US OIL POLLUTION ACT OF 1990
PROPOSALS TO AMEND VESSEL LIABILITY PROVISIONS

INTERNATIONAL CHAMBER OF SHIPPING

The International Chamber of Shipping ("ICS") is the principal international trade association for shipowners, with a membership comprising national shipowners' associations from 31 countries, including the United States of America. ICS represents 75% of world tonnage and all sectors and trades.

Various proposals to amend the United States Oil Pollution Act of 1990 (OPA 90) have been made following the Deepwater Horizon oil pollution incident in the Gulf of Mexico in April 2010. The shipping industry is concerned in particular about a proposal to remove the present limitation of liability system for vessels and replace it with a system which would be similar to the system that applies to the oil off-shore/extraction industry.

Summary of ICS position:

- The OPA 90 regime for vessel liability has functioned well for two decades, and the limits have been reviewed and updated as recently as 2006, and were increased further in 2009. The limits have proved to be adequate and workable. Every incident of pollution from a vessel has fallen within the limits of liability of OPA 90 and the Oil Spill Liability Trust Fund (the "OSLTF"). More particularly, in the few cases where vessel limits have been exceeded, additional resources have come from oil industry funding via the OSLTF which ensures sharing of responsibility for the costs of compensation between the shipping and oil industries.

- There are significant factual differences between the risk assessment of a drilling operation and of maritime transportation, and OPA 90 very rightly differentiates between the two sectors when determining the respective limits of liability.

- Changes to the liability and insurance related aspects of OPA 90 for vessels are unwarranted.

- The vessel liability provisions in OPA 90 strike a careful balance (taking into account both vessel type and size) to provide appropriate levels of responsibility for the broad range of vessels to which OPA 90 applies. The levels of liability and financial security for pollution are reasonable and insurable.

- Unlimited or disproportionate liability for vessels would undermine the operation of OPA 90 because the system relies on the immediate availability of insurance resources to support clean up and response

operations and compensate third party claimants with minimal delay or litigation.

- Unlimited or disproportionate liability for vessels would also be inconsistent with Congress's aim of having a comprehensive and vibrant transportation system that enjoys an effective, predictable liability and response regime. Unlimited liability is uninsurable and the providers of the Certificates of Financial Responsibility would not be able to provide COFRs for such liability. This would lead to an inability on the part of the majority of vessel operators trading to the US to continue to do so.

Liability and Compensation under OPA 90

OPA 90 was enacted in response to the Exxon Valdez oil spill in 1989 and is the primary federal statute addressing liability and compensation for oil spills in the US. The owners or operators of facilities or vessels which spill oil are known as "Responsible Parties". Responsible Parties are liable for removal costs and damages (subject to certain defenses and rights of limitation). The system promotes effective prevention measures, prompt response, and verifiable contingency planning. It provides prompt compensation for third party claimants, in the case of vessels, through a system of strict liability together with a fixed limit of liability. The statute ensures the availability of funds from Responsible Parties to meet the liabilities under the Act through the requirement of evidence of financial security (certificates of financial responsibility (COFRs)) and the right of direct action against the COFR provider. In the case of vessels, the liabilities are ultimately met by the shipowners' mutual insurance scheme provided through the P&I Clubs.

In drafting OPA 90, Congress's stated aims were to: ensure that sufficient funds were available to respond to spills and adequately compensate claimants, protect the US taxpayer from having to meet spill response costs and damages, and to ensure that those costs would be shared appropriately within the oil and shipping industries. These aims were fulfilled through establishing high limits of liability for the Responsible Party and through the establishment of the Oil Spill Liability Trust Fund (OSLTF), a separate compensation fund financed largely by a tax on both imported and domestic oil paid by the oil industry. The limit of liability for vessels is assessed by reference to the vessel's size (section 1004(a) OPA 90). The maximum limit of liability for the largest vessels is approximately USD 525 million. Further funding for clean-up and compensation costs is available from the OSLTF up to USD 1 billion per incident. These limits are similar to the limits in the international Conventions – the Civil Liability, Fund, and Supplementary Fund Conventions - of about USD 1.12 billion (at current SDR/USD exchange rate). It is important to note that the OPA 90 limits can be lost if it can be shown that there has been gross negligence or wilful misconduct or a violation of applicable federal safety, construction or operating regulations.

The incident history shows that OPA 90 has worked successfully for the maritime transportation sector. The package of prevention measures, response planning requirements, and liability and financial responsibility requirements has been very effective. This includes the phase-out of single-hull tank vessels and their replacement by modern double-hull tankers, as well as Coast Guard-approved tank vessel response plans which require vessel owners to plan for three different spill levels; average most probable spill, maximum most probable discharge, and worst case spill i.e. the loss of the entire cargo/fuel A rigorous program of training and unannounced periodic drills ensures that such plans are ready to deploy immediately in the event of a spill or the threat of a spill. The liability and financial responsibility provisions of OPA 90 have contributed to this record of enhanced prevention and more timely and effective response. Vessel owners must demonstrate financial responsibility up to the levels in OPA 90 which are reviewed periodically and were raised in 2006 and 2009. Today, the liability levels for tank and non-tank vessels are two to three times higher than they were in 1990, and a regulatory mechanism is in place to continue to increase the limits as needed over time. The statistics confirm that these measures have led to a remarkable decrease in the number of ship-source oil pollution incidents. Moreover, every incident of pollution from a vessel has fallen within the limits of liability of OPA 90 and the OSLTF. Thus the US taxpayer has not borne the cost of any ship-source pollution incidents.

US Administration's proposals to amend OPA 90

The Administration has proposed to amend the OPA 90 limitation of liability provisions for vessels by removal of the express overall limit, which is assessed by reference to the vessel's size, and replacing it with unlimited liability for removal costs plus an express dollar limit of liability (not yet quantified) for all other claims. In addition to this, the proposal seeks to extend liability of the Responsible Party for other heads of claims such as for employment costs, etc. These claims are expressly stated to be without reference to any limits of liability under OPA 90. Thus in this way, the proposals seek to extend the category of claims which would have no limit. The proposals in relation to unlimited liability for removal costs would bring the provisions in line with the OPA 90 provisions for the oil off-shore/extraction industry.

This proposal is of great concern to shipowners. Shipowners are generally independently owned companies, and depend upon insurance markets to meet their extensive liabilities under both international Conventions and OPA 90. Without such insurance, shipowners would be exposed to a complete loss of equity in their companies for liabilities that could occur even when there is no fault on their part (through the operation of the strict liability provisions). Put simply, without insurance, a shipowner cannot trade. The international treaties on oil pollution (the Civil Liability and Fund Conventions) recognise a need for a predictable and insurable liability regime for vessel operators and also that an adequate insurance system must be available to ensure the continuation of a

reliable and environmentally responsible transportation system. The US also expressly recognised this when the OPA 90 rule making process was underway, noting that the system "is intended to foster a continuing market for providers of financial responsibility". No insurer/provider of financial responsibility would be prepared to underwrite unlimited liability.

In recognition of the fact that the right of a shipowner to limit liability is fundamental to the insurability of such liability, the current OPA 90 provides for defined limits of liability applicable to all claims and thereby certainty of exposure for the purposes of facilitating insurance and certification of such insurance. The removal of limits for clean-up and employment costs resulting in unlimited exposure for shipowners will undermine the insurance and current COFR system. This will lead to an inability on the part of the majority of vessels currently serving US waters to continue to do so.

Furthermore, the application of a single limit for all other claims regardless of vessel size or type will have significant ramifications in terms of the cost and availability of insurance cover and certification, particularly for smaller vessels.

The Administration's proposals are the result of an incident affecting the oil extraction sector and in seeking to address the hardship caused by that particular incident, would make sweeping changes to the entire system when separate and different solutions for the respective sectors are warranted. The present statutory framework recognises the differences between the oil extraction industry and the maritime transportation system, and that while each has the potential for causing a major pollution incident, the consequences of an incident will not be the same. The primary difference is of course that an incident concerning a vessel will result in a finite spill of oil or hazardous substance, being the amount carried on board as cargo or fuel oil. Thus, the potential clean-up costs and other claims are more readily definable and quantifiable. An oil well however, as seen in the case of the Deepwater Horizon, can cause an unknowable and seemingly endless amount of spillage. This difference is recognised in the limitation of liability scheme of OPA 90: vessels are subject to an express overall limit for all claims and clean-up costs (presently a maximum of approximately USD 525 million for the largest vessels). Off-shore facilities on the other hand are subject to an unlimited liability for all removal costs plus USD 75 million for other claims. (Section 1004(a)(4) OPA 90).

CONCLUSION

In seeking to align the OPA 90 provisions on financial consequences of an oil spill from a vessel with that from an off-shore oil facility, the reason for the original point of distinction is disregarded. In ICS's view, such a proposal is unwarranted and, if effected, would disrupt the mechanism by which vessels fund their liability under the statute, and would make it impossible for shipowners to trade to the US.