



INTERNATIONAL  
OIL POLLUTION  
COMPENSATION  
FUND 1971

ASSEMBLY  
19th session  
Agenda item 26

71FUND/A.19/23  
16 September 1996

Original: ENGLISH

## REPLACEMENT OF INSTRUMENTS ENUMERATED IN ARTICLE 5.3 OF THE FUND CONVENTION

Note by the Director

### Introduction

1 In accordance with Article 5.3 of the 1971 Fund Convention, the 1971 Fund may be exonerated, wholly or partially, from its obligation to pay indemnification to the shipowner or his guarantor if the Fund proves that, as a result of the actual fault or privity of the owner, the ship in question did not comply with the requirements laid down in the four instruments listed in sub-paragraph (a)(i) - (iv) of that Article and that the incident or the damage was caused wholly or partially by such non-compliance. This provision applies even in cases where the flag State of the vessel concerned is not a Party to the relevant instrument.

2 The instruments originally listed in Article 5.3(a) were:

- (i) the International Convention for the Prevention of Pollution of the Sea by Oil, 1954, as amended in 1962 (OILPOL 54);
- (ii) the International Convention for the Safety of Life at Sea, 1960 (SOLAS 60);
- (iii) the International Convention on Load Lines, 1966; and
- (iv) the International Regulations for Preventing Collisions at Sea, 1960 (COLREG 60).

3 The purpose of Article 5.3 was to encourage shipowners, by means of indirect financial inducement, to make their ships conform to the requirements of the instruments mentioned in that Article, thereby reducing the risk of oil pollution incidents.

4 Article 5.4 of the 1971 Fund Convention provides a procedure for replacing the instruments specified in Article 5.3(a). These instruments may, under certain conditions, be replaced by new instruments if so decided by the 1971 Fund Assembly. Upon the entry into force of a new Convention designed to replace, in whole or in part, any of the instruments specified in Article 5.3(a), the Assembly may thus decide that the new Convention will replace such an instrument or part thereof for the purpose of Article 5.3. The Assembly will then fix the date from which such a replacement will take effect.

5 At its 8th session, the Assembly decided to interpret Article 5.4 so as to allow the inclusion in the list of instruments contained in Article 5.3(a) of not only new conventions but also amendments adopted by a tacit amendment procedure, provided that such amendments were of an important character for the purpose of the prevention of oil pollution (documents FUND/A.8/12 and FUND/A.8/15, paragraph 15.1).

6 The Assembly has applied Article 5.4 in respect of the instruments listed in Article 5.3(a)(i), (ii) and (iv). The present list of instruments in Article 5.3(a) reads as follows:

- (i) the International Convention for the Prevention of Pollution from Ships, 1973, as modified by the Protocol of 1978 relating thereto, and as amended by Resolutions MEPC.14(20), MEPC.47(31), MEPC.51(32) and MEPC.52(32) adopted by the Marine Environment Protection Committee of the International Maritime Organization on 7 September 1984, 4 July 1991, 6 March 1992 and 6 March 1992 respectively;
- (ii) the International Convention for the Safety of Life at Sea, 1974, as modified by the Protocol of 1978 relating thereto, and as amended by Resolutions MSC.1(XLV), MSC.6(48), MSC.13(57) and MSC.27(61) and, as regards Regulations V/8-1 and V/15-1, by Resolution MSC.31(63) adopted by the Maritime Safety Committee of the International Maritime Organization on 20 November 1981, 17 June 1983, 11 April 1989, 11 December 1992 and 23 May 1994, respectively, and as amended by Resolution 1 adopted on 9 November 1988 by the Conference of Contracting Governments to the International Convention for the Safety of Life at Sea, 1974 on the Global Maritime Distress and Safety System and as amended by Resolution 1 adopted on 23 May 1994 by the Conference of Contracting Governments to the International Convention for the Safety of Life at Sea, 1974;
- (iii) the International Convention on Load Lines, 1966; and
- (iv) the Convention on the International Regulations for Preventing Collisions at Sea, 1972.

7 The Assembly may wish to examine whether further modifications to the list should be made, resulting from amendments adopted in May 1994, May 1995, November 1995 and June 1996 to the International Convention for the Safety of Life at Sea, 1974 (SOLAS 74), amendments adopted in November 1994 to the International Convention for the Prevention of Pollution from Ships, 1973, as modified by the Protocol of 1978 relating thereto (MARPOL 73/78) and amendments adopted in November 1995 to the International Convention on Load Lines, 1966.

#### **May 1994 Amendments to SOLAS 74**

8 In May 1994, the Conference of Contracting Governments to SOLAS 74 and the Maritime Safety Committee of IMO adopted amendments to SOLAS 74 (Conference Resolution 1 and Resolution MSC.31(63) respectively) in accordance with the tacit amendment procedure specified in Article VIII(b) of SOLAS 74. Under this procedure, an amendment adopted by such a Conference or the Committee is communicated by the Secretary-General of IMO to the Governments of Contracting States. The amendment is deemed to have been accepted unless more than one third of the these Governments, or Governments of such States representing not less than 50% of the gross tonnage of the world's merchant fleet, have notified the

Secretary-General of their objection to the amendment. An amendment which is deemed to have been accepted will in principle enter into force in respect of all Parties except those having filed objections.

9 The dates on which the prescribed period for notification of objections to the Amendments contained in the respective Resolutions expire and the corresponding dates on which the Amendments have entered or will enter into force, unless a sufficient number of objections have been filed, are as follows:

	Expiry of period for notification of objections	Date on which Amendments have entered or will enter into force unless a sufficient number of objections have been made
Amendments contained in Annex I to Conference Resolution 1 (Chapters X and XI)	1 July 1995	1 January 1996
Amendments contained in Annex 2 to Conference Resolution 1 (Chapter IX)	1 January 1998	1 July 1998
Amendments contained in Resolution MSC.31(63) (Regulation V/8-1 and Regulation V/15-1)	1 July 1995	1 January 1996
Amendments contained in Resolution MSC.31(63) (amendments other than those referred to above)	1 January 1998	1 July 1998

10 The Amendments covered by Conference Resolution 1 introduce three new Chapters, ie Chapters IX, X and XI. Chapter IX, which applies *inter alia* to oil tankers of 500 gross tonnage and over, makes it compulsory for ships to comply with the International Management Code for the Safe Operation of Ships and for Pollution Prevention, adopted by IMO. Chapter X contains provisions relating to safety measures for high speed craft. Chapter XI, which contains provisions relating to special measures to enhance maritime safety, introduces *inter alia* an enhanced programme of surveys for tankers which are more than five years old.

11 The Amendments covered by Resolution MSC.31(63) include requirements affecting the safety of oil tankers, viz mandatory ship reporting systems, emergency towing arrangements on all tankers of 20 000 dwt and above, fire protection arrangements for fuel oil, lubricating oil and other flammable oils and improved navigation bridge visibility.

12 At its 17th session, the Assembly considered that the Amendments covered by Conference Resolution 1 of the Contracting Governments to SOLAS 74 and by Resolution MSC.31(63) were of important character for the purpose of the prevention of oil pollution (document FUND/A.17/35, paragraph 31.3). At its 18th session, the Assembly decided to include in the list of instruments contained in Article 5.3(a) of the Fund Convention, with effect from 1 May 1996, the Amendments contained in Annex I to Conference Resolution 1 and some of the Amendments covered by Resolution MSC.31(63) (ie those relating to Regulation V/8-1 and Regulation V/15-1) which entered into force on 1 January 1996 (document FUND/A.18/26, paragraph 23.1).

13 It is not possible at this stage to determine whether the remaining Amendments covered by these Resolutions will enter into force. For this reason, the Director considers it premature for the Assembly to take a decision at its 19th session on whether to include these Amendments in the list of instruments contained in Article 5.3(a) of the Fund Convention.

#### **November 1994 Amendments to MARPOL 73/78**

14 In November 1994, the Conference of Parties to the International Convention for the Prevention of Pollution from Ships, 1973 as modified by the Protocol of 1978 relating thereto, adopted amendments to MARPOL 73/78 (Resolutions 1, 2 and 3), in accordance with the tacit amendment procedure specified in Article 16 of the MARPOL Convention. This tacit amendment procedure is similar to the one described in respect of SOLAS 74.

15 The prescribed period for notification of objections expired on 3 September 1995. The Amendments came into force on 3 March 1996.

16 The Amendments covered by Resolutions 1, 2 and 3 introduce extension of Port State control on operational requirements. Under these Resolutions, States may inspect ships of other States to ensure that the crews are able to carry out essential shipboard procedures relating to marine pollution prevention. Resolution 1 covers amendments to Annex I (oil pollution) and Annex II (pollution by noxious liquid substances), Resolution 2 amendments to Annex III (pollution by harmful substances in packaged form), and Resolution 3 amendments to Annex V (garbage).

17 The Assembly, at its 18th session, considered whether or not to include the November 1994 Amendments to MARPOL 73/78 in the list of instruments contained in Article 5.3 (a) of the Fund Convention. The Assembly decided not to include these Amendments in the list, because they were not considered relevant for the purposes of Article 5.3 of the Convention (document FUND/A.18/26, paragraph 23.2). However, the Assembly instructed the Director to study further the relevance of these Amendments for the purpose of Article 5.3 of the Convention (document FUND/A.18/26, paragraph 23.3).

18 Having considered this issue further, the Director considers that the Amendments contained in these Resolutions are of importance for the prevention of oil pollution in a general way. He takes the view, however, that the Amendments are not relevant for the purpose of Article 5.3 of the Fund Convention, because they allow States to extend Port State control on operational requirements, but they do not introduce any new requirements for ships to comply with. These amendments should therefore, in his view, not be included in the list of instruments contained in Article 5.3(a) of the Fund Convention.

#### **May 1995 Amendments to SOLAS 74**

19 In May 1995, the Maritime Safety Committee of IMO adopted amendments to SOLAS 74 (Resolution MSC.46(65)) in accordance with the tacit amendment procedure specified in Article VIII(b) of SOLAS 74. The prescribed period for notification of objections expired on 1 July 1996. The Amendments will enter into force on 1 January 1997.

20 Under the Amendments covered by Resolution MSC.46(65), States may make ships' routing systems mandatory when adopted and implemented in accordance with guidelines and criteria developed and adopted by IMO. A ship shall use a mandatory ships' routing system adopted by IMO as required for its category or cargo carried and in accordance with the relevant provisions in force, unless there are compelling reasons not to use a particular ships' routing system.

21 At its 18th session, the Assembly considered that the Amendments covered by the Resolution MSC.46(65) were of an important character for the purpose of the prevention of oil pollution. However, the Assembly took the view that at the time of that session it was not possible to determine whether these Amendments would enter into force and that it was therefore premature to take a decision at that session on whether to include the May 1995 Amendments in the list of instruments contained in Article 5.3(a) of the Fund Convention (document FUND/A.18/26, paragraph 23.4).

22 It has now been established that the Amendments contained in Resolution MSC.46(65) will enter into force on 1 January 1997. It is proposed, therefore, that the reference to the instrument listed in Article 5.3(a)(ii) should be amended to read as follows (amendments underlined):

- (ii) the International Convention for the Safety of Life at Sea, 1974, as modified by the Protocol of 1978 relating thereto, and as amended by Resolutions MSC.1(XLV), MSC.6(48), MSC.13(57), MSC.27(61) and MSC.46(65) and, as regards Regulations V/8-1 and V/15-1, by Resolution MSC.31(63) adopted by the Maritime Safety Committee of the International Maritime Organization on 20 November 1981, 17 June 1983, 11 April 1989, 11 December 1992, 16 May 1995 and 23 May 1994 respectively, and as amended by Resolution 1 adopted on 9 November 1988 by the Conference of Contracting Governments to the International Convention for the Safety of Life at Sea, 1974 on the Global Maritime Distress and Safety System and as amended by Resolution 1 adopted on 23 May 1994<sup><1></sup> by the Conference of Contracting Governments to the International Convention for the Safety of Life at Sea, 1974;

#### **November 1995 Amendments to SOLAS 74**

23 In November 1995, the Conference of Contracting Governments to SOLAS 74 adopted amendments to SOLAS 74 (Conference Resolution 1) in accordance with the tacit amendments procedure specified in Article VIII(b) of SOLAS 74. The prescribed period for notification of objections expires on 1 January 1997. The Amendments will enter into force on 1 July 1997, unless a sufficient number of objections have been filed.

24 The Amendments covered by Conference Resolution 1 introduce regulations to improve the safety of ro-ro passenger ships.

25 In the Director's view these Amendments do not concern the safety of oil tankers nor are they otherwise of relevance for the purpose of Article 5.3 of the Fund Convention. He proposes, therefore, that these Amendments should not be included in the list of instruments contained in Article 5.3(a) of the Fund Convention.

#### **November 1995 Amendments to the International Convention on Load Lines, 1966**

26 In November 1995, the Assembly of IMO, at its 19th session, adopted amendments to the International Convention on Load Lines, 1966 (Resolution A.784(19)) in accordance with Article 29(3)(b) of that Convention. These Amendments require explicit acceptance by a certain number of States (two thirds of the Contracting Governments) for their entry into force.

27 Under the Convention, less strict requirements apply to ships navigating in the seasonal tropical area in the South Pacific off the coast of Australia. The November 1995 Amendments extend this area to include also the Port of Gladstone and its adjacent sea area.

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<sup><1></sup> The date has been corrected by replacing 23 May 1994 with 24 May 1996.

28 The Director considers that the Amendments covered by this Resolution concern the safety of navigation for ships, including oil tankers, and are relevant for the purpose of Article 5.3 of the Fund Convention.

29 It is not possible at this stage to determine whether the Amendments covered by this Resolution will enter into force. For this reason, the Director considers it premature for the Assembly to take a decision at its 19th session on whether to include these Amendments in the list of instruments contained in Article 5.3(a) of the Fund Convention.

#### **June 1996 Amendments to SOLAS 74**

30 In June 1996, the Maritime Safety Committee of IMO adopted amendments to SOLAS 74 (Resolution MSC.47(66)) in accordance with the tacit amendment procedure specified in Article VIII(b) of SOLAS 74. The prescribed period for notification of objections expires on 1 January 1998. The Amendments will enter into force on 1 July 1998 unless a sufficient number of objections have been filed.

31 The Amendments covered by MSC.47(66) introduce new regulations concerning structural, mechanical and electrical requirements for ships, corrosion prevention of seawater ballast tanks, additional requirements as regards the stability of passenger ships in damaged conditions, subdivision and damage stability of cargo ships, life-saving appliances and arrangements, cargo information and stowage of bulk cargo.

32 In the opinion of the Director, the Amendments contained in Resolution MSC.47(66) include important provisions which concern the safety of, *inter alia*, oil tankers relevant for the prevention of oil pollution.

33 It is not possible at this stage to determine whether the Amendments covered by this Resolution will enter into force. For this reason, the Director considers it premature for the Assembly to take a decision at its 19th session on whether to include these Amendments in the list of instruments contained in Article 5.3(a) of the Fund Convention.

#### **Action to be taken by the Assembly**

34 The Assembly is invited to consider whether to include in the list of instruments contained in Article 5.3(a) of the Fund Convention:

- (a) the May 1994 Amendments to SOLAS 74 (paragraphs 8-13 above);
  - (b) the November 1994 Amendments to MARPOL 73/78 (paragraphs 14-18 above);
  - (c) the May 1995 Amendments to SOLAS 74 (paragraphs 19-22 above);
  - (d) the November 1995 Amendments to SOLAS 74 (paragraphs 23-25 above);
  - (e) the November 1995 Amendments to the International Convention on Load Lines, 1966 (paragraphs 26-29 above); and
  - (f) the June 1996 Amendments to SOLAS 74 (paragraphs 30-33 above).
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