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REVIEW OF THE INTERNATIONAL COMPENSATION REGIME

ISSUES RELATING TO THE LIABILITY OF THE SHIPOWNER AND INSURER

Submitted by the French delegation

Summary:	Following the adoption of the Supplementary Fund Protocol, there is an urgent need to continue with the review of the liability regime in order to ensure that it is viable. While the current regime in fact makes it possible to respond to most incidents, those in which the ship is shown to have been in poor condition call for a change in the right of limitation and for the role of the insurers to be re-examined, in order to maintain the exemplary nature of the system. By the same token, such a situation should lead to systematic action against the charterers concerned.
Action to be taken:	See paragraph 17.

1 The adoption of the May 2003 Supplementary Fund Protocol marked a noteworthy stage in the review of the international liability and compensation system for oil pollution damage.

The Protocol in fact guarantees that nationals of States which choose to accede to it will be entitled to full compensation. It is for the States Parties to see to it that compensation is provided as promptly as possible, a point which must be examined within the present framework of the Fund, in particular via an analysis of the settlements made in respect of past incidents.

2 The response provided by the Protocol to the inadequacy of the funds available must not, however, be regarded as the only solution to the problems already referred to in a number of documents submitted to the Working Group. It would be dangerous to think that the review work must end there.

On the contrary, the effort made by certain States on that occasion, which has resulted in a very substantial additional burden for the contributors, inevitably calls for a review of the other aspects of the system, failing which the resulting imbalance may jeopardize the sustainability of the entire regime. If nothing more were to be done, it is likely that the first incident to lead to

implementation of the Supplementary Fund would also be the last to be dealt with by the CLC/IOPC Funds regime.

3 Furthermore, it cannot be argued that a system is perfect if, in practice, the owner and insurer of the ship responsible for the incident are free of any obligation against payment of a sum which, at most, represents 12% of the total burden of compensation.

In the case of a ship such as the *Erika*, the proportion borne by the party responsible appears to amount to 1.4% of the total sum.

In this connection, given the desire expressed by a number of delegations to be provided with comparative tables that take account of the sums paid by shipowners and their insurers, it is worth pointing out that, if they are to be of objective value, such tables must include the amount that the owners and insurers would have had to pay under the LLMC Convention and its 1996 Protocol, which provide the general framework within which such incidents would have been settled in the absence of the CLC.

4 Apart from the need to redefine the amount of the financial obligation, on which a number of proposals have been made, numerous incidents with which the Funds have had to deal show that the existing Conventions act contrary to all the other conventions of the International Maritime Organization. Far from encouraging the selection of safe, quality ships, they make it possible, by limiting liability, to restrict the financial risk involved in using dangerous vessels.

This state of affairs runs counter to a general policy of promoting safety in the shipping industry, to which many States are attached.

5 Such a policy, which aims to prevent accidents, must be a concern for all those involved in the shipping industry. It does not consist solely of laying down technical standards. It also involves seeking transparency in the structure of the companies engaged in shipping and leads to promoting the use of quality ships.

By the same token, it must also lead to sanctions against all those who contribute to maintaining on the market ships that constitute a danger. These points are currently being studied in other international forums, such as the OECD's Maritime Transport Committee, and it is necessary for the CLC/IOPC Funds system to be in line with international developments in these matters.

6 The part to be played by the CLC/IOPC Funds Conventions in improving the quality of shipping was an ongoing concern when those conventions were being drawn up and cannot be ignored today when thinking about the future of this regime.

As an illustration, without going back to the preparatory work, it will be recalled that, in the 1971 Convention, the Fund could be exempted from its obligation to indemnify the owner for the excess amounts for which he was held liable if it was shown that the damage resulted from the fact that the ship failed to comply with certain standards.

7 If we now come to examine the current system, the following observation may be made. The majority of accidents may be dealt with under the regime but it clearly becomes unacceptable if the incident can be attributed to a structural fault in the ship that is due either to poor maintenance or to wear and tear caused by age. In this context the preliminary findings of the survey generally show the insubstantial nature of the companies considered to be the owners of these ships (on this subject, see the Report of the OECD's Maritime Transport Committee on Ownership and Control of Ships).

In the light of this observation, what are the courses of action for dealing with this situation?

8 As has been stated, the present system does not entail any internalization of the financial risk associated with the ship's failure to comply with the common rules on safety. On the contrary, it transfers that risk to the contributors.

On the other hand, in previous meetings of the Executive Committee it was clear that there was no consensus among the delegations in favour of a strict return to conditions that enable the owner to be deprived of the right to limit his liability and of extending the courses of action available against the charterer where negligence could be proved against either of them.

Nevertheless, a number of delegations did acknowledge that the present system was too restrictive and did not allow the civil liability to be effectively challenged.

9 It would therefore seem that the Conventions must be amended by finding a way that will:
- make it possible to ensure that the cost of the damage is borne by those who use dangerous ships;
- without, however, resulting in an additional obligation for those shipowners who are involved in promoting quality shipping;
- and without resulting in poorer treatment for the victims.

10 With regard first of all to this last-mentioned aspect, which rightly remains at the heart of the concerns expressed by the States during the discussions of the Working Group, it should be borne in mind that redress for damage is determined within the framework of a specific system in which the international Funds provide compensation for the victims irrespective of the circumstances surrounding the incident. Any amendment must therefore endeavour to preserve this achievement and extend its scope in the event, say, of a dispute arising between the shipowner, his insurer and the Fund. The Conventions must be worded in such a way that the Fund is able to act immediately in the event of such difficulties arising.

11 Insofar as the first two objectives of such a reform are concerned, the corrective action must be focused on the owner and his insurer.

12 The originality and exemplary nature of the international system is based on two exceptions to the principles enshrined in other maritime law conventions: first, the a priori recognition of the shipowner's liability with, as its corollary, the almost irrefutable right to enjoy limitation of liability and, second, the covering of this liability by compulsory insurance that may directly benefit the victim.

This regime, which has already been described in a number of documents, is currently limited by the fact that where it is shown that the owner is no longer entitled to limit his liability, the insurer is also no longer bound by his obligation to provide cover.

Two amendments therefore appear to be necessary to ensure that the CLC/IOPC Funds system remains a model liability regime contributing towards the objective of maritime safety, by establishing the conditions for effective self-monitoring.

First, an exception must be made to the owner's right of limitation where the damage appears to result from the condition of the ship. Such an exception is aimed at imposing sanctions on the practice of keeping in service ships whose structure, for various reasons, no longer complies with the standards laid down by international conventions or defined by recognized international associations.

13 However, by itself such an amendment would have only a limited impact. In the situation referred to it is highly likely that the shipowner using this type of vessel will, for the fleet he controls, have set up as many different companies as there are ships. This exception to the right to limit his liability must therefore also be backed up by an obligation for the insurer to provide cover in such a situation.

14 Given the obligation to take out insurance laid down in the Convention, no ship carrying more than 2 000 tonnes of oil in bulk may sail unless it is covered by a guarantor.

The civil liability insurer, in this case the P & I Clubs, is therefore central to the smooth operation of the international system. Even so, the P & I Clubs have so far denied any involvement in the chain of safety of maritime transport.

And yet the very structure of these associations – non-profit-making groups of shipowners – shows that these are shipping professionals. The rules governing admission of ships to the Clubs entail a whole host of requirements, in particular special programmed unannounced visits. Similarly, any change in the situation of the ship (for instance, a change of classification society) requires the conditions under which the ship was admitted to be re-examined. Also, the P & I Clubs are ultimately the only ones to know the identity of the shipowners since they insure their entire fleets, which are often established as separate companies.

In view of their role in providing the insurance that is essential for the shipping of oil, the position and obligations of the P & I Clubs must, however, be re-examined.

15 It is necessary for insurers to be involved in covering damage where it results from the sinking of a ship caused by a failure arising from the condition of the vessel in question. In that sense, extending the obligation to provide cover to such a case would appear to be an effective and justified amendment.

Such an amendment would take account of the specific nature of the role and structure of marine insurance and not penalize responsible shipowners. It would call for an even more vigilant attitude on the part of all shipowners in the Club in order to verify the quality of the ships that they are being asked to insure, the risk being for them to have to contribute towards full compensation for the damage in the event of a failure to comply with the relevant obligations.

With regard to the victims, the existence of the international Funds, now endowed with adequate resources, would provide them with immediate compensation for the losses they have suffered.

16 Finally, this action should also be combined with a change of policy concerning charterers, for it is also up to them to select carefully the ships that they charter. It is therefore proposed that recourse actions be systematically brought by the Funds against these companies where the incident leading to intervention by the international Funds is the result of a structural defect in the ship used by them.

17 <u>Action sought</u>:

In States that have been affected by oil spills two main criticisms are levelled against the current system: it fails to compensate the victims properly and promptly, partly because the funds available are inadequate; and it inherently removes any sense of responsibility, since it is not involved in promoting quality shipping.

While the adoption of the Supplementary Fund goes some way towards responding to the first criticism, only the adoption of measures such as those proposed in this document will address the second criticism.
