INTERNATIONAL
OIL POLLUTION
COMPENSATION
FUND 1992

THIRD INTERSESSIONAL
WORKING GROUP
Agenda item 2

92FUND/WGR.3/14/5
16 January 2003
Original: ENGLISH

REVIEW OF THE INTERNATIONAL COMPENSATION REGIME

THE LIABILITY OF THE PARTIES INVOLVED IN THE CARRIAGE OF OIL BY SEA

Submitted by France, Spain and the European Commission

Summary:	This documents addresses the relationship between the responsibilities of parties involved in the transport of oil by sea and their exposure to liability and suggests potential ways to address this matter through amendments to the CLC and related conventions and protocols.
Action to be taken:	See paragraph 20

1 Introduction

1. The international oil pollution liability and compensation system as constituted by the Civil Liability Convention (CLC) and the Fund Convention has proven to be a workable regime. The Fund has already addressed over 100 incidents and has generally been able to provide for satisfactory compensation for victims and has, as intended, contributed to a shared burden of the costs between shipowners and the oil industry.

2. Nevertheless, the international oil pollution liability and compensation system is under increasing public pressure and scrutiny and has, with particular impetus in the last three years, been subject to criticism by both victims of pollution incidents and by certain public authorities.

3. The criticism in this regard has generally centered around three main issues:

- The available maximum compensation is not sufficient to cover any foreseeable incident, which means that there is a real risk that victims of a major oil spill are not fully compensated;

- The procedure to achieve full compensation is time-consuming, in particular in major oil spills, where pro-rating of claims has to be resorted to, and compensation is thus significantly delayed;

- The rules are concentrated mainly on providing compensation. The liability aspect of the regime is less evident and the link between the actual cause of the accident and the exposure to liability is rather remote. This means that the preventing/discouraging effects of the present liability and compensation system are very limited.

4. It has to be acknowledged that there is some truth in such criticism. This has been particularly notable in certain larger oil spills. It has to be acknowledged, too, that the underlying reasons for such critisism originate in the structure of the international conventions and is not linked to the operation of the Fund, by its governing bodies or staff.

5. On the contrary, the Fund has showed a considerable willingness to address the adequacy of the Fund on the basis of experience gained so far. The third intersessional working group was set up to address, among other things, these issues.

6. In the view of the co-sponsors of this document, the first two points of criticism indicated above have to a large extent been addressed through the setting up of the Supplementary Fund, which is scheduled for May 2003. This new Fund will provide for the possibility of the Contracting Parties, who so wish, to ensure a significantly higher overall compensation limit. In addition, it has been agreed to raise the maximum limits of the CLC and Fund Convention by some 50% as from 1 November 2003.

7. Yet, as these improvements are based on the same principles as the existing conventions they do not address the third point of criticism.

8. The co-sponsors of this document consider that as 20 years have elapsed since the present regime was negotiated and developed, the time has now come to analyse some of its principal features in more detail. They believe that an essential feature of the international system must be that it corresponds to present day attitudes in society and therefore is generally perceived as both efficient and fair. They fear that unless changes are made within the international system itself, new oil tanker accidents will continue to increase pressure on the regime, up to a point where political pressure may lead to the replacement of the system by legal regimes of a completely different nature. They finally believe that there are mechanisms to address this which do not require unmanageable changes to the existing regime nor disadvantages for victims of oil pollution.

2 Responsibilities and liabilities

2.1.1 General

9. The potential amendment of certain key features of the existing regime, such as the channelling clause and the threshold for the owner losing the right to limit the liability have been on the agenda since the inception of the third intersessional working group. So far, however, few concrete proposals have been made and progress in these areas has been limited. The debate has been dominated by documents and views put forward by the industry observer delegations, rather than by Contracting Parties. The purpose of the present submission is to initialise a discussion on two key features in particular.

2.1.2 The threshold for the shipowner's loss of right to limit the liability

10. The right of shipowners to limit their liability is practically unbreakable under the CLC (Article V.2). The owner of a ship does not lose the right to limit, unless it is proven that the damage 'resulted from his personal act or omission, committed with the intent to cause damage, or recklessly and with knowledge that such damage would probably result'. Negligence or even gross negligence on behalf of the owner does not meet these criteria and it is evident that in most

circumstances it would be very difficult to break this threshold. The co-sponsors consider that the risks involved in the transport of oil by sea need to be reflected in a greater exposure of the shipowner to unlimited liability.

11. In many environmental liability regimes developed in the 1990's the trend has been to abolish limitations of liability. Normally, however, such unlimited liability rules are not coupled with compulsory insurance requirements. That may not be a problem for land-based sources of pollution, as the identification of and jurisdiction over the liable person normally will not generate difficulties. In the case of maritime pollution the situation is different, as the polluter may be of any nationality and otherwise difficult to trace. Compulsory insurance and a right of direct action against the insurer are therefore instrumental if the protection of victims is to be ensured. These elements form important parts of the present regime and should remain integral parts of it.

12. As to insurance requirements, an anomaly in the present situation is the considerable discrepancy between the financial liability of the owner under the CLC and the current insurance practices within the International Group of P&I Clubs, which provide liability cover for virtually all oil tankers. Under the P&I Clubs standards, oil tankers are insured up to 1 000 million dollars, compared to levels of between four and 80 million US dollars under the CLC (to be raised by around 50% in November 2003). This produces the result that the amount of insurance and overall compensation available, should liability be established, is considerably higher in areas where the international regime does not apply than in Convention States. In the view of the co-sponsors, this is an unfortunate feature of the system, which complicates the argumentation in favour of it.

13. Furthermore, unbreakable limitation rights for shipowners prevent the Fund from effectively enacting its policy on recourse actions. This policy is summarised in document 71FUND/EXC.62/14, para. 3.6.11:

'The policy of the Funds is to take recourse action wherever appropriate. The Funds should in each case consider whether it would be possible to recover any amounts paid by them to victims from the shipowner or from other parties on the basis of the applicable national law. If matters of principle are involved, the question of costs should not be the decisive factor for the Funds when considering whether to take legal action. The Funds' decision as to whether or not to take such action should be made on a case-by-case basis, in the light of the prospect of success within the legal system in question.'

14. Within the Third Intersessional Working Group, this policy has been reiterated and it has been generally considered that the 1992 Fund should take recourse action whenever appropriate and that a firm policy by the Fund in this regard could be used against persons operating substandard ships.[<1>] The co-sponsors believe that the policy for recourse action is a correct one, but that it has not been applied to its full extent. As far as shipowners are concerned, the pursuing of this policy is effectively hampered by the 'unbreakability clause' of Article V.2 of the CLC. Recent experiences in the deliberations of the *Erika* case underline this issue.[<2>] The co-sponsors maintain that any decision as to whether to take recourse action or not should rest with the Fund's governing bodies, but that they should not be prevented from pursuing their goals or policies by unduly restrictive wording in the underlying conventions.

15. For these reasons, the co-sponsors consider that Article V.2 of the CLC should be carefully scrutinized, with a view to achieving ways to lower the threshold for the loss of the shipowner's limitation right and thereby make it possible to breach the threshold in cases where actual fault on behalf of the owner has been established. Such a measure would relate the exposure to liability more closely to the conduct of the shipowner. A model for a potential alternative wording in this respect is found in Article V.2 of the 1969 CLC, where the corresponding threshold for loss of limitation right was 'actual fault or privity'. Given this precedent, which has been applied within

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<1> Doc. 92FUND/WGR.3/9, paras 10.1-10.6.

<2> Doc. 92FUND/EXC.18/14, para. 3.4.29

maritime law since 1975, when the 1969 CLC entered into force, this wording is well-known in maritime law, including oil pollution liability law.

2.1.3 Channelling of liability

16. Under the existing liability regime, the liability for oil pollution damage is channelled to the registered shipowner only. The channelling of liability to one specified person has some advantages in providing clarity as to the liable party, thus facilitating the identification of the person to whom claims for compensation should be made. Channelling of liability is also a device for avoiding multiple insurance and hence contributes to higher theoretical levels of the liability to be insured. Therefore, channelling of liability is an important device for the clarity and rapidity of the system and should continue to remain an integral part of it.

17. However, the type of channelling which is provided under the 1992 CLC (Article III.4) goes several steps further by explicitly prohibiting claims against a number of other players (including notably, the charterer, manager and operator of the ship), who may well exercise as much control over the transport as the registered owner of the ship. Apart from possible recourse action by the registered shipowner, these persons are protected from any compensation claims unless the damage 'resulted from their personal act or omission, committed with the intent to cause damage, or recklessly and with knowledge that such damage would probably result' (which is the same practically unbreakable test as that relating to the shipowner's loss of the right to limit his liability referred to in section 2.1.2 above). Such protection of a number of key players implies that those persons can act within an almost assured immunity from compensation claims following an oil pollution incident.

18. The co-sponsors consider that such protection of key players is counterproductive with regard to the efforts within the international maritime community to create a sense of responsibility in all parts of the maritime industry. In addition, the same considerations as regards constraints on the Fund's recourse policy as those provided in section 2.1.2 above apply in this case. Concerns as to the feasibility of taking recourse action against certain key players involved in an incident have recently been raised in the *Erika* case.[<3>]

19. Therefore, the co-sponsors consider that the prohibition of claiming compensation from a number of key players involved in the transport of oil at sea should be re-examined, in particular those referred to in Article III.4.c of the CLC. As to the practicalities of such a measure, it can be noted that here, too, the regime that applied under the 1969 CLC provided for a much less rigorous channelling by only excluding the servants or agents of the shipowner.

3 Action to be taken

20. The Working Group is invited to endorse the principles and suggestions set out in this document and agree on a way ahead.

[<3>] Doc. 92FUND/EXC.18/5/Add.2.