



International Oil Pollution
Compensation Funds

Agenda Item 5	IOPC/APR19/5/2	
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1992 Fund Assembly	92AES23	●
1992 Fund Executive Committee	92EC72	
Supplementary Fund Assembly	SAES7	

REVIEW OF 1992 CIVIL LIABILITY AND FUND CONVENTIONS

Submitted by India

Summary:	Proposal for amending the 1992 Civil Liability Convention and the 1992 Fund Convention.
Action to be taken:	<u>1992 Fund Assembly</u> Take note of the information and refer the matter to the International Maritime Organization to include a new output in its work programme to amend the 1992 Civil Liability Convention and the 1992 Fund Convention.

1 Introduction

- 1.1 The 1992 Civil Liability Convention and the 1992 Fund Convention have been in existence for more than 26 years. The earlier 1969 Civil Liability Convention was amended after a period of 23 years in 1992. Similarly, the 1971 Fund Convention was also amended after a period of 21 years in 1992. Since more than 26 years have elapsed after the adoption of the earlier amendments, it is essential to amend both the Conventions to deal with the flaws and bring about clarity in both instruments.
- 1.2 The Indian delegation made statements during the meeting held in April/May 2018 (document [IOPC/APR18/9/1](#), paragraphs 3.4.8 and 4.1.11) and during the meeting held in October 2018 (document [IOPC/OCT18/11/1](#), paragraphs 3.12.22 and 9.2.7). However, both the instruments are yet to be taken up for amendments.

2 Reasons for proposing amendments to the Conventions

- 2.1 Coverage is available to all Member States without the need to make any payment of contributions
- 2.1.1 The Fund Convention is a commercial international instrument where a victim of oil pollution damage in a Member State obtains compensation for damage within its territory from oil carried as 'cargo' on a ship, with the receiver of oil cargo by sea within its territory paying contributions to the Fund. It is therefore akin to a Member State obtaining insurance cover against pollution damage in its territory, with the premium for such insurance being paid by its citizens through the receiver of cargo, as the oil company recovers its costs from the buyers of its products.
- 2.1.2 As per the provisions of the Convention, a Member State that does not receive any oil cargo by sea in its territory is not required to make any contributions to the Fund. However, even such a Member State is able to obtain full compensation for pollution damage in its territory even though no contribution is paid by the Member State.

- 2.1.3 The essential requirement for any contract to be valid is the requirement to pay consideration (i.e. a 'premium' in insurance contracts). Any contract without consideration is a void contract. Despite this specific requirement in contract law, the 1992 Fund Convention (which is a commercial international instrument between States), does not adhere to this basic tenet of contract law, due to which every State becoming a party to the instrument obtains cover without needing to pay any consideration.
- 2.2 Vessels carrying less than 2 000 metric tons of persistent oil are not required to have mandatory insurance
- 2.2.1 Article 7 of 1992 CLC requires ships carrying more than 2 000 metric tons of persistent oil in bulk to maintain compulsory insurance. This results in ships transporting less than 2 000 metric tons of oil cargo by sea not maintaining any form of mandatory insurance cover against oil pollution liabilities. This has resulted in some of the shipowners transporting less than 2 000 metric tons of oil cargo by sea not being able to meet their obligations, requiring the 1992 Fund to step in to pay compensation to the affected entities.
- 2.2.2 An analysis of the claims paid by the 1992 Fund reveals that of the total oil spill incidents for which the IOPC Funds have dealt with, only a few of the incidents have involved vessels carrying more than 2 000 metric tons of persistent oil, whereas the majority of the claims were in respect of incidents involving ships carrying less than 2 000 metric tons of persistent oil.
- 2.2.3 The payment of such claims by the second tier (i.e. cargo interests) without the first tier (i.e. shipowner) meeting its obligation contravenes the founding principles of the international liability and compensation regime.
- 2.3 Contributions are required to be paid only if the quantity of persistent oil received exceeds 150 000 metric tons
- 2.3.1 Article 10 of the 1992 Fund Convention requires a receiver of oil cargo in a Contracting State to pay contributions only if the person receives more than 150 000 metric tons of oil cargo by sea in a calendar year.
- 2.3.2 Even small quantities of oil pollution have resulted in substantially large claims these days. Hence, the Convention provision exempting a class of receivers not to contribute to the Fund could encourage a lack of adequate oversight by the receivers of small parcels of oil cargo by sea. It also imposes an additional burden on persons receiving more than 150 000 metric tons of oil cargo by sea, as they may have to shoulder the burden of making contributions to the Fund in case of incidents that may arise during transportation of such parcels by sea.
- 2.4 Claims record is not linked to contributions paid by a Member State
- 2.4.1 Unlike an insurance contract where the contribution of an insured entity is linked to its claims record, the 1992 Fund Convention does not link the claims record of a Member State to the contributions made by receivers of oil cargo in that State. Due to this lack of correlation between the claims record and contribution made, there is a growing tendency for claimants of jurisdictions affected by an oil spill to try and claim compensation to the maximum extent possible.
- 2.4.2 It may be mentioned that in an insurance contract, the premium paid is dependent on the evaluated risk and the claims record. If no claim is made in the previous year, the entity taking the insurance is entitled to a discount on the premium which is given on the renewal of the policy (i.e. Bonus). However, if there is a claim in the previous year, the premium is increased (i.e. Malus).

- 2.4.3 The principle of this Bonus-Malus System is that the higher the frequency of claims, the higher the insurance costs are. Unfortunately, the 1992 Fund Convention does not have this element of balance between the contributions paid and claims received, due to which, there is no incentive for claims to be kept to reasonable levels.
- 2.5 Contributions paid by a Member State are not linked to the cost of cleaning oil spills due to the difference in temperatures of warm- and cold-water regions
- 2.5.1 The current liability and compensation regime does not distinguish between the cost of cleaning oil spills in warm regions and cold regions. It may be mentioned that among several factors that influence the cost of cleaning oil spills, prevailing temperature is one of the most important factors. Generally, to clean oil spills in colder temperatures is more costly and requires more time.
- 2.5.2 Countries in the tropical region have warmer temperatures due to which it is possible for an oil spill in this region to be cleaned at a lower cost in comparison to the cleaning of a similar oil spill in colder regions. However, the provisions of the current regime do not take this factor into consideration. It therefore puts countries of the warmer regions at a disadvantage as the contributions paid by a Member State under the current regime is not linked to the cost of cleaning oil spills in different temperatures of warm- and cold-water regions.
- 2.6 Contributions paid by a Member State are not linked to the cost of living index of the Member State
- 2.6.1 The current regime does not differentiate between the cost of cleaning an oil spill incident in different areas of the world. In affluent areas, the cost of hiring equipment, labour and material is substantially more than in areas which have a lower cost of living. Hence the cost of living index of a Member State is an important element in determining the expenses likely to be involved in dealing with an oil spill incident.
- 2.6.2 Countries which have a lower cost of living will require lower costs for cleaning an oil spill in comparison to the cleaning of a similar oil spill in regions which have a higher cost of living. However, the provisions of the current regime do not take this factor into consideration. It therefore puts countries with a lower cost of living index at a disadvantage as the contribution paid by a Member State under the current regime is not linked to the cost of living index. This has resulted in affluent States obtaining more compensation for every claim compared to a claim of a similar nature in a less affluent country.

3 Action to be taken

1992 Fund Assembly

The 1992 Fund Assembly is invited to:

- (a) take note of the information contained in this document; and
 - (b) refer the matter to the International Maritime Organization to include a new output in its work programme to amend the 1992 Civil Liability Convention and the 1992 Fund Convention.
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