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The 2001 Bunker Convention: Needs for Completing Civil Liability Regime for Oil Pollution Damage Caused by Ships

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ABSTRACT

So far, the CLC isn't the most effective liability and compensation for oil pollution damage in the world. It should be acknowledged that there are still weaknesses in the CLC, and other liability mechanisms have been developed to cover those gaps. The 2001 Bunker Convention is one influential Convention. Although most of the catastrophic oil spills seem to have been caused by large tankers, one of the first sources of oil pollution at sea is bunker oil to operate ships. Bunker oil means any hydrocarbon mineral oil, including lubricating oil, used or intended to be used for the operation or propulsion of the ship, and any residues of such oil. (Article 1(5) of 2001 Bunker convention), so it presents the risk of causing pollution damage, which even more difficult and expensive to clean than a tanker spill. However, the bunker oil isn't covered by the CLC; therefore, 2001 Bunker Convention was born to fill it. Within the article's framework, the authors will analyze and evaluate the significance of 2001 Bunker Convention for damages caused by oil pollution from ships.

1. Introduction.

The 1969 International Convention on Civil Liability for Oil Pollution Damage (CLC 1969) has been in effect since 1975. This Convention was adopted with the aim of ensuring that compensation for oil pollution damages is fully, promptly, and effectively paid. However, CLC 1969 was revised under the 1992 Protocol, which is called the International Convention on Civil Liability for Oil Pollution Damage 1992 (CLC 1992) and entered into force on 30 May 1996. The CLC system has established the vessel owner's liability for damage caused by oil pollution, and shipowners must purchase compulsory insurance or financial security to ensure their liability for oil pollution damage caused by the ship.

International Maritime Organization - IMO met from 19 to 23 March 2001 to ratify the International Convention on Civil Liability for Bunker Oil Damage (the 2001 Bunker Convention) [1]. The object of this Convention is to unify mandatory international regulations relating to liability for damages caused by bunker oil pollution. On the basis of the provisions of United Nations Convention on the Law of the Sea, 1982 (UNCLOS 1982); CLC 69/92; International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage (FUND 71/92); International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea, 1996, and other related international conventions adopted by the IMO, the 2001 Bunker Convention was created. The 2001 Bunker Convention regulations and the rules of other relevant international conventions are directed towards a clean ocean (Recalling article 194 of the United Nations Convention on the Law of the Sea, 19821, which provides that States shall take all measures necessary to prevent, reduce and control pollution of the marine environment).

Since then, the CLC Convention has established an efficient and distinctive worldwide legal framework for civil liability and compensation for environmental pollution. A number of other civil liability regimes have been formed to address the signif-

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icant shortcomings of the CLC, such as Limited the scope of application, and compensation, etc. On the one hand, some countries have developed their own civil liability scheme and compensation for ships- sourse oil pollution (The United States is not a party to the international oil pollution liability regime. It has its own oil pollution liability regime, contained in the Oil Pollution Act,1990 (OPA 1990). Although the OPA 1990 is similar in structure to the international liability regime, the OPA 1990's scope is wider than that of the international regime. See The Oil Pollution Act of 1990).

On the other hand, some other countries have adopted treaties and conventions to tackle these specific problems. Both national and regional laws seem to be working in tandem with the civil liability system of the CLC. Moreover, there is a civil liability regime for the damage caused by the bunker oil contamination, which also operates in parallel with the CLC's civil liability regime. Since the 2001 Bunker Convention was ratified, the 2001 Bunker Convention has fulfilled the gaps left by the CLC and FUND in fuel oil emissions for engine service. (CLC and FUND conventions only regulate pollution caused by persistent oil). However, the 2001 Bunker Convention still has a number of limitations; for effective implementation of the Convention, it is highly dependent on the member states of the Convention. This will be clearly analyzed in the next presentations.

2. Main Contents of the 2001 Bunker Convention.

2.1. Liability of ship owners.

The 2001 Bunker Convention applied the concept of strict liability, meaning that owners are responsible for damage caused by bunker oil pollution of their ships, whether or not their ships are at fault unless otherwise provided by this convention. And an example of this issue can be analyzed as follows: A cargo ship was docking in the port and was struck by a tugboat of the port, leading to pollution caused by bunker oil of cargo ship. The owner of that cargo ship would be liable for the harm caused by such pollution, even if the pollution is caused by 100% of the tugboat's negligence, provided that accident was not caused by an act or omission done with intent to cause damage by the person who suffered the damage or from the negligence of that person. The liability of shipowners under the 2001 Bunker Convention is strict but not absolute, because shipowners are still excluded from liability in some cases. This implies that the shipowner is not responsible for polluting damage if he can prove that the damage is caused by one of the following reasons: the damage resulted from an act of war, hostilities, civil war, insurrection, or a natural phenomenon of an exceptional, inevitable and irresistible character; or the damage was wholly caused by any act or omission done with the intent to cause damage by a third party, or the damage 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.[3]

2.2. Party responsible for pollution damage under the 2001 Bunker Convention.

As defined in the 2001 Bunker Convention, the party responsible for damage caused by the pollution of vessels carrying bunkers is the shipowner. And the Convention also establishes the concept of shipowners to include the shipowner, the manager, the operator, and the charterer. Thus, according to this concept, the party responsible for the damage to fuel oil pollution of the ship (shipowner) has a broader meaning, including many people rather than merely the owner of the ship.

The 2001 Bunker Convention states that in the event that two or more parties are liable for damage caused by pollution, they shall be held jointly or separately liable for such damage. This means that a damaged third party[4] known as a shipowner, ignores litigation against each other and fixes the damage according to the best option available from the financial conditions of the shipowner.

2.3. Limited liability.

Subject to Article 6 of this Convention, the rights to limit the liability of shipowners or insurers shall not be impaired under the regime of limitation of liability of international or any country. It means that this Convention does not set out any independent limits to apply to it. However, member states have the right to choose the limited liability regime to apply. The Convention gives an applicable example of the Convention on Limitation of Liability for Maritime Claims 1976 as amended by the Protocol of 1996 (1976 /1996 LLMC Convention).

2.4. Compulsory insurance or financial security.

According to Article 7 of the 2001 Bunker Convention, the registered owner of a ship with a gross tonnage greater than 1,000 GT registered in a Contracting State shall retain insurance or financial protection to secure its liability for damage to bunker pollution in an amount equal to the limit under applicable international or national law, but in no case shall the amount be exceeded in accordance with the 1976/1996 LLMC Convention.

The 2001 Bunker Convention applied the 1976/1996 LLMC Convention to restrict the amount insured. However, there is no

[3] According to Article 3 (2), (4) of The 2001 Bunker Convention: 3. No liability for pollution damage shall attach to the shipowner if the shipowner proves that: (a) the damage resulted from an act of war, hostilities, civil war, insurrection or a natural phenomenon of an exceptional, inevitable and irresistible character; or (b) the damage was wholly caused by an act or omission done with the intent to cause damage by a third party; or (c) the damage 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. If the shipowner proves that the pollution damage resulted wholly or partially either from an act or omission done with intent to cause damage by the person who suffered the damage or from the negligence of that person, the shipowner may be exonerated wholly or partially from liability to such person.

[4] Third party who suffer a specific loss that was originally regulated in the relationship between the wrongdoer and another party. Art.3(2) of 2001 Bunker Convention provides that where more than one person is liable in accordance with paragraph 1, their liability shall be joint and several. The above provision, in essence, means that the damaged third party or state authorities can ignore litigation between the parties falling under the definition of Shipowner and recover in accordance to the best option available from the financially healthiest shipowner.

minimum claim in this Convention, resulting in varying coverage levels in different member states.

2.5. Judgment of a competent court.

The courts of the polluted state have jurisdiction over any claims for damage caused by the pollution of the vessels carrying bunkers to the shipowner, the insurance company, or its guarantor. Any judgment of the competent courts shall be recognized by any Contracting State to this Convention. When an award is recognized, it shall be enforced as soon as possible in each Contracting State.[5]

3. The relationship of the Bunker Convention 2001 and the CLC in compensation for oil pollution caused by ships.

3.1. Authority and scope of application.

The 2001 Bunker Convention refers to damage caused by oil pollution in the territorial sea or the exclusive economic zone of a Member State and to preventive measures wherever taken to avoid or mitigate damage caused by pollution. However, the 2001 Bunker Convention would not cover pollution damage that has been applied under the CLC regime.[6] Therefore, we should also recognize that the 2001 Bunker Convention is applicable to ships other than oil tankers in large quantities such as cargo, for example, container ships, passenger ships, etc. Ships carrying oil in bulk as cargo can also be subject to the 2001 Bunker Convention if they do not carry oil in clean cargo tankers.[7] The CLC regulatory exclusion of oil pollution damage means that only claims are recognized under the 2001 Bunker Convention for damages arising from a non-persistent fuel oil spill. Any claim or other failure to indemnify under the liability regime of the CLC would not be recognized under the liability regime of the 2001 Bunker Convention. Therefore, the 2001 Bunker Convention is set up to govern matters of civil liability for oil pollution damage rather than to govern all matters relating to oil pollution damage without being protected by the CLC regime's regulatory scope.

3.2. Liability for oil pollution.

According to the 2001 Bunker Convention, shipowners at the time of the incident causing oil pollution damage are strictly liable for such pollution damage. It is worth noting that unlike CLC 1992, the definition of the shipowner in the 2001 Bunker Convention is not limited only to the registered owner of the ship but also includes persons exempt from liability under CLC 1992, such as charterers and ship operators, etc. And the liability of those called shipowners is interrelated or separate. Thus, compared with CLC, ship owners, according to the 2001 Bunker Convention have broader meanings, including: including the registered owner, bareboat charterer, manager, and operator of the ship, which lead to more people responsible for oil pollution losses according to the 2001 Bunker Convention according to the CLC.

3.3. Insurance or financial security.

Under the CLC convention, shipowners of a ship registered in a member state carrying more than 2,000 tons of cargo oil are required to buy insurance or financial security. According to the 2001 Bunker Convention, the owners of a vessel of a member country with a gross tonnage greater than 1000 GT must maintain insurance or financial security to cover liability for pollution damage caused by the fuel oil of their vessel, in a proportion corresponding to the limit of liability under the applicable national or international limitation of liability regulations.

Claimants for oil pollution damage under the 2001 Bunker Convention can sue insurance companies that have given financial insurance to shipowners. And like CLC's liability regime, insurance companies have the right to protect their interests against claims for damages; be entitled to limit the same liability as to the owner of the ship; can be protected against polluting damages caused by intentional misconduct causing the shipowner's damage; may request the shipowners involved in proceedings in the lawsuit for compensation of oil pollution damage.

3.4. Limitation of Liability.

Shipowners or suppliers of insurance or financial security under the 2001 Bunker Convention have the right to limit liability under national or international law, for example, under 1976 /1996 LLMC Convention. Thus, the limitation of liability for bunker pollution damage is not specific but depends on the vessel owner's choice of liability regime. Hence, unlike the CLC's rule of liability, which sets a specific limit, the 2001 Bunker Convention provision on the limitation of liability for damage caused by bunker pollution could cause inconsistencies in the application of this Convention since various countries have different laws regarding this liability issue.

During the on the ratification of the 2001 Bunker Convention, there were difficulties in negotiating the establishment of an international fuel oil pollution fund. Although there is a high risk of oil pollution from a fuel oil spill, no international fund for bunker pollution damage has been created.[8] Therefore, unlike the CLC liability regime, there is a high possibility

[5] Article 10, 2001 Bunker Convention.

[6] Article 4, 2001 Bunker Convention.

[7] Art.4(1) provides that the Bunker Convention does ?not apply to pollution damage as defined in the Civil Liability Convention, whether or not compensation is payable in respect of it under that Convention?. The Bunker Convention has been developed for the purpose of filling the gap left open by the CLC/Fund scheme in respect of oil pollution caused from bunkers and not as an alternative or additional scheme to the CLC/Fund. Art.1(4) preserves this balance. Therefore, pollution damage caused by tankers (either from their cargoes of ?persistent? oil) where the CLC/Fund regime is applicable is covered by the CLC/Fund scheme only. Claimants cannot look at the Bunker Convention for recovery of damages caused by oil pollution from such ships because adequate compensation (or compensation at all) cannot be retrieved under the CLC/Fund scheme.

[8] Many delegations at the IMO Legal Committee debates in the late 1990s recognised that bunker spills were a great source of pollution and there was an assumption that they accounted for a significant number of pollution incidents. The 65th Session of the Legal Committee in September 1991 established a small Working Group of Technical Experts on Bunker Fuel Oils (for non-tankers), bunegotiationst it was not able to reach a consensus. Most delegations

that 2001 Bunker Convention damages claims will not be adequately compensated for lack of funds.

4. The value of the 2001 Bunker Convention in compensation for oil pollution caused by ships.

The 2001 Bunker Convention is modelled on the provisions of the CLC. Therefore, most of its main terms are similar to the international liability regulations and the oil pollution compensation regime, including regulations related to the applicable geographic extent, jurisdiction, and mandatory insurance or financial security. Some provisions, such as provisions on terms, apply from the CLC regime, although there were necessary adjustments. Besides, there are different provisions between the two regimes, such as the provisions on who is responsible and the limit of legal liability, in particular:

The regulation on the person responsible for oil pollution damage under the 2001 Bunker Convention has a wider application than under the CLC regime; it includes shipowner, operator, charterer. Meanwhile, according to the CLC, the person responsible for oil pollution damage includes only the ship's registered owner.

For the limit of liability, the CLC has provided a specific set of limitations of liability. According to the 2001 Bunker Convention, there is no specific limitation of liability, which depends on the legal framework of the country, which decides to apply it, typically the law of that Member State. If the country has a clear system of compensation laws for oil pollution damages, then the 2001 Bunker Convention's implementation will be smooth and effective; in contrast to an incomplete national system of oil pollution compensation laws, the implementation of the Convention is likely to be ineffective. This can be proven by a particular situation where two ships are the same (all aspects are the same) due to the application of the laws of two different countries, there is a different level of insurance, but both are certified in accordance with the 2001 Bunker Convention.[9]

As such, the 2001 Bunker Convention has developed a compensation mechanism for bunker pollution damages. It is expected to fill the void left by other oil pollution conventions, the CLC, and the Fund Convention. Although the 2001Bunker Convention established strict liability for member states, it did not agree on the limit of liability, and the amount insured. It was determined by the indemnity regimes that the selected countries apply. Therefore, whether the implementation of the 2001 Bunker Convention is successful or not depends very much on the laws of member states.

The 2001 Bunker Convention effectively complemented the shortcomings of the CLC in reimbursement for damage caused by oil pollution from ships. This allows us to better protect the marine environment from emissions from the oil supplies of our vessels, as well as to provide fair coverage for victims of both the pollution of cargo oil and fuel oil. The 2001 Bunker Convention applies to all ships, including tankers, so it covers oil pollution losses that have not been controlled by CLC regulations. As such, there will be no alternative between these two regimes; in order to complete a liability and compensation regime for oil pollution damage caused by ships, a nation must be a member of both the CLC and the 2001 Bunker Conventions.

Conclusions.

The comparison and analysis of 2001 Bunker Convention and CLC 1992, to determine the role of the 2001 Bunker Convention has allowed us to take a closer look at these two conventions, as well as international legal documents on liability for damages caused by oil pollution from ships. There are different or identical rules in each treaty, but all these international agreements are usually enacted in order to create a legal corridor, an international legal standard for member states to apply in order to minimize negative impacts on the marine environment, to resolve and cope with the impacts on the marine ecosystem and the blue ocean on Earth.

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favoured the inclusion of bunker fuels within an HNS regime. The Legal Committee noted the differences of opinion, but there was support for the view that there should be no contribution to a second tier HNS Fund by such cargoes in any event. At the 67th Session of the Legal Committee in September 1992 an indicative vote was held as to whether bunker fuel oil should be included in the HNS Convention. 20 delegations were against. The Committee decided, therefore, to leave bunker fuel oils outside its further work on hazardous and noxious substances, and the HNS Convention 1996 does not therefore cover bunker pollution. See LEG 65/8, 11 October 1991, and LEG 67/9, 13 October 1992, para 45. An attempt to reintroduce bunker oils was rejected at the 72nd Session in 1995.

[9] According to Art.7(1), the insurance or other financial security must be enough ?to cover the liability of the registered owner for pollution damage in an amount equal to the limits of liability under the applicable national or international limitation regime, but in all cases, not exceeding an amount calculated in accordance with the Convention on Limitation of Liability for Maritime Claims, 1976, as amended'. The amount insured is limited upwards by the limits set by the LLMC 1976 as ammended; this is, at most, around one third of the total limitation fund because the Bunker Convention does not cover claims in respect of death or personal injury (this amount is approx. double to that in respect of any other claims). However, there is no provision for minimum insurance as this was left to the ?applicable national or international limitation regime? of the State Party which is the ship's Flag State. There is no uniformity therefore on the level of cover. This may lead to situations where two ships (in all respects identical) have different levels of insurance cover but still both being properly certificated under the Bunker Convention scheme.

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