. It was therefore agreed that P & I cover should be extended to include claims under TOVALOP, and in December 1968 the Federation was formally established with sponsorship from the oil companies, independent tanker owners and clubs.

After many drafting sessions the detailed terms of TOVALOP were agreed on 7 January 1969. These provided for voluntary assumption of strict liability, subject to limited exceptions, up to a fixed limit. Responsibility for payment of claims rested not with the Federation but with the owner of the tanker and (in practice) his insurers. The scheme covered preventive measures taken before or after a spill (in the former case being termed "threat removal measures"). However it provided compensation only for the cost of measures taken by governments, and did not respond to claims for expenses, loss or damage incurred by other parties.[6] The Agreement came into force in October 1969 when the tonnage entered in the scheme reached 50 per cent of the world's tanker fleet. The membership continued to grow, reaching the target figure of 80 per cent within six months, and ultimately representing some 97 per cent of the world's tanker tonnage.[7]

6. For further details of the 1969 TOVALOP scheme see Becker, "A Short Cruise on the Good Ships TOVALOP and CRISTAL", 5 J. Mar. Law & Com. 609 (1974). These details are not examined further here for, as discussed below, the scheme was revised substantially in 1978 and again in 1987.

7. For further details of the genesis of TOVALOP see *Ten Years of TOVALOP*, published in 1979 by the International Tanker Owners Pollution Federation Limited.

## THE BRUSSELS CONFERENCE AND THE CIVIL LIABILITY CONVENTION 1969

On 10–28 November 1969 an International Legal Conference on Marine Pollution Damage was held in Brussels. Its purpose was to consider the drafts of two international Conventions proposed to deal respectively with the public law and private law problems highlighted by the *Torrey Canyon*, i.e., powers of state intervention, and liability to pay compensation for pollution damage.

On the latter subject, the Conference adopted the Civil Liability Convention, 1969, commonly known as "CLC". Its main features bore many similarities to TOVALOP, including strict liability of the tanker owner for oil pollution damage, regardless of fault; limited exceptions from liability; a right to limit liability to an amount fixed by reference to the tonnage of the ship; and dedication of the available compensation to pollution claims, including the costs of "preventive measures". It differed from TOVALOP in that the right to bring claims was not limited to governments but was open to any person suffering loss, damage or expense. The owner was also required to insure against his potential liabilities under the Convention, and this obligation was to be enforced by a system of certification and port state control. Six years were to pass before CLC had gained sufficient ratifications to enter into force, but it was to prove a very successful Convention, adopted by nearly 100 states. It remains today the backbone of oil pollution liability laws in many parts of the world.[8]

One of the issues which the Brussels Conference had to determine was the amount of the shipowner's liability limit. In the event it was decided that he should be liable for oil pollution claims up to a limit of 2,000 gold francs per limitation ton, provided the pollution did not result from his "actual fault or privity".[9] What made this possible was an agreement among governments represented at the Conference that a supplemental fund should be established to contribute to the cost of pollution claims, and to be financed by levies imposed on the owners of oil cargoes.

There was insufficient time at the Conference to develop appropriate provisions embodying this agreement in the text of CLC, and so a resolution was adopted instead, requesting IMCO to convene an International Legal Conference not later than 1971 to consider the establishment of a second-tier fund.

## CRISTAL

The form of a second-tier Convention, involving a levy on cargo owners, was naturally of great concern to oil companies transporting millions of barrels of oil around the world every day. The oil industry therefore developed a scheme which would be acceptable to its

8. The International Convention on Civil Liability for Oil Pollution Damage, 1969, was approved by the conference by a vote of 35 to 1 with 10 abstentions. For an account of the preparatory work leading to the Convention by a member of the CMI Working Group see Healy, "The C.M.I. and IMCO Draft Conventions on Civil Liability for Oil Pollution", 1 J. Mar. Law & Com. 93 (1969), and "The International Convention on Civil Liability for Oil Pollution Damage, 1969" 1 J. Mar. Law & Com. 317 (1970).

9. In 1969 the official value of 2,000 gold francs was US$134.40.

participants and provide a model for the proposed Convention. After the concept had been agreed within the industry and with the sponsors of TOVALOP the details of the scheme were worked out in conjunction with the Oil Companies International Marine Forum (OCIMF). The product of this work was an agreement reached on 14 January 1971 among the main participants in the industry: the Contract Regarding an Interim Supplement to Tanker Liability for Oil Pollution, known by the acronym CRISTAL.

To administer the scheme the industry established the Oil Companies Institute for Marine Pollution Compensation Ltd (known as the "Institute"). Its main purpose was to pay compensation for oil pollution damage in cases where the incident involved an oil cargo owned by a CRISTAL member, and where the claims exceeded the amounts recoverable from the shipowner under TOVALOP.

Though the two schemes dovetailed in many respects there were important differences between them. Whilst TOVALOP (and likewise CLC) imposed liability on the owner of the tanker involved in the incident, CRISTAL did not impose any similar liability on the owner of the cargo; responsibility for payment of claims was to be borne instead by the Institute, with the financial burden spread among the members in proportion to the quantities of oil which they received by sea transport each calendar year. Ultimately the CRISTAL membership embraced several hundred companies and accounted for the great majority of oil cargoes in international trade.[10]

## THE FUND CONVENTION 1971

In accordance with the resolution adopted at the 1969 International Legal Conference, IMCO convened a Diplomatic Conference to consider the establishment of a second-tier fund, and this took place in Brussels between 29 November and 18 December 1971.

The Conference adopted the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, known as the Fund Convention 1971. Its main purpose was to provide a system of supplemental compensation, additional to that available under CLC, and consequently only CLC states could become members of the Fund. Most of them did so, and the Fund Convention remains widely in force.

The 1971 Convention bore many similarities to the model of the CRISTAL scheme introduced earlier that year. It did not impose liability on individual cargo owners but provided for compensation to be paid by an intergovernmental body established to administer the fund, and financed by contributions levied on oil importers in contracting states. This body, the International Oil Pollution Compensation Fund (known as the IOPC Fund or simply "the Fund") was to have its headquarters in London and be governed by an Assembly of delegations representing member states. Decisions with respect to significant claims were to be made by an Executive Committee, but the day-to-day operations of the Fund were the function of a Secretariat headed by the Fund Director.

10. For further details of the 1971 CRISTAL scheme see Becker, "A Short Cruise on the Good Ships TOVALOP and CRISTAL", 5 J. Mar. Law & Com. 609 (1974).

An ancillary purpose of the Fund—as adumbrated in the resolution adopted at the 1969 Conference—was to relieve shipowners of the additional financial burden imposed upon them by CLC. At the 1971 Conference differences of opinion emerged as to the exact extent of the relief to be given. Most had envisaged that the shipowner would be indemnified for oil pollution liabilities incurred under CLC in excess of 1,000 gold francs, this being the limit of liability under the 1957 Brussels Limitation Convention. However the "indemnification relief" granted to shipowners by the Fund Convention applied only to liabilities in the band between 1,500 and 2,000 francs. This gave rise to a feeling in some quarters that political promises had been broken, and it reflected tensions between the shipping and oil industries which would again affect developments in later years.

The Convention was to take seven years to enter into force, but the membership continued to grow until ultimately the two-tier legal regime applied in nearly 70 countries around the world, in many of which it still remains in force.[11]

## ENTRY INTO FORCE OF CLC AND REVISION OF VOLUNTARY SCHEMES

The Civil Liability Convention 1969 came into force on 19 June 1975, with ratifications in 14 contracting states. But only gradually did it spread more widely, and so the question arose whether the voluntary schemes should be extended, in parallel with the Convention, and if so in what form.

In the industry discussions which took place it was considered valuable for tanker owners to maintain their commitment to pay promptly for clean-up and other claims in non-CLC states on a similar basis to that established by the Convention. If they were prepared to extend and increase this commitment then the oil industry was prepared to do likewise: it was therefore agreed that the compensation payable by the Institute under the CRISTAL scheme would be increased to a new limit of US$36 million, with scope for a possible further increase up to US$72 million, on the basis that the shipowner's responsibility under TOVALOP was increased to US$160 per ton, up to an overall maximum of US$16.8 million.

Part and parcel of these arrangements was a mechanism for re-apportioning the cost of oil spills between the two industries. The oil companies agreed to give a form of "roll-back" relief, akin to that provided for in the Fund Convention, and also to indemnify tanker owners against liabilities in non-CLC states above the TOVALOP limit. For their part, shipowners agreed to pay certain minimum amounts in incidents involving small tankers with low limits of liability under CLC.

Revised versions of TOVALOP and CRISTAL therefore came into effect on 1 June 1978, providing between them a worldwide system of voluntary compensation which was broadly similar (and in some respects superior) to that established by the Conventions. However, in order to deter governments from regarding the schemes as a substitute for the Conventions, their interim purpose was emphasised by limiting their duration to a period of three

11. For a more detailed summary of the two-tier legal regime by the Director of the IOPC Fund see Måns Jacobsson, "The International Conventions on Liability and Compensation for Oil Pollution Damage and the Activities of the International Oil Pollution Compensation Fund", Chap. 5 in *Liability for Damage to the Marine Environment* (Lloyd's of London Press, 1993).

years—although in the event they were subsequently renewed for successive further periods.[12]

## ENTRY INTO FORCE OF FUND CONVENTION: MAJOR INCIDENTS AND PROPOSALS FOR CHANGE

A few months later, on 16 October 1978, the Fund Convention finally came into force, and so at last was born the two-tier legal regime conceived nearly a decade before. But by now the adequacy of the new system was already under discussion, for exactly seven months earlier there had occurred the first of two major oil spills which were to demonstrate the need for higher compensation limits and stimulate other changes in the law.

On 16 March 1978 the VLCC *Amoco Cadiz*, carrying 220,000 tons of crude oil from the Persian Gulf to Rotterdam, suffered a failure of her hydraulic steering gear off the Brittany coast. The crew could not repair the defect and attempts at salvage also failed. The tanker foundered and her entire cargo escaped, polluting 180 miles of coastline in one of the most important tourist and fishing regions in France. Never before or since has so much oil come ashore from a ship. The incident led to complex litigation in Chicago which finally came to a conclusion in January 1992, nearly 14 years later, with an award of some US$61 million plus interest.

Long before any of these damages were paid the French government and other claimants were compensated under the international system for the consequences of another costly spill in the same vicinity. On 7 March 1980 the Malagasy tanker *Tanio* broke up in heavy weather off the Brittany coast and spilt some 13,500 tons of her cargo of fuel oil, polluting over 125 miles of shoreline. Apart from the cost of clean-up measures, considerable expense was also incurred in pumping operations, lasting 16 months, to remove oil remaining in the bow section of the wreck, which had sunk in deep water. By this time the Fund Convention was in force and the total compensation available, some £22.5 million, was sufficient only to pay 70 per cent of the established claims.[13]

On the positive side the *Tanio* incident did highlight the efficiency of the international system in contrast to the litigation which followed the *Amoco Cadiz*: despite the complexities of the case, interim payments were made and the balance of the claims settled without litigation within a period of only 3–5 years from the incident.[14]

But naturally it was a matter of concern that the limits of compensation, eroded in value by high inflation in the 1970s, were apparently insufficient to meet the cost of a major spill. In the event, until the *Haven* incident off Genoa in 1991, the *Tanio* case remained the only instance in which the compensation limits proved insufficient to cover established claims from an

12. For an account of developments leading to the 1978 schemes see A. F. Bessemer Clark, "The Future of Tovalop" [1978] L.M.C.L.Q. 572.

13. Supplementary compensation was subsequently recovered through settlement of claims brought against various other parties involved in the incident, including the shipowners (against whom "actual fault or privity" was alleged, so as to bar their right of limitation under CLC), the vessel's bareboat charterer and her classification society.

14. The relative merits of the two different compensation systems are discussed by Emmanuel Fontaine in "The French Experience: '*Tanio*' and '*Amoco Cadiz*' Incidents Compared", Chap. 9 in *Liability for Damage to the Marine Environment* (Lloyd's of London Press, 1993).

incident governed by the Fund Convention. Nevertheless, at the time it was seen as confirmation that increases in the compensation limits were urgently needed.

## THE 1984 PROTOCOLS

The issue was therefore considered at an IMO Diplomatic Conference in London in April 1984. Any significant increase in compensation depended to a large extent on the United States—by far the world's largest oil importer—being prepared to join the international system. As a condition of adopting the Conventions the USA sought increases which were significantly greater than those envisaged in most other parts of the international community. Nevertheless, in view of the importance of establishing a uniform system to apply worldwide, the US position was accommodated and agreement reached on a new limit of 135 million SDRs, together with scope for extension to 200 million SDRs. The shipowner's relative share of the financial burden was also substantially increased.[15]

The result was the 1984 Protocols to the Civil Liability and Fund Conventions. Their entry into force was in practice conditional on ratification by the United States, but the years came and went without a decision on Capitol Hill. Once again it was found that the industry schemes had a continuing role to play.[16]

## REVISION OF TOVALOP AND CRISTAL

A perennial advantage of the schemes lay in the comparative ease with which they could be brought up to date. Treaty amendments could take years to bring about and then wait even longer for the necessary ratifications. The voluntary schemes could be changed relatively quickly, with most participants following the lead taken by their representative industry bodies.

Another feature had also become increasingly significant: as more pollution claims had come to be settled under one legal liability regime or another, so the schemes had increasingly become a vehicle for readjusting the burden of claim settlements between the shipping and oil industries. Consequently, if the schemes were to be amended to bring them into line with the 1984 Protocols, this would not only make equivalent compensation available to the public within a much shorter time; in the interim it would also reapportion claim settlements between shipowners and oil companies so as to put them in approximately the same position relative to each other as that agreed in the Protocols.

For a while it was suggested that the schemes should go further than this and adjust, behind the scenes, the balance struck by the Protocols themselves. In some sections of the oil industry there was dissatisfaction that shipowners had not been required to bear a larger

15. The limit of liability under CLC was to be raised from 133 to 420 SDRs, and the overall limit boosted from 14 to 59.7 million SDRs. The shipowner would also bear the first 3 million SDRs of claims involving tankers of 5,000 tons or less.

16. For further details of the 1984 Conference and its sequel, see Magnus Göransson, "The 1984 and 1992 Protocols to the Civil Liability Convention 1969 and the Fund Convention 1971", Chap. 7 in *Liability for Damage to the Marine Environment* (Lloyd's of London Press, 1993); see also Jacobsen and Yellen, "Oil Pollution: the 1984 London Protocols and the *Amoco Cadiz*", 15 J. Mar. Law & Com. 467 (1984).

proportion of the total burden of spills, and this led to proposals for a new scheme, to be known as the Pollution Liability Agreement among Tanker Owners (PLATO), which would have required them to shoulder a greater share. This failed to gain the necessary support, and for a time it appeared that the existing voluntary schemes would expire without renewal.[17]

Negotiations nevertheless continued and eventually agreement was reached on revised schemes to come into effect from 20 February 1987. These revisions resulted in a bifurcation of TOVALOP into two versions which would apply side by side. Where the tanker involved in an incident was not carrying an oil cargo owned by a member of CRISTAL—with the result that the CRISTAL scheme did not apply—compensation would remain available from the shipowner under the version of TOVALOP which had been agreed in 1978, and which was to be known henceforth as the "TOVALOP Standing Agreement". Compensation under the schemes was accordingly limited in such cases to a tonnage-related amount which was subject to a maximum limit of US$16.8 million.

Considerably greater compensation would be available, however, if the tanker was carrying a CRISTAL cargo. In such cases the shipowner's responsibility would be governed by a Supplement to TOVALOP, applying alongside the Standing Agreement. The Supplement provided for the owner to pay compensation up to a new tonnage-related limit which could reach a maximum of US$70 million; above the Supplement limit CRISTAL would pay additional compensation which likewise depended on the tonnage of the tanker, but which for the largest ships would lift the aggregate compensation available under the schemes to a maximum of US$135 million.

The new compensation levels were significantly higher than those available either under the previous versions of the schemes or under the Conventions, but they were deliberately set slightly below those provided for by the Protocols.[18] A new company, Cristal Ltd., was incorporated in Bermuda to administer and pay claims under the oil company scheme, and in recognition of its continuing role the word "Interim" was dropped from its title.

Like its predecessor, the new CRISTAL contract would reimburse the shipowner for any liabilities incurred for pollution damage in excess of the TOVALOP limit (now the TOVALOP Supplement limit); however this indemnity was no longer restricted to liabilities incurred in the USA and other non-CLC states but could include cases where the shipowner incurred unlimited liability under CLC because the incident had resulted from his "actual fault or privity". As often on other occasions, the shipping industry was willing to pay greater compensation in exchange for a more secure right of limitation.[19]

On the other side of the scales the schemes also provided a new mechanism for shipowners and their P & I clubs to reimburse oil companies for contributions levied on them under the Fund Convention. Where an incident occurred in a CLC state, and the claims exceeded the

17. For an account of these developments see Oakes and Moss, "The Plato Philosophy" (*Seatrade* magazine, July 1985, p. 32), and for a commentary on them by the Director General of the Norwegian Shipowners Association see David Vikaren, "Plato—Falling a Long Way Short" (*Seatrade* magazine, September 1985, p. 144).

18. The comparison between US$135 million potentially available under the schemes with 135 million SDRs provided for by the Protocols naturally fluctuated with rates of exchange. However the maximum figure under the schemes would be reached only for tankers of about 140,000 grt, whilst the Protocols provided for a fixed limit irrespective of the size of the ship. Consequently the Protocols provided for greater compensation in cases involving tankers of small or medium size.

19. It was of course only in cases where CRISTAL applied that these benefits would be available to tanker owners—hence their decision to confine the TOVALOP Supplement to such cases, leaving others to be dealt with under the Standing Agreement.

shipowner's limit of liability under the Convention, the shipowner would remain responsible for payment of claims up to the substantially higher limit set by the TOVALOP Supplement. However if the Fund Convention was also in force the claimants would in practice normally be paid in accordance with the legal liability regime, i.e.by the IOPC Fund for amounts above the CLC limit. The new schemes therefore provided for oil companies in Fund member states to be reimbursed their contributions to compensation paid by the IOPC Fund below the Supplement limit. The 1987 schemes were later renewed periodically and underwent minor amendments from time to time. However the substance of them has remained unaltered.[20]

## EXXON VALDEZ

In early 1989 the US Congress was still debating whether new federal legislation on oil pollution from ships should implement the international regime or follow a different pattern. The issue was settled on the night of 24 March when the US flag tanker *Exxon Valdez* ran aground and spilled 37,000 tons of North Slope crude oil in Prince William Sound, Alaska.

Although the incident was well down the world league table of major spills it was the worst the USA had ever known. More than 1,300 miles of shoreline were affected in one of America's most pristine wilderness areas. The spill attracted unprecedented media attention and produced a clean-up bill many times larger than any previously seen. Billions of dollars were spent by Exxon, and opinions differed as to whether this reflected the extent of environmental damage or, instead, the depth of the company's pocket and its determination to repair damage to its public image. At all events it was widely perceived that the Conventions would not provide adequate funds to deal with the consequences of a major spill in US waters. Congress decided not to ratify the Protocols but to go its own way with the US Oil Pollution Act 1990.

## THE 1992 PROTOCOLS

With the realisation that the USA would not ratify the 1984 Protocols it was soon concluded that they were unlikely to enter into force unless the ratification requirements were changed. This was far from straightforward, but at an IMO Diplomatic Conference in London in November 1992 a way was found of funding the higher compensation limits without US support. This resulted in the 1992 Protocols, which in substance were the same as those agreed in 1984, but were governed by new conditions for entry into force. These were met within the unusually short time of 2½ years. After a further 12 months the Protocols came into effect on 30 May 1996, thus bringing into force the 1992 Civil Liability and Fund Conventions.

20. For an account of the 1987 revisions by maritime counsel in a major oil company see L. G. Cohen, "Revisions of TOVALOP and CRISTAL: Strong Ships for Stormy Seas", 18 J. Mar. L. & Comm. 525 (1987). For a description by the Managing Director of ITOPF of the schemes, including diagrammatic comparisons between the compensation levels available under the different regimes, see Dr I. C. White, "The Voluntary Oil Spill Compensation Agreements—TOVALOP and CRISTAL", Chap. 6 in *Liability for Damage to the Marine Environment* (Lloyd's of London Press, 1993).

## TERMINATION OF INDUSTRY SCHEMES—IMPLICATIONS FOR THE FUTURE

As these events unfolded the question arose whether TOVALOP and CRISTAL should be renewed after their expiry in February 1997. There was an argument for extending them until the 1992 Conventions had been more widely adopted, in much the same way as occurred in the mid-1970s when the original Conventions first came into force. However by the mid-1990s support for the international system was widespread. There were concerns that continuance of the schemes might lead some governments to treat ratification of the Protocols as a lower priority, and to avoid this the representative bodies of the tanker and oil industries announced in November 1995 that they would not be renewed, and would not therefore apply to incidents after 20 February 1997.

What does this mean for those concerned about the risk of oil spills in future? The question for them to consider is that posed at the outset, namely whether the law in force in their respective countries provides adequate remedies for pollution. This depends primarily on whether they are parties to the Civil Liability and Fund Conventions, and if so whether the original versions are in force or those adopted in 1992.

Where the 1992 Conventions are in force nothing is lost by the disappearance of the schemes, and indeed in some instances cover is significantly better.[21] However at present there are comparatively few states in this category, and many are still parties only to the original Conventions. Here the termination of the schemes will result in a reduction of the available compensation; there will also be a lack of cover in certain cases for which compensation has been available under the schemes, and is available now under the 1992 Conventions, but is not provided for in the original versions. These include cases involving the cost of measures taken in response to a shipping casualty but before any oil is spilt,[22] and spills from tankers in ballast.[23] Governments in these parts of the world should be considering whether to join the 1992 system. Many will have little to lose, particularly those whose oil imports are comparatively small.

There are still some states where domestic laws do not specifically address the subject and where the schemes have long been the only effective vehicle for responding to claims. Here it may be considered a matter of urgency to join the international system in order to fill a serious gap.

Given that the schemes played such a part in shaping and supporting the international system, should they be viewed with suspicion as favouring industry at the expense of claimants? The record speaks for itself. Today strict liability for pollution is taken for granted, but in 1969 its introduction by TOVALOP was an innovative vehicle for prompt compensation. The liability limits have in practice capped claims only in very few cases. Whilst commercial men needed the certainty of a simple and uniform system, the same features have operated very satisfactorily for claimants over the years.

The sponsors of the schemes have therefore been fair to conclude that their purpose has been fulfilled, and that the way forward is now clear for all who desire adequate cover for pollution in future.

21. This is particularly so in cases involving spills from small tankers: see note 18, *supra*.
22. These have been covered by the schemes as so-called "threat removal measures".
23. These are outside the CRISTAL scheme but have been covered by the TOVALOP Standing Agreement.