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COMPENSATION  
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WORKING GROUP  
Agenda item 2

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## REVIEW OF THE INTERNATIONAL COMPENSATION REGIME

**Submitted by INTERTANKO and the International Chamber of Shipping**

**Summary:** The shipping industry supports the introduction of an international third tier funded by oil interests and concurrently the proposal to increase voluntarily the minimum 1992 CLC limit. The impact on the current balance between shipowners and oil receivers in funding the costs of compensation should be assessed on the basis of claims experience after the third tier has been in operation for a number of years. The shipping industry also supports the adoption of an Assembly resolution clarifying the broad scope of the existing provisions with regard to environmental damage.

**Action to be taken:** Information to be noted.

### **1 Introduction**

- 1.1 The IMO decision to substantially increase the limits of the 1992 CLC and Fund Conventions in October 2000 (effective 1 November 2003) was fully supported by the shipping industry. The international system is highly successful and has generally served victims well over the years. However, shipowners recognise that the need to restrict the level of payments in respect of established claims in major incidents until the total amount of compensation payable is known is seen as a weakness in the scheme which threatens its credibility. Likewise, we recognise that established claims in recent major incidents approach – and, in the case of the *Erika*, are likely to exceed - the existing limits.
- 1.2 Shipowners support the view that victims of oil pollution incidents should receive prompt and adequate compensation even in the most serious oil spill incidents. As an international industry we strongly favour international solutions. We therefore regard the decision to establish an optional international third tier of compensation funded by oil receivers in States parties to the optional scheme as a pragmatic response to the call from some States for an increase in the overall level of compensation. The proposed international Supplementary Fund is supported by INTERTANKO and ICS, not least because it will assist in protecting the international system

from being undermined by regional initiatives and it will cause minimal disruption to the underlying liability and compensation regime. At the same time, we recognise that there is a legitimate concern that the limit of the opt-in third tier should be realistic and that it should not be set at such a high level that it becomes an impediment to ratification.

## **2 Sharing the Burden**

- 2.1 In recognition of the oil industry's concerns about the possible effects of the proposed Supplementary Fund on the concept of equitable sharing of the costs of compensation between shipowners and oil receivers, the shipping industry has co-operated with the International Group of P&I Clubs in the development of its proposal to increase voluntarily the limits of liability for small ships in States which adopt the third tier (see document 92FUND/WGR.3/11/1). The proposal has our support, notwithstanding the impact that it and the November 2003 increases in the 1992 CLC limits may be expected to have on the current balance between shipowners and oil receivers. The shipowner alone meets the great majority of oil pollution claims (95% historically) without recourse to the IOPC Fund. Increased 1992 CLC limits may be expected to result in more claims being met by the shipowner alone. It must also be remembered that shipowners have a continuing requirement to meet the cost of oil pollution insurance. All shipowners are obliged to maintain insurance at a relatively high cost to cover their legal liability for oil pollution. If cargo interests elect not to insure their exposure under the proposed Supplementary Fund Convention, their argument that they could be exposed to a substantial costs does not appear to be persuasive.
- 2.2 It should be stressed that shipowners' support for the small ships proposal is based on the understanding that the oil industry will be required to fund the optional Supplementary Fund. The shipping industry can see no justification for the suggestion that amendments should be made to 1992 CLC to provide for shipowner contributions to the third tier as proposed in the paper submitted by OCIMF (document 92FUND/WGR.3/11/2).

## **3 The Supplementary Fund**

- 3.1 In our view it is clearly premature and flawed to conclude that an optional third tier funded entirely by oil receivers would undermine the current balance between shipping and oil interests in the CLC/Fund regime. This will depend on many factors, including the number and cost (clean-up and damage) of individual incidents, as well as the tonnage of the tankers involved. Crucially, it will also depend upon the location of spills since this will determine the applicable liability and compensation regime. In this context it is relevant to note that claims history suggests that a third tier over and above the 2003 CLC and Fund limits would rarely if ever be called upon, i.e. its very existence would remain theoretical unless/until there was a major incident. On the other hand, the financial effect of the 2003 increases and the proposed voluntary increases in the small ships' limits would be very real indeed for the shipping industry as a whole since they can expect to be called upon frequently.
- 3.2 As we have observed in previous discussions on the subject, proposals for shipowner contributions to the proposed Supplementary Fund could only be implemented by way of amendments to 1992 CLC. However, amending 1992 CLC to provide for shipowner contributions to the Supplementary Fund, as proposed by OCIMF, would likely be a complex and lengthy process, necessitating a review of fundamental features and inherent "trade-offs" of the current system. Compromises and "packages" would need to be opened and unravelled which would be unwelcome to all sectors of the industry and divisive among Contracting States. In this connection, by way of example, we refer to the basis of liability (strict liability), the channelling provisions, the compulsory insurance requirements, direct action against insurers, the test for breaking limitation and environmental liability.
- 3.3 The proposal for shipowner contributions to the Supplementary Fund has implications for the entire system. In the current system there is no charterer liability, with oil receivers instead

contributing to the Fund. However, if shipowners were required to contribute to the Supplementary Fund in addition to their strict and limited liability under 1992 CLC, fundamental principles would be departed from, and the position of charterers would need to be reviewed. The principle of limitation would be rendered meaningless because shipowners would be exposed to greater liabilities in the Supplementary Fund. Why then should other principles, such as channelling of liability to the shipowner which shields charterers from direct liability, be preserved?

- 3.4 In addition, the proposal for shipowner contributions to the Supplementary Fund raises complicated treaty law issues which would need to be resolved. Some of these issues, and related policy issues, were identified in the paper submitted to the third session of the Working Group by Australia et al. (document 92FUND/WGR.3/8/4). They include problems arising from the difference in treatment of ships. It may be difficult for States to accept that ships from States parties to the Supplementary Fund would be subject to higher liabilities than ships from States parties to 1992 CLC. Higher limits could only be imposed on ships flying the flag of a State Party to the Supplementary Fund or of a State not party to the 1992 Conventions. This could result in shipowners choosing to flag their ships in States which were not parties to the Supplementary Fund.
- 3.5 As noted in document 92FUND/WGR.3/8/4, it is possible to create a system whereby States could impose the proposed higher limits on all ships, even those from States parties to 1992 CLC. But that would require all States parties to 1992 CLC to ratify amendments to the Convention. States which were content with the 2003 increased limits may be reluctant to accept a solution which would entail their participation in the funding of the Supplementary Fund.

#### **4 Safety and Quality**

- 4.1 The key to the success of the international liability and compensation regime is the fact that its sole purpose is the prompt and adequate compensation of victims. It was never designed to be a "moral" regime and as such it is not directed at the punishment of ship operators or cargo interests including charterers, or at the elimination of substandard shipping. Other specifically tailored international instruments, primarily SOLAS (including the specific provisions on ISM) and MARPOL, but also classification certification are directed at the enhancement of safety and environmental protection.
- 4.2 Of course the shipping industry welcomes any ancillary beneficial effect that the liability and compensation regime may have on safety and quality. However, should the international community decide that the focus of the regime should shift from prompt and adequate compensation of victims to ship safety and quality, the responsible behaviour of all players must be encouraged. Substandard ships would not exist if there was no market for them. The economic considerations of cargo interests determine which cargoes (highly polluting or otherwise) are transported to which regions (highly environmentally sensitive or otherwise) on which ships (high quality or otherwise). Higher levels of compensation are often required due to the nature of the cargo transported, or the particular sensitivity of the waters through which such cargoes are transported. Influence on such factors is not achieved through simplistic measures aimed at the shipowner alone. To address these factors more complex measures would need to be considered.
- 4.3 Attempts to change the focus of the international compensation regime to address issues of safety and quality also ignore the fact that many of the world's most costly spills over the years have involved "good" ships operated by high quality independent and oil company tanker owners. Furthermore, we do not accept the contention that the accelerated phase out of smaller single hulled vessels and the tighter voluntary inspection regimes of charterers will affect the current balance between shipowners and oil receivers by greatly reducing the number of small, low cost spills that fall exclusively under the 1992 CLC. Published statistics demonstrate conclusively that the majority of such small spills occur during routine operations such as loading and discharging

cargo or bunkering rather than by collisions or groundings. The compelling attraction of the current regime is that the victim is compensated whatever the origins of the spill.

- 4.4 However well meaning, the unfortunate consequence of including safety and quality incentives in the Conventions would be delay in the compensation of victims as is well explained in the paper submitted by the International Group (document 92FUND/WGR.3/11/1).

## **5 Environmental Damage**

The shipping industry supports the paper submitted by Australia *et al* (document 92FUND/WGR.3/11/3) and the proposal to clarify the broad scope of the existing provisions regarding environmental damage by an Assembly resolution.

## **6 Conclusion**

The shipping industry strongly believes that the proposed Supplementary Fund can in reality only be funded by the oil industry and that nothing should be allowed to jeopardise the continuation of the highly successful international liability and compensation regime. We fully support the paper submitted by the International Group of P&I Clubs (document 92FUND/WGR.3/11/1) and join with them in respectfully urging States to consider whether further revision can really be justified once the Protocol introducing the Supplementary Fund has been agreed and the voluntary minimum limit put in place. The impact on the current balance between shipowners and oil receivers can only be assessed in the light of claims experience after the third tier has been in operation for a number of years.

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