Merchant Shipping and Maritime Security Bill [HL Bill 79 1996/97]

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The *Merchant Shipping and Maritime Security Bill* [HL Bill 79 1996/97] was introduced to the House of Lords on 24 October 1996 and has its Second Reading in the Commons on 10 February 1997. It is wide-ranging and implements certain recommendations of Lord Donaldson's report *Safer Ships, Cleaner Seas*, which was produced in response to the MV Braer disaster off Garth Ness in the Shetlands in January 1993.

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I Introduction

The *Merchant Shipping and Maritime Security Bill* [HL Bill 79 1996/97] was introduced to the House of Lords on 24 October 1996, had its Second Reading on 7 November[1] and was committed to a Committee of the Whole House[2] (which was not however taken on the Floor of the House). The Bill had its Report stage in the Lords on 13 January[3] and has its Second Reading in the Commons on 10 February 1997. It implements certain recommendations of Lord Donaldson's report *Safer Ships, Cleaner Seas*[4], which was produced in response to the MV Braer disaster off Garth Ness in the Shetlands in January 1993.

The Braer spilt almost 85,000 tonnes of Norwegian light crude, but the largest ever spill in UK waters came from the Torrey Canyon which in 1967 lost 117,000 tonnes of oil off the Scilly Isles[5] and was followed in 1971 by the *Prevention of Oil Pollution Act* which gave the Secretary of State new powers to deal with oil spills. In 1978 the Amoco Cadiz released 220,000 tonnes of oil off the coast of Brittany. Lessons have been learnt from each of these incidents, and yet in February 1996 the Sea Empress lost 72,000 tonnes of Forties Blend crude oil at Milford Haven, an important marine conservation site; the third largest spill in UK waters[6], and one of the 20 largest spills ever.

Thankfully large tanker spills are rare, but they are spectacular and expensive; the Sea Empress incident will probably have cost over £10 million to clear up[7], not to mention the voluntary work done by organisations and individuals. There are also many smaller incidents. In 1994 there were seven prosecutions of British ships and four of foreign ships, all of which were successful, for oil discharges[8]. Lord Donaldson's inquiry was kept informed by the DoTp of the more significant maritime incidents which occurred during its lifetime; it was 'shocked to discover just how many potentially serious incidents there were'; in 1993 HM Coastguard dealt with 67 incidents involving merchant ships, some of which carried major polluting cargoes[9].

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[1]HL Deb 7 November 1996 cc731-780
[2]HL Deb 26 November 1996 CWH 53-100 and 25 November 1996 CWH 1-100
[3]HL Deb 13 January 1997 cc20-82
[4]*Report of Lord Donaldson's Inquiry into the prevention of pollution from merchant shipping* Cm 2560 May 1994 Department of Transport
[5]Sources: *Lloyd's List* 22 February 1996 pp 2-3; DoTp Marine Pollution Control Unit
[6]*The Sea Empress Incident Milford Haven 15 February 1996 A report by the Marine Pollution Control Unit* December 1996 Coastguard
[7]ibid p.77 para.356
[8]*Digest of Environmental Statistics* No.18 DoE 1996 Table 4.14
[9]*Safer Ships; Cleaner Seas Report of Lord Donaldson's Inquiry into the prevention of pollution from merchant shipping* Cm 2560 May 1994 Department of Transport Appendix L, p. 465

The Advisory Council on Protection of the Sea (ACOPS) surveys oil pollution around the coasts of the UK annually. In 1995 (the latest year for which figures are available) 585 oil spills were reported, an increase of 8.3% on the previous year. 142 incidents required partial or complete clean-up (with many small spills the oil disperses and degrades naturally). the number of land-based sources of pollution identified increased for the second year. 84 tonnes of oil were spilled that year from North Sea offshore oil installations in 145 reported spillages, a decrease from 174 tonnes from 147 spills in the previous year[10].

Merchant shipping law is complex and before the consolidating *Merchant Shipping Act 1995* ('the 1995 Act') was spread among many statutes, implementing numerous international Conventions. The present Bill seeks in many parts to amend the 1995 Act.

II Donaldson recommendations

Lord Donaldson's Inquiry was asked to identify what could 'reasonably' be done to protect the UK coastline from pollution from merchant shipping. The comprehensive report produced concluded that while much was already being done, there was a 'pressing need' for the UK to do more internationally, regionally and nationally. It noted the 'fiercely competitive' nature and low profit margins of the shipping industry, which would always favour the cutting of corners.

The UK today has only 1.35% of the world total tonnage of registered merchant ships, but it still has the third longest coastline in Europe and is one of the major Port and Coastal States in terms of the tonnage of ships calling at and passing its ports. Donaldson considered that this entailed a heavy leadership responsibility regarding international action, but felt at the same time that the UK might have to act unilaterally if necessary to safeguard itself.

The Donaldson report made 103 recommendations. Some of its main conclusions were that[11]

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[10] *Oil Pollution Survey around the coasts of the United Kingdom* 1995 ACOPS

[11] *Report of Lord Donaldson's Inquiry into the prevention of pollution from merchant shipping* Cm 2560 May 1994 Department of Transport From overview, pp. xxv-xxix; recommendations in full in Chapter 23, pp. 363-403

- Flag State Control should be strengthened to ensure all Flag States lived up to international obligations

- Ship inspection systems should be tightened and the results made known (half of 15,000 inspections carried out in 1992 revealed deficiencies and almost 600 of these were serious enough to require the detention of the ship for repair)

- All merchant ships should carry large identification signs to remove anonymity en route, with added surveillance if needed

- A *Seaway Code* should advise all ship Masters and owners of regulations and offer practical advice on avoiding incidents

- Marine Environmentally High Risk Areas, MEHRAs, should be established. The average ship Master has no way of knowing whether grounding in a certain area might cause exceptional damage. A limited number of MEHRAs shown on Admiralty charts and in the *Seaway Code* should indicate where environmentally sensitive and dense shipping lanes coincided

- Salvage tugs, becoming an 'endangered species', were needed in sufficient number and power to provide immediate assistance to vessels in distress. A co-operative scheme with neighbouring states was appropriate

- Ship Masters must be encouraged to seek assistance at the earliest opportunity

- The UK's facilities for cleaning up oil spills was 'impressive'; our facility for aerial dispersant spraying should be retained, and general clean-up facilities further improved.

In its initial response[12], the Government accepted 86 of the recommendations. Several recommendations were kept 'under consideration';

- The designation of the North Sea, English Channel and Irish Sea as Special Areas for oily waste as a long-term aim

- Placing a statutory obligation on port operators to provide waste reception facilities, free at the point of use

- Several recommendations regarding an increased inspection regime with new requirements regarding inspection logbooks, detention periods and provision of notice of arrival at ports (altogether representing a new approach to Port State Control); changes would have to be sought via the Paris Memorandum of Understanding on Port State Control (Paris MOU; see page 13)

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[12]*Safer Ships, Cleaner Seas Government Response to the Report of Lord Donaldson's Inquiry into the Prevention of Pollution from Merchant Shipping* Cm 2766 Department of Transport February 1995

- MEHRAs could help Masters identify areas where extreme care and vigilance were needed, but there were already a number of other designations (Particularly Sensitive Areas, Areas To Be Avoided, Deep Water Routes and so on) and the Government accepted the view of the shipping industry that MEHRAs could cause confusion unless established internationally and using rigorous criteria (see page 19)

- The recommendations for ensuring that a system of tugs with adequate capacity were available at key points around UK shores were complex and so the Government had appointed a study team (see page 10)

- The International Oil Pollution Compensation Fund (IOPC Fund) should be able to make payments for actions which benefitted the environment but did not necessarily save the ship; the question of who paid if a tug was called out had also to be examined carefully

- The division of responsibility between local authorities and harbour authorities and Coastguard regarding clean-up operations was the subject of consultation, as was whether local and harbour authorities should have a duty to produce contingency plans

- The Government would also consult on the possibility of establishing two UK Funds, for Port State Control inspections and for emergency responses, and on how these could be levied; it did not rule out unilateral action although international agreement was preferable

- Transshipment of fish between foreign fish factory ships ('klondykers') should indeed occur only under adequate third party insurance, and standards of seamanship and safety did need to be improved; but the UK's legal powers were limited in this respect.

Others were rejected;

- Port State Control needed to be tightened but unilateral action would disadvantage the UK commercially and innocent parties should not be penalised

- A statutory duty on harbour authorities to disclose information on ship arrivals and departures was not needed

- A special self-targeting inspection regime for ships in UK waters with a Paris MOU or UK logbook was inappropriate

- New routing measures (for rogue ships that failed to avoid MEHRAs) could not be enforced through entry reporting conditions, nor would such a proposal receive international support

- Less than 1% of 250 route reports analysed each month showed that ships had infringed IMO routing recommendations, so it would be unhelpful to require ships as a matter of routine to report on why their route had been chosen or why they were planning to enter specified areas

The Government agreed to keep interested parties informed as and when progress in implementing the Donaldson report was made, but did not commit itself to producing annual reports to Parliament. The first progress report was produced in October 1995[13]; on 31 October 1996 another report was produced. The Government has now accepted 91 out of the 103 recommendations, and says it has implemented over half of these[14].

For example, the recommendation that ship inspections should be stepped up and the results publicised has been acted on, with monthly figures being released for ships detained (detained ships have to satisfy surveyors that remedial work has been carried out before they are allowed to leave port). The Marine Safety Agency (MSA) detained 184 foreign-flag ships in UK ports during 1996, and the overall rate of detentions as a percentage of inspections carried out was 8.4% in 1996 and 11.6% in 1995. Five flag states (Cyprus, Russia, Malta, Panama and Turkey) accounted for over half the ships detained[15].

It is worth pointing out that the inspection of ships takes time and considerable effort. For example, very large crude carriers (VLCC) built in large numbers in the 1970s present particular problems; it has been estimated that the area to be checked is equivalent to 1,500 tennis courts and the height to be climbed 2,000m higher than Mount Everest; there may be 1,200 km of welding seams. Bulk carriers are almost as large and an IMO working group estimated that between 1990 and 1994 97 bulk carries and 532 lives were lost; most of the ships were over 15 years old. Ageing bulk carriers and tankers are a main source of concern to the IMO today and the survey and inspection of ships over five years old has been tightened[16]. The present Bill seeks to recover the costs of such Port State regulatory action as well as clean up (see page 28 onwards).

In response to Donaldson's call for the removal of anonymity en route the Government says it has been seeking an agreement with the IMO for the mandatory carriage of automatic identification transponders on ships. In the absence of an implementation timetable being agreed however, their voluntary fitting to tankers sailing off the coast of Northern Scotland is being encouraged at a cost of around £1-2,000 per ship, to respond automatically to 'interrogation' from sites at the Fair Isle Channel, the Pentland Firth and the Minch[17].

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[13]*Progress on implementing recommendations of Donaldson Report* DoTp 16 October 1995
[14]*Implementation of the recommendations of Lord Donaldson's inquiry into the prevention of pollution from merchant shipping: Progress as at 31 October 1996* DoTp 16 October 1996; DoTp Press Notice 340 7 November 1996 *Government publishes update on shipping safety and pollution prevention*
[15]DoTp/MSA Press release 3/1997 24 January 1997 *184 foreign ships under detention in UK during 1996*
[16]*IMO News* Number 3 1995 'World Maritime Day 1995 IMO's achievements and challenges' supplement pXIII
[17]DoTp Press Notice 347 19 November 1996 *Goschen welcomes ship-identification transponders initiative*

The Donaldson Report considered the use of tugs in emergency towing in depth (paras 20.62-20.149). Recommendation 85[18] said that the Government should set up a system to ensure that tugs with adequate and appropriate salvage capacity were available at key points around UK shores. If necessary, this should be done through co-operation with neighbouring states. Tugs are not addressed in the present Bill (see for example Viscount Goschen's comments on behalf of the Government at Report[19]), but as well as the study team mentioned above, the Government said in 1996 that it would provide tugs at Dover and at Stornoway this winter for the third year in succession at a cost of around £2m a year, plus a tug in the South Western approaches[20].

III Existing Controls

A UK framework

A series of Merchant Shipping Acts, beginning with the 1894 Act of that name, have implemented the UK's obligations under international conventions. Most recently the *Merchant Shipping (Salvage and Pollution) Act 1994* (David Harris's Private Member's Bill which enjoyed Government support) implemented directly and indirectly parts of various international agreements relating to marine salvage and pollution, and the *Merchant Shipping Act 1995* ('the 1995 Act') consolidated UK law on this subject[21]. Thus many of the present Bill's provisions seek to amend the 1995 Act.

The huge oil spill from the Torrey Canyon off the Scilly Isles in 1967 led to several developments in the UK's contingency plans for dealing with potential spills from deep sea tankers. The *Prevention of Oil Pollution Act (1971)* gave the Secretary of State for Transport powers to deal with oil and chemical pollution in UK waters, and to intervene in the case of a ship threatening to cause significant pollution (the extensive powers included sinking or destroying the ship).

In practice, clean-up operations are directed mainly by the Marine Pollution Control Unit (MPCU), which is now part of the Department of Transport (DoTp) and was set up in 1979. The MPCU has special responsibility for oil spills and is dispatched to an incident site to co-ordinate and direct operations. It currently spends around £7 million per year,

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[18] p.394
[19] HL Deb 13 January 1996 c36
[20] DoTp press release Tugs 96/01 17 June 1996 *Additional coastguard tug for the South Western approaches*
[21] the Merchant Shipping legislation included in the *Merchant Shipping Act 1894* and in some 30 other separate acts; DoT press release 224, 20 July 1995

although this amount is increased in years when a significant spill occurs; for instance, in both 1993/94 and 1995/96 it incurred additional costs of around £2 million through dealing with incidents[22].

The MPCU has a National Contingency Plan[23] and is set up to operate with HM Coastguard. While HM Coastguard's main concern is the protection of lives at sea, its position means that it is likely to be the first to hear of any accident with the potential to spill oil. The MPCU and HM Coastguard together form the Coastguard Agency or simply COASTGUARD, which is a DoTp executive agency and replaced the old Marine Emergencies Organisation on 1 April 1994[24].

The core staff of the MPCU is small (in all twelve mariners, scientists and administrators) and based in Southampton on 24-hour standby. However, it co-ordinates joint responses with local authorities and the national Government Environment Departments. Under contract, the MPCU keeps two aircraft with remote sensing facilities to detect spills and seven spraying aircraft (based at Coventry and Inverness)[25]. Stockpiles of dispersants are kept at 21 sites spaced evenly around the coast and cargo transfer equipment, including vessels, breathing apparatus and suits is also maintained, by a private sector contractor. In the case of an accident, first strike chemical teams of 6-8 people would be dispatched with the transfer equipment to the scene, and their job is to stabilise and assess the situation and report back. As well as its core staff, the MPCU has an advisory group of marine and chemical scientists who can advise on incidents[26].

The Marine Accident Investigation Branch (MAIB) of the DoTp was set up in 1989 and operates in line with the *Merchant Shipping (Accident Reporting and Investigation) Regulations 1994* laid under the *Merchant Shipping Act 1988*. The Chief Inspector of MAIB reports directly to the Secretary of State and has the power to investigate accidents involving or occurring on board any UK registered ship worldwide or any ship within UK territorial waters. The idea is that marine accidents can be investigated independently of the Marine Safety Agency, the regulatory authority for ship safety.

Masters and Skippers of UK registered vessels are obliged to report accidents by the quickest means to MAIB, any Marine Safety Agency Marine Office, or to HM Coastguard. Some 2,000 accidents and incidents are reported each year and around 600

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[22]HC Deb 14 November 1996 c301w
[23]*Marine Pollution Control Unit national contingency plan*. DoTp MPCU 1993 Deposited paper 9338
[24]*Safer Ships, Cleaner Seas Government Response to the Report of Lord Donaldson's Inquiry into the Prevention of Pollution from Merchant Shipping* Cm 2766 Department of Transport February 1995 p.18
[25]*The Sea Empress Incident Milford Haven 15 February 1996 A report by the Marine Pollution Control Unit* December 1996 Coastguard p. 7
[26]source: MPCU

require MAIB investigation with around 70 warranting Inspectors' Investigations and Inquiries resulting in reports of the individual incident being written[27].

B International framework

1. The IMO

The International Maritime Organisation (IMO) was created in 1948 and is the UN agency responsible for regulating international shipping. It has over 150 Member States and its most important treaties cover over 98% of the world shipping by tonnage. Since 1983 the IMO has been based in London.

Even before the IMO was established, 52 technical conventions were in force which affected shipping to some degree, notably the early versions of the International Convention for the Safety of Life at Sea (SOLAS). In its early years the IMO concentrated on enhancing safety at sea but prevention of pollution has become increasingly important, along with liability and compensation issues. Today the IMO's main responsibilities include;

- SOLAS 1974 and its 1978 Protocol which updated the early SOLAS Conventions and deals with ship construction standards, particularly for tankers
- the 1972 Convention on the International Regulations for Preventing Collisions at Sea which lays down routing measures (implemented in the UK by the *Collision Regulations*[28])
- the International Convention on Load Lines 1966 and its 1988 Protocol setting draught and Plimsoll Marks
- STCW; the International Convention on Standards of Training Certification and Watchkeeping for Seafarers 1987

[27]http://www.open.gov.uk/maib/maibhome.htm
[28]SI 1798/1989

- MARPOL 1973/78; International Convention for the Prevention of Pollution from Ships 1973 and its 1978 Protocol. MARPOL deals with pollution from oil, noxious liquids in bulk, dangerous substances, sewage and garbage.

The IMO has no power to make Governments or the industry take action. Measures have been adopted to speed IMO decisions and the entry into force of Conventions, but their implementation remains the biggest problem since 'ships flying the flags of some countries are far more likely to be involved in accidents than others'. As well as seeking to act through management standards for shipowners and operators (a minority of owners 'take their responsibilities lightly', encouraged by the small profit margins which make it difficult to invest in new tonnage) and seafarer's standards (through the STCW), implementation can be sought in two ways[29];

- **Flag State Control.** The Governments who ratify IMO Conventions vary 'enormously' in the degree to which they enforce IMO standards. Guidelines to assist Flag States have been produced and when survey and certification is carried out by classification societies (marine surveyors who work for Flag States, shipowners and underwriters) these must be adhered to. However, classification societies, like Flag States, vary greatly in their assiduousness[30]. The IMO provides technical assistance to States with little seafaring experience or tradition.

- **Port State Control.** Governments can inspect ships visiting their ports under the terms of Conventions such as SOLAS, Load Lines and MARPOL. Port State Control has become increasingly important compared to flag state control, because of the failings of the latter. If organised on a regional basis by neighbouring States, Port State Control is even more effective, avoiding duplicate checks, and the Paris Memorandum of Understanding (**Paris MOU**), which has 17 members, was the first such agreement.

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[29]*IMO News* Number 3 1995 'World Maritime Day 1995 IMO's achievements and challenges' supplement pp. II-XVII

[30]*Safer Ships, Cleaner Seas Government Response to the Report of Lord Donaldson's Inquiry into the Prevention of Pollution from Merchant Shipping* Cm 2766 Department of Transport February 1995 p.17

2. The IOPC Fund

The International Oil Pollution Compensation (IOPC) Fund is a worldwide intergovernmental organisation established in 1987. The Secretariat is based in London in the IMO building. Its main function is to provide supplementary compensation to those who cannot obtain full compensation for damage (from a shipowner or his insurer) for incidents which occur in the territorial sea of States which are Parties to the *1969 International Convention on Civil Liability for Oil Pollution Damage* (Civil Liability Convention) and the *1971 International Convention on the Establishment of an International Fund for Oil Pollution Damage* (Fund Convention). Those compensated might be Governments or other authorities who have incurred clean up costs, or private individuals or bodies which have suffered damage (fishermen or seaside hoteliers for instance whose trade or equipment has been damaged)[31].

Although it was set up by States from around the world, the IOPC Fund is financed by a levy on oil carried by sea paid by the organisations which receive the oil (*ie* the oil industry), not usually by the States themselves. Its 68 member states have been listed in a PQ[32]. Since its inception the Fund has paid over £120 million in compensation involving 72 incidents. Two voluntary industry schemes, TOVALOP and CRISTAL, set up as interim measures for States which had not ratified the Fund Conventions, are due to end in February 1997 and will not be renewed, because so many States now belong to the IOPC Fund, and to encourage others to join. So from that date, States will no longer be able to rely on voluntary industry schemes to compensate victims of oil pollution damage[33].

As well as compensation for pollution damage[34], the IOPC Fund, as well as the shipowner and his insurer, may pay compensation to states for the costs of reasonable preventative measures to prevent or minimise pollution damage, so if emergency measures result in a reduction of the amount of oil spilled, these may in principle qualify for compensation.

The IOPC Fund applies to spills of heavy or persistent oils from laden tankers. The shipowner pays under the Civil Liability Convention which requires him to carry sufficient insurance to cover his liability under this for ships carrying over 2000 tonnes of oil as cargo. Limits for liability are set out in the Convention and calculated using ships' tonnage (see below). The IOPC Fund pays under the Fund Convention when those suffering oil pollution do not receive full compensation under the Civil Liability Convention in the following cases;

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[31] *IMO News* Number 2 1996 'International regime for oil pollution liability and compensation' pp. 6-9
[32] HC Deb 8 March 1996 c401w
[33] *IMO News* Number 2 1996 'International regime for oil pollution liability and compensation' p.8
[34] defined by the Conventions as 'loss or damage caused outside the ship carrying oil by contamination resulting from the escape or discharge of oil from the ship...'

- the shipowner is exempt from liability because a grave natural disaster, sabotage by a third party or the negligence of the public authorities (in not providing navigational lights for instance) caused the accident
- the shipowner is financially incapable of meeting his obligations and the insurance is insufficient to satisfy claims for compensations
- damage exceeds the limit of the shipowner's liability under the Civil Liability Convention.

There is a limit to the level of liability under the Fund Convention[35]. The '1992 Protocols' to the Conventions came into force on 30 May 1996 and increased the total compensation available under the IOPC Fund for a single incident from £55 million to £125 million (some $200 million). They apply to unladen as well as laden tankers. The 1971 Fund is thus now due to be superceded by the new 1992 Fund although the two will operate alongside each other in London for some time[36].

The 1992 Protocols were implemented in the UK by the *Merchant Shipping (Salvage and Pollution) Act 1994* (not retrospectively, so for instance Braer claims were not affected), and the 1994 Act, with many others, was consolidated into the 1995 Act[37]. Of the £57 million available for claims for the Sea Empress, around £49 million will come from the IOPC Fund and around £8 million from the ship's insurers. There was some delay in the IOPC states deciding to pay the Sea Empress claims[38].

The USA does not belong to the IOPC fund[39], and has no limit to liability. It requires shipowners to provide evidence that they have sufficient financial resources or insurance cover to pay for a worst-case oil spill involving their ships[40]. Indeed, in many ways the USA seems to operate unilaterally. The Exxon Valdez accident led to the US Oil Pollution Act of 1990, which requires tankers operating in US waters to have double hulls and greatly increased vessel owner liabilities[41]. The US national transportation safety board marine accident report on the incident made a number of recommendations which the IMO considered[42], and in 1992 the IMO announced that following a meeting of the Marine Environment Protection Committee, any new supertankers would be required to have either a double hull, a type of design known as mid-deck (with horizontal divisions of oil tanks) or any other design which is as effective at reducing oil spills. The rules will apply

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[35]*International Oil Pollution Compensation Fund Claims Manual* 4th edn IOPC Fund June 1995
[36]*Merchant Shipping and Maritime Security Bill Notes on Clauses* House of Lords Clause 25
[37] the Merchant Shipping legislation included in the *Merchant Shipping Act 1894* and in some 30 other separate acts; DoT press release 224, 20 July 1995
[38]Department of Transport press notice 65 29 February 1996, attached
[39]HC Deb 8 March 1996 c401w
[40]*Lloyds List* 25.10.96 p.5 Leading article
[41]*New Scientist*, 14 March 1992
[42]HCDeb 23 April 1991 c.417-8w

to all supertankers built after July 1996. Donaldson's report[43] accepted the line the IMO had taken in promoting double hulls but had some doubts regarding their merits; it thought segregated ballast tankers had considerable environmental advantages over conventional tankers however. Greenpeace say the present Bill is a 'step in the right direction', but that it would like to see an unlimited liability regime, as exists in the USA[44].

3. UNCLOS

The 1982 UN Convention on the Law of the Sea (UNCLOS) is extremely long and wide-ranging and writes into international law such fundamental principles as the right of free passage and the rights of states on the high seas and in their territorial waters. UNCLOS was originally not signed by the UK[45] largely because of disputes over its Part XI, which deals with high sea bed resources and mining rights. UNCLOS has now come into force and we have already implemented parts of it, because many of its parts have become written into international law, and the UK has developed its own laws in line with the Convention anyway. For example, a series of Orders laid in 1995, such as the *International Sea-Bed Authority (Immunities and Privileges) Order 1995* and *Merchant Shipping (Prevention of Pollution) (Law of the Sea Convention) Order 1995* were parts of the 'last lap' of implementing UNCLOS.

The UK has been planning to accede to the Convention for some time now but we have not yet done so[46]. The original problem concerned deep sea mining rights but mineral prices are not so high as they were in the 1980s and the issue is not thought to be as pressing as it once was[47]. According to the latest statement on this matter, which was made by Sir Nicholas Bonser, the UK is now concerned about a different problem, relating to the international fisheries disputes[48];

> 'It is the Government's intention that the United Kingdom will accede to the United Nations convention on the law of the sea in due course. In the light of a number of continuing uncertainties in the international situation with regard to fisheries issues, the Government have concluded that now is not an appropriate time to accede to the convention. The timing of accession remains under review and Parliament will be informed as soon as the Government have taken a decision'.

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[43]op cit; para 23.14, 23.17 pp.365, 366
[44]*Lloyds List* 25.10.96 p.3 Muted response to a curate's egg of legislation
[45]HC Deb 26 June 1995 c533w
[46]eg *Merchant Shipping and Maritime Security Bill Notes on Clauses* House of Lords
[47]Source: Foreign and Commonwealth Office 19 January 1996
[48]HC Deb 23 July 1996 c185w

UNCLOS allows a coastal state to establish a territorial sea of up to 12 nautical miles. Beyond this, it allows the establishment of exclusive economic zones (EEZs) for up to 200 nautical miles. The UK has not so far claimed an EEZ but exercises various aspects of an EEZ jurisdiction. Within EEZs coastal states are given sovereign rights to explore and exploit fishing and non-living resources for the purpose of economic advantage. This extends to the waters, the sea-bed and its sub-soil[49]. However, beyond the EEZ or shelf limits -or beyond the territorial waters if no EEZ has been claimed- are the "high seas". High seas resources belong to no-one and are free for all[50].

4. OSPAR and London Conventions

The 1992 Convention for the Protection of the Marine Environment of the North East Atlantic (OSPAR Convention) replaces the 1972 Oslo and 1974 Paris Conventions, which both covered the North East Atlantic. The Oslo Convention regulated the dumping of industrial wastes, dredged material and sewage sludge from ships and aircraft. Industrial wastes ceased to be dumped in 1995 and sewage sludge dumping will have to stop by 1998. The Convention also covered incineration at sea until this was stopped in 1991[51]. Disposal of minestone will be stopped from 1997 at sea unless no practical alternatives are available[52].

The Paris Convention regulated pollution from land-based sources (rivers, pipelines and direct from the coast), with the aim of preventing, reducing and where appropriate eliminating these. In 1990 the Oslo and Paris Commissions (OSPARCOM) decided they should merge operations, with the resulting agreement which was signed in Paris in 1992. The OSPAR Convention will prohibit all disposal subject to certain exemptions, and the main exemption is dredged material[53]. The UK has been checking whether all of its legislation is consistent with OSPAR's requirements before it ratifies the Convention, which it signed in 1992[54].

The 1972 Convention on the Prevention of Marine Pollution by Dumping from ships and aircraft (London Convention) is a similar global agreement which aims to phase out, reduce or control dumping at sea any waste or other matter that is likely to be hazardous to health or marine life including low or intermediate level radioactive waste.

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[49]*The Law of the Sea*, UN 1983
[50]"The evolution of international whaling law" Gregory Rose and Saundra Crane in *Greening International Law* Ed. Philippe Sands 1993 p.162
[51]*North Sea Quality Status Report 1993* North Sea Task Force OSPARCOM/ICES
[52]*Policy Guidelines for the Coast* DoE November 1995 p.33
[53]ibid
[54]HC Deb 26 June 1995 c434w

IV The Present Bill

A Exclusion zones

Clause 1 allows the Secretary of State to place a temporary exclusion zone around a ship, structure 'or other thing' in UK waters if it is wrecked, damaged or in distress and if it appears to him that there is a danger of pollution, or on safety grounds.

The powers would enable the Secretary of State to place a temporary exclusion zone around a shipping casualty or structure to allow life-saving or counter-pollution operations to proceed without them being endangered, hindered or delayed by uninvolved vessels entering the area. This responds to recommendation 89 of the Donaldson report[55] that the UK Government should seek powers for the Coastguard Agency to establish sea exclusion zones in the way that air exclusion zones already exist. The rationale for this recommendation was given in paras 21.105-21.107 of the report;

> ***Exclusion zones***
>
> 21.105 A restricted area was established around the wreck of the BRAER under the Protection of Wrecks Act 1973, but this is not suitable for all occasions: in particular it applies only when there is a wreck. Exclusion zones were established around the PHILLIPS OKLAHOMA and the ROSEBAY for safety reasons. While the procedure has proved effective in practice, it is complex for an emergency situation. The London Air Traffic Control Centre has to be asked to issue and broadcast a Notice to Airmen, and the Hydrographer of the Navy has to be asked to place a sea exclusion zone on the specified area. The Hydrographer issues a Notice to Mariners and HM Coastguard broadcasts the information.
>
> 21.106 The procedure could be simplified if HM Coastguard had the power to establish sea exclusion zones: we would not want to alter the system for aviation. We consider that such a power is required. It should be selective, so that some vessels can be asked to assist while others are told to stay away, and it should apply both to wrecks and to vessels in difficulties.
>
> 21.107 We envisage that the new power might be exercised in two stages. HM Coastguard Watch Officers should be allowed through their standing instructions to **advise** vessels to follow a particular course of action in an emergency. **Instruction** would be given only rarely, only on the authority of senior staff (perhaps the Regional Controller). and only if advice had not been heeded. **We recommend that such powers should be taken**.

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[55] op cit, para 23.128

Only ships directed by the Secretary of State or those exercising a right of passage would be allowed to enter the zones, and ships exercising rights of passage would be 'encouraged to avoid the zones for their own safety'[56].

B MEHRAs

Establishing exclusion zones is NOT the same as setting permanent, relatively limited Marine Environmental High Risk Areas (MEHRAs) which ships could then routinely keep well clear of, as proposed by paras 14.120-14.140 and Recommendation 59 of the Donaldson report[57]. These would have to be justified both environmentally and because there was a likelihood of damage occurring. The thinking behind this was that if Masters knew why they were being asked to keep out of an area, they would be more likely to do so. The mere existence of a *limited* number of MEHRAs would thus, even without further protection, be useful. 'Rogue' ships which ignored the MEHRAs should be subject to special entry reporting conditions regarding their routes. While the Donaldson report said that the EC and IMO should be encouraged to act, it considered that individual States were best placed to designate MEHRAs so there was no reason for the UK not to act unilaterally, although the report did not recommend any locations for UK MEHRAs.

During every debate on the Bill during its passage through the Lords, Peers voiced their concern at the absence of provisions establishing UK MEHRAs. In Committee of the Whole House Lord Clinton-Davis and Lord Beaumont of Whitley tabled a probing Amendment seeking to insert a new Clause 2 to this effect[58]. Lord Clinton-Davis reiterated the Donaldson report's conclusions that ship routing was presently reactive, not proactive. Since IMO progress, if made at all, was likely to be slow, he wondered whether unilateral action would be contemplated.

The Parliamentary Under-Secretary of State, Department of Transport, Viscount Goschen, outlined Government thinking. Essentially, the Government believes that restrictions on the movement of vessels can only be made through the IMO; the rights of innocent passage and transit passage must be respected. While it 'certainly agreed' that there were areas around our coast where ships should take extra care, mandatory routing measures had been introduced through the IMO and following the Braer purely on safety grounds. Recent amendments to SOLAS had allowed such routing measures to be taken on environmental grounds as well. Work was now being done to develop criteria to assess environmental importance and sensitivity, and to improve knowledge of shipping

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[56]HL Deb 7 November 1996 c733 (Second Reading debate)
[57]*Safer ships, cleaner seas. Report of Lord Donaldson's inquiry into the prevention of pollution from merchant shipping.* 17 May 1994 Cm 2560 pp.219 and 382
[58]HL Deb 25 November 1996 CWH 1-6

movements. The environmental criteria were 'some way off' from being agreed with statutory and other advisers, including the RSPB, and in line with obligations arising through EU conservation Directives.

The Government's initial view is that the majority of the potential conflict areas (and some of the likely MEHRAs) around the coast already have IMO routing measures in place for safety reasons, and that radar surveys have indicated that the routes are being obeyed. However, areas with lower levels of shipping but with higher environmental sensitivity have now to be considered[59].

On Report Lord Clinton-Davis reintroduced his Amendment[60]. He pointed out that in Committee the Minister had said that restrictions on the movement of vessels could only be made through the IMO, but that this conflicted with the Donaldson report conclusions. (Lord Beaumont of Whitley added that since the Government has said that it is not waiting for EU proposals to come to fruition, this indicated that it could indeed act unilaterally.) In any case, the restriction of ship movement was not the only way in which a MEHRA could be implemented; use of tugs as escort, contingency planning and navigation aids could all be deployed. Around 15 NGOs supported his Amendment.

Viscount Goschen said there were three main reasons why the Amendment could not be supported; first, the necessary powers to establish a MEHRA as defined by Donaldson [essentially in a non-statutory manner through guidance] were already available; second, the Amendment seemed to go beyond the Donaldson recommendations and was 'partly inconsistent with international law', and third, it was premature in the light of work being done by the IMO and EU. On the second point, Viscount Goschen said that if non-statutory guidance did not lead to a change in behaviour, the IMO agreement might be needed for specific mandatory measures regarding routing, particularly if routing restrictions applied as conditions of entry into a particular port[61]. Lord Clinton-Davis withdrew both his Amendments, conceding that it was probably right to try out a voluntary system, but he urged the Government to act quickly[62].

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[59]ibid CWH 3-5
[60]HL Deb 13 January 1997 cc20-23
[61]ibid c.24
[62]ibid c. 26

In its progress report on the Donaldson recommendations the Government has said that work to assess the need for and to identify MEHRAs is continuing. Radar surveys have indicated that voluntary routing measures are working well (these include the Fair Isle Channel route adopted following Braer). In a separate move, the EC is working to establish criteria for environmentally sensitive areas[63]. However, these were promised following the Braer disaster, and progress has been slow[64].

C Intervention and direction powers

Clause 2 deals with intervention powers when an accident threatens pollution. Sections 12-16 of the *Prevention of Oil Pollution Act (1971)* empower the Secretary of State for Transport to deal with oil and chemical pollution in UK waters, and to intervene in the case of a ship threatening to cause large scale pollution (the extensive powers include sinking or destroying the ship). (In practice, clean-up operations are directed by the Marine Pollution Control Unit; see page 11.) Clause 2 amends the *1995 Merchant Shipping Act* ('the 1995 Act') so that the Secretary of State may intervene in the cases of ships threatening 'significant pollution' rather than 'pollution on a large scale'.

Clause 2 also extends the geographical scope of the powers to include UK controlled waters (ie within the 200 mile limit). This clause responds to recommendations 87b and 87c of the Donaldson Report that "the powers of intervention should be amended; and any new legislation should be framed in broad terms and any limitations on the use of powers should be managerial rather than legislative." The reasons for the above recommendations were discussed as follows in the Donaldson Report:

> 20.32 The Merchant Shipping (Salvage and Pollution) Bill ... [see page 10] will extend the powers so that they apply to prevent pollution in an area equivalent to an EEZ, as envisaged in UNCLOS 1982; and so that they apply within territorial waters or within an area equivalent to an EEZ in order to protect the interests of another State. We consider that the powers should also:
>
> (a) be amended to make the test for intervention less onerous;
>
> (b) include a power to issue an enforceable direction within an area larger than the territorial sea in order to protect it; and
>
> (c) include clear power to place an agent of the Secretary of State on board to inform him of the situation or to take action on his behalf: this might involve a Royal Navy boarding party. While we believe that it is possible to put someone on board any ship

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[63] *Implementation of the recommendations of Lord Donaldson's inquiry into the prevention of pollution from merchant shipping: Progress as at 31 October 1996* DoTp 16 October 1995 p.34

[64] *ENDS report* 262 November 1996 pp.30-32 Government under pressure over marine pollution Bill

> in territorial waters using the Royal Prerogative-- as was done in the case of the ODIGITRIA B (see Appendix L) -a clear and specific power is desirable to eliminate any scope for argument on powers in a crisis. Any new legislation should specifically put in a saver for the Prerogative power to prevent its extinction.

20.33 We believe that the Intervention Convention 1969 and Article 221 of UNCLOS 1982 taken together allow these powers to be exercised in a reasonable and proportional manner, not just in territorial waters but also in an EEZ (or equivalent) and on the High Seas. We recommend that suitable domestic legislation should be drawn up, after any necessary international consultation, in particular with neighbouring countries, to ensure consistency of approach.

20.147 Any review of the legislation under which HM Coastguard and MPCU operate should ensure that any new legislation is framed in broad terms and that any limitations on the use of the powers should be managerial rather than legislative. Absolute clarity is of course needed on who should do what: but that is best covered in guidance for staff and users.

The measures in Clause 2 have been generally welcomed. On Report Viscount Goshen introduced Government Amendments to widen the intervention powers still further, in line with the MAIB's (see page 11) preliminary conclusions following its Sea Empress enquiry. The Government Amendments also followed criticism of the absence of such measures by Lord Donaldson speaking during the Bill's Second Reading[65]. The Amendments will allow the Secretary of State to give directions to not only the owner, master or salvor of the ship, but to any pilot of the ship, or to a harbour master or harbour authority if a ship is in water regulated or managed by a harbour authority. Consultation showed wide support for such action. However, to widen the powers of direction to cargo interests as Lord Donaldson had also urged would, said Viscount Goschen, be difficult and premature at this stage[66].

Viscount Goshen also announced that in line with the MAIB's recommendations, the National Contingency Plan (see pages 10-11) would be placed on a statutory footing by making its preparation, review and implementation one of the Secretary of State's statutory functions under the 1995 Act. The Coastguard Agency had been asked to review the plan in the light of recent developments through a consultation exercise, and to submit it to the Secretary of State for approval[67].

Clause 3 extends the Secretary of State's powers to cover substances other than oil but which are prescribed or which may create hazards to health or marine life. This brings no changes in law but inserts the provisions into the 1995 Act; the present Regulations on this will be revoked[68].

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[65]HL Deb 7 November 1996 c744
[66]HL Deb 13 January 1997 c.27
[67]ibid cc. 28-29
[68]SI 1980/1093; see *Merchant Shipping and Maritime Security Bill Notes on Clauses* House of Lords

D Port waste facilities

Clause 5 deals with the provision of port waste facilities. The MARPOL Convention (see page 12) prevents marine pollution by the operational discharge by ships of oil and other harmful substances including garbage. The UK has implemented MARPOL through various means including the *Merchant Shipping Act 1979,* the *Merchant Shipping (Prevention of Oil Pollution) Regulations 1983*, and the *Prevention of Oil Pollution Act 1986.* The Government of each Party to MARPOL must undertake to (or can require ports to) provide adequate reception facilities for garbage from ships using its ports and terminals.

At the moment it is voluntary for ports to provide waste facilities. Clause 5 will allow regulations to be made to improve such facilities and include them in the planning process, and to force ports to produce waste reception facility plans or waste management plans. The Government says it will need to consult on whether port waste facilities should be charged for- while the regulations to be laid may make provision for charges to be set, these may act as a disincentive to ships using such facilities[69] (encouraging illegal dumping at sea). Contravening any regulations made would be punishable on summary conviction by a fine not exceeding the statutory maximum and on conviction on indictment a person may be liable to a term not exceeding two years or a fine, or both.

Following an assessment of the effectiveness of the planning regime, the clause will also enable the making of regulations to take other measures to improve the provision and use of port waste reception facilities. The Department of Transport already recommends that ports have waste management plans in order to ensure that the provision of reception facilities is adequate. This was one of a package of 18 measures incorporated in a paper *New Measures to Reduce Discharges of Wastes from Ships*[70]. This took account of the responses to the consultation document issued by the Department in April 1995 and recommendation 27 of the Donaldson Report:

> 23.41 There needs to be more waste oil and garbage reception facilities and they need to be easier to use (paragraphs 9.53 -- 9.62) without the disincentive of specific charges (paragraphs 9.63 -- 9.67). **Recommendation 27 The UK Government should:**
>
> (a) place a statutory obligation on port and terminal operators to provide reception facilities which :

[69]HL Deb 7.11.96 c733 onwards; Lords Second Reading
[70]Department of Transport press notice no 19, 24.1.96

i. are fully adequate;
ii. are geared to ease of use; and
iii avoid disincentives such as a requirement for ships to pre-sort waste

(b) encourage port and terminal operators to consider carefully, in consultation with shipping interests and waste disposal contractors:

i.what level of provision is needed;
ii.how disincentives to use the facilities can be avoided; and
iii.what scope there is for alternative means of waste collection, such as the use of barges rather than fixed points;

(c) set up a system of certification to ensure that facilities are adequate, involving the Department of Transport as experts on what is required and waste regulation authorities as experts on how it should be handled. Policing of the use of reception facilities must be part of such a scheme;

(d) consider with other North Sea and North East Atlantic States whether reception facilities need improving on a wider scale;

(e) ensure, preferably through agreement, that the cost of reception facilities in the UK is subsumed into standard port dues rather than through additional charges, and that the reception facilities element of port dues is proportional to the size and type of vessel;

(f) pursue vigorously a North Sea agreement designed to ensure that, so far as practicable, all European ports take a similar approach; and

(g) consider whether the customs duty raised on the import of oil as waste justifies the disincentive to an orderly and legal discharge of oily wastes.

In Committee[71] Lord Beaumont of Whitley said he was disappointed that the Bill included only enabling powers. He welcomed waste management plans which should cut down on illegal discharges at sea, but these needed to be mandatory so that those ports and harbours that were not drawing them up voluntarily would have to do so. Lord Beaumont said that Marine Safety Agency (MSA) research had shown that where facilities existed they were sometimes poorly advertised and hard to find; the MSA had so far received between 100 and 140 plans from a total of around 350 ports and harbours in the UK, and did not propose to assess the adequacy of these. Lord Berkley also welcomed the Bill's proposals, which the Chamber of Shipping as well as conservation bodies supported, and pointed out that unless similar statutory measures were put in place across the North Sea or Atlantic UK ports could be put at a competitive disadvantage. He wondered why marinas were not included as well.

[71]Committee debate on port waste facilities at HL Deb 25 November 1996 CWH 12-20

Viscount Goshen said the Government was convinced that enabling measures were the way to proceed. Flexibility was essential because the concepts had not been tested in legislation previously and lessons needed to be learnt from the waste management plans already produced or in the pipeline. A sub-group of the DoTp's newly-formed Maritime Pollution Advisory Group would review the plans produced so far and identify examples of good practice for use in drawing up the Regulations. EC and IMO and measures were also being developed and these might require the alteration of any Regulations made, which was another reason for flexibility. Viscount Goschen confirmed that marinas were included in the definition of 'harbour' under the 1995 Act, and reassured the Committee that the Government intended to make Regulations as quickly as possible and practicable. On Report Lord Berkeley withdrew an Amendment seeking to make the Government produce Regulations by 1 July 1998 after further reassurances from the Minister[72].

The environmental manager for Associated British Ports (the UK's largest port operator), which already provides port waste facilities, has commented that the Bill's requirements simply reflect their current practice, so they are 'very relaxed' about it[73].

Clause 7 raises the fine which may be imposed by Magistrates for the illegal discharge of oil into UK waters under MARPOL, implemented through the 1995 Act, from £50,000 to £250,000 (there is no limit on the amount which may be imposed by higher courts).

E Inspection and detention of sub-standard ships

In addition to the draft Bill the government also issued consultation papers on sub-standard and uninsured ships and the responsibilities of local authorities and port authorities in oil pollution response. As a result of the consultation on sub-standard and uninsured ships, clause 9 and schedule 1, clause 10, clause 11 and clause 15, which all deal with matters dealt with by the Donaldson Report, were added to the Bill.

Clause 9 and Schedule 1 of the Bill amend the 1995 Act in relation to inspection and detention of ships to make clear that a power of inspection and detention may apply to a ship in United Kingdom waters, except where it is exercising the right of transit or innocent passage.

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[72]HL Deb 13 January 1997 cc.41-44
[73]*Lloyds List* 25.10.96 p.3 Muted response to a curate's egg of legislation

Before January 1996, port state control surveyors had powers to inspect any ship in UK waters but their powers to detain ships could only be exercised when the ship was "in port". From January 1996, the powers to detain vessels were extended by the *Merchant Shipping (Port State Control) Regulations 1995, SI No 3128* which implement in UK law Council Directive 95/21/EC (the Port State Control Directive), apply broadly to any seagoing ship:

- in a port in the United Kingdom or at an offshore installation; or
- anchored off such a port or such an installation (except in waters which are either United Kingdom waters or designated waters)

This represented an extension of the UK's powers of detention though the term "anchored off [such] a port" has not been defined. Lord Donaldson considered the limitation of the effective use of port state control powers demonstrated by the approach that had to be taken towards klondykers anchored off Lerwick. In particular he pointed to the lack of power to detain a ship unless it was in a "port", now section 95(1) of the *Merchant Shipping Act 1995* which had been interpreted as meaning inside a harbour's walls. He recommended (Recommendation 102 (e)) that the UK Government should:

> (e) specify the areas within which the power to detain ships can be applied, by defining in legislation a "port" for this purpose.

F Power to move ships on

Clause 10 of the Bill contains enabling powers to allow the Secretary of State to give directions to a ship in UK waters to move on for reasons of safety of pollution, except when it is exercising the right of transit of innocent passage. As part of his recommendations about powers needed to control klondykers Lord Donaldson recommended (Recommendation 102 (a)) that powers should be taken to ensure that ships not on innocent or transit passage and whose presence pose a risk to safety or of pollution should be required to move on. His arguments supporting the recommendation are found in the following extracts of the report and refer to difficulties that were experienced in 1991 and 1992 when large numbers of laden oil tankers anchored in Lyme Bay waiting for the an improvement in the price of oil on the Rotterdam Spot Market.

Ships not on passage

5.28 Article 18(2) is an important part of the definition:

"Passage shall be continuous and expeditious. However, passage includes stopping and anchoring, but only in so far as the same are incidental to ordinary navigation or are rendered necessary by force majeure or distress or for the purpose of rendering assistance to persons, ships or aircraft in danger or distress"

5.29 Accordingly the right of innocent passage does not entitle ships to "park" in territorial waters for purely commercial reasons --for instance, as a floating store or factory. It must follow that the Coastal State can instruct the Masters of such vessels to move if they do anchor for long periods without a valid reason related to passage. When oil tankers "parked" in Lyme Bay, the United Kingdom Government did just this and the tankers left. A similar problem has arisen recently in Scottish waters. This is discussed in Chapter 17.

5.30 There is no doubt as to the United Kingdom Government's power in international law to instruct the Masters of such vessels to move or to impose conditions which must be met if they are to remain. There do not however appear to be any satisfactory powers in domestic law under which they can be ordered to move on, apart from Section 12 of the Prevention of Pollution Act 1971 which applies only in the special case where the ship has an accident and serious pollution is threatened. **We recommend that suitable powers be taken.**

G Klondykers and compulsory insurance

Clauses 9 and 10 include provisions which may be usd to combat the problem of klondykers. In addition, **Clause 11** of the Bill contains provisions for the Secretary of State to prescribe requirements relating to safety on ships receiving trans-shipped fish and to serve a notice on such ships prohibiting them from carrying on certain activities if such requirements are not complied with. In chapter 17 of his report Lord Donaldson considered the problems experienced with klondykers and made specific recommendations relating to them.

23.110 In the autumn of 1993 there were about 90 fish factory ships off Shetland, some of which were in a very poor condition. There were three serious incidents. There is no doubt that fish factory ships are important for the economy of the UK as a whole and of the areas where they operate, but events during 1993 showed that safety and pollution prevention standards were not good enough. Although some effective action has been taken already, more needs to be done.

23.111 **Recommendation 77** The UK Government should:

(a) require that transshipment of fish can take place in UK waters only if the ship concerned carries adequate insurance and if she meets clear, basic safety and pollution-

> prevention criteria. Permission for transshipment should be revokable if the conditions are subsequently breached;
>
> (b) seek to amend section 4 of the Sea Fish (Conservation) Act 1967 so that transshipment licences can be issued only to vessels which meet basic safety standards;
>
> (c) limit the number of licences issued in relation to the quantities of fish available, for reasons of safety and to limit congestion;
>
> (d) ensure that the reasonable costs of checking the safety of the ship and her insurance, and of any inspection, are charged to the vessels concerned;
>
> (e) ensure that the Fisheries Departments agree transshipment areas with the Department of Transport and any harbour authorities affected; and
>
> (f) declare straight away that from a specified date, well before next winter, the Fisheries Departments will not consider any applications for a transshipment licence unless the Master concerned produces evidence that his vessel is adequately insured and reaches minimum safety standards. Any licences issued under existing rules before that date should not run beyond that date.

While Lord Donaldson recommended that klondykers should be required to have appropriate insurance cover before a transshipment licence was issued he also considered the question of compulsory third party insurance for all other ships. He considered that adequate Protection and Indemnity (P&I Club) cover was essential and hull and cargo insurance desirable both to protect third parties and to ensure that salvage service were readily available. He concluded, however, that given the amount of ships passing the United Kingdom but not calling at UK ports international action was the best way of ensuring that all potentially polluting ships had adequate insurance to cover their third party liabilities.

The government said, in its consultation paper on the Draft Merchant Shipping Bill and measures to address substandard ships in early 1996, that it was reluctant to make continued trading conditional on holding appropriate insurance. Because insurers cannot be compelled to provide cover, in extreme market conditions business operations might be placed beyond the law by a requirement to be insured. However it decided to include such a requirement for insurance in what is now **Clause 16** of the Bill. The Clause contains enabling powers for the Secretary of State to require by regulations that ships have in force insurance, or other security, for liabilities in the regulations, and carry documentary evidence of this. The requirements could only be imposed on ships in the UK territorial waters and could be imposed selectively, to certain types of ship or those undertaking certain activities. They take forward Lord Donaldson's specific recommendation (number 77a) regarding insurance for fish factory ships[74].

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[74]Merchant Shipping and Maritime Security Bill Notes on Clauses House of Lords

The UK has pressed the IMO Legal Committee to include in its work programme a debate on compulsory insurance for shipowner liabilities. This has been accepted and the topic was discussed at the October 1996 meeting of the Legal Committee. As a result of discussion on compulsory insurance at that meeting a correspondence group has been set up to take the work forward.

H Funding Port State Control and clearing up

A new **Clause 12** was inserted by the Government at Report to enable a statutory duty to be placed on local authorities to maintain oil pollution contingency plans, in line with the MAIB's interim recommendations following its Sea Empress investigation. This would be done through amending the 1995 Act to implement the 1990 Convention on Oil Pollution Preparedness, Response and Cooperation (OPRC) Convention. However, the Convention does not explicitly mention the role of local authorities, who have traditionally taken part in clean-ups on a voluntary basis in the UK, and so at the moment it is unclear whether the OPRC Convention could be used to give local authorities a statutory duty. These issues will be consulted on further and the enabling powers in Clause 12 will not be used until consultation is complete and the Minister implied they might not be used at all[75].

Clause 13 and Schedule 2 enable the Secretary of State to make regulations subject to the affirmative resolution procedure, imposing charges for the purpose of recovering the whole or part of the costs incurred in connection with his maritime functions. This will allow charges to be made to cover the cost of port state control inspections, going beyond the charges which are already made to cover the cost of inspections and reinspections of ships which are detained following a first inspection. It also provides enabling powers to allow charges to be made to cover the costs of emergency response - the standing costs of its counter-pollution capacity, and emergency towing and standard setting. The government estimates that for port state control the expenditure that would need to be covered by charges is currently £1 million a year and for emergency response the expenditure which would need to be covered is currently £10 million.

This clause takes account of recommendations 95 to 98 of the Donaldson Report. The government announced in its response to the Donaldson Report its intention to take enabling powers to charge for port state control inspections and emergency response and it issued a consultation paper in February 1996 inviting views on the framework for introducing these charges and for other maritime services.

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[75]HL Deb 13 January 1996 c61 onwards

The Government noted in the consultation paper that if unilateral charging were imposed, this would have an adverse effect on the competitiveness of UK ports, UK shipowners based in UK ports, and UK exporters and importers using UK ports. Many respondents endorsed this point and the Government would prefer not to impose such charges unilaterally. The Government will therefore be taking forward discussions internationally.

The drafting of this Clause and Schedule is slightly different from the equivalent clause in the draft Bill. Clause 8 and schedule 1 of the Bill were more specific about the functions for which charges were to be imposed specifying funding of "counter-pollution measures" whereas the Bill specifies only "maritime services" in the amendment to the Merchant Shipping Act 1995. In schedule 11A also to be inserted in the above Act reference is made in the Bill to the "maritime functions" of the Secretary of State rather than his functions exercised through the Marine Safety Agency. This was to make the legislation more flexible.

The consultation on oil pollution response considered what changes to the current arrangements for responding to oil spillages would be needed to allow the UK to accede to the 1990 Convention on Oil Pollution Preparedness, Response and Cooperation (OPRC). It also considered whether the UK should implement the related recommendations (92 and 93) of the Donaldson Report. The OPRC Convention requires that states establish a national regime for pollution planning and response, through national and local contingency plans which define the roles and responsibilities of the bodies responsible for pollution response. The Donaldson Report had recommended that local authorities and harbour authorities should be given statutory duties for the tasks which they have accepted, including the production of contingency plans:

> **Responsibility for cleaning up**
>
> 23.132 While we are content with the present division of responsibility for cleaning up between the Coastguard Agency, local authorities, harbour authorities and, in some circumstances, the Department of the Environment for Northern Ireland and the National Rivers Authority (paragraphs 21.2 -- 21., 21.100 -- 21.101 and 21.109 --21.117),
> **Recommendation 92** The Department of Transport should ensure that:
>
> (a) local authorities and harbour authorities are given a statutory responsibility for the tasks which they have accepted (paragraphs 21.112 -- 21.117);
>
> (b) local authorities and harbour authorities report to the Coastguard Agency as a matter of routine:
>
> i. all spills upon which they are taking action themselves;
> ii the action they take; and
> iii any incident which has the potential to cause a significant marine spill
> (paragraphs 21.118 -- 21.121); and

(c) the Coastguard Agency is given a reserve power to direct local and harbour authorities on the action they should take (paragraph 21.121)

Contingency planning

23.133 While contingency planning arrangements (paragraphs 21.98 -- 21.128) are generally satisfactory, **Recommendation 93** The UK Government should:

(a) update the national contingency plan to take into account our recommendations (paragraphs 21.98 -- 21.99)

(b) impose a duty upon local authorities and harbour authorities to produce contingency plans and to submit their contingency plans to the Secretary of State for checking, but not for formal approval (paragraphs 21.118 -- 2.120);

(c) seek to ensure that local contingency plans take our recommendations fully into account (paragraph 21.99);

(d) seek to ensure that local contingency plans include plans for booming sensitive areas (paragraph 21.122);

(e) ensure that the Coastguard Agency takes part in relevant local exercises designed to test contingency plans (paragraphs 21.123 -- 21.125);

(f) expand its database on the characteristics of different pollutants as far as possible, taking powers to compel the sharing of information if necessary (paragraph 21.102); and

(g) investigate improvements in methods of protecting fish farms.

As mentioned, following Government Amendments and the MAIB's recommendations, the Bill now seeks to place the national contingency plan (see pages 10-11) on a statutory footing. At Second Reading debate Lord Donaldson noted that the charging provisions in Clause 12 (now Clause 13) which might require payments to fund clean-up operation standing charges were, thought 'dangerous ground' for him to address, but the main point was that any payments made by the industry should be ring-fenced from the Treasury[76].

I Liability and compensation

Clause 14 deals with hazardous and noxious substances (HNS), and allows the UK to implement the *1996 International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea* (the '1996 Convention'), whether or not the Convention has itself come into force. The 1996 Convention was only recently agreed by the IMO and the UK was one of its main

[76]HL Deb 7.11.96 c733 onwards; Lords Second Reading- Lord Donaldson's comments at c.746

supporters. Any Order made may also require contributions to be paid to the HNS Fund established under the Convention. The Convention is reproduced in Schedule 3 to the Bill. The HNS Fund would operate on a similar basis to the IOPC Fund (see page 13), with a two tier compensation regime; compensation would be paid by shipowners and their insurers in the first instance, and by the Fund financed by receivers of cargoes of NHS substances in the second instance.

Non-oil claims are governed by the *1976 Convention on Limitation of Liability for Maritime Claims.* **Clause 15** of the present Bill amends s.186 of the 1995 Act, to allow the UK to implement a protocol amending this, and to allow orders to be made as appear to the Secretary of State 'to be appropriate' setting the levels of compensation in line with those set out in the Convention . Again this may not be retrospective.

Clause 16 is discussed further in the context of klondykers in section G above. It states that regulations may be made requiring third party insurance to be carried by ships in UK waters. The regulations may require that proof of this is carried on the ship and produced on demand. At present, only oil tankers have to carry such evidence; the Government says use of these powers would ensure a level playing field for responsible shipowners who do carry insurance[77]. While the present provisons are intended primarily for klondykers or fish factory ships, consultation will be carried out on how far the powers will be used, and there has been some speculation as to whether this will amount in the UK to an absolute requirement for 'compulsory liability insurance', something the European Commission and IMO have now started considering, and a difficult issue which many feel must be tackled at international level. According to *Lloyds List*[78];

> Aimed primarily at the factory fishing vessels - klondykers - trading in the UK, the move nevertheless pre-empts efforts within the International Maritime Organisation to find a global solution to the problem of uninsured ships. The IMO held its first ever meeting on the subject of compulsory liability insurance last week.
>
> So far, no decision has been taken by the UK government on how it intends to use the enabling powers, merely that it is seeking authorisation 'to require shipowners calling at UK ports or operating in UK waters to have insurance or other financial security to meet their liabilities'.
>
> According to the Department of Transport (DTp), it is possible that the new regulations may only target a select group of ships, for example, klondykers over a certain size, and that it is possible no regulations at all will result.
>
> The chances of introducing new regulations before the next election also seem somewhat remote. What is clear, however, is that for the first time, a government is close to making

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[77]HL Deb 7.11.96 c733 onwards; Lords Second Reading
[78]*Lloyds List* 25.10.96 p.3 UK set to target uninsured ships: Proposed Bill will give government power to make third party insurance compulsory and *Lloyds List* 25.10.96 p.5 Leading article

liability insurance for all third party risks - not just those associated with marine pollution - mandatory. The move is likely to be welcomed by those parties exposed to third party risk in British waters, but is, however, unlikely to secure unqualified support from the shipping industry. A consultative document produced by the DTp earlier this summer, outlining the Bill's proposals, met with a guarded response from both shipowner representatives and insurers. Many observers feel a project of such enormity should only be tackled at international level through IMO, while other sections of the industry believe the relatively small number of ships trading uninsured may not warrant an international system of mandatory insurance. The International Chamber of shipping has already expressed fears that the cost of administering a compulsory insurance regime could well outweigh the benefits.

Certainly, the Government would prefer such arrangements to be international, so as not to damage UK competitiveness. Similarly, it would like the charges proposed by **clause 13**, to cover the standing charges for emergency responses and ship inspections (see notes above; which could be levied at ports and shipowners, and could thus affect imports and exports) to be arranged on an international basis.

J Miscellaneous including discharge books, light dues, information

Clause 17 of the Bill amends the 1995 Act regarding 'discharge books' which set out a seafarer's personal details, qualifications, sea service and medical information and so on. At present they cannot be issued to a seaman employed who has been only on non-UK registered vessels, even if that seaman is a UK citizen. Since increasing numbers of UK seamen now work on foreign-flagged vessels, the issue of UK discharge books needs to be widened.

Clauses 18 and 19 deal with the powers of and disclosure of information to general lighthouse authorities (GLAs), but **Clause 13** (formerly Clause 12) and **Schedule 2** may also apply to these. The notes on clauses produced by the Department of Transport describe the purpose of Clause 13 as follows:

> "The purpose is to provide an enabling power to charge for maritime services. The powers are exercisable through regulations which are subject to affirmative resolution procedure. The schedule also enables charges to be made to cover the expenditure on navigational aids which is currently met from light dues if, and only if, the existing powers to levy light dues ar incompatible with any future UK requirements under a Community obligation or international agreement.
>
> 2. The schedule takes forward the spirit of Lord Donaldson's recommendations 95 to 98, which proposed that funds should be set up to cover the costs of port state control inspections and emergency response, in line with the polluter pays principles. These proposals were broadened in a consultation paper issued by the Department of Transport in February 1996, which invited views on whether charges should also be levied in relation to work on marine standard setting.
>
> 3. The Government has said that the preferred approach is to seek international agreement on user charges. If any such agreement is reached, and covers the expenditure currently met from light dues, it may be necessary to amend the legislation which covers light dues in order to adapt the light dues system to the terms of such an agreement, and provision is made to allow this."

The industry's fears about the powers in Schedule 2 were acknowledged by the Shipping Minister, Viscount Goschen, during the Second Reading debate when he said[79]:

> "These changes may be necessary because the existing General Lighthouse Fund (GLF) arrangements may not be compatible with any new international scheme or, indeed, may conflict with such a scheme. The provisions in the Bill are designed to address that precise problem. However I understand that there are concerns from certain quarters that the effects of these clauses may go substantially further than that." The Minister sought to reassure the House. "That is why I can assure the House that there are no wider

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79 HL Deb 7.11.96 c735

> implications or intentions. I take the opportunity of this Second Reading debate to emphasise that assertion which was not perhaps sufficiently well explained before the Bill came to your Lordships' House."

There were further references to Clause 12/now 13 during the debate. Lord Greenway made the point that the general lighthouse authorities had not been consulted in the initial consultation process and wondered why when agreement on the funding of light dues in the Community appeared to be so far away it was necessary to insert a last minute provision in the Bill without consulting those who are most directly affected. He also expressed concern that the General Lighthouse Fund, which includes Trinity House pensions, might be used for other purposes[80]. Lord Berkeley was worried that the Bill might provide for back-door nationaliseation. "We received very strong comments from the General Lighthouse Fund. As we have heard, it is private money. The private status of the fund was confirmed by the Government in evidence to the Public Accounts Committee in 1982. The Treasury saw the GLA service as being provided by the private sector for the private sector. Is this back-door nationalisation?"[81].

The Minister explained that the contingent powers to amend light dues was not in the original consultation document because the relationship between the GLF and any fund established to meet the costs of a marine emergency had not been fully evaluated at the time. But he apologised that the communication was not adequately taken forward in terms of fully explaining the government's plans. He offered an assurance that nothing in the Bill changes the statutory position of the responsibilities of the three general lighthouse authorities to provide aids to navigation[82].

Finally the Minister stated that the proposals with relation to the GLF are not based on any proposal to reorganise the three authorities as some people have said. He said that the proposals deal with the possible implications for the GLF of the introduction of a more broadly-based funding system. He said that it seemed sensible to make contingent provision for such a system. He also said that there was no provision for a funded pension scheme which would cost a considerable amount to create. Therefore raiding the GLF would be a significant cost on the exchequer because of the large liabilities attached to it that have to be met[83].

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80 HL Deb ccs 758-759
81 HL Deb 7.11.96 c770
82 HL Deb 7.11.96 c778
83 HL Deb 7.11.96 c778

During the second day of the Committee proceedings Lord Beaumont of Whitley moved an Amendment to delete the powers relating to the GLF. There was some debate but he finally agreed to withdraw the amendment. A spokesman for Trinity House has said that it is 'disturbed' about the content of the Bill, about which it was not consulted[84].

Clause 20 exempts RNLI vessels from being called out by the Coastguard to deal with what would be effectively ship salvage rather than the saving of lives; this simply places into law what is common practice since the Coastguard would never envisage doing this.

Clause 22 relates to the retention of information by the Registrar General- in future he will no long need to preserve all documents but will only keep those prescribed the Secretary of State. In Committee[85] Lord Clinton-Davis voiced his concern at this deregulation, especially in an age when records could be stored electronically. Indeed, the day before, also in Committee[86], Lord Clinton-Davis had unsuccessfully moved Amendments relating to freedom of information, seeking to make ships keep records of their waste and oil disposal and for harbour authorities to collect these and to establish registers of ships' environmental records. Viscount Goschen said the MSA already published its monthly list of substandard ships (see page 9) and that such information could be open to misinterpretation. In a letter to Lord Clinton-Davis[87] Viscount Goschen has now said that since the *Environmental Information Regulations 1992*[88] came into force four years ago his Department has received just one request for information held by it relating to pollution from ships. The Regulations did not require the establishment of Registers and this would be a disproportionate bureaucratic and financial burden.

Clause 23 would let the UK give statutory protection to wrecks of merchant ships outside UK territorial waters, such as the Titanic and Estonia. This is intended to protect the final resting place of the victims of a shipwreck through international action.

Clause 29 sets the extent of the Bill; it applies to Northern Ireland and may be extended to the Isle of Man, the Channel Islands, or to any colony under the 1995 Act.

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[84]*Lloyds List* 8 November 1996 Maritime industry alarm over UK light dues Bill p.1
[85]HL Deb 26 November 1996 CWH 90
[86]HL Deb 25 November 1996 CWH 22-31
[87]Deposited paper/3 4489 DoTp 22 January 1997
[88]SI 1992/3240 which implemented the freedom of access to information Directive 90/313/EEC

Further reading

Safer Ships, Cleaner Seas Report of Lord Donaldson's Inquiry into the prevention of pollution from merchant shipping Cm 2560 May 1994 Department of Transport

Safer Ships, Cleaner Seas Government Response to the Report of Lord Donaldson's Inquiry into the Prevention of Pollution from Merchant Shipping Cm 2766 Department of Transport February 1995

The Sea Empress Incident Milford Haven 15 February 1996 A report by the Marine Pollution Control Unit December 1996 Coastguard

Lords Second Reading debate: HL Deb 7 November 1996 cc731-780

Lords Committee of the Whole House HL Deb 26 November 1996 CWH 53-100 and 25 November 1996 CWH 1-100

Lords Report stage HL Deb 13 January 1997 cc20-82

Implementation of the recommendations of Lord Donaldson's inquiry into the prevention of pollution from merchant shipping: Progress as at 31 October 1996 DoTp 16 October 1996

Abbreviations

1995 Act	the consolidating *Merchant Shipping Act 1995*
DoTp	Department of Transport
EEZ	Exclusive Economic Zone
GLAs	General lighthouse authorities
GLF	General lighthouse fund
HNS	Hazardous and noxious substances; an HNS Fund will be set up
IMO	International Maritime Organisation
IOPC Fund	International Oil Pollution Compensation Fund
MAIB	Marien Accident Investigation Branch (of the DoTp)
MARPOL	1973 Convention for the Prevention of Pollution from Ships and its 1978 Protocol.
MEHRAs	Marine Environmental High Risk Areas
MPCU	Marine Pollution Control Unit
MSA	Marine Safety Agency
OPRC	1990 Convention on Oil Pollution Preparedness, Response and Cooperation
OSPAR	1992 Convention for the Protection of the Marine Environment of the North East Atlantic (Olso and Paris)
Paris MOU	Paris Memorandum of Understanding on Port State Control
SOLAS	Safety of Life at Sea Convention 1974 with 1978 Protocols
STCW	1987 International Convention on Standards of Training Certification and Watchkeeping for Seafarers
UNCLOS	1982 UN Convention on the Law of the Sea