

The *Erika* and Its Aftermath

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The pollution, from the *Erika* and its loss produced a substantially greater effect than any other pollution incident in Europe such as the *Braer*, the *Sea Empress* and the *Aegean Sea*. These incidents had also brought legal ramifications but they did not affect the European political agenda as much as the *Erika*.¹

The *Erika* raised the pollution issue to the top of the European political agenda and prompted a huge legislative overhaul. What was the reason for such a big public outcry?

In analysing the reasons for the *Erika's* disastrous loss, many factors such as flag, class, age, charterer came into play. The *Erika* reflected the polyglot nature of the tanker industry. The charterer was French, the owner Italian, the crew Indian, and the flag Maltese. However, the *Erika* was not the only incident where so many nationalities were involved in the management of a vessel. There have been many oil pollution incidents where the vessels were registered under a flag of convenience country, polluted various sea resources but none of them had the same attraction. But the *Erika* was different from many previous incidents as it carried the required certificates, was under class and had been inspected by port states, flag states and industry inspectors on several occasions. However, the safety net that has been established involving inspections by the flag state, port state, industry and the classification society has clearly failed. In other words, the vessel slipped through the whole series of safety nets.

The *Erika* incident has brought up many issues under discussion. The oil pollution compensation system has been criticised for only deciding how the maximum limit of compensation provided under the Civil Liability and Fund Convention should be divided up between the ship interests and the cargo interests, without providing for

¹ *Aegean Sea* grounded at La Coruña, Spain, in heavy weather in 1992. The ship broke in two and caught fire-72,000 tonnes of oil was spilt and wide environmental damage resulted. Following this incident and other pollution incidents that took place between 1990-1995, extensive amendments to MARPOL 73/78 including requirements under Annex I for double hulls on new tankers and enhanced surveys for existing tankers and extensive amendments to SOLAS 1974 including the mandatory introduction of the International Safety Management (ISM) Code effective from 1998 have been adopted. In 1993, *Braer*, laden with 84,000 tonnes of North Sea crude, experienced engine failure south of Shetland Islands, UK. The ship was driven ashore in severe weather and broke up on coastal rocks, all cargo and bunker oil escaped. As a result of *Braer* incident, the Donaldson Inquiry was set up by the UK. In 1994, a conference was held to agree on major amendments to the International Convention on Standards of Training Certification and Watchkeeping. The *Sea Empress* stranded off entrance to Milford Haven, UK, when entering port in 1996. Bad weather made refloating difficult and 65,000 tonnes of oil leaked into the sea and caused grave damage to highly sensitive coastal areas and fishing. The ship was eventually floated and taken into harbour where remaining oil was transferred to other ships. Following this incident, in 1996, the International Conference on Carriage of Hazardous and Noxious Substances by Sea was held.

any increase in available funds. The system has also been criticised as the cargo owner and charterer interests have no interest in acting “responsibly” as the liability or responsibility is automatically channelled towards the shipowner. The incident greatly damaged the image of classification societies and put them under spotlight. It has been recognised by the International Association of Classification Societies (IACS) that the *Erika* incident had created a new climate in which the public was increasingly intolerant of any failure on the part of the maritime industry and that it was essential to work together towards restoring confidence in the system.² As pointed out by William A. O’Neil, the secretary-general of the International Maritime Organisation (IMO), “like a stone cast into a pond, the sinking of *Erika*, is causing waves that are continuing to spread far beyond the original incident.”³

This article briefly examines the measures taken by the EU and IMO following the *Erika* incident.⁴

The Incident

During the early morning of 12 December 1999 the Maltese registered tanker *Erika* broke in two in gale force winds in the Bay of Biscay approximately 60 miles off the Brittany Coast. The tanker was carrying 31, 000 tonnes of heavy fuel oil. Oil started to come ashore on 24 December. On 25 December, first of thick fuel oil cargo hit French Atlantic coast and washed up at dozens of points simultaneously. About 400 km of beaches including many popular holiday resorts have been polluted by the oil, and thousands of seabirds were covered in it.

Background

The *Erika* was one of a batch of eight sister ships built with successive yard numbers from 283-290 at Kasasdo Dockyard, Kudamatsu, Japan 1974-1976. The tanker was a 19,666 gross tonnage conventional steel single hull oil tanker with segregated ballast tanks. Following the casualty, the information released by the registers and classification societies showed that four out of the eight ships built in the same series had suffered serious structural damage involving cracking or buckling of the deck.

At the time of her sinking all of the *Erika*’s class and statutory certificates were valid. She was classed with RINA, a full member of IACS. The ship was under the management of an Italian company, which was also ISM certified by RINA. The 24 old tanker sailed under the Maltese flag and was owned by the Savarase family of Sorrento in Italy through the Tevere Shipping Company of Valletta. It was operated by Panship Management & Services of Italy.

Between 1991 and 1999, she was inspected 16 times by the port state control inspectors and 2 times by the flag states control inspectors. This figure does not

² IACS Press Release, 5 May 2000.

³ IMO News, “World Maritime Day 2000” Number 3, 2000, p. 16.

⁴ For detailed discussion of measures taken by the maritime industry following the *Erika* incident See Özçayır Z. Oya “Port State Control” to be published by LLP in 2001.

include the vetting inspections undertaken by the oil majors, or the surveys carried out by the classification society. Several oil companies chartered the *Erika* throughout the 1990s. The inspectors' of Texaco, Exxon's subsidiary Standard Marine, Repsol and Shell approved her as a fit vessel to carry their cargoes. The vessel was also approved by TotalFina whose cargo it was carrying when it sank. In December 1999, the *Erika* had the approval of most of major oil companies, which carry out vetting inspections prior accepting a tanker.

The Compensation System

Compensation is available to any individual business, private organization or public body who has suffered pollution damage as a result of the *Erika* incident. It is payable for expenses actually incurred and for loss or damage actually suffered as a result of the oil pollution under the 1992 Civil Liability Convention and the 1992 Fund Convention as enacted into French law. The incident has given rise to three main types of claims which are linked to:

- damage to property and clean-up operations;
- losses suffered by fishermen, oyster farmers, shellfish cultivators;
- economic losses affecting activities in the tourism sector.

The maximum amount payable by the 1992 Fund in respect of an incident is 135 million SDR (£ 115 million or US\$ 186 million), including the sum actually paid by the shipowner (or his insurer) under the 1992 Civil Liability Convention. Who is going to pay for claims made under the *Erika* incident? Under the current system the shipowner, usually through his P&I club insurer, pays up to a certain limit and then the Fund pays up to a maximum limit of about £ 115 million. The shipowner is normally entitled to limit his liability to an amount determined by the size of the ship. At the request of the shipowner, the Tribunal de Commerce in Nantes issued an order on 14 March 2000 opening limitation proceedings. The Court determined the limitation amount applicable to the *Erika* at £8.4 million and declared that the shipowner had constituted the limitation fund by means of a letter of guarantee issued by the Steamship Mutual.⁵ In case of a small ship, like the *Erika* (19 666 gt) the shipowner's limit is relatively low (£8.4 million) whereas in the case of a VLCC the shipowner will pay the majority of the (£115 million or US\$ 186 million). The £8.4 million represents the first layer of compensation, which is paid by the tanker owner or his P&I insurer, in accordance with the 1992 Civil Liability Convention. Above that, the second layer of the compensation is paid by the Fund, in accordance with the 1992 Fund Convention, up to the overall maximum of 135 million SDR.

As at January 2001, 3543 claims for compensation had been submitted for a total of FFr 412 million (£30 million). Some 2090 of these claims totalling FFr184 million (£18 million) had been assessed at a total of FFr123 million (£ 12 million). During its July 2000 session, the Executive Committee of the IOPCF had decided, due to uncertainty as to the total level of claims arising from *Erika*, to limit the payments of

⁵ International Oil Pollution Compensation Fund 1992, Executive Committee, 9th session, Agenda item 3, 92FUND/EXC.9/7 28 September 2000, p. 9.

the 1992 Fund to 50% for the loss or damage actually suffered by the respective claimants.⁶

The level of compensation payments had been reviewed during the Committee's January 2001 session. Considering the claims made and the study carried out within French Ministry of Economy, Finance and Industry on the estimate of the total admissible claims in the tourism sector the Committee decided to increase the level of payments from 50% to 60% of the loss or damage actually suffered by the respective claimants.⁷

Reactions to the *Erika*

The EU's Proposals

The First Phase

Three months after the incident, on 21 March 2000, the European Commission adopted its first package of post-*Erika* measures in the form of "Communication on the safety of seaborne oil trade." The first package proposes three sets of regulatory measures. These are; changes to the EC Directive on port state control, changes to the EC Directive on Classification Societies and faster phasing of single hull tankers in European waters.⁸

During its 30 November 2000 Plenary Session, the European Parliament approved, subject to a number of amendments, the Commission's proposals on the above mentioned subjects.

The main points of these amended proposals are as follows:

1. *Changes to the EC Directive on Port State Control:*⁹ Following the failure of the port state control inspections in the *Erika* incident, the European Commission aims to make the inspection regime of certain potentially dangerous ships mandatory rather than discretionary, to tighten measures against manifestly substandard ships and to ensure an improved implementation of the Directive provisions.

The Commission believes that some ships pose a manifest risk to maritime safety and the marine environment because of their poor condition, flag and history. They should therefore be refused access to Community ports, unless it can be demonstrated that they can be operated safely in Community ports. Therefore the Commission proposes

⁶ International Oil Pollution Compensation Fund 1992, "The January 2001 sessions of the governing bodies-In brief" (7 February 2001) <http://www.iopcf.org/jan01news.htm>

⁷ Ibid

⁸ Commission of the European Communities, 21.3.2000, COM(2000) 142 final, 2000/0065 (COD)-2000/0066 (COD)-2000/0067 (COD), Communication From the Commission to the European Parliament and the Council on the Safety of the Seaborne Oil Trade.

⁹ See Amended proposal for a Directive of the European Parliament and of the Council amending Council Directive 95/21/EC concerning the enforcement, in respect of shipping using Community ports and sailing in the waters under the jurisdiction of the Member States, of international standards for ship safety, pollution prevention and shipboard living and working conditions (port state control) COM (2000) 850 final/2-2000/0065 (COD) of 21.12.2000.

banning such ships from the European Union. This ban concerns gas and chemical tankers, bulk carriers, oil tankers and passenger ships, if they;

- have been detained more than once in the course of the preceding 36 months in a port of a State signatory of the Paris MOU, and
- fly the flag of a State appearing in the “very high risk” section of the black list as published in the annual report of the Paris MOU; or
- have been detained more than twice in the course of the preceding 24 months in a port of a State signatory of the Paris MOU, and
- fly the flag of a State listed in the black list published in the annual report of the Paris MOU.

The refusal of access shall become applicable immediately after the ship has been authorised to leave the port where it has been the subject of a second or third detention as appropriate.

Under the EC Directive on port state control, 95/21/EC, the decision to inspect a ship is always initially based on a prior selection made by a port state inspector on the basis of his professional judgement. In order to harmonise the selection criteria the target factor introduced by an amendment to the Directive on 19 June 1998. The Commission proposes making the inspection obligatory if the target factor exceeds 50, according to the procedure laid down in the Paris MOU and if the ships concerned are classed in a category justifying expanded inspection.

The Commission proposes making it obligatory to state which parts of the ship have been inspected in the inspection report in order to avoid the possibility of inspecting again the parts of the ship that have already been checked in the previous port.

Under Directive 95/21/EC the flag State and the classification societies are informed only of the detention of a ship by the port State inspection authorities. The Commission proposes amending the Directive to stipulate the transmission of a copy of the inspection report to the flag State and to the classification society.

The Commission believes that it is necessary to verify whether oil tankers calling at European ports have appropriate cover for oil pollution risks. Therefore it is proposed that whenever an oil tanker carrying more than 2000 tonnes of oil in bulk is inspected, the inspector must check the presence on board of an insurance or other financial guarantee covering oil pollution damage, in conformity with the 1969 International Convention on Civil Liability for Oil Pollution Damage, as amended by its 1992 Protocol. The absence of these documents should be taken as justifying a more detailed inspection of the ship and constitutes a ground for detention.

The existing port state control Directive provides for publishing the name of the ship’s operator and the classification society. The Commission proposes to include the publication of the following proposal:

- the identity of the charterer and the type of the charter (voyage or time charter). This obligation will concern only ships carrying bulk liquid or solid cargo;

- information on the most recent expanded inspection performed in the context of port state control, and the most recent “special survey” carried out by a classification society;
- lists of measures taken following a detention (deadlines set for repairs, etc.), whether by the port authorities or by the classification societies.

The Commission proposes to make amendments to the reimbursement of costs by stating that in the case of detention of a vessel for deficiencies or lack of valid certificates all costs relating to the detention in port shall be borne by the owner or operator of the ship.

Under Article 17 of Directive 95/21/EC Member States must provide certain information on the number of inspectors allocated to port state control and the number of individual ships entering in their ports in a representative calendar year. The Commission proposes increasing the frequency for transmission of this data and adds new items to the list of information to be transmitted to the Commission.

2. *Changes to the EC Directive on Classification Societies:*¹⁰ Under the proposed amendments a good record of safety and pollution prevention performance, measured in respect of all ships classed by an organisation, irrespective of the flag they fly, shall become essential to grant the initial recognition and to maintain such a recognition.

In addition to the authority of Member States to suspend the recognition of an organisation working on its behalf, a similar authority should apply at Community level. Under the proposed system the Commission, on the basis of the Committee procedure, may suspend the recognition of an organisation for a limited period of time. This suspension shall apply when an organisation whose safety and pollution prevention performance is worsening fails to take the appropriate corrective measures as requested by the Commission.

The Commission believes that the limitation of financial liability of the organisations working on behalf of the Member States represented a major obstacle to the proper implementation of the Directive 94/57/EC (Directive on ship inspection and survey organisations). It is felt necessary now to harmonise this issue at Community level by laying down common provisions to be applied by all Member States. The following provisions concerning the limitation of the financial liability has been proposed:

- for a wilful act or omission or gross negligence: unlimited liability;
- for personal injury or death, caused by any negligent or reckless act or omission of the recognised organisation: € 5 million;
- for loss or damage to property, caused by any negligent or reckless act or omission of the recognised organisation: € 2.5 million.

¹⁰ See Amended proposal for a Directive of the European Parliament and of the Council amending Council Directive 94/57/EC on common rules and standards for ship inspection and survey organisations and for the relevant activities of maritime administrations, COM (2000) 849 final-2000/0066 (COD) of 12.12.2000.

More stringent quality criteria must be met by the recognized organizations, including the obligation to follow certain procedures when a ship changes class, such as the transmission of the complete history file of the ship to the new classification society.

It has been proposed that a recognised organisation should not carry out statutory work if it is identical with or has business, personal or family links to the shipowner or operator. This incompatibility shall also apply to surveyors employed by recognised organisations.

3. *Faster Phasing Out of Single Tankers in European Waters:*¹¹ The EC's proposal on the accelerated phase out of single hull tankers is the most controversial of the series of three initiatives it launched in the immediate aftermath of the sinking of the *Erika*. The EC's concern is that due to differences between the American and the International system (MARPOL), single hull tankers banned from American waters because of their age will begin, from 2005 and onwards, to operate in the other regions of the world, including the European Union. Therefore it is in the interest of the Community to adopt measures to avoid that single hull oil tankers that due to their advanced age, or after the end-date limits, are no longer allowed under the OPA 90 to operate to and from US ports, will start or continue operating from European ports.

The initial EC proposal covered all single hull oil tankers of 600 tonnes deadweight and above flying the flag of a Member State. To encourage the use of double hull tankers, a system of financial incentives and disincentives was proposed to encourage the trade of double hull tankers to and from and between ports in the Community, and to discourage the trade of single hull tankers. There was also concern that similar measures should be taken at a global level. The Maritime Environment Protection Committee (MEPC) of IMO agreed during its 45th session on 2 to 6 October 2000 to accelerate the 73/78 MARPOL Convention's phase out of single-hull tankers by draft agreement to the MARPOL 73/78 Regulation 13 G of Annex I. This agreement is subject to refinement and adoption at the Committee's 46th session in April 2001

During its 30 November 2000 Plenary Session, the European Parliament approved, subject to a number of amendments, the Commission's proposals for a Council Regulation on the accelerated phasing-in of double hull or equivalent design requirements for single hull tankers.¹² The amendments adopted by the European Parliament are based on the draft MEPC agreement.

The amended proposal aims to establish an accelerated phasing-in scheme for the application of the double hull or equivalent design requirements of the MARPOL 73/78 to single hull tankers. The proposed phase-out schedule for single hull tankers is in line with the draft text of revised regulation 13 G of MARPOL Annex I. Under the amended proposal the system of financial incentives and disincentives are withdrawn. Tankers between 600 and 3000 tons deadweight are excluded from the phase-out

¹¹ See Amended proposal for a Regulation of the European Parliament and of the Council on the accelerated phasing-in of double hull or equivalent design requirements for single hull oil tankers, COM (2000) 848 final- 2000/0067 (COD) of 12.12.2000.

¹² COM(2000) 142 final-2000/0067 (COD) of 21.03.2000.

schedule of the proposal, to ensure normal supply to the market in the island regions of the Union.

The Second Phase

On 6 December 2000 the European Commission adopted a second set of community measures on maritime safety following the sinking of the oil tanker, the *Erika*, in the form of “Communication from the commission to the European Parliament and the Council.”¹³

In the second phase the Commission plans to make additional proposals in the following areas:

1. *Community monitoring, control and information system for maritime traffic:*¹⁴ It is stated in the Commission’s Communication that even after the first package of measures is adopted, sub-standard ships may escape inspection in the European Union. Moreover, Directive 93/75/EC laying down notification requirements for vessels carrying dangerous or polluting goods, as it stands, is inadequate for the purposes of identifying and closely monitoring ships, in particular those in transit off Europe’s coasts. The safety rules which bind flag states and port state control regulations are not sufficient to protect a state against the risk of accident or pollution of its coastline. The European Union must therefore acquire the means to monitor and control more effectively the traffic off its coasts and to take more effective action in the event of critical situations arising at sea.

The proposal provides in particular for:¹⁵

- Improving the identification of ships heading for European ports and monitoring all ships in transit in areas of high traffic density or hazardous to shipping, and requiring ships sailing in Community waters to carry transponder systems so that they can be automatically identified and constantly monitored by the coastal authorities; The Commission proposes to provide a Community legal basis for a number of practices or requirements applied by Member States in order to improve their efficiency and, where appropriate, to allow further application of a system of appropriate sanctions by the Member States in cases of infringements. In particular, it will be made compulsory:
 - to give prior notification before entering European ports;
 - to report to the mandatory reporting systems set up by Member States and approved by the IMO;

¹³ Commission of the European Communities, Communication From the Commission to the European Parliament and the Council on a Second Set of Community Measures on Maritime Safety Following the Sinking of the Oil Tanker the *Erika*, Brussels, 6.12.2000, COM(2000)802 final, 2000/0325(COD)-2000/0326(COD)-2000/0327(COD).

¹⁴ Proposal for a Directive of the European Parliament and of the Council establishing a Community monitoring, control and information system for maritime traffic, 2000/0325 (COD).

¹⁵ Commission of the European Communities, Communication From the Commission to the European Parliament and the Council on a Second Set of Community Measures on Maritime Safety Following the Sinking of the Oil Tanker the *Erika*, Brussels, 6.12.2000, COM(2000)802 final, 2000/0325(COD)-2000/0326(COD)-2000/0327(COD), pp. 3-4 and pp. 6-50.

- to use the vessel traffic services and ships' routing systems approved by the IMO.
- Extending the reporting requirements already provided for by Directive 93/75/EEC to other dangerous goods and in particular to bunker fuels carried on board, given the highly polluted nature of these products; Directive 93/75/EEC contains provisions on the reporting by ships of accidents or incidents at sea and the subsequent measures to be taken by Member States. However, because of the definition of "ship" given in the Directive, these measures apply only to ships bound for or leaving a Community port and carrying dangerous or polluting goods.

Therefore the first objective of the Commission's proposal is to extend these provisions to all ships, whether or not they are carrying dangerous goods or polluting goods and whether or not they call at a Community port.

- Simplifying and harmonizing the procedures relating to the transmission and use of data on dangerous or polluting goods carried by ships, notably through the systematic use of electronic data interchange (EDI); The proposal aims to harmonize methods of transmitting information. Currently, operators may use any means at all to give notification. Cargo information is often transmitted by fax, particularly to smaller ports, which obliges the authorities concerned to store large volumes of paper documents in their premises. The Commission is proposing that all cargo data now be transmitted electronically (i.e. by computer and not by fax), thus ending the current practice of using paper, which undermines the efficiency of the system. It is also proposed that, when EDI formats are used for electronic data transmission, use be made only of the appropriate EDIFACT formats listed in the annex to the directive, in order to avoid having divergent standards throughout the Community.
- Requiring ships calling at Community ports to carry black boxes (or voyage data recorders), in order to facilitate the investigation of accidents, and thereby contribute to improving accident prevention policy.

During the 73rd session of the MSC, held in 27 November-6 December 2000, it was decided that¹⁶ passenger ships and ships other than passenger ships of 3000 gross tonnage and upwards constructed on or after 1 July 2002 will have to carry voyage data recorders (VDRs) to assist in accident investigations, under new regulations adopted by IMO. The mandatory regulations were among a raft of amendments to the International Convention for the Safety of Life at Sea, 1974 (SOLAS) adopted by IMO's Maritime Safety Committee (MSC), at its 73rd session from 27 November to 6 December 2000.

Like the black boxes carried on aircraft, VDRs enable accident investigators to review procedures and instructions in the moments before an incident and help to identify the cause of any accident. The regulations for VDRs are contained in a revised Chapter V (Safety of Navigation) of SOLAS which also makes it mandatory for certain ships to

¹⁶ IMO Briefing 28 2000, "Ships to carry "black boxes" under new regulations, 12 December 2000, Maritime Safety Committee - 73rd session: 27 November - 6 December 2000

carry an automatic identification system (AIS). Currently ships are recommended but not required to carry VDRs. Performance standards for VDRs were adopted by IMO in 1997.

VDR requirements

The VDR requirements are part of a new revised Chapter V of SOLAS on Safety of Navigation. The following ships will be required to carry VDRs, under regulation 20 of the new SOLAS Chapter V:

- passenger ships constructed on or after 1 July 2002;
- ro-ro passenger ships constructed before 1 July 2002 not later than the first survey on or after 1 July 2002;
- passenger ships other than ro-ro passenger ships constructed before 1 July 2002 not later than 1 January 2004; and
- ships, other than passenger ships, of 3,000 gross tonnage and upwards constructed on or after 1 July 2002.

VDRs are required to meet performance standards "not inferior to those adopted by the Organization". Performance standards for VDRs were adopted in 1997 and give details on data to be recorded and VDR specifications. They state that the VDR should continuously maintain sequential records of preselected data items relating to status and output of the ship's equipment and command and control of the ship. The VDR should be installed in a protective capsule that is brightly coloured and fitted with an appropriate device to aid location. It should be entirely automatic in normal operation. Under the new regulation, all VDRs must undergo an annual performance test.

Administrations may exempt ships, other than ro-ro passenger ships, constructed before 1 July 2002, from being fitted with a VDR where it can be demonstrated that interfacing a VDR with the existing equipment on the ship is unreasonable and impracticable.

Study to examine VDRs for existing cargo ships

The MSC adopted a resolution on the carriage of VDRs on existing cargo ships, which calls for a feasibility study to be carried out to ascertain the need for mandatory carriage of VDRs on these ships. The feasibility study, to be carried out by the Sub-Committee on Safety of Navigation (and other Sub-Committees as appropriate), will take into account such factors as practicability, technical problems relating to the retrofitting of VDRs, adequacy of existing performance standards including the possible development of simplified standards, experience in the use of VDRs on ships already fitted with them, including data that could not have been obtained without VDRs, and relevant financial implications, including a cost-benefit analysis.

The aim is to finalize the study by January 2004 so that, if the study demonstrates a compelling need for mandatory carriage of VDRs on existing cargo ships, relevant amendments to SOLAS Chapter V and the associated performance standards can be drafted. In the meantime, the resolution invites Governments to encourage shipowners

to install VDRs on existing cargo ships voluntarily, so that wide experience of their use may be gained.

- stepping up the development of common databases and the interconnection of the stations responsible for managing the information gathered under the Directive;
- ensuring closer monitoring of ships posing a particularly serious threat to maritime safety and the environment and requiring information about them to be circulated among Member States, to enable the latter to identify dangerous situations sooner and take any preventive action necessary in respect of such ships; It is believed that closer monitoring would make it possible to detect more swiftly manoeuvres which were risky or which threatened the safety of shipping and to take the precautionary measures required, and to inform ports of call or the authorities of other Member States of the arrival of these ships. With the information they have the concerned Member States, before accepting high-risk ships into their ports, ask for additional information in order to check that international conventions were being complied with by the ship, or if necessary, to carry out on board inspections under Directive 95/21/EC.
- enhancing the powers of intervention of Member States, as coastal States, where there is an incident hazard or threat of pollution off their coasts (territorial waters and the high seas). Member States will thus be able to order re-routing of a ship posing a threat to their coasts, to instruct the ship's master to stop a pollution risk, to put an assessment team on board or to impose mandatory pilotage or towage of the ship;
- requiring Member States to take measures to receive ships in distress in ports of refuge, and prohibit ships from leaving ports in exceptional weather conditions involving a serious threat to safety or the environment; The proposal aims to make it easier to seek a port of refuge in the event of trouble at sea, and also to prevent the risk of accident by prohibiting ships from leaving ports of call in the Community if particularly bad weather and sea conditions increase the risk of an accident.

2. *Improving the liability and damage compensation schemes in force.*¹⁷ The liability regime is currently governed by international conventions. The Commission considers that the existing international liability and compensation regime, while having served its purpose relatively well over the last decades, entails a number of shortcomings. It is stated by the Commission that some recent accidents, most notably the *Erika* incident, have clearly shown the insufficiency of the existing limits. Consequently, victims of an oil spill may not be fully compensated and there will be significant delays in the payment of compensation. Therefore, the Commission has decided to act particularly quickly in order to create a mechanism for raising the limits of compensation in order to ensure that future oil spills in Europe will be adequately compensated.¹⁸ Following the *Erika* incident

¹⁷ 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, 2000/0326 (COD).

¹⁸ Commission of the European Communities, Communication From the Commission to the European Parliament and the Council on a Second Set of Community Measures on Maritime Safety Following the

process started in IMO to increase the existing limits of the CLC and fund Conventions. The first decisions to approve this increase were taken in October 2000 and the amendments will, if finally adopted, be applicable at the earliest on 1 November 2003. The Commission considers that a 50% increase of the existing limits, providing a total of some EUR 300 million, which will come into effect in three years' time, is insufficient to guarantee adequate protection for victims of a potential major oil spill in Europe.

The Commission proposes to create a European supplementary fund, the COPE Fund, to compensate victims of oil spills in European waters. The Fund will only compensate victims whose claims have been considered justified, but who have nevertheless been unable to obtain full compensation under the international regime, owing to insufficient compensation limits.

Compensation from the COPE fund would be based on the same principles and rules as the current international fund system, but subject to a ceiling which is deemed to be sufficient for any foreseeable disaster, i.e. EUR 1, 000 million. It is considered that an overall ceiling of EUR 1,000 million would provide the necessary safeguard of coverage for any foreseeable disaster. The limits is more consistent with the ceiling of the Oil Spill Liability Trust Fund established under federal laws in the United States and with the existing insurance practices as regards shipowners' third party liability cover for oil pollution, which may come into play if the limitation under CLC is not applicable.

The COPE Fund could also be used to speed up the payment of full compensation to the victims.

The COPE Fund will be financed by European oil receivers. Any person in a Member State who receives more than 150 000 tonnes of crude oil and/or heavy fuel oil per year will have to pay its contribution to the COPE Fund, in a proportion which corresponds to the amounts of oil received. The Fund will only be activated once an accident that exceeds, or threatens to exceed, the maximum limit provided by the IOPC Fund has occurred in EU waters. If no such accident occurs, the COPE Fund will not require any contributions to be made.

The proposed legislation includes an article introducing financial penalties for grossly negligent behaviour by any person involved in the transport of oil by sea. This penalty will be imposed by the Member States outside the scope of liability and compensation and will thus not be affected by any limitation of liability.

However, there are certain points where the proposal and the current liability and compensation system may clash.

- Under the present system the right of shipowners to limit their liability is practically unbreakable. The owner of a ship does not lose the right to limit, unless it is proven that the damage "resulted from his personal act or omission, committed with the intent to cause damage, or recklessly and with knowledge

Sinking of the Oil Tanker the *Erika*, Brussels, 6.12.2000, COM(2000)802 final, 2000/0325(COD)-2000/0326(COD)-2000/0327(COD), p 4 and pp. 51-83.

that such damage would probably result”. Negligence or even gross negligence on behalf of the owner does not meet these criteria and it is evident that in most circumstances it would be very difficult to breach this threshold. The Commission believes that there is no justification for copying such an unassailable test for the loss of the limitation of right into oil pollution liability regime. It considers that the extraordinary risks involved in the transport of oil by sea need to be reflected in a greater exposure of the shipowner to unlimited liability. It considers that the current threshold for loss of limitation rights should be lowered in order to bring it into line with other comparable regimes. At least proof of gross negligence on behalf of the shipowner should trigger unlimited liability.

- The liability for oil pollution damage is channelled to the registered shipowner only. Under the CLC claims against a number of other players (including notably, operators, managers, charterers) who may well exercise as much control over the transport as the registered owner of the ship is prohibited. These persons are protected from any compensation claims unless damage “resulted from their personal act or omission, committed with the intent to cause damage, or recklessly and with knowledge that such damage would probably result” (which is the same test as that relating to the shipowner’s loss of right to limit his liability).

The Commission considers that such protection of key players is counterproductive with regard to its efforts of creating a sense of responsibility in all parts of the maritime industry. Therefore the Commission believes that the prohibition of claiming compensation from a number of key players involved in the transport of oil at sea should be removed from the CLC and that, to the extent protection of certain players is considered to be necessary for the functioning of the system, the threshold should at least be lowered to the same as that advocated for the shipowner above.

- The type of damage covered by the present CLC/IOPC Fund regime is mainly centered on damage to or loss of property and economic losses. With regard to environmental damage it covers preventive measures, which includes clean-up costs, and “reasonable measures of reinstatement undertaken or to be undertaken”.

It is acknowledged by the Commission that there are problems involved in covering damage to the environment *per se* and considers that the assessment of such damage should be quantifiable, verifiable and predictable in order to avoid a wide variety of interpretations between various parties to the regime. From a Community perspective it is not justifiable that compensation of environmental damage varies widely depending on whether the pollutant was an oil tanker, another ship or a factory on shore.

The Commission also considers that the existing coverage of reinstatement costs could be expanded to include at least costs for assessing the environmental damage of the incident as well as costs for the introduction of components of the environment equivalent to those that have been damaged, as an alternative in case reinstatement of the polluted environment is not considered feasible.

In the light of above discussed issues, the Commission concluded that the international regime explicitly prohibits any additional compensation claims to be made outside the convention regime. This means that it would be very difficult for the Community to impose additional individual liabilities on shipowners or any of the protected parties without being in conflict with the international conventions. In case such individual liabilities were introduced at Community level, Member States would thus have to denounce the conventions before being in a position to implement any such Community rules.

As the benefits of an international liability and compensation regime have been recognized by the Commission, it has been concluded that introducing measures that would necessitate the denunciation of the international regime by the Member States would be counterproductive at this stage. Therefore, the Commission takes the view that considerable efforts need to be put in amending the conventions along the lines outlined above, while addressing the insufficiency of the existing limits as an immediate priority at Community level.

3. *A European Maritime Safety Agency*.¹⁹ The Commission believes that the establishment of a European Structure for maritime safety should be considered. The prime task of such establishment would be to monitor the organization and effectiveness of national inspections in order to ensure greater uniformity. The creation of a European Maritime Safety Agency would provide the Commission and Member States with support in applying and monitoring compliance with Community law and in assessing the effectiveness of the measures in place.²⁰

In its proposal, the Commission sets out the following tasks for the Agency, the organization and role of which are largely based on the Aviation Safety Agency:

- technical assistance in preparing proposals for amendments to the Community legislative texts, particularly in the light of changes in the international rules;
- on the spot inspections of the conditions under which port state control is carried out by Member States;
- organization of appropriate training activities;
- collection of data and operation databases on safety at sea that will, among other things, enable the Commission to draw up a “black list” of substandard shipping. All the information will be placed at the disposal of Member States’ inspectors, who will thus immediately have at their fingertips all the data relating to a ship and so be able to detain if necessary;
- tasks relating to the monitoring of shipping and the management of traffic data;
- assessment and auditing of the classification societies;

¹⁹ Proposal for a Regulation of the European Parliament and of the Council establishing a European Maritime Safety Agency, 2000/0327(COD).

²⁰ Commission of the European Communities, Communication From the Commission to the European Parliament and the Council on a Second Set of Community Measures on Maritime Safety Following the Sinking of the Oil Tanker the *Erika*, Brussels, 6.12.2000, COM(2000)802 final, 2000/0325(COD)-2000/0326(COD)-2000/0327(COD), pp. 4-5 4 and pp. 84-116.

- participation in, or coordination of, activities relating to investigations following an accident at sea;
- provision of assistance to the EU candidate countries, in order to assess the manner in which their maritime administrations meet their obligations as flag States and port States.

The IMO's Proposals

Raised compensation limits for oil pollution disasters: The adoption of the increased limits comes in the wake of two major incidents, the *Nakhodka*²¹ in 1997 of Japan and the *Erika*. During its 82nd session the Legal Committee of IMO considered a proposal to amend both the 1992 Civil Liability Protocol and the 1992 Fund Protocol to increase the limits of the said Protocols, in order to reflect the increasing cost of major oil spills now before the 1992 Fund. During the same session the Legal Committee adopted amendments to raise by 50 per cent the limits of compensation payable to victims of pollution by oil from tankers. The amendments are expected to enter into force on 1 November 2003, unless objections from one quarter of contracting states are received before then.

The compensation limits set by the 2000 amendments entering into force in 2003 are as follows:

- For a ship not exceeding 5,000 gross tonnage, liability is limited to 4.51 million SDR (US\$ 5.78 million)
(Under the 1992 Protocol the limit was 3 million SDR (US\$ 3.8 million))
- For ship 5,000 to 140,000 gross tonnage liability is limited to 4.51 million SDR (US\$ 5.78 million) plus 631 SDR (US\$ 807) for each additional gross tonne over 5,000.
(Under the 1992 Protocol, the limit was 3 million SDR (US\$ 3.8 million) plus 420 SDR (US\$537.6) for each additional gross tonne)
- For a ship over 14,000 gross tonnage: liability is limited to 89.77 million SDR (US\$ 115 million)
(Under the 1992 Protocol, the limit was 59.7 million SDR (US\$76.5 million))

Mandatory ship reporting system: A proposal from France and the United Kingdom for the mandatory ship reporting system stemmed from the *Erika* incident.²² The new system to be called MANCHEREP would apply to all ships of over 300 gross tonnage and would cover the current traffic separation system of Less Casquets and the areas bordering upon it. Ships over 300 gross tonnage entering the area would be required to give information to the coastal authorities, including the name of ship, position, destination and details of cargo if any potentially dangerous cargoes are carried on

²¹ In January 1997, the Russian tanker *Nakhodka* broke up in heavy seas some 100 kilometres north-east of the Oki islands in the Sea of Japan. The tanker broke into two sections, resulting in a spill of some 62 000 tonnes of oil.

²² Under mandatory ship reporting systems, ships are obliged to give information about themselves, including their identity and cargo, to coastal authorities. Authorities can then track voyages and communicate with ships immediately in dangerous situations such risk of collision or grounding, arise. Outside mandatory reporting systems, coastal authorities may only be aware of blips on radar screens with no particular information on the particular ship.

board. During its 73rd session on 27 November-6 December 2000 the Maritime Safety Committee adopted new and amended ships' routing and ship reporting systems including: new mandatory ship-reporting system "Off Les Casquets and the adjacent coastal area." The new measures take effect from 0000 hours UTC on 1 June 2001.

Agreement on single hull tanker phase out: Proposals for amendments to MARPOL 73/78 have been submitted to the Marine Environment Protection Committee for consideration at its 45th session (MEPC 45) on 2-6 October 2000. Belgium, France and Germany have jointly submitted a proposal for amendments to regulation 13G of Annex I of MARPOL 73/78 in order to speed up the phasing out of single-hull oil tankers.²³ During this session it was agreed to accelerate the current phase-out schedule to be adopted at the next MEPC session in April 2001. A working group report on proposed amendments to MARPOL 73/78 has been approved. The approval opens the way for the adoption of a revised regulation 13 of MARPOL at MEPC 46, which is scheduled for April 2001 allowing for the quickest way. Amendments to the technical Annexes of MARPOL 73/78 can be adopted using "tacit acceptance" procedure, whereby the amendments enter into force on a specified date unless an agreed number of states parties object by an agreed date. If the amendments were adopted at MEPC 46, these amendments could enter into force in August 2002 at the earliest. The compromise resembles the USA Oil Pollution Act 1990 (OPA 90) phase out scheme for tankers more than 20,000 tons deadweight, but it varies as it is based on the ship's deadweight and on the need to mitigate the impact on supply of oil world wide and to accommodate ship yard and ship recycling capacities.

During the 45th session of the MEPC it was agreed to exclude the phase out of tankers (oil and product) less than 5000 deadweight as the removal of almost 4000 tankers in this category was considered to have too much of an impact on the marine oil supply due to insufficient yard capacity.

In its draft revision of MARPOL regulation 13 G, the MEPC working group identified three categories of tankers as follows:

- *Category 1 oil tanker:* oil tankers of 20,000 tons deadweight and above carrying oil, fuel oil, heavy diesel oil or lubricating oil as cargo, and of 30,000 tons

²³ The double hull requirements for oil tankers were introduced in March 1992, when IMO adopted amendments to Annex I of MARPOL 73/78 which introduced two new regulations 13 F and 13 G, relating to standards for design and construction of new and existing oil tankers (resolution MEPC. 52 (32)). Under Regulation 13 F, oil tankers delivered on or after 6 July 1996 had to comply with double hull requirements or equivalent design standards. Under Regulation 13 G, single hull crude oil tankers of 20,000 tons deadweight and above or product carriers of 30,000 deadweight and above (according to the products carried), delivered before 6 July 1996, had to comply with the double hull requirements or with equivalent design standards defined in Regulation 13 F not later than 25 years, or in some cases 30 years, after their date of delivery.

Existing single hull oil tankers which do not comply with requirements relating to segregated ballast tanks with protective location applicable from 1982 will no longer be permitted under Regulation 13 G of MARPOL 73/78 to operate after 2007 (1982+25 years), or in certain cases 2012 (1982+30 years), unless they comply with the double hull requirements or equivalent design standards of regulation 13 F. For existing single hull oil tankers which do not comply with requirements relating to segregated ballast tanks with protective location, this deadline will be reached by 2006 (1996+30 years) at the latest.

deadweight and above carrying other oils, which do not comply with the requirements for protectively located segregated ballast tanks (commonly known as Pre-MARPOL) tankers.

- *Category 2 oil tanker*: oil tankers of 20,000 tons deadweight and above carrying crude oil, fuel oil, heavy diesel oil or lubricating oil as cargo, and of 30,000 tons deadweight and above carrying other oils, which do not comply with the protectively located segregated ballast tanks requirements (MARPOL tankers).
- *Category 3 oil tanker*: oil tanker of 5,000 tons deadweight and above but less than the tonnage specified for category 1 and 2 tankers.

The draft revision sets out two alternative schemes, A and B, for phasing out single hull tankers:

- Under both schemes Category 1 vessels would be phased out progressively between 1 January 2003 and 1 January 2007 depending, on their year of delivery.
- Category 2 tankers built in 1986 or earlier would be phased out after their 25th year of operation under both schemes.
- Category 2 ships built after 1986 would be phased out between 2012 and 2015 under Alternative A and between 2012 and 2017 under Alternative B.
- For Category 3 tankers both schemes entail progressive phasing out of tankers built in or before 1987 phased out between 2003 and 2013. But ships built after 1987 would be phased out between 2013 and 2015 for ships under scheme A and between 2013 and 2017 under scheme B.

The MEPC also agreed that Category 1 and 2 tankers will need to satisfactorily complete a condition assessment in order to operate during the tanker's final years ((yet to be defined) of operation prior to phase out. The Condition Assessment Scheme (CAS) is to be developed during an intersessional working group (funded by France) using a set of principles drafted by the MEPC. Under the preliminary non-exhaustive list prepared by an informal group the following elements have been stated as underlying principles in considering the scheme: checks on the physical condition of the vessel; checks on documentation recording its past performance; and possible improvements in survey and inspection practice. Ships certified to CAS are to be reported to IMO so that a "white list" can be developed and periodically published to facilitate enforcement. The main objective of CAS is to check and report on the ship's physical condition and on its past performance based on survey and ISM audit reports and port state performance records.

Conclusion

The *Erika* incident created a new climate in which the public is increasingly intolerant of any failure on the part of the maritime industry. The maritime community is acting faster than before in order to bring into force new legislative measures and restore the confidence in the system again.

The approach taken following the *Erika* incident is similar to the one taken following the OPA 90. The *Exxon Valdez* oil spill, happened in Alaska in 1989, caused widespread environmental damage in Alaska and out a heavy financial burden on

Exxon, one of the world's largest corporations. The incident is not probably among the top 20 oil spills. The wreck of *Torrey Canyon* spilled three times as much oil. The grounding of *Amoco Cadiz* of Brittany led to a spill of six times the amount in Alaska. But the *Exxon Valdez* spill was the largest oil spill in the United States history emanating from a vessel. It mainly affected the marine transport of oil and changed the way American society, government, media and the industry will deal with oil pollution in the future. The incident induced a burst of legislative activity in the US Congress and as a result OPA 90 went into force.

There is no doubt that the *Erika* incident, like the *Exxon Valdez* in the USA, showed the maritime community the gaps in the present system. At present, with the memory of *Erika* fresh in European minds, unilateral action seems to be more attractive however, in the long term industry will benefit from any legislation designed on an international basis.