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PROCEDURE FOR SETTLEMENT OF CLAIMS  
ARISING FROM INCIDENTS IN JAPAN

Note by the Director

Introduction

1 In order to be entitled to limit his liability, the shipowner shall, pursuant to Article V.3 of the Civil Liability Convention, constitute a fund for the total sum representing the limit of his liability. The fund shall be constituted with a court or other competent authority of any Contracting State in which action is brought under Article IX of the Civil Liability Convention. The fund can be constituted either by deposit of the sum or by producing a bank guarantee or other guarantee acceptable under the legislation of the Contracting State where the fund is constituted, and considered to be adequate by the court or other competent authority.

2 The Executive Committee, at its 10th session, took the position that compensation shall not in principle be paid to claimants in respect of an incident until the limitation fund has been set up. In one particular incident, the SHINKAI MARU N°3, the Executive Committee agreed, however, that in view of the disproportionately high legal costs that would be incurred in establishing the limitation fund, compared with the amount of liability under the Civil Liability Convention, compensation could, as an exception, be paid without the limitation fund being established. The Executive Committee expressed the view that the IOPC Fund should normally require the establishment of a limitation fund and that this requirement should be waived only in exceptional cases such as the SHINKAI MARU N°3 incident. It would, in any case, be for the Executive Committee to decide if the exceptional circumstances of a case allowed the IOPC Fund to pay compensation without the prior establishment of the limitation fund (FUND/EXC.10/5, paragraph 3.1.4).

3 In Japan, the limitation proceedings in oil pollution cases have developed on the basis of an agreement between the Japan Ship Owners' Mutual Protection & Indemnity Association (JPIA) and the IOPC Fund, entered into on 10 August 1979 in connection with

the MIYA MARU N°8 incident, the first of the IOPC Fund's Japanese cases. JPIA has, in fact, been the third party liability insurer in all 15 incidents involving the IOPC Fund which have so far occurred in Japan. All ships involved have flown the Japanese flag. In addition, it is a typical feature of these incidents that in all cases there have only been Japanese claimants.

4 However, certain problems of a practical nature have now become apparent. This document sets out the limitation proceedings in Japan. It also deals with the problem relating to the rapid payment of compensation to victims in Japan in view of the legal situation in that country.

#### Limitation proceedings under Japanese Law

5 The limitation proceedings in Japan are governed by the Law on Compensation for Oil Pollution Damage (N°95, 1975), Articles 31-38, and, by reference, the Law on the Limitation of Shipowner's Liability (N°94, 1975), Chapter 3 (some Articles excepted). These laws contain very detailed provisions concerning the limitation proceedings.

6 The limitation proceedings commence on application by the shipowner or his insurer. The application shall contain a statement by the shipowner concerning the cause of the incident in order to show that the incident did not result from the shipowner's actual fault or privity. It has also to be shown that the aggregate amount of the claims will exceed the limitation amount.

7 The Japanese legislation does not foresee the deposit of the sum equivalent to the limit of the shipowner's liability until the court is satisfied that the application for limitation should be granted. The court must first establish that the total damage exceeds the limitation amount and that the incident was not caused by the actual fault or privity of the shipowner. If it is clear that the total damage arising out of the incident falls below the limitation amount, the application should be rejected. The court may at this first stage of the limitation proceedings require prima facie evidence showing that the incident was not caused by the actual fault or privity of the shipowner.

8 When the amount corresponding to the limit of liability is deposited, the court will decide to commence the limitation proceedings. It is explicitly provided that the limitation proceedings become effective as from the moment of that decision. It appears, therefore, that the effects of Articles V and VI of the Civil Liability Convention will not arise until that decision has been rendered. When the commencement of limitation proceedings has been ordered, the court appoints a liquidator, decides on a period for the submission of claims against the limitation fund and fixes a date for the examination of the

claims. Information about the decision has to be announced in the official gazette.

9 The limitation proceedings may, under Japanese law, be terminated only with the consent of all parties concerned, ie all claimants who have intervened in the limitation proceedings, the insurer and the IOPC Fund. These proceedings are normally terminated after the expiry of the period fixed by the court for the submission of claims against the limitation fund. In most cases the limitation proceedings are terminated with the consent of all claimants, JPIA and the IOPC Fund, when a general agreement on the settlement of claims has been reached.

#### Practice of the IOPC Fund

10 Under the procedure agreed in 1979 between the IOPC Fund and JPIA on the occasion of the settlement of the claims arising out of the MIYA MARU N°8 incident, the limitation proceedings are suspended immediately after the application for the commencement has been filed. This procedure was devised in order to enable the IOPC Fund to intervene in the limitation proceedings if the official investigation into the cause of the incident were to show that the incident occurred as a result of the actual fault or privity of the shipowner (FUND/EXC.2/5, page 6, fourth paragraph). It was thus considered to be in the interest of the IOPC Fund to be able to produce evidence and to submit arguments in the proceedings. The claimants may not have any interest in attempting to break the limitation, as they will in any case be compensated in full by JPIA and the IOPC Fund.

11 As was reported to the Executive Committee at its 2nd session, the purpose of the procedure laid down in the 1979 Agreement was to facilitate the quick settlement of claims, especially in relation to fishery claims, as the fishermen depend on regular income from the sea for their livelihood (document FUND/EXC.2/5, page 6, last paragraph). The fishery claims account for a substantial part of the claims against the IOPC Fund arising out of Japanese incidents. Although the 1979 Agreement only relates to the MIYA MARU N°8 incident, the principles on which that Agreement was founded have been considered by both JPIA and the IOPC Fund as the basis for the claims settlement procedures also for other incidents in Japan.

12 The procedure developed by the Director for the settlement of claims was discussed by the 5th Intersessional Working Group. The Group expressed agreement, both in general and in detail, with this procedure (FUND/A.4/10, paragraph 6). At its 4th session, the Assembly generally endorsed the results of the Working Group's discussions (FUND/A.4/16, paragraph 13).

13 It should be noted that the Law on Compensation for Oil Pollution Damage does not contain any explicit provision

concerning the suspension of limitation proceedings. However, it explicitly gives the IOPC Fund the right to intervene in these proceedings.

14 While the limitation proceedings are suspended, out of court negotiations on the claims settlement are carried out. Third party claims are settled with the consent of JPIA and the IOPC Fund. JPIA pays compensation in respect of the accepted claims up to an amount corresponding to the shipowner's liability under the Civil Liability Convention, whereas the IOPC Fund pays the balance of these claims (cf FUND/EXC.2/5, page 7, second paragraph). As a matter of fact, JPIA actually pays the third party claims in full. The IOPC Fund, therefore, reimburses the total amount which JPIA has paid to claimants minus the amount of the shipowner's limitation of liability. Indemnification to the shipowner is not paid by the IOPC Fund until the official investigation into the cause of the incident has been completed by the Maritime Accident Investigation Agency (MAIA), so that the IOPC Fund can establish whether there is any ground for refusing the payment of such indemnification.

15 When all claims arising out of the incident have been settled and the official investigation into the cause of the incident has been completed by MAIA, the limitation proceedings are recommenced; this is done when the shipowner has withdrawn his petition to suspend the limitation proceedings. After the recommencement, the Court will apply the formal procedure laid down in the Law on Compensation for Oil Pollution Damage (paragraphs 5 - 9 above). It is not until this stage, ie in connection with the formal limitation proceedings, that the shipowner or his insurer deposits the sum representing the limitation amount. The official investigation by MAIA into the cause of the incident takes on average 12 - 18 months. Compensation is normally paid by JPIA and the IOPC Fund much earlier. For this reason, the recommencement of the limitation proceedings and the actual deposit of the limitation amount take place considerably later than these payments.

16 There has so far been no case in which a claimant not previously known to JPIA and the IOPC Fund has filed a claim against the limitation fund during the limitation proceedings. This is so because the Marine Accident Pollution and Surveying Service Ltd (MAPSS), the surveyors dealing with the Japanese claims, have a very good knowledge of the cases and the claimants; MAPSS is involved in every incident from an early stage.

#### Director's Proposal

17 The Director is of the opinion that the procedure applied so far in respect of the settlement and payment of claims in Japanese cases should be used also in the future. In his view, it has been shown that this procedure is satisfactory to everybody concerned. In addition, it does not give rise to any financial risks for the IOPC Fund.

18 If the IOPC Fund were to defer payments of compensation to claimants, eg Japanese fishermen's co-operative associations, until the official investigation into the cause of the incident was concluded and the limitation amount was paid into the court, this would delay payments for a considerable period of time, often two years or even longer. It appears that this would not be acceptable as it is important that compensation to victims of pollution damage is paid quickly. It is also the duty of the IOPC Fund under the Fund Convention to compensate victims rapidly. The rapid settlement of Japanese incidents has in many cases contributed to settlements at lower amounts than would otherwise have been possible. It should be noted that the procedure followed so far has never caused any problems to the IOPC Fund. The Director has, therefore, tried to work out a practical method of dealing with this problem without entailing any additional financial risk for the IOPC Fund.

19 A solution that has been discussed between the Director and JPIA is that JPIA would issue a formal letter of undertaking to the IOPC Fund in respect of each incident involving a ship entered with JPIA, to the effect that JPIA would guarantee the payment into the court of the shipowner's limitation amount if and when the IOPC Fund requests such a payment be made. JPIA would further guarantee that if it were established by the competent Japanese court that the shipowner was not in fact entitled to limit his liability, JPIA would refund the amounts that the IOPC Fund would have paid to claimants in respect of claims relating to that particular incident. A corresponding guarantee was given in respect of the MIYA MARU N°8 incident. It has always been understood that the same guarantee would apply also in other Japanese cases, in spite of the fact that no formal guarantee had been given. It is envisaged that the present procedure under which the IOPC Fund pays compensation via JPIA, with the deduction of the limitation amount applicable to the shipowner, would be continued.

20 The Director is of the opinion that such a procedure would be fully satisfactory from the point of view of the IOPC Fund. Such a letter of undertaking would guarantee that the IOPC Fund would not ultimately have to pay compensation if it is established that the shipowner is not entitled to limit his liability. Such a letter would, in fact, as regards the IOPC Fund, have the same effect as the setting up of the limitation fund under Article V.3 of the Civil Liability Convention.

21 It is suggested that the Director be authorized to deal with the Japanese incidents in accordance with the procedure described in this document.

#### Action to be Taken by the Executive Committee

22 The Executive Committee is invited to consider the information given in this document and to take such decision as it considers appropriate.

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