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REVIEW OF THE INTERNATIONAL COMPENSATION REGIME

LIABILITY OF THE SHIPOWNER, CONSEQUENCES THEREOF AND DEFINITION OF THE OWNER'S FINANCIAL OBLIGATION

Submitted by the French delegation

Summary	In view of the fact that the International Fund has, for a number of years, found it necessary to act systematically, also in the case of minor incidents, while the Fund Convention refers to its subsidiary role, this document examines a number of points of the current regime and the consequences thereof.
Action to be taken:	See paragraph 18.

1. The international regime is based on two conventions, the second of which, on the establishment of an international compensation fund, is intended to be implemented only on a subsidiary basis, as noted in its preamble. And yet for a number of years there has been a tendency for the IOPC Fund to play an increasing role, which demonstrates the current inadequacy of the Convention on Civil Liability for Oil Pollution Damage. This Convention must therefore be revised following a two-pronged approach: a return to strict channelling that does not preclude looking for liability elsewhere than with the registered owner; and a redefinition of the owners' financial obligation, which must be increased.

A. The restoration of a regime of civil liability

The Convention was designed to facilitate and guarantee access for victims to compensation for pollution damage and not to prevent any remedy being sought from those liable for the damage.

2. The regime established by the International Convention is a regime intended to offer guaranteed compensation to the victims of pollution caused by oil tankers. To that end, in addition to granting jurisdiction to the courts of the area affected by the damage, it places liability for the damage caused by the ship with the registered owner, leaving him to seek remedy from those he considers liable for the damage. Thus a registered owner may take action against the bareboat charterer if the damage is the result of incompetence on the part of the crew provided by that charterer. This regime is therefore favourable to the victim and this right to be compensated by the registered owner, regardless of whether he is in fact in operational control of the ship, must be preserved as the basis of the regime.

3. In the case, however, of liability that is sometimes characterized as no-fault liability, combined with a right to limitation, it is only natural that in the event of established fault on the part of the owner, the right to limitation should be withdrawn from him. It should be emphasized that here fault lies with the registered owner; in the case given as an example in the preceding paragraph, it would not be possible to establish fault on the part of the owner, who would retain the privilege of limitation. Moreover, the current Convention does not provide otherwise, although on the one hand it defines fault of the owner too strictly, depriving him of the right to limitation, and, on the other, it extends the benefit of channelling to persons whose liability should be able to be established in accordance with the general law.

4. And yet the channelling of liability to the registered owner of the ship must be strict and is not intended to cover other persons. In other words, the registered owner does not have to answer for fault on the part of others. On the other hand, he must assume the consequences of his own faults or those of his servants (captain and crew). But on this latter point, the requirement of fault as characterized by the 1992 Protocols does not appear to be justified. If doubts exist as to how to characterize the fault that is to be considered in the light of the experience of the regime established by the 1969 Convention (since the expression "actual fault or privity" has been construed in what is deemed to be a broad sense), other criteria should, however, be found that preserve the possibility of changing over from a regime involving strict liability and giving entitlement to limitation to one involving liability for fault without right to limitation.

5. Consequently, the protection introduced in Article III, paragraph 4, of the 1992 Protocols concerning charterers does not appear to be justified and the gradation of the fault required in order to have their liability in the occurrence of the damage recognized even less so. In the case taken as an example, where the registered owner has not committed any fault but the damage is the result of fault on the part of the charterer, the manager making the arrangements, who may, for instance, have allowed the ship to set sail without having provided it with a suitable crew and adequate stores and bunkers, it is only natural that it should ultimately be the negligent charterer who should bear the burden of compensating the victims. The regime put in place must enable victims to obtain rapid compensation but must not preclude establishing where real liability lies. Beyond the compensation which they may expect from the registered owner and which it is for the latter to recover from those who are liable, victims must be able to seek from the negligent charterer full reimbursement in respect of the loss that they have suffered.

6. The argument put forward during the discussions and in certain documents (on this point, see section 6.2.6 of doc. 92FUND/WGR.3/6), emphasizing that the restoration of a regime of strict channelling to the owner would not be conducive to rapid compensation of the victims, is unacceptable, since a number of provisions of the Convention refer to the right of recourse of the registered owner or his insurer. Where fault on the part of the registered owner of the ship cannot be established but the damage is the result of fault on the part of the charterer, the owner or his insurer, if compensation has been paid to victims, may bring a recourse action against the charterer.

7. The victims must be able to establish directly liability of the charterer, if that is in their interest. This is a choice left to the initiative of the victim, separate from the fact that the registered owner

is entitled to limit his liability. In any case the argument derived from the fact that such a regime, under which claims could be made for compensation against persons other than the owner, would, by delaying IOPC Fund action to compensate the victims, be contrary to the interests of the victims, does not appear to be well founded, as the IOPC Fund also has a right of recourse, and legal actions brought by victims against those who may be liable do not preclude them from being compensated by the IOPC Fund, which enjoys a right of subrogation. Such an argument demonstrates, should that be necessary, that this is a departure from the subsidiary nature of action by the IOPC Fund, as laid down in the Convention, in order to make it less difficult to invoke the civil liability mechanisms under the 1992 Protocol to amend the Civil Liability Convention.

8. The obligation to maintain insurance and direct action against the insurer are the Convention's main contribution and must be strengthened in this respect. This will be achieved by clarifying the wording of Article VII-8, highlighting the fact that even where the owner is not entitled to limit his liability, the insurer is required to compensate victims subject to the limits provided for in Article V, paragraph 1, of the Civil Liability Convention, the insurer also enjoying a right of recourse.

B. Redefining the financial obligation of the owner

The approach favoured in this document is based on the fundamental place occupied by the Convention on Civil Liability for Oil Pollution Damage.

9. As already pointed out in the first part of this document, the Fund Convention must retain its subsidiary role. If that premise is accepted, it is not right for the Fund to be required to act, as has already happened, in the case of damage resulting from routine operating incidents, such as collision with a dock wall, an error in operating a valve or a negligent collision, damage which may be covered by specific clauses in the policies taken out with the P & I Clubs.

10. Compensation for such damage caused by culpable or negligent conduct also raises the question of whether there is good reason for insurance not to be required for ships carrying less than 2 000 tonnes of oil. The IOPC Fund has already had to act on a number of occasions in such circumstances and this situation no longer appears to be justified, so it is proposed that this exemption be terminated.

11. Finally, the issue should be addressed of the adequacy of the limitation amounts, even after the revised maximum amounts enter into force on 1 November 2003. As was pointed out in document WGR.3/5/7, submitted by the French delegation, the procedures enabling the upper limits to be raised are strictly controlled in terms of time (minimum of not less than eight years between two proposals for amendment) and the amounts (6% per annum in compound interest, without the increases leading to the trebling of the initial amount of the Convention being exceeded). A number of ways may be envisaged for remedying this situation and some have already been proposed.

12. The purpose of the following two proposals is to address this issue taking account on the one hand of the desire expressed by some States to remain within the framework of the 1992 Protocols, whose protection is considered by them to be sufficient, and, on the other, of the desire expressed by other States to increase significantly the maximum amounts provided for in the two Conventions.

13. In this respect a diplomatic conference has been convened for May in order to examine the adoption of an international convention on the establishment of a supplementary compensation fund. It is therefore legitimate to take into account the concern expressed by a number of States who sponsored the preparation of this draft within the Working Group, by inserting in the text of the Civil Liability Convention provisions enabling this supplementary fund to be financed also by the owner of the ship liable for the pollution. It would thus make it possible for the system

resulting from the 1992 Protocols to coexist alongside the one that should incorporate the existence of a supplementary fund.

14. In the first instance, the question of the gradation of the owner's financial obligation needs to be re-examined. In this connection the proposal made by the P & I Clubs that the level of the obligation for smaller units should be reviewed on a voluntary basis if the incident should occur in one of the Contracting States to the supplementary fund calls for the following reservation. In terms of the principles involved, it does not appear to be consistent with international law to mix public law international conventions with private arrangements. If, as is implicitly acknowledged in the proposal of the P & I Clubs, the level of the financial liability of the shipowners is not sufficient, it is for the States Parties to the Civil Liability Convention to redefine the obligation.

15. More fundamentally, in the light of recent events, the question may be raised of the validity of the criterion of tonnage as the reference point. The *Tanio*, *Nakhodka*, *Erika* and *Prestige* incidents show that small ships can cause damage that is disproportionate to the owner's liability limit. As a reminder, in the case of the *Erika* the damage probably amounts to somewhere in the region of €800 million, with the *Erika*'s owner for his part bearing less than €13 million, i.e. less than 2% of the total amount of the damage.

16. The total amount of the damage in this incident may also be compared to the theoretical cover for this type of damage under the P & I Clubs' policy. This cover, amounting to USD 1 billion, is, however, intended to be invoked, as explained in document 92FUND/WGR.3/5/5, only when the owner is not entitled to limit his liability, but on the basis of negligence, a situation corresponding to that which occurred recently in the case of the *Nakhodka* incident and which in fact led the insurer to pay more than the amount provided for in the Civil Liability Convention in order to end the dispute.

17. If these points of comparison are borne in mind, it would not be improper for the amount of the owner's liability to be fixed, whatever the tonnage of the ship, at the maximum amount laid down in the Civil Liability Convention, which itself corresponds to only about 10% of the P & I Clubs' cover for this risk. Such an amendment would in fact have only a limited effect since, as INTERTANKO and the ICS pointed out in document 92FUND/WGR.3/11/5, the owners currently bear alone, without the intervention of the IOPC Fund, 95% of oil pollution compensation claims.

18. Consequently, the Working Group is requested to examine the following proposed amendments to the current text of the Convention :

    (i) **Article III 4**. *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*. (Wording based on the text of the 1969 Convention)

    (ii) **Article V 1**. *The owner of a ship shall be entitled to limit his liability under this Convention in respect of any one incident to an amount of 89.77 million units of account. However, where the pollution damage affects a State Party to the International Convention on the establishment of a Supplementary Fund, the owner shall also be required in respect of the Supplementary Fund to contribute x% of the amount of the compensation paid by that Fund. The amount in question may not in any event exceed x million units of account.*

    (iii) **Article V 2**. *The owner shall not be entitled to limit his liability under this Convention if it is proved that the damage resulted from his fault or negligence.*

    (iv) **Article VII 1.** *The owner of a ship registered in a Contracting State and carrying oil in bulk as cargo shall be required to maintain insurance or other financial security, such as*

the guarantee of a bank or a certificate delivered by an international compensation fund, in an amount corresponding to the sums laid down in Article V, paragraph 1.

(v) **Article VII 8.** *Any claim for compensation for pollution damage may be brought directly against the insurer or other person providing financial security for the owner's liability for pollution damage. In such case the defendant may, even if the owner is not entitled to limit his liability according to Article V, paragraph 2, avail himself of the limits of liability prescribed in Article V, paragraph 1. He may further avail himself of the defences (other than the bankruptcy or winding up of the owner) which the owner himself would have been entitled to invoke. The defendant shall in any event have the right to require the owner to be joined in the proceedings.*