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REVIEW OF THE INTERNATIONAL COMPENSATION REGIME

PROPOSAL BY THE CHAIRMAN OF THE THIRD INTERSESSIONAL WORKING GROUP TO SUBMIT AGENDA ITEMS TO THE 1992 FUND ASSEMBLY FOR DECISION

Submitted by the Chairman

Summary:	This paper provides a summary of outstanding issues under discussion in the Working Group with an assessment in each case by the Chairman of their viability as a basis for amendment of the CLC and FC. The issues are divided into three categories – those considered viable for future amendment, those where further guidance is required from the Assembly and those that are recommended to be dropped for lack of sufficient support.
Action to be taken:	In light of the issues dealt with in this paper, endorse one of the options set out in paragraph 6.

1 Introduction

1.1 The Third Intersessional Working Group (WG) on Revision of the Civil Liability Convention (CLC) and IOPC Fund Convention (FC) has completed eight sessions. In that time it has made some significant changes to the international regime governed by these two Conventions. Most notably, it has developed the Protocol establishing the Supplementary Fund (SF), which will substantially increase the amount of compensation available per incident. The new Protocol, adopted in May 2003, will enter into force on 3 March 2005.

1.2 Other amendments to the international regime have been discussed in the WG, some of which have been implemented without the need to amend the basic Conventions, such as changes to the Claims Manual with respect to the handling of environmental claims. The WG also developed an Assembly Resolution (*1992 Fund Resolution N°8*) aimed at promoting the uniform application of the two Conventions. Additionally, the Legal Committee of the IMO agreed to amendments of compensation amounts in both Conventions by means of the amendment procedure included in the 1992 versions. It is generally recognised, however, that other changes that have been discussed can only be implemented by reopening the Conventions.

1.3 The object of this paper is to set out the various topics that have been discussed in the WG and to give my assessment of their viability in terms of agreement within the Group. My hope is that this will provoke a thorough discussion in the WG and resolve the issue whether the Conventions should be reopened. Based on this discussion, I can then report to the Assembly of the 1992 Fund with recommendations whether future sessions of the WG should be planned or whether for the

time being the Group has completed its work and should, consequently, be terminated. In the event of a positive outcome, a further objective is to identify the topics that should be included in any revision.

1.4 Accordingly, I set out below a brief description of the remaining issues and my assessment of them for consideration and comment by the WG.

2 Issues to be recommended to the Assembly for approval for amendment in the CLC and FC

2.1 Level of shipowner's limitation amount and its relationship with the compensation funded by oil receivers

2.1.1 The fundamental issue before the WG is whether to reopen the two Conventions with the object of adjusting the shipowner's limit of liability, in the light of increases that entered into force in November 2003, and those that have been agreed for cargo interests under the Protocol of 2003 establishing a Supplementary Fund. The details of the discussion on the issue of the shipowner's limits are amply described in the reports of the meetings of the WG, in particular the various options that have been proposed, and do not require any further elaboration for present purposes.

2.1.2 In my opinion this issue requires a clear resolution, since all other matters proposed for amendment in the WG would not justify a reopening of the two Conventions and the complications that this would entail, even though some of those matters are of pressing importance.

2.1.3 On the basis of those who have spoken on this matter in the WG, my assessment is that a small majority favour reopening the Conventions to redress the perceived imbalance that has emerged, in their view, as a consequence of the adoption of the SF Protocol. Many delegations, however, have remained silent. If those delegations that have so far not spoken on this issue were pressed to take a position, I expect that the result would be the same, ie a small majority in favour of revision. It is also worthy of note that some delegations that spoke against revision favoured voluntary industry agreements to address the issue of imbalance. So far no such industry agreements have been presented. On that basis, the revision of shipowner's limits, and an adjustment of those limits in relation to compensation offered by the IOPC Fund, should be recommended to the Assembly for approval.

2.1.4 If that is a correct analysis of the outcome of the debate on this fundamental issue in the WG, it becomes relevant to consider the remaining issues.

2.2 Tacit amendment procedure

2.2.1 There has been a general agreement that the existing tacit amendment procedure needs improvements either to allow an automatic revision of the limits in accordance with a suitable formula that would trigger any increase or reduce the time periods in the current procedure. The WG recently considered two options for amending the tacit amendment procedure in respect of the financial limits of the 1992 Conventions.

2.2.2 I believe that the strong show of support from both industry representatives and most delegations shows that there is agreement that the tacit amendment procedure should be amended. Therefore, I propose that this item be put before the Assembly with recommendation for approval to amend the Conventions.

2.3 Compulsory insurance

2.3.1 Experience has shown that vessels carrying less than 2 000 tonnes of oil are capable of causing serious pollution damage and that the IOPC Funds have on a number of occasions been the only source of compensation as a result of the shipowner having had neither the insurance cover nor

the financial capability to pay claims. In previous WG sessions there was considerable support for widening the compulsory insurance obligation to include vessels under 2 000 tonnes that carry oil in bulk as cargo. It should be borne in mind that the HNS Convention covers all ships regardless of the amount of HNS carried on board.

2.3.2 I believe that the majority of delegates are in favour of this modification and consequently this item should be put before the Assembly with the recommendation to amend the CLC.

2.4 Non-submission of oil reports

2.4.1 The non-submission of oil reports has been a problem within the Fund system almost since its inception as the records of Fund Assemblies amply illustrate. Accordingly, a proposal has been made to replicate Article 15 of the SF Protocol in any amending instrument.

2.4.2 While such a proposal might require further discussion, I believe most delegations support, in principle, a revision along the above lines and therefore this matter should be recommended to the Assembly for approval to amend the FC.

2.5 Quorum for meetings of the 1992 Fund Assembly

2.5.1 Regular attendees to meetings of the IOPC Fund will be well aware that with growing membership of the Fund, it is becoming increasingly difficult to achieve quorums for Assembly meetings. This could lead to a crippling of the Fund and consequently to a disruption in the payment of claims. To address this unacceptable situation, a proposal has been put forward to amend the quorum requirements in Article 20 of the FC.

2.5.2 While some concerns were expressed with this proposal and details might require further discussion, I am satisfied that, on balance, there was sufficient support to recommend to the Assembly that Article 20 be appropriately amended.

2.6 Definition of 'ship'

2.6.1 There has been some suggestion that the definition of ship in the CLC gives rise to certain ambiguities that are counter to the original intention of the text. To fix this ambiguity, proposals were made to amend the definition of 'ship' in the CLC in Article 1.

2.6.2 While I note that there was disagreement on the wording of the proposed text, it is clear that most delegations that intervened in the discussion on the definition of ship agreed that there is a need to amend the CLC text in order to remove this ambiguity. Therefore, I believe that this matter should be recommended to the Assembly for approval to amend the CLC.

3 Issues requiring further guidance from the Assembly

3.1 Substandard transportation of oil

3.1.1 Several delegations have made proposals in regard to the substandard transportation of oil. Some of these proposals have provided a disincentive to registered owners, and others a disincentive to both registered owners and oil receivers using 'a certain category of ship', which would be defined on the basis of objective criteria. Others suggested that there should be different tests for breaking limitation of liability for these ships.

3.1.2 I note that a number of delegations expressed doubts about the viability of these proposals in the context of a compensation scheme on the grounds of the legal difficulties that could arise if these considerations were introduced into such a scheme. Others argued the point that the problems of substandard transportation were technical in nature and should be addressed by the technical conventions developed under the auspices of the IMO. Clearly this is a rather novel issue that has

not yet been fully discussed and explored by the WG. I also note that this idea was not part of the WG's original mandate therefore I am proposing that this agenda item be sent to the Assembly requesting guidance on whether the subject should be further developed.

3.2 Uniform application of the Conventions

3.2.1 Concerns have been raised in the WG in regard to issues pertaining to the uniform interpretation and application of the CLC and FC. Problems have arisen in some jurisdictions, which have resulted in decisions by the courts that have conflicted with the intention of the Conventions. With this in mind, the Administrative Council, acting on behalf of the 1992 Assembly, adopted a *Resolution on the interpretation and application of the 1992 Civil Liability Convention and the 1992 Fund Convention (1992 Fund Resolution N°8)* already referred to above. The Resolution captures the essence of the problem, however it is non-binding and courts can potentially still misinterpret the Conventions.

3.2.2 The question now arises if the intent of the Resolution should be embodied in the text of the Conventions and therefore I recommend that this item be sent to the Assembly requesting further guidance.

4 Issues to be recommended to the Assembly for deletion from the WG agenda

4.1 Breaking of limitation of liability

The WG discussed on several occasions the current test for breaking of limitation of liability, which was introduced in the 1992 CLC in Article V (2). Some delegations recommended that the reinstatement of the test contained in the 1969 CLC be considered. However, this idea did not attract much support from the WG. Therefore I suggest that we recommend to the Assembly that the issue be dropped from any future WG agenda. (See, however, discussion of related issue in section 3.1).

4.2 The problems faced by oil storage companies

4.2.1 The WG considered a proposal to incorporate two provisions contained in the 1996 HNS Convention, one relating to the concept of 'receiver' and the other relating to the definition of 'contributing oil'. Both provisions relate to the temporary storage of contributing oil.

4.2.2 A number of delegations have, in principle, supported the proposal to amend the definition of receiver in line with the HNS Convention, which in their view was more equitable. However, on the whole, I sensed that most delegations were opposed to the proposal, arguing that the HNS Convention was a special case and that the contribution system under the HNS Convention had yet to be proven to be workable compared with the simpler and well tried and tested system operated by the 1971 and 1992 Funds. On this basis I feel that this item should be sent to the Assembly with the recommendation that it be dropped from the WG agenda.

4.3 Cargo owner liability

4.3.1 The WG has seen several proposals to establish an additional tier of liability concerning cargo owners to be considered beside the shipowners' and the Fund's financial liabilities. It is intended under this proposal to impose an additional layer of liability on cargo owners that use substandard transportation of oil. It is perceived that this additional liability would alleviate the increased burden to be borne by responsible cargo owners on account of the introduction of the SF.

4.3.2 While I note that there was some support for amending the Convention to put in place an additional tier of liability for cargo owners, I feel that the balance of views was not in favour of such an amendment. Consequently, I think that this item should be put before the Assembly with the recommendation that it be dropped from the agenda of the WG.

4.4 Minimum annual contribution to the 1992 Fund

4.4.1 The WG considered a proposal that all Member States should be required to pay a minimum annual contribution to the 1992 Fund based either on a minimum deemed quantity of contributing oil (ie on the same basis as such a fee would be payable to the SF) or on a fixed percentage of the total financial burden on the Fund.

4.4.2 While there was some support for this modification, others had reservations, noting that the inclusion of such a contribution in the SF could perhaps be justified on the grounds that membership in that Fund is optional, whereas the basic scheme is more inclusive. It was also argued that a minimum contribution might be a burden for smaller countries. On balance, my assessment is that the disadvantages of this modification outweigh its benefits and should therefore not be pursued.

4.5 Merging of the Conventions

4.5.1 Several delegations have introduced the idea of merging the CLC, IOPC Fund Convention and the SF Protocol into a single instrument to facilitate the ratification process and provide better scope for ensuring their uniform application as well. The proposal might also offer means for simplifying treaty law issues involved in the revision of the regime and ensure that there would be a clearer link between the handling of claims under all tiers.

4.5.2 On balance, it does not seem to me that there was sufficient support for this proposal and accordingly I would recommend that this topic be dropped from the agenda of the WG.

5 Other issues

Treaty law issues

In previous WG sessions the Director of the IOPC Fund has raised a number of treaty law issues, some of them linked to uniform application of the Conventions. The Director has also indicated that further documents would be submitted on these issues if it were decided that the 1992 Conventions should be revised.

Consequently, I recommend that this matter remain on the agenda for the time being.

6 Action requested

6.1 The WG is requested to consider the issues described in this paper and the conclusions I have reached. It is imperative that those who disagree with my conclusions let their voices be heard, particularly those Member States who have for the most part remained silent during the course of the WG.

6.2 Once the WG has reached a conclusion and come to an agreement regarding the various issues set out in this paper, those conclusions will be reflected in the report of the WG, with the aim of requesting the Assembly to instruct the WG on the appropriate course of action - **either termination of the WG or planning for the future sessions:**

(a) to develop treaty text for all issues approved by the Assembly for amendment in the CLC and FC and

(b) to carry out further work on any other issue as instructed by the Assembly.