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COMPENSATION
FUND 1992

THIRD INTERSESSIONAL
WORKING GROUP
Agenda item 2

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REVIEW OF THE INTERNATIONAL COMPENSATION REGIME

UNIFORM APPLICATION OF THE CONVENTIONS

Note by the Director

Summary: The document deals with certain provisions in the 1992 Conventions in respect of which it is felt that in the past the Conventions have not been applied in a uniform manner or difficulties have arisen as a result of the relationship between the Conventions and national law, namely channelling of liability, time bar, enforcement of judgements, jurisdiction and distribution of the amounts available for compensation. Various options to enhance uniform application are discussed.

Action to be taken: Information to be noted.

1 Introduction

The issue of uniform implementation of the Conventions was considered at the Working Group's second and third meetings (document 92FUND/A.6/4, section 25). At its third meeting the Working Group considered a document submitted by the Director (document 92FUND/WGR.3/8), in which he dealt with certain provisions in the Conventions in respect of which he felt that in the past the Conventions had not been applied in a uniform way or difficulties had arisen as a result of the relationship between the Conventions and national law, namely channelling of liability, time bar, enforcement of judgements, jurisdiction and distribution of the amounts available for compensation. These issues are dealt with in Sections 2 – 6 ^{<1>}.

2 Channelling of liability

- 2.1 The issue of channelling of liability is governed by Article III.4 of the 1969 Civil Liability Convention and the 1992 Civil Liability Convention, respectively. These provisions read:

<1> Sections 2-5 of this document largely correspond to document 92FUND/WGR.3/8

Article III.4 of the 1969 Civil Liability Convention

No claim for compensation for pollution damage shall be made against the owner otherwise than in accordance with this Convention. No claim for pollution damage under this Convention or otherwise may be made against the servants or agents of the owner.

Article III.4 of the 1992 Civil Liability Convention

No claim for compensation for pollution damage may be made against the owner otherwise than in accordance with this Convention. Subject to paragraph 5 of this Article, no claim for compensation for pollution damage under this Convention or otherwise may be made against:

- (a) the servants or agents of the owner or the members of the crew;
- (b) the pilot or any other person who, without being a member of the crew, performs services for the ship;
- (c) any charterer (howsoever described, including a bareboat charterer), manager or operator of the ship;
- (d) any person performing salvage operations with the consent of the owner or on the instructions of a competent public authority;
- (e) any person taking preventive measures;
- (f) all servants or agents of persons mentioned in subparagraphs (c), (d) and (e);

unless the damage resulted from their personal act or omission, committed with the intent to cause such damage, or recklessly and with knowledge that such damage would probably result.

- 2.2 In spite of these provisions in the 1969 Civil Liability Convention (Article III.4) prohibiting claims against the servants or agents of the shipowner, national courts have held the master personally liable for pollution damage. The courts arrived at this result because claims for compensation based on the Conventions were filed in criminal proceedings and since a person held criminally liable for a given event is automatically civilly liable for the same event. In one of these cases, the master, the shipowner's insurer and the 1971 Fund were held primarily liable whereas the registered owner was held subsidiarily liable, although it is clear from Article III.1 of the 1969 Civil Liability Convention that the shipowner is the person primarily liable. There is a risk that national courts may arrive at a similar result in respect of cases falling under the 1992 Civil Liability Convention.

3 Time bar

- 3.1 The relevant provisions in the Conventions on time bar read:

Article VIII of the 1969 Civil Liability Convention and the 1992 Civil Liability Convention

Rights of compensation under this Convention shall be extinguished unless an action is brought thereunder within three years from the date when the damage occurred. However, in no case shall an action be brought after six years from the date of the incident which caused the damage. Where this

incident consists of a series of occurrences, the six years' period shall run from the date of the first such occurrence.

Article 6 of the 1971 Fund Convention and the 1992 Fund Convention

1. Rights to compensation under Article 4 *or indemnification under Article 5* ^{<2>} shall be extinguished unless an action is brought thereunder or a notification has been made pursuant to Article 7, paragraph 6, within three years from the date when the damage occurred. However, in no case shall an action be brought after six years from the date of the incident which caused the damage.

2. Notwithstanding paragraph 1, the right of the owner or his guarantor to seek indemnification from the Fund pursuant to Article 5, paragraph 1, shall in no case be extinguished before the expiry of a period of six months as from the date on which the owner or his guarantor acquired knowledge of the bringing of an action against him under the Liability Convention^{<3>}.

- 3.2 Some Fund Member States have not implemented in their national law the exact texts of the time bar provisions in the Conventions but have reworded the provisions in their national statutes, thereby changing their substantive contents. In addition, the courts in some States tend to interpret the time bar provisions in conjunction with provisions and principles on time bar in their national law. This problem is of particular importance in States where claims for compensation may be brought in both civil and criminal actions. In one Member State once a criminal action has been brought in respect of a particular event, the running of time bar periods is suspended until the criminal action has been brought to an end by a final judgement.
- 3.3 The main question is whether (as the Funds have maintained) the three-year time period from the date of the damage is absolute, or whether, as has been suggested in some Member States, the period can be extended or suspended through the application of general domestic law relating to time bar or prescription. There have also been different views expressed as to whether the three-year period can be interrupted by legal steps other than the bringing of an action for compensation or through notification in accordance with Article 7.6 of the Fund Conventions. It is important in the Director's view that the provisions on time-bar in the 1992 Conventions are applied in a uniform manner in all 1992 Fund Member States.

4 Enforcement of judgements against the 1992 Fund

- 4.1 The enforcement of judgements rendered by national courts against the Funds is governed by Article 8 of the 1971 and 1992 Fund Conventions respectively. Articles 4.5 and 18.7 are also relevant in this regard. These provisions read:

Article 4

5. Where the amount of established claims against the Fund exceeds the aggregate amount of compensation payable under paragraph 4, the amount available shall be distributed in such a manner that the proportion between any established claim and the amount of compensation actually recovered by the claimant under *the Liability Convention and* ^{<4>} this Convention shall be the same for all claimants.

<2> The words in italics do not appear in the 1992 Fund Convention.

<3> This subparagraph does not appear in the 1992 Fund Convention.

<4> The words in italics do not appear in the 1992 Fund Convention.

Article 8

Subject to any decision concerning the distribution referred to in Article 4, paragraph 5, any judgement given against the Fund by a court having jurisdiction in accordance with Article 7, paragraphs 1 and 3, shall, when it has become enforceable in the State of origin and is in that State no longer subject to ordinary forms of review, be recognized and enforceable in each Contracting State on the same conditions as are prescribed in Article X of the 1992 ^{<5>}Liability Convention.

Article 18

The functions of the Assembly shall, *subject to the provisions of Article 26^{<6>}*, be:

7. to approve settlements of claims against the Fund, to take decisions in respect of the distribution among claimants of the available amount of compensation in accordance with Article 4, paragraph 5, and to determine the terms and conditions according to which provisional payments in respect of claims shall be made with a view to ensuring that victims of pollution damage are compensated as promptly as possible;

- 4.2 In one case it became apparent that the national system for the enforcement of judgements had not been adapted so as to take into account the provisions of the 1971 and 1992 Fund Conventions referred to above. The national law does not contain any specific provision to the effect that the courts shall consider whether payments have to be pro rated or take into account decisions rendered by the competent Fund body in accordance with Article 4, paragraph 5 on pro rating. It was argued that the decisions by the national courts in respect of individual claims shall always be enforceable in full against the Fund, notwithstanding the provision in Article 8 ('subject to any decision concerning the distribution referred to in Article 4, paragraph 5'). This problem may arise also in other States, in particular in States where claims for compensation arising out of the same incident may be pursued in several courts, for example in both civil and criminal courts. If courts ignore the provisions on pro-rating this could result in claimants whose claims are approved by the courts shortly after an incident being paid in full, whereas claimants whose claims are approved later would not receive any payment since the total amount available for compensation has already been used.

5 Jurisdiction

An additional problem encountered by the IOPC Funds is that of jurisdiction. The Conventions only govern the distribution of jurisdiction between various States but do not deal with the competence of courts within the State where the pollution damage occurred. In some countries this may result in several courts being competent to hear claims relating to the same incident. In one case litigation was pursued in five courts at various levels. It may be appropriate, therefore, for States to consider when implementing the Conventions whether it would be appropriate to provide in the national law that all claims falling under the Conventions arising from the same incident should be heard by the same court.

6 Distribution of the amounts available for compensation

Many States have not included in their national law provisions on the procedures to be applied for the distribution of the shipowner's limitation fund between claimants, which may give rise to problems. Similarly, many States have not included in their national law any provisions on the distribution of the amount payable by the 1992 Fund. This may cause difficulties for the courts if the amount available is insufficient to pay all claimants in full. This may in particular be the case

^{<5>} The 1971 Fund Convention does not contain the expression '1992'.

^{<6>} The words in italics do not appear in the 1992 Fund Conventions.

if an incident causes pollution damage in more than one State. Also in that situation, Article 4 paragraph 5 of the 1992 Fund Convention should be respected. Should the 1992 Conventions be revised, it might be appropriate to consider inserting provisions dealing with these issues.

7 Previous consideration of these issues by the Working Group

- 7.1 At its third meeting the Working Group considered that uniformity of implementation and application of the Conventions was crucial to the equitable functioning of the international compensation regime and to equal treatment of claimants in various Fund Member States. It was recognised that States used different methods for implementing international treaties in their national legal system. It was noted that it was often not the implementation of the 1992 Conventions that was the problem but rather the application of the relevant provisions in the national statutes.
- 7.2 During the discussions at the Working Group's fourth meeting a number of delegations emphasised the importance of uniform application of the Conventions. It was recognised, however, that this was a difficult issue since national courts were sovereign in their interpretation of the Conventions, although they often lacked relevant experience. It was suggested that if more information were made available to Member States and national courts on decisions by the IOPC Funds' governing bodies relating to the criteria for admissibility of claims and on other aspects concerning the interpretation of the Conventions, this might contribute to a uniform interpretation. It was further suggested that it might be useful if the IOPC Funds could make available on their website a collection of decisions by national courts relating to the interpretation of the Conventions.
- 7.3 The Director mentioned that consideration was already being given to the creation of a database of important decisions by the Assemblies and Executive Committees relevant to the interpretation of the Conventions and the admissibility of claims.
- 7.4 One delegation mentioned that IMO had elaborated an explanatory document entitled 'Unified Interpretation' which had been published together with the MARPOL 73/78 Convention and which had proven effective in achieving a high level of consistency in the application of that Convention by national administrations and courts. That delegation suggested that the 1992 Fund should develop along the same lines a formal explanatory document on the 1992 Conventions which would be published by the Fund together with the Conventions.
- 7.5 It was suggested by a number of delegations that consideration should be given to the adoption by the 1992 Fund Assembly of a Resolution on uniformity of interpretation and application of the Conventions.
- 7.6 In summing up the discussions the Chairman stated that there was general agreement that uniform interpretation and application of the 1992 Conventions was crucial for the functioning of the international compensation regime. He suggested that the IOPC Funds might consider including on their website information on decisions by national courts on the interpretation and application of the Conventions as well as on important decisions by the IOPC Funds' governing bodies in this regard. He also stated that the proposal to adopt a suitably-worded Assembly Resolution on this issue had received considerable support and should be considered further.

8 Director's considerations

- 8.1 In the Director's view uniform interpretation and application of the Conventions is crucial for a proper and equitable functioning of the international compensation regime. The Director recognises, however, that it is difficult to find a solution which would ensure uniformity. This is due to several factors, as discussed at the Working Group's previous meetings (cf paragraphs 6.1 and 6.2 above). It should also be noted that the difficulties encountered by national courts may differ dependent upon whether under the applicable legal system Conventions apply directly as

part of national law (monistic system) or are implemented by means of a national statute (dualistic system).

- 8.2 One option which might be considered would be to make the provisions in the Conventions more precise, thereby reducing the scope for national courts to arrive at varying interpretations. This could be done by amending the provisions dealt with in paragraphs 2-6 above. Texts of possible amendments to some provisions to this effect are set out in the Annex. These provisions have been drafted purely for the purpose of illustrating the issues involved and do not constitute proposals by the Director for amendments to the Conventions.
- 8.3 It must be recognised, however, that it would be impossible to be so precise in the text of a Convention as to ensure uniformity in all cases. It is also impossible, when drafting provisions in Conventions, to foresee how these provisions would be implemented and applied in various Contracting States. Furthermore, it is often difficult to find a wording which would be given the same interpretation by courts with varying legal traditions.
- 8.4 In the Director's view it is important that States when implementing the Conventions in national law consider carefully how the provisions of the Conventions relate to other provisions in their domestic law, so as to prevent an application which in fact is at variance with the Conventions. It may be necessary to consider for example the relation between civil liability and criminal liability, or between the time bar provisions in the Conventions and other provisions or jurisprudence on time bar in national law.
- 8.5 When implementing Conventions special attention should, in the Director's view, be given to cases where pollution damage is caused in several Contracting States, in order to ensure a correct distribution of the shipowner's limitation fund and the amount payable by the 1992 Fund.
- 8.6 In this context attention is drawn to the Report of the 7th intersessional Working Group set up by the 1971 Fund Assembly. That Working Group took the view that national courts should, when making decisions on the interpretation of the definitions of 'pollution damage' and 'preventive measures', take into account the fact that these definitions were laid down in international treaties. It was argued by some delegations that the decisions taken by the IOPC Fund Assembly and Executive Committee should be considered as constituting agreements between the Parties to the Fund Convention on the interpretation of these definitions in accordance with Article 31.3(a) and (b) of the Vienna Convention on the Law of Treaties (document FUND/A.17/23, paragraph 7.1.4). The Working Group's report was endorsed by the 1971 Fund Assembly at its 17th session held in October 1994 (document FUND/A.17/35, paragraph 26.8).
- 8.7 One option which was mentioned during the discussions in the Working Group could be to insert a provision in the 1992 Fund Convention to the effect that national courts should take into account decisions by the 1992 Fund governing bodies on the interpretation of the 1992 Conventions. The question is, however, whether such a provision would be acceptable to the Member States.
- 8.8 At the 1992 Fund's Working Group's fourth meeting it was suggested that if more information were made available to Member States and national courts on decisions by the IOPC Funds' governing bodies this might contribute to a uniform interpretation. The Director believes that although information of this kind could contribute to uniform application in some cases, this would not address the basic problems. In fact, in several cases the national courts have been made aware of the positions taken by the Funds' governing bodies on a particular issue but have not attached any major importance thereto.
- 8.9 During the discussions in the Working Group, reference was made to an explanatory document entitled 'Uniform Interpretation' which had been published by IMO together with the MARPOL 73/78 Convention. However, the MARPOL 73/78 Convention largely deals with technical issues where such a document may make a significant contribution to a uniform application. The provisions in the 1992 Conventions deal with issues within the field of civil and procedural law,

and a similar document would therefore not, in the Director's view, have the same impact on the interpretation of these Conventions.

- 8.10 The Director considers that a suitably worded formal 1992 Fund Assembly Resolution might be useful. Should a revision of the 1992 Conventions be carried out, it might be worth considering the adoption by the Diplomatic Conference of a Resolution on uniform interpretation and application of the revised Conventions. However, such Resolutions would in any event have only limited value, since the national courts are sovereign in the interpretation of Conventions.

9 Action requested

The Working Group is invited:

- a) to take note of the information contained in this document; and
- b) to give due consideration to the issues raised in the document in its recommendations to the Assembly.

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ANNEX

Illustration of possible amendments to certain provisions of the 1992 Conventions to ensure uniform interpretation and application of the Conventions (amendments underlined)

Article III.4 of the 1992 Civil Liability Convention

No claim for compensation for pollution damage may be made against the owner otherwise than in accordance with this Convention. Subject to paragraph 5 of this Article, no claim for compensation for pollution damage under this Convention or otherwise may be made against:

- (a) the servants or agents of the owner or the members of the crew;
- (b) the pilot or any other person who, without being a member of the crew, performs services for the ship;
- (c) any charterer (howsoever described, including a bareboat charterer), manager or operator of the ship;
- (d) any person performing salvage operations with the consent of the owner or on the instructions of a competent public authority;
- (e) any person taking preventive measures;
- (f) all servants or agents of persons mentioned in subparagraphs (c), (d) and (e);

unless the damage resulted from their personal act or omission, committed with the intent to cause such damage, or recklessly and with knowledge that such damage would probably result.

These provisions apply whether the claim is brought in civil, criminal or administrative proceedings and independent of the type of court where the claim is brought.

Article VIII of the 1969 Civil Liability Convention and the 1992 Civil Liability Convention

Rights of compensation under this Convention shall be extinguished unless an action is brought thereunder within three years from the date when the damage occurred. However, in no case shall an action be brought after six years from the date of the incident which caused the damage. Where this incident consists of a series of occurrences, the six years' period shall run from the date of the first such occurrence. These periods may not be suspended, interrupted or extended by the application of any other provisions or any principles in domestic law.

Article 6 of the 1992 Fund Convention

Rights to compensation under Article 4 shall be extinguished unless an action is brought thereunder or a notification has been made pursuant to Article 7, paragraph 6, within three years from the date when the damage occurred. However, in no case shall an action be brought after six years from the date of the incident which caused the damage. These periods may not be suspended, interrupted or extended by the application of any other provisions or any principles in domestic law.

Article 8 of the 1992 Fund Convention

Subject to any decision concerning the distribution referred to in Article 4, paragraph 5, any judgement given against the Fund by a court having jurisdiction in accordance with Article 7, paragraphs 1 and 3, shall, when it has become enforceable in the State of origin and is in that State no longer subject to ordinary forms of review, be recognized and enforceable in each Contracting State on the same conditions as are prescribed in Article X of the 1992 Liability Convention. When deciding on enforcement the

competent court shall respect any decision by the competent body of the Fund taken pursuant to Article 4, paragraph 7 that payments shall be limited to a specific proportion of the established claims.
