

**IMO**

## Protection of the Marine Environment in 2000

by Louise de La Fayette\*

### 1. Introduction

#### *a. Three Challenges*

The year 2000 was a time of great trial for the International Maritime Organisation (IMO), in particular, because of the myriad issues raised by the *Erika* oil spill disaster<sup>1</sup> off the coast of France in December 1999. The Organisation was challenged by the *Erika* to take immediate action both to satisfy the public that something would be done as soon as possible to prevent such catastrophes in future, and to forestall regional action by the European Union threatening IMO's legislative supremacy in matters concerning maritime safety and pollution prevention. However, in rushing to respond before the EU could act, IMO was not simply trying to protect itself, it was also striving to ensure the continued existence of a uniform global regime applicable to all ships in all waters, which would be the most efficient and effective means of protecting the marine environment from the dangers of international shipping activities. After all, IMO exists and is remarkably successful in many ways, because states recognise that shipping is an preeminently *international* activity that must be regulated at the international level.

Hence, IMO activities in 2000 were dominated by the various reactions to the *Erika* in the form of measures to enhance pollution prevention, to improve emergency response and to raise the level of compensation for pollution damage. Simultaneously, the Organisation also had to meet the second challenge of enhanced cooperation and collaboration with other international organisations to an extent not attempted before and in areas where the somewhat narrowly focused IMO had not previously ventured. Fortunately, the Organisation responded well to both challenges, although possibly the most daunting challenge – that of how to handle flags of convenience – remains to be fully addressed.

Still, there were some signs of movement in the right direction, for it was Cyprus that proposed the final significant development of the year. At the November 2000 IMO Council meeting the Cypriot delegation surprised everyone by calling for an integrated IMO strategy for the protection of the marine environment. It argued that instead of simply responding to individual issues as they arose, IMO should prepare a plan for the future to address all the environmental issues in an organised manner and to integrate that plan with its work on shipping safety. This is not only a sensible idea, it also comes at a most

appropriate time, when all international bodies with an environmental mandate should be preparing for the 2002 World Summit on Sustainable Development.

#### *b. The Erika Oil Spill Disaster*

On 11 December 1999, the Maltese-registered tanker *Erika* was carrying 31,000 tonnes of heavy fuel oil from Dunkirk to Italy when she encountered exceptionally adverse weather conditions off the Atlantic coast of France. Battered by waves six metres high, the stricken tanker split in two, spilling around half of its cargo into the sea. A vast 450 km stretch of the French Atlantic coast was affected, with intermittent pollution in Finisterre, Moriban and Vendee, and almost continuous pollution in Loire-Atlantique occurring between December 1999 and February 2000. The highly viscous oil slicks killed approximately 63,000 sea birds and numerous other marine organisms and animals; contaminated shellfish beds, forcing their closure to harvesting; and also contaminated sea salt production beds, causing the abandonment of two-thirds of the year's production. The physical damage was serious and extensive, cost of clean-up very high, and the economic loss, including from tourism, was quite considerable. According to the French authorities, final claims for compensation are likely to reach one billion French francs.

The oil was difficult and expensive to clean up due to its high viscosity, the continued rough condition of the seas, and repeated oiling of shore areas already cleaned by oil initially remaining offshore being swept in by wind and wave. Fortunately, the French authorities were assisted by other members of the 1983 Bonn Agreement<sup>2</sup> and by Spain under a bilateral oil spill contingency agreement. Moreover, provoked by the public outcry, TotalFina, the French oil company that had chartered the *Erika*, undertook to assist in the clean-up operation, taking full responsibility for pumping the remaining oil out of the wreck, as well as for disposal of the oily waste from shore-based operations.<sup>3</sup> It also agreed not to seek reimbursement for the cost of clean-up operations unless some funds remained after compensation of the victims and the French government.<sup>4</sup>

Ultimately, the impact of the *Erika* may prove to be almost as great as that of the epoch-making *Torrey Canyon* in 1967 or the *Exxon Valdez* in 1989. The *Erika* catastrophe outraged the public, spurred the French government and the European Union to threaten unilateral and regional action to prevent further such casualties, and prompted the IMO to react rapidly to protect its position as the global forum for international action to protect the marine environment from international shipping activi-

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ties. At every IMO meeting in the year 2000, the Secretary-General of IMO vowed to take every possible action as quickly as possible both to seek to prevent and to respond effectively to such casualties in future. Furthermore, he emphasised that, as the shipping industry was global, any new measures to deal with oil pollution had to be taken at IMO, the competent international organisation, and not at the national or regional level, for the consequence of unilateral or regional action would be chaos. Although all delegations speaking at IMO meetings agreed with this position, the continued possibility of legislation at the EU level was a significant spur to agreement to otherwise unpalatable measures at IMO.

Already, the *Erika* has prompted IMO to 1) prepare significant amendments to the International Convention for the Prevention of Pollution from Ships (MARPOL 73/78)<sup>5</sup> to phase out older single hull tankers and to accelerate the phasing in of double hulls, 2) raise the limits to the oil pollution liability conventions, 3) work on improving emergency response to spills of Erika-type heavy fuel oil, and 4) examine a host of other suggestions to enhance tanker safety and to minimise pollution should an accident occur. In October 2000, MEPC 45 approved in principle significant amendments to Annex I of MARPOL and agreed to pass a list of possible additional measures to MSC and the various subcommittees for urgent consideration. To accelerate the process even further, the Secretary-General brought forward the dates for MEPC 46 and for the next meeting of the Sub-Committee on Flag State Implementation (FSI 9) to ensure rapid adoption of any measures agreed. In addition, a rare intersessional meeting, funded by France, was scheduled for January 2001 to develop a Condition Assessment Scheme, an important element of the draft amendments to MARPOL.

This report will summarise very briefly actions prompted by the *Erika* in the context of the continuing regular activities of IMO in the Marine Environment and Legal Committees, as well as other IMO bodies.

## 2. The Marine Environment Protection Committee

In 2000, MEPC met twice: MEPC 44 in March and MEPC 45 in October. As noted above, one of the Committee's major accomplishments was agreement in principle for the accelerated phasing-out of single-hulled oil tankers. After the *Exxon Valdez* oil pollution disaster in Alaska in 1989, the United States had taken unilateral action in the Oil Pollution Act of 1990 (OPA '90), which included a phasing-out of oil tankers with single hulls, in favour of double-hulled tankers, because double hulls were believed to provide more protection from pollution in the event of accidents. Although IMO had followed suit in 1992 by adopting Regulation 13G of Annex I of MARPOL, the IMO schedule for phasing in double hulls was much more extended than that in OPA '90.

### a. The Phasing out of Ships with Single Hulls

The amendments approved at MEPC 45 to accelerate the phasing-out of single-hulled ships were a reaction to

the EU proposal to adopt a more rapid phase-out schedule for oil tankers in Community law. The EU wanted a timetable corresponding more closely to that in OPA '90. In the summer of 2000, a number of EC states submitted proposals to MEPC 45 for amendments to MARPOL providing for a more rapid phase-out of single-hulled oil tankers. However, these proposals were opposed by some



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major maritime states, which feared the expense of shipowners having to purchase new vessels "prematurely", and which claimed that neither ship scrapping facilities nor ship-builders could cope with the decommissioning of ships and their replacement in a relatively short period of time. To allay these concerns, IMO and some country delegations submitted statistical analyses of the volume of oil carried

by tankers, numbers of tankers, ship scrapping capacity, ship-building capacity and an initial assessment of costs to the shipping industry. In August and September 2000, Denmark coordinated the development of a compromise proposal, which was approved at MEPC 45 for circulation to states parties, for consideration before formal adoption at MEPC 46.

A working group developed a draft revision of regulation 13G of Annex I to MARPOL providing for the phasing-out of oil tankers not meeting the requirement for double hulls or equivalent protective measure set out in regulation 13F. Oil tankers were divided into three categories, with different phase-out schedules for each. Category 1 oil tankers are crude oil tankers over 20,000 tons and product carriers over 30,000 tons without segregated ballast tanks (SBT), known as pre-MARPOL tankers. Category 2 tankers comprise crude oil tankers over 20,000 tons and product carriers over 30,000 tons which do have segregated ballast tanks, known as MARPOL tankers. Category 3 includes smaller oil tankers 5,000 tons deadweight and above, up to the lower limits for categories 1 and 2. Although such tankers were not previously covered by regulation 13G, all states agreed that they should now be covered.

Because the working group could not agree on final end dates, the draft Regulation presented two alternatives. Under both alternatives, ships delivered in 1986 or earlier would be phased out progressively between 1 January 2003 and 1 January 2012. For ships built thereafter alternative A has an end date of 2015 for the decommissioning of all single-hulled tankers, while alternative B has an end date of 2017. States parties to MARPOL were to take the decision at MEPC 46.<sup>6</sup> Furthermore, because of disagreement as to whether older ships in relatively good condition should be phased out early or should be allowed to continue to operate, a compromise was agreed whereby such tankers would only be permitted to continue operating if they met certain criteria to be adopted for a "condition assessment scheme" (CAS) in addition to the enhanced survey provided for in resolution A.744(18). A small in-

formal group prepared a preliminary and non-exhaustive list of factors to consider in the elaboration of such a scheme, but due to time constraints, it was not discussed in detail. An intersessional working group was to meet from 31 January to 2 February 2001 to consider the CAS proposal in greater detail. Some elements already proposed were a physical check of the vessel, an examination of documents detailing past performance, and the institution of improvements in inspection and survey practice.

As the flag state of the *Erika*, Malta presented a report to MEPC 45 on the causes of the accident. The main cause was structural failure caused by corrosion, poor quality repairs, and poor quality inspections and surveys, during which the defects were not noticed. Since the *Erika* disaster was not caused by the lack of a double hull, one might ask why many delegations, including that of France, were proposing the accelerated phase-out of single hulls as a remedy. The answer is that the phasing out of single-hulled tankers is simply a convenient means of forcing older tankers out of service. Not surprisingly, statistics show that old tankers have more accidents and cause more pollution than new tankers. While many shipowners insist that old ships are safe if properly maintained, there is no doubt that ships deteriorate with age and are therefore more likely to have defects and deficiencies, especially corrosion and structural failure.

#### **b. Other Measures to Address Substandard Ships**

In addition to the need for earlier decommissioning of older vessels, the Maltese report and proposals by other delegations pointed to other problems that had to be addressed, such as the quality of surveys and inspections, which are important for ships of any age. The very large number of proposals by various country and observer delegations were collated and assembled into a non-exhaustive list by the Working Group, which did not have time to discuss them. The 33 proposals on the consolidated list included:

- promotion of the uniform and effective implementation of the rules and standards for the safe transport of hazardous cargoes,
- promotion of the effective implementation of the OPRC Convention,
- improvements to the programme of enhanced surveys under resolution A.744(18),
- reinforcement of the guidelines on the performance and control of classification societies,
- mandatory application of the self-assessment exercise,
- improved inspection procedures and coordination of inspection practices for port state control,
- designing tankers and bulk carriers so as to make them easier to inspect for cracks and corrosion,
- operational limits or restrictions for tanker above a certain age,
- stricter provisions on a change of classification society,
- new requirements on change of flag,
- new provisions to enhance the safety of double-hull tankers, which are structurally complex,
- standard terminology applied to nature and serious-

ness of defects and guarantees that all repairs are carried out as specified.

Special arrangements were made to have the list considered at short notice by the meeting of the Maritime Safety Committee held in late November 2000 (MSC 73). After revising the list and dividing the proposals into those dealing with safety matters and those dealing with environmental matters, MSC 73 forwarded the issues to the relevant technical sub-committees – Bulk Liquids and Gases, Flag State Implementation and Ship Design and Equipment – for detailed consideration.

#### **c. Emergency Response**

In addition to considering measures to prevent or to reduce the occurrence of tanker accidents and consequential oil pollution, MEPC 44 and 45 also dealt with questions of emergency response, for the heavy fuel oil spilled from the *Erika* posed special problems for clean-up and remediation. At IMO this issue is addressed under the OPRC Convention, whose implementation is assured, on a continuing basis, by the OPRC Working Group, meeting in conjunction with MEPC. At MEPC 44 an informal meeting of the OPRC Working Group identified several problems in tackling spills of *Erika*-type heavy fuel oil. First, because that type of oil has a specific gravity close to seawater, it remains submerged and is difficult to detect and track. Second, when mixed with water, the *Erika* oil formed thick, viscous patches that were difficult for regular skimmers and pumps to handle. New equipment would have to be devised to collect such material. Third, there was difficulty in recovering the oil, due to the very rough seas, which hampered the operation of recovery equipment.

At MEPC 45, in continuance of its follow-up to the *Erika* casualty, the OPRC Working Group considered several documents and information presented orally on the question of response to spills of high density oils. While recognising that some of the questions could be dealt with in work already underway on a new manual for combating oil pollution, the Working Group agreed with statements made in plenary proposing the convening of an R&D Forum (conference) on emergency response to spills of high density oils. It agreed that the Forum should focus on the operational and technical aspects of emergency response, addressing the specific issues of: 1) detection; 2) fate; 3) at-sea response, in particular, containment and recovery; and 4) the storage, transport and final disposal of waste generated after clean-up. Plenary agreed to this proposal, as well as to the offer by France to host the Forum in Brest in March 2002, prior to MEPC 47. Although funding remains to be confirmed, the EU is likely to contribute, as part of its response to the *Erika* incident.

#### **d. Harmful Antifouling Systems**

In 2000, the MEPC continued its work on a draft International Convention on the Control of Harmful Antifouling Systems. In order to prevent marine organisms from attaching themselves to ships' hulls, thereby slowing down the ship and causing an increase in the use of

fuel, biocides are used in paints on those hulls. Unfortunately, the paints not only kill organisms clinging to the ship; they also leach out into the water adversely affecting and even killing other organisms, progressing up the food chain to fish and marine mammals in nearby areas. For these reasons, in 1999 the IMO Assembly decided to instruct the MEPC to prepare a legally binding agreement to prohibit the use of highly toxic organotin compounds as biocidal paint on ships' hulls. Negotiations proceeded rapidly on the basis of a draft submitted by the United States.

The draft convention was approved in principle at MEPC 45, with only a few issues remaining to be decided at the diplomatic conference planned to adopt the convention in October 2001. The convention would ban the application of such paint by 1 January 2003 and its use as an active biocide by 1 January 2008. In the event that substitute antifouling systems are found to be harmful, the convention provides for states to submit proposals to MEPC for the prohibition or restriction of other systems. If MEPC believes it warrants further consideration, the Committee will transmit it to an expert group, which will examine the scientific and technical details and make recommendations to MEPC. MEPC will then decide whether to add the anti-foulant to the list of prohibited or restricted substances or system in Annex 1, which already contains a prohibition on the application and use of organotin compounds.

The Annex will constitute an integral part of the Convention, binding on all states parties. Flag states would control the use of listed antifouling systems on their ships and all states would prohibit their application or installation on their territories. The term "system" is used rather than paint, in the event that a non-paint technology is devised to prevent marine organisms from attaching to ships' hulls. The convention also provides for surveys, certificates and inspections of ships to ensure that they are not using the prohibited systems.

#### *e. Alien Organisms and Pathogens in Ships' Ballast Water*

Simultaneously, work continued on another treaty to protect marine life, biodiversity and human health: the draft International Convention for the Control and Management of Ships' Ballast Water and Sediments. The purpose of the Convention is to control and eventually to eliminate the spread of harmful organisms and pathogens from one area of the world to another through their carriage in ballast water taken up and released by ships to ensure their stability. Although causing no harm in their native environments, many organisms can proliferate and cause enormous damage in foreign areas by destroying native species and interfering with the operation of native ecosystems.

Unfortunately, the development of regulations to control such organisms has been hampered by the fact that there is no safe and sure method at present either to prevent the take-up of harmful organisms in ballast water or to destroy them en route. Currently, the only method used is ballast water exchange in mid-ocean where there are fewer organisms to take up. However, mid-ocean exchange

is only an interim solution, for three main reasons: 1) it is not always possible for a ship to travel to a suitable area, 2) the procedure is not always safe, as the ship may become destabilised, and 3) it is not very effective, as many organisms could still be taken up in ballast water and transported to and released in foreign waters.

While awaiting the invention of a method or piece of equipment that is safe, cheap, easy to use and 100 per cent effective, the ballast water working group is preparing regulations requiring all ships to carry a ballast water management plan and a ballast water record book. In 2000, the majority agreed to consider a two-tier approach, whereby first tier regulations would apply everywhere and special restrictions on ballast water uptake and discharge would apply only in certain areas. However, many delegations, including the environmental NGOs, realised that such an approach would not be effective, because, with a few exceptions such as disease-carrying pathogens, it is not possible to know in advance which organisms will cause damage in which areas. At MEPC 45, discussion was begun on standards for ballast water management and treatment, to be continued interessionally. It was considered that a convention would not be ready for adoption before the 2003-2004 biennium.

#### *f. Special Areas and Particularly Sensitive Sea Areas*

After several years of discussion, MEPC 45 approved in principle new draft guidelines for designation of Special Areas under MARPOL 73/78 and for the identification and designation of Particularly Sensitive Sea Areas (PSSAs) to replace the old combined set guidelines adopted in 1991 by Assembly Resolution A.720(17). Environmental NGOs had pressed for revision of the 1991 PSSA Guidelines, which had been used only twice (by Australia and Cuba), because they were too long, complicated and difficult to understand. In addition, they were out of date. A correspondence group and drafting group reviewed the old text, divided it into two separate sets of guidelines, and considerably shortened and simplified it, deleting large amounts of unnecessary and outdated material. In addition, new procedures for the designation of PSSAs proposed by the United States and adopted by resolution A.885(21) have been integrated into the new PSSA guidelines. Some commentators believe that the new, more complicated and demanding procedures may make it more difficult to have PSSAs adopted in future.

Another problem was the deletion of some material that environmental groups considered essential. Because so much material was excised from the original texts, the Secretariat was instructed to provide additional information in a separate document. One of the most serious issues was the deletion of most of the information about the protective measures available for PSSAs, thereby disadvantaging developing countries with limited technical resources. For this reason, environmental groups were particularly concerned to have a list of possible protective measures annexed to the Guidelines. However, the major maritime states are expected to object to this, as they wish to limit the creation of PSSAs. Finally, contrary to the instructions given to the correspondence and drafting

groups, there was little discussion of the relationship of the Guidelines to the United Nations Convention on the Law of the Sea. This disappointed the United Nations Secretariat, which had submitted a paper on the subject. Following a final editorial review in April 2001, the draft guidelines will be forwarded to the IMO Assembly for adoption in November 2001.

**g. The Annexes to MARPOL 73/78**

In 2000, MEPC proceeded with its almost continuous revision of the six annexes to MARPOL, including those not yet in force. Both Annex I (Prevention of Pollution by Oil) and Annex II (Control of Pollution by Noxious Liquid Substances in Bulk) to MARPOL are being completely revised and rewritten in order to bring them up to date, to make them consistent and to render them easier to understand and apply. Annex III was modified, not necessarily for the better; Annex IV was completely revised before its entry into force in order to induce more states to become parties; and Annex V was amended. Implementation measures for Annex VI were adopted, with an effect close to provisional application, pending entry into force.

*i) Annexes I and II*

In 1999-2000, work continued on complete revisions of Annexes I and II, but that on Annex II was threatened by budgetary restraints. The call by Chapter 19 of Agenda 21 for a complete review of chemicals management, for risk assessments and for international agreement on chemicals classification, has led to work on chemicals in a number of fora, including the OECD, which in turn has had an impact on the revision of Annex II to MARPOL, leading to a restructuring of the system of hazard classification. The target date of 2002 for the revision of Annex II is dependent upon the completion by GESAMP<sup>7</sup> of new hazard profiles for chemicals subject to the International Bulk Chemicals (IBC) Code. Consequently, the refusal by IMO Council to increase the budget to cover the necessary meetings would have caused several years delay, had the UK and the Netherlands not donated the necessary funding. It is unfortunate that while some representatives of states agree to certain IMO programmes, other representatives of the same states then starve it for funds. One can only conclude that treasuries the world over are deaf to the pleas of environment and transport ministries.

*ii) Annexes III, IV and V*

With respect to Annex III (Prevention of Pollution by Harmful Substances Carried by Sea in Packaged Form), MEPC 44 approved amendments, initially opposed by Norway, to delete tainting as a criterion for marine pollutants from the *Guidelines for the identification of harmful substances in packaged form*. Tainting refers to the uptake of substances by seafood so as to adversely affect its taste or smell, making it unpalatable. Even if tainted seafood is not actually toxic, one is compelled to ask whether this deletion is an improvement, in particular in relation to the precautionary principle, as a bad taste might indicate the presence of substances which might subsequently be found to be harmful.

As noted above, MEPC has also considered how to promote the entry into force of Annex IV (Prevention of Pollution by Sewage from Ships). Having investigated the reasons why states were reluctant to ratify Annex IV, MEPC 44 approved a revised version designed to make it more attractive. These amendments will be formally adopted once the current (old) Annex IV comes into force. In this connection, the Committee adopted Resolution MEPC.88(44) requesting the Secretary-General to circulate the revised text of Annex IV in preparation for adoption once the old Annex IV comes into force and resolving that parties to Annex IV should implement the revised text immediately (*i.e.* provisionally) upon entry into force of the old text in order to avoid a dual regime while awaiting entry into force of the new text. Furthermore, the resolution urges states to ratify existing Annex IV, on the understanding that they would only have to implement the new text, which would be adopted and applied provisionally as soon as the old text came into force. This is an interesting technique for promoting the adoption and provisional application of new regulations before the old ones come into force. MEPC is to be commended both for its ingenuity and for its concern to prevent pollution from ships' sewage.

Finally, at MEPC 45, the Committee adopted amendments to Annex V on Garbage, prohibiting the disposal into the sea of incinerator ashes from plastic products that may contain toxic or heavy metal residues. Also adopted was an amendment of the definition of "nearest land" in relation to the north-east coast of Australia, to consider the Great Barrier Reef as land, for the purposes of regulating disposal of garbage from ships. Under the tacit amendment procedure,<sup>8</sup> these regulations will come into force in March 2002. To assist in the implementation of Annex V, the Committee adopted amendments to the Revised Guidelines for the Implementation of Annex V to MARPOL under cover of Resolution MEPC.92(45).

*iii) Annex VI - Prevention of Air Pollution from Ships*

Ever since the adoption of Annex VI to MARPOL on the Prevention of Air Pollution from Ships, MEPC has been engaged in preparations for its entry into force. At MEPC 44, the NO<sub>x</sub> Technical Code was reviewed in the light of technical developments and certain errors were rectified. On volatile organic compounds, MEPC responded to requests from industry associations for advance information on VOC controls by ports, by issuing a circular calling on ports to provide such information. Upon an application by North Sea states, MEPC approved in principle the designation of the North Sea as an SO<sub>x</sub> Emission Control Area, to be formally adopted when Annex VI comes into force. Furthermore, a draft Assembly resolution was approved inviting member governments, in particular, those in Emission Control Areas, to ensure the availability of low sulphur fuel oil in their jurisdiction. Finally, the Netherlands submitted the first in a series of reports on the results of monitoring of the global sulphur content of ships' fuel oil. This was found to be an average of 2.7 per cent, much lower than the controversially high level of 4.5 per cent agreed to in the Annex.<sup>9</sup>

#### *h. Inadequacy of Reception Facilities*

Reception facilities in ports to receive wastes from ships are necessary to the proper functioning of MARPOL, for if ships cannot dispose of their waste in ports, they cannot fulfil their obligations not to release it into the sea. The existence of adequate reception facilities is absolutely essential in areas designated as Special Areas, where (with some exceptions) no discharges are permitted. Unfortunately, more than a quarter of a century after MARPOL came into force, there is still a serious lack of adequate reception facilities in many areas of the globe. Although IMO has published a Comprehensive Manual on Port Reception Facilities providing technical advice, MEPC considered that further guidance was required on the provision and improvement of port reception facilities. Therefore, in accordance with Assembly resolution A.896(21), MEPC established a correspondence group and then a Working Group to prepare new Guidelines for Ensuring the Adequacy of Port Waste Reception Facilities. These were adopted by MEPC 44 in March 2000.

### 3. Adoption of the HNS-OPRC Protocol

One of the signal and very satisfying events of 2000 was the adoption of the Protocol on Preparedness, Response and Cooperation to Pollution by Hazardous and Noxious Substances to the International Convention on Oil Pollution Preparedness, Response and Cooperation (HNS-OPRC Protocol).

#### *a. The Regime for Prevention of, and Response to, Marine Pollution*

As noted above, at IMO the need for cooperation in contingency planning and emergency response to marine pollution has been addressed primarily by the 1990 International Convention on Oil Pollution Preparedness, Response and Cooperation (OPRC Convention).<sup>10</sup> However, the OPRC Convention only applies to oil spills. A resolution adopted at the diplomatic conference at which the Convention was concluded called upon states to work towards its application to spills of hazardous and noxious substances (HNS).<sup>11</sup> Consequently, among its other tasks, the OPRC Working Group spent several years negotiating a protocol to provide for contingency planning and emergency response to HNS spills. These labours came to fruition on 15 March 2000, at a diplomatic conference held in conjunction with MEPC 44, when parties to the OPRC Convention adopted the Protocol on Preparedness, Response and Cooperation to Pollution by Hazardous and Noxious Substances (OPRC-HNS Protocol).<sup>12</sup>

The OPRC-HNS Protocol completes the comprehensive IMO regime for the maritime carriage of hazardous and noxious substances called for in Agenda 21, para. 17.30 (xii). Other instruments comprising this regime are: the 1973 Protocol to the 1969 International Convention Relating to Intervention on the High Seas in Cases of Oil Pollution Casualties;<sup>13</sup> the 1974 International Convention for the Safety of Life at Sea, as amended (Chapter VII on dangerous goods);<sup>14</sup> the International Maritime Dangerous Goods (IMDG) Code;<sup>15</sup> the International Convention

for the Prevention of Pollution from Ships, 1973/1978 (MARPOL) (Annexes II and III), as amended; the International Code for the Construction and Equipment of Ships carrying Dangerous Chemicals in Bulk (IBC Code);<sup>16</sup> the Code for the Construction and Equipment of Ships carrying Dangerous Chemicals in Bulk (BCH Code);<sup>17</sup> the Manual on Chemical Pollution;<sup>18</sup> and the International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea (HNS Convention).<sup>19</sup>

#### *b. Emergency Response to Accidental Discharges of Hazardous Substances from Ships*

The Protocol applies to spills of hazardous and noxious substances (*e.g.* chemicals) the same provisions on reporting of spills, contingency planning and positioning of equipment, emergency response and inter-state cooperation already applicable to oil spills under the OPRC Convention. Hazardous and noxious substances are defined in the Protocol as “any substance other than oil



A ship's crew receives special training in maritime safety

Courtesy: IMO

which, if introduced into the marine environment is likely to create hazards to human health, to harm living resources and marine life, to damage amenities or to interfere with other legitimate uses of the sea”. Incidents covered include those causing fire and explosion, as well as discharges, releases or emissions which pose or may pose a threat to the marine environment, to the coastline or related interests of a state and which requires emergency action or immediate response. Interestingly, the preamble refers to the “polluter-pays principle” as a general principle of international environmental law.

States parties are required to establish national and regional systems for emergency response, including the preparation of contingency plans, the institution of the necessary administrative infrastructure, the pre-positioning of emergency equipment, and the establishment of a mechanism to coordinate response at the bilateral or regional level, as appropriate. Ships are required to report incidents involving HNS in accordance with requirements in other conventions and to have emergency plans on board to guide response to such incidents. Sea ports and handling facilities where HNS are loaded and unloaded are also required to have appropriate plans for emergency response. —

Article 10 sets out the functions of IMO in implementing the Protocol, and one of the six resolutions adopted by the Conference calls for the early implementation of the provisions of Article 10. However, an inevitable impediment to the final, as well as provisional, implementation of this article, is the chronic reluctance of IMO Council to provide sufficient funds for IMO to carry out its functions. As regards the OPRC Convention itself, IMO Council has persistently refused to approve a budget increase to support the oil pollution response unit within the Secretariat, required to carry out the functions assigned to IMO under the Convention. Hence, implementation of the Convention and Protocol will have to depend on the parties alone, many of whom urgently require the information, education and training, technical services and technical assistance which could be provided by IMO if funding were provided.

#### **4. Collaboration with Other Organisations in the United Nations System**

As noted above, the second challenge of the year 2000, after dealing with the implications of the *Erika*, was collaboration with other international organisations. While the work on greenhouse gases emitted by ships proceeded without any controversy, and in fact was to a certain extent led by the United States, involvement with the issues of illegal fishing and ship scrapping were initially resisted, as being unrelated to the mandate of IMO to address questions of shipping safety and protection of the marine environment from hazards caused by international shipping activities. Ultimately, however, IMO found that it could make some contribution to the resolution of these problems, in collaboration with other bodies of the United Nations system.

##### **a. Climate Change and Greenhouse Gases Emitted by Ships**

Although the issue of greenhouse gases emitted from ships was not covered by Annex VI to MARPOL, a resolution adopted at the 1997 diplomatic conference called upon MEPC to consider which CO<sub>2</sub> reduction strategies might be feasible in light of Article 2.2 of the Kyoto Protocol to the United Nations Framework Convention on Climate Change (UNFCCC). One challenge is how to attribute greenhouse gas emissions to specific states, given that ships might be registered in one state and shipowners in another, while the fuel might be bought in a third and CO<sub>2</sub> emitted all over the globe. Since IMO has no expertise in climate change, MEPC decided to commission a study on these issues by independent consultants, guided by a steering committee composed of member states. The resultant report was submitted to MEPC 45, but not considered in depth, due to lack of time. Discussions will continue in 2001. In the interim, IMO has signed an MOU on cooperation with the Secretariat of the UNFCCC, and officials of both organisations have been attending each other's meetings.

##### **b. Illegal, Unregulated and Unreported Fishing**

The question of Illegal, Unregulated and Unreported Fishing (IUU Fishing) was raised by the United Nations Food and Agricultural Organisation (FAO) at MSC 71 in 1999. It was also discussed at the 1999 Seventh Session of the Commission on Sustainable Development (CSD-7), which forwarded a recommendation to the United Nations General Assembly that IMO collaborate with FAO on the issue, in particular on the question of the "genuine link" between ships and the state in which they are registered. Despite the lack of an appropriate item on the agenda, the matter was discussed at the January 2000 meeting of the IMO Subcommittee on Flag State Implementation (FSI 8), which requested instructions on how to handle the issue from its parent committees MEPC and MSC. MEPC 44 agreed in principle to collaboration with FAO, but referred the question to MSC because there was no written proposal from FAO. Such a proposal containing the terms of reference for a joint FAO/IMO Working Group was submitted by FAO to MSC 72 and approved by the Committee.

The Joint Working Group held its first meeting in October 2000 at FAO in conjunction with a meeting to prepare an International Plan of Action on IUU Fishing. The results of the Working Group meeting were summarised in fourteen points to be submitted to the Twenty-Fourth Meeting on the FAO Committee on Fisheries to be held in February-March 2001. Very briefly, *inter alia*, the Working Group: recognised the need to enhance flag state control over fishing vessels and to ensure a link between registration and the authorisation to fish; recognised the need for cooperation between flag states and coastal states; agreed that states should give full effect to rights and obligations under international law; agreed that states should be encouraged to become party to international instruments relating to matters of effective flag state control; stressed that states in the exercise of sovereign powers over their ports had considerable scope to adopt and enforce domestic legislative measures to deal with foreign fishing vessels entering their ports; and recognised that an international or regional system of MOUs on fisheries port state control could be an important tool for controlling IUU Fishing.

##### **c. Ship Recycling (Scrapping)**

Because of numerous hazardous materials and toxic chemicals built into ships and used in their operation, the process of dismantling decommissioned vessels to obtain steel scrap and other recyclable material causes both pollution of the environment in and around the scrapping yards, and harm to human health, especially that of scrap yard workers. Most ship scrapping is carried out in developing countries such as India, Bangladesh and China, where health and environment protection laws are minimal or even non-existent. The question of what IMO should/could do about ship scrapping was raised at the Seventh Session of the Commission on Sustainable Development in 1999. Shortly thereafter, Norway submitted a paper to MEPC 43 proposing that the issue of ship recycling be placed in its

agenda. The Committee requested the submission of further information for its next meeting.

After discussion in plenary, MEPC 44 decided to investigate the question of ship recycling, in particular the role that IMO could play, given that recycling was carried out on land and that a number of other international organisations had competence for the various issues: the Basel Convention for the transboundary movement and disposal of hazardous waste and the International Labour Organisation for health and safety standards for workers. A correspondence group coordinated by Bangladesh was established to collect information and to present a report to MEPC 46 in April 2001.

## 5. The IMO Legal Committee

In 2000, the IMO Legal Committee met twice, LEG 81 in March and LEG 82 in October. Although usually operating quite separately from the rest of IMO, in 2000 even the Legal Committee was compelled to consider issues arising from the *Erika* incident. In particular, pursuant to the provisions of the international compensation regime, it had to consider a proposal to increase the level of compensation. Co-incidentally, it also completed consideration of a draft convention to provide compensation for the type of fuel oil carried by the *Erika*, but when used to operate the ship, not as cargo. Finally, the Committee agreed to suspend temporarily consideration of a draft convention on wreck removal – one of the issues faced after the *Erika* casualty, among many others.

### a. Raising of Compensation Limits for Oil Pollution Damage

The 1992 Protocols to the International Convention on Civil Liability for Oil Pollution Damage (CLC) and the International Convention on the Establishment of an International Fund for Oil Pollution Damage (IOPC Fund) provide for a special tacit acceptance procedure to raise the limits of compensation involving the adoption of new limits by the IMO Legal Committee. In the spring of 2000, after the *Erika* disaster made clear that the existing limits were grossly inadequate, a group of states led by the United Kingdom submitted a proposal for the increase of compensation limits at LEG 82. The increase was adopted and will come into effect on 1 November 2003, unless objections are received before that date from one-quarter of the states parties. Liability amounts vary according to the ship's tonnage, but the maximum under the CLC will increase from 59.7 million SDRs to 89.77 million SDRs (approx. 115 million US dollars).<sup>20</sup> The maximum for the IOPC Fund will increase from 135 million SDRs to 203 million SDRs. However, if three states contributing to the Fund receive more than 600 million tons of oil per annum, the maximum amount is raised to 300,740,000 SDRs (386 million US dollars).

### b. Draft International Convention on Civil Liability for Bunker Oil Pollution Damage

In March 2000, the Legal Committee finalised the text of the draft International Convention on Civil Liability for

Bunker Oil Pollution Damage. The Convention makes the shipowner strictly liable for oil pollution damage caused by bunker (mainly fuel) oil used to operate the ship. Although the new convention is based upon the CLC Convention, there are several important differences. First, whereas the CLC applies only to oil tankers carrying oil as cargo,<sup>21</sup> the bunker convention applies to all ships operating by means of fuel oil, covering pollution damage caused by that oil used as fuel or lubricant, *not* carried as cargo. Second, the term "shipowner" refers not only to the registered owner, as in the CLC Convention, but also to the bareboat charterer, the manager and the operator of the ship. Thus, several persons (companies) will be jointly and severally liable for damage caused by bunker oil spills. Third, there is no limit to liability specified in the convention; the limit will be that applicable under the relevant national or international instruments, such as the Convention on Limitation of Liability for Maritime Claims, 1976, as amended.

Finally, unlike the CLC and HNS Conventions, there will be no second tier of compensation, if the shipowner cannot pay or if the cost of damage exceeds the limitation amount. It was for this reason that the proponents of the convention wanted a larger group of persons to be liable and for this reason that they deleted the immunity from liability for salvors and persons taking preventive measures included in the other conventions. IUCN protested vigorously against the deletion of responder immunity, because it believed that the prospect of liability would deter people from responding rapidly to oil spills and from taking preventive measures to prevent and minimise any damage. These protests were seconded by the International Tanker Owners Pollution Federation, the International Group of P and I Clubs (mutual insurance associations) and by the International Salvage Union. The Convention will be adopted at a diplomatic conference in March 2001.

### c. Wreck Removal Convention

Because delegations were focused on other matters during 2000, little progress was made on the draft Convention on Wreck Removal. This convention would authorise coastal states at risk to require shipowners to remove wrecks posing a hazard to shipping or to the envi-



A view of the battered hull of the tanker Castor

Courtesy: IMO



ronment, or to render them harmless, for example, by removing hazardous cargo or bunkers. If the shipowner cannot or will not remove the wreck or the hazard, then the threatened coastal state may do so and collect the costs from the shipowner. At LEG 82 it was decided to suspend the correspondence group pending further consideration of the question of liability for locating, marking and removing the wreck. Industry associations and insurers were invited to submit papers on the issue to LEG 83. Other questions still to be resolved are the jurisdiction of coastal states to remove wrecks to ensure the safety of navigation, and the definitions of "wreck" and "hazard". The jurisdiction issue has somewhat surprisingly been raised mainly by the United States and the United Kingdom. Apparently, they are not opposed to ensuring the safety of navigation, but are concerned about possible "creeping jurisdiction" by coastal states wishing to extend their control over "other matters".<sup>22</sup>

## 6. The Sub-Committee on Flag State Implementation

In the early 1990s, IMO realised that although it had adopted a great many excellent conventions on safety and environmental protection, there were still far too many sub-standard ships and far too many serious accidents. Although a certain number of accidents are inevitable, the problem was mainly due to certain flag state administrations not properly implementing the conventions and not enforcing them against ships on their registries. Consequently, to address the issues of flag state implementation and compliance, in 1992 IMO established the Sub-Committee on Flag State Implementation (FSI), which reports to both the MEPC and the MSC. Unfortunately, in its first few years, the FSI made very slow progress indeed. Because flag state members of IMO are very jealous of what they consider to be their "sovereignty", they have refused to submit their compliance with IMO treaty requirements to outside scrutiny, except in the case of the training and certification of seafarers.

Although FSI has experienced considerable difficulty in devising ways to encourage flag states to improve their implementation of and compliance with their international obligations, it has managed to prepare a number of instruments adopted by IMO Assembly. These include Resolution A.881(21) adopting the IMO Self-Assessment Form. The Resolution confirms that flag states have primary responsibility to ensure that their vessels conform to requirements in IMO instruments, and urges such states to use the form to assess their own performance. In January 2000, FSI 8 agreed upon a list of criteria and a series of performance indicators by which flag state performance could be measured when complying with the recommendations in Assembly Resolution A.847(20) on the implementation of IMO instruments as well as when filling in the self-assessment form. FSI 8 also prepared a draft MSC/MEPC circular setting out the criteria and performance indicators for the approval of the parent committees. Perhaps more significantly, states were encouraged to submit their completed self-assessment forms to IMO for the es-

tablishment of a database, "which would assist IMO in its efforts to achieve consistent and effective implementation of IMO instruments".

As part of their general avoidance strategy, flag states have repeatedly tried to deflect the focus of the Sub-Committee on to the performance, or lack thereof, of port states. For example, at FSI 8 in the discussion of flag states not responding to notifications of deficiencies, detentions and violations, Vanuatu and others complained that they had not received the requisite notification from the port state. This is difficult to credit, as port states have every reason to contact the flag state when a problem arises and because IMO publishes the details of contact points provided to it by flag states. In any event, in response to these claims, a correspondence group was established to investigate the question of improving the dialogue between port states and flag states on port state interventions in respect of deficiencies. The correspondence Group will report to FSI 9.

Finally, as noted above, FSI 8 considered the FAO proposal for collaboration on the question of IUU fishing and requested instructions from its parent committees on how to deal with the issue. After some discussion, MSC 73 referred the matter to FSI 9.<sup>23</sup> For a number of reasons, the next FSI meeting at the beginning of 2001 will be a crucial one, for it will have to deal with the important political issue of further measures for ship safety and pollution prevention arising from the *Erika*, as well as illegal, unregulated and unreported fishing, and the question of the request of CSD 7 to IMO to develop measures to ensure that ships of all flag states meet international rules and standards.

## 7. Regional Cooperation on Port State Control

Because of the deficiencies noted above in flag state control of their vessels, IMO has been promoting and assisting in the development of regional agreements on Port State Control. While individual states have the power to inspect ships in their ports for compliance with international safety and environmental standards, regional cooperation is essential so that ships cannot avoid inspection by going to a nearby port where no control is practised. Signatories to MOUs cooperate by exchanging information, harmonising procedures and by adopting campaigns targeting particular types of vessels or types of deficiencies. The year 2000 witnessed the adoption of the eighth such agreement: the Memorandum of Understanding on Port State Control in the Black Sea, signed in Istanbul, Turkey, on 7 April 2000. Work on an MOU for the Gulf region is proceeding with IMO assistance. When this last MOU is signed the regional MOUs will cover all areas of the world. The next step will be for these regions to cooperate with each other, so that substandard vessels will have nowhere to hide.

## 8. IMO Council

As noted above, at the 85th meeting of IMO Council, held in November 2000, Cyprus proposed that, rather than

addressing environmental issues individually, IMO adopt a comprehensive environmental strategy integrated with safety concerns and taking into account recommendations emanating from the UNCED. Council decided to request MEPC to consider the development of an environmental strategy integrated with the overall safety strategy of the Organisation, taking account of developments within the United Nations on environmental matters, including the follow-up of UNCED and activities under the Commission on Sustainable Development and the United Nations Framework Convention on Climate Change.<sup>24</sup>

## Conclusions

Thus, in 2000, IMO continued and even enhanced its very positive record in respect of adoption of new legislation to preserve and protect the marine environment. In contrast, however, the record of implementation, by some flag states at least, is very poor. The great challenge for the years ahead will be not only to complete the extensive legislative programme already underway, but also to persuade the recalcitrant open registries to accept that they must fulfil their international legal obligations, and to induce them to accept the kind of peer review that has become normal practice in all other international organisations and in respect of a wide range of international environmental agreements.

## Notes

- 1 Hereinafter referred to as "the Erika", for reasons of brevity.
- 2 Agreement for Cooperation in Dealing with Pollution of the North Sea by Oil and Other Harmful Substances, Bonn, 13 September 1983; in force 1 September 1989. Cmnd. 9104.
- 3 "The Erika accident", report submitted by France to MEPC 46, as IMO Doc. MEPC 46/4/4, 26 January 2001.
- 4 Given the very high amount claimed by victims, this was not at all likely.
- 5 Hereinafter "MARPOL".
- 6 In the event, the amendment finally adopted at MEPC 46 was modified at the insistence of some states with large fleets to provide a slower phase in schedule, with a number of possible exceptions, offset by a provision authorising denial of access to ports of ships taking advantage of the exceptions.
- 7 IMO/FAO/UNESCO-IOC/WMO/WHO/IAEA/UN/UNEP Joint Group of Ex-

perts on the Scientific Aspects of Marine Environment Protection. IMO serves as the Secretariat. See website at <<http://gesamp.imo.org>>.

8 The tacit amendment procedure is a legal technique pioneered by IMO and later adopted in various international environmental agreements, to permit rapid adoption of new technical requirements, without the need to go through the usual lengthy procedure for amendment and ratification of international agreements. The basic principle is that states are assumed to consent to the new regulation if they do not specifically object within a certain period. This silent or tacit consent obviates the need for states to do anything to agree; in particular, they do not have to present the measure to their legislature for approval, a process that may take many years. The new regulation comes into force for all states that do not object on a specified date, usually after 18 months, provided that one-third of the parties do not object. In practice, this rarely happens, because all measures are adopted by consensus.

9 Although developed countries argued for a much lower level of sulphur content, they were constrained to accept the percentage insisted upon by certain developing countries in order to have the Annex adopted.

10 Text in 30 ILM 733 (1991).

11 Mainly chemicals.

12 Final Act of the Conference on International Cooperation on Preparedness and Response to Pollution Incidents by Hazardous and Noxious Substances, IMO Doc. HNS-OPRC/CONF/11/Rev.1, 15 March 2000.

13 1969 Intervention Convention, adopted 29 Nov. 1969, in force 6 May 1975, #1975 UKTS 77; Protocol of 1973, adopted 2 November 1973, in force 30 March 1983, #1313 UNTS 3. Article 221 of the LOSC recognises the right of coastal states, both customary and convention to take emergency measures to protect its coastline and related interests from pollution resulting from shipping casualties. The conventional right referred to that provided in the Intervention Convention, covering oil pollution, and the 1973 Protocol, extending it to hazardous substances other than oil.

14 SOLAS 1974, the Protocol of 1978 and the numerous subsequent amendments are available only as IMO publications, 1997 Consolidated Edition, IMO sales No. IMO-110E. For subsequent amendments, please refer to reports of the Maritime Safety Committee, at which they are adopted.

15 The IMDG Code, is available as a voluminous IMO publication. It has been extensively revised and reformatted. The MSC has decided that it should be made mandatory. Latest version as revised in 2000: IMO Sales No. IMO-200E.

16 The 1998 edition is available as IMO publication IMO-100E. Subsequent amendments have been adopted by MSC.

17 The 1993 edition is available as IMO publication IMO-772E. For subsequent amendments, see reports of MSC.

18 Manual on Chemical Pollution, Section 1, 1998 edition, IMO publication IMO-630E; Section 2, 1991 edition, IMO publication IMO-633E. This is currently being revised.

19 See IMO website for details of these and all IMO conventions: <<http://www.imo.org>>, or see "Focus on IMO: A summary of IMO Conventions", February 1998, available as either a paper document or on the IMO website.

20 SDRs are the unit of account used by the International Monetary Fund.

21 Or in some cases, having carried oil as cargo where there are residues present.

22 These are generally understood to be military. Major naval powers do not want any restrictions on their military activities, both overt and covert.

23 See decision in IMO Doc. MSC 73/21, paras. 8.9-8.12.

24 IMO Doc. C 85/D, para.6.2.

