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LEGAL GUIDE LINES IN CASE OF OIL SPILL
FROM VESSELS IN COLOMBIA

BY

MARIA OLGA PATRICIA ROJAS M

A paper submitted to the WORLD MARITIME UNIVERSITY in
partial satisfaction of the requirements for the award of a

MASTER OF SCIENCE DEGREE
IN
GENERAL MARITIME ADMINISTRATION

The contents of this paper reflect my own personal
views and are not necessary endorsed by the World Maritime
University or the International Maritime Organization


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To GOD.

To my parents Ramon and Olga who have always
given me love and encouragement

To Ivan Dario, Martha Helena and Claudia Ximena,
my brother and sisters, who believe in me.

To Petter my love and best friend.

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**LEGAL GUIDE LINES IN CASE OF OIL POLLUTION
FROM SHIPS IN COLOMBIA.**

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**LEGAL GUIDE LINES IN CASE OF OIL POLLUTION
FROM SHIPS IN COLOMBIA**

C H A P T E R I

A. OBJECTIVE : Legal Contingency Planning.

Legal contingency planing is necessary to guarantee the compensation for damage caused to victims by oil spills from ships. For the achievement of this goal, it is important to know what should be done , from the legal point of view, when spill a occurs.

The present work aims to be useful to persons in the government and private sector in Colombia who may be involved in legal cases of marine pollution from oil spills from ships. Basically, legal contingency planning is important for the following reasons:

1. The marine évironmental problems are not well known, not only among the common people in Colombia but also among lawyers and Tribunals. The classic system of judges and courtroom lawyers, avoids on many occasions the understanding of Colombia's environmental legislation.

Traditionally, Colombia has not been a maritime country, it is only nowadays that the colombian people are starting to have a marine consciousness. Colombia for

centuries has have a land mentality as a consequence of the Spanish colonialism and, of course, because of the productivity of the land.

As a consequence of the above, most of the law is based on the protection of individuals right on the land.

The marine rules that apply to our seas in which are defined the limits, duties and rights over the Economic Zone, Territorial Sea and Internal Waters are unknown.

The regulations on marine oil pollution from ships are dispersed among many civil and administratives rules and they are not substantial with reference to the concept of compensation.

The difficult situation described above is becoming worse the marine casualties are dealt with by common judges (when they are not solved by Tribunals of Arbitrament) who in most cases are not especialized in maritime matters.

The risk of a oil spill in Colombia is big. The National Contingency Plan has detected the following risk areas: 1) in the Caribbean Pozos Colorados, San Andres and cartagena, 2) in the Pacific Buenaventura and Tumaco.(1)

2. Another reason for the topic of this thesis is that the application of the international schemes related

(1) In 1987 Colombia's crude oil export accounted for 145,995 b/d. Petroleum Economist Data, 1989.

with to compensation for damage in case of an oil spill from a ship in Colombia waters is very complex:

Internationally the problem of compensation has been tackled by both governments and private sectors. The first corresponds to the IMO's conventions, and the second corresponds to tanker and oil industry agreements.

Since 1989 Colombia has been a member of the International Convention on Civil Liability for Oil Pollution Damage 1969, and its Protocol of 1976 (in the following it will be called the Liability Convention).

This means that the changes introduced by this Convention into the National legislation related to the concept of civil liability are rules that must be applied by the national maritime authority and civil judges.

The Liability Convention which is only one part of the intergovernmental solution is concerned with the civil liability of the tanker owner.

The other International convention concerns cargo owner obligations related to the damage from oil spills. This is the International Fund Convention for Oil Pollution Damage 1971 (later in this thesis called referred to as the Fund Convention 1971) of which Colombia is not yet a member.

The private schemes TOVALP and CRISTAL also apply in Colombia and concern the tanker owners' and cargo owners'

obligations respectively. Ecopetrol (The Colombian Oil Company) demands in the conclusions of the charter parties for the sale and purchase of oil the inclusion of this scheme in the pollution clause.

Finally, the issue about liability and compensation for oil pollution, was discussed in the last international meeting of the national authorities of the countries that belong to the South Pacific Permanent Commission C.P.P.S. and Panama.

The meeting organized by PNUM and IMO took place in Cartagena Colombia. The main point can be summarized as follows:

How can people claim a compensation? On many occasions claims are made incorrectly and as a consequence they are not well compensated. This was the Saint Peter case in 1976 in the Colombian waters where the Colombian government only got 850,000 USD.

The governments at the time of the conference recognized the necessity of harmonizing the national legislation in accordance with the intergovernmental schemes. Also they agreed on the creation of the necessary and specialized tribunals. (2)

(2) Newspaper " EL TIEMPO ", Bogota, December 1989.

CHAPTER I I

A. INTERNATIONAL MARINE ENVIRONMENT LAW RELATED TO OIL SPILL

1. The Transportation of Oil as a factor of Environmental Risk:

Oil forms a comparatively small part of the total pollution of the seas. In most areas, sewage from towns and cities, effluent from factories often entering the seas through rivers and then run-off of pesticides and herbicides used in farming are potentially a greater hazard to the marine environment than oil. In many cases, such pollutants are much more dangerous not only because they poison fish and other marine life but because, by entering the food cycle, they can ultimately threaten human life as well.

"It was stimated in 1973 that as much as 6 million tons of oil entered the oceans of the world that year, of which perhaps as much as two-thirds came from sources on land:

The remainder, perhaps 2 million tons, was estimated to have come from the tansportation of oil by sea." (3)

(3) Skul, Marine Pollution .pag 15

a. The major oil treat:

The world's major oil deposits are found a great distance from the industrialized nations which are responsible for the greatest consumption. Consequently the oil has be transported many thousands of miles by sea.

From the Arab states and Iran oil is transported to Europe and North America, usually by way of the Cape of Good Hope; to the Mediterranean by pipeline and through the Suez Canal; and to Japan via South East Asia. Other tanker routes are from Nigeria to North America and Europe from the Caribbean to North America; and from Alaska to the Western United States and through the Panama canal .

For the future implications in the world oil trade the result of the current crisis in Iraq and Kuwait will be very interesting. If the crisis continues there is the possibility that the USA will put more emphasis on exploring its own resources and also that the demand for oil from other regions such as the Caribbean will increase Colombia will greatly benefit from such change because of its land resources in oil and offshore possibilities.

b. The transportation of oil by sea could result in oil pollution in a variety of ways:

1) The most common comes during terminal operations when oil is beging loaded or discharged. Perhaps this accounts for much as 92 per cent of oil spills, according to figures published by the Oil Companies International Forum.

Because they occur close to the shore and often in a confined area , such as a port, their environmental damage on the immediate vicinity can be considerable. But in tonnage terms such accidents provide only a small proportion of the total.

2) A much greater quantity of oil enters the sea as a result of normal tanker operations. In tonnage terms this is still probably the biggest source of oil pollution from ships, but, because the modernization in the design of the majority of the vessels according MARPOL requirements, it has declined in recent years.

3) The best known cause of oil pollution is that which results from tanker accidents." Although this may contribute as little as 5 per cent of the total oil entering the sea in a year, the consequences of an accident can be disastrous for the immediate area, particularly if the ship involved is a large one and if the accident occurs close to the coast." (4)

In the last 16 years alone, enough oil has been spilled in major incidents by tankers and combination carriers to fill 11 VLCCS; the number of ships involved in these incidents a staggering 160.

(4) SKUL, Marine Pollution pag. 14 .

The largest volume of oil spill in one incident followed the collision of two VLCCS - Atlantic Express and Aegean Capitan- in the Caribbean Sea in 1979.

The 2.14 million barrels of oil that was lost into the sea from ships accounts for one -tenth of all the oil spilt since the beginning of 1974 and a full half of that spill in 1979.

The environmental risk exist for Colombia all ready in the Atlantic Ocean -Caribbean Sea- not only for the sale and purchase of the oil that Colombia does but also because of the actual exploration that Venezuela does in the Golfo de Coquibacoa and the threat going to EEUU through Panamá canal.

2. The IMO'S Action Against Oil Pollution (a short aproache):

IMO tackles the problem of oil pollution through the conventions in many ways: Preventing operational and accidental pollution, reducing the consequences of pollution and enforcing systems for the compensation of the victims of oil pollution .

The objective of this chapter is to provide the reader with the minimum information needed in order to have a clear picture of the pollution problem that will permit a better understanding of the compensation issue.

The applicability in Colombia of the compensation schemes (intergovernmental and private) is the main topic

of the thesis whose concepts and elements I will discuss in the following chapter.

a. Preventing Operational Pollution:

The most effective approaches are to construct, equip and operate ships so as to avoid operational (deliberate) pollution.

The Convention that has specific application in this topic is the International Convention for the prevention of pollution from ships, 1973 as amended through its Protocol of 1978 (MARPOL 73/78). (Colombia ratified it).

b. Preventing Accidental Pollution:

One of the major functions of IMO is to make shipping of all types safer, not just oil tankers.

The measures incorporated in the numerous safety Conventions and Recommendations therefore apply to tankers as well as other ships. The measures involve such matters as construction of ship; the equipment carried; navigational procedure; communication; and crew standards.

The most important of all Conventions adopted by IMO is probably the International Convention for the Safety of Life at Sea (SOLAS) 1974 and its Protocol 1978. (Colombia ratified it).

Another Convention very important in preventing accidental pollution is Marpol 73/78.

An interesting new tanker design is being discussed by the industry and national administrations in the IMO's meetings as a consequence of the Exxon Valdez accident and other recent incidents of oil pollution at sea.

The new class requirements imply primarily increased protective location of cargo tanks, especially in the forward part of the ship, and reduced outflow in grounded conditions as a consequence of under pressure in cargo tanks.

A decision is expected on the controversial United States -USA- legislation outlining the introduction of double hulls and bottoms for tankers.

This proposal has its opponents who have also argued that double hulls and double bottoms are only of limited value in protecting a vessel and bring with them a new set of technical problems.

IMO's final position on this matter will be known in the near future.

Other Conventions on preventing accidental pollution are as follows:

-The International Regulations for the Prevention of Collision at Sea 1972 and its amendment of 1981. (Colombia ratified).

-The International Maritime Satellite Organization INMARSAT. (Colombia has ratified it).

-The International Convention on Standards of Training, Certification and Watchkeeping for Seafarers. (Colombia has not ratified it).

c. Reducing the Consequences of Pollution:

Other measures adopted by IMO are designed to limit the damage which can be caused to the marine environment following an accident.

MARPOL 73/78, for instance, limits the size of the tanks which can be installed on oil tankers. By making tanks smaller (the maximum size is 40,000 cubic metre) the amount of oil which can escape into the sea if the tank is damaged is correspondingly reduced.

MARPOL 1978 introduced a further element. This is the concept known as protective location of segregated ballast tanks. It means that the ballast tanks are positioned where the impact of collision or grounding is likely to be the greatest. In this way the amount of cargo spilled after such an accident will be greatly reduced.

IMO is preparing through its Maritime Environment Committee a draft Convention on Oil Pollution Preparedness and Response.

The aim of the draft Convention and other measures considered is to improve existing international arrangements for combating major incidents or threats of marine pollution. The preamble to the draft Convention stresses the importance of prompt and effective action to minimize the damage caused by oil spills.

The measures envisaged include a requirement for ships and offshore platforms to be provided with an oil pollution emergency plan. Procedures for reporting oil pollution incident are laid down for both governments and ships.

According to the draft, parties to the Convention are required to establish a national system for combating oil pollution incident including a national contingency plan.

The following section discusses the participation of the country in the elaboration of the regional agreements for combating oil pollution incidents and the state of the Colombian Contingency Plan.

1. Colombian Action for the Protection of Marine Environment and Coastal Areas:

a) Regional Cooperation:

The adoption of internationally agreed standards is only part of the battle. Legislation alone cannot prevent accidents occurring. For this reason IMO has had to develop other ways to help nations fight pollution. One step is the manual on oil pollution which is designed for the use of governments in preparing antipollution measures another step in this effort is that IMO has also encourage and assisted nation to establish emergency arrangements for dealing with oil pollutions emergencies.

At this point it is necessary underline the effort that Colombian Government has put into developing such

International cooperation- in other words, the participation in the design of the Action Plans for the protection of the marine environment and coastal areas of the South -East Pacific and Caribbean Sea.

Colombia is a member of the South Pacific and Caribbean Action Plan through the rules 45 of 1985 and 65 of 1987 respectively.

In those two regional conventions, the National Maritime Authorities reached a compromise for cooperation on oil pollution control emergency measures. The two agreements differ slightly as regards the specific rights and obligations of the participating countries, but in the main, each country is under the obligation to give regular monitoring data of pollution and to give notification of any oil pollution which may become a threat to the interests of a neighbouring country, as well as to give assistance, given the actual capabilities of each state, if another country is exposed to pollution from oil.

Much of the co-operation involves the participation in workshops and seminars with the objective of keeping each other informed of developments in respect of oil pollution control emergency services in the different countries, so that each knows what help it can expect to receive. Emphasis is also placed on exchange of experiences and cost/benefit analyses which give each country the best possible basis for decisions concerning the development of its own emergency plan in the future.

b) Oil Pollution Contingency Plan in Colombia:

National Decree 2324 of 1984 in its article 5 # 9 establishes the prevention and control of marine pollution in colombians internal waters, territorial sea and economic zone under the authority of the General Directotote of Shipping and Ports.

In the same way rules 45 of 1985 and 65 of 1987 (through which Colombia became a member of the South East Pacific and Caribbean Action Plan) estipulate that the National Maritime Authorities take the corresponding measures to guarantee regional co-operation, within their own capabilities, with the objective of promoting the preservation of the marine enviroment.

In relation to the National Contingency Plan it is necessary to say that the General Directorate of Shipping and Ports -DIMAR- is taking the necessary measures for the implementation of the national oil pollution contingency plan, elaborating the draft of a corresponding decree, which is is awaiting approval.

This decree also constitutes the legal basis for the development of programs of regional cooperation to combat oil spills.

d. Compensation for Oil:

As mencioned in the first part of this chapter, IMO and private efforts in the formulation of compensation schemes for oil pollution damage will be discussed in the following chapter.

C H A P T E R I I I

A. MARINE ENVIROMENTAL LAW IN COLOMBIA

One of the new branches of juridical science is Environmental Law, which means the group of principles, rules and the regulations that give a juridical valorization to: 1. The problem of pollution of the environmental elements: atmosphere, land and water (including under this concept the sea of course), and 2. The indiscriminated use of removable natural resources, a problem for which these rules try to give a contemporary solution.

The regulations that refer to the marine environmental in Colombia are, in most of the cases, in general form . However there are some specific legislation for the protection of the marine environment. These regulations are summarised as follows:

1. Juridical Institutions dealing with the Environmental Law:

It is a matter of great importance to identify the juridical institutions that apply to Environmental Law .

These can be found in the traditional branches of the law namely: Civil, Administrative, Penal, Labour, Tributary and also the Commercial Law and other more specialized branches such as Mining Law.

In what follows, some comments will be given on the juridical institutions of the first three branches, because of the directly connection that they have with the topic of this thesis.

a. Relationship between the Civil and the Environmental Law:

Regarding Civil Law, the main institution in which Environmental Law also participated is civil liability- not only contractual but also extracontractual, well known as a Aquiliana.

Extracontractual civil liability is related to the violation of the environmental rights of individuals or of states by other individuals or by a colectivity. The violation to these rights involves the liability for compensation for the caused damage.

Of interest to this thesis is the extracontractual liability that is involved in the compensation for oil pollution damage as a consequence of a tanker accident.

The first manifestations of compensation for damage involving the concept of pollution, deterioration and depletion of resources, were in 1938 and later on 1976 when the Supreme Court of Colombia applied the theory of the risk and the special liability for the execution of dangerous activities. This is established in the National Civil Code in Article 2356 " Anyone develops a dangerous activity is presumably liable for the damage that such activity causes.

The National Civil Code contains general rules on the environment which are complemented by different statutes:

There are some Colombian regulations whose objectives are the protection of the environment and the efficient and effective use of the natural resources.

Rule 23 of 1973 gives extraordinary power to the President of Colombia in the expedition of the National Code on the Renewable Natural Resources, which correspond to extraordinary Decree 2811 of 1974.

Edourar Soamuda said with respect to the National Code on Renewable Natural Resources: " This code constitutes the first approach for creating a juridical base and institutional relationship with the environment. On the other hand, the juridical principles of Estocolmo's Declaration had their first legislative confirmation in such Code."

The environment is defined in the National Code on Renewable Resources as a common inheritance of all the colombians and it comprises all the renewable natural resources and the environmental elements.

The non-living resources were excluded from the regulation.

The National Code on Natural Resources is just a general rule which is a necessary and adequate stape in order to rich a systematic, concrete and coherent group of rules.

On the other hand, there are other specific statutes related to the marine environmental protection.

The Colombian Constitution establishes in Articles 3 and 4 that the marine areas defined by the marine limits conventions belongs to Colombia

Rule 12 of 1978 relates to the duties and rights in the internal waters, territorial sea and Economic Zone, while extraordinary Decree 1875 of 1979 establishes some rules on marine environmental protection. The provisions on the procedure for compensation for damage to the marine environment are weak.

In summary, the existing regulations do not give any special treatment to marine pollution from oil spills from ships.

The import of the Liability Convention on various national legislation is limited in that the former only covers oil spills from ships in certain circumstances only the concept of civil liability has been affected.

b. The Relationship between the Administrative Public and Environmental Law:

They are also some points of Environmental Law also participating in Public administrative Law.

These regulations refer to the uses of the natural resources by the state or by individuals and concern the

concessions and licences that the state give to the particulars.

The administrative institutions responsible for preventing and controlin marine pollution are:

In Colombia there are three entities directly responsible for the prevention and control of marine pollution. These three entities also, according to their own regulations, are in charge of imposing the respective fines on the liable person for causing marine pollution.

- General Directorate of Shipping and Port (DIMAR):
DIMAR is a branch of the Ministry of Defense, whose main aim is to command the National Army.
The Marine Directorate's organization and its functions are regulated in Decree # 2349 of 1984.
In Article # 5 of Decree 2324, # 19 states:
"Corresponding to the Directorate: the application, coordination, fiscalization and enforcement of the national and international rules related to the preservation and the protection of the marine environment."

- Institution of the Natural Resource (INDERENA):
This Institution belongs to the Ministry of Agriculture. According to Decree 0376 of 1957, this institution is responsible for the administration of fishing in all the Colombian waters.
Also assigned to INDERENAis the protection of the marine environment in cooperation with DIMAR.

- Ministry of Health:

The functions of the Ministry of Health are given in the rule # 9 of 1979. This rule was developed in the point of the polluting to the sea by the decree 1594 of 1984, according with which one corresponding to the Ministry of Health in coordination with INDERENA and DIMAR the protection of the marine environment.

c. The Relationship between Penal Law and the Environmental Law:

In the National Penal Code (Decree # 100 of 1980) there is a Chapter related to the delicts of the Natural Renewables Resources Code. In these articles the basis for the delict is culpability; it is not necessary demonstrate the intention of causing the damage. There is an important element that it refers to the amount of the fines (which is very high) that the penal judge can impose on the juridical person liable for the pollution and the imprisonment on the person that physically caused the damage.

However, the important effects that the oil pollution can have from the penal point of view are not going to be discussed here because the main topic of this thesis is civil liability.

d. The Relationship among Procedural and the Environmental:

Although the National Code on Natural Resources in Colombia establishes especifics regulations in order to protect all the natural resource in Colombia, the absence of procedural rules in the Code is notable.

The procedural legislation is the point that will be given more attention in this thesis, because of the necessary relationship between the administrative and civil procedures that will follow an accident.

CHAPTER IV

A. AN INTRODUCTION TO THE IMO AND PRIVATE COMPENSATION SCHEMES: WHAT ARE THEY?

Compensation is the final link in the chain of the measures against oil pollution damage in which again the responsibility of the government is involved.

There has been a growing awareness that liability is an important issue as important as prevention and reduction of marine pollution which were discussed in the Chapter II. Since the Torrey Canyon incident which happened in 1967, discussions have taken place at the government level and among the tanker and oil industries. As a result, the various international agreements dealing with compensation for oil pollution damage from tanker and offshore operations have been established.

There were some problems in the discussions of international agreements related to compensation for oil pollution damage from ships. The oil companies argued that pollution liability should be confined to the shipowner and thus be consistent with general principles of maritime law. They stated that only the carrier controlled his own actions and should therefore be directly responsible for accidents, whereas the cargo owner has no control over his cargo once it is loaded on board the vessel.

The tanker owner, on the other hand, argued that the oil cargo is the polluting agent although the vessel may provide the means for the pollution. If pollution occurs, both ship and cargo are required to be present.

1. The result of the IMO deliberations on pollution liability in those days was the adoption of two unique Conventions : the International Convention on Civil Liability for Oil Pollution damage, 1969 (The Liability Convention), and the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, 1971 (Fund Convention).

a. The Liability Convention is based on the liability the tanker owner while the Fund Convention 1971 is related to the liability of the cargo owner.

Colombia has been a member of the Liability Convention since 1989. This Convention contains many features which at the time were regarded as fairly radical in maritime law. The fundamental principles are mainly related to the following:

- 1) The liability on the shipowner is strictly, it must be insurable, and can be limit
- 2) The concept of the damage is determined and
- 3) the state jurisdiction.

The Liability Convention entered into force on June 19, 1975, and the 1976 Protocol on April 8, 1981.

b. The fund Convention 1971 principles are to establish one international fund, financed by levies on imports of oil companies and designed to supplement the Liability Convention by providing the possibility for compensation for clean up Costs and damages over and above the tanker owners's liability under the Liability Convention.

Colombia is not yet a member of this Convention, in spite of its potentials advantages for the country, its main features will be discussed together with the other schemes in the following chapter.

The Fund Convention has been in force since 16 October, 1978.

It is important to underline that these Conventions are only one of the two schemes that exist internationally exist for compensation for oil pollution damage.

2. The other scheme is a system of voluntary agreements concluded by the industry. These two schemes, although separate in their application, look very much alike; in fact, the voluntary scheme intentionally mirrors the scheme based on the IMO Conventions.

The voluntary agreements are The Tanker Owners and Barboat Charters Voluntary Agreement Concerning Liability for Oil Pollution (TOVALOP) and The Contract regarding a Supplement to Tanker Liability for Oil Pollution (CRISTAL).

TOVALOP and CRISTAL are described as voluntary plans. This means only that the decision on whether or not to participate is voluntary, since having become a party there is a contractual obligation to meet all the terms and conditions of the applicable agreement or contract.

These two plans were also created because there was concern that the two IMO marine pollution conventions

would take too long to enter into force and that some states might not ratify these conventions at all. A rapid response was needed.

a. TOVALOP, since coming into force in October 1969, has been amended on a number of occasions. The most recent amendments which came into effect on 20th February, 1987, resulted amongst other things in substantially higher limits of liability through the addition of a supplement to the existing agreement (Standing Agreement). ECOPETROL from Colombia is a contracting member of the TOVALOP Standing Agreement and Supplement.

Whilst the Standing Agreement can only apply to incidents where no liability is imposed under the terms of the the Liability Convention (in order not to duplicate its similar limits and coverage), the TOVALOP Supplement is designed to apply worldwide whenever a CRISTAL owned cargo is involved. This ensures that claimants in states that have ratified the Liability Convention can also avail themselves of the extra compensation available under the TOVALOP Supplement.

b. CRISTAL was devised originally to provide compensation supplementary to that available from tanker owners and bareboat charters under TOVALOP. In common with TOVALOP, the contract was amended on February 20 1987 and further amended up to on February 20 1989, among other things to increase substantially the amount of compensation available to those victims of oil pollution from tankers who would not be fully compensated under the terms of the TOVALOP Supplement, C.L.C or Fund Convention.

Both agreements intend to be interim solutions up to

the time that the International Conventions have world - Wide applications and there is no longer a need for private schemes filling the geographical gaps left by the Conventions, as far as the Protocols of those Conventions coming into force.

3. The 1984 Protocols of the Liability Convention and Fund Convention: The main objective of both 1984 Protocols of the IMO Conventions are among other things to increase the limit of the amount of money that will be paid to the victims of one oil spill. The amount established by the the Liability Convention and the Fund Convention is nowadays no enough.

Nevertheless, the future of those Protocols is not clear at the present. Colombia can not ratified them until the USA ratification is done because this is a determining factor for the protocols enter into force.

a. The future of the 1984 Protocols is not clear nowadays. The Protocols were structured in such a way that the participation of the USA, which receives far more oil by ship than any other country, is necessary.

It is necessary to say that the USA's participation in the negotiation of the Protocols was important. The limitation figures for both ships and cargo which were agreed were adopted at the insistence of USA.

There has been much demand for new oil pollution legislation in the USA following the Exxon Valdez oil

spill in the Alaska and the massive clean-up.

The incident had an enormous impact on American public perception of the risk of oil pollution from ships, and public pressure, fuelled by the press and news media, has inevitably been felt in Washington.

For years the Congress has been unable to resolve the conflict between the different approaches to the problem. Should the United States adopt the international solution by ratifying the Liability and Fund Conventions, as amended by the 1984 Protocols with their greatly increased limits, or should it continue to have basic Federal Legislation granting the right of individual states to enact their own laws.

Following the cases of Bt Nautilus and Mega Borg, the position of the USA is clear and is very far away from the intention of ratifying the 1984 Protocols

b. **Serious concern that the USA is going to change the basis of the existing liability systems:** the United States might open the way to unlimited liability for shipowners involved in oil pollution.

The case of the Mega Borg shows this phenomenon: the ship carried \$ 700 million USD of liability coverage through the Gard P & I Club. But because the incident took place in international waters some 55 miles off the Mexican and USA Gulf coasts, and because both the USA and Mexico are not signatories to the Civil Liability and Fund Convention, the provisions of those conventions were not

applicable.

INTERTANKO believes a plan by the United States Senate to allow individual states within the USA to set unlimited liability for oil spill pollution could make disasters more likely.

It says the USA scheme would scare off reputable owners and encourage speculators using poorly maintained ships to venture into the United States market.

Is interesting to note the position of one of the major oil companies, The Royal Dutch Group, to suspend crude deliveries to mainland USA mainland ports because of fears over huge liability claims in the event of an oil spill.

C H A P T E R: V

A. THE APPLICATION OF THE INTERNATIONAL SCHEMES TO COLOMBIAN CASES: WHAT TO DO WHEN A SPILL OCCURS?

Aware of the difficulties that the application of the compensation schemes can have (in the case of a spill in Colombia), the present chapter includes an explanation of each one, including the national legislation following the next procedure on the presentation:

For a better understanding of each scheme (the cases where they apply and the cases in which they are excluded) and of their interaction with each other and with the national legislations exist, each scheme will be explained in terms of the following elements that are common to all compensation systems:

- BASIS OF LIABILITY.
Exceptions.
- JURISDICTION
Authority
Geographical Scope
- COMPENSABLE DAMAGE
Concept of Damage.
- LIABLE PERSON
- PERSON ENTITLED TO CLAIM.

- PERSON ENTITLED TO CLAIM.
- LIMITATION OF THE LIABILITY AND COMPULSARY INSURANCE.
- THE ADMINISTRATION.

1. THE CIVIL LIABILITY ELEMENTS:

a. BASIS OF THE LIABILITY :

1). General concept:

Liability for damage can be established in a number of ways.

First, a party's liability can be based on fault, that is, he may be liable only when the claimant can prove that the accident resulted from his negligence .

In the case of the Torrey Canyon there was no dispute about the liability of the shipowner, as the Liberian Board of Investigation found negligence on a number of grounds.

Second, liability can be founded on fault with a reversed burden of proof. In this system it is the party from whom compensation is being claimed who must prove that the accident was not due to his negligence. This is more favorable to the claimant. There is one even one more rigorous regime, strict liability, where responsibility for compensation is imposed on the party causing the damage whether or not he was at fault. Some specific

exceptions to his liability are accepted. This liability is called "presumptive" by some authors as a presumptive liability.

Finally, liability can be absolute. This means that the party causing the damage is always liable, regardless of circumstances. This type of liability is called "objective" by some authors.

2). The National Legislation:

The system existing in Colombia for environmental liability is based on the strict liability (which had been recognized by the jurisprudence as a presuntive liability) when the damage occurs as a consequence of dangerous activity. The case that takes our interest the transport of oil, is a dangerous activity and for that reason, the oil spill case should be framed into the Article 2356 of the National Civil Code according to the interpretation that the Court of the Republic of Colombia has made in similar cases.

The presumption of the liability means, according to this code, that the liability can be broken down only if the author of the damage can prove that the damage occurred for any of the following causes:

- Act of war, hostilities, civil war, insurrection, natural phenomenon of an exceptional, inevitable, unpredictable and irresistible character.

- The accident was wholly caused by an act or omission done with intent to cause damage by a third party.
- The damage was caused through the negligence of the victim.

The victim is exonerated of proving the culpability of the author of the damage. Accordingly the victim has only to prove:

- That what happened was a result of the carrying out of dangerous activity.
- The damage.
- The causal relationship between incident and the damage resulting.

(Judgement of the Supremes Colombian Court of Justice 14th of March of 1838).

3). The Liability Convention:

The shipowner will be strictly liable for pollution damage unless he can prove one of the following:

- That the damage was resulting from an act of war, hostilities, civil war, insurrection or natural phenomenon of an exceptional, inevitable and

irresistible character; or

- That the accident was wholly caused by an act or omission done with intent to cause damage by a third party (sabotage); or

- That the incident 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; or

- In addition, if the pollution damage or the taking of threat removal measures resulted wholly or partially either from an act or omission done with the intent to cause damage by or from the negligence of the person who sustained the pollution or who took the threat removal measures, then any compensation otherwise payable to that person will be denied or reduced proportionally.

However, this will not be the case for claims by the owners of the tankers involved unless the incident resulted from the owner's willful misconduct or the tanker's unseaworthiness where this occurs with the privity of the owner.

The basis of Colombian civil liability basis did not change in a big way. The Liability Convention introduced into our legislation only one exception to the shipowner as a means of defense as follows:

" If the incident 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".

4). Fund convention:

After the Liability Convention, The fund Convention is applied by the same tribunal. Its objective is to complement the liability of the owner that was already declared on the basis of strict liability.

The only exceptions are war, hostilities, pollution damage resulting from a discharge by a non-commercial state-owned vessel, lack of proof that the damage is the result of the shipping incident.

5). TOVALOP:

As a private scheme, the declaration of liability is based on a voluntary agreement. TOVALOP is an agreement entered into by tanker owners and bareboat charterers under which the parties agree to assume certain obligations for which they might not otherwise be legally liable.

TOVALOP deals with the following issues:

For TOVALOP to apply, it is not necessary to demonstrate that the owner or bareboat charterer was at fault and there are only a very limited number of circumstances in which a party will be totally free of

any obligations under the agreement (e.g if the incident resulted from an act of war).

Compensation can be obtained by claimants without recourse to legal proceedings which may prove lengthy, although the TOVALOP party does not thereby waive the right of recovery from third parties whose fault may have caused, or at least contributed to, the incident. This agreement now covers companies owning 99% of world tanker tonnage (excluding government owned tonnage).

Regulation IV, paragraph B, sub-paragraph (a) of the TOVALOP agreement provides that there is no liability for pollution damage " if the incident caused pollution damage anywhere in the world for which the liability of any party imposed under the terms of the liability Convention".

This clause removes the possibility of the owner being faced with double liability under the Liability Convention and TOVALOP if an incident causes pollution damage to one state that is a party to the Liability Convention and the same time to another state that is not a member of that convention. This provision in the TOVALOP agreement does not, however, prevent the owner from being liable under the Liability Convention in one state and under national law in another state.

6). CRISTAL:

CRISTAL Contract establishes in paragraph (D) of clause IV on Compensation and Payments the exceptions for the payment of compensation. There are ten items. In the case of Colombia that is member of the Civil liability

convention but not of the Fund convention, they may be summarised as follows:

- The oil involved in the incident is not owned by a Oil Company Party, as provided in the CRISTAL Contract.

- The incident results as a consequence of the same circumstances that are excepted in the IMO compensation convention schemes.

- If there is no evidence , satisfactory to CRISTAL, that the claim arrive to the limits established by the CRISTAL Contract.

- The aggregate amount to be paid by CRISTAL in the case of a spill in Colombian waters shall not exceed the limits established by the contract.

- There is not payment or compensation if the person (that according to the contract has the right to claim) "prosecutes a claim for Pollution damage or the cost of preventive measures or threat removal measures against any fund established and / or maintained by means of assesments against oil companies , irrespective as to whether any said Person is entitled to either indemnification or compensation under the terms of any such Fund; provided that nothing set forth herein prevents such a person from asserting, prosecuting or settling a claim, against any said fund for those amounnts not satisfied pursuant to this contract or under either (i) the Liability Convention, or (ii) against the Fund under the fund Convention, or both, if or to the extent, they are applicable".

b. JURISDICTION

1). General Concept:

The term jurisdiction can have different definitions the most well known deals with the right of the State to make rules of law prescribing conduct (regulatory jurisdiction) and to enforce such laws in a determined area.

The concept is related to the sovereign rights of the state in that it is not a concept applicable to private bodies as are the private schemes of compensation. Instead of jurisdiction these schemes have " a field action" The sinonimus term for them is field of action.

Coastal state concern about the environmental impact of foreign shipping is a recent phenomenon. Prior to the 1954 conference, little international attention had been paid to the pollution issue, and what proposals did surface seldom, if ever, called for changes in the customary law, "freedom of the seas".

Although the 1954 Conference included some provisions as the one that is related with to fifty-mile coastal "prohibition zone", it implied no transfer of authority from the flag state to the coastal state. The high seas/territorial seas distinction was retained, so that the flag state exclusively controlled standards and enforcement to within a distance of three to twelve miles from the shores of another state.

In 1958, at the first U.N Conference on the Law of the Sea, the status quo was now formally, if vaguely, confirmed in a treaty form . Indeed, the only convention of any significance for these issues was the convention on the Territorial Sea and Contiguous Zone of 1958.

Importance was given to the contiguous zone, which went to a maximum of only twelve miles from the coast, and its allowed a coastal state to take action to prevent the infringement of a limited number of regulations including "sanitary regulations within its territory or territorial sea. The importance of this Convention in that matter is the recognition of a " functional zone " conferring any actual jurisdiction beyond the territorial sea on the coastal state.

The development in 1969 of the Intervention Convention was for IMO a first foray into the realm of delineating jurisdictional competences. But to some extent the application of the convention demonstrated the limits of the organization.

In the 1973 Conference, concerning the extent of jurisdiction, it was apparent that many states felt that the traditional division of legal authority between a narrow territorial sea and the high seas was dangerously anachronistic.

The 1973 Convention was to replace 1954 Convention. Now, with no replacement for the 1954 Convention's article 11 on jurisdiction, the content of coastal state

jurisdictional powers was completely left to UNCLOS III.

The two issues of greatest consequence concerning the the topic of jurisdiction are (1) the replacement of the traditionally vague coastal powers over its territorial sea by explicit regulations and (2) The right of the states to set environmental standards outside the territorial seas particularly in the protected 200 miles of the Economic Zone.

In relation to civil jurisdiction, the discussion starts with the proposition that, as a fundamental rule of customary international law, a state has sovereignty over its land territory and its internal waters. Therefore , if a foreign ship pollutes the shores of a state while in its internal waters or territorial sea, that state's courts do have jurisdiction in international law to entertain a civil action for damages.

2). Authority:

a) National Legislation:

According to the goals of organic Decrees 1875 of 1975 and 2324 of 1984 of The National Directorate of Shipping and Ports in Colombia (DIMAR), the object of the investigation and the procedure is the accident of the vessel, which involves the knowledge of the causes of the accident, the liability of the liable persons involved and, of course, the amount of the damage.

The case seems to be within the competency of DIMAR

when there is a necessity to make another decision, as in the case of the awarding compensation.

b. The Liability Convention.

There is a point that is interesting to underline because it was a determining factor in Colombia's ratification of this Convention. It is related to the exclusive competence that the Courts or any competent authority of the state affected have dealing with the case. In other words, the possibility of a confirmation of foreign tribunal of arbitration for solving the case is contrary to the philosophy of the Convention.

This is a tremendous advantage for the victims of the pollution damage because they have easy access to a procedure which they are familiar with—and also it is in Spanish.

The world tribunal that is described in the Liability Convention includes, for Colombian application, not only the judge but also the National Directorate of Shipping and Ports for the specific matters that were described above under the national legislation.

The possibility of considering DIMAR as a competent authority in the first step of a compensation action is perfectly correct in spite of the broad definition given by the Convention.

c. Fund Convention:

The Court with jurisdiction under the C.I.C also has jurisdiction over claims against the Fund for a particular

incident.

d. TOVALOP:

A conflict that arises in the application of the agreement will be solved by the arbitration Tribunal under British Law.

d. CRISTAL :

The administration of the contract will pay claims under the conditions of the CRISTAL Contract. In fulfilling its obligations, CRISTAL shall be the sole judge in accordance with terms of the contract (except in the case of compensation of an oil owner member for a contribution made under the Fund Convention).

3) Geographical Scope:

a) National Legislation:

Articles 3 and 4 of the Colombian Constitution established that the atmospheric, land and maritime places already defined or to be defined by bilateral conventions belongs to Colombia.

The Rule 12 of 1978 established the limits of the territorial waters (12 nautical miles), and of the Exclusive Economic Zone (188 nautical miles) according to the definition adopted by the UNCLOS Convention of 1982, which Colombia signed.

This rule was the result one hand of the Colombian participation in the negotiation of the UNCLOS Convention and on the other of the adoption by the Colombian Government of the Santiago' Declaration of 1959. In this Declaration the members recognised an area of 200 miles from the coastline as being necessary to protect, especially against pollution. The declaration established that this area is under the jurisdiction of the member states.

Rule 12 of 1978 was developed in 1979 into four Decrees which referred in very general terms to the rights and duties over these areas. The Decree regarding pollution matters is Decree 1875 of 1979.

The Decree recognizes the competence of the National Directorate of Shipping and Ports in coordination with other competent institutions in the prevention and control of marine pollution in these areas (including the

Exclusive Economic Zone) and also in the investigation of incidents that cause pollution and the imposing of administrative fines.

b) The Liability Convention:

Article II of the Liability Convention provides that " this Convention shall be applied exclusively to such cases in which pollution damage is caused on the territory including the territorial sea of the contracting state, and to take measures to prevent or minimize such damage."

The geographical concept (territory and territorial sea) adopted by the Convention as criteria for its application was regarded as fairly radical in maritime law. Remember that at this time the international community did not agree about the definition of the power of the states over the territorial sea. However, nowadays the concept is not adequate in spite of the extension of the jurisdiction of Colombia over the Exclusive Economical Zone.

The sole criterion for the geographical scope of application of the Convention is therefore the place where the damage occurred. The nationality, domicile and residence of the defender are irrelevant; it is not required that the shipowner should be a national of a contracting state or that the ship fly the flag of a contracting state.

According to the definition given by Article II of the Liability Convention, it is important to underline two situations wich are not subject to the application of this

Convention:

1. Pollution damage caused in the Exclusive Economical Zone of the contracting state.

2. Preventive measures taken to prevent damage in the territory, in the territorial sea or in the Exclusive Economical Zone, if as a consequence of such measures the damage does not appear.

Nevertheless, the point related with the concept that the preventive measures taken out side of the territorial sea to prevent pollution, that were succesfully in this objective, are not covered by the Liability convention and Fund Convention are changing in spite of a some what douful wording as a result of the two accidents that occured in front of the territorial sea of France.

The incident of March, 1980 and the Gino incident in April 1975, in which this goverment took some preventive measures such as the pumping of the oil out of the sunken wreck.

The P & I Club and the Fund are studying very carefully if there is a responsibility for the expenses under the C.L.C and Fund convention.

This two cases are covered by TOVALOP scheme and were included in the Liability and Fund Convention Protocols in 1984.

c) The Fund Convention:

The Fund covers pollution in the territory of member nations caused by any vessel, regardless of whether or not it is registered in a member country.

d) TOVALOP:

Tovalop applies in the case of pollution (for the spill of the tanker owned by a member ship) in the Territory, Territorial Sea or the Exclusive Economical Zone of any state.

This is a substantial differential point with the Liability Convention. This occurs because TOVALOP was designed to fill the gaps left by the Liability Convention and this is one of them.

e) CRISTAL:

This contract applies to pollution damage (defined by the contract) wherever the spill may occur. The contract does not refer to any specific area but it is possible to conclude by interpretation of the Contract's provisions related to compensation and payments (especially Clause IV (A) and (D) (B)) that the spill can occur in the Internal Waters or Territorial Sea. However, its application in the Exclusive Economic Zone is not clear .

The reason is that the CRISTAL contract applies (besides are other situation which is not interesting to this point) to an incident in a jurisdiction where the

provisions of the Liability Convention or any applicable domestic law are in force or in a jurisdiction where the provisions of both the Liability Convention and the Fund Convention are in force. These Conventions do not apply to the Exclusive Economic Zone.

c. COMPENSATORY DAMAGE

An oil spill may cause different types of damage - some of them can be evaluated in monetary terms but others cannot. This situation raises a problem in the determination of the compensable damage.

Under classical law, in an extracontractual judgement it is necessary to prove the existence of personal and clear injury. This is because in civil law everything must be claimed with a legitimate interest proved and discussed.

Referring to compensation for oil pollution, the concept of damage is limited to the following issues:

1) CONCEPT OF POLLUTANT:

a) The National Legislation:

Decree 1875 of 1979 refers in general to any kind of pollutant without any classification into the persistent or non-persistent oil.

b) The Liability Convention:

The convention applies to seagoing vessels of any type carrying oil in bulk as cargo. This means that dry cargo ships and vessels in ballast are not covered. Nor are the bunkers of vessels other than those capable of carrying oil in bulk.

The convention only applies to an incident where persistent oil as cargo is actually spilt (not to fuel or chemicals products).

" Persistent oil" is not defined, but would include crude oil, fuel oil, heavy diesel oil, lubricating oil including whale oil cargo. Pollution by bunkers is covered only if a persistent oil cargo is carried.

The non-persistent oils are excluded because their toxicity is less than that of persistent oils and also because the damage arising from such incidents is likely to be relatively small.

c) The Fund Convention :

As a complement of the Liability Convention this Convention reffers to the same concept of the pollutant as being persistent oil.

d) TOVALOP:

The terms of the TOVALOP Supplement apply to incidents where a participating tanker is carrying a cargo

of persistent oil owned by a member of CRISTAL. In all other cases the terms and limits of the Standing Agreement alone remain applicable. This means that also non-persistent oil is covered.

TOVALOP furthermore includes in its scope pollution arising from bunker oil of unladen tankers (e.g fuel).

The particular differences between Tovalop and the Liability Convention in terms of application are related to the fact that Tovalop applies in all cases, not just those (as in the Liability Convention) where the owner has not been guilty of actual fault or privarty.

e) CRISTAL:

The contract for the purpose of its application defines oil as a persistent hydrocarbon mineral oil including, but limited to, crude oil, fuel oil, heavy diesel oil and lubricating oil whether carried on board a tanker as cargo or in the bunkers of such a tanker.

For CRISTAL to apply to an incident, the tanker must be carrying a cargo of persistent oil that is owned, or deemed to be owned, by a party to the CRISTAL contract, and the tanker owner must have paid compensation up to an amount equal to the vessel's TOVALOP Supplement limit.

If these conditions are met, uncompensated pollution damage or cost incurred in responding to the incident would qualify for compensation under CRISTAL, up to the applicable limit.

2) CONCEPT OF DAMAGE:

Compensation is generally awarded for personal injury and property damage when individual and concrete rights are infringed. Exceptions to this are some non-economic losses.

Compensation for pure economic losses also presupposes in general the infringement of an individual right. In the case of environmental damage, however, interest is often directed towards cases where common rights have been infringed.

The question of protecting common rights by means of tort laws is relatively new in both national and international debate. In general, there exist no rules covering compensation for the infringement of common rights in different countries.

It is not possible to compensate everybody who suffers from not being able to enjoy common rights. Compensation should be restricted to those who commercially suffer economic losses in the exercise of the commercial activity because common rights cannot be enjoyed and an unreasonable obligation to pay compensation (e.g. in the event of many claimants and large claims) could be regulated by means of national rules on adjustment of liability.

There are, technical arguments, for not awarding compensation in all cases where common rights have been infringed. If the right to claim compensation is afforded to all people who can be affected by the pollution, it may result in a large number of claimants and consequently

many problems of a practical, procedural and technical nature.

Even though it does not seem appropriate or practical for everybody whose common rights have been infringed to have the right to claim individual compensation, it is possible to imagine solutions that would indirectly guarantee their interests.

In this connection it is interesting to note that the Norwegian comprehensive rules governing liability for environmental damage referred to earlier offer a solution by which public organizations (primary local government authorities and private bodies with legal interest in the case) have the right to claim reasonable compensation from the defendant/s for the restoration of the environment. In other words, it is a question of a claim made on a collective basis.

An argument in favour of such a solution is that restoration of the environment compensates for pollution damage of a non-economic nature suffered by the public. The environment is restored as far as possible so that fishing, berry picking, swimming, etc - the exercise of common rights are once more possible. In this way the problems usually associated with evaluating non economic losses are avoided.

The compensation that can be claimed from the defendant/s constitutes reasonable cost (often considerable) for restoring the environment- insofar as this is possible. If the restoration of the environment

is not possible or if it is not economic, the obligation might be laid upon the defendant to provide an alternative recreation area or make financial compensation.

Further more, the principle of compensation for environmental damage has been accepted in the Protocol of the Liability Convention (1969/1984) by making provisions for compensation for reasonable expenses incurred in restoring the environment - including future expenses. The 1984 Protocol to amend the Liability convention has the following wording:

"... provided that compensation for impairment of the environment other than loss of profit from such impairment shall be limited to the cost of reasonable measures of reinstatement actually undertaken or to be undertaken"

This compensation is also introduced by the CRISTAL Contract.

b) National Legislation:

Article 2341 and 2356 of the C.L.C orders that any damage must be repaired. This means that both material and moral damage should be repaired.

It can be noted that only individual rights are covered. Common rights are not covered.

c) The Liability Convention:

The Convention covers the damage caused outside the ship carrying oil by contamination resulting from the

escape or discharge of oil from the ship, wherever such escape or discharge may occur, and includes the cost of preventive measures and further losses or damage caused by preventive measures.

Preventive measures are the ones that are taken by any person after an incident has occurred to prevent or minimise pollution damage.

Pollution damage occurring on the territorial sea of a contracting state is covered regardless of where the original spill occurred. This only applies to the damage caused in the territory and the territorial sea, not in the Exclusive Economic Zone.

In general, all quantified damage resulting from oil contamination, including the costs of preventive and clean-up measures and further damage from preventive measures is covered.

Preventive measures taken in a pure threat situation are excluded.

d) The Fund:

Covers damage under the same principles as the Liability Convention does.

e) TOVALOP :

Provides that precautionary and pre-spill preventive measures are covered by the agreement. This is a distinction of most practicable importance from the IMO schemes.

f) CRISTAL :

Specifies in Clause I and in the part II of the Rules, what the meaning of pollution damage is:

"Pollution damage means (I)physical loss damage caused outside the tanker by contamination resulting from the escape or discharge of oil from the tanker, wherever such escape or discharge may occur, including such loss or damage caused by preventive measures, and/ or (II)proven economic loss actually sustained, irrespective of the accompanying cost of preventive measures, and /or (III) cost actually incurred in taking reasonable and necessary measures to restore or replace natural resources damaged as a direct result of an incident, but excluding any other damage to the enviroment."

The term used by the contract "proven economic loss", means that " the economic loss can be sustained without accompanying physical damage if the Claimant demonstrates that such loss could reasonably have been anticipated to occur as a direct result of contamination by oil and would not have occurred but for such contamination, but shall not include any remote or speculative economic loss based upon theoretical calculations of any form.

The term "pollution damage" shall also include loss or damage, and reasonable measures taken to prevent further loss or damage, caused by airborne particles of oil emanating from the tanker.

The CRISTAL contract also accept claims for compensation for the cost of threat removal measures. This is one of the most biggest differences from the intergovernmental schemes which do not cover them.

The Cristal Limit Rules provide more clarification as regards the items that will be compensated by CRISTAL :

The term "threat removal measures shall be interpreted to include reasonable measures taken directly to prevent an escape or discharge of oil from a tanker, but shall not include measures the primary purpose of which is not directly towards the prevention of an escape or discharge of oil, nor shall it include measures which, irrespective of pollution considerations, any responsible or prudent owner would have taken in the circumstances to ensure the safety of the tanker, its personnel and/or its cargo".

Part III of the CRISTAL limit rules clarify that CRISTAL : "only will compensate Governments, and/or a person who compensates governments, for reasonable incremental costs incurred by government to use a public service(including personnel and equipment) in response to an incident".

Part IV, Claims and Payment Procedure, establishes that CRISTAL: "may, in the sole discretion of the Directors, compensate a person for the cost of studies undertaken to assist in quantifying or verifying pollution damage and for any additional cost which CRISTAL determines assisted in resolving claims, but such cost under the terms of the contract clause IV (D) (5) a. shall not otherwise be considered pollution damage.

CRISTAL will not compensate for any environmental studies, even if required by local law, unless(i)

authorised by CRISTAL or (ii) CRISTAL concludes that they were designed to assist in quantifying of verifying pollution damage.

g) The following are the types of damage that will be compensable under any scheme:

1. Cost of clean-up operations at sea and an/or the beach:

As for operations at sea, the cost may be related to the deployment of vessels, crew salaries, the use of booms, and the spraying of dispersants. In respect to the clean-up on shore, the operations may result in major costs for personel, equipment, absorbents, and other services and supplies.

The preventive measures must be reasonable from an objective poin of view. The cost must not be disproportionate to the result that could be reasonably by expected. Another factor that most be taken into account is the capacity of the marine enviromental to restore itself .

One of the most important points that the Colombian government should take into consideration in order to get compensation is the advice of experts sent by the P & I clubs, the TOVALOP Federation and CRISTAL after a spill has occured.

Through their experience, they naturally have better

knowledge of the treatment of spills and can therefore advise the government on what types(s) of treatment will meet compensation requirements.

2. Damage to property:

The oil may contaminate boats, fishing gears, piers and embankments. If the polluted property (public or private) can not be cleaned the cost of its replacement must be given.

3. Salvage operations:

Clause I (a) of the Lloyd's Open Form Salvage Agreement, is an exception to the "no cure no pay" principle. Where the property being salvaged is an oil tanker laden or partly laden with a cargo of oil that is not "successful" (in the traditional sense of some valuable property being salvaged) the salvager is entitled to his reasonable incurred expenses and an increment (to represent profit) of 15 per cent of these expenses.

There may be no "success" because the tanker may sink despite much work or because a government uses its intervention power to destroy the tanker.

The Executive Committee of the International Oil Pollution Compensation Fund: IOPC Fund, has taken the position that salvage operations can be considered as preventive measures only if their main objective was to prevent or minimize pollution damage; if operations had other primary goal, such as salvaging hull cargo, the operation should not be considered as preventive.

4.- Pure Economic loss:

Persons whose property has not been damaged may nevertheless suffer economic loss as a result of an oil pollution incident. If a certain area of the sea is heavily polluted, fishing may be altogether impossible in that area for a certain period of time, which may cause economic loss to a great number of fishermen for whom there is no possibility of fishing elsewhere. Hotel owners and restaurants may suffer economic loss due to the fact that tourists do not come to an area where the beaches have become polluted.

The amount of the damage may have to be assessed by a comparison with the claimant's income during a comparable period in the years preceding the incident. (5)

(5) Damage from International Disasters in the light of Tort and Insurance Law. General Report.

5. Damage to the Marine Environment:

Oil spills may cause damage to the marine environment as such. The marine environment does not have any market value, and damage of this kind cannot, therefore, be easily assessed in monetary terms.

Under Fund Conventions, the compensation is paid only to a claimant who has a legal right to claim under national law and has suffered quantifiable economic loss.⁽⁶⁾

Some states have accepted the ecological damage (e.g. the USA and the USSR) ⁽⁷⁾

This position has the oppositors which argue that any calculations of the damage suffered in monetary terms will, of necessity, be arbitrary.

For these reasons, it is maintained that it would be inappropriate to admit claims for compensating damage to unexploited natural resources that have no owner and that, in many cases, are not constrained by national boundaries.

⁽⁶⁾ Mans Jacobsson. The International Oil Pollution Compensation Fund: 10 years of claim settlement experience.

⁽⁷⁾ Claims for the benefit of the environment in the

It must also be recognized that restoration of a contaminated environment to its pre-spill conditions is not always possible.

Compensation for restoration, in the C.L.C Protocol 1984 and Fund Protocol 1984 of the marine environment is expressly limit to cost of reasonable measures of reinstatement actually undertaken or to be undertaken.

d. PERSON LIABLE:

1) General Concept:

Different countries vary as to the solution of who is liable for the types of damage to the environment.

The group of liable persons varies depending on the type of liability, the basis of the liability and different forms of legislation. In a number of cases liability is laid expressly upon a given person, whereas such an indication is either lacking altogether or is very vague in other legislation.

There are also areas where it is not important to specify the person liable.

In international conventions, the person/s upon whom liability is laid and who are expected to maintain liability insurance are clearly designated.

In relation to the definition of the liable person in case of oil pollution from vessels, the definition of the liable person has not always been clear. The following gives the background of the spill that made changes in the classic system of civil liability in this issue.

Studying the Torrey Canyon incident (1967), both the British and French governments found that simply locating the party could pose as great a problem as obtaining the compensation from it.

The Torrey Canyon was owned by a Bermuda corporation, the Barracuda Tanker Corporation, and it was in a full bareboat charter to the Union Oil Company of California. At the time of the incident, it was also on a voyage charter to British Petroleum. Beyond this contractual relationship, however, a Union Oil spokesman said that there was no corporate relationship between Union Oil and the Barracuda Tanker Corporation, thereby leaving the latter to bear full liability as the owner of the ship. In fact, Barracuda was a corporate creation of Union Oil (if not a legal subsidiary). Its incorporation, meant that Union Oil, as a separate corporation, could avoid responsibility for damages caused by the ship. This is a notoriously common arrangement. Often these shadow corporations are only one-ship companies in which, after an accidental loss, there are no other assets for limited insurance coverage to provide for all the ship's liabilities. In this case, the Torrey Canyon did have two sister ships: the Lake Paloude and the Sansinena. As a result, if either were discovered in a territory where Britain or France could serve a writ, it could be seized as an asset to cover the corporation's potential liability.

In spite of the difficulty in finding the liable person the Liability Convention established that the shipowner will be the only one.

This Convention indeed was and still is a revolutionary one about which more comments will be made under the corresponding point.

2) The National Legislation:

In Colombia, joint and several liability is recognized. This joint and several liability can extend so far that even the remotest connection to an environmental incident can result in full liability.

Article 2356 of the C.C.C. specifies the liable person only as the person who presumably causes the damage. Article 2344 of the C.C.C. establishes the joint and several liability when the act has been done by many persons. The decree 1875 of 1975 do not determinate the liability in one person. In this order will be liable who cause an incident e.g. owner, ship agents.

3) The Liability Convention:

Under Article III of the Liability Convention it is the owner and the owner alone, who is liable; the master, members of the crew, servants, or agents and other persons are not liable under the Convention.

The owner is defined as the person registered as the owner of the ship.

The liability of, for example a bareboat -charterer is not dealt with. It is, therefore, up to the national law to decide whether a bareboat - charter is liable under domestic law in addition to the liability of the owner under the Liability Convention.

The salvor is also excluded from the liability under

the Liability Convention.

However, the owner is liable irrespective of his residence or domicile; he is liable even if he is a national of a state that is not a member of the Liability Convention.

An important justification for placing liability on the vessel owner is the effort to locate the liable person as quickly and easily as possible. The owner of the vessel can usually be identified from different registers, whereas other persons that might be liable are more difficult to identify because of complicated charter and other contractual arrangements.

In the investigation of a spill by the Colombian Maritime Authority, the declaration of the liability of the shipowner involves the identification of the ship and its cargo. This will determine the subsequent applicability of first TOVALOP and then CRISTAL.

4) TOVALOP

TOVALOP is an agreement entered into by tanker owners and bareboat charterers under which the parties agree to assume obligations for which they might not otherwise be legally liable. As a result, compensation can be obtained by claimants without recourse to legal proceedings which may prove lengthy, although the Tovalop party does not thereby waive any right of recovery from third parties whose fault may have caused, or at least contributed to, the incident. Thus Tovalop facilitates the payment of compensation without in any way shifting the actual responsibility for the spill or prejudging the issue of

ultimate liability.

Most of the shipping companies, therefore, as parties to this agreement, undertake either to clean up the coast-line themselves or to compensate the national and / or local governments who are victims of pollution damage.

The liaison between the Liability Convention and TOVALOP scheme can also be demonstrated here when a shipowner member of TOVALOP is also liable under the rules of the liability convention. In terms of applicability those schemes are not incompatible with each other: the joint application is a benefit for the victim and also for the tanker owner because he can limit his liability. Around 90% of the world tanker fleet is covered by TOVALOP.

5) CRISTAL:

Being a private scheme of compensation, there is not a liability *stritu sensu*. The directors shall be the sole and final judges as to whether, and to what extent, compensation or payment shall be paid to the claimant(s) or member(s) in accordance with the provisions of the contract and the rules.

For the applicability of CRISTAL the oil must belong to a member to the contract and it is the CRISTAL organization that will pay. The framework of this scheme can be described as follows:

Any oil company in the world may become a party to CRISTAL provided it is willing to be bound by the terms of

the contract and agrees to become a member of CRISTAL limited and to abide by its bye-laws, rules and directives. The term "oil company" is widely defined as "any individual or partnership or any public or private body, whether corporate or not" that (1) is "engaged in the production, refining, marketing, storing, trading or terminaling of oil or any one or more of whose affiliates are so engaged", or (2) "receives oil in bulk for its own consumption or use".

As well as what are normally regarded as oil companies, this would include, for example, major users of oil as a source of fuel, such as power companies.

6) Fund Convention:

The Fund is financed by mandatory contributions from receivers of oil assessed on the basis of an amount per ton on the quantity of persistent oil they receive by sea at ports and terminals of member nation or at ports or terminals of non-member nations when the oil is subsequently transported to a member. Only companies receiving more than 150,000 tons of oil a year are subject to this annual assessment.

Like the TOVALOP Supplement, CRISTAL is also applied worldwide. Thus claimants in states that have ratified the Fund Convention (Colombia is not yet a member) can also avail themselves of any additional compensation that may be available. In order to ensure that CRISTAL members in Fund states do not bear disproportionate share of the cost of oil pollution settlements through having to contribute to both the voluntary and intergovernmental

renimes, there is a reimbursement mechanism written into the TOVALOP supplement and the CRISTAL contract.

Through this mechanism, CRISTAL members who have been required to contribute to the Fund settlement of an incident involving a tanker carrying a cargo owned by a CRISTAL member would have those contributions reimbursed by the tanker owner (up to applicable TOVALOP supplement limit) and by fellow CRISTAL members.

Whilst this is of not direct consequence to claimants, the reimbursement mechanism will result in oil companies resident in states party to the Fund Convention receiving contributions from tanker owners and other CRISTAL members for a significant proportion of their contributions to the International Oil Pollution Compensation Fund. (IOPC FUND) TOVALOP and CRISTAL.

c. THE RULE OF THE INSURANCE COMPANIES IN THE COMPENSATION SCHEMES:

1) General Concept:

Protection and Indemnity Clubs are mutual insurance associations for shipowners. Their functions is to cover their members against third party liability which they may incur in the course of their operations and which would not be covered by ordinary hull and cargo insurance. The Clubs cover almos all the world's oceans-going tanker fleet.

Insurance is provited for a wide range of liabilities including liability for oil pollution.

P & I- Protection and Indemnity- is a special concep. as the objective of the P & I clubs is to try and protect their members against claims of compensation and indemnify them. if after all, they are held liable.

2) Ensuring Environmental Risk for Oil Pollution:

Insurance of environmental impairment liability is in many ways a problem. First, there is the question of capacity. Environmental damage- and also other disasters- can take on such proportions that the available capacity of the insurance market does not offer a satisfactory degree of coverage

Any vessel entered for protection and indemnity insurance with a P & I Club, which is a member of the " International Group of P & I Club." has coverage for its liability expenses, including fines for oil pollution damage, up to a certain limit, which as from February 20th, 1990 is USD 500 million per incident per ship. This amount can be increased up to 700 million in a case of reinsurance.

This limit is the result of an increase in the worldwide insurance market capacity during the last several years, especially in reinsurance.

The P & I Club covers the liability of the shipowner in respect to TOVALOP and/or the Liability Convention or national pollution laws.

The limit of 500 million USD only applies to claims in respect of oil pollution. Other types of claims are not subject to the limit, even if they arise out of the same casualty which caused the oil pollution .

If the aggregate total of the member's claims in respect of oil pollution exceeds the limit, the associations normally are liable, on a pro rata basis, for an appropriate proportion of each individual claim.

However, the total liability of the association in respect of claims to the ship, cannot normally exceed the limit.

f. COMPULSORY LIABILITY INSURANCE:

1) General Concept:

The question of whether liability insurance should be made compulsory is interesting in the case of environment risk. Hitherto more compulsory liability insurance has not been usual in Europe. To a certain extent, however, some countries have accepted the principle of compulsory insurance for disaster liability—principally on the basis of international conventions.

The insurance has a double purpose: compensation of persons who are damaged by dangerous activity and coverage of liability regarding the dangerous activity.

The compulsory insurance that results in a limitation of the liability of the person who is compelled to insure his responsibility does not have, as its primary objective,

the protection of damaged persons, but the protection of the interest of the insured to cover fully the risk of his liability- a coverage that is available for one engaged in a dangerous activity only if his liability is limited to an amount that can be borne by the insurance market. ()

The 1969 Liability Convention obliges the shipowner to maintain liability insurance or other financial security when carrying a cargo of more than 2.000 tons of oil in bulk (article 7)

The Convention provides that ships from non-contracting states entering or leaving a port in the territory of a contracting state have to maintain the same insurance coverage as shipowners of contracting states because they are also liable under this Convention.

The Convention has detailed provisions on the insurance and certificates to be carried on board the ships.

g. PERSON ENTITLED TO CLAIM:

1) General Concept:

Consult the concept of compensable damage all ready discussed in this chapter.

2) National Legislation:

All the persons who where injure from the incident have the right to be compensated. The article 2356 of the C.C.C establish that damage(that is repaired under the terms of the C.C.C) must be repaired.

3) Liability Convention:

According to the terms of the Liability Convention, all the victims of the spill that have economic loss as a consequence of the discharge and all the persons who took preventive measures to prevent or minimize such damage.

4) The Fund Convention:

The Fund shall pay compensation to any person suffering damage if such person has been unable to obtain full and adequate compensation for the damage under the terms of the liability Convention. examples of that can be:

1. No Liability for damages arises under the -Liability Convention.
2. The tanker owner cannot be held liable (the fund's defences are fewer than those granted the tanker owner under the Liability Convention.
3. The damages exceeds the owner's liability under the Liability Convention financial incapacity of the shipowner- damages exceed Liability Convention limites-.

The Fund Convention supplements the Liability convention indemnifies owners for a part of their C.I.C liability. The flag state of the ship must be a party to the Convention or its insurer form part of its liability under the Liability convention. providing it was not guilty of willful misconduct in the incident and is in compliance with the four specified International

Convention affecting safety at sea.

In such cases the Fund will indemnify the owner for the part of the owner's liability under the Liability Convention which is between USD 131 per gross ton or USD 11 million, whichever is lower, and the liability limit under the Liability Convention (USD 175 per gross ton or USD 18.4 million, whichever is lower). Revisions now under considerations would eliminate this indemnification.

4) TOVALOP:

Under Tovalop standing agreement the persons that can claim is more limited than the Tovalop Supplement: Under Tovalop Supplement the persons whose incurred to remote a Threat of an escape of discharge of oil where not pollution occurs have the right to claim compensation of the cost of the action take.

Some authors like says that Under TOVALOP the idea is to reimburse only the public national authorities and not private individuals. If the government chooses to take proceedings under TOVALOP and thus obtain reimbursement it must subsequently give up any further claim. (middle east)

We think independent of what is done in the reality. that according with the Standing Agreement point " 1 and specialy Supplement of Tovalop, point # 3 " financial Responsibility for an applicable incident" the person that can claim affected.

5) CRISTAL:

CRISTAL offers a comprehensive coverage to compensate any person or government who has suffered pollution damage or who has taken threat removal measures as a result of an incident.

h. ADMINISTRATION AND COMPULSORY INSURANCE:

1) National Legislation:

According to Decree 2324 of 1984, The National Directorate of Shipping and Ports is the entity in Colombia in charge of issuing ships with the certificates corresponding to the conventions.

2) The Liability Convention:

The relevant governmental agencies of contracting states are responsible for ensuring that the provisions of the Liability Convention are enforced. They must ensure that ships carry certificates of insurance / financial responsibility confirming that insurance exists. Such certificates are issued by the administering authorities for ships under their flags.

Basically the Liability Convention certificate is a certificate issued by a national authority which testifies that the vessel is covered by adequate insurance to meet the requirements of the International Convention to compensate for damages caused by the spillage of oil from the ship.

A certificate is issued by the maritime authorities of the state under whose flag the vessel is sailing. Such a country is referred to a "Contracting State".

When an owner is taking over a ship, it is essential that a P & I association's assistance in applying for a certificate is requested in good time before the delivery

of the ship to allow sufficient time for the relevant authority to issue the certificate, which the owner must ensure is placed on board before the vessel's delivery.

The owner must obtain a "blue card" from the P & I Club. The "blue card" must, together with a letter of application, be sent to the issuing authority accompanied by the registration fee, which varies from nation to nation. Some convention authorities have their own special form of application for a Liability Certificates.

For the sale and purchase of oil ECOJETROL (The Oil State Company in Colombia) concludes charter parties in which it is necessary to include the pollution clause.

In this clause the shipowner and the charterer are obligated to comply with the terms of TOVALOP and CRISTAL.

Certificates issued or certificated under the authority of a contracting state shall be accepted by contracting states for the purposes of this convention and shall be regarded by other contracting states as having the same force as certificates issued or certified by them.

A contracting state may at any time request consultation with the state of a ship's register should it believe that the insurer or guarantor named in the certificate is not financially capable of meeting the obligation imposed by this convention.

Furthermore, each contracting state is required to

ensure, under its national legislation, that no ship, wherever registered, actually carrying more than 2,000 tons of oil in bulk as cargo, shall enter or leave any port or off-shore terminal in its territory or territorial sea unless it has on board a valid certificate of insurance.

3) The Fund Convention.

The Fund is administered by the Fund Convention Secretariate acting on behalf of an executive committee and General Assembly. The Assembly consists of representatives of all the contracting states.

4) TOVALOP:

In administering TOVALOP, the Federation takes steps to ensure that parties to the agreement meet their various obligations. After verifying that the tanker owner has adequate financial security, it issues TOVALOP certification.

5) CRISTAL:

Cristal Limited is a Bermuda registered company which administers the CRISTAL Contract.

i. LIMITATION OF LIABILITY:

1) General Concept:

The basic principle in most countries when it comes to liability for environmental disasters is that the damage caused shall be compensated in full- provided that the conditions of compensation are met. As far as possible the claimant shall enjoy the same economic position as before the damage occurred. That his loss has been fully compensated means that the reparative function is hereby fulfilled.

2) National Legislation:

Decree 1875 of 1979 established a limitation for liability for oil pollution damage of 1,000,000 USD but neither the liable person nor the basis for the liability is clearly established.

3) The Liability Convention:

If there is no actual fault or privity, the shipowner liability can be limited to approximately 59.7 million units of account. In 1976 a protocol to the Liability Convention established that the pointcare Franc Values set out in the conversion should be replaced by the SDRs of the IMF. This protocol entered into force in 1981.

This coverage is, of course, provided by the P & I Club of the vessel. According to this protocol, the owner is entitled to limit his liability to an amount of 133 SDR (US \$ 166) per ton of the ship's tonnage or 14 million SDR (US \$ 17.5 million) (6)

Article V Paragraph 1 of the Liability Convention says: "The owner of a ship shall be entitled to limit his liability under this convention in respect of any one incident to an aggregate amount of 2.000 Francs for each ton of the ship's tonnage. However, this aggregate amount shall not, in any event exceed 210 million Francs".

The liability under the Liability Convention is limited only if the owner has constituted the limitation found for the total limit of his responsibility in accordance with the provisions of Article V, Paragraph 3 of the Liability Convention and the applicable national law implementing this provision.

4) Fund Convention:

A maximum of USD 54 million, aggregated with C.L.C. compensation (if any). The Fund Assembly can decide to increase this limit to USD 72 million

5) TOVALOP:

Under the Standing Agreement, the maximum compensation for all claims arising out of any one incident is US \$ 160 per limitation ton (about USD 140 per gross ton) or US \$ 16.8 million whichever is the less.

Under the terms of the TOVALOP supplement the maximum limits of liability are:

-For all tankers up to 5,000 gross tons, a set maximum of USD \$ 3.5 million.

-For a vessel over 5,000 gross ton, USD 3.5 million, plus USD 493 for each gross ton in excess of 5,000 gross tons, up to a maximum of USD 70 million which corresponds to a tanker of about 140,000 gross ton.

6) CRISTAL:

Total compensation available from CRISTAL limited inclusive of that paid by the tanker owner is independent of the size of the tanker involved in the incident.

Periodic calls are based on that percentage of the total call that individual parties reported receipts bear to the total receipts reported in the previous year; however, all parties are required to contribute at least a minimum amount which is set by the Directors each time a periodic call is made by CRISTAL.

The limit of liability under CRISTAL is USD 135 Million.

i. CONSTITUTION OF THE FUND:

1) National Legislation:

In Colombia there is no regulation that establishes a pollution Fund.

2) Liability Convention:

According to C.L.C. the shipowner has to constitute a fund until the limit of the liability with the competent authority to which action for compensation is brought.

Here, it is necessary to clarify that DIMAR (the National Maritime Authority) which is the first authority that receives results of the investigation of a marine casualties, will declare among other things the liability of the shipowner and also the amount of the damage.

One of the functions of DIMAR, already established by legislation, is to avoid the sailing of the vessel that has caused the pollution until the shipowner constitutes acceptable warranty.

Again, DIMAR is not an entity with the jurisdiction in any civil actions for compensation; that is the function of the civil judges.

Nevertheless, to guarantee the effectiveness of the civil judgement, it is necessary that DIMAR demand the constitution of the C.L.C Fund in a bank that is chosen by the relevant port authority to the order of the civil judge who will distribute it in solving the action of compensation.

Other debts of the owner such as are fines that may be imposed on him by the administrative authority will not be covered by the C.L.C.

CHAPTER VI

A. CONTINGENCY PLANNING FOR OIL SPILL LITIGATION

This chapter is devoted specially to the persons that has some responsibilities in the action contingency plan. In its differens liveles: in the critic area, in the zone or inthe national livel. With an especial enfasys to the ports capitans and of course lawyers and judges.

The need for legal contingency planning rest on an obvious proposition that when a spill occurs, potential damage claims should be promptly and throughly evaluated. Because time is of the essence, a potential defendant cannot afford the luxury of deferring his investigation to a mor convenient time. Failure to anticipate the need for litigation fact-gathering usually means the important information- particulary scientific data- will be lost forever.

There is also another underlving the need for legal contingency planning, which may not be quite so obvious, particulary to non-lawyers. To be of any use in court, the information gathered must first qualy as admissible evidence. If a court will not admit into evidence the proffered information, there is no way it can be used to refute a claim or to contradict a witness. Careful advance planning will ensure that the information -gathering procedures pass muster under the accepted rules of evidence.

Technical evidential requirements are particulary

stric for scientific studies or analysis. For example, failure to properly document the "chain of custody" of samples upon which the studies are based may result in a court declining to admit the studies into evidence. One court recently refused to admit a sophisticated analysis, which cost thousands of dollars, solely because no one could demonstrate that the samples analyzed in the laboratory had actually come from the impact area.

Because a damage trial will typically occur years after spill, a legal response plan must be designed to preserve relevant evidence. The goal should be to create relatively permanent documentary sources of evidence such as photographs, movies, reports etc.

In situations where damage claims are likely to be made for damage to natural resources, contingency planning can be especially useful. Such claims of damage are based on the assumption that the environment has been altered by the spill; therefore, it is critical to determine as precisely as possible what the immediate pre-spill reference conditions were.

1. Basic Elements of a Legal Response Plan:

Each spill presents a unique set of physical and economic characteristics. While contingency planning can provide a road map, the details of a legal response plan must be specifically tailored to meet the needs of the particular spill. Nevertheless, certain key elements of the legal response should be carefully addressed.

These elements are:

- Personnel selection.
- Documentation of the geographic extent of the spill.
- formulation of procedures for collection of sediment and organism samples.
- Establishment of procedures to monitor the impact of the spill on affected commercial activities.
- Evaluating and influencing cleanup decisions.

Each of these elements will be considered in the following sections.

2. Personnel Selection:

It is critical that qualified personnel be selected to carry out the legal response plan and all individuals should be chosen well in advance. With the exception of the legal coordinator, who will normally be lawyer, the other participants should be investigators whose scientific experience and background qualify them as potential trial experts.

3. Documenting the geographic extent of the spill:

One of the main objectives of any legal response plan is the documentation of the spill's geographical scope. (Aerial photographs, visual inspection, sampling and analysis of sediment and organism samples). The easiest way to refute a claim is to prove that the alleged damage occurred at a place where the spilled oil has never been. It is a mistake to rely exclusively on government-generated reports concerning the geographic extent of the spill. Reports of this type from a cleanup coordinator's staff are

usually hurriedly assembled and are often inaccurate. If report documentation is inadequate, it cannot be verified a later date.

In documenting the geographic scope of the spill, investigations should be conducted beyond the impact area for the purpose of demonstrating the absence of impact.

4. Formulation of sampling strategy :

All major spills that affects the shoreline will require some sampling and analysis of sediment and organism to determine the presence or absence of spilled oil, its likely persistence, the biological consequences, and the presence or absence of other toxic substances.

It is important obtain background or control samples has been previously noted. If pre-spill samples are unattainable, "reference" stations as similar as possible to those in the impact zone should be established (possible areas just outside of the impact area)

Potential defendants should anticipate that claimants will attempt to attribute any perceived biological abnormality to particular oil spill. These claims invariably will be made despite the presence of numerous other causal factors such as raw sewage, PCBs, for instance. The possibility that these factors are presented should be kept in mind in designing the appropriate sampling program.

5. Monitoring Spill impact on commercial activity:

It should come as no surprise that many claimants, including governments, look upon the oil spill defendant as a kind of Santa Claus to be sued for whatever they can get. After one particularly well publicized oil spill, a coastal town even went so far as to make a claim against a shipowner for the cost of a new sewage treatment plant as well as for general road upkeep.

The investigator should obtain all available information indicating pre-spill price levels and sales volumes. Newspapers and personal interviews can usually provide this kind of information.

6. Evaluating and Influencing Cleanup Decisions:

In Colombia oil spill cleanup proceeds under direction of the Government who takes charge of all cleanup activities and is generally responsible for determining how cleanup will proceed.

While this cleanup is based on a certain degree of logic, it is also flawed.

CONCLUSIONS

All of the legal aspects of marine environmental problems need to be faced in Colombia, not only the case of oil pollution from ships.

The complex nature of the application of the Liability Convention in Colombia allows us to see the gaps in the national legislation concerning compensation for environmental damage, not only for oil spills but also from any kind of pollution coming into the earth or into the sea.

Because marine pollution has a necessary connection with pollution on land, it is necessary to formulate a national environmental protection policy which must focus on the following:

1. The creation of an Administrative Department of the Environment for protecting the Environment and controlling pollution of the atmosphere, land or sea.

2. The formulation of a systematic body for preventing, controlling and warranting the compensation to victims.

From administrative point of view, it is necessary to develop the existing rules in order to create a unique administrative procedure for all kinds of marine pollution. This will avoid cause-specific legislation that only creates confusion.

This administrative procedure should be based on strict liability and the evidence and judgements should be the basis for the civil procedure that will order the compensation.

If the reforms in the legislation are enforced and the amounts of the fines are appropriate, they may be part of the administrative budget for the use in the protection of marine environment.

From civil point of view, strictly liability (on determinate liable person) combined with liability insurance is an important component in a modern, practicable and functional system of compensation that must exist in Colombia. By means of liability insurance the risk can be shared and the costs of insurance are in the final analysis borne by the enterprises customers - often the public at large - and therefore the overall risk is broken down into small parts.

From the procedural point of view, the possibilities of affording increased protection to common right should be weighed. More emphasis should be placed on protecting interest in addition to right

3. It is necessary to give more importance to the development of Articles 2359 and 2360 of the National Civil Code which establish the class action or popular action which is very well developed in the common Law of the USA.

4. Finally nothing of what we can say about rules can be really be very effective if we do not dispose of a mechanism for detecting pollution at sea and for catching the preasumably liable ship. This means that it is necessary to provide more financial resources to the Colombian Coast Guard.

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