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Liability and Compensation with Regard to Places of Refuge

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Executive summary

The purpose of this study is to analyse the existing system for liability and compensation for ship-related pollution incidents in relation to places of refuge. In particular, it is examined to what extent a coastal State which is involved in the decision-making in a place of refuge situation is protected under the existing system and to what extent such a State is exposed to financial or legal risks.

The first part concludes that only the rules relating to oil pollutions by tankers are in force. There are many other types of ships and pollution for which there is no special liability regime, including ships carrying chemicals or other hazardous and noxious substances and non-tankers with oil in their fuel tanks. For all such other ships, the existing system is unsatisfactory and does represent a risk for the coastal State, both in terms of insufficient compensation and in terms of additional risks of claims against the State. There are no insurance requirements for such ships and the financial liability of the owner is generally limited to a very low level, but the laws vary largely from one Member State to another.

The applicability of the existing international liability schemes is examined in more detail in the second part. The focus is here on the regime governing liability and compensation for oil pollution caused by tankers, but the results will also apply to ships carrying other hazardous substances if and when the 1996 'HNS Convention' enters into force. Here it is concluded that the regimes offer a reasonably good protection for coastal State to be compensated for its losses and to avoid liability for damage arising from a place of refuge situation. A key criterion for the protection of the State relates to the reasonableness of its decisions in light of the information available at the time. This is considered to represent a good starting point, as there is no justification for protecting coastal States against unreasonable decisions or measures. However, the exact requirements of reasonableness of a decision are somewhat unclear, as there is no case yet in which the IOPC Fund or courts have decided on these criteria in the specific context of places of refuge. The new IMO Guidelines on places of refuge may be of importance in this assessment of reasonableness. Ultimately, however, the exposure of coastal States will depend on the national laws of the State where the case is decided.

In the last part of the study various methods for EU Member States to complement the legal regime in relation to places of refuge are considered, bearing in mind the legal constraints imposed by the international liability rules. The study does not assess the need for such additional measures, but indicates various ways in which the protection of the coastal State could be enhanced, should it be considered necessary. The options discussed include: additional entry requirements for ships wishing to enter places of refuge in the EU, in the form of pre-made agreements or by means of legislative measures; specific insurance requirements, either in terms of an obligation for shipowners to make specific insurance arrangements for the benefit of the place of refuge or in the form of EU-wide rules on rights of direct action against maritime liability insurers; other EU-based legislation to reduce the risk for legal action against public authorities following place of refuge situations; and the establishment of a 'back-up' fund financed by the maritime industry to ensure that coastal States will not suffer financial losses for accepting ships in distress into a place of refuge.

1 Introduction

Places of refuge involve a number of legal uncertainties. Many of them have recently been exposed following some well-publicised refusals of access of ships in distress, which have provoked widespread attention within the international maritime community.¹ The ensuing clarification of the rights and obligations of the parties involved in a place of refuge situation, at international and EU level, have recently produced the first results. Article 20 of EU Directive 2002/59 requires all Member States to develop plans for places of refuge with a view to ensuring that ships in distress may be accommodated in a place of refuge subject to the authorisation of the coastal State authorities.² The IMO Guidelines on places of refuge for ships in need of assistance, adopted in December 2003, include a number of criteria to be taken into account by coastal State authorities when responding to requests for places of refuge.³ The matter has also recently been on the agenda of various regional environment protection organizations.⁴ All these efforts are designed to increase the authorities' involvement in place of refuge situations in their territories and to clarify the role and responsibilities of all parties involved with a view to ensuring that ships in distress are

¹ The problem is not new, however. See e.g. Kasoulides (1987), at pp. 184—195, providing an overview of a variety of incidents where (potentially) polluting ships have been refused access to places of refuge since the late 1970s. He also describes a number of (essentially unsuccessful) efforts to regulate the entry rights of ships in distress, including places of refuge, at international and regional levels in the 1970s and 1980s. See also Lucchini & Völckel (1996), at pp. 295—299.

² Directive 2002/59/EC of the European Parliament and of the Council of 27 June 2002 establishing a Community vessel traffic monitoring and information system and repealing Council Directive 93/75/EEC

The full article reads: “Member States, having consulted the parties concerned, shall draw up, taking into account relevant guidelines by IMO, plans to accommodate, in the waters under their jurisdiction, ships in distress. Such plans shall contain the necessary arrangements and procedures taking into account operational and environmental constraints, to ensure that ships in distress may immediately go to a place of refuge subject to authorisation by the competent authority. Where the Member State considers it necessary and feasible, the plans must contain arrangements for the provision of adequate means and facilities for assistance, salvage and pollution response. Plans for accommodating ships in distress shall be made available upon demand. Member States shall inform the Commission by 5 February 2004 of the measures taken in application of the first paragraph.”

³ IMO Resolution A.949(23), Annex, (hereinafter ‘the IMO Guidelines’), section 3. In para 1.19 of the Guidelines a place of refuge is defined as “a place where a ship in need of assistance can take action to enable it to stabilize its condition and reduce the hazards to navigation, and to protect human life and the environment.”

⁴ See e.g. the amendments made, in September 2001, to Annex IV of the 1992 Helsinki Convention on the Protection of the Marine Environment of the Baltic Sea Area. A new Regulation 13 provides that the States Parties “shall, following-up the work of EC and IMO, draw up plans to accommodate, in the waters under their jurisdiction, ships in distress in order to ensure that ships in distress may immediately go to a place of refuge subject to authorisation by the competent authority; and ... shall exchange details on plans for accommodating ships in distress”. See also Part XII of the Declaration on the Safety of Navigation and Emergency Capacity in the Baltic Sea Area (Helcom Copenhagen Declaration), adopted on 10 September 2001.

Article 16 of the 2002 Protocol concerning Cooperation in Preventing Pollution from Ships and, in Cases of Emergency, Combating Pollution of the Mediterranean Sea obliges the parties to “define national, subregional or regional strategies concerning reception in places of refuge, including ports, of ships in distress presenting a threat to the marine environment.”

In the North Sea framework, a detailed (interim) chapter on places of refuge was included in the Bonn Agreement Counter Pollution Manual (Chapter 26) in May 2002. See <http://www.bonnagreement.org>.

handled in a manner which is most beneficial for maritime safety and the marine environment.

None of those instruments, however, deal with liability and compensation of damage. The IMO Guidelines explicitly exclude such matters from their scope,⁵ but the IMO Assembly requested the Legal Committee to consider the guidelines ‘from its own perspective’, specifically including the provision of financial security to cover coastal State expenses and/or compensation issues.⁶ The international maritime law committee, the CMI, has undertaken to study the matter, the result of which has recently been reported to the Legal Committee of the IMO.⁷ At the European level, several EU institutions have requested the Commission to analyse this matter in detail and to make appropriate proposals.⁸

The whole issue may appear surprising. As the inherent purpose of places of refuge is to minimise hazards and damage, one could reasonably assume that shipowners, insurers and coastal State authorities alike would do their utmost to ensure that a ship in distress will have access to a place of refuge. The owner and his insurer should clearly have an economic interest in minimising damage, and could therefore be thought to provide willingly the guarantees, liabilities and other securities which are required by the coastal States for entry into sheltered waters. On the other hand, the coastal State’s interest in avoiding a larger scale pollution of its coastline, or that of its neighbours, could be thought to encourage it to accommodate potential polluters in any case. Yet, as a number of recent incidents have indicated, things do not always work that way in practice.

A coastal State may, rightly or wrongly, fear that the existing liability and compensation regimes are insufficient to cover their potentially considerable financial and legal exposure which may accompany their acceptance of a polluting ship into its waters.⁹ Owners and insurers on their part may be hesitant to accept significant entry requirements by coastal States, partly because of the potential for abuse and partly because the existing liability regime offers them strong protection in terms of limited liability which does not necessarily provide them with financial incentives to minimise damage at all costs.

The purpose of this study is to analyse the relevant liability and compensation rules in some more detail. What rules are relevant for the establishment of liability and compensation in place of refuge situations? How broadly do the rules and associated practices cover the specific risks posed by ships seeking a place of refuge and are they sufficient in terms of substance and coverage? If not, what measures could be contemplated to improve the situation and what are the legal limits relevant for such additional measures by coastal States

⁵ IMO Guidelines, para. 1.17.

⁶ IMO Resolution A.949(23), operative paragraph 4.

⁷ See IMO Doc. LEG 89/7, dated 19 August 2004. The report does not offer a solution to the IMO, but only presents a number of options, ranging from the development of a new convention, amendment to a number of existing conventions or the drafting of a set of new guidelines. On this project, and previous work by the CMI on places of refuge, see www.comitemaritime.org.

⁸ See recital No. 16 and Article 26(3) of Directive 2002/59 (note 2 above) and European Parliament Resolution of 23 September 2003 on improving safety in response to the Prestige accident (P5_TA(2003)0400), para. 10.

⁹ See e.g. the concerns raised by Spain in the submission to the IMO’s Legal Committee in IMO Doc. LEG 87/7/1.

in general and by the European Community in particular? The underlying assumption, when analysing those questions, is that matters relating to liability and compensation should play a very limited role only in the decision by the coastal State to accept or refuse the request for access by a ship in distress. Such decisions should be made on the basis of technical and environmental criteria. Liability rules should, if anything, encourage and support decisions to be made on sound technical-environmental grounds and discourage the opposite. If liability and compensation considerations interfere with the technical decision-making, there is a problem either in the applicable rules or in the perception of them.

The study consists of three main parts. The first part (chapter 2) reviews the existing legal rules relevant for determining liability and compensation for accidental pollution by ships in more general terms, while the second part (chapter 3) analyses their more specific applicability in place of refuge situations. The third part (chapter 4) elaborates on the range of options available to issue further regulatory measures within the limits of applicable international law. Some general conclusions are offered in chapter 5.

2 The applicable rules

2.1 Introduction

Liability and compensation in place of refuge situations is governed by a multitude of international, regional and national rules, depending on the case. This chapter offers a brief general presentation of the rules which are most likely to be of relevance in a place of refuge situation.

2.2 Public international law

The right of a ship in distress to enter a place of refuge vis-à-vis the right of the coastal State concerned to deny such entry represents, in public international law, a balance in which neither right is absolute.¹⁰ That said, international law does entail a variety of obligations, both customary and conventional, for States to protect their marine environment. Apart from the more generally phrased obligations to refrain from acts which cause pollution to the marine environment,¹¹ or from transferring pollution from one area to another,¹² a number of

¹⁰ The most recent manifestation of this understanding of the law is the IMO Guidelines, which acknowledge the need for such a balance by providing that each request for refuge needs to be considered on a case by case basis, as ships, cargoes and incidents may pose very different considerations and risks. To this effect, see the IMO Guidelines, para. 3.12: “When permission to access a place of refuge is requested, there is no obligation for the coastal State to grant it, but the coastal State should weigh all the factors and risks in a balanced manner and give shelter whenever reasonably possible” and footnote 3: “[i]t is noted that there is at present no international requirement for a State to provide a place of refuge for vessels in need of assistance”. Note also the “subject to authorisation by the competent authority” proviso in Directive 2002/59 (note 2 above) and Article 9 of the 1989 Salvage Convention, providing that “[n]othing in this Convention shall affect the right of the coastal State concerned to take measures in accordance with generally recognized principles of international law to protect its coastline or related interests from pollution or the threat of pollution following upon a maritime casualty ...”.

Generally on this question, see See e.g. Churchill & Lowe (1999), p. 63; Molenaar (1998), p. 101; Kasoulides, note 1 above; Lucchini & M. Vœlckel, note 1 above; and van Hooydonk (2004).

More recent national case law on the topic includes the *Long Lin*, Judicial Division of the Council of State (the Netherlands), 10 April 1995, R01.92.1060 and the *Toledo*, High Court (Admiralty) (Ireland), 7 February 1995, (1995) 3IR 406, both of which support a degree of latitude for the coastal State to deny entry into its waters in the case of environmental risks.

In the European Court of Justice, the calling into a port by reasons of distress has been considered only once. In Case C-286/90, *Poulsen and Diva Navigation*, [1992] ECR I-6019, the Court eventually considered that it was not the right forum to decide on this aspect of the case (concerning a breach of EU fisheries conservation measures). In paras. 38—39 of the judgment, the Court concluded that “the question concerning the legal consequences of the situation of distress does not concern the determination of the sphere of application of Community legislation, but rather the implementation of that legislation by the authorities of the Member States. ... In those circumstances, it is for the national court to determine, in accordance with international law, the legal consequences which flow ... from a situation of distress involving a vessel from a non-member country.”

¹¹ See e.g. UNCLOS Article 192: “States have the obligation to protect and preserve the marine environment” and Article 194(2): “States shall take all measures necessary to ensure that activities under their jurisdiction or control are so conducted as not to cause damage by pollution to other States and their environment, and that pollution arising from incidents or activities under their jurisdiction and control does not spread beyond the areas where they exercise sovereign rights in accordance with this Convention.”

global and regional conventions include more specific obligations to ensure that the effects of maritime accidents are minimised and that there is adequate capacity and co-operation to respond to such accidents if they occur,¹³ including in some cases specific provisions on places of refuge.¹⁴ While such obligations do not necessarily amount to a general obligation for coastal States to accommodate a ship in distress, their combined effect may clearly imply concrete international legal obligations for coastal States in a place of refuge situation and a limitation of their range of options available in dealing with the situation.

With respect to liability and compensation, however, traditional public international law at present offers rather limited guidance for this type of situations. To the extent public international law instruments have been contemplated for dealing with liability and compensation issues at all, efforts have generally been focused on inter-State liability for wrongful acts in general,¹⁵ or environmental harm more particularly, whether the act causing the harm was wrongful or not.¹⁶ The 1982 UN Convention on the Law of the Sea (UNCLOS) accordingly contains few provisions on the responsibility and liability for matters which could be of direct relevance for places of refuge and those that exist generally focus on the liability of States in relation to other States. Article 235(1) merely provides that States “shall be liable in accordance with international law”. The relationship to existing liability regimes is not dealt with, apart from Article 304 clarifying that the UNCLOS provisions “are without prejudice to the application of existing rules and the development of further rules regarding responsibility and liability under international law”.

However, some provisions may be of more direct relevance for the liability of States in relation to private parties. First of all, Article 235(2) requires States to “ensure that recourse is available in accordance with their legal systems for prompt and adequate compensation or other relief in respect of damage caused by pollution of the marine environment by natural or juridical persons under their jurisdiction”. Secondly, Article 232, which deals specifically with the liability for enforcement measures taken to protect the marine environment provides that “States shall be liable for damage or loss attributable to them arising from [enforcement] measures taken ... when such measures are unlawful or exceed those reasonably required in the light of the available information. States shall provide recourse in their courts for actions in respect of such damage or loss.” Similarly, 1969 Intervention Convention, which in its

¹² See in particular UNCLOS Article 195: “In taking measures to prevent, reduce and control pollution of the marine environment, States shall act so as not to transfer, directly or indirectly, damage or hazards from one area to another or transform one type of pollution into another.”

¹³ See e.g. UNCLOS Article 194(3)(b), and the 1990 International Convention on Oil Pollution Preparedness, Response and Co-operation and the 2000 Protocol on Preparedness, Response and Co-operation to Pollution Incidents by Hazardous and Noxious Substances. Note also Article 11 of Salvage Convention, which places some limits on coastal State action by requiring that “a State Party shall, whenever regulating or deciding upon matters relating to salvage operations such as admittance to ports of vessels in distress or the provision of facilities to salvors, take into account the need for co-operation between salvors, other interested parties and public authorities in order to ensure the efficient and successful performance of salvage operations for the purpose of saving life or property in danger as well as preventing damage to the environment in general.”

¹⁴ See the examples offered in note 4 above.

¹⁵ See the International Law Commission’s Articles on State Responsibility, which were approved in 2001 (See UN Doc. A/56/10).

¹⁶ Generally on States’ international liability for environmental harm, and on various on-going international efforts to codify this law, see e.g. Birnie & Boyle (2002), pp. 181—200.

first Article gives States broad rights to take measures on the high seas to prevent or mitigate or eliminate dangers arising from oil pollution casualties, provides in Article VI that a State that has taken measures “in contravention of [the Convention] causing damage to others, shall be obliged to pay compensation to the extent of the damage caused by the measures which exceed those reasonably necessary to achieve the end”.¹⁷ In view of such international obligations, it is not inconceivable that a place of refuge situation could give rise to claims under public international law, possibly even involving the compulsory dispute settlement procedures under UNCLOS Part XV.¹⁸ So far, however, there is no known case law on places of refuge which establishes liability for a coastal State under public international law.¹⁹

Apart from the case of nuclear liability, for which the State’s liability is specifically regulated at the international level,²⁰ the more substantive aspects of the liability and compensation

¹⁷ The 1969 International Convention Relating to Intervention on the High Seas in Cases of Oil Pollution Casualties. The same rule has been extended to apply to other forms of pollution than oil, through Article II of the 1973 Protocol to the Convention.

¹⁸ See in particular UNCLOS Article 297(1), providing that the compulsory settlement procedures apply to disputes concerning the interpretation or application of UNCLOS as far as, among other things, environmental protection is concerned.

¹⁹ The absence of relevance in practice of these provisions is also indicated by the replies to a questionnaire on liability rules in relation to places of refuge, which was sent to national maritime law associations by the CMI in 2003 (see note 114 below), where very few responses made any mention of liability under public international law. In its report to IMO, the CMI concluded that “very few responders referred to conventions, such as UNCLOS as potentially giving rise to liabilities in Governments or authorities where they have refused a Place of Refuge, or to the Intervention Convention which expressly creates an obligation in a party to pay damages in certain circumstances” (IMO Doc. LEG 87/7/2, p. 2).

In this respect it may be interesting to note the on-going disputes in US Courts between the Spanish Government and the American Bureau of Shipping (ABS) in relation to the *Prestige* incident. Here, the ABS, in response to allegations against it made by the Spanish State, took action against the Spanish State, arguing that any damage suffered by Spain was caused in whole or in part by its own negligence. The New York Court dismissed the counterclaim on the grounds that the Spanish State was entitled to sovereign immunity. ABS is currently seeking reconsideration by the Court or permission to appeal. For a brief summary, see IOPC Fund Doc. 92FUND/EXC.26/8, para. 9.8.

²⁰ Liability for transport of radioactive materials is governed by nuclear law rather than by maritime law. Most EU Member States, including all nuclear States, are Parties to the 1960 Paris Convention on Third Party Liability in the Field of Nuclear Energy and the Brussels Convention Supplementary to the Paris Convention, as amended by later protocols. The regime is based on a strict and exclusive liability for the operator of the nuclear installation, financial limitation of liability, compulsory financial security, time limits of claims and unity of jurisdiction and enforcement of judgements. It is based on three tiers, in which public funding is used for covering damage which exceeds the operator’s liability. The latest protocols, signed in February 2004 will, when they enter into force, raise the limits of the operator to € 700 million, complemented by a maximum of €500 million to be provided from public funds made available by the installation State, and by another €300 million in the third tier which is provided by public funds by all Contracting Parties. Total compensation available under the revised Paris-Brussels regime will thus amount to €1.5 billion. In addition, the revised protocols expand the concept of nuclear damage, extend the time limit for bringing claims, reduce the number of permitted defences and extend the geographical scope of the regime. The revised conventions provide for jurisdiction of coastal States over actions related to nuclear damage during transport in the exclusive economic zone. On the ratification by EU Member States of this Protocol, see also Council Decision 2004/294.

In 1971 the Convention relating to Civil Liability in the Field of Maritime Carriage of Nuclear Material was adopted to resolve difficulties and conflicts between those conventions and maritime law. The 1971 Convention provides that a person otherwise liable for damage caused in a nuclear incident shall be

regime which applies in case of a maritime incident should therefore primarily be sought in civil law, several aspects of which have been harmonised internationally in various civil liability conventions, notably, for present purposes, those developed by the IMO.

2.3 ‘Global’ limitation of liability

The IMO liability conventions are, quite naturally, coloured by the historic roots which have applied in maritime liability regulation for centuries. The most significant feature is perhaps the generally acknowledged right of shipowners and others involved in the operation of ships to financially limit their liability in accordance with a sum related to the size (or, previously, value) of the ship (and its cargo).²¹ This right is very much still alive, as evidenced by the codification of the limitation right in the Convention on Limitation of Liability Maritime Claims (LLMC). The LLMC exists in various versions, one of which is in force in most EU Member States.²²

The LLMC regime does not as such establish or regulate liability; it merely lays down the right for owners and other parties²³ to limit their liability and specifies the extent of that limitation. It contains no provisions relating to questions such as who is liable, or for what acts or omissions, nor does it prescribe any insurance requirements. Those questions are to be answered on the basis of the relevant national law of the State concerned. The LLMC covers a variety of maritime claims, including claims in respect of loss of life or personal injury and loss of or damage to property.²⁴ The limitation encompasses the aggregate of claims submitted against the shipowners, which means that the owner, charterer, operator and manager will have a joint, rather than separate, maximum liability corresponding to the specified limitation amount.²⁵ However, Article 4 specifies that the right of limitation does not apply when it is proved that the loss resulted from “the personal act or omission” by the liable person “committed with the intent to cause such loss or recklessly with knowledge that

exonerated for liability if the operator of the nuclear installation is also liable for such damage by virtue of the nuclear liability conventions, or national law which is similar in the scope of protection given to the persons who suffer damage. This Convention is in force since 1975 and is ratified by eleven EU Member States.

²¹ The limitation right, despite its historic roots, has by no means remained uncontroversial. In English law, Dr Lushington in the *Amalia*, more than 140 years ago (Law Journal Reports, 1863, New Series, Vol. 32, Probate, Matrimonial and Admiralty, 193) took the view that “the principle of limited liability is that full indemnity, the natural right of justice, shall be abridged for political reasons”. More recently, in the *Bramley Moore*, Lord Denning stated that the shipowner’s right to limit liability “is not a matter of justice, it is a rule of public policy which has its origin in history and its justification in convenience” ([1963] 2 Lloyd’s Rep. 429, at p. 437).

²² The LLMC Convention exists in various versions from 1924, 1957, 1976 and 1996. Within the EU, the most significant instrument is currently the 1976 Convention on Limitation of Liability for Maritime Claims, but is likely to be gradually replaced by the amendments introduced by the 1996 Protocol to it, which entered into force in May 2004. The 1996 Protocol is now ratified by 7 EU Member States. It is to be noted, however, that several Member States of the EU are not party to any of the LLMC instruments. For a fuller picture of the ratification status, see Annex 1.

In the following, unless otherwise is explicitly stated, the “LLMC” refers to the 1976 version which, apart from the limits, is only lightly changed in substance by the 1996 Protocol.

²³ Article 1(2) of the 1976 LLMC defines the shipowner as meaning “the owner, charterer, manager and operator of a seagoing ship”, including the insurer of such persons. Apart from this, the LLMC also applies to salvors, which is defined as “any person rendering services in direct connexion with salvage operations”, including wreck and cargo removal operations as well as measure to minimise damage (Article 1(3)).

²⁴ Article 2(1) of the 1976 LLMC is quoted in full below.

²⁵ See Article 9, which also includes provisions on aggregation of claims against the shipowner and salvors.

such loss would probably result”. Given the difficulty of meeting that criterion, it is evident that the limitation right offered by the LLMC is a very strong one.²⁶ The LLMC applies on a *lex fori* basis, that is, where it is part of the law in the State where the limitation proceedings take place, which in turn is depending on where the claims have been instituted and, eventually, on a number of factors under private international law.²⁷

The levels of financial limitation are laid down with regard to the nature of the claim²⁸ and the tonnage of the ship and have been raised by the introduction of new versions of the LLMC. As was already noted, the 1976 Convention is the most significant regime in terms of EU Member State participation, but is likely to be gradually replaced in significance by the 1996 Protocol.²⁹ By means of an example, the table below indicates the evolution of the limitation amounts. The table only covers limitation rights for claims which do not relate to loss of life or personal injury.

	LLMC 1976	1996 Protocol
Minimum limit (up to 500 tons (1976), or 2,000 tonnes (1996))	167,000 SDR	2,000,000 SDR
Ship of 30,000 tons	5,093,500 SDR	13,200,000 SDR
Ship of 70,000 tons	10,093,500 SDR	25,200,000 SDR
Ship of 150,000 tons	16,733,500 SDR	41,200,000 SDR

(On 8 October 2004, 1 SDR corresponded to EUR 0,839.)

While limits of such magnitude may be sufficient for covering many maritime claims, they may clearly be insufficient to cover the losses caused by certain shipping activities, which by their nature are prone to cause extensive damage in case of an accident. As far as pollution is concerned, this is notably the case in relation to accidents involving dangerous cargoes, which not only may cause extensive economic damage but will generally affect innocent third parties, who are in no contractual or business relationship with the ship’s owner or operator. Therefore, separate conventions have been developed to deal more comprehensively with all aspects of liability, compensation and insurance obligations of the parties involved in the transport of dangerous substances. Once such conventions come into being, claims which are covered by them are excluded from the LLMC regime.

²⁶ This threshold, also known as the “unbreakability-clause”, originates in Article XIII of the 1955 Protocol to 1929 Warsaw Convention for the Unification of Certain Rules Relating to International Carriage by Air, and has subsequently in effect been introduced in various ways to all relevant maritime liability conventions discussed below.

²⁷ See also section 2.9 below.

²⁸ Claims related to loss of life or personal injury, as well as passenger claims, admit higher amounts of liability than other claims.

²⁹ While the older versions are of limited applicability in EU Member States, it should be noted that the 1957 LLMC is not yet without significance, as is evidenced by the ratification of it by Lebanon in 1994 and by Macao in 1999.

The significance of the ‘global’ limitation right under LLMC is thus primarily limited to fields where no specific international liability convention applies. This covers a significant portion of the potential claims emanating from a place of refuge situation, pollution caused by oil tankers being the main exception as of today. The financial limits of liability under the LLMC regime are explicitly referred to in the 2001 Bunkers Convention and the draft Wreck Removal Convention. Similarly, Directive 2004/35 on environmental liability applies “without prejudice” to the rights to limit liability as set out in the LLMC. For such reasons, a closer examination of the relationship between claims related to pollution damage and the LLMC is justified.

As to the nature of claims covered by the LLMC, Article 2(1) of the 1976 Convention provides as follows:

“Subject to Articles 3 and 4 the following claims, whatever the basis of liability may be, shall be subject to limitation of liability:

- a. claims in respect of loss of life or personal injury or loss of or damage to property (including damage to harbour works, basins and waterways and aids to navigation), occurring on board or in direct connexion with the operation of the ship or with salvage operations, and consequential loss resulting therefrom;
- b. claims in respect of loss resulting from delay in the carriage by sea of cargo, passengers or their luggage;
- c. claims in respect of other loss resulting from infringement of rights other than contractual rights, occurring in direct connexion with the operation of the ship or salvage operations;
- d. claims in respect of the raising, removal, destruction or the rendering harmless of a ship which is sunk, wrecked, stranded or abandoned, including anything that is or has been on board such ship;
- e. claims in respect of the removal, destruction or the rendering harmless of the cargo of the ship;
- f. claims of a person other than the person liable in respect of measures taken in order to avert or minimize loss for which the person liable may limit his liability in accordance with this Convention, and further loss caused by such measures.”

In order to be covered by the limitation regime of the LLMC, the damage or loss has to fall within one of these categories. This raises a number of questions with respect to places of refuge and claims for pollution damage. While ‘traditional damage’, such as damage and losses to property, and associated consequential losses, fall under subparagraph (a), it is less clear to what extent the list includes ‘pure economic losses’, that is, losses of earnings by persons who have not suffered any material damage (such as hoteliers and restaurants in the affected area).³⁰ Similarly, damage to the environment *per se* does not necessarily fit into any of the categories listed, and even with respect to the costs of restoring the damaged environment it is debated whether such claims fall within the LLMC regime or not.³¹ Clean-

³⁰ There is limited case law on this issue, but in legal literature, opinions vary as to what extent such losses are covered under sub-paragraph (c). Compare e.g. Griggs & Williams (1998), p. 17: “So long as the right being infringed is not contractual the precise legal nature of the right and nature of the legal liability incurred by its infringement does not seem to be relevant in view of the wording of the introductory paragraph to Article 2(1)” with Wu (2002), p. 563: “at common law, physical attachment is traditionally prerequisite to recovery of economic losses. Thus, ... [claims of this type] may not be subject to limitation under the LLMC.” See also de la Rue & Anderson (1998), p. 272 noting that “[s]ome countries with a civil law tradition allow recovery of pure economic loss only where the basis of liability is that the claimant’s rights have been infringed ... but in common law jurisdictions a different approach to pure economic loss has been taken and the concept of ‘rights’ being ‘infringed’ is relatively unusual.”

³¹ Wu (2002), p. 564 holds that “[t]his type of cost, which may appear to fall into the category of claims in (f), i.e., measures to minimize loss, will not be limitable, as the environmental damage itself is not listed as a ‘loss’ in the LLMC”, while Griggs & Williams (1998), p. 22, consider that the shipowner may limit its liability in

up costs by Governments are supposedly normally covered by sub-paragraphs (f) and (d),³² and possibly (e), and will thus form part of the claims for which the shipowner may limit his liability.³³

Claims specifically excluded from the scope of the LLMC include salvage claims,³⁴ claims relating to nuclear damage and claims for oil pollution within the meaning of the CLC.³⁵ Apart from that, Article 18(1) of the LLMC Convention explicitly permits States to exclude the application of sub-paragraphs (d) and (e) of Article 2(1).³⁶ A number of claims which may not only be of relevance for the removal of the wreck or cargo, but also for other potential losses arising from a place of refuge situation, may thus be exempted from the global limitation scheme, if the State decides to make such reservations. This has been done by some, but not all EU Member States.³⁷ Finally, Article 18(1)(b) of the 1996 Protocol to the LLMC, which entered into force on 13 May 2004, permits the additional exclusion of claims within the meaning of the HNS Convention, irrespective of whether the HNS Convention is in force.

In conclusion, therefore, as long as the shipowner's liability is not based on any specific liability convention there may be significant differences between EU Member States in respect of the extent and nature of compensation available from pollution and other damage caused by ships. Depending on how the national courts apply the relevant provisions of the LLMC to the claims at hand, claims resulting from a place of refuge situation may or may not be covered by the limitation regime. In financial terms, the combined overall liability of the parties comprising the term 'shipowner' is generally low under the LLMC regime, but varies significantly depending on what version of the LLMC applies and on the size of the ship. However, the applicability of the LLMC depends not only on its ratification in the State where the case is decided, but may also be due to the nature of the claim and the extent to which specific reservations or exclusions to the limitation right have been made. If the

relation to "the actual costs of reasonable measures for reinstatement of the environment." de la Rue & Anderson (1998), p. 273, conclude that a liability for claims which go beyond such reinstatement measures "would not appear to be subject to limitation under LLMC" (footnote omitted).

³² It is to be noted that paragraph (d) only applies where the ship is "sunk, wrecked, stranded or abandoned". Para. (f), for its part, entails the additional condition that it only refers to averting or minimizing loss "for which the person liable may limit his liability under [LLMC]". de la Rue & Anderson (1998), p. 274 submit that "[d]epending on the facts it may be doubtful whether public authorities who have taken preventive and clean-up measures did so 'in order' to avert or minimize such losses (which are normally suffered by private parties), even though the measures may incidentally have had this effect."

³³ Preventive measures taken by the shipowner himself will normally not be subject to such limitation rights given the proviso "other than the person liable" in paragraph (f).

³⁴ LLMC Article 3(a). On this point the 1996 Protocol includes an explicit addition to salvage claims which relate to 'special compensation' under Article 14 of the 1989 Salvage Convention (see section 2.6.2 below).

³⁵ LLMC Article 3(b)—(d).

³⁶ LLMC Article 18(1). This is an exception to the main rule that no reservations are permitted under the LLMC Convention.

³⁷ On the basis of the information available at the CMI website (www.comitemaritime.org/ratific/imo/imo11.html) at least Belgium, Germany, the Netherlands and the UK, have reserved the right to exclude (one or both of) the relevant subparagraphs. No Member State has made exclusion with respect to claims covered by the HNS Convention.

LLMC regime does not apply, the liability of the owner and others may be unlimited, if the national laws so provide.

2.4 Maritime liability insurance

There is no general requirement for ships to be insured for liability in relation to third parties (that is, persons with no contractual relationship to the ship or its operation). In the past few years, there have been efforts within the IMO to introduce a general compulsory liability insurance requirement, but those efforts have so far failed in light of the complexity of the matter. In 1999 the IMO Assembly adopted a Resolution urging shipowners to maintain liability insurance similar to that offered by leading P&I Clubs.³⁸

In reality, the effects of the absence of such a requirement are mitigated by the fact that commercial pressures will often oblige ships to be insured, both for the hull and for liability.³⁹ Insurance for third party liabilities is normally provided by protection and indemnity (P&I) Clubs, which are non-profit making corporations formed by its (shipowner) members and are based on the principle of mutuality. The leading P&I Clubs (presently thirteen) belong to the International Group of P&I Clubs. Within this Group, the clubs share a number of risks and are therefore required to have very similar rules.⁴⁰

It is generally held that some 90 per cent of the world fleet is covered by the clubs belonging to the International Group of P&I Clubs,⁴¹ but as this figure is based on the world's tonnage, it may not accurately describe the situation with respect to the number of ships. There are alternative insurance arrangements available outside the system of P&I Clubs, but the quality of these alternatives varies.⁴²

The cover of the P&I Clubs which participate in the International Group is generally quite wide. By entering a P&I Club the shipowner will obtain marine insurance cover for all losses sustained to third parties caused by his ship, for which he might be found to be liable. The cover includes liabilities to cargo interests, liability to crew for loss of life, injuries or repatriation and liability for pollution damage and wreck removal, the two last-mentioned being particularly important for place of refuge situations.⁴³

³⁸ IMO Resolution A.898(21): 'Guidelines on Shipowners' Responsibilities in respect of Maritime Claims'.

³⁹ A typical example is that mortgagees and other commercial interests insist on insurance of the hull on the basis that the hull is their collateral and of liability because liabilities secured by maritime liens (on first priority) represent a threat to the value of the ship.

⁴⁰ In the following, the rules of one of these clubs, Assuranceforeningen Gard, are used as an example. The rules are available on the Internet at (<http://www.gard.no>).

⁴¹ See e.g. IMO Doc. LEG 89/7/1, para. 1.

⁴² See IMO Doc. LEG76/WP.1 (<http://folk.uio.no/erikro/WWW/corrgr/insurance/uninsured.pdf>), indicating that ships which are not insured in a leading P&I Club are overrepresented among vessel that are detained or otherwise appear to be substandard. Generally on the links between insurance and safety in shipping, see the OECD Maritime Transport Committee Report on the Removal of Insurance from Substandard Shipping, of June 2004, available at <http://www.oecd.org/dataoecd/58/15/32144381.pdf>.

⁴³ See, e.g., Gard's Rules, Rules 38 and 40.

The P&I Clubs which are members of the International Group reinsure and pool their liabilities in an intricate system, which shall not be described here.⁴⁴ In theory, the overall cover extends to about USD 4.25 billions⁴⁵, but has never been tested in practice for claims above the reinsured layer (presently around USD 2 billions⁴⁶). The coverage for oil pollution liability is, in any event, limited to USD 1 billion.⁴⁷

In order for the P&I cover to apply, the basic conditions of P&I cover must be satisfied. Among other things, liability or loss must arise in respect of the member's interest in an entered ship and out of the events occurring during the period of entry of the ship in the association and must be in connection with the operation of the ship. The exposure of P&I Clubs is obviously limited by the right of shipowners to limit their liabilities.⁴⁸ Apart from this, the clubs will frequently invoke a number of policy defences which are included in their rules.⁴⁹ Such policy defences includes the wilful misconduct of the insured⁵⁰ and loss of class of the ship.⁵¹ Furthermore, the clubs maintain that a claimant has no direct action against them, but that their liability only arise once the claim has been made against the shipowner and the latter has responded to the claim (the so-called 'pay to be paid rule').⁵² Some of the shortcomings following such limitations have been overcome in the mandatory insurance systems described below in the following section.

2.5 International pollution liability conventions

2.5.1 General

The most important conventions for regulating liability and compensation for ship-source pollution, whether in a place of refuge situations or otherwise, are the IMO conventions specifically regulating the liability and compensation for pollution damage caused by ships. These conventions are based on the types of ships and cargoes causing the pollution and cover the following substances: oil carried by tankers; hazardous and noxious substances; oil carried as bunker in any ship; and nuclear material carried on board ships.⁵³ In addition, IMO is currently preparing a convention relating to the liability of the owner to remove ships which have become wrecks, which may be of some relevance for places of refuge situations.

These conventions will be presented below, with specific emphasis on the oil pollution regime, which is the only maritime liability regime which has entered into force as of yet. This regime, now consisting of three different conventions, is described in section 2.5.2 below. A largely similar regime will apply for ships carrying other hazardous and noxious

⁴⁴ For a summary, see e.g. the OECD Report referred to above and the introductory part of Commission Decision 1999/329/EC of 12 April 1999. The details of the current pooling agreement are not disclosed to the public.

⁴⁵ See, e.g., Gard's Rules, Appendix VI.

⁴⁶ See, e.g., Gard's circular Circular No. 6/2003.

⁴⁷ See, e.g., Gard's Rules, Appendix III, para. 2(c).

⁴⁸ *Ibid.*, Rule 2(4)

⁴⁹ *Ibid.*, Rule 2(6).

⁵⁰ *Ibid.*, Rule 72.

⁵¹ *Ibid.*, Rule 8.

⁵² *Ibid.*, Rule 55. For more on the 'pay to be paid rule', see section 4.5.2 below.

⁵³ On nuclear liability, see note 20 above.

substances when the 1996 ‘HNS Convention’ enters into force. Thirdly, the 2001 ‘Bunkers Convention’ deals with the liability and compensation for damage caused by oil spilled by ships which are not covered by the two other liability regimes.

2.5.2 Oil pollution by tankers

The basis of the international regime for liability and compensation of oil pollution damage caused by tankers consists of a two-tier system based on two international conventions, soon to be supplemented by a third level of compensation.⁵⁴ The regime covers pollution damage caused by spills of persistent oil from tankers in the coastal waters (up to 200 miles from the coastline) of the participating States and preventive measures, wherever taken. The conventions apply to ‘pollution damage’, which is specified in a two-fold definition. On the one hand it includes loss or damage caused outside the ship by contamination resulting from the escape or discharge of oil from the ship, but contains a limitation as regards ‘pure environmental damage’ (not involving any loss of profit) to “reasonable measures of reinstatement”. On the other hand, it covers the costs of ‘preventive measures’ (which means any reasonable measures taken by any person after an incident to prevent or minimize pollution damage) and further loss or damage caused by such measures.

The first liability tier, the liability of the registered shipowner, is governed by the CLC. The owner’s liability is strict and thus not depending on fault or negligence on his part. The owner is normally allowed to limit his liability to an amount which is linked to the tonnage of the ship, presently maximum 89,8 million SDR for the biggest tankers.⁵⁵ The owner loses the right to limit his liability only if it is proved that the pollution damage “resulted from his personal act or omission, committed with the intent to cause damage, or recklessly and with knowledge that such damage would probably result”.⁵⁶ Through the ‘channelling’ of the liability to the *registered* owner of the ship, many other parties, including notably the ship’s manager, operator and the charterer, as well as salvors and any person taking preventive measures are explicitly protected from compensation claims, unless their negligence amounts to the same as that of shipowners’ loss of right to limit their liability, quoted above.⁵⁷

⁵⁴ The conventions are the 1969 International Convention on Civil Liability for Oil Pollution and the 1971 International Convention setting up the Oil Pollution Compensation Fund, as amended by the 1992 Protocols to them (hereinafter, the ‘CLC’ and the ‘Fund Convention’). A Protocol establishing an International Oil Pollution Compensation Supplementary Fund was adopted in May 2003 (hereinafter, the ‘Supplementary Fund Protocol’).

⁵⁵ The figures mentioned here refer to the limits agreed in by the IMO’s Legal Committee in 2000, which entered into force on 1 November 2003, through which the limits of the original 1992 Protocols were raised by some 50 per cent, according to the tacit acceptance procedure foreseen in Article XI *ter* (Article 15) of the CLC and Article 36 *quinquies* (Article 33) of the Fund Convention.

⁵⁶ This is the same test as under the LLMC described above. In the earlier version of the CLC from 1969, the test for loss of limitation right was whether the loss was caused by the ‘actual fault or privity’ of the owner.

⁵⁷ The full text of Article III(4) provides as follows:

“No claim for compensation for pollution damage may be made against the owner otherwise than in accordance with this Convention. Subject to paragraph 5 of this Article, no claim for compensation for pollution damage under this Convention or otherwise may be made against:

- (a) the servants or agents of the owner or the members of the crew;
- (b) the pilot or any other person who, without being a member of the crew, performs services for the ship;
- (c) any charterer (howsoever described, including a bareboat charterer), manager or operator of the ship;

The CLC also requires the owner of a ship carrying more than 2,000 tons of oil to provide evidence of insurance cover upon the ship's entry into port of any State which is party to the Convention by production of a certificate, regardless of whether the State of the ship's registry is party to the Convention. The certificates will be issued by the State of the ship's register or, if that State is not party to the Convention, by a State Party. States Parties are required to accept any certificate issued by any other State Party. Claims for compensation may be brought through 'direct action', that is, directly against the insurer or person providing financial security.⁵⁸

The CLC regime is supplemented by the International Oil Pollution Compensation Fund (the IOPC Fund), which was established through the Fund Convention in order to compensate victims when the shipowner's liability is insufficient to cover the damage. Recourse to the IOPC Fund may take place in three cases. The most common is where the damage exceeds the shipowner's maximum liability.⁵⁹ The second case is where the shipowner can invoke any of the defences allowed in the CLC.⁶⁰ The last case is where the shipowner (and his insurer) is financially incapable of meeting his obligations. The maximum compensation by the IOPC Fund is around 203 million SDR. The IOPC Fund is financed by contributions from companies or other entities receiving oil carried by sea. In the event of a major oil spill, thus, all oil receivers world-wide which are established in the States parties to the Fund Convention will contribute to the compensation as well as to the administrative expenses of the Fund, wherever the pollution damage has occurred.

Victims of oil spills may present their claims directly against the IOPC Fund and, to the extent claims are justified and meet the relevant criteria, the Fund will compensate the claimant directly. If the total of approved claims exceeds the maximum limit of the IOPC Fund all claims will be reduced proportionately ('pro-rating' of claims). Claimants may also decide to pursue their claims before the courts of the State where the damage occurred.

The Fund has very few defences and will compensate even in cases where the owner is uninsured or otherwise incapable of meeting his financial obligations, or even exempted from

(d) any person performing salvage operations with the consent of the owner or on the instructions of a competent public authority;

(e) any person taking preventive measures;

(f) all servants or agents of persons mentioned in subparagraphs (c), (d) and (e);

unless the damage resulted from their personal act or omission, committed with the intent to cause such damage, or recklessly and with knowledge that such damage would probably result."

Under paragraph 5 of the Article this does not prevent the owner from making claims against any such persons, or any other third party, by way of recourse action.

⁵⁸ Through the 'direct action' provisions (which are largely identical in all IMO liability conventions discussed below) the risks involved in the 'paid-to-be-paid' clause are reduced, as the insurer, or other person providing financial security, may not use the bankruptcy or winding up of the owner as a defence for escaping its compensation obligations. On the other hand, the direct liability of the insurer is always limited to the maximum limits of the shipowner's liability, even if the owner loses the right to limit his liability. Moreover, the direct action requirement does not do away with the insurer's defence of wilful misconduct on behalf of the owner. If, in other words, the owner has caused the accident by wilful misconduct, the insurer may be relieved from its obligations to pay compensation (CLC Article VII(8)).

⁵⁹ More than 90 per cent of the cases in which the Fund has been involved so far have arisen on this basis.

⁶⁰ See section 3.2.2 for more details.

liability altogether. Similarly, the Fund compensates pollution damage occurring in the coastal waters of a State Party, independently of the nationality of the ship or the shipowner. Compensation is thus largely independent of what or who actually caused the damage. Yet, there is a possibility to exonerate the owner and the Fund from their compensation obligations with respect to claimants who have contributed to the damage through their own fault or negligence. Once it has paid claimants, the Fund has the possibility to take recourse action against the owner, his insurer or against third parties.⁶¹

Since it was first established in 1978, the IOPC Fund has dealt with some 130 cases, most of which have been within the limits of compensation and thus fully compensated according to the Fund's own, or a Court's, assessment as to the validity of claims.⁶² To further increase the amount of compensation available, a Supplementary Fund is likely to be established in 2004, once the entry into force requirements of the 2003 Supplementary Fund Protocol are met.⁶³ The new Fund will supplement the compensation available under the IOPC Fund with an additional third tier of compensation. The Protocol is optional and participation is open to all States Parties to the IOPC Fund. The Supplementary Fund will thus not affect what damage is compensated or the criteria for compensation, but will raise the maximum compensation available to SDR 750 million and thus considerably reduce the risk of incomplete compensation, or delays in compensation due to pro-rating of claims.

2.5.3 Hazardous and noxious substances

The 1996 International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea (the HNS Convention, or HNSC) is based on the same principle as that for oil pollution by tankers. Consequently, the HNS Convention applies, in general and to place of refuge situations, in a very similar manner to the CLC/Fund system, for example in respect of grounds of exoneration and channelling of liability. The main differences are that the range of substances and damage covered is different and that it includes both tiers; the owner's liability and the HNS Fund, in the same instrument.

The HNS Convention establishes a liability and compensation regime for pollution damage caused by a great variety of substances, including oils, gases and chemicals, when carried by sea.⁶⁴ In total, the HNS Convention covers some 35,000 substances, through references to a number of existing IMO instruments, such as Marpol, the IBC and IMDG and Bulk Chemical Codes.⁶⁵ To some extent these substances duplicate those covered by CLC, but it excludes

⁶¹ See section 3.2.3.

⁶² Most of the cases have been settled directly between the Fund and the victims, without the involvement of legal proceedings. In total the Fund has paid out some \$ 900 million to date, which represents more than half of the total compensation paid by owners and the Fund in 5 802 incidents having occurred in the 25-year period 1978-2002. See IOPC Doc. 92FUND/WGR.3/22 of 14 May 2004.

⁶³ The Supplementary Fund Protocol will enter into force three months after at least eight States have ratified the Protocol, who have received a combined total of 450 million tons of contributing oil.

⁶⁴ The HNS Convention does not cover damage caused during the transport of HNS to or from a ship. Cover starts from the time when the HNS enters the ship's equipment or passes its rail, on loading, and the cover ends when the HNS ceases to be present in any part of the ship's equipment or passes its rail on discharge.

⁶⁵ HNS cargo includes both bulk cargoes and packaged goods. Bulk cargoes can be solids, liquids including oils or liquefied gases. The International Maritime Dangerous Goods Code (IMDG Code) alone lists thousands of

from its scope any pollution damage which is already covered by the CLC and damage caused by certain radioactive materials. However, as the damage covered by the HNSC is broader than that covered by the CLC, a parallel application of the two conventions is possible, for example in the case of damage resulting from fire or explosion.

The first tier, the liability of the registered (ship)owner is regulated in Chapter II of the Convention. The owner's liability is strict and normally limited to an amount which is linked to the tonnage of the ship, from minimum SDR 10 million to maximum SDR 100 million for the biggest ships. The HNS Convention also requires owners to maintain liability insurance and gives claimants the right of direct action against the insurer up to the limits of the owner's liability.

The first tier is supplemented by the HNS Fund, which is set up in Chapter III of the Convention in order to compensate victims when the owner's liability is insufficient to cover the damage.⁶⁶ The HNS Fund is financed by contributions from companies or other entities who receive a certain minimum quantity of HNS cargo during a calendar year. The tier will consist of one general account and three separate accounts for oil, liquefied natural gas (LNG) and liquefied petroleum gas (LPG). The maximum compensation by the HNS Fund is 250 million SDR.

2.5.4 Bunker oil

The most recent of the three pollution liability regimes aims at covering spills of bunkers from ships other than oil tankers, and thus not covered by any of the other two regimes. The 2001 International Convention on Civil Liability for Bunker Oil Pollution Damage (the 'Bunkers Convention', or BC) is different in that it comprises no supplementary layer of compensation, but only sets out a regime of strict liability of the shipowner for pollution damage. On the other hand, the shipowner is much more broadly defined in this instrument, by including the owner, bareboat charterer, operator and manager of the ship. The provisions on grounds of exoneration of the shipowner are similar to those in the CLC and HNS Conventions, but the channelling of liability is different, in that it does not provide for the 'immunity' for compensation claims against a number of parties, such as salvors or persons taking preventive measures. This may have important implications in a place of refuge situation, as it could affect the readiness of salvors, governmental authorities and others to take preventive action in an incident covered by the Bunkers Convention in fear of liability claims.⁶⁷ The Bunkers Convention also includes a requirement of compulsory insurance for

materials which can be dangerous when shipped in packaged form. Some bulk solids such as coal and iron ore are excluded because of the low hazards they are deemed to present.

⁶⁶ As opposed to Article 4(1)(c) of the Fund Convention, the corresponding Article 14(1)(c) of the HNSC does not make reference to cases where the damage exceeds the liability under other conventions. In some rare cases, this might have implications on compensation. See, for example, IMO Doc. LEG 87/11/1 Annex 3, on the effects this might have on collisions involving an HNS ship which are governed by the 1910 Collision Convention.

⁶⁷ This risk was acknowledged at the 2001 Diplomatic Conference, which adopted a Resolution (LEG/CONF.12/18 - Resolution on Protection for Persons Taking Measures to Prevent or Minimize the Effects of Oil Pollution), the operative part of which:

"1. Urges States, when implementing the Convention, to consider the need to introduce legal provision for protection for persons taking measures to prevent or minimize the effects of bunker oil pollution;

all ships over 1,000 gross tonnage, coupled with rights of direct action, but this obligation is imposed on the registered owner of the ship only.

The financial limit of the liable party is established by reference to the applicable national or international limitation regime, but the liability shall not exceed an amount calculated in accordance with the LLMC, 1976, as amended.⁶⁸ In practice this means that the Bunkers Convention will have little impact on the funds available for compensating damage. Not only will the overall limitation amount be governed by the applicable version of the LLMC, but the wording presumably also means that bunker pollution damage claimants will have to make their claims against the limitation fund alongside other property claims arising out of the same incident, and thus share any available funds with such other claimants.⁶⁹

On the other hand, Article 6 falls short of providing for an explicit *right* for shipowners to limit their liability.⁷⁰ First of all, the wording of Article 6 leaves the possibility open for States Parties to apply different national limitation schemes for bunker claims against the shipowner. If a State chooses to exclude bunker claims from the limitation regime, or is not a party to any such limitation regime, the Bunkers Convention will not affect that circumstance, which may involve unlimited liability for the shipowner. Secondly, even if the LLMC regime applies in the jurisdiction concerned, the extent to which it encompasses claims for bunker pollution damage is uncertain. As was noted above, the claims for which liability may be limited are set out in Article 2(1) of the LLMC, but the extent to which those claims cover claims for pollution damage or preventive measures is not altogether straightforward.⁷¹ To the extent the LLMC regime excludes, or is interpreted to exclude,

2. Recommends that persons taking reasonable measures to prevent or minimize the effects of oil pollution be exempt from liability unless the liability in question 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;

3. Recommends further that States consider the provisions of article 7, paragraphs 5(a), (b), (d), (e) and (f) of the International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea, 1996, as a model for their legislation.”

⁶⁸ Article 6 of the Bunkers Convention reads: “Nothing in this Convention shall affect the right of the shipowner and the person or persons providing insurance or other financial security to limit liability under any applicable national or international regime, such as the [1976 LLMC], as amended.”

⁶⁹ See Wu (2002). See also IMO Doc. LEG CONF 12/9, para. 9, where the International Group of P&I Clubs note that the wording of Article 6 is not clear on this point. “This provision could readily be construed as preserving the right to limitation in respect of all claims other than pollution from bunkers, particularly since article 7 requires security ‘in an amount equal to the limits of liability under the applicable national or international regime....’ Taken together these provisions would make it relatively easy to argue that the purpose of the Bunkers Convention was to provide a separate fund in respect of bunker spill claims in the same amount as the LLMC fund.”

⁷⁰ The wording contrasts with that of Article 7(1) offering the express right of insurers to limit their exposure to that of the LLMC limits, and with the wording of the draft Wreck Removal Convention, discussed in section 2.6.1 below.

⁷¹ See the discussion in section 2.3 above. The lack of clarity in this respect does not seem to have been foreseen by the drafters of the Bunkers Convention, who seem to have presumed that all claims of the convention will be subjected to limitation rights. See the Conference Resolution on Limitation of Liability (LEG CONF 12/18), which urges all States to ratify or accede to the 1996 Protocol to the LLMC, thus increasing the fund available for all claims – including bunker pollution claims. Recitals 2 and 3 of the Resolution note that “Article 6 of the Convention preserves the right of the shipowner to limit its liability under any applicable national or international regime” and reaffirm that “clear rights to limitation of liability are desirable, to enable the shipowner to take out effective insurance cover at reasonable cost”.

claims arising from pollution caused by bunker oil, the Bunkers Convention does not, consequently, stipulate any limitation of the shipowner's liability either. In any case, the insurer has the unequivocal right to cap the exposure in relation to direct action claims to the applicable LLMC limit according to paragraphs (1) and (10) of Article 7.

In brief, the Bunkers Convention, by referring to the LLMC regime transfers the problems relating to the scope of coverage of the latter to the liability and compensation regime for bunker oil pollution. The issues are accentuated as the Bunkers Convention on the one hand prescribes a strict liability of the shipowner in relation to pollution caused by bunker oil, which may not always fall within the scope of the claims covered by the LLMC, but still, on the other hand, allows limitation schemes such as the LLMC to regulate the financial extent of the liability. Questions relating to the effects of a potential disparity between the two regimes will not be answered until the Bunkers Convention has been implemented in practice and tried in courts. But even then, a uniform interpretation of these questions is unlikely to be achieved, as the application and interpretation of the Bunkers Convention, as opposed to the CLC and HNSC, is fully dependent on national authorities and judges. The main practical significance of the Bunkers Convention probably lies in its provisions relating to compulsory insurance for all ships above 1000 gross tons, coupled with direct action rights up to the limits of the applicable version of the LLMC.

2.5.5 Summary

The three existing IMO pollution liability regimes have a number of key features in common. They are all based on a strict but limited liability of the owner, a compulsory insurance regime admitting rights of direct action for claimants against the insurer and a certificate to be verified in the port of each State Party. They all cover pollution damage caused in the territory, including the EEZ or similar zone up to 200 nautical miles from the coastline, and measures, wherever taken, to prevent or minimize such damage. The three regimes also lay down a regime of exclusive jurisdiction for the courts of the State where the pollution has occurred and a system of mutual recognition and enforcement of judgments of those courts between States Parties.⁷²

On the other hand, there are variations of certain key concepts as between the three regimes, which go beyond the type of substances covered. The Bunkers Convention does not establish a secondary layer of compensation in the form of a fund and establishes a regime for the channelling of liability, which differs from the CLC and HNS Conventions. Even as between the two last-mentioned conventions, there are certain important differences, such as regarding the damage covered. The main substantive differences of the three regimes are summarised in a table format in Annex 2, while Annex 3 indicates the difference in monetary terms with respect to the overall liability and compensation available under the three regimes, for different sizes of ships.

However, as is evidenced by the table in Annex 1, the applicability of the international pollution liability rules in the EU is very unbalanced. At present, only the oil pollution

⁷² See also section 2.9 below. On these parts of the liability conventions and their relationship to Council Regulation 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, see Ringbom (2004a).

liability regime is in force and widely ratified by EU Member States. The Member States which have not yet become parties to the regime are land-locked States and are already subject to an EU obligation to accede to the 1992 Protocols, under Decision 2004/246.⁷³ The recent agreement among EU Member States to ratify the Supplementary Fund Protocol as soon as possible further improves the prospect for EU Member States of being fully compensated for any damage caused by oil pollution caused by tankers.⁷⁴ The widespread acceptance of these conventions goes a long way towards ensuring that victims of oil pollution by tankers, be they private persons or public authorities, will be compensated in case of a spill. Given the scope of these conventions, however, the coverage does not include all potential risks.⁷⁵

Apart from oil pollution by tankers, the situation is considerably less complete. The HNS and Bunkers Conventions are not in force and only very few of the EU Member States have ratified or even signed them. There is a specific authorisation for the EU Member States to ratify or accede to the HNS and Bunkers Conventions by 30 June 2006, which indicates the wish of EU Governments to apply these two conventions throughout the Union as soon as possible.⁷⁶ These decisions do not lay down a strict deadline for the purpose, however, and it is unclear when these liability and compensation regimes will become effective in the EU and beyond. Until such a time, a discrepancy will remain with respect to the way damage caused by hazardous material carried on ships which are not oil tankers will be assessed and compensated in the EU.

⁷³ Council Decision 2004/246/EC of 2 March 2004 authorising the Member States to sign, ratify or accede to, in the interest of the European Community, the Protocol of 2003 to the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, 1992, and authorising Austria and Luxembourg, in the interest of the European Community, to accede to the underlying instruments. See also COM(2004)329 final (Proposal for a Council Decision adapting Council Decision 2004/246/EC by reason of the accession of the Czech Republic, Estonia, Cyprus, Latvia, Lithuania, Hungary, Malta, Poland, Slovenia and Slovakia).

⁷⁴ *Ibid.* This decision, too, fails to give a strict deadline for the purpose by providing that ratification shall take place “within a reasonable time and, if possible, before 30 June 2004”. As is seen from Annex 1, however, not many Member States have yet ratified the Protocol, though many look set to do so within the coming months.

⁷⁵ Restrictions, which could potentially be important in a place of refuge situation, relate to the limitation in scope to *persistent* oils (thereby excluding non-persistent oils, such as gasoline, light diesel oil and kerosene and the limitation to damage or losses caused by *contamination* (thereby excluding damage caused by fire and explosion). However, the coverage in these areas would be significantly extended, even for oil tankers, in case the HNS Convention applied.

⁷⁶ Council Decision 2002/762/EC of 19 September 2002 authorising the Member States, in the interest of the Community, to sign, ratify or accede to the International Convention on Civil Liability for Bunker Oil Pollution Damage, 2001 (the Bunkers Convention) and Council Decision 2002/971/EC of 18 November 2002 authorising the Member States, in the interest of the Community, to ratify or accede to the International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea, 1996 (the HNS Convention). The target date for ratification/accession is “within a reasonable time ... and, if possible, before 30 June 2006.”

2.6 Other relevant IMO Conventions

2.6.1 Wreck removal

Another IMO Convention of interest is one which is still under development, dealing with various obligations relating to the removal of wrecks. IMO anticipates that the draft Wreck Removal Convention (WRC) will be ready for consideration by a Diplomatic Conference in the 2004-2005 biennium. The WRC will provide international rules on the rights and obligations of States and shipowners in dealing with wrecks and drifting or sunken cargo which may pose a hazard to navigation and/or pose a threat to the marine environment, including the identification, reporting, locating and removal of hazardous wrecks. As States, under the law of the sea, may apply national rules for such matters in their territorial sea, the geographical scope of the WRC is confined to the EEZ (or equivalent area not extending beyond 200 NM from the coastline). Yet, it can probably be assumed that States Parties to the WRC will apply similar rules for all of their coastal areas once they decide to participate in the WRC.

The draft WRC⁷⁷ sets out who is responsible for determining whether a hazard exists when the wreck or ship is beyond territorial waters, based on a list of specific criteria, including depth of water above wreck and proximity of shipping routes. In addition, it specifies the rights and obligations to remove hazardous ships and wrecks, that is, when the shipowner is responsible for removing the wreck and when a State may intervene.⁷⁸ For this purpose, the draft also includes provisions on the financial liability for locating, marking and removing ships and wrecks and sets out the security required to cover liabilities regarding claims for compensation under the Convention.

More particularly, the financial responsibility for those measures lies with the registered owner of the ship,⁷⁹ who shall be entitled to limit his liability “under any applicable national or international regime.”⁸⁰ The relationship of the Convention to other maritime liability conventions is laid down in Article 12, which appears to exclude the application of the WRC in cases where the costs are covered or explicitly excluded by the definition of (pollution)

⁷⁷ For the latest draft, see IMO Doc. LEG 89/5, Annex 1.

⁷⁸ Draft WRC, Article 10, places the obligation to remove a wreck which has been determined to constitute a hazard on the registered owner of the ship. The coastal State concerned may place conditions and limitations on the removal operation, including a deadline, after which the coastal State may remove it itself, at the expense of the owner. The conditions placed by the coastal State authorities, as well as their intervention measures in cases where the removal of the wreck has commenced, are limited to those “necessary to ensure that the removal proceeds in a manner that is consistent with safety and environmental considerations.”

⁷⁹ The only exception to this rule being where the owner proves that the casualty that caused the wreck:
“(a) resulted from an act of war, hostilities, civil war, insurrection, or a natural phenomenon of an exceptional, inevitable and irresistible character;
(b) was wholly caused by an act or omission done with intent to cause damage by a third party; or
(c) was wholly caused by the negligence or other wrongful act of any Government or other authority responsible for the maintenance of lights or other navigational aids in the exercise of that function.” (Draft WRC, Article 11(1)).

⁸⁰ WRC, Article 11(2). This wording, in contrast to that of the Bunkers Convention, provides a *right* of the owner to limit liability. On the other hand, there is no further specification as to what national or international limitation scheme might apply for this purpose.

damage in any of the other conventions.⁸¹ Similarly, paragraph 3 provides that to the extent the locating, marking or removal of the wreck are considered to be salvage under applicable law, salvage law shall have precedence over the WRC. The draft WRC, too, includes provisions on compulsory insurance or other financial security to be verified by the issuing State and in ports and off-shore facilities. The insurance requirement is capped at the limits provided by the 1976 LLMC, as amended, and involves a right for claimants to take direct action against the insurer.⁸²

2.6.2 Salvage

General

Marine salvage plays a critical role in avoiding or minimizing pollution and other damage following an incident at sea, which means that the early engagement and successful role of salvors may be of key importance for the outcome of situations involving ships in distress.⁸³ This notwithstanding, there have sometimes been problems in engaging salvors for the purpose of salvaging potentially hazardous ships, partly because of the legal regime of salvage. This regime has undergone some important changes in the past decades with a view to encouraging salvors to take an early and proactive role in environmental risk situations, whether when being in charge of the operation themselves, on the basis of an agreement with the owner, or under direction of coastal authorities.⁸⁴

The salvage award and the protection of the environment

The general principles of salvage law are laid down in two international conventions: the 1910 Salvage Convention and its successor of 1989. The latter one (hereinafter the ‘Salvage Convention’) is in force since 1996 and currently ratified by 45 States, including 15 EU Member States. According to traditional principles of salvage, the remuneration of salvors is

⁸¹ Draft WRC, Article 12(1). The wording of this (draft) paragraph provides that “[t]he registered owner shall not be liable under this Convention for the costs ... if, and to the extent that, liability for such costs is established or explicitly excluded” under the definitions of damage in the CLC, HNS and Bunkers Conventions as well as nuclear damage, as defined in the international conventions referred to in note 20 above or in national law.

This formulation does not seem to exclude simultaneous application of two conventions (it is by no means excluded that liability for the removal of the wreck is neither established nor excluded in a case involving pollution under any of the other pollution liability conventions) and is likely to generate uncertainty about the application of the WRC where any of the other conventions apply.

⁸² Draft WRC, Article 13.

⁸³ According to the International Salvage Union (ISU), its members, who are responsible for more than 90 per cent of all marine salvage activity worldwide, have recovered 11 million tonnes of potential pollutants in the past decade. In 2003, emergency assistance was provided for 218 vessels with cargoes or bunkers threatening pollution (involving 300,000 tonnes of crude oil and diesel oil; 61,000 tonnes of chemicals; 72,000 tonnes of bunkers and 169,000 tonnes of other pollutants, such as gasoline, slops and dirty ballast water). See http://www.marine-salvage.com/media_f03.htm.

⁸⁴ In practice, the modalities of salvage are normally agreed in a salvage contract concluded between the salvor and the shipowner (often represented by the Master), on the basis of existing standard contracts, the most frequently used being the ‘Lloyd’s Open Form’. (According to ISU statistics since 1978, 2523 out of 4620 recorded services were performed under Lloyd’s Form. The most recent version of the Lloyd’s Open Form is LOF 2000, introduced on 1 September 2000. For the text, see <http://www.marine-salvage.com/documents/lof2000c.pdf>.)

paid by the owner of the salvaged property, that is, in practice normally by the underwriters of the ship and cargo. Remuneration is based on the success of the operation ('no cure-no pay') and on the value of the salvaged property. In other words, the incentive of the salvor to engage in a salvage operation depends on the value of the ship and cargo and the prospect of success of the operation in the individual circumstances. Neither of these elements provides for an incentive for salvage operations for the sole purpose of protecting the environment.

With a view to improving this situation, the 1989 Salvage Convention introduced some important novelties which were based on industry practice. On the one hand, it specifically included the protection of the environment among the criteria to be taken into account when fixing the salvage award.⁸⁵ On the other hand, it introduced the notion of 'special compensation'. This represents an exception to the 'no cure-no pay' principle, whereby the salvor is entitled to compensation by the owner of the ship (generally paid by the owner's P&I Club) if the salvage relates to a ship "which by itself or its cargo threatened damage to the environment".⁸⁶ Special compensation is payable where the salvor has failed to earn an equivalent 'normal' salvage award under Article 13 of the Convention (i.e. even if the property has not been saved) and shall at least cover the salvor's expenses, but may be increased up to maximum 100 per cent of those expenses.⁸⁷

The 'special compensation' regime has given rise to certain further developments at industry level. Most notably, the SCOPIC Clause has been developed to govern the relationship between the shipowners, cargo owners and salvors in some more detail.⁸⁸ The SCOPIC Clause may be added to the Lloyd's Open Form salvage contract at the option of the salvor, and will, if applicable, replace Article 14 of the Salvage Convention. Among other things, the SCOPIC Clause includes more detailed guidelines for calculating the remuneration of salvors on the basis of fixed rates, provisions for the co-operation between the parties involved, including insurers, and rules on the provision of financial security. Invoking the SCOPIC Clause will lead to a reduction of the 'normal' salvage award under Article 13 of the Salvage Convention, should that award exceed the SCOPIC remuneration. The rationale for invoking the SCOPIC Clause thus depends on the circumstances in the individual case. Since the introduction of the clause in 1999, the number of cases based on SCOPIC remuneration has outnumbered that of cases based on Article 14 of the Salvage Convention.⁸⁹

The liability of salvors

⁸⁵ See in particular Article 13(1)(b) referring to "the skill and effort of the salvors in preventing or minimizing damage to the environment".

⁸⁶ Article 14

⁸⁷ See Article 14(2), which specifically mentions a potential increase of 30 per cent of the salvor's expenses if the latter has prevented or minimised damage to the environment. 'Salvor's expenses' is defined in paragraph 3 of the same Article and has been further interpreted in the *Nagasaki Spirit* Case (1997 1 Lloyd's Rep. p. 323ff.).

⁸⁸ SCOPIC stands for 'Special Compensation P&I Clause' and represents the outcome of discussions commenced in 1997 between the International Group of P&I Clubs, the International Salvage Union, property underwriters and the International Chamber of Shipping. The SCOPIC 2000 Clause and its appendices can be viewed at http://www.marine-salvage.com/media_i03.htm.

⁸⁹ The ISU statistics of 2002 indicate that three Article 14 Special Compensation cases were finalised (producing revenue of US \$0.6 million), while the corresponding figure for SCOPIC cases was 15 (US \$28.1 million). See http://www.marine-salvage.com/media_c03.htm

The introduction of mechanisms to promote salvors' involvement in cases relating to environmental protection does not mean that salvors will be paid whatever they do during the operation. The Salvage Convention specifically lays down the duty of due care of the salvor and foresees that a salvor may be deprived of the whole or part of the payment – or special compensation – due, in case of fault or neglect on his part during the operation.⁹⁰ Apart from this, the conduct of salvors may be challenged in tort by third parties. In this case questions relating to the basis of liability, the burden of proof etc. will depend on applicable national law.⁹¹ Yet, a number of important limitations on such actions are imposed by the rules examined earlier in this chapter.

Firstly, as was noted in section 2.5.2, the channelling clause of the CLC prohibits compensation claims emanating from oil tankers from being brought against “any person performing salvage operations with the consent of the owner or on the instructions of a competent public authority”, unless the damage resulted from the personal act or omission of the salvor, “committed with the intent to cause such damage or recklessly and with knowledge that such damage would probably result”.⁹² This means that claims against salvors are unlikely to be successful in places and cases where the CLC applies. Secondly, as was noted in section 2.3, even if there are legal remedies outside those regimes to take action against salvors, the salvor will normally have the right to limit his liability in accordance with the LLMC.⁹³

Public authorities and salvage

Salvage law, as laid down in the Salvage Convention, applies not only to professional salvors, but may be invoked by other persons performing salvage operations at sea.⁹⁴ There is

⁹⁰ See Articles 8(1), 14(5) and 18.

⁹¹ Wetterstein (1999) at p. 252 notes that the national laws relating to the liability of salvors vary considerably. While liability in many countries is based on fault or neglect some countries apply a strict liability for this purpose. See also Brice (1998), pp. 572ff.

Among the responses to the CMI questionnaire referred to in note 114 below, several replies from maritime law associations of EU Member States referred to the potential of salvors being held liable under domestic tort law, including Denmark (in case of gross negligence), the Netherlands (in case of negligence). See CMI Yearbook 2003, Part II, pp. 324–326. In cases governed by English law, which include those where the salvage is based on Lloyd's Open Form, de la Rue & Anderson (1998), at pp. 602–604 note that there is nothing in principle to prevent a salvor from incurring liability in accordance with ordinary principles of negligence.

⁹² CLC, Article III(4)(d) and, similarly, in HNSC Article 7(5). This does not, however, affect the owner's right to take recourse action against the salvor under CLC Article III(5) (and HNSC Article 7(6)). On the other hand, as is shown in section 3.2.1 below, the person having paid the salvage award (or indeed the salvor himself, if he is not reimbursed) may, under the CLC, and presumably in the future under the HNSC, be reimbursed for a reasonable part of his expenses to the extent the *primary* purpose of the salvage was to prevent pollution, which is often likely to be the case in the salvage of tankers in distress.

⁹³ See LLMC Article 2(1) (quoted in section 2.3 above) which includes a number of claims relating to salvage among the claims which are subject to the right of limitation. In LLMC Article 1(3), a ‘salvor’ is defined as “any person rendering services in direct connection with salvage operations”, specifically including claims falling under Article 2(1)(d), (e) and (f). Claims *for* salvage, on the other hand, are not covered by the LLMC.

⁹⁴ Article 1(a) defines salvage operation as meaning “any act or activity undertaken to assist a vessel or any other property in danger in navigable waters or in any other waters whatsoever”. In the recent discussions on places of refuge, it has been suggested that ports offering a place of refuge to a ship in distress should be

nothing to prevent the authorities of the coastal State from performing those operations themselves, and in that case the State may or may not avail itself of the rights of salvors as provided for in the Salvage Convention.⁹⁵

But even in the absence of such a complete intervention, coastal authorities may be deeply involved in the salvage operation. The right of public authorities to control the salvage operation, and to give direction in relation to it, is explicitly confirmed in the Salvage Convention, but may be derived from general international law as well.⁹⁶ In such cases, the right of the salvors who carry out the operations to avail themselves of the rights and remedies provided for in the Convention, that is, to be remunerated according to the normal principles of salvage, is explicitly preserved.⁹⁷ The interests of the salvor and those of the coastal State may not always converge. While the former's principal financial interest is to bring the salvaged ship and property to safety as soon as is possible, the authorities may have completely different considerations in mind when directing the operation. Under the law of salvage, the financial risk for the authorities' decisions rests with the salvor.

The Convention does, however, impose an obligation on coastal States Parties, whenever regulating or deciding on matters relating to salvage operations, including specifically the decisions relating to places of refuge, to "take into account the need for co-operation between salvors, other interested parties and public authorities in order to ensure the efficient and successful performance of salvage operations".⁹⁸

2.7 Regional rules

Within the EU, additional rules may be of relevance. Most notably, the recent Directive 2004/35/EC on environmental liability with regard to the prevention and remedying of environmental damage contains provisions on the relationship to the above-mentioned IMO Conventions.⁹⁹ The adoption of this 'horizontal' instrument in April 2004 represented the culmination of a long-standing project within the Community to establish a general regime for environmental liability within the EU, which dates back to the early 1990's. Despite the more ambitious plans originally envisaged by the Commission,¹⁰⁰ the Directive does not represent a full-fledged civil liability regime. Its focus is exclusively on preventing and

granted a salvage award too. See van Hooydonk (2004), pp. 438—443 and on some complications involved in this suggestion, Ringbom (2004b), pp. 165—168.

⁹⁵ Article 5(1) specifically provides that the Convention shall not affect any national law or international convention relating to salvage operation by public authorities, while Article 5(3) adds that the extent to which a public authority *under a duty* to perform salvage operations can avail itself of the Convention's rights depends on the national law of that State.

⁹⁶ Salvage Convention, Articles 5(1) and 9. On the right of coastal States to intervene in emergencies, see also the Article I of the 1969 Intervention Convention and UNCLOS Article 221. The right of coastal States to direct salvage operation is also implicitly sanctioned in CLC Article III(4)(d) and HNSC Article 7(5)(d). (See note 57 above).

⁹⁷ Salvage Convention, Article 5(1)

⁹⁸ *Ibid.*, Article 11. This is what remains of an article which originally was intended (by some parties) to establish an obligation on coastal States to accommodate ships in distress.

⁹⁹ Directive 2004/35/EC of 21 April 2004 on environmental liability with regard to the prevention and remedying of environmental damage. The Directive has to be implemented in the national laws of the Member States by 30 April 2007.

¹⁰⁰ See e.g. COM(2001) 264 final.

remediating environmental damage, thus excluding from its scope the whole segment of ‘traditional’ damage, such as personal injury, property damage and economic losses.¹⁰¹

Notwithstanding this major difference in scope in relation to the IMO liability Conventions, the Directive might well be of relevance for maritime pollution incidents, once it becomes applicable on 30 April 2007. The Directive imposes a number of minimum obligations on the ‘operator’¹⁰² of any of the enumerated occupational activities, which includes maritime transport of dangerous goods,¹⁰³ to take preventive and remedial action in relation to environmental damage and to bear the costs thereof.¹⁰⁴ The Directive does not, like the maritime liability conventions, provide for any limitation of the liability for the relevant person(s), nor does it; on the other hand, stipulate any obligation for operators to maintain insurance or other financial security.¹⁰⁵ The geographical coverage of the Directive in the maritime zones is unclear, but appears to be limited, as far as ‘water damage’ is concerned, to damage occurring within a sea area of 1 nautical mile from the baseline.¹⁰⁶ In almost all respects, therefore, the regime laid down in the Directive is fundamentally different from that of the IMO Conventions, and it is difficult to see how the two types of regimes could be applied simultaneously to (different aspects of) the same pollution incident.

The potential for a parallel application of the IMO Conventions and the Directive is reduced, though not necessarily altogether eliminated, by Article 4(2) of the Directive which exempts environmental damage, or threat thereof, “arising from an incident in respect of which liability and compensation falls within the scope of any of [the international maritime

¹⁰¹ See definitions of ‘environmental damage’ and ‘damage’ in Art. 1(1)—(2) and Recitals No. 11 and 14.

¹⁰² The ‘operator’ is defined widely in Article 2(6) as meaning “any natural or legal, private or public person who operates or controls the occupational activity ...”

¹⁰³ Annex III of the Directive lists a number of activities which by their nature invoke the obligations of the Directive irrespective of fault or negligence on behalf of the operator (but see next footnote). Of particular relevance for maritime transports are items No. 8 (transport by inland waterways or by sea of dangerous or polluting goods as defined in Directive 93/75 as amended (which is very wide in scope of coverage)); No. 10 (transport of genetically modified micro-organisms; and No. 12 (transboundary shipment of waste within, into and out of the Community, which is prohibited or requires an authorisation under Regulation 259/93).

¹⁰⁴ Article 8(1). The ensuing paragraphs of this article lists a number of defences available to the operator in this regard, including where the damage was caused by a third party or resulted from compliance with a compulsory order (para. 3). The lack of fault or negligence on behalf of the operator (to be proven by the operator) may be of relevance if the operator’s conduct was fully in accordance with applicable national laws and authorisations or if the damage was unforeseeable in light of available scientific and technical knowledge, but this defence is, in any event, subject to the discretion by the Member State in question (para. 4).

¹⁰⁵ Article 14 merely provides that Member States “shall take measures to encourage the development of financial security instruments and markets ... with the aim of enabling operators to use financial guarantees to cover their responsibilities under this Directive” and obliges the Commission to present a report for this purpose by 2010. In light of that report, together with an impact assessment and cost-benefit analysis, the Commission “shall, if appropriate submit proposals for a system of harmonised mandatory financial security.” See also the Commission’s Declaration relating to this article, which is attached to the Directive.

¹⁰⁶ See the definition of ‘water damage’ in Article 2(1)(b) and ‘waters’ in 2(5), both of which refer to Directive 2000/60, which, for its part, in Article 2(7) defines ‘coastal waters’ as extending to no more than 1 nautical mile from the coastline. Yet, no such geographical limitation apply in Article 2(1)(a) for damage to ‘protected species and natural habitats’. Such protected species and habitats are defined in Article 2(3) through references to Directives 74/409 and 92/43, which may well extend beyond the 1 mile-zone.

liability conventions] which is in force in the Member State concerned.”¹⁰⁷ The reference to ‘incidents’, as opposed to ‘damage’ falling under the scope of these liability conventions largely ensures that simultaneous application is excluded: either the incident is covered by any of the international conventions, or it is not covered at all, in which case the damage may be regulated (at least in part) by the regime set out in the Directive.¹⁰⁸

The main significance of this Directive is therefore that it complements the maritime liability conventions by stepping in where no international maritime liability regime applies and produces a harmonised approach within the Community in relation to the assessment of damage and the necessary rules for preventing and remedying environmental damage. ‘Traditional’ damage caused by such an incident will (continue to) be regulated by national law.

Significantly, however, Article 4(3) also provides that the Directive “shall be without prejudice to the right of the operator to limit his liability in accordance with national legislation implementing the [LLMC], 1976, including any future amendment to the Convention”. While the chosen wording may not be entirely unambiguous,¹⁰⁹ the provision clearly suggests that the intention of the Council was to preserve the right of shipowners’ and others to limit their liability at the level specified under the LLMC Convention.¹¹⁰ This has the consequence that even if the HNS or Bunkers Conventions are not in force by the time the Directive becomes applicable (meaning that the evaluation and compensation of environmental damage is governed by the Directive rather than the IMO Conventions), shipowners and others will normally in any event have the benefit of the (relatively low) maximum liability as specified under the LLMC. Such a right is not granted to any other group of operators under the Directive.

In this case, too, the diverging versions of the LLMC applying in different EU Member States and the difference policy of EU Member States as regards reservations of the Convention will lead to substantially different financial obligations for the operator,

¹⁰⁷ Annex IV, listing the relevant conventions in this regard, contains the CLC, Fund, HNS and Bunkers Conventions, and the 1989 Convention on Civil Liability for Damage Caused during Carriage of Dangerous Goods by Road, Rail and Inland Navigation Vessels. A similar exemption is made in Article 4(4) with respect to a number of nuclear liability conventions, including the 1971 Convention on Civil Liability in the field of Maritime Carriage of Nuclear Material. Both provisions contain a reference to any future amendment of the conventions, which seeks to ensure compatibility even when the international liability conventions are amended or updated.

A parallel application of the Directive and these conventions will be the result if the pollution from one incident causes damage in two or more Member States, not all of which are parties to the convention concerned.

¹⁰⁸ There could be incidents which cause both pollution damage and other damage, for example, following an explosion of an oil tanker. The extent to which the Directive could cover the latter type of damage is unclear. See also note 75 above.

¹⁰⁹ Firstly, the “without prejudice” formula falls short of providing an explicit right of shipowners to limit their liability in accordance with the LLMC (cf. the discussion on the Bunkers Convention above in section 2.5.4). Secondly, the formulation is focused on national laws implementing the LLMC, which leaves room for diverging interpretations or selective application of the convention in domestic law.

¹¹⁰ The applicability of the exception to the LLMC was a very controversial issue throughout the drafting process of the Directive and was resolved only at the very end of the adoption process. For a full account of the drafting history, reference is made to the Legislative Observatory of the European Parliament at:

http://www.db.europarl.eu.int/oeil/oeil_ViewDNL.ProcedureView?lang=2&procid=5985.

depending on the law applicable in the (Member) State where the case is decided. Moreover, and in any event, cases relating to the compensation of environmental damage under the Directive which involve ships are likely to raise intricate questions as regards the relationship between the damage covered under the Directive and the range of claims covered by the LLMC.¹¹¹ The applicability of the Directive to place of refuge situation remains to be tested, but in certain cases, the exemption for actions which are based on instructions for public authorities may be of significant relevance.¹¹²

2.8 National rules

2.8.1. General

Incidents which are not covered by any of the liability rules outlined above will be governed by national law (but will, as indicated in section 2.3 above, normally still be subject to the limitation rules of the LLMC regime). All EU Member States have some sort of liability and compensation laws for property damage and personal injuries, including those resulting from environmental harm, which would take the place of the international liability rules in case the latter do not apply.¹¹³ While a detailed examination of the applicability of the various national laws in place of refuge situations goes beyond the scope of the present study, it is interesting to relate to the recent survey by the international maritime law committee, the CMI, on national laws applicable in various jurisdictions worldwide. The study was based on questionnaires sent by the CMI to its national member (maritime law) associations in 2003, containing detailed questions on the liability issues which regulate places of refuge in their countries.

In summary,¹¹⁴ the responses highlight the crucial role played by the applicable international maritime liability conventions, in this case, the CLC. States which have implemented the CLC appear to rely exclusively on that regime for settling claims related to oil pollution, whether in a place of refuge situation or not. This means that the registered owner of the ship will generally be the sole liable person in a place of refuge situation, while additional persons such as salvors, charterers etc. may only be (co-)liable in very exceptional circumstances.¹¹⁵

¹¹¹ A claim relating to damage to the environment as such, which at least to some extent *is* covered under the Directive (see the definitions of ‘environmental damage’ and ‘damage’ in paragraphs (1) and (2) of Article 2) will not necessarily, as was noted in section 2.3 above, be subjected to the right of limitation under LLMC.

¹¹² See Article 8(3) of Directive 2004/35, relieving the operator from his obligations when damage “resulted from compliance with a compulsory order or instruction from a public authority other than an order or instruction consequent upon an emission or incident caused by the operator’s own activities” and requires Member States, in that case, to “take the appropriate measures to enable the operator to recover the costs incurred”.

¹¹³ See e.g. COM(2002)17, pp. 16—17, explaining that part of the reasons underlying the omission of personal injury and property damages from the EU environmental liability directive lied in the fact that “[n]ational legal systems (legislation and case law) are quite developed with respect to traditional damage, which constitute their subject matter by excellence.”

¹¹⁴ For full reference to the questions, and answers for individual States, reference is made to CMI Yearbook 2003, Part II, pp. 318—328 (also available on the Internet at <http://www.comitemaritime.org/year/2003/pdffiles/YBK03-14.pdf>). See also the summary as reported by the CMI to the Legal Committee of IMO in October 2003 (IMO Doc. LEG 87/7/2).

¹¹⁵ See IMO Doc. LEG 87/7/2, paras. 4 and 5: “[m]ost responders have identified the provisions of the CLC as confirming that the shipowner would be liable, subject to any available defences under the Convention, and any

Governments, public authorities, ports and others are generally reported to have no liability in this respect, although some responses acknowledge that responsibilities may be triggered if the damage is directly attributable to the actions by the authorities,¹¹⁶ notably in case of refusal of access.¹¹⁷

2.8.2 The United States

Given the overriding significance of the IMO liability convention in States which have implemented them, national liability regimes are mostly relevant in States where no such convention regime applies. Among these, it is particularly interesting to note the liability regime applicable in the United States, which is the only major maritime State which is outside the CLC-system.

As far as oil pollution liability is concerned,¹¹⁸ the most important act is the 1990 Oil Pollution Act (OPA 90).¹¹⁹ Despite being a fundamentally different, and more stringent liability regime than that under the CLC and Fund Conventions, OPA 90 has some important similarities to the international regime. It, too, is based on a strict and limited liability of the liable party for the costs associated with the containment or cleanup of the spill and any damages resulting from the spill, which is coupled with compulsory insurance requirements (to be proved by a Certificate of Financial Responsibility, or ‘COFR’) and a national fund to supplement compensation, should recovery from the liable person fail. The prescribed liability limits are not dramatically different from those under the CLC.¹²⁰ However, in many

right to limit liability. Compensation, for most responders, would be expected from the ship’s P&I insurance and/or the IOPC Fund.... Most responders have identified the channelling provisions in the CLC which grant responder immunity and confirm that the shipowner would have the responsibility, unless third parties have acted with intent to cause damage or with knowledge that the damage would probably result, and pointed out that recourse actions may lie at the suit of the shipowner where there has been negligence by a third party.”

¹¹⁶ *Ibid.*, para. 2: “The consensus of responses received is that Governments would not have a liability for granting a Place of Refuge when damage ensues, whether within their own jurisdiction or in that of a neighbouring country. Most responders referred to the channelling provisions of the Civil Liability Convention (CLC), although some responders considered that where the Government or Authority acted negligently they could face a liability provided any damage suffered was directly attributable to the decision to grant a Place of Refuge.”

¹¹⁷ *Ibid.*, para. 3: “Many responders anticipated that there could be a liability on a Government or Authority which acted negligently in declining a Place of Refuge provided there is a sufficient degree of causative connection between the refusal and the ensuing damage. It has been pointed out in some responses that the immunity provisions in the CLC could apply if the Government or Authority concerned sought to suggest that their actions were taken as preventive measures. An issue as to whether the actions taken were done recklessly would then arise.”

¹¹⁸ Liability for pollution from ships of other substances than oil is governed by several acts, none of which is specifically designed to deal with pollution from ships. Among the most important ones is the Comprehensive Environmental Response Compensation and Liability Act (CERCLA, or ‘Superfund’) from 1980, which, among other things, establishes a strict, and widely channelled liability regime for the reimbursement of government response costs in relation to hazardous substances and creates \$ 1,6 billion fund for the clean-up of hazardous waste sites.

¹¹⁹ Pub. L No. 101—380, 104 Stat 484 (1990) (codified as amended at 33 U.S.C. §§ 2701—2761). OPA 90 did not, however, completely repeal existing laws, which means that in certain situations, pre-existing laws may still be of relevance, such as the 1977 Clean Water Act (Pub. L No. 95—217, 91 Stat 1566 (codified as amended at 33 U.S.C. §§ 1251—1376)).

¹²⁰ Liability for tank vessels larger than 3 000 gross tons is \$1 200 per gross ton or \$10million, whichever is greater (Section 2704(a) (1994)).

key aspects OPA 90 lays down a considerably more far-reaching liability regime. It should also be borne in mind at the outset that OPA 90 only represents a federal minimum standard as far as liability is concerned. Individual States may, according to section 1018 of the Act decide to implement stricter rules and many States have done so.¹²¹

Section 1002 of the Act establishes that:

“[n]otwithstanding any other provision or rule of law, and subject to the provisions of this Act, each responsible party for a vessel ... from which oil is discharged, or which poses the substantial threat of a discharge of oil, into or upon the navigable waters or adjoining shorelines or the exclusive economic zone is liable for the removal costs and damages ... that result from such incident”.

The liability under OPA 90, which covers oil spill caused by all vessels, not only tankers, is thus not channelled to the registered shipowner only, but the ‘responsible party’ refers to any person owning, operating or demise chartering the vessel.¹²² Whilst providing for only one person – the owner – to be covered by compulsory insurance,¹²³ OPA 1990 allows the possibility of a primary action against the operator of the vessel – including pilots and pilotage authorities, mortgagees in possession, salvors, persons taking preventive measures and a time charterer as long as their function constitutes an ‘operation’ of the vessel. By contrast, cargo owners are not liable under OPA 90, but some individual States in the US have inserted some provisions to this effect in their state laws.¹²⁴

The first threshold for losing the right to limit liability is that of gross negligence or wilful misconduct, which in itself is more easily broken than the ‘unbreakability clause’ used in the IMO Conventions. However, a number of additional conditions for maintaining the limitation right in reality make it very easy to break the limitation right under OPA 90. Section 1004 also provides that limitation is not allowed where “the incident was proximately caused by the violation of an applicable Federal safety, construction, or operating regulation by the responsible party, an agent or employee of the responsible party, or a person acting pursuant to a contractual relationship with the responsible party”. Moreover, the same Section also provides that the right to limit is lost where the responsible party fails or refuses “to report the incident as required by law and the responsible party knows or has reason to know of the incident”; “to provide all reasonable co-operation and assistance requested” or “to comply with an order issued under ... the Federal Water Pollution Control Act.” On this basis, the liability regime laid down in OPA 90 is often characterised as *de facto* providing for unlimited liability.

¹²¹ A useful (though nowadays somewhat outdated) summary of existing US state legislation in the field is provided in de la Rue & Anderson (1998), Appendix 11 (pp. 1163—1178).

¹²² See § 2701 (32). The liability is strict and joint and several for responsible parties, meaning that liability may be based simply on the status as owner or operator of the vessel without requiring direct involvement or control.

¹²³ Section 1016, which provides for compulsory insurance up to the limits of liability and rights of direct action for claimants. Since the adoption of OPA 90 additional insurance requirements have been elaborated by the US Coast Guard to implement and specify the OPA requirements on COFRs. On these requirements, and the unrest they have created in the shipping and marine insurance industries, see de la Rue & Anderson (1998), pp. 200—213.

¹²⁴ See de la Rue & Anderson (2001)

The prospect of losing the limitation right under OPA 90 gains crucial relevance, as the right to compensation is extensive. OPA 90, among other things, covers a wide range of pure economic losses (i.e. economic losses unconnected to property damage or personal injury) and makes responsible parties liable for damages to natural resources. As to the assessment of the latter it includes not only the cost of restoration, but also the cost of rehabilitation, replacement or acquisition of the equivalent resources plus the diminution in value of those resources pending restoration, which opens up the possibility for potentially very extensive damages for restoration of damaged natural resources.¹²⁵

OPA 90 offers very limited defences for the responsible party. Under Section 1003(a), a responsible party can only avoid liability if he can prove that the discharge and ensuing damage was caused solely by 1) an act of God, 2) an act of war or 3) acts or omissions by third parties, subject to a number of important conditions. In addition, Section 1003(b) provides for particular claimants on the basis of contributory negligence.¹²⁶

Finally, OPA 90 contains several important criminal provisions, for violations of marine pollution statutes and otherwise, which have had the effect of drastically increasing the level of fines assessed in oil pollution incidents.¹²⁷

The Oil Spill Liability Trust Fund has a rather different function from the IOPC Fund. When the responsible party is unknown or refuses to pay within 90 days, funds from the Oil Spill Liability Trust Fund can be used to cover damages and removal costs. The Fund can provide up to \$1 billion for this purpose and it is up to claimants to decide whether they would use the Fund or whether to continue pursuing other legal routes for compensation. If the Fund pays out compensation, it will be up to the Fund to recover its expenses from the responsible party. The Fund is financed by a five-cent-per-barrel federal tax on imported oil (which is only collected until the Fund reaches the \$1 billion).

OPA 90 clearly applies to place of refuge situations, and is, like the CLC/Fund system in their State Parties, the principal legal instrument to regulate the liability and compensation for damage arising from those situations.¹²⁸

¹²⁵ Section 2706 (d)(1)(A-B). On the compensation of damage to natural resources under various US laws, including various valuation methods for the purpose, see de la Rue & Anderson (1998), pp. 512—558 and Kiern (2000), pp 538—544.

¹²⁶ 33 U.S.C. § 2703(b), referring to the particular claimant's gross negligence or wilful misconduct. But even here, the mitigation of the liability is conditional on the fulfilment of a number of co-operation obligations by the responsible party.

¹²⁷ See Kiern (2000), pp. 571—579.

¹²⁸ In this sense, see also the replies to the CMI questionnaire referred to above concerning US law, as provided in the CMI Yearbook, 2003, Part II, at p. 320: "If the United States Government agreed to provide a place of refuge and pollution occurred it would look to the discharging vessel's P&I coverage for reimbursement"; p. 321: "There is not thought to be any legal basis upon which the United States could be compelled to pay any clean-up costs or damages arising from a refusal to permit entry to a vessel to a Place of Refuge"; and p. 324: "The shipowner would generally have the liability but it does have a complete defence where pollution damage is occasioned by an act of God, act of war, or an act or omission of third parties provided the shipowner reports the incident in a timely fashion, provides assistance and complies with all directions. Compensation would be

2.9 What rules apply when? On legal fora and choices of law

2.9.1 Forum for the claim

The starting point in Community law when deciding where a case relating to liability actions shall be settled is that such actions, whether in connection with places of refuge or otherwise, shall be brought at the courts at the domicile of the defendant or at the location of the damage.¹²⁹ If this is within the Community, the decision will generally be recognized and enforced by the other Member States.¹³⁰ Similar principles are, through the Lugano Convention,¹³¹ extended to Norway, Iceland and Switzerland. However, the above applies with the reservation that all Member States have not yet ratified the Conventions which make the principle available in relation to Denmark and the non-Member States.

Claims which are based on any of the IMO pollution liability conventions discussed above in section 2.5 shall usually be brought at the place of the damage.¹³² These conventions thus limit the choice of fora under the general rules of Community law, and also extend the principle of mutual recognition and enforcement of judgments to other States Parties.¹³³ The conditions for recognition and enforcement are, for practical purposes, similar to those under Community law.

The notion of ‘damage’ for the purposes of determining the jurisdiction under the conventions is a wide one,¹³⁴ including preventive measures and a threatening situation which does not lead to actual pollution.¹³⁵ The rules of the conventions will consequently be applicable in a very wide range of potential place of refuge situations, and there may often be a choice for the claimant between several jurisdictions where ‘damage’ occurs.

The conventions do not prevent actions from being brought in States which are not parties to them. If such non-party States belong to the Community system for the recognition and enforcement of judgments described above, judgments in such States will under the Community system prevent an additional action under the conventions, even if the outcome of the judgment is that the shipowner has a very limited or no liability. This situation may

sought under OPA 90 from the vessel’s P&I Club, any assets of the shipowner and as a last resort the Oil Spill Liability Trust Fund”.

¹²⁹ Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (hereinafter the ‘Brussels Regulation’) Chapter II, Section 1 and Article 5(3); and in respect of Denmark, the 1968 Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters as amended (the ‘Brussels Convention’) Title I, Section I and Article 5(3).

¹³⁰ Brussels Regulation Chapter III; and in respect of Denmark, the Brussels Convention Title III.

¹³¹ The 1988 Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters.

¹³² CLC Article IX, Fund Convention Article 7, Supplementary Fund Protocol Article 7, HNS Convention Article 38, Bunkers Convention Article 9.

¹³³ CLC Article X, Fund Convention Article 8, Supplementary Fund Protocol Article 8, HNS Convention Article 40, Bunkers Convention Article 10.

¹³⁴ CLC Article I(6), Fund Convention Article 1(2), Supplementary Fund Protocol Article 1(6), HNS Convention Article 1(6), Bunkers Convention Article 1(9).

¹³⁵ CLC Article I(7 and 8), Fund Convention Article 1(2), Supplementary Fund Protocol Article 1(6), HNS Convention Article 1(7 and 8), Bunkers Convention Article 1(7 and 8).

arise if an EU Member State, or a State Party to the Lugano Convention, has not yet implemented any of the pollution liability conventions.¹³⁶

2.9.2 Limitation forum

Limitation under the IMO pollution liability conventions follow the same jurisdiction rules as those applying to the liability action described above.¹³⁷ Under the LLMC, however, limitation funds must be constituted where action is brought in respect of claims subject to limitation.¹³⁸ This, in turn is determined on the basis of the ordinary Community Rules on jurisdiction discussed above. The limitation forum under LLMC is thus, within this framework, the choice of the person who *first establishes the limitation fund*, though that person is likely to choose, if possible, a forum with some connection to the incident, so as to secure the release of the vessel under LLMC Article 13. In comparison to other limitation systems, the rules of the LLMC are thus comparatively restrictive in respect of the owner's right to freely chose forum.

An LLMC fund constituted in one State Party to the LLMC is recognized in other States Parties, and the same applies to LLMC 1996.¹³⁹ However, an LLMC 1996 State is not necessarily a party to LLMC 1976 and vice versa. In such a case, and when there are national rules on limitation or no national limitation rules, multiple limitation actions can only be prevented by the Community jurisdiction rules. This prevention is rather effective.

As opposed to the pollution liability conventions, LLMC provides the possibility, subject to national law, for the shipowner to limit his liability without first establishing a limitation fund.¹⁴⁰ In those cases, Community jurisdiction rules provide that the court seized of the liability issue is also competent to address the limitation issue.¹⁴¹ Its decision in this respect must be recognized and enforced by other courts covered by the Community system, with the potential exception of the (unlikely) situation where a limitation fund is constituted in another State *after* a claim has been limited without the constitution of a limitation fund.

2.9.3 Choice of law

Both for the substantive issues under the conventions and for the limitation issues the choice of law is *lex fori*, which means that the law of the court seized with the case will apply.¹⁴² States that are not parties to the pollution liability conventions may use the law of the place where the damage occurred for the substance (liability) issues, but hardly for limitation.

Through this regime, the choice of forum becomes of evident importance if the rules vary as between Member States, opening up the possibility for 'forum shopping' by the shipowner.

¹³⁶ A case which raises the question as to whether the substantive liability issues, in such cases, must be brought in the jurisdiction where the limitation fund has been established is presently pending before the European Court of Justice (Case C-39/02).

¹³⁷ CLC Article IX, Fund Convention Article 7, Supplementary Fund Protocol Article 7, HNS Convention Article 38, Bunkers Convention Article 9.

¹³⁸ LLMC Article 11(1).

¹³⁹ LLMC Article 11(3)

¹⁴⁰ LLMC Article 10.

¹⁴¹ Brussels Regulation Article 6a, Brussels Convention Article 6a, Lugano Convention Article 6a.

¹⁴² LLMC Article 14.

This may be particularly significant in place of refuge situations, where a number of significant differences in national laws may and, as has been shown above, do exist.¹⁴³

2.10 Conclusion

It follows from the foregoing that the present-day situation for liability and compensation is not satisfactory, whether for place of refuge situations or otherwise. A number of potentially hazardous ships and cargoes, which may very well be in the need of a place of refuge, are not subject to any strict liability regime or compulsory insurance regime, nor is there any second layer of protection in the form of a compensation fund available. In such circumstances, the liability of any of the players involved in the place of refuge situation will normally be decided on the basis of national laws, the negligence of the players involved generally being the key criterion for establishing liability. With the applicability of the ‘environmental liability Directive’ in 2007, EU Member States will apply a common regime with respect to operators’ obligation to repair environmental damage and to pay for it. The fact that shipowners nevertheless in most cases will benefit from the right of limitation under the LLMC Convention significantly limits the impact of the Directive on the compensation available in ship-related incidents and place of refuge situations. The extent of that concern depends on what type (and size) of ship is involved, on what version of the LLMC applies in the Member State concerned, and on what type of claims are at issue.

Most EU Member States are parties to some of the existing versions of the LLMC, but there are significant differences between these versions, notably with respect to the limitation amounts. Moreover, the extent to which the LLMC covers claims emanating from pollution incidents may vary from country to country even among parties to the same version. In any case, it is clear that an incident governed by the LLMC will result in significantly lower protection for victims of pollution incidents than the CLC/Fund and HNS Conventions. Not only are the maximum amounts of liability significantly lower, but the pollution claims will also have to compete for the limited funds available with all other claims against the owner, charterer, operator and others which emanate from the same event. Moreover, the absence of third party insurance requirements on ships increases the risks of not receiving compensation. On the one hand, there is a risk that the ship may not be insured at all. On the other hand, the ‘pay-to-be-paid’ clause which normally applies to P&I cover implies that even if there is P&I cover, that cover may not be available for claimants, unless the owner has the financial capability (and will) to meet the claims first.

It can be concluded that the current situation outside the oil tanker pollution liability regime, which entails a variety of liability and compensation rules and levels, which in turn depends on a variety of different factors such as the type of ship, cargo and applicable laws, is unlikely to encourage coastal States to accommodate ships in distress to places of refuge at a general level. As the prospect of full financial recovery for all claimants may be reduced through the applicability of the LLMC limitation, and the potential absence of availability of and access to insurance cover, pressure for supplementary claims against other parties may

¹⁴³ Such as differences in terms of ratification of the pollution liability or LLMC conventions, differences with respect to reservations on wreck removal and clean-up costs under LLMC Article 18 and differences in the understanding on what types of claims are covered by the LLMC in the first place.

increase accordingly. The place of refuge situation may provide the opportunity for claimants to direct such supplementary claims against the public authorities. Apart from the risk of incomplete compensation, due to low compensation levels and unclear rules on coverage and procedure, the variety of applicable regimes may also have the effect of ‘place of refuge shopping’, whereby a ship in distress, if it has a choice, chooses to request refuge, in a State where more lenient liability rules apply. In addition, differences in the rules of Member States open up the possibility for the liable person to pick and choose among the fora where his liability is to be decided.

From a Community point of view, this type of variation between Member States in their rules on compensation and limits is particularly problematic as it extends to areas which are otherwise subject to harmonising rules, through the recent Directive on the liability for damage caused to the environment and through Article 20 of Directive 2002/59.

Probably the most obvious solution to improve this state of affairs would be to ensure EU-wide ratification of the IMO liability conventions which already exist, in particular the HNS Convention. Some steps have recently been taken by the Community to ensure that all Member States ratify or accede to the HNS and Bunkers Conventions within the coming years. These decisions, however, originate in other considerations than the protection of the environment, and do not include a strict deadline for the purpose, which places limits on the legal remedies available should Member States fail to ratify them. Interestingly, the entry into force of the 1996 Protocol to the LLMC introduces an additional mechanism to encourage the ratification of the HNS Convention. A policy among EU Member States to exclude all HNS claims from the applicability of the LLMC¹⁴⁴ would have the effect that damage resulting from hazardous and noxious substances carried by sea would fall fully within the scope of Directive 2004/35 and any complementary national laws relating to the compensation of ‘traditional damage’, such as personal injury and damage to property. In either case, there would be no financial limit on the liability of the person concerned.

Whether widespread applicability of the IMO liability conventions in itself would be sufficient to overcome the potential range of concerns of coastal States in a place of refuge situation is a different question, which is subject to a more detailed examination in the next chapter.

¹⁴⁴ Under Article 18(1)(b) of the Protocol. See section 2.3 above.

3 The applicability of the rules in place of refuge situations

3.1 Introduction

Even if/when the international pollution liability conventions are in force, the regime which they lay down is not necessarily without ambiguities or gaps in relation to coastal States involved in place of refuge situations. The IMO Conventions referred to above are generally neutral as to the cause of the damage. As a starting point, therefore, their applicability is not altered by the fact that the damage resulted from a place of refuge situation. Yet, the specific circumstances during the accommodation/refusal of the ship may involve additional considerations, as in this case the coastal State is actively involved in the decision-making process.

As was explained above, the IMO pollution liability conventions are based on the principle of strict liability of a specific party: in the CLC/Fund and HNS regimes, the ‘registered owner’ of the ship and in the Bunkers Convention the wider concept of ‘shipowner’. The strict liability of the (ship)owner will generally encompass the obligation to compensate all claimants, whether public or private, who have suffered damage or losses from the incident, irrespective of the cause of the incident, and, where there is a second tier Fund, even if the owner’s insurance fails. On the basis of these general principles, therefore, the coastal State participating in these regimes will not be held liable for pollution damage occurring in a place of refuge situation, and will have access to compensation for any damage or loss it has suffered in that context. It remains to be analysed whether any of the exceptions to the owner’s liability or the Funds’ compensation obligations, or any other provision in the conventions, could alter this assumption in certain circumstances.

The focus of the analysis below is the exposure of the coastal State in the CLC/Fund regime. The 26 years of experience of its operation has resulted in a well-established practice relating to the scope and nature of several key concepts, which are common to the conventions and which are likely to be subject to similar interpretations in the other regimes, once they enter into force.¹⁴⁵ However, it should be made clear at the outset that there is very little practice on issues which are specific to places of refuge. In fact, to date there has not been a single incident in which the activities of the coastal State in a place of refuge situation have been up to consideration in national courts or the governing bodies of the IOPC Fund.¹⁴⁶

¹⁴⁵ In most cases, the claims for compensation have been settled out of court between claimants, P&I Clubs and the Fund. For this reason, the decisions taken by (the Executive Committee of) the Fund represent the most important ‘case law’ in relation to the Fund. Even when cases do go to judicial settlement, Courts have generally taken into account the Fund’s policy regarding compensation, and in this way helped to ensure a uniform interpretation of the conventions among its parties.

¹⁴⁶ But see note 186 below.

3.2 Recovery of the coastal State's losses and expenses

3.2.1 Recoverable losses

The definition of the damage covered by the CLC/Fund and HNS Conventions covers not only 'traditional' damage in the form of damage to property and economic losses, but also includes (reasonable) environmental restoration costs as well as (reasonable) costs of 'preventive measures' and further loss or damage caused by such measures. During its years of operation, the IOPC Fund has gradually developed more detailed criteria with respect to the admissibility of claims. While a detailed examination of those criteria goes beyond the purpose of this study, it may be useful to outline briefly the admissibility criteria for the types of claims which may be raised in a place of refuge situation, with particular reference to the types of claims which are typically submitted by the public authorities.

The costs for cleaning polluted property, such as contaminated boats, fishing gear, beaches and piers are compensated by the Fund. If the polluted property cannot be cleaned, costs of replacement are generally accepted, subject to reduction for wear and tear. Property damage may also extend to roads, piers etc. which were damaged during the on-shore clean-up operations. Apart from compensating damage to property as such, the Fund will also cover claims relating to loss of earnings by the owners or users of the polluted property (consequential losses).¹⁴⁷ Moreover, a very important group of claims in financial terms relate to pure economic losses, which are such losses of earnings suffered by persons whose property has *not* been polluted.¹⁴⁸ The Fund has elaborated some criteria on the compensation of such pure economic loss claims¹⁴⁹ and of claims related to measures to *prevent* pure economic loss.¹⁵⁰

Expenses incurred for clean-up operations are also compensated, including the costs for the deployment of vessels, salaries of crew, the use of booms and spraying of dispersants at sea, but also potentially significant costs for the shore-based operations, such as personnel, equipment and the cost for disposing of the collected oil. However, the costs for measures to prevent or minimize pollution

¹⁴⁷ The classical example being the fisherman's loss of income as a result of his nets becoming polluted.

¹⁴⁸ Examples include a fisherman whose nets or other property has not been polluted, but is still prevented from fishing in the sea area he normally uses and cannot fish elsewhere, or a hotel or restaurant owner whose premises are close to a contaminated public beach who suffers loss of profit because a decrease in the number of guests during the time of the pollution.

¹⁴⁹ A claim is not admissible for the *sole* reason that the loss or damage would not have occurred had the oil spill not happened. In particular, the Fund requires that there is a 'reasonable degree of proximity' between the contamination and the damage or loss. This includes taking into account the following elements:

- the geographic proximity between the claimant's activity and the contamination
- the degree to which a claimant was economically dependent on an affected resource
- the extent to which a claimant had alternative sources of supply or business opportunities
- the extent to which a claimant's business formed an integral part of the economic activity within the area affected by the spill.

The Fund also takes into account the extent to which a claimant was able to mitigate his loss.

¹⁵⁰ These criteria include that:

- the cost of the proposed measures is reasonable
- the cost of the measures is not disproportionate to the further damage or loss which they are intended to mitigate
- the measures are appropriate and offer a reasonable prospect of being successful
- in the case of a marketing campaign, the measures relate to actual targeted markets.

damage are only compensated to the extent the costs and measures are reasonable.¹⁵¹ Salvage measures will be compensated only if the *primary* purpose of the salvage is to prevent pollution.¹⁵²

Preventive measures, including clean-up operations at sea or on shore, are often carried out by public authorities which use permanently employed personnel, or vessels, vehicles and equipment owned by those authorities. The authorities may then incur additional costs, that is, expenses which arise solely as a result of the incident and which would not have been incurred had the incident and related operations not taken place (such as payments for overtime). Reasonable additional costs are generally accepted by the IOPC Fund. Authorities may also claim compensation for fixed costs, that is, costs which would have arisen for the authorities concerned even if the incident had not occurred, such as normal salaries for permanently employed personnel and capital costs of vessels owned by the authorities.¹⁵³

A difficult issue relates to the compensation of damage to the environment as such, which does not have a market value and therefore is difficult to assess in monetary terms. The IOPC Fund has ruled out assessment of compensation on the basis of “abstract quantification of damage calculated in accordance with theoretical models” and thus presumes that claimants, in order to be compensated, should have suffered quantifiable economic loss.¹⁵⁴ The definition of pollution damage codifies this practice by providing that compensation for impairment of the environment (other than loss of profit from such impairment) shall be limited to “costs of reasonable measures of reinstatement actually undertaken or to be undertaken”.¹⁵⁵ It has been recognised that oil spills do not generally cause permanent damage to the marine environment. The aim of reinstatement measures should therefore be to bring the damaged site back to the same ecological condition that would have existed had the oil spill not occurred, or at least as close to it as possible. The more detailed requirements for compensating environmental reinstatement have been clarified subsequently. Among other things, it has been established that the costs of the measures should be reasonable and proportionate to the results achieved or the results which could reasonably be expected and that the measures should offer a reasonable prospect of success.¹⁵⁶ The latest revision of the Fund’s policy in this respect was undertaken in 2002, when new criteria were in the revised 1992 Fund Claims Manual.¹⁵⁷ These criteria provide, among other things, that “reinstatement measures taken at some distance from, but still within the general vicinity of, the damaged area may be acceptable, so long as it can be demonstrated that they would actually enhance the recovery of the damaged components of the environment.”¹⁵⁸ The

¹⁵¹ On the criteria for reasonableness, see section 3.2.4 below.

¹⁵² In this case, compensation will not be assessed in the same way as salvage awards, but would only cover the costs incurred and a reasonable margin of profit. Should the operation have another primary purpose, such as salvaging hull and cargo, it does not qualify for compensation. See IOPC Doc FUND 92/A.6/4, para. 20.1; de la Rue & Anderson (1998), pp. 412—429; Wu (1996), pp. 281—286 and Nichols (2003), p. 105.

¹⁵³ The IOPC Fund accepts a reasonable proportion of fixed costs, provided that these costs correspond closely to the clean-up period in question and do not include remote overhead charges. See IOPC Doc FUND 92/A.6/4, para. 15.1 et seq. for recent (essentially unsuccessful) discussions to extend the Fund’s policy in relation to compensation of fixed costs.

¹⁵⁴ Resolution on the admissibility of claims relating to damage to the environment, 1980.

¹⁵⁵ CLC Article I(6)(a). In its further work, the Fund has specified that the test of reasonableness in this regard should be the same objective test as that applying for preventive measures (see section 3.2.4 below).

¹⁵⁶ See IOPC Doc. FUND/A.17/23, paras. 7.3.13—17.

¹⁵⁷ IOPC Fund Claims Manual, November 2002

¹⁵⁸ *Ibid.*, pp. 29—30. Other criteria listed in the Claims Manual are that:

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

2002 revision also included a number of criteria aimed at assisting the compensation of the costs of scientific studies aimed at assessing the damage and determining the feasibility of reinstatement measures.¹⁵⁹ Damages of a punitive character, calculated on the basis of the degree of the fault and/or the profit earned by the wrong-doer are not admissible, nor are civil or criminal penalties arising in connection with the pollution incident.¹⁶⁰

3.2.2 General defences for the owner

The three main exceptions to the owner's liability, which are common to all three IMO liability conventions, relate to damage: 1) resulting from an act of war, hostilities, civil war or insurrection or exceptional natural phenomenon; 2) which is wholly caused an act or omission by a third party done with the intent to cause damage; and 3) which is wholly caused by public authorities' negligence in maintaining lights or other navigational aids.¹⁶¹ The first two defences are of a general nature and are commonly considered to be necessary exceptions in any pollution liability regime involving compulsory insurance and are, in any event, unlikely to be of relevance in a place of refuge situation.¹⁶² The third defence, however, is specific to the IMO Conventions and could very well be raised by the owner of a ship in a place of refuge situation.¹⁶³ A fourth defence, which exists only in the HNS Convention (Article 7(2)(d)), is where the owner is unaware of the hazardous and noxious nature of the substance shipped due to failure of the shipper or other persons to inform him about it and provided that the owner or his servants and agents ought not reasonably have known about this anyway. However, while the third and fourth defences may be important safeguards for the owner and his insurer, they are of more limited importance for the question of the compensation of a coastal State having admitted a ship in distress to a place of refuge. As will be shown below, those defences will not as such affect the Funds' obligation to compensate the coastal State.

Apart from such complete exonerations of liability of the owner, the three conventions also admit the possibility to exonerate the owner, wholly or partially, from his liability with respect to specific claimants. This applies where the owner proves that the damage resulted wholly or partly either from an act or omission done with intent to cause damage by the person who suffered the damage, or from the negligence of that person.¹⁶⁴ The latter aspect

The assessment should be made on the basis of the information available when the specific reinstatement measures are to be undertaken.

¹⁵⁹ *Ibid.*, pp. 30—31. Among other things, the importance of the study's scientific qualities and of co-operation with the IOPC Fund is highlighted. In addition, "[t]he scale of the studies should be in proportion to the extent of the contamination and the predictable effects."

¹⁶⁰ IOPC Doc FUND 92/A.6/4, para. 11.1.1.

¹⁶¹ CLC Article III(2), HNSC Article 7(2) and Bunkers Convention Article 3(3).

¹⁶² Owners would presumably be exonerated from any liability in accordance with CLC Article III(2)(b) in a case where a polluting ship is brought into a place of refuge and it turns out that the act of pollution was a terror attack. In this case, the Fund would generally have the obligation to compensate the victims of the pollution, as long as the situation could not be brought within its defence relating "act of war, hostilities, civil law or insurrection" under Fund Convention Article 4(2).

¹⁶³ Some places of refuge may be indicated on the navigational chart. The indication of a wholly unsuitable place of refuge could perhaps in itself be considered to exempt owners from liability according to this defence. Moreover, it is clear that bringing ships into the coastal waters increases the risk of discovering potentially unmarked navigational hazards, which, in a very unfortunate case, may cause or contribute to (further) environmental damage and may be of significance in establishing liability.

¹⁶⁴ CLC Article III(3), HNSC Article 7(3) and Bunkers Convention Article 3(4).

(also known as contributory negligence) may be particularly relevant in place of refuge situations, as owners may be exonerated from their liability to public authorities if they can prove that the damage was caused by the authorities' negligence during the operation. Examples where contributory negligence on behalf of the coastal State could be invoked by the owner include a case where a State directs a tanker to a place of refuge which turns out to be wholly unsuitable for the purpose, or controls a salvage operation which is eventually unsuccessful and, due to negligence on behalf of the authorities, results in further damage. Here too, however, such a finding would not in itself eliminate the possibilities for the coastal State to be compensated under the IOPC and HNS Funds.

3.2.3 Defences of the compensation Funds

Absence of liability on behalf of the owner does not necessarily mean that there will be no compensation for the damage caused. The second compensation tier, the IOPC and HNS Funds, have different defences from those of the owner and will be under an obligation to compensate for the damage, even if the owner and his insurer are financially incapable of meeting their obligations, and even if there is no liable party under the first tier at all. This applies irrespective of whether the total cost of the incident extends beyond the limit of the shipowner's liability.

The IOPC and HNS Funds are fully exonerated from their compensation obligations only if: 1) they can prove that the damage resulted from an act of war, hostilities, civil war or insurrection;¹⁶⁵ 2) they can prove that the damage was caused by substances released from a warship or other ships owned or operated by a State (thereby invoking the liability of that State); or 3) the claimant cannot prove that the damage resulted from an incident involving one or more ships.¹⁶⁶ In other words, the extent of the Funds' obligation to compensate victims of a pollution incident is designed to ensure that any pollution damage which can be linked to maritime transport will be compensated, save for the case of war or other hostilities under the first defence.

In addition to those very limited defences, the IOPC and HNS Funds, like the owner under the first tier, have a possibility to exonerate their obligations wholly or partially towards particular claimants, in case the funds can prove contributory negligence or intent on behalf of the claimant.¹⁶⁷ Indeed, the conventions provide that the funds shall "in any event be exonerated to the extent that the owner may have been exonerated [under the first tier]". However, in the second tier this possibility is coupled with a significant limitation, in that the last sentence of the paragraph provides that "there shall be no such exoneration ... with regard to preventive measures."¹⁶⁸ Even if, in the examples above, the coastal State is found to have acted negligently, thereby exonerating the owner from his duties towards the coastal

¹⁶⁵ It is to be noted that the coverage here is broader here than under the first tier, where the owner's corresponding defense includes damage resulting from "a natural phenomenon of an exceptional, inevitable and irresistible character".

¹⁶⁶ Fund Convention Article 4(2), HNSC Article 14(3). In the latter Convention, the third defense is slightly different, in that claimants only have to prove "that there is reasonable probability" that a ship is involved in the incident.

¹⁶⁷ Fund Convention Article 4(3), HNSC Article 14(4).

¹⁶⁸ *Ibid.*

State, the State would still have access to compensation for its losses, provided the measures can be characterised as preventive measures.¹⁶⁹

In other words, the key to obtaining compensation for any losses and expenses in a place of refuge situation lies in whether the measures taken can be characterised as preventive measures. If so, the measures and ensuing damage and losses will form part of the definition of pollution damage and will generally be compensated by the Fund, irrespective of whether the owner is liable or insured, and irrespective of whether the total cost of the incident exceeds the level of the owner's liability, and irrespective of contributory negligence on behalf of the person taking the preventive measures. In addition, the immunity for additional compensation claims against any person taking preventive measures laid down in the 'channelling clauses' will apply. If, on the other hand, the measures are *not* characterised as preventive measures, the ensuing costs and losses may not be recoverable in the first place. In addition, in that case there is no 'responder immunity' protecting the person taking the measures from additional claims, and there is a possibility that contributory negligence on part of the coastal State (which in that case need not be a long step away) will affect the duties of the owner and the funds to compensate, wholly or partly, damage suffered by that State. Clearly, therefore, the question of whether the authorities' measures in relation to a place of refuge situation qualify as 'preventive measures' is of key importance for determining their financial risks.

3.2.4 'Preventive measures'

Preventive measures are defined as "any reasonable measures taken by any person after an incident has occurred to prevent and minimize damage".¹⁷⁰ As was already noted, there is no geographical condition with respect to preventive measures, as they are covered "wherever taken". Yet the qualification in CLC Article II(b) that they be aimed at preventing *such* (pollution) damage, implies a limitation in that measures taken to prevent pollution in areas where the convention does not apply i.e. on the high seas or in a non-convention State may not be recoverable.¹⁷¹ Another condition for preventive measures which follows from the above definition is that they are taken 'after an incident has occurred'. If there was no pollution damage before the authorities took up the action, disputes may thus arise with respect to the timing of the 'incident'.¹⁷²

¹⁶⁹ This more limited applicability of the 'responder immunity' under the first tier of compensation is also implicit in the 'channelling clause', where Article III(4)(e) (like Article 7(5)(e) of the HNS Convention) prevents the placing of additional compensation claims on any person taking preventive measures, but still preserves the right of owners to take recourse action against such persons. The slightly confusing result of this difference between the two tiers is that while the owner may be relieved from his obligation to compensate a person who has taken preventive measures and acted negligently in doing so, that person will still have the right to be compensated by the Fund under Article 4(3) of the Fund Convention. In a spill which is within to the financial limit of the CLC, this person will be the only one with access to the Fund.

¹⁷⁰ CLC, Article I(7), Fund Convention Article 1(2), HNSC Article 1(7).

¹⁷¹ This qualification of preventive measures does not form part of the corresponding provision of HNSC Article 3(d).

¹⁷² The term 'incident' is relatively broadly defined in CLC Article I(8) and HNS Article 1(8) as meaning "any occurrence, or series of occurrences, having the same origin, which causes [pollution] damage or creates a grave and immediate threat of causing such damage." In a case where a ship is admitted to a place of refuge before

The criterion for preventive measures which is by far the most important one for determining their admissibility obviously relates to the word ‘reasonable’. The reasonableness of a decision to accommodate or refuse the access of a ship in distress to a place of refuge has never been assessed by the IOPC Fund, but as a starting point it can probably be assumed that the criteria for that assessment, should it have to be made, would be similar to the criteria for assessing the reasonableness of other measures to prevent or minimise pollution.¹⁷³ These criteria have primarily been developed in relation to the recovery of the costs for off-shore operations (to recover or disperse oil at sea) and onshore activities (such the collection and final disposal of the oil).

In its interpretation of the reasonableness of such measures,¹⁷⁴ the Fund has taken the view that this question should be determined on the basis of *objective* criteria in the light of the facts available *at the time of the decision* to take the measures, rather than in retrospect. The mere fact that a Government decides to take a specific measure does not, in other words, make it reasonable. On the other hand, the fact that the measures prove to be ineffective is not in itself a reason for rejection of a claim. If, on the basis of the information available at the time, it could have been foreseen that a particular measure would have been ineffective, the associated claim for costs would normally be rejected.¹⁷⁵ Those in charge are expected to continually reappraise their decisions in the light of developments and further technical advice.¹⁷⁶

It follows from the above that the assessment of the reasonableness of preventive measures is strongly based on the *technical* soundness of the measure. This will presumably apply to decisions relating to the accommodation/refusal of a ship as well. However, it is the express policy of the Fund to take into account the particular circumstances of the incident in each individual case,¹⁷⁷ which may have implications on that starting point in relation to place of refuge decisions. In contrast to clean-up and other ‘customary’ preventive measures dealt with by the Fund so far, the authorities’ decisions in a place of refuge situation will inevitably involve, and be influenced by, a number of criteria other than purely technical

any pollution or damage has occurred, the characterisation of the measure as a preventive measure may thus depend on the level of threat posed by the ship at the time refuge was granted.

¹⁷³ This assumption appears to be shared by the Fund’s Director, Mr Måns Jacobsson, in Jacobsson (2004) at p. 8.

¹⁷⁴ See the Claims Manual, in particular at pp. 18—19. For more details, see de la Rue & Anderson (1998), pp. 396—431 and Wu (1996), pp. 288—299.

¹⁷⁵ Nichols (2003), at pp. 104—105. Similarly, the ITOPF submission to the seventh intersessional working group of the 1971 IOPC Fund in January 1994 provides in para. 2.1.1 that “a claim may be rejected ... if it was known that the measures would be ineffective but they were instigated simply because, for example, it was considered necessary ‘to be seen to be doing something’. On this basis, measures taken for purely public relations reasons would generally be considered unreasonable.” The Document is available in Appendix 13/1 in de la Rue & Anderson (1998), pp. 1185—1193.

¹⁷⁶ On this basis, the Fund did not compensate all measures taken by the Japanese Government to remove the oil from the *Nakhodka* in 1997. While the Fund accepted that the idea of constructing a temporary causeway from land to the bow section of the ship in order to remove oil was reasonable, it took the view that the project should have been abandoned when the difficulties caused by severe weather conditions became apparent. For this reason, the Fund covered only part of the expenses related to the construction and removal of the causeway. See e.g. Nichols (2003), p. 106.

¹⁷⁷ 2002 Claims Manual at p. 19.

ones. In addition, those decisions will normally have to be taken within a short space of time and sometimes during the early stages of the operations, by which the detailed facts of the ship and cargo may not be available to the person(s) in charge of the decisions. Furthermore, the question of reasonableness of the place of refuge decisions may in certain cases be of critical importance for the compensation of the Government's losses and its financial exposure more generally, which significantly increases its legal, financial and political implications. In light of such considerations the question arises as to whether the Fund will allow for a broader range of criteria, apart from the purely technical ones, to play a role in the assessment of the measures and decisions taken by the coastal State in a place of refuge situation.¹⁷⁸ In any case, it is possible that *some* measures taken by the coastal State in a place of refuge situation would be characterised as reasonable (and thus as preventive measures), while others would not.¹⁷⁹

There is nothing in the convention texts or in their implementation so far indicating a difference in this respect depending on whether the decision of the authorities is to accommodate or refuse access to a place of refuge. In either case, the access to compensation is dependent on the reasonableness of the decisions at the time they were made.¹⁸⁰ However, as will be shown below, the recent elaboration of new technical rules on places of refuge, inclining towards acceptance of ships into places of refuge, may have the effect of placing the presumption of reasonableness in favour of acceptance too.

In conclusion, it can probably be assumed that *bona fide* measures taken by authorities in a place of refuge situation, or, measures which were taken with the genuine aim of preventing or minimising pollution in the convention area, will qualify as preventive measures. Yet, in the absence of any practice on this specific issue, any such assessment is bound to be of a tentative nature.

3.3 Liability of coastal States

The risk of not being able to recover fully its losses and expenses represents only part of the potential concerns of a coastal State admitting or refusing a ship into a place of refuge. A more serious concern is probably the risk that the coastal State may be held liable for having contributed to the damage through its own decisions and conduct during the operation.

¹⁷⁸ See also Jacobsson & Trotz (1986), at p. 472: "However, it must be recognised that the authorities concerned and the parties involved in the operations will often have to decide rapidly, and without full knowledge of the circumstances, on the taking of preventive measures. For this reason, it appears that when the test of reasonableness is to be applied, they should be allowed a certain margin of error in their judgment."

¹⁷⁹ For example, if the decision to accommodate the ship as such is a preventive measure, but the authority in that context chooses to direct the ship into a naval pier which is totally unsuitable for the purpose, instead of an available oil terminal, it is conceivable that the two decisions are separated, one being reasonable and the other not. In that case, the damage sustained to the port facilities in the naval port which go beyond damage caused by contamination would not be compensated. See also the decision in respect of the *Nakhodka* referred to in note 176 above.

¹⁸⁰ See also Jacobsson (2004), p. 8: "It appears therefore that if a State which, in order to prevent or minimise pollution damage, has taken measures for a ship to enter a place of refuge within its jurisdiction or for the ship to leave its waters, the Fund would not be exonerated vis-à-vis that State even if the pollution damage was caused negligently by that State, provided that the measures themselves were reasonable".

Despite the fact that the IMO liability conventions, through their strict liability regimes and various manifestations of the ‘responder immunity’, are designed to avoid this type of result, concurrent coastal State liability is not excluded. This could take place in a number of situations. The incident may not be covered by any of the conventions, either because they are not in force or because the incident otherwise falls beyond their scope. In addition, certain aspects of the litigation relating to the incident may, depending on the parties to the dispute, take place in a jurisdiction where the conventions do not apply. Finally, even if the conventions do apply, there is no guarantee that coastal States will be immune from claims of liability, as many aspects will depend on the domestic laws of each State Party. Some situations in which this last consideration may apply will be considered below.

Firstly, the ‘immunity’ offered by the channelling clause to any party taking preventive measures is in some respects deceptive, as it presupposes that the decisions and measures taken by the coastal State are so labelled. As was shown above, this is not necessarily the case given the condition of reasonableness, which is inherent in the notion of preventive measures, and may have been affected by the adoption of the IMO Guidelines. If the measures of the coastal State fail the reasonableness test, which is likely to be at the centre of any dispute relating to its role in a place of refuge situation, the ‘responder immunity’ is lost, which in turn opens up the door for salvors, charterers, classification societies and others to place claims on the coastal State for compensating their losses.

Secondly, even if the measures taken by the coastal State qualify as preventive measures, owners and insurers would still have the right under CLC Article III(5) to take recourse action against any third parties, including public authorities.¹⁸¹ The extent to which a similar possibility exists for the Fund is less clear.¹⁸² The liability of public authorities in the context of such recourse actions is not governed by the conventions, but depends on the State’s domestic law which is not harmonised within the EU or elsewhere, and it may be that in some jurisdictions, such recourse actions may succeed.

¹⁸¹ The paragraph reads: “[n]othing in this Convention shall prejudice any right of recourse of the owner against third parties.” The corresponding Article 7(6) of the HNSC is even more explicit, by continuing “including, but not limited to, the shipper or the receiver of the substances causing the damage, or the persons indicated in paragraph 5 (i.e. those excluded through the channelling clause).”

¹⁸² See Fund Convention Article 9(2), which in principle provides the Fund with broad rights of recourse and subrogation against third parties. Yet, the Fund’s entitlement to a general right of recourse against third parties is less explicit than that of the owner and may entail limitations, as the Fund’s rights in this respect could exceed those of the persons which it subrogates. The Fund’s policy is to take recourse actions “whenever appropriate”. Consideration is to be given in each case about the prospect of recovery in light of the facts and the applicable national law. However, “if matters of principle are involved, the question of costs should not be the decisive factor” (IOPC Docs. 71FUND/EXC.62/14 para. 3.6.11 and 92FUND A/6.4, para. 10.2). See also the recent discussions on these principles in the *Al Jaziah 1* and *Zeinab* incidents, referred to in the IOPC Annual Report 2003, at pp. 73—74 and in Doc. 92FUND/EXC.26/8/Add.1.

In practice, the Fund’s approach to recourse action has been cautious and seems to have taken into account the limitations imposed by the ‘channelling clause’ of CLC Article III(4) (see e.g. the discussions in the *Erika* Case, documented in IOPC Fund Doc. 92FUND/EXC.18/5/Add.2), which implies that the Fund itself takes the view that its rights of recourse are more restricted than those of the owner and that a person listed in the channelling clause (including a person taking preventive measures) would be exempt from such actions. For an overview of the recourse actions by the Fund, see Jacobsson (2003), pp. 18—20.

Thirdly, even in the absence of such actions by the owners or the Fund, authorities having directed a polluting ship into its jurisdiction may be subject to internal pressure from pollution victims who might not be entitled to compensation by the Fund, or may otherwise be dissatisfied with the situation. There is nothing in the conventions to prevent victims of an oil spill suing the authorities directly for negligence and, here again; it is possible that they will succeed.¹⁸³

In all such cases, the outcome of the case will depend on the national laws of the State concerned. It is not feasible to undertake an analysis of the national laws of the EU Member States within the ambit of this study, but it is to be recalled that UNCLOS which applies in most EU Member States, and in any event is widely considered to represent (binding) customary international law, contains some important obligations for coastal States in this respect. Firstly, Article 235(2) prescribes that “States shall ensure that recourse is available in accordance with their legal systems for prompt and adequate compensation or other relief in respect of damage caused ... by natural or juridical persons under their jurisdiction”. Moreover Article 232, like Article VI of the Intervention Convention, provides that States *shall* be liable for damage or loss attributable to them arising from enforcement measures to protect the marine environment “when such measures are unlawful or exceed those reasonably required in the light of the available information”. Most of the replies by national maritime law associations in EU Member States to the CMI questionnaire referred to above confirm that such provisions exist in the Member States’ national legal orders.¹⁸⁴

It is not possible to assess the possibility or probability of such liability arising in the abstract, as each case needs to be considered individually and depends on the nature of the coastal State’s action and its relationship to the damage or loss. Any such case is likely to involve difficult assessments as to the level of negligence by the authorities and the causal

¹⁸³ In this case, a key question is likely to be whether the coastal State measures were deemed to be ‘preventive measures’ or not. If they are, they would be covered by the channelling provision, excluding additional compensation claims.

¹⁸⁴ See in particular the replies to the question on liability for coastal States for refusal/access of a ship in distress by the maritime law associations of **Denmark** (“Because the authorities are given a discretion as to whether entry is permitted or denied under the Danish Marine Pollution Act, it is considered doubtful whether an authority could be found to have been negligent in the exercise of its discretion and thus have a liability.”); **Finland**: (“Unless liability arose under an International Convention ratified by Finland it is difficult to see how liability would arise under domestic tort law”); **Italy**: (“There would only be liability if the decision to permit entry was negligent and can be said to have caused damage”); **Malta**: (“If there has been causative fault by the government, then it is possible for the government to have a liability; but in practice it would seem to be unlikely in the postulated circumstances, especially in circumstances in which the vessel’s entry was permitted in order to save life”); **The Netherlands**: (“There would be no liability in the authority unless a vessel had been ordered into the port by the authorities and damage ensued as a direct result of the entry”) and **The United Kingdom**: (“The Secretary of State’s representative and harbour masters could be liable where they have negligently exercised their powers in permitting or granting refuge to a vessel in distress in British waters. ... “If it were held that the Secretary of State or his/her representative had acted upon improper motives or upon irrelevant considerations or had failed to take account of relevant considerations in preventing a vessel from entering a Place of Refuge in the UK there could be a liability. However the question arises as to whether exemptions from liability contained in the responder immunity provisions in the CLC and in the UK legislation would apply. It would no doubt be argued that preventive measures were being taken by the competent authority. Questions of reasonableness would then arise.”) All quotes are from the 2003 CMI Yearbook, Part II, note 114 above, at pp. 318—321.

link between that negligence and the ensuing damage. The risks for coastal States should not be exaggerated, however. In general, the measures and decisions taken by the coastal State offering a ship in distress a place of refuge are not at the origin of the incident, which reduces the case for placing the blame and financial liability for it with its authorities. The strict liability of the owner and the general design of the system, including in particular the protection offered to persons taking preventive measures, are also intended to avoid this type of claims. So far, the negligence or liability of the coastal State has not been of much practical relevance in the operation of the IOPC Fund. Not a single incident has yet been considered by the Fund, where compensation has been specifically linked to the negligence or liability of the coastal authorities in a place of refuge situation,¹⁸⁵ though it is possible that such cases may come up in the future on the basis of legal action by the Fund in pending incidents.¹⁸⁶

3.4 The legal effect of the new technical rules on places of refuge

It has been shown above in sections 3.2 and 3.3 that the financial exposure of the coastal State in a place of refuge situation is closely linked to the reasonableness of its action. This applies to all aspects of exposure discussed above, including the definition of recoverable costs, the potential of not obtaining compensation for the costs incurred, the prospect of being held liable under the convention system or outside, whether on the basis of national or international law. It has also been shown that objective and technical criteria are likely to be of crucial relevance for establishing the reasonableness of the measures taken.

The recent elaboration of new technical standards, specifically detailing the role of the players involved in a place of refuge situation, notably the IMO Guidelines, may affect liability and compensation. The new technical standards may, perhaps inadvertently, influence the liability of the parties involved by affecting the standard of care which is expected from them. So far there have been few specific standards against which the conduct and decision-making of the coastal State in a place of refuge situation could be assessed. On the one hand, the text of the IMO Guidelines, like general international law, very clearly preserves a degree of latitude for the coastal State in deciding on whether or not to accommodate a ship in distress to a place of refuge.¹⁸⁷ On the other hand, the Guidelines explicitly enumerate a number of criteria to be assessed and measures to be taken by coastal authorities when deciding on the access of a ship in distress. It might even be argued that

¹⁸⁵ It should be noted, however, that the 1971 Fund, under the 1969 CLC, took recourse action against the Milford Haven Port Authority (MHPA), following the grounding of the *Sea Empress* in 1996, claiming, *inter alia*, that the MHPA had failed to put in place a proper system to satisfy itself that the proposed entry of a particular vessel into Milford Haven at a particular time was safe and/or for refusing permission for a vessel to enter the port at such a time unless the MHPA was so satisfied. The action eventually led to a settlement in which the MHPA agreed to pay 20 million pounds to the Fund (see IOPC Fund Annual Report 2003, pp. 60—62).

¹⁸⁶ In the *Erika* incident, the Fund has taken measures to protect its right to take recourse action against the French State, pending the outcome of criminal charges against the deputy manager of Centre Régional Opérationnel de Surveillance et de Sauvetage (CROSS) and three officers of the French Navy who were responsible for controlling the traffic off the coast of Brittany (see IOPC Fund Annual Report 2003, p. 92). Similar considerations may be relevant with respect to the *Prestige* once the time-bar for taking protective action approaches.

¹⁸⁷ See note 10 above.

failure to meet those standards could in itself be considered to represent evidence of unreasonable or negligent conduct. Such questions may be particularly relevant within the EU, where respect for the IMO Guidelines has been anchored in a more solid legal basis through the reference (albeit a loose one) in Article 20 of Directive 2002/59.

The new situation will work both ways. In case the coastal State *accepts* a ship into a place of refuge, the ensuing damage may be (partially) blamed on the authorities' negligence, if the applicable procedures have not been complied with. Similarly, in the case *refusal* of access leads to damage, whether in the coastal State itself or in another State, the emerging new standard of care will probably be invoked for scrutinizing in detail the reasons given for the refusal.¹⁸⁸ In both cases, it is probable that the new standards will not only clarify, but also lower the threshold for negligence on behalf of public authorities. In other words, while representing but a 'side-effect' of the on-going clarification of the place of refuge rules, the IMO Guidelines may well increase the financial risks of coastal States in being involved with ships in distress. Generally, it can be presumed that the situation in which a coastal State refuses a ship's request for access to a place of refuge is more likely to generate claims for liability and compensation than cases where access is granted. This is partly inherent in the IMO Guidelines and other available rules, the thrust of which lies in promoting *acceptance* of ships into places of refuge, rather than refusal.¹⁸⁹

3.5 Conclusion

The analysis undertaken above indicates that there may be cases within the existing legal framework where the acceptance or refusal of a ship to a place of refuge could entail risks for the coastal State, both in terms of financial risks and in (partial) liability.¹⁹⁰ The provisions protecting persons taking preventive measures go a long way towards ensuring that a coastal State taking (reasonable) preventive measures will have a remedy for recovering its

¹⁸⁸ As was noted in section 2.2 above, refusal of a ship to a place of refuge may involve other types of responsibilities for the coastal State, even if the ship concerned does not cause any pollution damage in its territory. If the refusal results in transboundary pollution, questions of inter-State liability under public international law may arise. See in particular the text in and at notes 11—13 above.

¹⁸⁹ See para. 1.3 of the IMO Guidelines: “[w]hen a ship has suffered an incident, the best way of preventing damage or pollution from its progressive deterioration would be to lighten its cargo and bunkers; and to repair the damage. Such an operation is best carried out in a place of refuge.” See also the background section (paras. 1.8—1.10) listing a number of additional advantages in accepting a ship into a place of refuge, as to opposed to refusing it. Para. 3.12, which is the only paragraph of the Guidelines indicating a presumption, provides that the State, after having balanced all factors, should “give shelter whenever reasonably possible”. EU Directive 2002/59 similarly presumes that the aim of the place of refuge plans is “to ensure that ships in distress may immediately go to a place of refuge subject to authorisation by the competent authority”.

¹⁹⁰ While the focus of this study is on civil claims and compensation, it may be noted that there are no guarantees that authorities accepting a ship to a place of refuge will remain outside the reach of criminal charges. Recent amendment proposals by the European Parliament with respect to the draft Directive on ship-source pollution and on the introduction of sanctions, including criminal sanctions, for pollution offences (COM(2003)92 final) indicate that there may be political demands for this type of penal measures to be expressly regulated in the EU. In the proposed amendment, “the competent (port) authority” is added among the parties potentially exposed to criminal liability in case of marine pollution. In the justifications for the amendment, the Parliament explains that: “[d]ecisions by the port authorities or responsible agencies may give rise to or exacerbate environmental pollution by shipping, for example, where the competent authority refuses a ship in distress access to a port or a safe anchorage.” See EP Doc. A5-0388/2003 of 13 January 2004.

(reasonable) losses and expenses, irrespective of negligence. It does not, however, guarantee that measures taken in a place of refuge situation meet the criteria for preventive measures. Nor does the current regime protect the authorities against claims for contributory negligence, which in turn may result in other losses for the coastal State. Finally, a coastal State accepting a ship into a place of refuge is not protected against other claims for liability for causing or contributing to the damage, notably those arising from recourse actions by the owner or the Fund, or claims which are brought against it outside the convention system.

It has been concluded that the key to obtaining a very significant protection for coastal States under the CLC/Fund (and most likely, in the future, the HNS) Conventions lies in whether the measures taken can be characterised as preventive measures, which depends on the *reasonableness* of the decisions made by the authorities, and in particular the reasonableness in light of the information available at the time of the decisions. The Bunkers Convention offers a weaker protection for parties taking preventive measures, as far as non-tanker ships are concerned.¹⁹¹

As long as the decisions are reasonable in light of the information available at the time, coastal States can generally be confident that they will recover their losses and avoid liability under the existing regimes. This must be considered to be an appropriate starting point, as there is no environmental, legal or other justification for protecting coastal States' action in a place of refuge situation irrespective of the reasonableness of its action. If a similar protection was granted to a coastal State whose decision and actions clearly fail the criteria of reasonableness, it might even create problems of consistency with the (few) provisions of general international law which govern this matter.¹⁹²

The critical issue, then, is how the reasonableness of the public authorities' action in a place of refuge situation is to be defined and assessed. This matter has not yet been considered by Fund's governing bodies or, as far as is known, by courts. It is possible that a slightly broader spectrum of considerations than those which apply for States to recovering the costs of clean-up and other customary preventive measures is justified in these situations. The best indication of what those considerations may entail is probably to be found in the IMO Guidelines on places of refuge. In this sense, the Guidelines may represent an important complement to the existing liability and compensation schemes, confirming the liberty of States to make their own decision on the access of ships into places of refuge, but introducing a range of criteria to be considered in this process. The purpose of the Guidelines is to ensure that the decision by a coastal State can be justified in light of all relevant factors available at the time, which is precisely what the essence of the legal requirements examined in this

¹⁹¹ In the Bunkers Convention, consisting of a single compensation tier only, the protection of the coastal State is weaker, in that there is no supplementary compensation to go beyond the liability of the shipowner, whether in terms of financial limits or as regards substantial coverage. Moreover, the absence of a channelling clause in the Bunkers Convention means that there is no 'responder immunity' for persons taking preventive measures. On the other hand, it may be presumed that incidents involving ships which are not tankers will present smaller risks for extensive pollution damage. Finally, since the application of the Bunkers Convention is entirely left to national courts, without the involvement of an international fund as a party, there is no guarantee that the understanding of various concepts which has developed in the practice of the IOPC Fund will be similarly understood and interpreted under the Bunkers Convention.

¹⁹² Notably Article 232 of UNCLOS and Article VI of the Intervention Convention.

chapter boil down to. Since the Guidelines and other relevant rules adopted recently nevertheless incline towards the *acceptance* of a ship in distress into a place of refuge, it is possible that their effects will be particularly reflected in the form of greater legal pressure on States that refuse such access.

Ultimately, the liability of States will depend on the applicable national laws, and it would appear that in most States this requires, as a minimum, proof of negligence on behalf of the authorities and a close causative link between that negligence and the ensuing damage. Proving that authorities have acted negligently is complicated by the discretion offered to public authorities in deciding on whether or not to accommodate a ship in distress to a place of refuge, both under general international law and in the recent IMO Guidelines on places of refuge. Yet, the guidelines offer a mechanism against which the decisions of the coastal State may be measured, at the procedural level at least, which may have implications for the assessment of its negligence and, thereby, on liability.

On this basis, a tentative conclusion (which will inevitably have to be a cautious one in light of the lack of any judicial or other experience in applying the IMO conventions – or the IMO Guidelines – to place of refuge situations) is that the regime set up by the CLC/Fund and HNS Conventions, in combination with the IMO Guidelines, offer a satisfactory degree of protection for coastal States in place of refuge situations. This conclusion obviously presupposes that both regimes apply in the EU coastal waters, which, as was concluded in chapter 2, is not yet the case.

4 Legal possibilities to complement the existing rules

4.1 General

The IMO Guidelines leave open the possibility that liability and compensation considerations will play a role in the assessment and decision-making process in place of refuge situations, by basing themselves on a case-by-case assessment of each individual request. To some extent such considerations are even explicit in the IMO Guidelines.¹⁹³ The financial and legal exposure of the coastal State, whether perceived or real, may thus be expected to play a role when the State decides on whether or not to accommodate the ship.

In order to avoid that matters related to liability and compensation overtake technical and environmental considerations in the decision-making, coastal States need to be assured that the applicable rules offer the necessary protection for them. On the basis of the analysis in the two previous chapters, the existing liability and compensation regime does not preclude risks for the coastal State, but the extent of those risks varies largely depending on the nature of ship and cargo involved and, of course, on the actions taken by the coastal State authorities. It may be, therefore, that States or groups of States consider that the new technical place of refuge standards bring about a new situation which needs to be reflected in the rules of liability and compensation. On those premises, some ways in which coastal States could possibly improve their protection against financial exposure will be briefly discussed below.

It should be emphasised, however, that the purpose of the discussion below is to illustrate that there may be ways to address the protection of coastal States in place of refuge situations, even within the currently existing legal framework. The examples given are only examples at an early stage of development and do not necessarily represent workable, or even desirable solutions, all factors being considered. Nor is the discussion below to be taken as an indication of the need to opt for any such additional solutions. Its ambition is limited to indicate a (non-exhaustive) list of examples of ways to enhance the protection of coastal States, should a need for that be identified by regulators.

The possibility leaving the greatest range of options for the coastal State is the enactment of independent and unilateral liability rules, based on the assumption that the existing international conventions do not enter into force and those that apply are denounced. This would allow the State(s) to agree on a number of specific criteria for the attribution of liability and compensation in a place of refuge situation or otherwise, including specific standards for liable parties, insurance, limitation and negligence, through which the division of responsibility between the ship and the coastal State could be laid down in great detail.

¹⁹³ See e.g. para. 3.9, listing among the factors to be analysed “whether the ship is insured or not insured” and “identification of the insurer, and the limits of liability available”. Para. 3.14 of the Guidelines provide: “[a]s a general rule, if the place of refuge is a port, a security in favour of the port will be required to guarantee payment of all expenses which may be incurred in connection with its operations, such as: measures to safeguard the operation, port dues, pilotage, towage, mooring operations, miscellaneous expenses, etc.” See also Appendix 2, para. 2.2 suggesting that the authorities pose themselves the question: “[i]s a bank guarantee or other financial security acceptable to the coastal State imposed on the ship before admission is granted into the place of refuge?”

The remaining part of this chapter will not address the option of denouncing the existing liability regimes. Rather, it represents an assessment of the possibilities to complement the existing liability and compensation regimes, by means of additional measures. The starting point for this part is the same as that taken by the Commission in the ‘Erika-2 package’ (COM(2000)802 final), that is, that any additional liability and compensation rules should fit within the existing legal framework and should, if possible, improve it without distorting its effective operation. That point of departure for the policy also underlies a number of other Council Decisions which have been referred to above.¹⁹⁴

This starting point reduces the options available for coastal States, given the exclusive nature of the existing maritime liability regimes in relation to additional compensation claims. The design of the liability regimes presents States with a number of legal restraints when seeking to improve the protection of claimants generally or to improve their own financial protection in place of refuge situations. As is shown, however, this does not necessarily mean that additional measures by coastal States to improve their protection are entirely excluded.

The options that will be explored below include the option of clarifying the international conventions with respect to place of refuge situations (section 4.3); voluntary agreements with the maritime industry (section 4.4); the imposition of additional financial security requirements for ensuring a complete recovery of a coastal State’s losses in a place of refuge situation (section 4.5.1) or for access to insurance more generally (section 4.5.2); the establishment of a separate fund for the same purpose (section 4.5.4); and the potential elaboration of specific Community legislation in relation to certain aspects of places of refuge (section 4.5.3). Any new measure to improve the protection of coastal States must have regard to various limitations imposed by public international law for authorities’ measures relating to ships in distress, some of which are initially outlined in section 4.2.

4.2 General limitations derived from public international law

While a State’s right to place conditions on a foreign ship’s right of access to its ports or waters is widely acknowledged in international law, it is subject to a number of limitations, some of which are particularly important in a place of refuge situation. First of all, the right to place conditions on foreign ships’ access to ports is not an absolute right to start with. It is derived from the State’s territorial sovereignty and is implicitly acknowledged by UNCLOS Articles 25(2) and 211(3), but may be limited by the States’ treaty commitments or by general principles, such as non-discrimination, the requirement of good faith and considerations of reasonableness.¹⁹⁵ Moreover, UNCLOS Article 300 provides that even if a right to deny a ship entry is deemed to exist, it must not be abused.

Second, the distress element which is inherent in the place of refuge situation circumscribes the liberty of the coastal State. Traditionally, ships in distress were considered to enjoy a right of access to ports, and to enjoy immunity of some local rules in that context. The legal status of such a right is currently uncertain, and by now it seems doubtful that a ship involving environmental hazards would have a right to enter any port of its choice, in

¹⁹⁴ See at notes 73 and 76 above.

¹⁹⁵ On these considerations, in a different context, see Molenaar (1998), pp. 115—117.

particular if there are no human lives at risk.¹⁹⁶ A more realistic description of prevalent international law on this point is probably that each request for a place of refuge needs to be considered individually and be assessed in light of the advantages and disadvantages involved in the accommodation/refusal of the ship.¹⁹⁷ This, too, can obviously place limits on port States' liberty to deny access to ships in distress.¹⁹⁸

Third, ships in distress may not always be in need of a port (or even internal waters) as a place of refuge. Sometimes the necessary measures to assist the ship could be undertaken in sheltered waters in the territorial sea, where ships in distress have certain explicit rights of stopping and anchoring. In the territorial sea, ships have a right of innocent passage, which under UNCLOS Article 18 includes stopping and anchoring in distress situations, as long as the pollution itself does not render the passage non-innocent, which will only very rarely be the case.¹⁹⁹ In international straits subject to the regime of transit passage, ships enjoy a right of 'continuous and expeditious' transit, but in this case too, those criteria are relaxed where "rendered necessary by *force majeure* or by distress".²⁰⁰ Denying ships in distress their right to stop or anchor in such areas will thus presumably require even stronger legal and factual justification.

Fourth, as was indicated in section 2.2 above, the obligations of States to protect their environment, as laid down in UNCLOS, may involve limitations on the possibility of States to refuse access to a ship involved in an environmental emergency. The prohibition to pollute other States' environment through activities which are under the jurisdiction or control of the coastal State (Article 194(2)) applies to the coastal States activities in a distress situations in its waters, as does the prohibition to transfer, directly or indirectly, damage or hazards from one area to another (Article 195). As was shown earlier, certain provisions even go as far as providing for State liability in case the protective measures which the coastal State has taken are "unlawful or exceed those reasonably required in the light of available information" (Article 232, and Article VI of the Intervention Convention).

Taken together, these provisions may place important limitations on the coastal State's liberty to decide freely on the access of a ship in distress into a place of refuge. Such limitations apply irrespective of the applicability of the IMO liability conventions or of any national or regional rules related to places of refuge.

¹⁹⁶ See note 10 above.

¹⁹⁷ This, as has been noted, is also the approach taken in the IMO Guidelines.

¹⁹⁸ Such limits have been recognised in Community law. See e.g. Regulation 417/2002 on the accelerated phasing-in of double hull or equivalent design requirements for single hull oil tankers, as amended by Regulation (EC) No 1726/2003, which in its Article 8(1) provides that Member State may allow, "under exceptional circumstances, an individual ship to enter or leave a port or offshore terminal or anchor in an area under the jurisdiction of that Member State, when... an oil tanker is in difficulty and in search of a place of refuge..."

¹⁹⁹ In the pollution context, passage will only be considered non-innocent if the dual criteria of 'wilful and serious pollution' (Article 19(2)(h)) is met, which will obviously rarely apply to ships seeking a place of refuge. On the interpretation of this provision in the post-UNCLOS State practice, see the Final Report of the International Law Association's Committee on Coastal State Jurisdiction Relating to Marine Pollution (2000) (available at <http://www.ila-hq.org/pdf/Coastal.pdf>), in particular at pp. 12—15 and 51—54.

²⁰⁰ UNCLOS Article 38 and 39(1)(c).

4.3 Changes to the international regime

The broadest possibilities to change the current liability regimes for places of refuge situation without distorting the international unity could be arrived at through amendments to the relevant international conventions. The option of more fundamental alteration of the IMO pollution liability conventions shall not be further discussed here, as it is evident that such a change is beyond the control of a group of States only.²⁰¹ Yet, since the analysis above indicates that the potential concerns of coastal States could perhaps in part be addressed by less radical measures than amendments of the conventions, some of those measures shall be briefly considered below.

A relatively simple solution could be the adoption of an IOPC Fund Resolution to clarify the role of preventive measures for States accepting a ship in distress into a place of refuge. Such resolutions, while formally non-binding, may nevertheless have significant legal effects, as they indicate the wish of the Parties to the conventions.²⁰² There are several existing examples where the Fund has sought to clarify its understanding and interpretation of individual issues by means of Resolutions adopted by its Assembly. On the basis of the analysis of potential gaps in the compensation and liability of coastal States, one could in particular consider a clarification that the whole range of measures taken on behalf of coastal States in a place of refuge situation generally are to be considered to represent preventive measures. Alternatively, this interpretation could be limited to decisions made by coastal States to *accept* a ship into a place of refuge only.²⁰³ Either way, the uncertainties in relation to the interpretation of ‘reasonableness’ could be alleviated and public authorities could be largely confident that they avoid compensation claims by other parties. In addition, such an interpretation would serve to limit the applicability of the ‘contributory negligence’ regime for them.

Another possibility is to consider whether the compensation of environmental damage, which is not linked to loss of profit, could be further extended and clarified in light of the adoption of Directive 2004/35. An extension of this type was proposed by the Commission in its ‘Erika-2’ Communication of 2000,²⁰⁴ and contributed to the new criteria being introduced in the 2002 Claims Manual. However, at the time the EU-wide regime for assessing and remedying damage to the environment was not yet established.

²⁰¹ It is to be noted, however, that a more fundamental revision of the CLC/Fund system is currently being discussed in the Third Intersessional Working Group of the IOPC Fund, which provides an opportunity for the Community and/or EU Member States to propose specific modifications to address the liability and compensation in relation to places of refuge. Even if such revisions were to be agreed upon, it seems clear that the adoption of potential new protocols and the subsequent replacement of the existing regime by the new one will take many years.

²⁰² Article 31(3)(a) of the Vienna Convention on the Law of Treaties provides that, when interpreting treaties, account shall be taken of “any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions”.

²⁰³ See also Hetherington (2004), p. 463, proposing a draft wording for a potential new sub-paragraph of CLC Article III(4), excluding from compensation claims: “any State, port authority, all their servants and agents and any other person or corporate entity granting a place of refuge to a vessel.”

²⁰⁴ COM(2000)802 final.

4.4 The 'voluntary' approach

4.4.1 Conditions for access to a place of refuge agreed *ad hoc*

The relative freedom for States under the law of the sea to impose conditions for access to its ports could possibly be used for imposing specific conditions on ships in distress when they request permission to enter a place of refuge. One may, for example, conceive that the coastal State requires the shipowner to agree on an *ad hoc* basis, on the spot, to various additional requirements as a condition for access. A typical – and not entirely hypothetical – example in the field of liability would be a requirement that the owner denounces the right to limit his liability in a place of refuge situation.²⁰⁵ Such a 'voluntary' denunciation of the owner's limitation right may be legally possible, depending on its form.²⁰⁶ The most obvious risks with this type of *ad hoc* solutions, from an environmental point of view, are that they may delay the place of refuge operation and may divert attention from the environmental and technical criteria established for the decision-making process. Another plausible risk with this particular example is that owners and their insurers may not agree, which in reality turns the invitation for voluntary measures into a blanket refusal of access.

If so, the access to port requirement easily defeats the purpose of places of refuge, as it amounts to a *de facto* refusal of any ship in distress from any place where the requirement applies, irrespective of the particularities in the individual situation. That consequence does not appear to fit within the current policy framework for places of refuge,²⁰⁷ nor does it appear compatible with the coastal State's responsibilities under international law, as outlined in section 4.2 above. The emerging regime for places of refuge, as laid down in Directive 2002/59 and the IMO Guidelines, is also based on the balancing of a variety of factors and seem to exclude that one single aspect guides the decision.²⁰⁸ An additional observation with respect to such requirements relates to the presumed negative consequences the measure would have, should the owner agree, on the application of the existing liability and compensation mechanisms. Uncertainty about the owner's liability would probably persist until a final judgment is given, which may well complicate and delay the role of the existing compensation regimes and, thus, the compensation of other victims of the pollution.

²⁰⁵ Requirements which may include the denunciation of limitation rights under CLC and other conventions as a condition for access to a place of refuge have recently been adopted by Spain through Article 21(5)(g) of Royal Decree 210/2004 of 6 February 2004 (see Boletín Oficial del Estado No. 39, p. 6868 or <http://www.alavela.com/downloads/Legislacion/RD2102004.pdf>).

²⁰⁶ As in most maritime law jurisdictions, waiving the owner's right to limit liability goes beyond the authority of the Master, other mechanisms of consent would be required for such agreement to be legally effective.

²⁰⁷ *De facto* refusals are particularly problematic when viewed at from an EU perspective. Unless such rules are applied jointly throughout the wider geographical area, this type of solution involves obvious risks of 'place of refuge shopping' as between Member States, which is neither in the interest of neighbouring States nor of environmental protection generally.

²⁰⁸ Requirements relating to the liability of the owner and others go beyond the scope of the IMO Guidelines and EU legislation for the time being. The denunciation requirement in the example above would thus not as such conflict with those provisions. That does not exclude, however, that the application of such a requirement could be incompatible with the technical criteria established for the purpose of assessing place of refuge situations, if it would affect, let alone negate, the relevance of those criteria.

4.4.2 Access conditions worked out in advance

Additional access requirements for ships in distress would, therefore, seem more appropriate and legally permissible if the requirements have the potential of being accepted by both coastal States and the representatives of the ship concerned. A more forthcoming variant of a this type of solution could be based on an agreement between the parties involved, worked out in advance by way of a common understanding. This could take the form of agreeing on the spot to the application of specific access conditions, which are pre-made for the purpose and agreed in advance by coastal States and the maritime industry interests alike, bearing some similarity to the practice of how salvage contracts, or the SCOPIC Clause are made applicable.²⁰⁹ The European Community is better placed than most groups of States to engage in such a dialogue with the maritime industry, by for example using the regular contacts of the Commission and EMSA with key industry partners, such as shipowners' organizations, the International Group of P&I Clubs and representatives of salvors.

The substance of such an agreement will obviously have to depend on the negotiations and cannot be outlined unilaterally by either party. Considering, however, the range and extent of potential concerns of coastal States, it would, on the basis of the above analysis, seem particularly important to improve the guarantees for the case where refuge is requested by a ship which is not an oil tanker, or where the CLC/Fund regime otherwise does not apply. One could, for example, consider an undertaking by the P&I Clubs, developed in co-operation with coastal States, that in specific (clearly defined) place of refuge situations, liability insurers will indemnify the liabilities and losses of the State which result from damage incurred in the course of the place of refuge operation.²¹⁰ Financial security requirements are not, as such, excluded by the IMO Guidelines.²¹¹ Such arrangements ought to be feasible, in

²⁰⁹ It is notable that the International Group of P&I Clubs have recently drafted a standard letter of guarantee for place of refuge situations. The text of this guarantee is submitted to IMO's Legal Committee in IMO Doc. LEG 89/7/1, Annex.

²¹⁰ See also Hetherington (2004), at pp. 465—466, referring to P&I letters of comfort or letters of undertaking as a potential model. Here it is noted that in some instances P&I Clubs do provide such guarantees, but that they are likely to oppose any guarantees which would waive any reliance on applicable limitation rights. This assumption appears to be confirmed by the model letter drafted by the P&I Clubs, referred to in the previous footnote, which mentions a guarantee of USD 10 million and stresses the rights of the owner and the club to limit their liability in accordance with applicable law.

²¹¹ See in particular the last point of Appendix 2, para 2.2, suggesting that the authorities pose themselves the question: “[i]s a bank guarantee or other financial security acceptable to the coastal State imposed on the ship before admission is granted into the place of refuge?” Specific requirements on (potentially sizeable) financial guarantees are imposed through Articles 22 and 23 of the Spanish Royal Decree 210/2004 (note 205 above), implicating a wide number of parties (ship operator, owner, salvor or cargo interests). See also the *Long Lin* Case referred to in note 10 above.

Article 8(2) of the ‘environmental liability Directive’ (section 2.7 above) provides that the authority “shall recover, inter alia, via security over property or other appropriate guarantees from the operator who has caused the damage or the imminent threat of damage, the costs it has incurred in relation to the preventive or remedial actions taken under this Directive”. In relation to salvors, see also Article 21 of the Salvage Convention, which provides that the person liable to pay the salvage award shall provide “satisfactory security” upon the request of the salvor, and that failure to put up such security may result in that the salvaged ship and property are prevented from being removed from the port or other place of first arrival.

light of the fact that P&I cover generally by far exceeds the owners' liability limits as set out in the conventions.²¹²

If a similar arrangement were to be extended to cover incidents which are already covered by the existing IMO liability conventions, care should be taken not to complicate the application of that system with respect to other claimants. The financial security should therefore probably be limited to cover the coastal State authorities only and should not affect the compensation of other victims of the incident. To avoid double compensation, the agreement could, and probably should, be based on a corresponding commitment on behalf of the coastal authorities not to seek compensation from other sources (i.e. the IOPC or HNS Fund). In this form, the arrangement would not hamper the compensation of other claimants, but would, on the contrary, make more compensation available to them by relieving the Funds from the authorities' claims. Here too, however, widespread acceptability of the requirements is essential to ensure their legal legitimacy and to prevent the risk of defeating the purpose with the emerging regime for places of refuge.²¹³

Throughout the history of maritime pollution liability, the compulsory regime has been complemented by more informal agreements involving the liability insurers.²¹⁴ There is no immediate reason why places of refuge could not be another of those cases. It ought to be feasible, not least as the admittance of a ship into a place of refuge in the end is designed to avoid or to mitigate damage, which is clearly an interest which shipowners and liability insurers can be expected to share for commercial reasons.

4.5 Legislation which could be applied at a regional level

4.5.1 Financial guarantee requirements

The prospective solutions need not necessarily be in the form of voluntary commitments to be legally defensible under the existing liability regimes. As noted above, various 'exclusivity clauses' of the CLC and HNS Conventions seek to ensure that the parties involved in the incident are protected from any additional liability or claims apart from those laid down in the conventions. In particular, they include a clause providing that "no compensation claim shall be made against the owner otherwise than in accordance with this

²¹² See section 2.4. In the case of oil pollution liability, for example, owners are covered for legal liabilities up to US \$ 1 billion, but have a *de facto* unbreakable right to limit their liability to something between \$ 6 and 150 millions, depending on the size of the tanker. This higher insurance cover is thus only 'virtual' in places where the CLC applies.

²¹³ Cf. section 4.4.1 above. It could also be noted that when it comes to the *release* of detained ships, UNCLOS contains a number of provisions stressing the importance of the reasonableness of any requirement on a bond or financial security (see e.g. Articles 73(2) and 226(1)(b)) and even contains a fast-track procedure for an international court or tribunal to assess the reasonableness in this regard (Article 292). It appears justified to assume that the requirement of reasonableness applies to securities required for the entry into ports as well, in particular if the entry is not 'voluntary' in nature. (In this sense, Articles 218(1) and 220(1) limit the port State's environmental enforcement jurisdiction to ships which are 'voluntarily' in their ports or terminals.)

²¹⁴ For two recent proposals by the P&I Clubs to participate more extensively in the compensation of claims where the Supplementary Fund applies, see the 'Small Tanker Oil Pollution Indemnification Agreement', in which the P&I Clubs proposed to raise the limits of the compensation of small tankers (See IOPC Doc. 92FUND/WGR.3/14/7, Annex II) and a subsequent proposal to share the burden of the Supplementary Fund on a 50/50 basis, based on a contract with the IOPC Fund (IOPC Doc. 92FUND/WGR.3/22/13 of 7 May 2004).

Convention”²¹⁵ and that the owner loses the limitation right only “if it is proved that the pollution damage resulted from his personal act or omission, committed with the intent to cause such damage, or recklessly and with knowledge that such damage would probably occur”.²¹⁶ Similar protection is offered to a range of other parties, who are not subject to liability at all under the conventions.²¹⁷ These provisions, however, rule out additional *compensation claims* for pollution damage, not necessarily requirements on additional *financial security*. While it will not be legally possible, in the absence of a specific agreement to that effect, to apply financial security requirements which are based on the same liability principles as the IMO conventions, there may be solutions outside the framework of liability and liability insurance.

One solution could be to require ships, as a condition for access, to take out an accident insurance policy indemnifying the place of refuge for damage and losses it might sustain in the course of the operation. Such insurance could be underwritten on an *ad hoc* basis, on the basis of a pre-made agreement on scope and coverage, or could perhaps form part of the more general insurance requirements for ships trading to or from EU ports. This type of insurance would presumably not be provided by the ship’s liability insurer, but could be purchased on the commercial insurance market and could hence be specifically designed for the purposes of meeting the coastal State’s concerns about financial exposure in places of refuge situations. The more detailed terms of such insurance policies would have to be laid down separately, if possible in agreement with a larger group of States. The limitations on entry into port requirements which have been discussed earlier in this chapter would apply for this type of financial guarantee as well, but as opposed to the measure discussed in section 4.4.2, this one entails the advantage that it is not limited to cases where P&I cover is already in place.

One might also consider the possibility of requiring this type of indemnification to be made by owners following a pollution incident in general. The obligation of shipowners to take active part in the preventive measures following a pollution incident is not regulated in the liability conventions, apart from the right of owners, like any other persons, to be compensated for (reasonable) costs of (reasonable) preventive measures.²¹⁸ One could even contemplate whether, in that case, failure to make such indemnification could amount to ‘recklessness’ within the meaning of the conventions,²¹⁹ thus involving the possibility that his right to limit his liability may be lost in case of non-compliance.

A risk with this sort of additional insurance from a different source is that it may complicate the functioning of the laws and institutions already in place for compensating damage. This is a real risk, but such problems could probably be minimised through a careful drafting of the terms of the insurance policy. Here, too, the insurance should probably be restricted

²¹⁵ CLC Article III(4), HNSC Article 7(4). See also Bunkers Convention Article 3(5).

²¹⁶ CLC Article V(2), HNSC Article 9(2).

²¹⁷ Same as note 215.

²¹⁸ See Fund Convention 4(1), and the corresponding HNSC Article 14(2): “Expenses reasonably incurred or sacrifices reasonably made by the owner voluntarily to prevent or minimize pollution damage shall be treated as pollution damage for the purposes of this Article.”

²¹⁹ CLV Article V(2), HNSC Article 9(2) and LLMC Article 4.

exclusively for the benefit of the public authorities of the coastal State. In its widest form it could cover any eligible compensation claims brought against the Government authorities as a result of the accommodation of ship in distress. As a narrower alternative, it could be limited to expenses or losses which are not covered by existing compensation mechanisms.

4.5.2 Requirements on access to insurance

The effectiveness of the liability rules is in practice closely connected to the availability of, and access to, the insurance cover. This is of particular relevance in shipping, as the owner or other liable person may not be clearly identifiable, may not be solvent or it may perhaps be impossible to sue that person in a convenient jurisdiction, where the judgments issued could be enforced where his assets are to be found.

As was already noted in section 2.4, there is presently no obligation for ships or their owners to maintain liability insurance outside the specific international liability regimes. This may present two types of concern for potential claimants. On the one hand, there is a risk that there is no liability insurance at all. Unless the IOPC (or HNS) Fund applies to the incident in question, this will severely reduce the likelihood of claimants receiving their compensation. On the other hand, even if a vessel is insured in a leading P&I Club, claimants will generally not have access to that coverage, due to the absence of a general right of direct action against the P&I Club. This may have the consequence that the claimant might not benefit from the liability insurance at all, even if it is in place. It also means that the claimant's negotiation power is reduced in the settlement of a claim.

For such reasons, the introduction of rights of direct action is beneficial to claimants and, as has been shown, the IMO pollution liability conventions do include such provisions. It is conceivable, however, that claimants could obtain rights of direct action even in the absence of (applicable) international liability conventions. Some European States already provide for rights of direct action against foreign insurers and this also forms part of the insurance requirements of OPA 90 in the USA. On that basis, there is no immediate obstacle for envisaging a similar regional rule within the EU, in particular as the issue has already been touched upon in a couple of instances.

In the Community system for recognition and enforcement of judgements, described above in section 2.8, a right of direct action against a liability insurer at the place where the damage occurred is allowed "where such direct actions are permitted".²²⁰ While this provision clearly requires that direct action shall be permitted under the law of the court seized, it is not entirely clear whether it also requires as a condition that direct action is permitted under the insurance contract in question, and whether, in that case, the national law of the court seized can override prohibitions of direct action laid down in the insurance contract. This issue is particularly important in shipping, given the 'paid to be paid rule' which forms part of the P&I Club rules.

In this respect a current Community initiative seems to offer clarification. The Commission's proposal for a Regulation on the law applicable to non-contractual obligations (the 'Rome II

²²⁰ Brussels Regulation Article 11(2); Brussels Convention Article 11(2); Lugano Convention Article 11(2). See also section 2.9 above.

proposal²²¹) gives explicit precedence for the law of the court seized in the matter in its Article 14, and thus clarifies that there may be direct action irrespective of the terms of the insurance contract.²²² Thus, if direct action were to be allowed in mandatory legislation, the proposed clause would have the consequence that such actions could not be prevented by clauses in the insurance contract, such as the ‘pay to be paid clause’. However, while this could certainly be a welcome development for victims of pollution incidents, it would not in itself affect the fact that the *scope* of the insurer’s obligations is still determined by the insurance contract.²²³ Moreover, for the purpose of the present study, it should also be noted that such a Community system for recognition and enforcement of judgements, would not alleviate all concerns in respect of claims arising after place of refuge situation. Some of these claims may be considered to represent public law claims and thus, under the case law of the European Court of Justice, fall outside the scope of this system.²²⁴ In order to ensure direct action against the insurer for such public law claims, separate rules would be needed.

4.5.3 Regional rules on pollution liability

It was concluded in section 3.5 above that many issues relating to the application of the existing international rules in place of refuge situations ultimately depend on the national law of the State concerned. With respect to the international liability regimes in place, this is notably the case for the eventual success of recourse actions against the State by the shipowner or the Fund, but may extend to various other matters which are not conclusively regulated in the conventions. The role of domestic law is obviously even more significant for matters which are outside the scope of applicable international compensation regimes.

As opposed to most other groups of States, EU Member States have a legal framework in place for harmonising their national laws in this respect, which might be used as a tool for reducing potential concerns related to places of refuge. An EU Regulation specifically exempting Member States from any liability in cases where they accept a ship into a place of refuge is probably not realistic. The extent to which public authorities generally can be held liable for its acts or omissions varies considerably among EU Member States, but it seems improbable that any of the legal traditions would admit such a complete exclusion of liability, independently of an assessment of the alleged unreasonableness or negligence involved.²²⁵ With the appropriate limitations, however, EU measures seeking to increase the protection of coastal States in place of refuge situations need not be excluded.

²²¹ COM(2003)427 final.

²²² Article 14 reads: “[t]he right of persons who have suffered damage to take direct action against the insurer of the person claimed to be liable shall be governed by the law applicable to the non-contractual obligation unless the person who has suffered damage prefers to base his claims on the law applicable to the insurance contract.”

²²³ For this reason, compulsory insurance arrangements, such as those in the IMO liability conventions, usually combine the direct action requirement with specific provisions on the annulment of certain policy defences.

²²⁴ Case 814/79, *Netherlands State v Reinhold Rüffer*, [1980] ECR 3807.

²²⁵ See also the restraints imposed by UNCLOS Article 232, providing for liability for measures “which are unlawful or exceed those reasonably required in the light of the available information” and requiring States to “provide recourse in their courts for actions in respect of such damage or loss”. Similar restrictions could also stem from other branches of international law, such as human rights law and, in the case of the EU, from internal measures, such as the environmental liability Directive (see in particular note 112 above).

For example, a more focused measure aimed at minimising the risk for recourse actions by the shipowner or the Fund within the IMO liability regimes might well be feasible. There is nothing to prevent EU Member States from laying down the standard of care required public authorities in place of refuge situations in more detail. More precise rules on the rights and obligations of coastal States, and on those of the ships involved, would not only clarify the exposure of coastal States to liability, but would also harmonise the position of Member States in this regard. In its simplest form such a result could be arrived at through a more explicit incorporation of (parts of) the IMO Guidelines into Community law. A more elaborate idea, based on the introduction of an obligation for shipowners to take out insurance in favour of the place of refuge was discussed in section 4.5.1 above.

Another example of a Community-based approach to places of refuge could be a common policy with respect to ratification and reservations to the LLMC Convention. Insofar as the LLMC regime is deemed to be desirable among Member States at all, it is evident that the 1996 Protocol offers significantly better protection for victims of pollution incidents, whether in a place of refuge situation or otherwise, than the 1976 Convention, which is still the most commonly applied version among Member States. With respect to reservations, the LLMC gives the possibility for States to make exceptions with respect to certain claims of relevance in place of refuge situations, such as claims relating to wreck removal. Moreover, as was noted in section 2.3 above, the 1996 Protocol offers a possibility for its Parties to exclude claims under the HNS Convention from its scope. Making use of this possibility would have the effect that potential damage following a ship carrying HNS cargo would be subject to national laws (and, as from June 2007, the EU environmental liability Directive) which in reality in most States would imply a broadening of the range of liable persons, and of the right of the parties involved to limit their liability. In addition, a joint reservation excluding HNS claims from the LLMC regime would no doubt serve as a significant incentive to speed up the ratification of the HNS Convention.

4.5.4 'Back-up' compensation of coastal States

It has sometimes been suggested that local communities which have been designated places of refuge might deserve some form of compensation for that reason alone, irrespective of potential incidents taking place in that area. This option shall not be further discussed here, as it is not related specifically to the laws on maritime liability and compensation. Suffice it to note that while this option would probably change the attitude of some communities when it comes to the *designation* of places of refuge, it is no guarantee that it will affect the willingness of the authorities concerned when it comes to *implementing* the responsibilities arising in an individual distress situation.

A more targeted modification of this idea is that ports and other coastal authorities should be financially encouraged to improve their facilities to deal with ships in distress. It is generally for public authorities to bear the costs for the preparedness and response capacity which is required by various international instruments.²²⁶ Clearly, there is nothing to prevent the EU

²²⁶ Such as the 1990 International Convention on Oil Pollution Preparedness, Response and Co-operation and the 2000 Protocol on Preparedness, Response and Co-operation to pollution Incidents by Hazardous and Noxious Substances.

from establishing a fund, specifically designed for places of refuge, to help financing coastal States' response equipment and other capabilities to receive ships in distress. Such a fund could supplement the existing EU-wide co-operation framework for marine pollution²²⁷ and could, in line with the 'polluter pays principle',²²⁸ be financed by ships calling at EU ports, either generally or in a more targeted fashion by focusing on specific high-risk ships, such as oil and chemical tankers. The fee could be collected on the basis of individual port calls, or perhaps in the form of long-term 'subscriptions' providing the ship with a certificate to be verified in EU ports. It is also conceivable that payments to such a fund could be made by cargo interests, on the basis of the information which States collect for the contribution to the IOPC (and HNS) Fund. The European Maritime Safety Agency, which has recently been endowed with tasks relating to pollution response,²²⁹ could be well-placed to administer such a fund. At the national level there are several such mechanisms in place, which may well serve as models for the purpose.²³⁰ A major advantage with such an EU place of refuge fund is the flexibility with regard to its potential uses. Apart from assisting in ensuring the availability of facilities and response equipment for receiving ships in distress, it could also serve to indemnify coastal States for potential financial losses incurred while accepting ships into a place of refuge.²³¹ This, in turn, might well reduce the need for many of the other potential solutions discussed in this chapter.

²²⁷ Established by Decision 2850/2000/EC on a Community framework for cooperation in the field of accidental or deliberate marine pollution.

²²⁸ This principle, which is already codified in a multitude of international environmental conventions, is also a cornerstone of the EU environment policy, as laid down in Article 174(2) of the Treaty establishing the European Community.

²²⁹ Regulation 724/2004 of 31 March 2004 amending Regulation 1406/2002 establishing a European Maritime Safety Agency. According to a new Article 1(3) the Agency's shall, among other things, "support on request with additional means in a cost-efficient way the pollution response mechanisms of Member States, without prejudice to the responsibility of coastal States to have appropriate pollution response mechanisms in place and respecting existing cooperation between Member States in this field."

²³⁰ The Finnish Oil Pollution Compensation Fund (established by Act No. 379/74, as amended) is particularly illustrative for the purpose. Interestingly, Section 2(1) of the Act makes the fee to be paid by "whosoever declares the oil for customs clearance" dependent on the type of ship involved, by providing that "[a] double charge shall be collected if the oil is transported in a tanker vessel not fitted with a double bottom over the entire cargo hold". Another example is the Japanese Maritime Disaster Prevention Center (MDPC), which is funded jointly by government and industry. Oil tankers entering terminals in Japan are required to ensure that they have access to available response equipment, provided by the MDPC, and shall participate in the funding for this purpose. See the website of the International Tanker Owners' Pollution Federation, www.itopf.com/country_profiles.

²³¹ It has sometimes been suggested that the newly established European Solidarity Fund (Council Regulation 2012/2002) could serve a similar purpose of indemnifying States for maritime pollution incidents. However, the Solidarity Fund, which is financed by public money, was created to deal with 'major disasters' of a magnitude, which is unlikely to apply in place of refuge situations, or exceptionally with "an extraordinary disaster, mainly a natural one" (where there is no 'responsible person' to claim the money from). Marine pollution incidents are very different in this respect, whereby the 'polluter pays principle' would seem to be a more appropriate starting point, in particular as this principle forms part of the Community's environmental policy (see note 228 above). See also Recital No. 7 of the Solidarity Fund Regulation, specifically preserving the applicability of the polluter pays principle.

5 Summary and Conclusions

The starting point of this study, as outlined in its introductory chapter, has been that liability and compensation rules should only play a limited role in the relevant authorities' decision-making process on whether to allow or to refuse a ship's request for access to a place of refuge. Their role should be to encourage and support decisions made on sound technical-environmental grounds in the individual place of refuge situation and to discourage the opposite. At any rate, liability and compensation rules should not have the effect of discouraging the accommodation of ships in distress by entailing sizeable financial risks for the coastal State.

It has been concluded that the existing legal framework does not adequately live up to those standards. This is particularly the case with respect to risks associated with incidents and substances which are not covered by any international liability and compensation regime in force, which today covers all incidents not falling under the scope of the liability regime for oil pollution caused by tankers. For any other case, as was concluded in chapter 2, the accommodation of ships in distress may involve considerable financial risks for the coastal State and the situation varies widely from one Member State to another. There is no general regime of strict liability, which normally significantly complicates the compensation of victims, nor is there any second layer of protection in the form of a compensation fund available. Instead, the liability of the parties involved will normally be decided on the basis of national laws, but in the absence of insurance requirement for all ships, there is no guarantee that the ship has liability insurance and, even if it has, claimants may not have access to it if the insurer can use any of its defences. Moreover, in most Member States shipowners and others have a right to limit their liability under the LLMC regime, which means that the liability by those persons in most circumstances is likely to be very low in any event, the exact amount of the liability depending on a variety of factors, such as the size of the ship, the version of the LLMC which applies in the Member State concerned, the type of claims are at issue and on the extent to which specific reservations have been made. While the recent adoption of the 'environmental liability Directive' may introduce a strict liability for 'operators' in case of environmental damage, it is not intended to affect rights under the LLMC, nor does it improve compensation for other types of damage, such as property damage or economic losses. Moreover the Directive includes no specific insurance obligations at this stage.

The situation described above applies in maritime liability law in general, and could very well in itself represent a concern for EU Member States. In the specific case of place of refuge, such concerns may be exacerbated, as this type of diversity in the rules and levels available for liability and compensation may affect coastal States' preparedness to accommodate ships in distress to places of refuge, and could lead to 'place of refuge shopping', or at least 'forum shopping', whereby the liable person(s) seek to have the liability issue decided in a State where more lenient liability rules apply. Moreover, as the prospect of full financial recovery for all claimants may be reduced through the applicability of the LLMC regime and the potential absence of availability of and access to insurance, pressure for supplementary claims against other parties may increase accordingly. The place

of refuge situation may provide the opportunity for claimants to direct such supplementary claims against the public authorities.

A method which would be both effective and coherent with the current Community policy would be to ensure the rapid ratification of the existing IMO pollution liability conventions in all Member States with a coastline. In particular, the entry into force of the HNS Convention would significantly increase the protection for incidents involving ships carrying hazardous and noxious substances. Like the current regime for oil tankers, it would raise compensation limits significantly from those laid down in the LLMC, introduce compulsory insurance with direct action rights for claimants and establish a second tier compensation fund providing significant immunities from compensation claims for parties taking preventive measures, which includes reasonable measures taken by public authorities to prevent pollution. In addition, the HNS Convention offers an important complement to the existing oil pollution compensation regime, by covering some incidents and types of damage which are not presently covered by the CLC/Fund regime. The Bunkers Convention provides for less significant advances to the current situation, as the extent of the shipowner's liability is made dependent on the national law in the State concerned (explicitly including LLMC limitation laws).

Even where international regimes are in place, however, there are a number of instances in which the relationship between the accommodation or refusal of a ship into a place of refuge and the existing maritime liability and compensation conventions is not altogether straightforward. As regards the recovery of the coastal State's potential losses, section 3.2 concludes that the understanding of the term 'preventive measures' and the notion of 'reasonableness' which is inherent in the definition of such measures is of key importance. This is probably an appropriate starting point, as there is no justification for ensuring compensation for unreasonable measures taken by coastal States in place of refuge situations. However, the concept of reasonableness has not yet been applied to decisions taken by coastal State authorities in a place of refuge situation. On the basis of the IOPC Fund's policy on preventive measures by public authorities in general, it seems that compensation is not linked to what the preventive measures consist of, thereby leaving a degree of latitude for the coastal State to take the measures which it deems to be appropriate. Instead, emphasis is placed on the technical soundness of the decisions in light of the information available at the time of the decisions. This is considered to be an appropriate starting point in relation to measures taken in place of refuge situations.

A more serious concern for public authorities is probably that they could be held (partly) *liable* for the pollution occurring in a place of refuge situation. This question is considered in section 3.2 and here too, it emerges that the reasonableness of the coastal State actions is crucial for their protection from compensation claims under the CLC/Fund (and HNS) Conventions. Apart from this, there may be actions against the coastal State authorities by means of recourse actions, or claims being brought outside the convention system. Ultimately, the coastal States' exposure to liability depends on the national laws which apply to the case in question. It has been suggested that current initiatives within the IMO, EU and elsewhere to clarify the roles and responsibilities of the various players involved in a place of refuge situation will probably not be without effect on matters of liability and compensation.

In particular, the establishment of new criteria and obligations for coastal States when deciding whether and how to admit a ship into a place of refuge will presumably raise the standard of care expected of the State in charge.

In light of such conclusions, chapter 4 of the study has briefly considered some measures which could be available for EU Member States, should they consider it necessary to take additional action to reduce their financial exposure in place of refuge situations. *Whether* such rules are necessary is not considered in this study, as that decision will have to be based on risk-assessments which go beyond questions of law.²³² Some of the measures discussed in chapter 4 build upon existing regulatory instruments, ranging from ‘soft law’ solutions such as IOPC Fund Resolutions, through reservations to restrict the applicability of the LLMC to formal treaty amendments. Various new measures are also reviewed, both voluntary ones building on commitments by the maritime industry and mandatory requirements to be introduced in coastal States’ or EU legislation.

In brief, the key findings of the study may be summarised in the following bullet points:

- The current regime for liability and compensation of pollution damage is unsatisfactory. In the absence of specific pollution liability rules, which currently only exists for oil pollution by tankers, liability is governed by national law, but most Member States would still apply the general scheme for limitation of liability under the LLMC Convention. The instrument which is most commonly applied among EU Member States is the 1976 LLMC, which by now is profoundly out of date. Otherwise, too, the LLMC is an inappropriate instrument to govern pollution liability, as it gives a range of key persons a very solid right to limit their liability without regard to the risks at stake, and in effect irrespectively of the conduct by the persons involved. It prescribes for relatively low limits, linked to the size of the ship only and not to substances involved or damage caused. Another concern in the current situation is the absence of insurance obligations for ships, and the absence of rights of claimants to take direct actions against the insurer. In place of refuge situations, the absence of sufficient compensation increases the possibility that claims are directed against the public authorities.
- The regimes which apply in the EU Member States show great variations in terms of coverage and limitation amounts. The diversity of rules provides opportunities for the liable persons to affect their liability by choosing the forum where the case is decided.

²³² The risk of a place of refuge situation falling outside the coverage of the three existing pollution liability regimes has to be assessed against the risks and foreseeable benefits of potential complementary measures. While it is difficult to assess the former risk in the abstract, the fact that there has been no incident to date in which the compensation of authorities has been denied or diminished due to its own involvement, suggests that most risks of coastal States can be expected to be covered by the CLC/Fund and future HNS systems. With respect to the latter assessment, it should be borne in mind that while a regime protecting the authorities from any financial risks following a place of refuge situation probably would increase States’ readiness to accommodate ships in distress, it may not serve as a mechanism to encourage technically and environmentally sound decision-making in the process. The difficulties that new measures may cause to the operation of the existing regimes also need to be borne in mind.

- The only exception to that situation as of today is the regime covering oil pollution by tankers. While the system may be criticised for not being ‘fair’ in the sense that liability of the parties involved is not closely linked to their conduct, it does provide for an effective mechanism for compensating victims of pollution incidents, whether private persons or public authorities. It establishes a harmonised regime of strict liability, compulsory insurance, direct action and supplementary compensation by the IOPC Fund. The impending entry into force of the Supplementary Fund Protocol will ensure that most foreseeable damage caused by oil pollution from tankers can be compensated, for coastal States and other victims alike.
- The entry into force of the HNS Convention in the Community coastal waters would represent a most significant improvement to the existing liability situation. This would ensure that a whole set of potentially very dangerous cargoes would be subject to a similar regime to that applying for pollution damage caused by oil tankers. It would also complement the CLC by covering a number of potential types of damage, ships and cargoes which are not currently fully covered by the CLC. It is not certain if and when the HNS Convention will enter into force. Until then, a common policy among Member States not to accept claims relating to HNS within the scope of the (1996) LLMC would be a way to avoid that damage caused by HNS substances are subject to limitation. In this case, the EU Directive and national laws on (environmental) liability would govern the liability for pollution by those substances.
- The Bunkers Convention would provide for less dramatic improvements in this sense, but its entry into force in the EU would ensure widespread compulsory insurance requirements for ships entering EU ports, coupled with direct action rights, and requirements of a specific on-board certificate to this end.
- The structure and design of the CLC/Fund and HNS regimes is generally neutral as to the cause of the damage and ensures extensive protection for parties taking preventive measures to minimise pollution. Both elements should alleviate the concerns for financial or legal exposure by coastal States involved in a place of refuge situation. While the interpretation by the IOPC Fund of certain key concepts, such as the ‘reasonableness’ of preventive measures has not been tested in the specific context of places of refuge, the interpretation used in other contexts corresponds to international law and does not appear to give rise to specific concerns for coastal States involved with ships in distress.
- Whether a place of refuge situation falls under the scope of any of the existing liability conventions or not, the elaboration of new guidelines to be used when assessing requests for places of refuge is likely to raise the standard of care expected by the coastal State in dealing with such a request in the future. This is particularly true for EU Member States, as Community law makes reference to the IMO Guidelines. While the Guidelines are neutral as to the outcome of the decision on whether to accommodate the ship or not, they still lean in favour of acceptance of the request and, in any event, introduce a number of procedural and substantive criteria on which the assessment should be based. The application of these criteria may be of

relevance in deciding on the liability and other financial exposure of the State concerned.

- Despite the existence of a variety of relevant international rules, the liability of coastal States in a place of refuge situation will ultimately depend on the national law in the State where the case is decided. International law does, however, place certain limitations on how far national laws can go in avoiding liability for the State.
- To the extent that the existing international conventions are considered to be insufficient, there are possibilities to improve them, subject to a number of limitations imposed by general international law.
- It is acknowledged that amendments to the international conventions cannot be introduced by EU Member States alone, but the negotiation power of 25 States within the IMO should not be neglected. Moreover, useful measures to improve or clarify the role of a coastal State accommodating a ship into a place of refuge could be undertaken without formal amendments to the conventions.
- Additional measures are feasible, but have to be carefully designed in order not to conflict with the exclusive nature of the existing liability conventions or interfere with the technical-environmental assessment of the individual request of a place of refuge. The options discussed include the following:
 - To place additional entry requirements for ships entering places of refuge in the EU, either in the form of pre-made agreements with the parties concerned or by means of legislative measures. In either case, a number of limitations for such measures will apply under public international law.
 - To develop specific insurance requirements, either in terms of an obligation for shipowners to make specific insurance arrangements for the benefit of places of refuge or in the form of EU-wide rules on rights of direct action against maritime liability insurers.
 - To introduce legislation which could reduce the exposure for coastal State liability, and thus complement the existing liability conventions, both in relation to a common policy with respect to limitation of liability under the LLMC, and in relation to measures to reduce the risk for action within and outside the IMO pollution convention regimes against public authorities following place of refuge situations.
 - To establish a ‘back-up’ fund financed by the maritime industry to ensure that coastal States will not suffer financial losses for accepting ships in distress into a place of refuge.

The measures discussed are not necessarily mutually exclusive, nor is there a hierarchy proposed as between them. Apart from the solution discussed in section 4.4.1, which is not recommended, the line of action to be followed will have to depend on the desired outcome, as the measures discussed target different aspects of the liability and compensation of places of refuge.

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Annexes