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At the November Meeting of the Association, a Report was submitted on the activities of the Comité Maritime International's Sub-committee on oil pollution, commonly known as the "TORREY CANYON" Committee.

As stated in the Report, at a meeting of the "Working Group" of the Sub-committee held in Rome October 4 and 5, 1967, a questionnaire was drafted for submission to the national maritime law associations constituting the C.M.I. This questionnaire is contained in the enclosed Report of the Working Group, which is now being circulated. It includes eight questions, each printed in boldface, with the Working Group's commentaries on each.

The next meeting of the Working Group is to be held February 29th and March 1st. In order to assist the Executive Committee in formulating the Association's reply to the questionnaire in advance of that meeting, all members interested in the subject are earnestly requested to submit their answers to the eight questions, with such comments as they may wish to add, to the undersigned, on or before February 5th.

J. EDWIN CAREY,
Secretary.

"TORREY CANYON"

Report to the International Sub-Committee by its Working Group made after meeting in Rome on 4th and 5th October 1967.

INTRODUCTION

The facts relating to the wreck of the "TORREY CANYON" and to the initiation of this inquiry are set out in paragraphs 1 to 4 of the working paper prepared for the meeting of the International Sub-Committee at its meeting in Brussels on 31st August, 1967. It may be convenient to add that French claims have now been put at 40,000,000 francs. It is convenient also to set out again "Item 16" which contains the terms of reference for the work in which IMCO and the C.M.I. are co-operating.

> "All questions relating to the nature (whether absolute or not), extent and amount of liability of the owner or operator of a ship or the owner of the cargo (jointly or severally) for damage caused to third parties by accidents suffered by the ship involving the discharge of persistent oils or other noxious or hazardous substances and in particular whether it would not be advisable:
>
> (a) to make some form of insurance of the liability compulsory;
>
> (b) to make arrangements to enable Governments and injured parties to be compensated for the damage due to the casualty and the costs incurred in combating pollution in the sea and cleaning polluted property."

At the meeting of 31st August a preliminary study of the problem raised by this Item was made. A similar study was made at a meeting in London on September 25th/26th 1967 of Working Group II of IMCO's Legal Committee, which was attended by some members of the C.M.I. Working Group. It is clear that the two aspects of the "TORREY CANYON" incident which have especially attracted the attention of Governments are:

> (a) the very substantial amount of damage which can be caused by cargo of this sort escaping from a ship; and

(b) the recoverability of the cost of protective measures which are taken by Governments for the benefit of those who have suffered or may suffer damage.

Although no decisions were taken at the meeting of 25th/26th September, the view was freely expressed that the existing maritime law was unsatisfactory in that liability was based on fault and the limit was too low. The possibility of a system of compulsory insurance was also considered. There was some support for a solution whereunder compensation for those who had suffered would be provided by Governments out of money levied by them on the oil industry.

It appears to the Working Group that two preliminary questions arise before the nature of the International Sub-Committee's work can be settled. They are:

(a) Is there any need for change in the present state of the law?

(b) If there is, how should the change be effected?

If it is thought that there is a need for change and that it should take the shape of a new maritime convention, the Working Group considers that the preparation of a new convention would have to be undertaken in two stages. Their discussions have shown that many of the points that will have to be settled are interdependent in the sense that the solution of one depends on the solution adopted for another. This makes it desirable to settle first the major questions of principle so as to have fixed points for development in detail. The Group has therefore formulated six questions of principle for consideration at the first stage. The eight sections of this Report set out in the form of a questionnaire the two preliminary points and the six points of principle with a commentary on each. You are asked to express the views of your Association on each of these questions. If it is considered that there are further questions of *major principle* (it is appreciated that there will be many points of detail to be discussed after the framework of a new convention has been put down on paper) to be settled before the preparation of a new convention is begun—please set them out at the end of your reply to the Questionnaire.

I

In the light of the "TORREY CANYON" incident, do you consider that there is need for change in the present state of the law?

COMMENTARY

Although this question comes logically first the answer to it must depend upon whether it is thought that cases like the "TORREY CANYON" cannot be satisfactorily handled without the introduction of concepts not hitherto used in maritime law. These are chiefly:

(a) strict liability

(b) compulsory insurance

(c) the recovery of the cost of protective measures.

Each of these is discussed in subsequent sections. If it is thought that any one of them should be introduced, then in the opinion of the Working Group, a new convention will be necessary. If it is thought that the problem can be handled without recourse to any of these concepts, an adaptation of existing law (e.g. increase of the limit of liability under the 1957 Convention) should be sufficient.

The Working Group thinks it right to call attention to a factor which should be taken into account in answering this question in particular and also to some extent, in answering subsequent questions. Hitherto it has been the practice of the C.M.I. to prepare a draft convention with at most only informal and unofficial consultation with the Governments of the countries to which National Associations belong. Governments as a whole did not formally come into the picture until the Diplomatic Conference when their views were necessarily decisive. Co-operation with IMCO is changing this practice. Governments now will make their attitudes known through IMCO as discussions are proceeding. The view of the Working Group reached after the IMCO meeting of 25th/26th September is that most Governments are likely to think that they cannot get the protection against oil pollution which they want without some fairly drastic change in the present state of the law. In deciding your answers to this and other questions it is necessary to take this factor into account. Even if you think

that the present state of the law is satisfactory from a commercial point of view, you must consider what changes you are prepared, if necessary, to accept. If a new system is to be devised, the object of the C.M.I. will be to help in the production of a new convention that is both acceptable to Governments and commercially workable.

II

If you consider there is a need for new measures, would you support a solution whereby:

(a) Compensation for those who suffer is provided by governments out of moneys levied by them; or

(b) Present Maritime Rules are changed or adapted to effect such measures?

COMMENTARY ON (a)

It has been suggested that there is a simple solution falling outside the field of maritime law and which therefore will not involve any change in the present rules. A premise for this solution is that, whatever system is adopted, the cost of compensation for damage will ultimately be reflected in the price of the commodity and so will fall on the consumer. The solution may be expressed as follows:

> The government of any state whose coasts are exposed to pollution by oil who wish to take measures to ensure that such damage is compensated may accept liability for it and finance the cost of such liability by means of a levy on oil carried to or from its country.

It must be emphasized that this solution is directed towards damage done by oil only. If it is thought that any new measures should cover other cargo besides oil (this topic is considered in the next section) this solution would appear to be ineffective.

There would seem to be certain advantages to this scheme:

(1) There should be no delay in implementing the scheme and, as it is common practice for all States to tax oil products, no new machinery would need to be established.

(2) No revision of existing law covering liability for damage by cargo would be required.

(3) Compensation should be available for damage by oil pollution irrespective of whether or not the offending ship can be found.

(4) Since Governments would have a right of recourse against a shipowner whose offence can be proved, they would be encouraged to take measures that would ensure that offending shipowners are detected.

It is suggested that the disadvantages are as follows:

(1) Quite apart from the possible reluctance of Governments to set a precedent in accepting liability for damage of this nature, they may be disinclined (for political reasons) to impose an additional tax on oil, notwithstanding the assumption that any extra cost will be borne by the consumer regardless of whether the premium is raised by a direct tax or by an increase in the final cost.

(2) The cost of insuring against pollution damage will be applied on a national basis and will not be spread uniformly on an international basis. This means that in the case of a country with a long coastline but with a small population, the cost per capita will be higher than in a country with a restricted coastline and a large population. The importance of this objection depends on the cost of insurance against damage by oil pollution.

(3) It means that in effect Governments will be going into the insurance business. However the levy is described it is in substance a premium against a risk that has to be estimated. The natural tendency of a Government would be to fix the levy on the high side so as to make sure there is always enough in the pool to meet any possible liability. Then the forces of inertia that operate against any change in legislation may keep the levy at an unnecessarily high figure, the fund will accumulate and then there may be a temptation to use the surplus for other national purposes.

COMMENTARY ON (b)

If the first question is answered affirmatively and the solution just considered is not adopted, it would seem to follow that there must be some change, great or small, in the existing maritime law. Until the major changes are decided upon, it would be premature to consider whether they can best be effected by the adaption of existing conventions or the framing of a new one. But the following points may be taken into account:

> If the new rules are restricted to shore damage, the basis of liability may be altered without amending existing conventions (the Collision Convention 1910 only deals with damage to colliding ships, their cargo and persons on board).
>
> If the limit of liability is to be altered *and* liability is to remain with the shipowner (or carrier), then the Limitation Convention 1957 would have to be amended, since this Convention entitles the shipowner to limit his liability to approximately £24 per ton for material damage.
>
> If liability is imposed on the shipper, receiver or cargo owner, no change in existing Conventions is required.

III

If you favour a new convention, what should be its scope?

COMMENTARY

There are three aspects of this question which must be examined, namely what should be the territorial scope of the convention and what damage or what cargo should be covered.

> (a) *Territorial Scope:*
>
> Ought the provisions of a new convention to cover damage flowing from incidents occurring in territorial waters? It would, it might be thought, be inconvenient to try to draw a line between the high seas and territorial waters and have two different sets of principles operating on either

side of the line. But then questions might arise about inland waterways.

(b) *What kind of Damage should be covered:*

i. The first possibility is to confine the convention to damage by pollution by crude oil with the expectation that it will be used as a prototype for later conventions on similar topics. If this is done, it should be easy to arrive at a definition of crude oil. It would have to be considered whether the convention should apply only to crude oil carried as cargo i.e. excluding bunkers; this might depend on whether the convention applied to territorial waters, where leakage from bunkers might be a nuisance. The disadvantage of the prototype method is that it takes a long time to negotiate a convention and to pass it into law and there is much to be said for tackling the problem in one convention, which would avoid what might otherwise be anomalous differences in relation to different sorts of cargo. The scope could be widened by referring, instead of to pollution by crude oil, to pollution by any cargo, this including, for example, chemicals.

The scope could also be widened a little more by referring to damage caused by escape of cargo; this would cover fire damage also.

ii. The scope could be limited by reference to the character of the victims, i.e. it should cover any damage done by any cargo to persons or property on shore.

(c) *What kind of cargo should be covered:*

i. The first possibility is to confine the convention to damage caused by crude oil and in this case the remarks made above under (b) (i.) apply.

ii. The second possibility is to draw up a list of cargoes which may cause extraordinary damage if they escape from the ship. We refer hereafter to this type of cargo as "noxious" cargo. We use this expression having in mind that cargo may cause very substantial damage, either by virtue of the nature of the cargo itself or by virtue of

the quantity of cargo (innocuous in itself) which is carried. The cargoes to be covered could be listed in a schedule which could be added to from time to time. The disadvantage of this is that scientific developments, particularly in chemicals, may make any list become very rapidly out of date; and it might be difficult to devise suitable machinery for adding to a schedule.

iii. The third possibility is to find a general definition for the sort of noxious cargoes that are to be covered. The difficulty about this is to find a sufficiently precise definition to be workable. If there is to be, for example, compulsory insurance, it must be quite clear what is to be insured and what is not; there cannot be a dispute about whether a cargo comes within a particular definition. So also if courts of law in different countries are to have jurisdiction, there cannot conveniently be different rulings about whether a particular cargo falls within the general definition.

iv. The fourth possibility is to make all cargoes liable for any damage done to third parties. This would be an acceptance of the fact that all cargo is capable of doing damage, though in many cases the risk will be very slight. But since insurability is the key to the new system, it can be left to the insurance market to assess the risk. No hardship will be incurred by the shipper of innocuous cargo because the premium would be nominal. This introduces a flexible system, since the insurance market will respond automatically to changes in the character of commodities and the risks involved in shipping them; and it avoids the need for a general definition.

There are, however, two possible disadvantages. The first is that if the convention is to apply to all cargo carried in all vessels, it will bring within its scope all sorts of small fry; these may find the effecting of an insurance for apparently innocuous cargo, even though the premium is nominal, an intolerable burden. Moreover, since there may, in cases like the "TORREY CANYON", be claims for enormous sums, there would have to be some list of approved insurers; not every certificate would do. The second possible disad-

vantage of this solution is that it may avoid the need for one general definition of cargo. It would look as if there must be a definition of damage. It would be necessary to exclude, for example, damage done when cargo was being handled. But a definition of damage ought to be much easier. Whatever the nature of the cargo, what is being aimed at is damage done by its escape from control, e.g. by pollution, explosion, leakage, etc.

IV

(a) In a new convention, should there be liability without fault?

(b) If so, on whom should it be imposed?

COMMENTARY ON (a)

Some arguments in favour of strict liability (in French responsibilité objective) are:

(1) Those who engage in maritime adventure must accept that there are risks entailed and should be content to be protected against negligence. But the victims of oil pollution are not engaged in any adventure and can say that those who carry cargo for profit ought to be absolutely responsible for its escape.

(2) Damage by oil pollution (whether by fault or accident) is something that should naturally be covered by insurance. It will be awkward and difficult for "shore victims" to obtain cover. Is it not simpler for all the insurance to be carried by ship or cargo and passed on in the cost of the product?

(3) The law of many countries would impose strict liability in a case of this sort; and in other countires the trend is towards strict liability.

(4) Under strict liability the non-marine victim is spared what for him would be the difficult task of proving a marine fault.

The arguments advanced against imposing liability without fault include the following:

1. It would be inequitable to give those sustaining pollution damage a preferred status vis à vis personal injury, death and property damage claimants with claims arising out of other marine casualties.

2. A seaworthy steamship or motor vessel, properly manned, is not per se a dangerous instrumentality, and the operator should not be required to pay for or insure against losses not caused by his fault. Nuclear vessels are in a special category; even so, the Nuclear Ship Convention has not been ratified.

3. Oil cargoes are not per se dangerous, and their owners should not be required to pay for or insure against losses caused by such cargoes.

4. In a competitive market, it may not be possible for the shipowner to pass on the extra cost of insurance against liability without fault to the shipper in the form of additional freight; shipowners large enough to be self-insurers may have an advantage over small operators. Furthermore, the owner of tankers under long term time or consecutive voyage charter would be unable to increase the charter rate of hire or freight so as to recover the cost of insuring against liability without fault.

5. The Liberian Board of Investigation found the "TORREY CANYON" at fault. Hence, no need for a convention imposing liability without fault is indicated by the case which prompted this study.

COMMENTARY ON (b)

The substantial question here is whether liability should be imposed on the ship or on the cargo.

If it is liability for fault only it would presumably be put on the shipowner as usual.

But if it is strict liability, then since the damage is caused by the nature of the cargo rather than by the vessel as such, it can

be argued that it would be more logical to impose it on the cargo owner. As against this there is the difficulty of identifying the cargo owner, particularly while the voyage is in progress. Also it is easier for a shipowner to insure his liability on a time basis than for a shipper to take out an insurance for each shipment made. So convenience may suggest that the carrier should accept liability and adjust the freight accordingly.

V

Should liability be limited?

COMMENTARY

In maritime transport it has for long been accepted that liability for third party damage should be limited. Various arguments for this situation have been advanced over the years, the huge capital risks involved in maritime transport, the desire to encourage an important and nowadays even vital service, etc. While these reasons still retain weight, it is believed that at present the main arguments for retaining a limitation system are the following:

(i) It is important to everybody participating in a maritime adventure that a ship and her cargo is not tied up in port until the amounts of third party claims are finally ascertained and security given for the aggregate amounts of them but that the adventure could proceed by quickly putting up security for a maximum amount known in advance.

(ii) The difficulty—or for practical purposes even the impossibility—of obtaining insurance cover for a third party risk unless a maximum liability is fixed and known in advance.

At this stage the question is whether limitation of liability should be accepted in principle. If it is, the method of fixing the ceiling will require exhaustive consideration at a later stage. It may be useful now just to look at some of the problems involved.

If liability is put on the ship, it should be possible to retain the basic idea of the 1957 Convention, introducing modifications such as increasing the figure per ton, increasing the minimum limit and providing for a progressve scale of liability for vessels over a certain size.

If on the other hand liability is put on the cargo, there is no international precedent to fall back upon. There are, however, in some countries provisions about the transport of nuclear cargo where the method of limiting liability for third party damage is to fix it at a certain amount per kilo of the nuclear cargo carried. Were the scope of a new convention confined to damage done by petroleum products only, a limitation system might possibly be devised based on the same idea. If it is believed that a new Convention should cover third party damage caused not only by petroleum products, but also by cargo of other types then it would no doubt cause certain difficulties to elaborate a system of limitation that would be at the same time fair and reasonable and workable as well. Basing the limitation method on cargo volumes would obviously cause great difficulties owing to the various commodities involved, the fluctuation of market values and the difficulty in assessing these factors in advance of the incident.

V I

Do you consider it desirable and practicable that the person liable should be required to provide security by insurance or otherwise?

COMMENTARY

Owing to the considerable amount of damage that may be occasioned by cargo, victims may have no effective redress if the ship is lost and the person liable (whether ship owner, cargo owner or shipper) is not solvent. If present rules of liability are to be amended, or new rules set up, their purpose will be to ensure effective redress for the victims. Does this imply the obligation for the person liable to show at all times that, in the event of damage, adequate funds shall be made available to the victims, for instance by way of compulsory insurance or by providing other types

of security? If the answer is affirmative, one should consider the practical problems involved. More particularly, how is evidence of suitable security to be provided and by whom? Is this feasible, whether liability rests on the ship or on the cargo? Should there be a direct recourse of the victims against the person providing the security?

It would seem at first sight as if the best way of enforcing any system of compulsory security would be by requiring—by analogy with automobile insurance—that an insurance certificate or similar document should be included with the ship's documents. This would not necessarily mean that liability for damage would have to be on the ship, but it would at any rate have to be the ship's responsibility to see that the document was obtained. It is difficult to discuss the practicability of this without first putting down on paper some scheme for comment and criticism, and the scheme below is appended purely for that purpose.

SCHEME

1. A contracting State shall not permit a vessel under its flag to trade unless the vessel is covered in respect of her liability under the Convention. The cover required is a contract of indemnity by an insurance company or other financial guarantor approved by the Government of the contracting State whereunder the indemnifier binds himself in the event of any claim being made under the convention, to deposit in a court having jurisdiction under the convention such a sum, not exceeding the limit of liability, as the court shall order.

2. A contracting State shall issue to every vessel under its flag that is permitted to trade, a certificate that the vessel is covered in accordance with paragraph 1; and it shall not permit vessels of other contracting States to enter its ports unless they can produce such a certificate.

3. A contracting State shall not permit a vessel of a non-contracting State to enter its ports unless she is covered in accordance with paragraph 1 by an insurance company or other financial guarantor approved by the contracting State.

VII

Should there be any provision regarding jurisdiction? If so, what court or courts should be given jurisdiction?

COMMENTARY

Unless an International Tribunal is set up, this will have to be the court of some country or countries. If the precedent set by the nuclear conventions is followed, this will be the country where the damage is sustained. If damage is sustained only in one country, this is simple and there is no need for any further machinery. It is, however, not at all improbable that as in the case of the "TORREY CANYON" the same incident will result in damage being done to the coasts of two countries. It is not likely that the government of any country would be willing to require its subjects to seek recourse in the courts of another country. Apart from limitation of liability there seems to be no reason why claims should not be made in the courts of each country in which damage occurs. It might then be left to the option of the insurer to choose the country in which to deposit the fund. It would then have to be provided:

(a) that the courts of the country administering the fund accept foreign judgments on the same basis as their own; and

(b) that the country places no restriction on the satisfaction of such judgments in foreign currency.

The distribution of the fund would then become merely mechanical.

VIII

Should the cost of protective measures be recoverable? If so, who should be allowed to recover?

COMMENTARY

Protective measures are deemed to include all measures taken after an incident has occurred and which appeared at the time to be reasonably necessary in order to prevent or minimize injury.

It may happen that no damage occurs at all to the country which takes the measures, either because they are successful or because the supposed eventuality does not materialize. Nevertheless, it would seem equitable that if danger is reasonably apprehended, it should not be a defence to a claim for the cost of protective measures that no damage was in fact done. For the purpose of jurisdiction a country to which damage was threatened and which took protective measures accordingly would have the same status as a country to which damage was done.

It would be useful to know whether the cost of protective measures is allowed in principle under different systems of law.

Does your national law permit a plaintiff, in cases in which compensation would be given for damage, to recover the cost of measures reasonably taken to avert the damage,

(a) if taken by the owner of the property at risk?

(b) if taken by a national or local authority acting in the general interest but not under legal duty?

(c) if taken by a stranger acting purely out of good will?

Do you consider that a new convention should provide for the recovery of the cost of protective measures in any or all of these cases?