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"SEAFARERS' RIGHTS"

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Good morning.

I am grateful and honored to be with you today. I have known Captain Anuj Chopra for many years and have learned from him as well as from Mr. Peter Cremers, Captain Pradeep Chawla and Captain Khushroo Vimadalal about Anglo-Eastern's commitment to attracting and keeping the top-notch professional seafarers. My being here with you gives me the opportunity to witness first-hand the high quality of Anglo-Eastern's people and its programs. I am a seafarers' rights advocate. My presence here is also a sign of Anglo-Eastern's commitment to protecting seafarers' rights and well-being. Taking good care of seafarers is not only a sound business practice, it is also the right thing to do.

Seafarers have for centuries been protected by a wide range of legal protections. Ancient maritime codes accorded seafarers numerous rights that are still with us today. The first written maritime codes that appeared in the 11th to 13th centuries provided remarkable protections for ship's crews, even by current standards. These codes followed commercial practices that had developed in Mediterranean shipping in the pre-Christian era. For example, the ancient codes' provisions for seafarers' medical care are still better than modern land workers' medical care rights. The codes guaranteed that ship's crews would be repatriated to their home at the end of their voyage. The codes also required that ship's crews be provided decent lodging and sustenance (by the standards of the day). The medieval Barcelona Code, for example, required that seafarers be provided bread every evening, meat three times a week and wine twice a day. Many of the seafarers' rights contained in the Maritime Labour Convention, 2006 have their origins in the ancient maritime codes.

It is important to note that these ancient seafarers' protections were not created by enlightened lawmakers for charitable or human-rights reasons. The early maritime enterprises and early

courts both recognized that maritime commerce depended on protecting the people who moved the goods, and it was in everyone's best interest that their rights were guaranteed.

Those motivations are as relevant today as they were when seafarers' rights laws were created. Seafarers continue to face particular perils, endure substantial physical hardships, put up with strict discipline, and suffer lonesome separations. They have special lives and work and they need special laws to protect them. These special protections may cost maritime employers more than what land-based employers might pay, but these costs are necessary for recruiting and retaining good people.

Today's globalized economy is critically dependent upon merchant shipping, and merchant shipping relies on skilled and responsible seafarers. Even in today's economic downturn, there are not enough qualified seafarers to operate today's and future merchant fleets. Recruiting and retaining seafarers is the maritime industry's gravest long term crisis. The crisis does not affect only shipowners: it has grave consequences for the world's economic prosperity that is so critically dependant on merchant shipping.

The looming seafarer shortages have prompted the International Maritime Organization to proclaim this year as "**2010: Year of the Seafarer**" to pay tribute to seafarers for their unique contribution to society and to take "immediate and effective action to forestall a situation from developing in which ships are not manned with sufficient skilled personnel."

There are many reasons for the maritime industry's inability to attract enough good people to seagoing careers. Discussions about all of the factors that affect seafarers' job satisfaction and career decisions could be the subject of many seminars and conferences. I am aware of my time limitations and will address only two areas: first, seafarers' exposure to criminal prosecutions, specifically to environmental crimes in the United States, and second, to the effects of piracy on seafarers.

CRIMINAL EXPOSURE

Seafarers' work is difficult and dangerous. They endure long periods of separation from home, family and friends, and they live and work in a very hazardous environment. Because of this, maritime nations enacted special protections for seafarers to induce them to pursue their dangerous and lonely work. Criminal laws have provided important protections for seafarers from the intentional acts of others, including other seafarers. Few of us would question imposing criminal sanctions on seafarers for intentional acts which harm others or the environment, but regrettably, seafarers have increasingly been subjected to criminal prosecutions in cases where only simple negligence or even no negligence existed. Some environmental crimes are "strict liability" crimes that require no criminal intent or negligence.

Coastal states have justified the retreat from the traditional concepts of criminal intent on "public welfare" grounds. When enacting environmental crimes, lawmakers have sought to balance public interests against individual protections. They reason that their need to protect the public from pollution hazards outweighs traditional concepts of criminal intent. This results in criminal liability in pollution cases for conduct that would not be considered crimes under traditional

criminal laws. Mariners understand the need to protect their marine environment and support criminal sanctions for people who intentionally pollute. Regrettably, when coastal states send mariners to jail for strict liability crimes or for simple negligence errors, they create other public interest problems. Strict liability laws deter skilled people from pursuing sea-going careers, and they discourage mariners from cooperating with coastal authorities to determine the cause of a pollution incident.

Captain Deboo told me that you are interested in learning more about environmental crimes. Because this is a very broad topic that could easily consume the entire conference, I will limit my remarks to a discussion of what you might expect in a MARPOL oily water separator case in the United States.

As all of you already know, the International Convention for the Prevention of Pollution from Ships (MARPOL) has been ratified by virtually all maritime nations. Since 1983 MARPOL has required ships to process oily waste water by an oily water separator and to properly record discharges in an Oil Record Book.

Ever since the Exxon Valdez ran aground in Alaska in 1989 and caused the largest oil spill in US history, the United States has become increasingly vigilant in enforcing MARPOL and other environmental laws. In 2002 the United States put new emphasis on seeking criminal penalties for MARPOL violations in addition to the administrative penalties that had previously been imposed. While administrative penalties were, and continue, to be imposed for minor MARPOL violations, the U.S. Coast Guard and Department of Justice aggressively prosecute egregious MARPOL violation cases criminally.¹ Since 2002, more than 90 companies and 67 crew members have been prosecuted by the US Department of Justice under MARPOL. More \$200 million has been paid in criminal penalties and many seafarers have been sentenced to jail.

What is very surprising to me is that despite all of the worldwide publicity about MARPOL enforcement in the United States since 2002, intentional violations continue to occur. In 2008, two MARPOL cases were referred to DOJ for criminal prosecutions and approximately \$20 million in criminal penalties were paid.

MARPOL enforcement cases typically begin with a Coast Guard boarding upon entry into the United States. A crew should make no assumptions simply because a vessel is boarded: the Coast Guard might board a merchant vessel for many reasons, ranging from inspecting vessels suspected of violating United States laws to conducting routine inspections to check on the vessel's operational condition and compliance with international safety and environmental protection standards. The Coast Guard can use the information gained in its investigation for administrative as well as for criminal purposes. Some of the reasons for a Coast Guard boarding and inspection include:

¹ The U.S. Coast Guard considers the following factors in determining whether to refer a case to the Department of Justice for criminal prosecution: significant environmental harm; failure to report; trend of illegal conduct; history of repeated violations; knowledge of illegality of conduct; presence of deliberate misconduct; concealing misconduct; falsifying regulatory documents, tampering with monitoring devices and making false statements; and Obstruction of Justice. COMDINST M16201.1

- Routine port state control (PSC) inspection: Because the Coast Guard does not have the resources to board every vessel that arrives in a United States port, it uses a "Safety Targeting Matrix" to determine which ships should be inspected. The matrix is designed to make best use of the Coast Guard's resources by focusing attention on vessels most deserving of enforcement attention.² All vessels, irrespective of their targeting matrix score, are subject to periodic random inspections. Most PSC inspections are limited to paperwork and document inspections and spot inspections of various areas. But, inspections can be expanded if there is reasonable suspicion that a violation has occurred.
- Remote sensing: The Coast Guard uses high technology remote sensing equipment on reconnaissance aircraft to detect, identify, map and document oil spills at sea. Vessels spotted with an oil slick trailing behind it can expect a boarding.
- Marine casualty investigation: The Coast Guard conducts investigations of vessels that are involved in a marine casualty, such as a collision or severe personnel injury.
- Mystery Spills: Vessels which have been in the vicinity of a mystery spill can expect to be boarded by the Coast Guard.
- Referrals from foreign countries: Flag states and port states sometimes ask the US Coast Guard to investigate possible violations of their law on vessels arriving in the United States.
- Whistleblower allegations: The Act to Prevent Pollution from Ships (APPS), the law implementing MARPOL in the United States, gives courts the power to award monetary payments or "whistleblower awards" for as much as one half of any criminal fine imposed. There are real incentives for seafarers to report MARPOL violations (and big disincentives if they give false reports). Special Agents and Prosecutors are especially careful when a case is initiated by whistleblowers. Allegations are usually confirmed by multiple witnesses, documents and physical evidence. The Government does not usually

² The Matrix uses five criteria:

1) Ship Management: whether an owner, operator, or charterer has been listed on the Coast Guard's "Ship Management List." The list includes those that have been associated with two or more safety detentions within the past twelve months.

2) Flag state: SOLAS Vessels. Higher points are assigned to flag states with higher detention than the overall average for all flag states

3) Classification society. Class societies are evaluated on their performance over the previous three years based on their detention ratio. Detention ratios are the total number of detentions, over a three-year period, that were directly associated with that class society, divided by the total number of distinct vessel arrivals that the class society had in the U.S. for that same three-year period.

4) Vessel history: A ship may receive varying points for certain activities. For instance, detention, denial or entry, or expulsion within the last 12 months is worth 5 points, while a casualty within the past 12 months is worth one point each.

5) Ship type: Various points are given for the type of ship. For instance, 1 point is assigned for passenger ships, 1 point for gas carriers, and 4 points for bulk freighters over 20 years old. The points from all five criteria are added and the vessels are assigned a "priority" for examination by the Coast Guard. Please note, however, that even "non-priority" vessels may be examined by the Coast Guard through a random selection process. www.uscg.mil/hq/g-m/pscweb/Boarding

inform witnesses of possible whistleblower award until case is complete. Prosecutors may or may not bring APPS charges and may or may not recommend an award. The Court determines awards.

The Coast Guard is a law enforcement agency with broad authority to board and inspect merchant vessels in United States waters and to interview persons on board.³ The Coast Guard has subpoena power to obtain evidence in its investigations. The United States Constitution, however, protects a person from having to provide evidence that might incriminate that person. When the Coast Guard inspects your vessel, I recommend the following:

- Stay calm and tell the truth. Make sure you understand the questions you are being asked and seek clarification or an interpreter if necessary. In most MARPOL cases, crewmembers and shipping companies are convicted of lying or presenting false records to the Coast Guard, not for the actual dumping oil in the sea.
- Cooperate and be forthcoming with the Coast Guard inspector. Hindering an investigation could result in obstruction of justice charges. Don't force the Coast Guard to use its subpoena power.
- Don't try to influence other crew in their discussions with the Coast Guard. Insist that all crewmembers tell the truth when talking to the Coast Guard or other authorities.
- Protect your rights. You have the right to refuse to answer any question from the Coast Guard that might incriminate you. This is a personal right. You don't have the right to refuse to answer a question that might incriminate someone else. Don't expect to receive a "Miranda Warning" like you see in American films and television. Miranda warnings are not required unless the person to be interviewed is in custody, and US courts decided that Coast Guard investigations on vessels are not custodial interrogations requiring a "Miranda Warning."
- If you have any questions about your rights, especially if there is a chance that you might be suspected of committing a crime, you should get advice from a lawyer. You have the right to get advice from a lawyer who represents your interests only- not the interests of others. There could be conflicts between you, the shipping company, and other crew members. Make sure that you get advice from a lawyer who represents your interests.

Experience in US MARPOL prosecutions have shown that some crewmembers, motivated by bonuses for keeping under budget, or by a mistaken belief that they are benefiting the company, bypass the oily water separators and falsify ORBs. The costs associated with MARPOL compliance pales when compared to the costs of violations. In order to bridge the disparity between the shore-side management's environmental compliance culture and the ship-board culture the highest levels of management must be committed to compliance. As a starter, management conduct inspections and drills at sea, looking for the things that the Coast Guard looks for during an inspection. Some of these include:

³ During an inspection, Coast Guard officers may "address inquiries to those on board, examine the ship's documents and papers, and examine, inspect and search the vessel and use all necessary force to compel compliance." 14 U.S.C.A. § 89(a). If the Coast Guard officers have probable cause to believe that U.S. laws have been violated, they may arrest crew members and detain the vessel. 14 U.S.C.A. § 89(a).

- Are the ORB and the bilge soundings records accurate? Do the records correlate with each other?
- Does the ORB recorded discharge exceed tank capacity?
- Does the OWS work properly? Has it been modified by ship's engineers?
- Are there flexible hoses near the OWS?
- Are there freshly painted bolts, flanges and pipes around the OWS?
- Is there oil on pipes, flanges, and valves on the discharge side of the OWS?
- Does the crew know how to use the OWS?

What happens if, despite all of your efforts to comply with MARPOL, the Coast Guard discovers evidence of a violation? Once the Coast Guard discovers a possible MARPOL violation, things can start happening quickly. The Coast Guard will most likely augment its investigation team by adding criminal investigators from the Coast Guard and other agencies. At this stage the Coast Guard and perhaps other federal agencies will attempt to gather sufficient evidence for the prosecutor to take to the Grand Jury and eventual criminal trial. If not already accomplished, individual legal counsel should be provided to crewmembers. The ship owner/operator and P&I Club should be alerted to the situation. The P&I club's local correspondent typically engages lawyers to protect the interests of the owner, operator and crew. Be alert to the likelihood that parties' legal interests might conflict, necessitating separate lawyers.

In order to make sure that proper evidence and testimony is available throughout the criminal process, the Coast Guard will detain the ship and its crewmembers and seize the ship's records. Detentions can last many months causing significant hardships for the shipowner and crewmembers. Shipowners can minimize their losses by entering into a surety agreement whereby they agree to pay the expenses (food, lodging, medical care, and wages) of crewmembers needed by the prosecutors for the investigation and subsequent trial in return for releasing the vessel.

The crewmembers, however, are not allowed to leave. If foreign nationals leave the United States, they cannot be required to return to appear in court as defendants or witnesses. For this reason, the prosecutor will not allow potential crewmember witnesses or defendants to leave the court's jurisdiction. In most cases, the crewmembers will be provided housing, food, and wages by the shipowner according to the surety agreement.⁴ It is unlikely that any crew will be charged with a crime at this stage. Crewmembers with conflicting interests, for example witnesses, will be separated from suspects. However, all of the detained crew will be taken care of according to the surety agreement until after the Grand Jury returns an indictment.

In the United States, prosecutors must present evidence of serious crimes to a Grand Jury. Grand Juries are independent bodies that investigate allegations of crimes to ascertain whether there is sufficient evidence to warrant a trial. The grand jury has broad investigative authority due its ability to compel testimony, to order the production of documents and the power to indict. If the

⁴ In the rare event that there is no security agreement, the prosecutor can seek material witness warrants from a federal district judge. If the judge determines that crewmember witnesses should be detained, they may be kept in a detention facility. Sometimes, in lieu of a detention facility, crew members may be housed by the government in hotels. Prosecutors much prefer using surety agreements instead of material witness warrants in MARPOL cases.

prosecutor convinces the Grand Jury that there is probable cause that a crime has been committed, the case can proceed to trial. Unlike criminal trials, Grand Juries are not open proceedings. Witnesses do not have the right to be represented by counsel in Grand Jury proceedings. If the Grand Jury agrees with the prosecutor that there is probable cause that a crime has been committed, it will return the indictment and the person named in the indictment will be arrested and formally charged with a crime. The case will then proceed to Federal District Court.

Typically, a criminal defendant's first court hearing is an arraignment before a judge or magistrate. An arraignment is an appearance in court where charges are formally read to a defendant. Bail and conditions of release from pretrial confinement are often set at the arraignment. At arraignment, the defendant is offered the opportunity to enter a formal plea of "guilty or "not guilty". If a "not guilty" plea is entered, the court will ordinarily advise the suspect of his right to remain silent and his right to an attorney. If a defendant cannot afford an attorney, he will usually be given the opportunity to petition the court for an appointed attorney.

A defendant should speak to an attorney before deciding whether or not to enter a plea of "guilty".

If bail is granted, and the defendant posts the required bail, he will be released. Sometimes, a defendant will be released on his own recognizance -- his promise that he will appear for the next court hearing. Sometimes, bail is set in a very high amount. A defendant who is accused of very serious crimes may be denied bail, or have bail set in the millions of dollars.

After the arraignment, the prosecutor and the defense attorney will likely demand "discovery" from each other. The prosecution must provide the defense with the names and addresses of all relevant witnesses, and with copies of written or recorded statements made by the defendant or by co-defendants. Federal procedures authorize depositions, whereby witnesses testify under oath before a court reporter before a trial. Depositions could reduce the time that witnesses must be kept available for trial. However, either prosecutors or defense counsel can object to taking depositions if their case is enhanced by having witnesses testify in person at trial.

Prior to the trial, either the defendant or the prosecutor may file motions with the trial court. Typical motions include motions to exclude illegally collected evidence from trial, motions to limit the issues or evidence at trial, and motions to dismiss because of legal deficiency.

The process from an initial boarding and investigation to preparing a case for the Grand Jury to preparing a case for trial in federal court can take many months.

Experience has shown that the United States is very serious about enforcing MARPOL and other environmental crime cases. American authorities have become very good at detecting falsified logs and records. Seafarers have demonstrated that they are not good liars in investigations. Substantial "whistleblower" awards provide great incentives for crewmembers to become informants. The risk of getting caught in the United States for MARPOL violations is increasingly high. Penalties to shipowners and seafarers for MARPOL violations are substantial.

Clearly, it is much cheaper to comply with MARPOL than to violate it. If you want to protect your rights **make sure that MARPOL is scrupulously followed on your ship**, and if isn't, **don't lie about it!**

I will now shift my remarks to piracy. The real or perceived threat of pirate attacks poses an deterrent to skilled people contemplating beginning or remaining in shipboard careers.

The Seamen's Church Institute has been working on piracy issues since the early 1990's, when piracy in the Straits of Malacca was the big issue. We get calls from journalists, governmental authorities, students, and the just plain curious. Most of the inquiries fall into one of three categories: 1. Can you find me a pirate to interview? 2. Can you find a seafarer who has been attacked by pirates who I can interview? 3. What can be done to stop piracy (which usually includes why can't merchant mariners be armed)? Even though we usually cannot provide answers that satisfy the questioner, the calls underscore the general public's enduring fascination with pirates.

In popular culture, pirates are nothing like the real thing. They are romanticized, fictionalized characters with a positive image. In popular culture, pirates are a lot of fun, and they are good for business. Sports teams are named after pirates. Several brands of rum and even a chain of seafood restaurants are marketed with pirates.

The blending of fact, myth, literature, and cinema have created an image in popular culture of pirates as basically good people fighting injustice under a code of honor while unfettered by societal constraints. Popular culture, for the most part, overlooks the reality that pirates brutalized seafarers on the ships they attacked. In the rare instances where seafarers receive any attention, they are inaccurately portrayed either as cowards for surrendering their ships to pirates or as functionaries of the establishment who deserved to be attacked.

Governments have looked at pirates in a very different light. To governments, pirates have always been criminal thugs who threatened commerce, political stability, and security. Pirates have been attacking commerce for as long as goods have been transported on ships. Early rulers responded by creating an extraordinary legal theory unique to piracy. Because piracy was considered a particularly heinous crime, pirates were deemed to be "Hostis Humani Generis," or enemies of all humanity. Piracy became, as early as in Cicero's time, a universal crime, and it remains so today. This means that pirates can be prosecuted by any country, irrespective of their nationality or where the act of piracy occurred.

In 2008, Somali pirates rekindled governments' attention to piracy. The dramatic increase in pirate attacks off the coast of Somalia, including hijacking the *M/V Faina* with its cargo of 33 T-72 tanks and other weapons, the *M/T Sirius Star* loaded with a \$100,000,000 cargo of crude oil, and ships carrying United Nations World Program aid prompted an amazing international response. The United Nations Security Council adopted five resolutions addressing piracy off the coast of Somalia. But, none of these resolutions cited protecting merchant mariners as a rationale

for international efforts to suppress piracy in Somalia.⁵ A Contact Group on Piracy off the Coast of Somalia, comprised of twenty-four nations, several international organizations and maritime industry representatives, was established to facilitate and coordinate efforts implementing Security Council Resolution 1851. More than 25 countries have sent naval units to patrol waters off Somalia to protect shipping from pirates. The International Maritime Organization recently updated its guidelines for flag states and ship operators on preventing and suppressing acts of piracy. These are just a few examples of governmental responses to Somali pirates.

Almost every day, somewhere in the world, a seminar, conference, or other discussion on piracy takes place. However, most of the piracy discussions and measures concentrate on preventing and suppressing acts of piracy, such as the use of force, arming merchant ships, and prosecuting pirates. While these are very important topics, one critical issue remains unexamined: What happens to merchant mariners who have been threatened or attacked by pirates?

Hardly any attention is given to piracy's effects on merchant mariners by either governments or popular culture.

Since 2003, pirates have kidnapped or taken hostage more than 3,600 merchant mariners, and they have robbed or attacked many more. What happened to the seafarers after their release or after being attacked? Did they continue their seafaring careers? Are they fit to work on ships? Do they need continuing medical attention? Do they receive medical attention? Where do they get help to deal with the aftermath of surviving a piracy incident?

The answer to all of these questions is the same: no one knows. After trying to respond to the phone calls I have been getting since the early 1990's, I have been unable to find anyone who keeps comprehensive records of seafarers attacked by pirates. In fact, no one knows who they are or what happens to them long-term.

In response, SCI has initiated, in conjunction with the Disaster Psychiatry Outreach at the Mount Sinai School of Medicine and the New York Psychoanalytic Society and Institute, a groundbreaking clinical study to assess the effects of piracy on merchant mariners. Our study will go beyond examining how pirate attacks and hostage-taking affect seafarers. It will also look at the stress of simply traveling through pirate infested waters. The lessons learned from the study will help us develop advice to merchant mariners, shipowners, chaplains, first responders, and seafarers' families on dealing with piracy generated stress, how to cope with being held captive, and how to deal with trauma caused by a pirate attack. A critical element of the study will be our gaining access to seafarers who have been affected by pirates or who have experienced a pirate attack – or have endured the stress of transiting pirate infested waters. The study will be conducted at the highest ethical and scientific levels, scrupulously protecting seafarers' individual privacy. I ask your help in gaining access to seafarers for the study.

The study is just one step towards focusing more attention on merchant mariners, critical for both ethical and practical reasons. World commerce depends on merchant shipping. More than 90%

⁵ Although one Security Council Resolution, Res. 1816, did mention crews in a preamble paragraph "*Deploring* the recent incidents of attacks upon and hijacking of vessels in the territorial waters and on the high seas off the coast of Somalia including attacks upon and hijackings of vessels operated by the World Food Program and numerous commercial vessels and the serious adverse impact of these attacks on the prompt, safe and effective delivery of food aid and other humanitarian assistance to the people of Somalia, and the grave dangers they pose to vessels, crews, passengers, and cargo."

of world trade travels by ship. But, an acute shortage of trained and experienced merchant mariners threatens shipping, and by extension, world prosperity. More must be done to make seafaring an attractive career option for skilled and reliable people, including protecting them from the scourge of piracy before, during, and after attacks. Perceptions of vulnerability to pirate attacks is just one of the disincentives taken into account by persons considering beginning or staying in seagoing careers. Governments and the maritime industry must take an active role not only in preventing and suppressing pirate attacks, but also in ensuring that seafarers affected by piracy receive proper care.

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