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REPORT OF THE THIRD INTERSESSIONAL WORKING GROUP

DRAFT PROTOCOL ESTABLISHING A SUPPLEMENTARY COMPENSATION FUND

Submitted by the Japanese delegation

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| Summary: | Japan has considered the text of the draft Protocol on the Establishment of a Supplementary Compensation Fund revised by the Director as contained in the document 92FUND/A.6/4/1. With regard to the draft Protocol, Japan wishes to express the view that more appropriate measures, such as capping, should be incorporated so that larger number of States may join the Supplementary Fund. |
| Action to be taken: | The Assembly is invited to consider the proposals of the revisions presented in this paper and to revise the draft as it deems appropriate. |

1 Background

- 1.1 At the third Intersessional Working Group held in June 2001, Japan expressed its view that the Establishment of a Supplementary Compensation Fund should be considered carefully by reason that it did not see the need for increasing the maximum amount available over and above the amount of 203 million SDR which would be applied from 1 November 2003.
- 1.2 A number of delegations supported the establishment of such a Fund from the viewpoint of full compensation for oil pollution victims.

2 Proposals for mitigation of contributions

- 2.1 Japan considers that, although the Supplementary Fund is to be established on a voluntary basis, it would be important for other States to join the Fund so that it could work efficiently to the fullest extent. For this purpose, it would also be essential, when it is established, to prepare for some mitigating measures, with that measures, countries otherwise heavily burdened could accede to the new scheme without great difficulty. In this context we strongly believe that the most appropriate measure is capping.
- 2.2 In considering the specific provisions for a Supplementary Fund, it is necessary to add provisions which stipulate capping as a mitigating measure. The following provision should be added to the draft Protocol.

Transitional Provisions

(New Article to be inserted after Article 10)

1. *The aggregate amount of the annual contributions payable in respect of contributing oil received in a single Contracting State during a calendar year shall not exceed []% of the total amount of annual contributions to be made pursuant to the Protocol of the Supplementary Fund in respect of that calendar year.*
2. *If, under the provisions in paragraphs 2 and 3 of Article 10, the aggregate amount of the contributions payable by contributors in a single Contracting State in respect of a given calendar year exceeds []% of the total annual contributions, the contributions payable by all contributors in that State shall be reduced pro rata so that their aggregate contributions equal []% of the total annual contributions to the Supplementary Fund in respect of that year.*
3. *If the contributions payable by persons in a given Contracting State shall be reduced pursuant to paragraph 2 of this Article, the contributions payable by persons in all other Contracting States shall be increased pro rata so as to ensure that the total amount of contributions payable by all persons liable to contribute to the Supplementary Fund in respect of the calendar year in question will reach the total amount of contributions decided by the Assembly.*

3 Proposals and comments for other revisions of the draft protocol

3.1 Article 4.2(b)

Since the proposed Supplementary Fund scheme aims at full compensation for the largest amount of damages at the reasonably foreseeable level caused by an oil pollution accident, which means the amount of the oil received per year would not affect the amount of damages, the provision which establishes an additional tier for compensation should be deleted from the draft Protocol.

3.2 Article 4.4

For the sake of clarity, the following addition should be made to the original text.

Furthermore, Article 4.4 is not sufficiently clear as to when and under which conditions the Supplementary Fund would be obliged to pay compensation. In view of the functions of the Supplementary Fund which only supplements the compensation payable under the 1992 Fund, the 1992 Fund has to decide first whether the total amount of the established claims exceeds the aggregate amount of compensation payable under the 1992 Fund, and express provisions are necessary as to when and under which conditions the Supplementary Fund pays compensation. The following provision would possibly be added:

The Supplementary Fund shall pay compensation under the conditions that;

- *the 1992 Fund, based on the decision of the Assembly, concludes that the total amount of the established claims will exceed the aggregate amount of compensation payable under Article 4, paragraph 4 of the 1992 Fund Convention, and*
- *the amount of compensation which will not be covered under the 1992 Fund Convention can be assessed with certainty and precision.*

The amount of compensation paid from the Supplementary Fund shall be decided by the Assembly of the Supplementary Fund, based on the decision on the amount of compensation made by the 1992 Fund.

3.3 **Article 5**

It seems unclear whether a claimant shall make a claim for damages both against the Supplementary Fund and against the 1992 Fund, or whether the claimant is to make such a claim only against the 1992 Fund, in which case the claim against the 1992 Fund is construed to mean that the claimant also made a claim against the Supplementary Fund. In the latter case, the following paragraph should be added to this Article:

Article 5.2

A claim which a claimant made against the 1992 Fund shall be regarded as a claim which the same claimant made against the Supplementary Fund under the scheme of the Supplementary Fund.

3.4 **Article 12**

“The Director of the Supplementary Fund” in this article should be modified to “the Director,” because the term has already been defined in Article 2.2.

3.5 **Article 15**

Since it is very likely that the interest of the Supplementary Fund will contradict that of the 1992 Fund, if the Director or the Secretariat of the Supplementary Fund also functions as the Secretariat and the Director of the 1992 Fund, they must act in good faith for the best interest of the Supplementary Fund. The resolutions or other appropriate measures to this effect need to be considered for the clear and transparent management on each side of the two funds.

The article to be added would be as follows:

(Article to be inserted after Article 17)

1. *The Secretariat of the 1992 Fund, headed by the Director of the 1992 Fund, may also function as the Secretariat and the Director of the Supplementary Fund.*
2. *If, in accordance with paragraph 1, the Secretariat and the Director of the 1992 Fund also perform the function of Secretariat and Director of the Supplementary Fund, the Supplementary Fund shall be represented, in cases of conflict of interests between the 1992 Fund and the Supplementary Fund, by the Chairman of the Assembly of the Supplementary Fund.*
3. *The Director and the staff and experts appointed by him, performing their duties under this Protocol and the 1992 Fund Convention, shall not be regarded as contravening the provisions of Article 30 of the 1992 Fund Convention applied by Article 15.2 of this Protocol in so far as they discharge their duties in accordance with this Article.*
4. *The Assembly of the Supplementary Fund shall endeavour not to take decisions which are incompatible with decisions taken by the Assembly of the 1992 Fund. If differences of opinion with respect to common administrative issues arise, the Assembly of the Supplementary Fund shall try to reach a consensus with the Assembly of the 1992 Fund, in a spirit of mutual co-operation and with the common aims of both organizations in mind.*
5. *The Supplementary Fund shall reimburse the 1992 Fund all costs and expenses arising from administrative services performed by the 1992 Fund on behalf of the 1992 Fund.*

The 1992 Fund Convention might be revised or a resolution may be necessary to ensure that the same measures are to be taken on the 1992 Fund Convention.

3.6 **Article as to the criteria for admissibility of claims**

Since the admissibility of claims under the Supplementary Fund should be as strict as that under the 1992 Fund, the following provision should be inserted:

In considering claims, the Supplementary Fund shall apply the same criteria for admissibility as those applied by the 1992 Fund and to the extent possible follow the same procedures as the 1992 Fund.

3.7 **Article 20.1 and (a)**

Twelve months should be given for the Parties to conduct necessary work for domestic legislations between the time of the fulfillment of requirements and the entry into force, as is the case of the 1992 Fund.

As to the number of States which is necessary for the entry into force, it should be eleven States which proposed the scheme of this Supplementary Fund.

3.8 **Article 24**

This article seems to intend that the increase of the limits of the 1992 Fund should automatically increase the limit of the Supplementary Fund by the same amount through tacit procedure. Since the limit of the Supplementary Fund should be considered from the viewpoint of the nature of the Supplementary Fund independently of the limit of the 1992 Fund, this article should be deleted.

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

The Assembly is invited to consider proposals and revise the draft Protocol as appropriate.
