INTERNATIONAL
OIL POLLUTION
COMPENSATION
FUND 1992

THIRD INTERSESSIONAL
WORKING GROUP
Agenda item 2

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# REVIEW OF THE INTERNATIONAL COMPENSATION REGIME

## AMENDMENTS TO THE CIVIL LIABILITY AND FUND CONVENTIONS

A discussion paper

**Submitted by Australia, Canada, Finland, France, Netherlands, New Zealand, the Russian Federation and the United Kingdom**

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| ***Summary:*** | The co-sponsors believe that the CLC/IOPC Fund regime has to continue to meet the needs of all Contracting States as well as providing an appropriate balance between the interests of shipowners and cargo interests. The co-sponsors believe that financial responsibility in the 1992 regime needs to be re-examined to maintain a proper balance between shipowners and cargo interests. |
| ***Action to be taken:*** | See paragraph 4 |

## 1 Introduction

1.1 The International Oil Pollution Compensation Regime has now been fully operational for 25 years and the co-sponsors believe that it is essential to revise the regime in light of the lessons learned to date. The regime was founded on the necessity to ensure better financial protection for claimants. The past success of the regime has been based upon the sense of balance it provided to meet the needs of Contracting States, shipowners and contributors. The regime has also been founded very much on a general principle of mutuality for all Contracting States. The co-sponsors believe that the regime has, overall, been successful in dealing with many financial consequences arising from serious oil pollution incidents. However, in recent years the co-sponsors believe that imbalances have begun to appear that have created an inequality among shipowners and contributors and threatens to undermine the reputation of the regime.

1.2 The Working Group was set up to reappraise the regime and its first task was to develop the Supplementary Fund Protocol, adopted by the IMO in May 2003. Notwithstanding this achievement the Working Group recognised that further improvements are necessary to the

regime with respect to the CLC Convention. The co-sponsors believe that the Working Group must now undertake a reappraisal of the current regime and that this needs to be undertaken bearing in mind the considerations and discussions at the time the Conventions were first considered.

1.3 During the regime's operating period, a range of specific problems have arisen. In many instances the goodwill of the Contracting States has allowed these issues to be addressed. However, some of the issues have touched upon fundamental principles which the existing regime has been unable to tackle effectively. It is also inevitable that over a period of 25 years the expectations and emphasis should change. Therefore, the co-sponsors believe that this requires a fundamental review of the financial responsibility between shipowners and cargo interests. It is unlikely that there will be such a suitable opportunity for review for some years to come and if priorities for change are not now addressed the regime may again fall short of needs and expectations - with damaging consequences.

1.4 The co-sponsors fully accept that the adoption of the Supplementary Fund Protocol in 2003 was a vital first step in the review process. They believe, however, there is now a need to address the key issue of financial responsibility in the underlying regimes. This meets the objective of the Resolution adopted at the Diplomatic Conference on the Supplementary Fund Protocol on *'the Review of the International Compensation Regime'* to continue that review. The IOPC Fund study on the balance of sharing will, inevitably, have to be taken into account as well.

1.5 The co-sponsors believe that the Working Group should now focus, as a matter of urgency, on the issue of financial responsibility. They also believe it is necessary for the Working Group to consider how the regime can remain a valid means of meeting the consequences of major oil spills for many years to come while, at the same time, preserving the prime purpose of paying legitimate claimants as quickly as possible. In particular, the co-sponsors believe that the CLC regime should be amended to introduce greater equity in the financial contributions between shipowner (and thereby the insurers) and the cargo interests under the CLC/Fund regime. It should be noted in this context that the intention of the original 1971 Fund Convention was to ensure that economic consequences of oil pollution damage should be borne by the oil cargo interests in part, ***only*** (see preamble to the 1971 Fund Convention, and 1992 Fund Protocol).

1.6 This paper sets out key considerations for the review and proposes two models to improve the existing regime. The views expressed in this paper should not be taken as representing the formal position of the sponsoring delegations or their governments on any item discussed.

## 2 Considerations

2.1 In its present form, the regime (including the Supplementary Fund) is vulnerable due to increasing concerns by contributors about the fairness of the split in financial responsibility between shipowners and cargo interest. There are also concerns that they are unable to influence the carriage of oil on good quality ships but are in effect 'subsidising' bad ships.

2.2 There is also an anomaly at present because of the considerable discrepancy between the financial liability of the owner under the CLC regime and the current insurance practices within the International Group of P&I Clubs. Under the standards of this Group of Clubs, together with other available coverage on the insurance market, oil tankers are insured up to $1 000 million, compared to levels of between $6.5 million and $130 million under the CLC (as raised by 50% in November 2003). Thus, the amount of insurance and overall available compensation, should liability be established, is considerably higher in certain areas outside of the jurisdiction of Convention States.

2.3 A further issue for consideration concerns changes in the industries involved in the transportation of oil over the past 25 years. When the Conventions were first negotiated, there were a limited number of oil companies involved in the transportation of oil by sea. There are now many

independent operators in this sector, which operate outside the standards of recognised international industry organisations.

2.4 The co-sponsors understand that part of the original justification for the high proportion of costs falling on oil companies was that they are able to exert influence over the type and standard of vessels used. However, the increase in the number of independent operators means that a significant proportion of oil shipments are not subject to the vetting process applied to shipments within the recognised international system. The effect being that sub-standard vessels continue to be chartered, and incidents involving such vessels are 'subsidised' by the very companies striving to improve standards in oil tankers. Any revision should also seek to harmonise the regime in this respect, and an amendment to the shipowners' limit of liability would apply to all vessels, regardless of the charterer or the vetting process. Higher liability limits should place a greater incentive on insurers and shipowners to maintain international rules and safety standards, resulting in a possible reduction in the number of incidents and claims on the Fund. Here there is also a relationship with improving safety standards by way of enhancing the current possibilities under the CLC and Fund regimes to be more engaged in recourse actions.

2.5 The proposals in this paper would also ensure that the underlying regime dovetails with the Supplementary Fund and should in no way harm the prospects for the coming into force of the 2003 Protocol.

## 3 Possible options

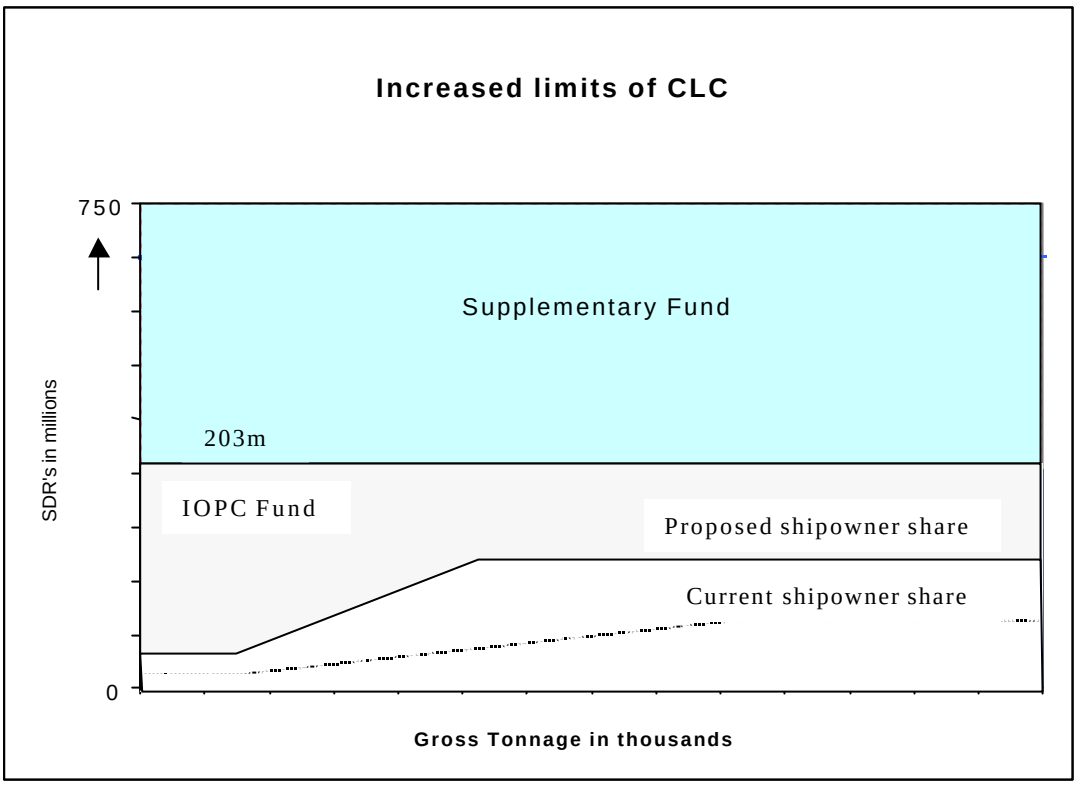
3.1 In this context two options are submitted for discussion. The key point is that both options provide the means to meet the objective of ensuring a proper balance between shipowners and cargo interests and reflect today's needs and expectations for the regime.

3.2 The first option is the traditional approach based on the tonnage of the vessel, involving payment first by the shipowner and then by the IOPC Fund. The second option may be seen as a more innovative approach by which sharing forms an intrinsic part of the settlement of the majority of the claims.

3.3 Two graphs are provided to better depict each of the proposed options. The graphs and their supporting figures are for illustrative purposes only and do not represent a preferred position on the part of any of the co-sponsors.

### Option 1
***Increased CLC limits with a higher minimum and a sharper, tonnage-based increase, than the existing limit***

3.4 The basic idea of this model would be to introduce a higher minimum limit of liability for vessels up to a given tonnage, followed by a more progressive tonnage increase than contained in the 1992 CLC regime, with the top limit of shipowners' liability being reached at a lower tonnage than at present. Currently, the maximum shipowners' limit of liability, following entry into force of the 2003 limits is approximately 90 million SDRs and only applies to vessels over 140 000 gross registered tonnes.




3.5 This option would involve greater participation of the shipowner in the overall regime and would ensure that more costly incidents involving vessels of a smaller tonnage do not have the greater protection of the IOPC Fund as at present. The existing maximum shipowner's limit of liability, set at approximately 90 million SDRs, would also be reached at a lower tonnage threshold than is presently the case (i.e. <140 000 grt).

3.6 The experiences of a number of incidents involving the CLC/Fund regime have demonstrated that the tonnage of the vessel is not necessarily the major factor in the total cost of claims arising from an incident. For example, various technical factors, in combination, determine the cost of tanker spills, including the type of oil, amount and rate of spillage, clean up and response measures, and location.

3.7 The co-sponsors do not believe that there is, presently, justification for such a wide range between the minimum (from 4.51 million SDRs) and maximum (89.77 million SDRs) shipowners' limit of liability, based on the tonnage of the vessel. Whilst it is recognised that a considerable number of incidents below the minimum limit are met, in full, by the shipowners' insurers, in the event of a serious incident at the lower end of the tonnage scale (e.g. *Erika* (19 666gt), *Nakhodka* (13 159gt)) the exposure of the Fund is disproportionate to that of the shipowner. This option therefore places greater recognition on the principle that small tankers can cause expensive spills.

3.8 The co-sponsors welcome the International Group of P&I Clubs' development of the Small Tanker Oil Pollution Indemnification Agreement (STOPIA), but do not believe this is sufficient to conclude that no further consideration should be given to amending the 1992 Conventions, as proposed. The co-sponsors do not believe that reliance on a voluntary arrangement by industry is a positive step forward in the context of reviewing proposed amendments to improve the international Conventions. For example, this voluntary agreement only covers the International Group of P&I Clubs members and, therefore, there will be a 'gap' in coverage provided by other insurers. The Agreement is also only available within the jurisdiction of those States party to the Supplementary Fund Protocol. The co-sponsors believe that any such Agreement should be included as an integral part of the overall revision of the CLC regime and not confined solely to the Supplementary Fund Protocol.

**Scale of revision needed to the existing text**

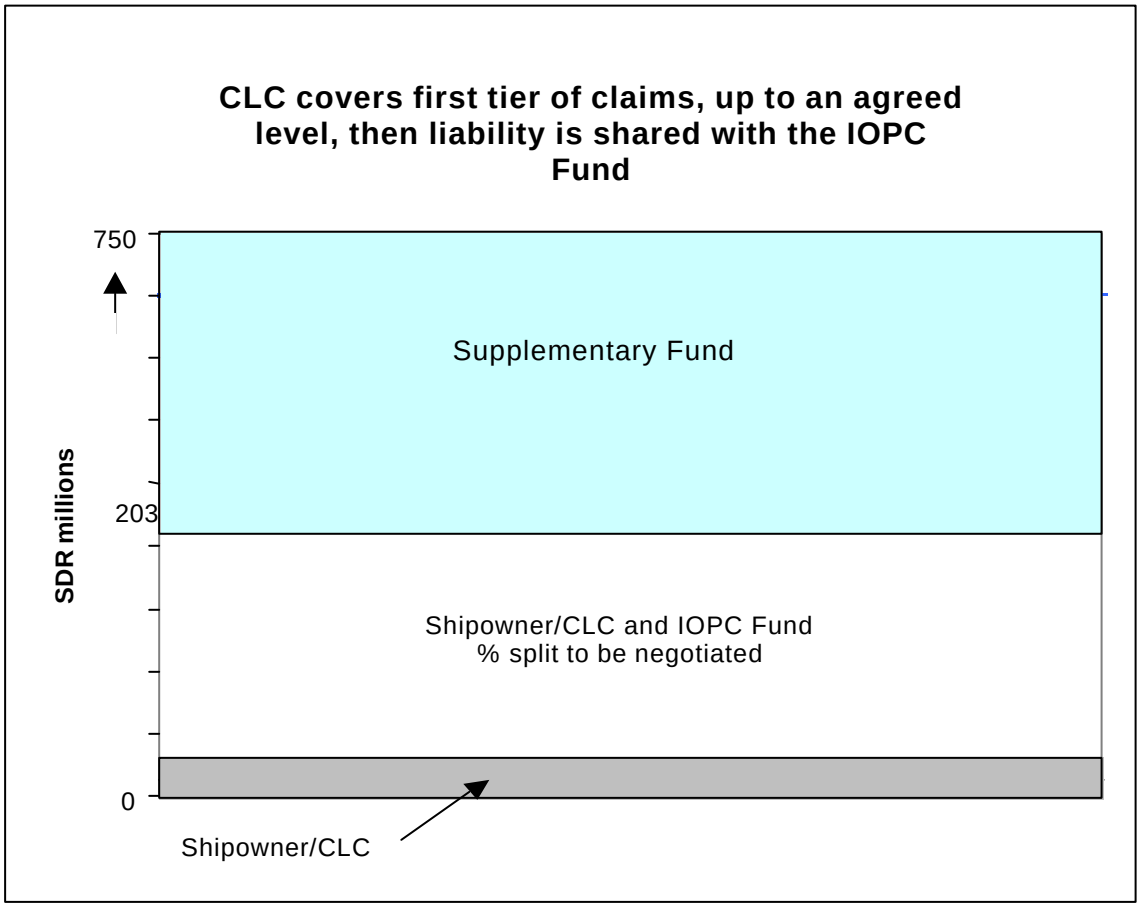
3.9 This option would be relatively easy to implement as a new instrument and could be achieved by simply amending the figures contained in Article 5 of the 1992 CLC.

**Option 2**

***Shared liability between CLC/IOPC Fund***

3.10 This option would entail a clearer sharing of responsibility between the shipowner and the IOPC Fund on most claims.

3.11 In order to make the claims process easier when the level of claims is relatively low, claims up to a negotiated level would be met by the shipowners' insurer in accordance with the same criteria as are applied to claims of a higher level. At present this level is established at 4.51 million SDR for a vessel not exceeding 5 000 gt under the 1992 CLC. Thereafter, there would be a balanced sharing of financial responsibility between the shipowner and the IOPC Fund, ***regardless of the vessel's tonnage***, on all claims up to the overall limit of the 'core' regime (203 million SDR following the November 2003 increase). Claims beyond the limit of the core regime would continue to be met from the Supplementary Fund, in its existing form, in those States that choose to join that optional regime.




3.12 The co-sponsors recognise the increased administrative burden that would be placed on the IOPC Fund with a sharing of responsibility for every incident, hence the coverage of smaller incidents by CLC. However, at the same time this would ensure a clearer sharing of the financial burden in

most cases, with the percentage split between the shipowner and the IOPC Fund to be negotiated at a diplomatic conference (and not on an incident by incident basis).

3.13 This option would probably work best if the new regime required the insurer and the IOPC Fund to follow the same policies and practices on claims settlement.

**Scale of revision needed to the existing text**

3.14 The co-sponsors recognise that this option would require a more substantial change to the approach under both current Conventions. The emphasis would shift from that of the limits of liability under each tier to one of the quantum of claims falling first to the shipowner and then to both the shipowner and the Fund, i.e. the new text would need to provide for a given percentage (%) of each claim in excess of this amount to be met by the shipowner with the remainder provided by the Fund.

## 4 Action requested

The co-sponsors consider that priority should now be given to a comprehensive revision of the limits of liability. The co-sponsors also request that the Working Group considers the options presented in this paper.

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