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REVIEW OF THE INTERNATIONAL COMPENSATION REGIME

AN ESSENTIAL CASE FOR REVISION OF THE 1992 CIVIL LIABILITY AND FUND CONVENTIONS

Submitted by the Oil Companies International Marine Forum (OCIMF)

Summary:	This document outlines comprehensive arguments in favour of revision of the 1992 Conventions, and identifies defects in the Conventions that can only be rectified by amending them. The issue of the financial responsibility of the shipowner is one of the significant issues that needs to be addressed in a revision. In addition, many of the other defects have the potential to delay payments to claimants and eventually result in the break up of the international regime, if they are not rectified.
Action to be taken:	The Working Group is requested to support the Chairman's proposal to submit to the 1992 Fund Assembly the issues referred to in section 2 of document 92FUND/WGR.3/25/1 for amendments to the Conventions.

1 Introduction

At its meeting in March 2005, the Working Group is set to consider whether or not the 1992 Conventions should be revised in order to amend and adapt the international liability and compensation regime for oil pollution damage. Many arguments have been put forward in both written submissions and oral interventions making the case for and against revision. The intention of this document is to list, in a 'global' context, the arguments in favour of revision. Most of these arguments are likely to be familiar. However, when they are put together in context, only one conclusion can be reached. The arguments for revision are compelling.

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

2.1 It is one of the basic tenets of the international liability and compensation regime that the shipowner is strictly liable for the costs of pollution damage up to a limited amount based on the vessel's tonnage. It was expected that, in most cases, the shipowner's liability would cover all the costs of pollution damage. The purpose of the IOPC Fund was as a supplementary scheme to ensure that, in the few incidents in which the costs of pollution damage exceeded the shipowner's liability, the Fund would ensure that claimants were fully compensated.

2.2 It is also a fundamental principle of the regime that 'breakability' of limitation should begin where insurability ends. In other words the limitation of liability should end at the limit of capacity of the insurance market. Limitation limits currently lie well below the capacity of insurance and it is therefore feasible to increase limits closer to market capacity. This would ensure that shipowners, both in the Supplementary and 1992 Fund Member States, take financial responsibility up to the limit of insurance capacity. As originally intended, when the insurance capacity is reached, the Fund would then take responsibility to ensure that full compensation is available to claimants. This issue can only be addressed through revision of the Conventions.

2.3 OCIMF have long argued that increasing the financial responsibility of the shipowner by increasing Civil Liability Convention (CLC) limits as well as participation in the Supplementary Fund is necessary to ensure that the person with control over the vessel has an appropriate financial stake in the regime. Without this 'financial responsibility' the regime will not create, maintain and instil the correct incentives for safe and, above all, pollution free shipping. It is a fundamental principle of all liability systems that the one who has control over or causes damage takes financial responsibility. This has a two-fold effect. Firstly, the person causing the damage should pay for his actions and is in the best position to insure such risks. Secondly, it is an appropriate way of trying to prevent future damage by ensuring that the person with the potential to cause the damage does everything possible to prevent it. Every modern day society demands a liability system with these principles.

2.4 In turn, if the financial responsibility of the shipowner is addressed in the 1992 regime and the Supplementary Fund this will give the International Group of P&I Clubs (through their pooling agreement) the appropriate financial responsibility and incentives to give greater consideration to the quality of its shipowner assureds. The quality of the shipowner assureds should be of vital importance to an insurer for assessing risk and premium.

2.5 Indeed, the possibility of revision of the Conventions, through the Working Group, has already caused the International Group of P&I Clubs to consider improvements to their systems to better select and screen vessels prior to providing insurance cover.

2.6 Ensuring that the financial responsibility of the shipowners is commensurate with their operational controls of and responsibilities for their ships will provide a real incentive for marine liability insurers to better select and screen vessels for insurance cover. Indeed, Terence Coghlin, a former Chairman of the International Group of P&I Clubs and the author of the OECD report on insurance and substandard shipping said the following in a recent lecture entitled 'Tightening the Screw on Substandard Shipping':

> '*I happen to believe that club underwriters should be reviewing the methods they use to determine the appropriate rate for each fleet for the coming year. I would like to see them becoming more discriminatory and doing less by reference to the often misleading loss record and more by reference to other indicators of quality and risk*'.

2.7 The Round Table of Shipowning Organisations agreed with this philosophy in a report of their recent meeting in Lloyds List (October 2004) in which they called for the P&I Clubs to 'incentivise' higher safety standards and good performance from shipowners. This 'incentivisation' to date has only been possible because of the prospect of revision. It must be cemented with firm proposals to revise the Conventions.

2.8 On the basis of the Chairman's assessment, there is a small majority in favour of revising the Conventions. In addition, a strong argument for revising the Conventions has got to be that States that provide around three quarters (73%) of the financing for the Fund openly favour revision of the regime. It would be disingenuous, and strike at the heart of mutuality, for States opposing revision to say that the system is working fine and should not change, when three quarters of those financing the Fund take the opposite view.

3 Supplementary Fund – An interim solution only

The Supplementary Fund was created following a large incident, when it became necessary to act quickly to plug a financial gap in the regime without addressing the relative financial burdens on oil cargo and shipowning interests. A Resolution was duly agreed at the Diplomatic Conference, adopting the Supplementary Fund Protocol. A similarly urgent situation arose following the *Torrey Canyon* incident in 1967, which led to the adoption of the 1969 CLC and (consequent upon the requisite Resolution and Diplomatic Conference) the 1971 Fund Convention. It is now again necessary to address the question of shipowner liability and financial responsibility, as well as all other issues relevant to ensuring that the regime remains viable and does not become paralysed.

4 Compulsory insurance

Another necessary change which can only be achieved through revision is the compulsory insurance of all ships below 2 000 tons. There are too many incidents involving the Fund in which vessels do not have insurance. There seems to be no logical reason for tolerating a situation where vessels below 2 000 tons may not have insurance. The International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea (HNS Convention)obliges all ships to have compulsory insurance. The same should apply under the Civil Liability Convention (CLC).

5 Costs study

In addition, it should not be forgotten that the costs study called for by States shows a need for action in the smaller tonnage scale. This can only be achieved by increasing liability at the lower end of the tonnage scale. Revision of the Conventions is the only way to remedy this problem.

6 Quorum

Another compelling reason to revise the Conventions is to deal with the difficulty of achieving a quorum at the Fund Assembly meetings. If more States continue to ratify the Fund, this problem is likely to be exacerbated. In this respect the Fund may become a victim of its own success. Failure to achieve the necessary quorum would have the effect of paralysing the operation of the Compensation Fund. It would be unable to take any valid decisions and more importantly take decisions involving payment to claimants or levies from contributors. Any decisions it might make could be challenged and become the subject of litigation which, on an analysis of recent incidents, seems to be becoming more and more prevalent.

7 Non-submission of oil reports

The non-submission of oil reports may often seem an innocuous, insignificant problem to many States but it strikes at one of the core principles of the Compensation Fund ie its mutuality. Contributors from some States pay more into the Compensation Fund than those in other States. However, the system of contributions is fair because it is based on individual receipts. Nevertheless, if States fail to submit reports on receipts the system is no longer equitable and its status as a 'mutual' is severely prejudiced. The failure to submit oil reports not only causes mutuality problems, it also causes significant administrative and practical problems for the Fund. In the Director's latest report we hear that it may delay the winding up of the 1971 Fund. More significantly, claimants of pollution damage in a State which has not submitted an oil report may fall victim to legal wrangling as to whether the Compensation Fund is permitted and/or obliged under the 1992 Fund Convention to make payment to claimants. This issue can only be resolved by revision of the Conventions. It is also important that this issue is resolved now otherwise it may become an even greater problem in a sister Convention (HNS) and ultimately lead to the downfall of that Convention.

8 Definition of 'ship' and uniform application of Conventions

There are a number of cases currently being considered by the 1992 Fund that give cause for concern about the uniform interpretation and application of the Conventions. The case of the *Slops*, involving a stationary oil waste storage vessel, is currently in the Supreme Court in Greece because there is a dispute over the definition of a 'ship' and whether or not the costs of pollution damage should be covered by the IOPC Fund. There have been a number of court cases as a result of the *Erika* incident in which the courts have failed to consider the Funds criteria for admissibility of claims, despite a requirement to do so under the Vienna Convention on the Law of Treaties. Wherever there is uncertainty in the interpretation of the Conventions, there will be fertile ground for litigation with the potential for delays to claimants with valid claims. This can only be resolved by revision of the Conventions in order to clarify the uncertainty in the treaty text.

9 Pervasion of criminal sanctions

One argument for revising the Conventions which has not yet been made in the Fund Working Group relates to proposals to impose criminal sanctions where instances of accidental pollution damage have occurred. The Common Position of all 25 Member States in relation to the draft EU Directive on criminal sanctions for ship source pollution cites the perceived paucity of dissuasive elements in the current international compensation regime as justifying the imposition of criminal sanctions. Revision of the conventions may reduce the growing pressure for criminal sanctions directed towards seafarers.

10 Regional solutions

A related point is that revision of the conventions is becoming necessary, and will become more so in the future, to avoid regional solutions. It will only need one region to become dissatisfied and develop its own independent system to result in the break up of the international regime and a greater potential cost to developing nations. Regulation of an international industry should be on an international basis rather than by fragmented regional legislation.

11 Voluntary solutions

There has been much talk within the Working Group meetings about voluntary solutions but, unfortunately, they cannot address many of the issues above and neither can they deal with all the issues they may try to address. Whilst such offers are welcome they cannot deal with quorum, compulsory insurance for vessels below 2000 tons, 100% coverage for all vessels and non-submission of oil reports. Many tankers within the Japan P&I Club are not covered under the International Group re-insurance contract and so may not be included within any voluntary arrangement. In addition, tankers within other insurers outside of the International Group would not be covered by voluntary arrangements eg British Marine, Terra Nova, Korea P&I Club, China P&I Club and Russia P&I Pool. Furthermore, the voluntary arrangements proposed by the International Group create additional conditions for payment over and above those within the Conventions. They can also be unilaterally amended and withdrawn at any stage.

12 Action to be taken by the Working Group

The Working Group is invited to:

(a) take note of the information contained in this document; and

(b) support the Chairman's proposal to submit to the 1992 Fund Assembly the issues referred to in section 2 of document 92FUND/WGR.3/25/1 for amendments to the Conventions.