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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, France, Italy, Netherlands, New Zealand, the Russian Federation and the United Kingdom

Summary:	Previous meetings of the 3rd Intersessional Working Group have considered amendments to the 1992 Civil Liability and Fund Conventions on the following issues: (a) the definition of 'ship'; (b) the tacit acceptance procedure; (c) the non-submission of oil reports; and (d) a requirement to maintain insurance cover for the carriage of less than 2 000 gt of cargo oil The co-sponsors propose specific amendments on each of these issues, to be considered if the Conventions are revised, as well as a new proposal on merging the Conventions together into a single instrument.
Action to be taken:	See paragraph 8

1 Introduction

1.1 At the 5th meeting of the 3rd Intersessional Working Group in February 2003, the UK (documents 92FUND/WGR.3/14/13 and 92FUND/WGR.3/14/11) and Canada (document 92FUND/WGR.3/14/ 8), proposed that:

(a) the Working Group develops a suitable means of revising the tacit acceptance procedures in the CLC/IOPC Fund regimes to ensure that the limits maintain their real value to enable claims for compensation to be met;

(b) the current ambiguity on the interpretation of the definition of 'ship' be removed, and a clarification made to the application of the Convention to FSUs and FPSOs; and,

(c) the non-submission of oil reports be addressed.

1.2 The Working Group also considered a proposal that all ships which carry oil in bulk as cargo, regardless of the amount, should be required to maintain insurance or other financial security to cover liability for oil pollution damage. The Working Group has considered a number of the above issues on a number of previous occasions. There was general agreement by the Working Group at its 5th meeting that:

- the time periods in the current tacit acceptance procedures are too long and prevent the IOPC Fund membership from being able to react easily to problems relating to the limits;
- if the Convention were to be revised, it would be appropriate to amend the definition of 'ship' so as to remove any ambiguity; and,
- it was necessary to continue work on the non-submission of oil reports in order to find the most effective method of resolving the problem in any future revision of the 1992 Fund Convention.

1.3 In this paper, the co-sponsors propose specific amendments to the CLC and IOPC Fund regimes on each of these proposals. The co-sponsors also propose specific amendments on the requirement to maintain insurance or other financial security regardless of the amount of oil carried as cargo, and on merging the two Conventions. However, the co-sponsors propose these amendments on the basis that the Conventions are revised to address the key issue of shipowners' liability.

1.4 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 Definition of 'Ship'

2.1 The 5th meeting of the 3rd Intersessional Working Group considered two possible options of amending the definition of 'ship' in the 1992 Civil Liability Convention, in particular as regards the extent to which unladen tankers were covered by the Convention. The co-sponsors believe that this matter has taken on added importance given recent discussions in the 1992 Fund Executive Committee on the applicability of the regimes to the *Slops* (2000) and *Victoriya* (2003) incidents.

2.2 At its 5th meeting the 3rd Intersessional Working Group accepted that the interpretation of the definition of 'ship' adopted by the Assembly could give rise to problems since national courts might not accept this interpretation. The Group further accepted that the 1992 Fund should maintain that policy as long as the 1992 Civil Liability Convention was not revised on this point - (the 2nd Intersessional Working Group on the definition of 'ship' acknowledged that the final decision regarding the interpretation of the Conventions rested with the national courts in Contracting States).

2.3 The co-sponsors do not propose that the Working Group enters into detailed discussions on the definition of 'ship' at the 7th meeting, but re-submits the two possible options, with explanation, contained in document 92FUND/WGR.3/14/11 for consideration in light of the previous agreement reached by the Working Group that it would be appropriate to amend the definition of 'ship' if the 1992 Civil Liability Convention were to be revised.

Unladen tankers

2.4 At its 5th meeting the UK stated its view that there is an inherent ambiguity in the current definition of 'ship' in respect of tankers and that there is clearly scope for differing interpretations and unequal treatment of claimants. The UK proposed that there is, therefore, a strong case for amending the Conventions to remove this ambiguity.

2.5 The UK proposed two workable options:

Option 1:

To suitably amend the Conventions on the basis of the views expressed in document 92FUND/A.4/21/1 presented to the 4th session of the Assembly by Australia, Canada, the Netherlands and the United Kingdom. In the view of the UK at the 5th session, that document showed very clearly the scope for confusion in the future on the current text of the Conventions; it recommended that:

'a dedicated oil tanker (i.e. a tanker capable of carrying persistent oil and non-persistent oil) is always a 'ship' for the purposes of the 1992 Civil Liability Convention; and

that the proviso in the definition of 'ship' applies only to vessels and craft capable of carrying oil, including non-persistent oil, and other cargoes.'

This could read:

Article I of 1992 CLC:

'Ship' means:

a. any sea-going vessel and seaborne craft of any type whatsoever which is constructed or adapted for the carriage of persistent or non-persistent oil in bulk as cargo; and

b. any sea-going vessel and seaborne craft of any type whatsoever which is actually carrying persistent oil in bulk as cargo or which is on any voyage following such carriage unless it is proved that it has no residues of such cargo of persistent oil in bulk aboard.

Or

Option 2:

To remove the existing ambiguity by amending the Conventions to apply the current policy more effectively. In which case the following wording would then seem to be most appropriate:

Article I of 1992 CLC:

'Ship' means any sea going vessel and seaborne craft of any type whatsoever ~~constructed or adapted for the carriage of oil in bulk as cargo, provided that a ship capable of~~ actually carrying oil ~~and other cargoes shall be regarded a ship only when it is actually carrying oil~~ in bulk as cargo and during any voyage following such carriage unless it is proved that it has no residues of such cargo of oil in bulk aboard.

This would remove all of the text agreed at the 1992 Diplomatic Conference to deal with the issue of combination carriers and effectively recognise that that negotiated text is superfluous. The proposed text is therefore a mixture of the old 1969 definition of 'ship' with the text relating to

coverage for oil cargo residues agreed in 1992. This would seem to fully reflect the current policy agreed at the 5th session of the Assembly.

2.6 The co-sponsors agree that both of these options offer the means of clarifying the definition of 'ship'.

3 Tacit acceptance procedure: a revised mechanism for revision of limits

3.1 The 5th meeting of the 3rd Intersessional Working Group also considered a proposal submitted by the UK (92FUND/WGR.3/14/13) to provide a suitable means to amend the tacit acceptance procedure in the CLC and IOPC Fund regimes. The paper proposed an amendment so as to allow an automatic revision of the limits in accordance with a suitable formula that would trigger any increase.

3.2 There was general agreement by the Working Group that the time periods in the current tacit acceptance procedures are too long and prevent the IOPC Fund membership from being able to react easily to problems relating to the limits. Any new proposal to increase the limits cannot enter into force for a total of 11 years since the limits – which came into force in November 2003 - were agreed at Legal Committee in 2000. These concerns were also expressed by industry representatives at the time the 2003 limits were agreed by the IMO Legal Committee (October 2000), and focussed on the issue that significant increases had a detrimental effect on industry and it was indicated at the time that more modest but regular increases would be preferred.

3.3 In document 92FUND/WGR.3/14/13 the UK sought agreement, in principle, that an amendment to the tacit acceptance procedure is needed. This paper provides such an amendment so as to allow an automatic revision of the limits on a more regular basis, along the lines of the tacit acceptance procedure contained in the 1999 Montreal Convention for the Unification of Certain Rules for International Carriage by Air or some other acceptable mechanism.

3.4 Again, the co-sponsors do not propose that the Working Group enters into detailed discussions on this issue, but proposes this option for consideration by the Working Group if the Conventions were to be revised on the more fundamental issue of shipowners' liability.

3.5 More modest, but regular increases of the limits, is a feature of the tacit amendment procedure contained in the 1999 Montreal Convention for the Unification of Certain Rules for International Carriage by Air, whereby a review of the limits of liability contained in the Convention is undertaken at five-year intervals.

3.6 Each review is undertaken with reference to an inflation factor based on the average annual rates of increase (or decrease) in the Consumer Price Indices of the States whose currencies comprise the SDR, namely the US dollar, pound sterling, the Japanese yen and the euro. Any such revision[<1>] becomes effective six months after it has been notified to State Parties and if, within three months, a majority of States register their disapproval, the revision does not become effective.

3.7 While provision is made within the current regime for increasing the limits of liability and compensation, the present arrangement is liable to increase the limits infrequently and is entirely dependent on a lengthy political process. The co-sponsors believe that the needs of the claimants, shipowners, insurers and contributors would be better served by a mechanism such as the one contained in the 1999 Montreal Convention that triggers a more gradual increase on a more regular basis according to agreed criteria.

3.8 A copy of the text of the relevant articles contained in the 1999 Montreal Convention for the

[<1>] If the review concludes that the inflation factor has exceeded 10%, then State Parties are notified of a revision of the limits.

Unification of Certain Rules for International Carriage by Air is included in the Annex to this document.

4 Tacit acceptance procedure: administrative changes

4.1 The co-sponsors believe that the Working Group should also consider that the tacit acceptance procedure could be revised to address issues other than the levels of compensation contained in the 1992 Civil Liability and Fund Conventions. The co-sponsors believe that consideration should also be given to a revision of the tacit acceptance procedure to introduce administrative changes which could either improve the operation of the IOPC Fund or solve problems in the running and operation of the Fund.

4.2 The scope for this procedure would be limited to matters of an essentially 'technical' nature in terms of the Fund administration, e.g. Article 18 (Functions of the Assembly), Article 20 (Quorum majority - this could be an effective means of ensuring problems such as the quorum for the Assembly would not become an obstacle to the operation of the regime), and Article 29 (Functions of the Director).

5 A requirement that oil reports and contributions must be submitted within a reasonable time so as to maintain coverage under the regime

5.1 The non-submission of oil reports has also been considered by the Working Group on a number of previous occasions, and like the previous two proposals, the co-sponsors do not propose that the Working Group enters into detailed discussions on this matter, but re-submits the options, with explanation, contained in document 92FUND/WGR.3/14/8 for consideration in light of the previous agreement reached by the Working Group that it is important to find a solution to this problem. Furthermore, the co-sponsors propose that the 1992 Fund Convention is revised along the lines contained in paragraph 5.7 of this document only if the Convention were to be revised.

5.2 At the 5th meeting of the 3rd Intersessional Working Group, the Group noted that, whilst the international system of compensation gave protection to States, it also imposed responsibilities.

5.3 As the compensation limits increase it becomes more important to ensure that the requirements on reporting and contributions are fully applied. Otherwise questions will be raised as to the fairness of the system. The principle of mutuality among all is a fundamental feature of the regime which requires that all Contracting States continue to meet their obligations under the regime regardless of whether they are contributing States or not.

5.4 Document 92FUND/WGR.3/14/ 8 submitted by Canada to the 5th meeting of the Working Group proposed, as part of two options, that if no reports were received or the membership fee remained unpaid at the end of a specified period, the Fund Convention would cease to be in force in respect of that State.

5.5 The Working Group noted a number of options to solve this problem, including an Assembly Resolution or the removal of voting rights. The co-sponsors recognise the work undertaken by the Director of the Fund to make contact with those Member States that have previously failed to submit annual reports. However, the co-sponsors believe that firm action must be taken through amendments to the system to ensure that those States that do provide financial contributions are not financially disadvantaged as a result of those that do not contribute (through non-submission of reports) where the thresholds are exceeded.

5.6 The co-sponsors recognise that the Assembly has previously decided that it could not pursue the option of withdrawing cover under the regime through the existing Conventions. Yet, the co-sponsors do not believe that amending the Rules of Procedure, forbidding such States to become members of the Executive Committee, a loss of voting rights, or an Assembly Resolution will solve this serious problem. This has been a long-term problem for both the 1971 and the 1992

Funds. Subsequently, the co-sponsors believe the only way to effectively overcome the difficulties of non-submission is to amend the Fund regime.

5.7 Therefore, the co-sponsors believe that States should be required to submit reports within a given timeframe with the prospect of losing coverage if they do not do so. States should also have a greater responsibility for helping secure outstanding contributions in circumstances where any individual contributors fail to meet their obligations to pay.

5.8 The co-sponsors recommend that in addition to drafting text on this issue for inclusion if there is a proposed revision to the 1992 Civil Liability and Fund Conventions, it will also be necessary to prepare at the same time appropriate draft revisions to the internal regulations.

6 Compulsory insurance for ships below the present limit of 2 000 tonnes of cargo oil

6.1 The co-sponsors also support, in principle, the notion put forward in the document submitted by OCIMF to the 5th meeting of the 3rd Intersessional Working Group (document 92FUND/WGR.3/14/2) that all ships, which carry oil in bulk as cargo, regardless of the amount, should be required to maintain insurance. As presently worded, Article VII of the 1992 Civil Liability Convention does not require the owners of ships carrying less than 2 000 gt of oil in bulk as cargo to insure against oil pollution liabilities at all. Incidents such as the *Prestige*, *Erika* and *Nakhodka* have shown the extensive damage that can occur by spills of relatively low amounts of high grade oil.

6.2 The co-sponsors recognise that a number of incidents have occurred involving vessels carrying less than 2 000 gt of oil in bulk as cargo where the consequences have been borne directly by the Funds e.g. *Osung N° 3, Milad 1* and *Vistabella*. The co-sponsors do not believe that the regimes should provide shipowners with an option to refrain from maintaining insurance cover to meet their liability under the Convention, effectively providing a gap in the shipowners' financial security that is subsequently met by the Fund.

6.3 The co-sponsors propose that all vessels governed by the 1992 CLC regime that carry oil in bulk as cargo shall be required to maintain insurance or other financial security in the same way as ships carrying more than 2000 tonnes of oil in bulk as cargo are currently required to do by Article VII of the 1992 Civil Liability Convention. This would require a minor amendment to Article VII of the 1992 Civil Liability Convention:

Paragraph 11 is replaced by the following text:

> *'11. Subject to the provisions of this Article, each Contracting State shall ensure, under its national legislation, that insurance or other security to the extent specified in paragraph 1 of this Article is in force in respect of any ship, wherever registered, entering or leaving a port in its territory, or arriving at or leaving an off-shore terminal in its territorial sea, if the ship actually carries any oil in bulk as cargo'*

6.4 A possible alternative may be to decrease the threshold for maintaining insurance cover to a level as contained in other international instruments.

7 Merge CLC and Fund into a single Convention (like the HNS Convention)

7.1 This proposal would facilitate the ratification process, and provide better scope for ensuring more uniform application as well. This would also offer the means for simplifying the treaty law issues involved in the revision of the regime. This should also ensure that there would be a clearer link between the settlement of claims under both 'tiers'. For example, there should be a provision that would give the Fund a right to be involved in any legal actions where a point of principle is involved and which might lead to setting precedents; (this would cover circumstances like the *Patmos* case where the Fund was unable to have any influence over the court decisions in respect of environmental damages.)

7.2 Merging the two Conventions would also give better scope for ensuring that the same policies and practices for claims settlement could be applied. There would also be scope for requiring the courts to have regard to decisions by the governing body. The separation in the two regimes exists as a result of the urgency to reach an agreement on a treaty text after the *Torrey Canyon* incident, resulting in the 1969 CLC regime. Subsequently, the 1971 Fund Convention followed. Merging the two conventions would also be consistent with the original intention for the regime. Merger would also be particularly relevant if the second option for sharing the financial responsibilities were pursued.

7.3 Revision of the CLC and Fund conventions will also require consideration of the necessity for transitional arrangements similar to those that were applied under the 1992 Protocols. An alternative approach would be to allow the 1992 regime to 'stand alone' for as long as States feel it is needed and for denunciation once they have decided to move into the new regime.

8 Conclusion

The co-sponsors invite the Working Group to keep the proposals contained in this document under review, for consideration on the basis that the Conventions are revised to address the key issue of shipowners' liability.

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ANNEX

Convention for the Unification of Certain Rules for International Carriage by Air
(Montreal, 28 May 1999)

Article 24 – Review of Limits

1. Without prejudice to the provisions of Article 25 of this Convention and subject to paragraph 2 below, the limits of liability prescribed in Articles 21, 22 and 23 shall be reviewed by the Depositary at five-year intervals, the first such review to take place at the end of the fifth year following the date of entry into force of this Convention, or if the Convention does not enter into force within five years of the date it is first open for signature, within the first year of its entry into force, by reference to an inflation factor which corresponds to the accumulated rate of inflation since the previous revision or in the first instance since the date of entry into force of the Convention. The measure of the rate of inflation to be used in determining the inflation factor shall be the weighted average of the annual rates of increase or decrease in the Consumer Price Indices of the States whose currencies comprise the Special Drawing Right mentioned in paragraph 1 of Article 23.

2. If the review referred to in the preceding paragraph concludes that the inflation factor has exceeded 10 per cent, the Depositary shall notify States Parties of a revision of the limits of liability. Any such revision shall become effective six months after its notification to the States Parties. If within three months after its notification to the States Parties a majority of the States Parties register their disapproval, the revision shall not become effective and the Depositary shall refer the matter to a meeting of the States Parties. The Depositary shall immediately notify all States Parties of the coming into force of any revision.

3. Notwithstanding paragraph 1 of this Article, the procedure referred to in paragraph 2 of this Article shall be applied at any time provided that one-third of the States Parties express a desire to that effect and upon condition that the inflation factor referred to in paragraph 1 has exceeded 30 per cent since the previous revision or since the date of entry into force of this Convention if there has been no previous revision. Subsequent reviews using the procedure described in paragraph 1 of this Article will take place at five year intervals starting at the end of the fifth year following the date of the reviews under the present paragraph.