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REVIEW OF THE INTERNATIONAL COMPENSATION REGIME

Submitted by the Republic of Korea

Summary:	A Cushion Fund should be introduced using a premium system in order to maintain a stable level of contribution and to guarantee prompt and better compensation. In addition, a new supplementary compensation fund should be introduced on top of the current limit covering up to a certain amount.
Action to be taken:	The above proposals should be included in the list of issues to be considered by the Intersessional Working Group.

1. INTRODUCTION

- 1.1 An interesting discussion took place at the 5th extraordinary session of the Assembly on the 30th of January 2001 relating to the European Commission proposal for a Regulation on the establishment of a fund for the compensation of oil pollution damage in European waters and related measures. This proposal aims to respond to the difficulties in the aftermath of the *Erika* incident and seeks to achieve a new speedy and more effective compensation system. Under the proposal there would be set up a European Fund guaranteeing a better compensation system. The proposal also includes certain measures to guarantee quality shipping. The European Union proposal is also directly related to the operation of the IOPC Funds although the compensation is intended to be additional to the regime created by the 1992 Conventions. Although the Commission has expressed the view that the current system operates reasonably well as a novel device based on international mutuality, the Korean delegation believes that the current system based on the Civil Liability Convention and the IOPC Funds is by no means perfect and recognizes that there are deficiencies in the system. The proposal by the European Commission also offers an opportunity to examine the current system with a view to improving its procedures and practices.

- 1.2 The criticisms of the current system are focused mainly on two points. Firstly, the current system is too slow in compensating victims and the scope of compensation is too restrictive when applying the criteria in place, specifically as regards environmental damage. Furthermore, the strict requirement of proof of the quantum of damage and of the link of causation between the damage and the incident are also unacceptable. Secondly, the maximum amount available for compensation under the current system is too low. Even the increased amount adopted by the IMO Legal Committee which will come into force soon is still far short of the amount envisaged in the European Commission proposal. The low total amount available has led to protracted discussions on the percentage of the payments which can be made in order to guarantee equal treatment of all claimants without the Fund risking overpayments as a whole.
- 1.3 During the discussions in the Assembly almost all delegations which took the floor were unanimous in emphasising that a global solution would be preferred to a regional solution. It was emphasised by many delegations that universality and generality should be the spirit of the international community in achieving the common goal. The Korean delegation also takes the view that the IOPC Funds have great possibilities in contributing to the success of a new regime. By a combination of the current regime and a new regime, the Korean delegation believes that the same objective could be achieved more easily. In the Korean delegation's view there would be considerable difficulties in setting up and maintaining a Fund of the type proposed by the European Commission without the involvement of the IOPC Funds, if the European Fund were to intervene only in respect of very few incidents and if it is intended to remedy all the deficiencies in the present system mentioned above.
- 1.4 With the aim of meeting the objectives of an improved compensation system, the Korean delegation humbly submits the following proposal. Two new funds should be established, namely a Cushion Fund and a Supplementary Fund. This proposal is based on the assumption that the operation of the IOPC Funds currently in place should remain intact. The Cushion Fund and the Supplementary Fund would operate in addition to and in parallel with the current system based on the Civil Liability and Fund Conventions. It is believed that these Funds could reduce to a considerable extent the difficulties encountered under the current system. However, the Korean delegation does not suggest that the proposed two Funds would solve all the related problems and meet all the demands indicated by the European Commission.

2. A Cushion Fund

- 2.1 Under the current system, the amount of contributions varies from year to year depending on the amount of compensation to be paid in the subsequent year. This is the system usually applied by the P & I Clubs which raise levies by way of calls. This call system differs from the premium system where members are required to pay a fixed amount of premium calculated on the basis of potential claims. It is proposed that for the Member States of a new regime, a combination of the call system and the premium system should be introduced. Under such a combined system, the contributors would be required to pay at a usually fixed, but slightly variable rate each year. For contributors the amount would be almost always predictable, and for the Fund the amounts of the contributions would be easy to calculate.
- 2.2 Under the proposed system, there would be three kinds of rates in the premium, namely (i) the Reduced Rate, (ii) the Ordinary Rate and (iii) the Higher Rate. The Reduced Rate would be fixed so as to cover contributions usually levied under the current system as well as the contributions to newly created Supplementary Fund, if applicable. The Ordinary Rate would be slightly higher than the Reduced Rate so that it would create a surplus. The Higher Rate of the premium would be fixed in such a way as to produce a sufficient fund to pay back the debt a State's account owes. However, in a year when the amount of contribution assessed under the current system is extremely high, an additional premium may have to be levied but on a much less harsh scale. The new system would offer the benefit of maintaining the level of contribution reasonably steady in

the form of premiums. It may, however, create some difficulties in cases where the contributors within a Member State change from year to year.

- 2.3 The funds actually accumulated under the proposed system would constitute the Cushion Fund. Each Member State would have its own Cushion Fund which would be used only for the victims and contributors in that State. There would be no cross-subsidy and no mutuality. The funds would be kept within the 1992 Fund with interest accruing. Each State would have a ceiling on the amount of the Cushion Fund. It is therefore anticipated that the rates and the ceiling would be easily fixed by the Fund, assisted by an actuary and in consultation with the State concerned, having regard to various elements including the magnitude of potential damages in that State.
- 2.4 The Cushion Fund would be primarily used to pay the contributions levied under the current system and the contributions to be levied for the new Supplementary Fund. The applicable rate would normally be the Ordinary Rate. If the accumulated funds reach the ceiling applicable to that State, the Reduced Rate would be applied from that year on. Once the account for a State showed a deficit, the rate would go up to the Higher Rate.
- 2.5 When an incident occurs in a State, the funds accumulated for that State could be used to make advance payments to the victims whose claims are assessed or agreed but who are not wholly or partially paid due to the equal treatment rule. To enhance the Fund's capability to make such payment, credit would be given up to 100% of the ceiling to the Cushion Fund for that State. Thus, the total sum available for such payments is the fund actually accumulated at any given time plus the amount of the credit so accorded. Any drawing on such credit would be in the form of a loan from the IOPC Fund and payment drawn on the credit should therefore be repaid with appropriate interest by the Cushion Fund for that State. From the time when the account for the State shows a deficit, the High Rate will start to apply in the premium for that State. Under the current system, the IOPC Funds are bound to be over-cautious in making payments for compensation. If there is a slight possibility of overpayment, no matter how remote it is, the IOPC Funds are obliged not to pay agreed claims in full. It has now become a practice for the IOPC Funds to wait until at least the limitation period expires so that the Executive Committee is absolutely sure that no new and unexpected claims come up. By making a considerable sum available for advance payments, many victims could be guaranteed compensation much earlier. The Cushion Fund should not be used to pay compensation to claimants who fail to substantiate their claims even if the claims relate to a type of damage which is admissible in principle. The payments would be made, until the Cushion Fund is exhausted, as they are requested on a first-come first-serve basis. However applications for payments should be made through the Government concerned. The amount so paid would be repaid to the State's account by the IOPC Funds when it subsequently turns out that the overall amount of compensation falls below the maximum amount available for compensation. The rights of victims will be automatically transferred by subrogation to the account of the State from which advance payments have been made.
- 2.6 The above measures have shortcomings. When a series of incidents occur in a State, the funds accumulated and credited would be soon exhausted. For States with little contributing oil, it would be difficult to constitute a Cushion Fund.

3. A Supplementary Fund

- 3.1 The European Commission has proposed to create a supplementary fund as a third tier of compensation. This supplementary fund would operate as a means to provide the compensation supplementary to the compensation currently available under the Civil Liability Convention and by the Fund. The Korean delegation does not see any reason why the same objective could not be achieved through an international regime which is devised in such a way as to suit both European and non-European States.

- 3.2 The figure of 1000 million Euro is used as the limit for the third tier in the European Commission proposal. For many States this limit is too high in relation to the amount of damage likely to occur in these States. After all, the third tier is bound to be mainly for European States and only a small number of other States may be interested in the new regime. For the time being, it would be wise not to expect many non-European States to join this third tier. This would make it possible to accommodate within the new regime the Commission's proposal as to the maximum amount.
- 3.3 The third tier should be managed by the Secretariat of the IOPC Funds. It would operate with the same governing bodies applying the same criteria as to admissibility unless specifically modified by the Convention.
- 3.4 The new regime may be devised in such a way that the notion of 'environmental damage' is expanded and compensation could be given to victims of war. In this respect, the new regime would to the extent possible reflect the objectives of the European Commission. However, the Korean delegation suggests that the third tier should remain a fund to compensate quantifiable damage actually suffered and it should not be a fund which would hand out a certain amount of money after an incident to alleged victims on the basis of political pressure

4. General Matters

- 4.1 A single instrument should be introduced in the Legal Committee of the IMO containing the measures necessary to implement all the proposals set out above. The instrument would contain only the main features of the Cushion Fund scheme, leaving the details to be included in the Internal Regulations.
 - 4.2 A Contracting State would have the option to indicate on accession whether it accepts both funds or it accepts only one of them.
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