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REVIEW OF THE INTERNATIONAL COMPENSATION REGIME

Submitted by Greece

Summary:	Greece considers that no sufficient case has been made out for revising the 1992 Conventions. The intended benefits are unlikely to materialise, and they do not justify the risks of undermining the current widespread and very successful system. If it is decided that CLC 92 should be revised, with the aim of providing incentives for higher standards of shipping, the focus should be on those who provide employment for substandard ships by chartering them. Provision should be made for liability to be additionally borne and compulsorily insured by the charterers of substandard ships and/or for enhanced contributions to be paid to the 1992 and Supplementary Funds by the receivers of heavy fuel oil.
Action to be taken:	The Working Group is invited to consider the issues raised in this paper.

1 Introduction

1.1 Many interesting suggestions have been advanced for possible revisions of the Civil Liability and Fund Conventions. It is widely accepted that the current system has operated very successfully in practice and that its attraction should be maintained. On the other hand, no one would wish to undermine it, nor to run an unnecessary risk of doing so, by modifications which lead to more harm than good.

1.2 The suggestions made to date have been presented more as general concepts than as firm drafting proposals. It does not appear that full consideration has yet been given to their implementation, or to a weighing in the balance of the benefits to be expected against any disadvantages which may be involved. The latter include treaty implications which, again, do not yet appear to have been considered in any detail.

1.3 This paper attempts to address these issues. It considers whether there can be sufficient confidence that changes of the kind suggested will indeed bring real benefits, and that these are not outweighed by collateral effects on the compensation system.

1.4 The main benefits suggested are firstly financial adjustments designed to maintain an equitable apportionment of the cost of oil spills; secondly, a combination of possible benefits in making it easier to deprive the shipowner of his right to limit liability; and thirdly, greater incentives for eliminating substandard ships. These proposals overlap but they each raise a number of issues which are considered separately below. This paper comments on the likelihood of the intended benefits being realised and on the likely implications of the proposals for the compensation system.

2 Apportionment of financial burden

2.1 It has been generally accepted that there should be an equitable sharing of the financial burden between shipowning and oil company/cargo interests, but as yet there has been no compelling evidence that this balance will not be adequately maintained following the 50% increase in the CLC limit which took effect on 1 November 2003.

2.2 In this respect the outcome of the expected study concerning the costs of past spills and the apportionment of these costs between shipping and oil industries should be taken into account for any decisions that may need to be taken on this issue.

2.3 In addition, whether the balance has been adequately struck hitherto can be known only by examining how the cost has been borne of all oil pollution incidents. There has been a common tendency for disproportionate attention to be paid to major cases, in which the shipowner's contribution may be relatively small, in isolation from the overall claims experience.

Voluntary increase in shipowners' contributions

2.4 It is understood that the P&I Clubs are ready to accept that the introduction of the Supplementary Fund may call for a further adjustment, in addition to the 50% increase in the CLC limit, in order to ensure that a satisfactory balance is maintained. An increased contribution has been offered, either in the form of a voluntary increase in the minimum limit for small tankers (the proposed STOPIA Scheme), or alternatively in the form of a voluntary contribution to the Supplementary Fund.

2.5 In some quarters it has been argued that voluntary arrangements are not an adequate substitute for changes to the law as set out in the Convention, but in the view of Greece these arguments are not convincing.

2.6 It may not be widely known that the voluntary industry schemes TOVALOP and CRISTAL not only made compensation available to victims of pollution but also served to re-distribute the burden of compensation paid under CLC 69 and the Fund Convention 1971. This mechanism existed from 1987 until the termination of the schemes ten years later. Notwithstanding his legal liability limit under CLC 69, the shipowner's financial contribution was re-calculated under TOVALOP by reference to a higher limit, approximately equal to that set by the 1984 CLC Protocol (the substance of which became the CLC Protocol of 1992). Oil receivers in 1971 Fund Member States then received reimbursement of contributions they had made to compensation paid by the 1971 Fund between these two limits.

2.7 Some important observations can be made on the basis of this experience.

2.8 First, it is much easier for industry agreements to be drawn up and brought into effect than is the case with international treaties. The compensation limit set by the 1984 Protocol was in practice in force on a voluntary basis some ten years before it took legal effect in CLC 92.

2.9 By the same token, a voluntary scheme can be more easily amended, with prompt effect, should the need arise.

2.10 Although the voluntary schemes did not apply in every case (eg because the ship involved was not entered in TOVALOP, or the cargo was not owned by a CRISTAL member), the great majority of spills involving internationally trading tankers were covered. No instance is known of any such case in which a valid reimbursement claim was not honoured, or where contributors to the 1971 Fund were worse off as a result of the reimbursement process being founded on voluntary arrangements rather than on a statutory basis. Indeed, although the schemes were entered into on a voluntary basis, once agreed they had contractual force. There is no reason to suppose that the voluntary arrangements now proposed will not be equally effective.

2.11 The comment has been made that a voluntary scheme is less satisfactory because it is limited to ships entered in one of the Clubs in the International Group. However the great majority of internationally trading oil tankers are entered in an International Group Club. The issue is not whether every individual case is covered but whether the overall burden is materially shifted between the two industries, as clearly would be the case.

2.12 In summary Greece considers that:

- It is not necessary to revise the Conventions in order to maintain an equitable apportionment of the cost of oil spills;
- Voluntary industry schemes are a more effective way of accomplishing promptly any adjustments that may be considered appropriate; and
- If there are any advantages in making such adjustments by revision of the Conventions, these are very limited, are more theoretical than practical, and need to be weighed against the disadvantages to be foreseen in re-opening the compensation system. These are considered in Section 5 below.

3 Breaking limitation

3.1 It has been proposed that the shipowner's right to limit liability should be denied more readily under an amended regime. Various different possible benefits appear to be envisaged, principally that it should operate as an incentive for shipowners to maintain high quality shipping. It appears that it may also be seen as a means of providing additional compensation for claimants and/or as a means of re-apportioning the cost of pollution in certain cases. The prospect of these different possible benefits being realised by these means are now considered in turn.

As an incentive

3.2 An amendment which undermines the right of all shipowners to limit liability is not well targeted against substandard ships, and there are a number of reasons for concluding that it is unlikely to achieve its intended aim. Some of these involve policy considerations which relate generally to the subject of substandard shipping, and which are addressed in Section 4 below. Here the focus is on factors of a more legal nature.

3.3 Unlimited liability is meaningless unless it is capable of being enforced. The very people against whom liabilities are hardest to enforce are rogue operators of the kind who are responsible for substandard ships. If they are involved in an incident, and are deprived of the right to limit liability, they are least likely among all in the shipping industry to have traceable assets available for satisfying substantial compensation claims.

3.4 The imposition of unlimited liability is a purely reactive measure, and does not identify any standard or precaution to be observed in the interests of maritime safety.

3.5 The former test of conduct barring limitation depended on 'actual fault or privity', or 'faute personnelle', on the part of the owner. This test was not directly concerned with the standard of

ships or ship operations, but with the identity of the person who could be held accountable for the act or omission which caused the incident. That might have been an isolated error, and not a fair reflection of the overall standard of the ship or its operations. Holding this threat over the heads of all shipowners, including the great majority who operate high quality ships, does nothing to help drive substandard ships from the seas.

3.6 The owners of quality tonnage cannot easily banish substandard ships, but those who charter them can be deterred from doing so. Thus if any amendments are made to introduce new incentives, these should focus on charterers rather than shipowners. This is considered further in Section 6 below.

As a benefit to claimants

3.7 Depriving the shipowner of his right of limitation is of no real value to claimants. Compensation is normally available in any case from the 1992 Fund, and in future it will be available also from the Supplementary Fund.

3.8 When the right of limitation has been challenged (notably by the 1971 Fund in cases where CLC 69 applied), normally the Fund has paid claims above the CLC limit and then sought recovery from the shipowner by way of recourse. If the same practice were to be followed in future, any additional amounts recovered from the shipowner would go firstly to reimburse the 1992 Fund (and Supplementary Fund, if involved), and only any surplus would be available as extra compensation for claimants.

3.9 This means that claimants benefit only if:

(i) the aggregate of their claims exceeds the limit of compensation available from the 1992 Fund (and from the Supplementary Fund, if involved); and

(ii) the total amounts recovered from the shipowner also exceed that limit.

In practice any such recovery from the shipowner will normally be extremely unlikely. Certainly it is most unlikely to be made from the type of rogue operator associated with substandard ships.

3.10 CLC provides for the direct liability of the ship's insurer to be limited in all circumstances to the ship's liability limit, even if the shipowner's right of limitation is lost (Art. V.8). Even if recovery above the CLC limit could be made from the insurer, this would be capped by a coverage limit (US$1 billion) which is within the limit of the Supplementary Fund.

As a re-apportionment of the financial burden

3.11 Even though the claimants themselves gained no benefit, the 1971 Fund has maintained a policy of pursuing the shipowner and his insurer by way of recourse in cases where the right of limitation was considered to be open to challenge. Whilst it may well be appropriate for the Funds to pursue third parties who are outside the compensation system, it is open to question what benefit is gained from attempting to re-apportion the burden as between the compensation bodies themselves.

3.12 If the Funds challenge the shipowner's right of limitation, nothing is achieved unless an actual recovery is made from him above the CLC limit. In most cases this is possible only if liability can be enforced by direct action against the insurer, but CLC entitles the insurer to limit liability even if the shipowner cannot do so.

3.13 The more secure right of limitation granted to the owner by CLC 92, in exchange for a significantly higher liability limit, has substantially eliminated such recourse actions without any adverse implications for the compensation system.

3.14 If there is now to be a return to an easier test for breaking the shipowner's right of limitation, this will normally be valueless unless the insurer's absolute right of limitation is also removed. However, such a measure would be unworkable: no insurer can consent to providing an unlimited guarantee, and not even US legislation requires financial security above the ship's liability limit.

3.15 Suggestions that the insurer could be made directly liable up to his limit of cover are misconceived. That limit is calculated by reference to the capacity of the reinsurance market to cover P&I liabilities which are expected to be extremely rare, if not wholly theoretical. Any measures designed to make those funds routinely accessible presents the risk of exhausting market capacity with the result that insurance limits may have to be fundamentally reassessed.

3.16 In some cases the 1971 Fund has pursued P&I Clubs for amounts above the CLC limit in recourse actions based on national direct action laws. It should be recognised that any states whose laws allow this are arguably in breach of their treaty obligation under CLC Art. V.8 to allow the insurer to limit liability to the CLC limit. The insurer is not bound to provide a 'blue card', or to agree to be named as guarantor in a CLC certificate, thereby assuming direct liability for claims. The absolute limit of his direct liability is one of the conditions on which he agrees to do so. Recourse actions of this kind circumvent the Convention and the exclusivity of the remedies it provides against the shipowner and his insurer for pollution damage. They also undermine the uniformity of application of CLC in contracting States. It is therefore open to question whether it is an appropriate policy for the Fund to avail itself of national laws which permit this.

3.17 The objections to such actions have been muted in circumstances where CLC 69 was in the process of being superseded to a great extent by CLC 92, with its clearer right of limitation. However if the law on this point is to be reversed, by a return to a weaker right of limitation, then unless recourse actions of this kind against the insurer are expressly precluded there may be cause for insurers to review their willingness to act as guarantors. In that event it may be necessary for independent guarantors to be nominated for this purpose, in a similar manner to the practice which has been necessary under the US Oil Pollution Act, with the result that the operation of the compensation regime becomes more complex.

3.18 A more straightforward and satisfactory way of re-apportioning the cost of oil spills – if that is felt necessary – is by reviewing the compensation limits and the overall apportionment of the financial burden between the affected industries. As already noted, this can readily be done within the framework of industry schemes, without any need to re-open the conventions.

4 Substandard ships

4.1 The aim of eliminating substandard shipping is one in which all governmental and non-governmental organisations, as well as all reputable industry interests, will unite. However, the importance of the objective should not lead to an uncritical assumption that the proposed changes are worth making. It remains necessary to consider whether they would be likely to achieve their aim, or to have adverse side effects on the compensation system.

4.2 A number of questions arise:

- What is meant by a 'substandard' ship?
- Is there a sufficiently close connection between substandard shipping and the compensation regime?
- Would the proposed changes provide effective incentives?

Meaning of 'substandard' ships

4.3 A common understanding is needed of what is meant by 'substandard' shipping. However it is

clear that the term means different things to different people. In particular, what it means to professionals directly concerned with ships, shipping standards and accident prevention is altogether different from popular perceptions based on media reports.

4.4 If real improvements are to be achieved in the quality of ships, it is of paramount importance that any decisions taken with regard to maritime safety and marine environment protection issues are based on purely professional and technical appraisals and assessments.

4.5 Treating ships as substandard by reason of their age or design is even more illogical when they have yet to reach their phase-out date; when they trade perfectly legally (their condition having been thoroughly scrutinized and found in full compliance with international standards); and when the withdrawal of their services would seriously disrupt international trade.

4.6 If there are some categories of ship or cargo that are reasonably thought to involve a higher degree of risk than others – eg those involved in the carriage of heavy fuel oil – this can be reflected in enhanced contributions by the oil receiver, but the description of such a vessel as 'substandard', when it trades perfectly legally, can only confuse.

4.7 In an international instrument the relevant criteria should have a sound legal basis and be consistent with the primary global regimes governing safety at sea. These purposely avoid any definition of the term 'substandard', this being a complex and subjective issue. What they do provide is a system for control of shipping standards by flag and port state administrations. The main features of this system provide for:

- the issue of certificates by the flag state administration, under the relevant regulations in SOLAS and MARPOL, to attest that the ship, its equipment and managers comply with those Conventions;

- the ship and its equipment to be maintained in conformity with SOLAS and MARPOL; and

- port state administrations to detain the ship when its condition does not correspond substantially with the particulars of any of its certificates, or when the ship and its equipment have not been maintained in conformity with SOLAS or MARPOL.

4.8 Accordingly, for the purposes of an international legal regime a ship should be considered as substandard if the ship itself or its managers do not have valid certificates as required by SOLAS or MARPOL, or if its condition would justify detention under port state control.

Relationship between substandard shipping and compensation regime

4.9 It follows from the above that a ship is not to be considered as substandard on the sole ground that it has unfortunately been involved in an oil pollution incident. This point merits being stressed because public outrage after an oil spill has often fostered the misconception that the incident must signify a substandard ship or operator. In fact there have been numerous incidents over the years involving first class ships and operators. Certainly there have been many in which there would have been no grounds for detaining the vessel.

4.10 Studies into the causes of maritime accidents suggest that human error is a far more common cause of casualties than the condition of the ship itself. An error in the navigation or handling of a ship by those on board can cause an unfortunate incident, but it may be an isolated act or omission which does not necessarily signify a substandard vessel or operator. Moreover, casualties often result from a combination of errors by different individuals, and the contributory fault of the master and crew of the tanker may be relatively minor. This has often been the case, for example, when pollution has resulted from a collision between a tanker and another vessel.

4.11 Pollution has also often resulted from groundings and other incidents at or in the vicinity of ports and terminals. Those unfamiliar with shipping do not always appreciate how many people are involved in the transport of oil by sea, and how readily accidents can be caused by failures on the part of shoreside personnel unconnected with the ship or her operators.

4.12 It should also be noted that many incidents can be attributed to a failure either to maintain a dredged channel in a safe condition, or to provide reliable information to mariners, or to provide properly trained pilots, or to respond in a professional manner to requests for assistance from a ship in distress, or to comply with the obligation in international law to allow innocent passage through territorial seas or exclusive economic zones. It is in cases of this kind that masters, crews and owners have been most vociferously accused. In this regard, in recent years there has been a disturbing increase in the number of cases where the Greek administration has had to make considerable diplomatic efforts to release seafarers from detention in other jurisdictions where they have been held for very long periods pending trial of criminal charges following an oil spill.

4.13 This disturbing tendency has not contributed to a wider public understanding of the causes of maritime accidents nor the steps required to prevent them. There are, however, encouraging signs that the attention paid to this subject in recent years has led to a greater appreciation of the relevant issues in some quarters than may have been the case when this review of the compensation regime was first proposed.

4.14 Although substandard ships do of course run greater risks, and are responsible for a proportion of oil pollution incidents, they are no more than part of a wider subject that needs to be addressed in order to improve safety at sea and reduce marine pollution. A drive to reduce oil pollution needs to focus on *all* causes of maritime casualties. This cannot be achieved within the compensation regime and calls for further development of SOLAS and/or MARPOL.

4.15 Likewise a drive to eliminate substandard ships needs to target *all* such ships and their operators, not only those which happen to be involved in an oil spill. If a substandard ship is involved in an incident, the more important question to be asked is not what legal action to take after the event, but how the ship came to be sailing in the first place. The primary answer must lie in scope for improvement in the enforcement of SOLAS and MARPOL through tighter controls by flag and port state administrations.

5 Impact of proposals on compensation regime

5.1 The above considerations lead to the following conclusions:

- there is no need to revise the compensation regime in order to re-apportion the cost of oil spills;
- there is no need to do so in order to improve standards of shipping – development and enforcement of SOLAS and MARPOL being more effective methods; and
- any benefits expected from imposing greater sanctions on shipowners, within the framework of the compensation regime, are likely to be illusory.

5.2 Consideration is now given to the other side of the equation, namely the negative implications which can be foreseen for the compensation system. Important features of the current system which need to be preserved are

- its simplicity;
- co-operation between the compensation bodies involved at each tier of the regime, notably between the Funds and the P&I Clubs; and
- widespread international support for the regime as a uniform system.

Simplicity and co-operation

5.3 The simplicity of the current system is due largely to the elimination of issues of fault, in relation both to the shipowner (whose liability is strict and, in return, is limited), and to third parties (whose liability to the victims is in most cases excluded).

5.4 These features were strengthened by CLC 92, which reduced considerably the scope for fault-related disputes in the context of limitation, and also for proceedings against other defendants (which would likewise usually be fault-related). Those changes were made in the light of experience, including the legal proceedings which took place in the United States after the *Amoco Cadiz* incident. The complexity, expense and delay involved in fault-related litigation of that kind, against multiple defendants, provided a warning of what could also happen in contracting States.

5.5 Some of the proposals which have been made would involve a reversal of these improvements and a retrograde step involving:

- expense and delay of litigation;
- conflict between the shipowner's insurer and the IOPC Funds, when maximum co-operation is required to make the compensation system work smoothly, and
- distraction from the primary function of settling claims.

Treaty issues

5.6 Although reference has been made to the possible 'revision' of the 1992 Conventions, any instrument intended to modify the compensation system would have to take the form of a new convention or conventions, which may or may not be as widely accepted as the existing regime.

5.7 The proposals for a modified regime embrace a number of issues which are far more controversial than those introduced by the 1992 Conventions. It should therefore not be assumed that any new conventions will necessarily supersede those of 1992 to the same extent that the 1992 Conventions have superseded those of 1969 and 1971.

5.8 Most of the proposals concern the possibility of a new CLC rather than a new Fund Convention. However it seems unlikely that it will be possible for the 1992 Fund to operate in conjunction with two different versions of CLC, particularly if the liability limits are changed: its financial position would be different in each case, resulting in a lack of reciprocity as between different Member States. Accordingly, it seems likely that a new CLC would need to be accompanied by a new Fund Convention, and that there would need to be new IOPC Funds, with their own membership separate from that of the 1992 Fund.

5.9 It is likewise open to doubt whether the Supplementary Fund could operate in conjunction with two different IOPC Funds.

5.10 Consequently, the implementation of the proposed changes would be likely to involve an overhaul of the entire compensation system, possibly at all three levels. The complications would not

necessarily be limited to a transitional period but could result in a longer-term fragmentation of the current uniform regime. This would be most unfortunate.

Conclusion

5.11 Weighing the above considerations in the balance, there can be little confidence that the suggested changes will lead to any real benefits, and there must be grave concerns that any advantages will be greatly outweighed by adverse implications for the compensation system.

5.12 Accordingly, despite lengthy debate since the decision in April 2000 to establish this Working Group, Greece is of the view that no sufficient grounds have yet been shown for revising the Conventions.

6 Responsibility of the charterer/oil receiver

6.1 If, despite the above, CLC is amended with a view to providing greater incentives for quality shipping, account should be taken of scope for those who charter substandard ships to be deterred from doing so. Experience suggests that if tighter regulation is not alone sufficient to drive substandard ships from the seas, a more effective expedient is to deny them employment by making them commercially uncompetitive or unviable. This can be achieved by imposing appropriate liabilities or other financial burdens on those who keep them in business by continuing to charter them.

6.2 If the Convention is revised, it should provide that where an incident is caused wholly or partially by breach of any international regulation or standard relating to the construction, maintenance or operation of the ship, then the charterer should not enjoy immunity from suit but should be made strictly liable for the damage, jointly and severally with the owner. Charterers should also be required to maintain compulsory insurance covering such liability.

6.3 There is also a case for making separate arrangements for heavy fuel oils, in view of the greater damage they are liable to cause. Such arrangements could involve higher levies to be paid by receivers of contributing oil which falls into this category.

6.4 However a more effective approach to these issues would be to leave the compensation conventions undisturbed, and to introduce sanctions affecting the charterer in cases where a vessel is found to be substandard, irrespective of whether an incident has occurred.

7 Conclusions

7.1 Greece considers that no sufficient case has been made for revising the 1992 Conventions. The intended benefits are unlikely to materialise, and they do not justify the risks of undermining the current widespread and very successful system.

7.2 If it is decided that CLC 92 should be revised, with the aim of providing incentives for higher standards of shipping, the focus should be on those who provide employment for substandard ships by chartering them. Provision should be made for liability to be additionally borne and compulsorily insured by the charterers of substandard ships, and/or for enhanced contributions to be paid to the IOPC and Supplementary Funds by the receivers of heavy fuel oil.

7.3 The Working Group is invited to take note of the observations made in this paper.
