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THIRD INTERSESSIONAL
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REVIEW OF THE INTERNATIONAL COMPENSATION REGIME

Submitted by the International Group of P & I Clubs

Summary:	The submission explains that it is to the benefit of the claimant that the CLC/IOPC Fund system is based on the principle of compensation and does not attempt to apportion moral fault. It also demonstrates how the financial burden of the compensation system is shared between the tanker and oil industries.
Action to be taken:	The Working Group is invited to take note of this information.

Introduction

1 The thirteen P & I Clubs that are members of the International Group of P & I Clubs are mutual liability insurers which cover the third party liabilities of shipowners, including liability in respect of oil pollution. The Clubs cover over 90% of the world's tankers and are the principal providers of the certificates of financial responsibility which are required under CLC. The Clubs have therefore been involved in most of the major oil spills of the last thirty years.

2 The high degree of co-operation that has existed between the Clubs and the IOPC Funds has enabled the CLC and Fund Convention to be operated smoothly and very successfully to the benefit of claimants. It is also important to note that, apart from a relatively few high profile cases, the vast majority of claims has been dealt with expeditiously and without resort to litigation. We are anxious that this situation should continue and therefore offer comments on some of the principal issues currently being considered by the Working Group.

Sharing the Burden

3 The equitable apportionment of the cost of compensation was very much in the minds of those who drafted the CLC and Fund Convention and who applied the polluter pays principle by nominating as polluter both tanker owners and the receivers of oil cargoes. From the outset it was envisaged that both the tanker and oil industries should share the burden of paying compensation.

4 A recent study of the cost of 360 tanker spills during the 10 years 1990-1999 conducted by the International Group of P & I Clubs demonstrates that the 1992 CLC and Fund limits achieve the equitable sharing envisaged by the regimes' drafters. Some conclusions may be drawn from the attached booklet. Although over 95% by number of all non-USA tanker spills would have been fully compensated by tanker owners under the terms of the 1992 CLC alone, the total value of compensation payable in all 360 cases would have been shared equally between tanker owners (under the 1992 CLC) and oil receivers in Fund countries (under the 1992 Fund Convention). This also applies when the inflated costs of the spills are compared to the increased 1992 CLC and Fund limits that will come into force in November 2003. It is also worthy of note that only the anticipated cost of the ERIKA exceeds this increased Fund maximum.

5 Given the success of the regimes in equitably sharing the burden of compensation it is our view that some of the changes that have been suggested would constitute retrograde steps. For example, if the test for breaking the shipowner's right to limit was weakened then the shipowner might be held liable in many more cases with the result that the oil industry's involvement in pollution matters would reduce dramatically. This would significantly upset the balance between the contributions made by the tanker and oil industries.

6 While we strongly support the way in which the Conventions have been structured and implemented it has to be recognized that in exceptional cases like the ERIKA they may fail to provide adequate compensation, principally because of the intractable nature of the cargo involved. We therefore support the increases recently agreed at the IMO Legal Committee which take effect in November 2003 and the proposal to amend the tacit amendment procedure to allow the Conventions to be made more responsive.

7 We also support the proposal to provide a higher level of compensation in those States where further protection for victims is felt to be necessary. At the second meeting of the Third Intersessional Working Group there was support for a third tier of compensation funded by oil receivers. We would support this proposal as ensuring the long-term viability of the Convention system, provided that the level of the third tier is set at a reasonable level, related to the likely value of proper claims, and is not such as to encourage inflated and exaggerated claims. Moreover, based on the historical record this third tier will only be called into play on very rare occasions.

8 Nonetheless, in potential at least the proposal could distort the pattern of sharing as between ship and oil receivers until such time as the shipowner's liability is adjusted in the second phase of the work of the Third Intersessional Working Group. In recognition of this potential inequity shipowner organizations and P & I Club Boards are currently discussing the possibility that the limits for small ships under the 1992 CLC might in certain circumstances be increased significantly through voluntary action applicable in those States that join an opt-in third tier. A further paper to the Working Group will provide details of this proposal.

Compensation not Punishment

9 When the oil pollution Conventions were first formulated thirty years ago it was recognized that their principal objective was to provide rapid and effective compensation to victims. To this end all claims are channelled to the shipowner who alone is strictly liable. Furthermore the liability of the shipowner is limited and the test for breaking limitation requires gross misconduct. As a consequence a charterer or manager who has been negligent will not be liable under the Convention and the liability of the registered owner, whether or not he has been negligent, is in any event limited.

10 Several States and commentators have objected to this result, some because they believe it is wrong that the 'guilty' party could escape liability for the consequences of his negligence, others because they believe that the imposition of liability on more than one party will improve operational standards and the quality of ships. Both of these positions are without foundation in the context of the oil pollution compensation system under the Conventions. The manifest benefit

to the victim which is conferred by the existing system cannot be maintained if these crucial elements are removed. The hope has been expressed that the 'user-friendliness' of the existing system can be maintained while taking steps to ensure that blame is apportioned more accurately. These two aims are contradictory. For example, if the provisions on channelling of liability in CLC were removed in order to impose liability on the negligent charterer or operator then litigation would inevitably ensue in order to determine whose fault had given rise to the spill. The victim would remain uncompensated until the litigation had been concluded.

11 It is recognised that it may not be attractive that an operator who is not the registered owner is not held immediately liable for the consequences of a spill which has been caused by his negligence. Nonetheless it is suggested that this is a price that has to be paid in order to ensure prompt compensation to victims. Moreover, it should always be borne in mind that although the victim will only be able to claim against the owner, the recourse action that the owner will bring in most cases should ensure that the party actually at fault will be ultimately held liable – but without impeding prompt payment of compensation to the claimant.

12 It is important to note that it is not correct to assume that historically oil pollution cases are in the main attributable to the quality of ships involved. In the experience of the Clubs there is no evidence that there is a necessary link between the imposition of liability and the quality of ships or their operators. This is particularly so when very large claims are involved. A shipowner, like other commercial parties, is always able to insure his potential liability so that the direct link between liability and conduct is lost; indeed he is required to do so under CLC. While it is the case that the cost of such insurance will be related to an individual owners performance for smaller claims, the cost of large claims is spread over the whole industry through pooling and reinsurance mechanisms and so will have little impact on the insurance cost of the individual owner. Insurers in their turn try to ensure that the ships they cover are of an appropriate standard but even though the Clubs run extensive survey programmes in order to supplement the work of the Classification Societies it is not possible for insurers to supplant the fundamental obligation of shipowners to ensure that all ships are maintained and operated to an appropriate standard. Most owners take this obligation very seriously. To the extent that some may fall short, this obligation must be encouraged in practice by other methods such as Flag State and Port State Control, and the introduction of the ISM Code.

13 Changes in the liability system intended to improve ships' standards are unlikely to succeed but will have a negative effect on the viability of a compensation system which has served the victim well.

Definition of Damage

14 The International Group of P & I Clubs welcomes the suggestion that the 1992 Fund Assembly be recommended to adopt resolutions clarifying the flexibility of the existing provisions of the Conventions with regard to environmental damage particularly in relation to restoration and post-spill environmental studies. It is apparent from the suggestions made by several commentators that it is not generally appreciated how wide in scope the existing provisions are. It will be of great benefit if this issue could be clarified.

Other issues

15 The International Group of P & I Clubs will be in a position to comment on the other issues before the Working Group at a later stage.

* * *

ANNEX

Introduction

In the aftermath of the *Erika* spill in December 1999, discussions have taken place in several quarters regarding the operation of the international Conventions on liability and compensation for oil pollution damage. Discussions will continue at IMO, the IOPC Fund and also in the EU.

In order to provide a factual basis for these considerations, this report presents an analysis of the cost of oil spills from tankers, for the period 1990 to 1999.

Whilst every effort has been made to ensure the accuracy of the data used in this study, assumptions have had to be made, especially as regards the cost of unsettled cases. Some of these estimates may prove to be unreliable.

1992 CLC & 1992 Fund

General

The amounts of compensation available under the 1992 CLC and 1992 Fund Convention are expressed in Special Drawing Rights (SDR). For the purposes of this study they have been converted to US$ using exchange rates at 30 December 1999, published in the IOPC Funds Annual Report 1999.

On this basis a rate of **1 SDR = US$ 1.3677** has been applied throughout this analysis. Any other exchange rates required (i.e. from national currencies) have also been sourced from the IOPC Funds Annual Report 1999.

1992 CLC

For a tanker not exceeding 5,000 GT, a set maximum limit of SDR 3 million (approximately US$ 4.1m) is available.

For a tanker in excess of 5,000 GT:
SDR 3m plus SDR 420 (approximately US$ 575) per additional GT up to a maximum (reached for a tanker of 140,000 GT) of SDR 59.7 million (approximately US$ 81.7m).

1992 Fund Convention

A maximum of SDR 135 million (approximately US$ 185m) per incident, irrespective of the size of the tanker but including the sum paid by the tanker owner or his insurer under 1992 CLC.

If the total of all approved claims exceeds the total amount available under 1992 CLC and 1992 Fund Convention, the compensation paid to each claimant is reduced proportionately. This is known as pro-rating and is only likely to arise following an exceptional oil spill.

Increased Limits

The IMO Legal Committee at its meeting during the week of 16 October 2000 considered a proposal to increase the limits of the 1992 CLC and 1992 Fund Convention according to provisions set out in the Conventions and agreed an increase of roughly 50% which will come into effect in November 2003.

Historical Tanker Spill Cost Database

For the purposes of this report, data has been collected from all the P & I Clubs within the International Group as well as from the IOPC Fund and CRISTAL Limited. The database contains approximately 450 incidents during the ten-year period 1990 to 1999, over 350 of which occurred in countries other than the USA.

A distinction between USA and non-USA incidents has been made in this study because of the different rules governing liability and compensation in the USA under the Oil Pollution Act of 1990 (OPA 90). For this reason scenarios 1–3 relate to non-USA incidents only, whereas scenario 4 specifically reviews the

cost of USA spills since OPA 90 was implemented (August 1990) and up to the end of 1999, in relation to the 1992 CLC and Fund limits.

Methodology

- The study compares the costs of oil spills against the 1992 CLC and Fund Convention limits, irrespective of whether or not these Conventions actually applied to the incident. In scenarios 1–3 the number of incidents and share of claims that would have fallen under each Convention is assessed.

- The costs are also compared to the 50% increase in 1992 CLC and Fund Convention limits which was agreed by IMO Legal Committee in October 2000.

- The study reflects the basic cost of each incident, that is the total value of established claims before any pro-rating takes place.

- All data has been converted into US$, using exchange rates published in the IOPC Funds Annual Report 1999.

- The effect of inflating the costs to 1999 values has also been evaluated. The cost of each tanker spill has been attributed to the policy year in which it occurred. Its value has then been inflated to 1999 levels using the International Monetary Fund (IMF) World Consumer Price Index (CPI). This Index was chosen because of the worldwide occurrence of the tanker spills, although it gives inflation values that are considerably higher than many national indices.

- In scenarios 1–3 the implications of removing the estimated costs of the *Erika* and *Nakhodka* incidents from the analyses have also been evaluated as these are the only incidents that have approached or exceeded the 1992 Fund Convention limit.

- Whilst every effort has been made to ensure the accuracy of the database, assumptions have had to be made and certain limitations have been identified. These are outlined below.

Assumptions and Limitations

- The aim has been to restrict the data on non-USA spills to the costs of preventive measures (including cleanup) and pollution damage that would have been admissible under the 1992 Fund criteria. However, some figures provided for the study may include other costs which would not normally be considered as admissible by the 1992 Fund e.g. P & I Club legal expenses.

- Interest paid on claims due to delayed settlement should ideally have been excluded to prevent distortion when the costs are inflated to 1999 values. However this may not always have been possible.

- There are variations in the lower limit of claims reported but no attempt has been made to adopt a standard baseline. This also highlights the fact that there are probably numerous small spills for which there is no data e.g. those where the cost falls within the tanker owner's deductible.

- As not all claims have been settled to date, it has been necessary to make a "best estimate" of the likely settlement value. In some such cases the estimate may be unreliable since, for example, the final settlement may depend upon the outcome of legal actions.

Conclusions

- Over 95%, by number, of all the non-USA tanker spills during the period 1990 to 1999 would have been fully compensated by tanker owners under the terms of the 1992 CLC. This is true both of actual costs and existing limits (scenario 1) and inflated costs and increased limits (scenario 3). It is relevant to note that the percentage would have been even higher had data been available on the numerous additional small spills that occurred during the period.

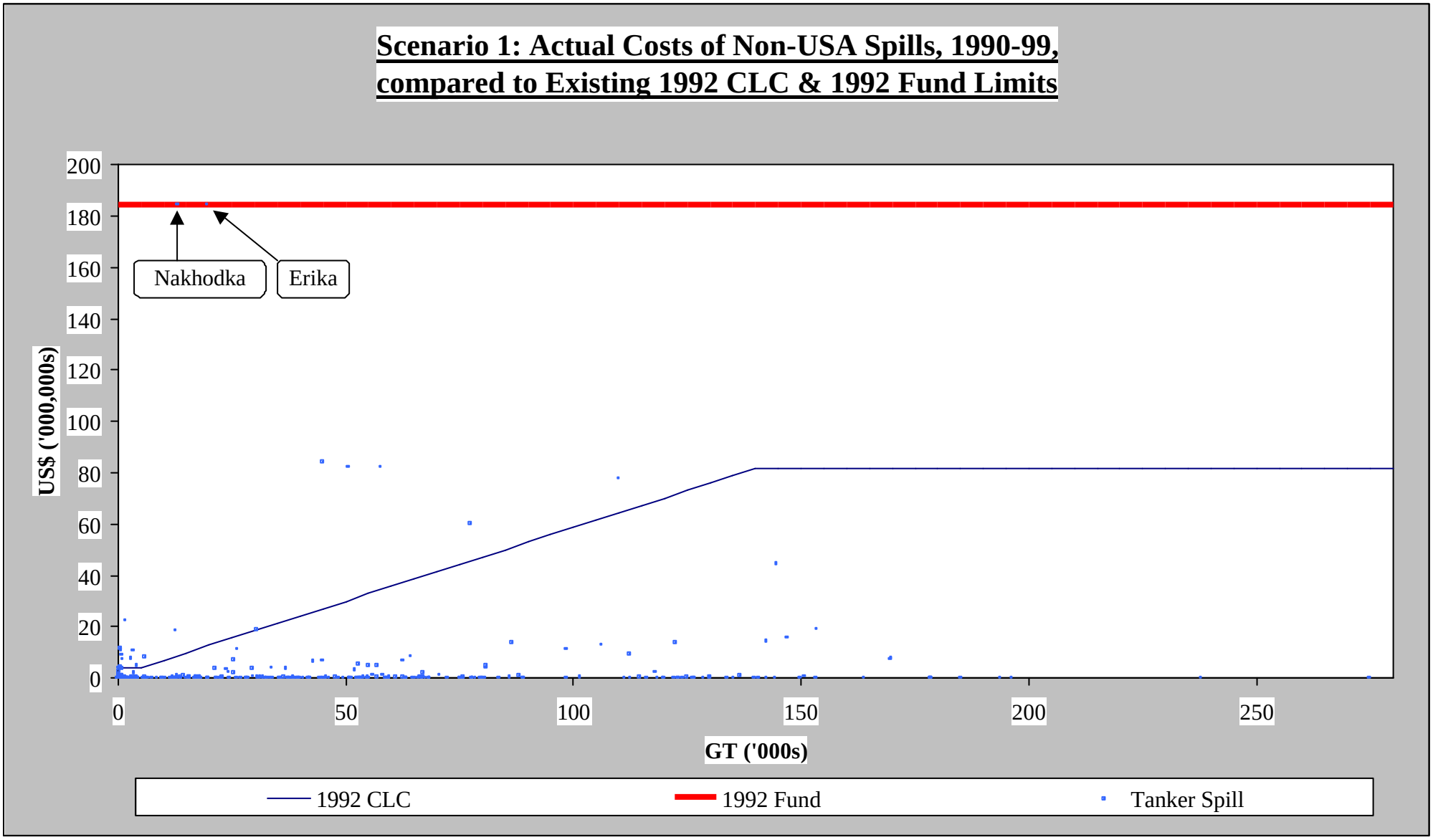
- The existing 1992 CLC and Fund limits would have been more than adequate to compensate fully the actual costs of all non-USA tanker spills during the period 1990 to 1999 (scenario 1), with the

probable exception of the *Erika* and *Nakhodka* incidents where the total value of established claims has yet to be determined.

- When the costs of non-USA spills are adjusted for inflation (scenario 3), the costs of only one further incident exceeds the existing 1992 CLC and Fund limits but this case would have been fully compensated by the increased 1992 CLC and Fund limits.

- In all non-USA cases (scenarios 1–3) the total value of compensation would have been shared equally between tanker owners (under the 1992 CLC) and oil receivers in Fund countries (under the 1992 Fund Convention). If the estimated costs of the *Erika* and *Nakhodka* are removed from the calculation the percentage of the total cost falling on tanker owners increases greatly. This serves to illustrate the influence that one or two major cases can have on the analyses.

- The costs of all USA tanker and barge spills (actual and inflated values) since the enactment of OPA 90 and up to the end of 1999 would have fallen within the existing 1992 CLC and Fund limits.


Scenario 1: Actual Costs of Non-USA Spills, 1990-99, compared to Existing 1992 CLC & 1992 Fund Limits
200
180
160
140
120
100
80
60
40
20
0
US$ ('000,000s)
Nakhodka
Erika
0
50
100
150
200
250
GT ('000s)
1992 CLC
1992 Fund
Tanker Spill

Scenario 1

Cost: Actual costs of Non-USA spills

92 CLC/Fund Limits: Existing limits

Period: 1990-1999

Contribution to total costs	CLC %	Fund %
Tanker Spills	51	49
Ex Erika	59	41
Ex Erika & Nakhodka	71	29

Number of Incidents	CLC	Fund	Total	CLC % of cases
Tanker Spills	342	18	360	95
Ex Erika	342	17	359	95
Ex Erika & Nakhodka	342	16	358	96

Comments

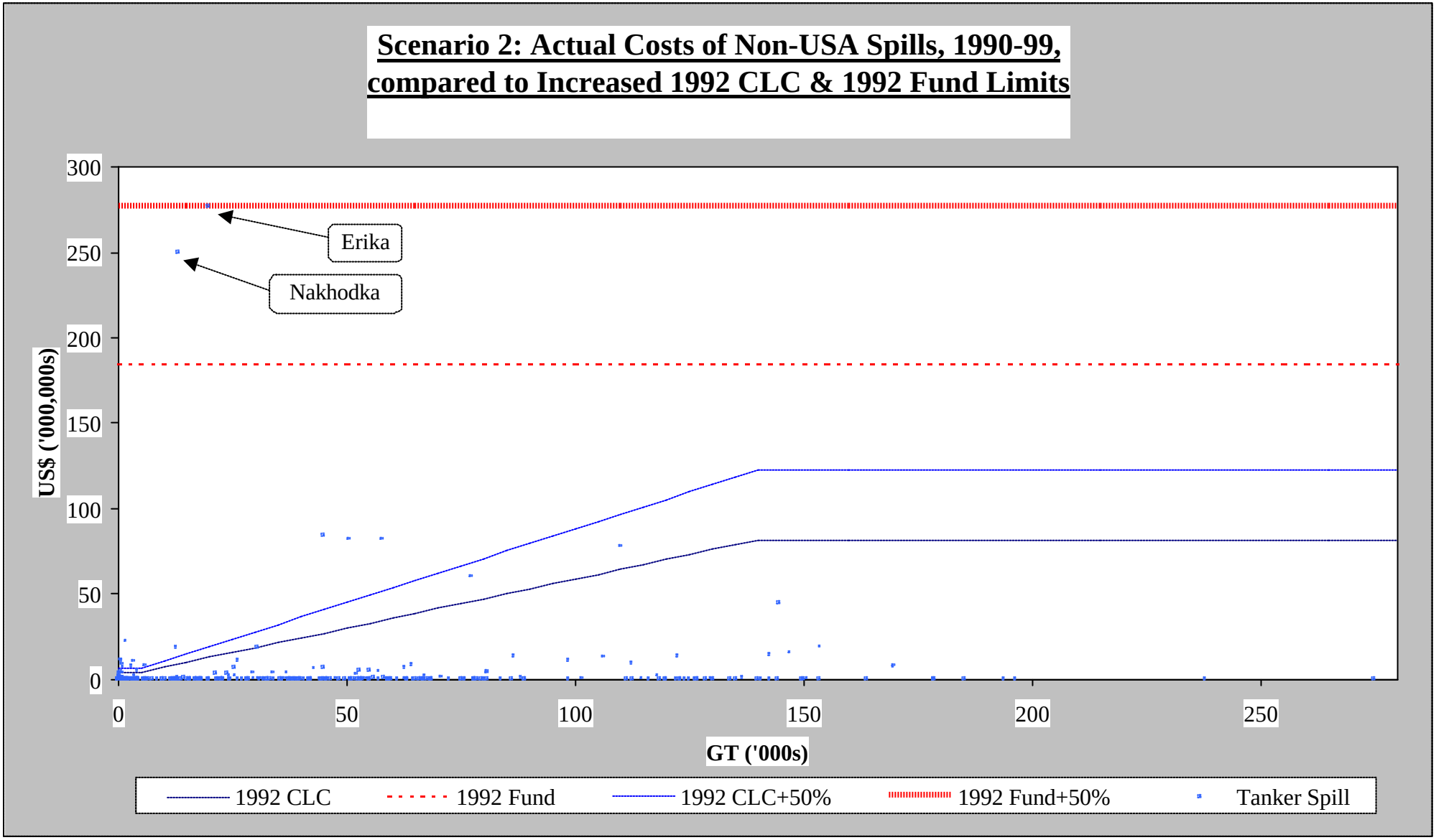
The *Erika* and *Nakhodka* have been included at the 1992 Fund maximum and not at their potential total cost.

Conclusions

1) 95% of all non-USA tanker spills would have been fully compensated by tanker owners under the terms of 1992 CLC.

2) Tanker owners (under 1992 CLC) and oil receivers in Fund countries (under 1992 Fund Convention) would have made an equal contribution to the total compensation provided.

3) The percentage of the total cost borne by tanker owners under 1992 CLC increases dramatically (to 71%) if the *Erika* and *Nakhodka* incidents are excluded from the analysis, thereby demonstrating the influence of one or two major incidents.


Scenario 2: Actual Costs of Non-USA Spills, 1990-99, compared to Increased 1992 CLC & 1992 Fund Limits
US$ ('000,000s)
300
250
200
150
100
50
0
Erika
Nakhodka
0
50
100
150
200
250
GT ('000s)
1992 CLC
1992 Fund
1992 CLC+50%
1992 Fund+50%
Tanker Spill

Scenario 2

Cost: Actual Costs for Non-USA Spills

92 CLC/Fund Limits: Limits Increased by 50%

Period: 1990-1999

Contribution to total costs	CLC %	Fund %
Tanker Spills	53	47
Ex Erika	64	36
Ex Erika & Nakhodka	82	18

Number of Incidents	CLC	Fund	Total	CLC % of cases
Tanker Spills	346	14	360	96
Ex Erika	346	13	359	96
Ex Erika & Nakhodka	346	12	358	97

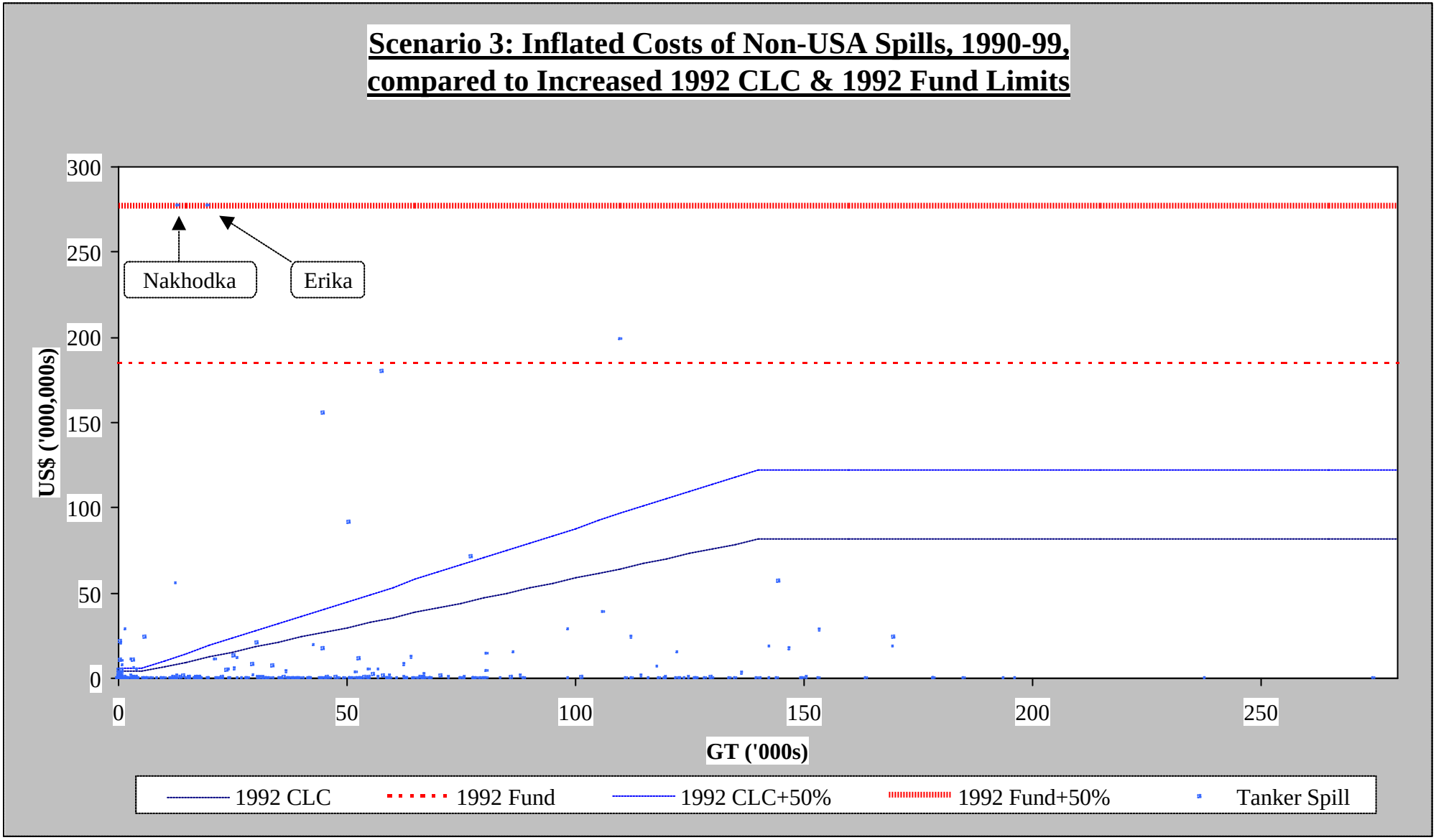
Conclusions

1) 96% of all non-USA tanker spills would have been fully compensated by tanker owners under the increased 1992 CLC limits.

2) The *Erika* and *Nakhodka* are the only incidents that approach or exceed the increased 1992 Fund limit.

3) Tanker owners (under 1992 CLC) and oil receivers in Fund Countries (under 1992 Fund Convention) would have made an equal contribution to the total compensation provided.

4) The effect of the increased limits and the exclusion of the *Erika* and Nakhodka incidents from the analysis is to further increase the tanker owners' share (under 1992 CLC) when compared to scenario 1.


Scenario 3: Inflated Costs of Non-USA Spills, 1990-99, compared to Increased 1992 CLC & 1992 Fund Limits
US$ ('000,000s)
300
250
200
150
100
50
0
Nakhodka
Erika
0
50
100
150
200
250
GT ('000s)
1992 CLC
1992 Fund
1992 CLC+50%
1992 Fund+50%
Tanker Spill

Scenario 3

Cost: Inflated Costs of Non-USA Spills

92 CLC/Fund Limits: Limits Increased by 50%

Period: 1990-1999

Contribution to total cost	CLC %	Fund %
Tanker Spills	49	51
Ex Erika	55	45
Ex Erika & Nakhodka	65	35

Number of Incidents	CLC	Fund	Total	CLC % of cases
Tanker Spills	343	17	360	95
Ex Erika	343	16	359	96
Ex Erika & Nakhodka	343	15	358	96

Comments

Application of the IMF World CPI Index results in a threefold increase in costs since 1990. This causes a dramatic increase in the costs of older spills.

The *Erika* and *Nakhodka* have been included at the increased 1992 Fund maximum and not their potential total inflated cost.

Conclusion

1) 95% of all non-USA tanker spills would have been fully compensated by tanker owners under the increased 1992 CLC limits.
2) The *Erika* and *Nakhodka* cases are the only incidents that approach or exceed the increased 1992 Fund limit.
3) Tanker owners (under 1992 CLC) and oil receivers in Fund countries (under 1992 Fund Convention) would have made an equal contribution to the total compensation provided.
4) The effect of excluding the *Erika* and *Nakhodka* incidents from the analysis is less dramatic than in scenarios 1 and 2 because of the considerably greater cost of older Fund cases through the application of the inflation index.

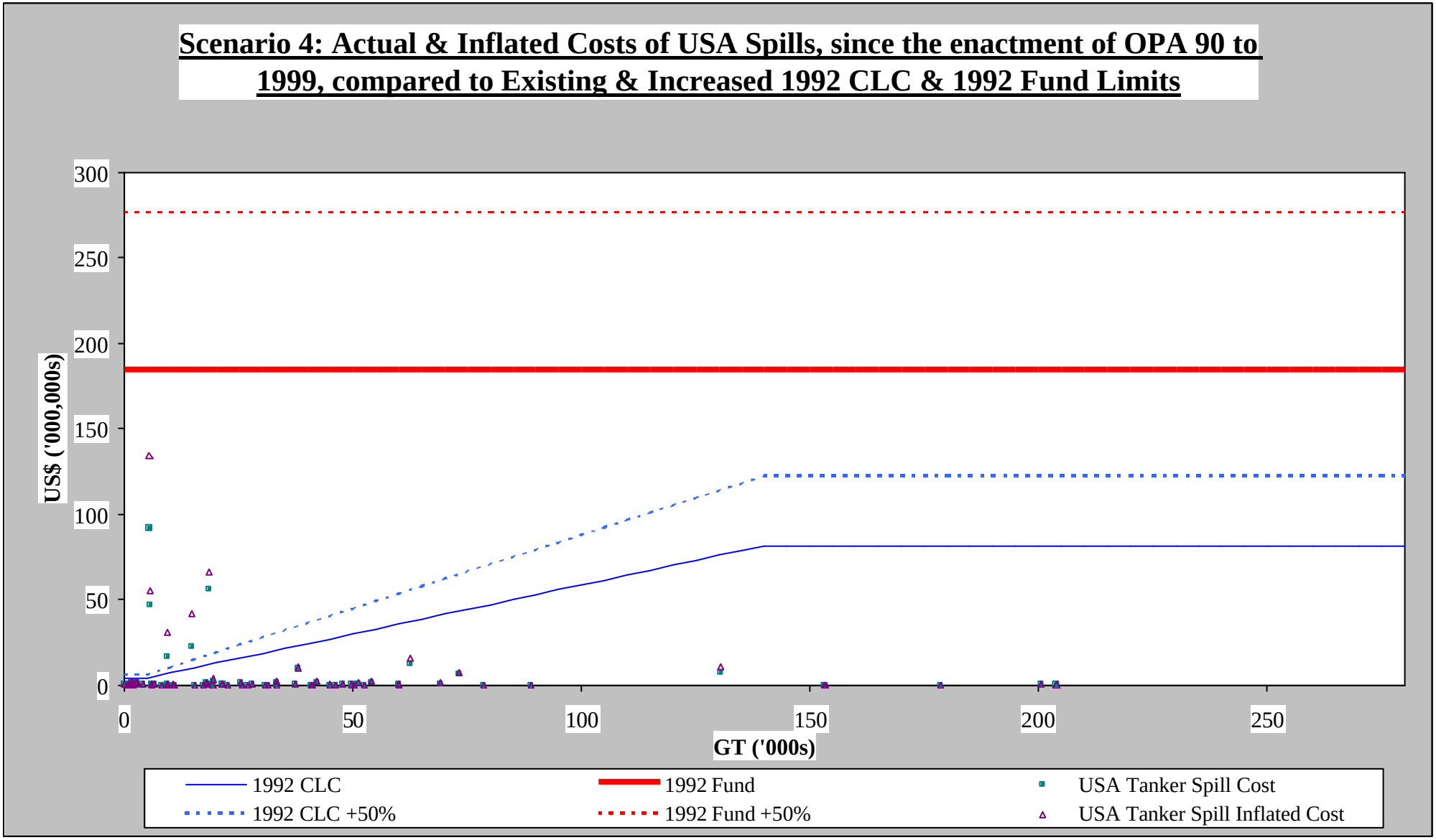
Summary of Analysis

Scenario	Period	Cost	92 CLC & Fund Limits	Share of total cost		Share ex. Erika		Share ex. Erika & Nakhodka	
				CLC	Fund	CLC	Fund	CLC	Fund
1	1990-9	Actual	Existing	51	49	59	41	71	29
2	1990-9	Actual	Increased by 50%	53	47	64	36	82	18
3	1990-9	Inflated	Increased by 50%	49	51	55	45	65	35

KEY:

= CLC share of costs greater than Fund share

= CLC share of costs less than Fund share


Scenario 4: Actual & Inflated Costs of USA Spills, since the enactment of OPA 90 to 1999, compared to Existing & Increased 1992 CLC & 1992 Fund Limits
US$ ('000,000s)
300
250
200
150
100
50
0
0
50
100
150
200
250
GT ('000s)
1992 CLC
1992 Fund
USA Tanker Spill Cost
1992 CLC +50%
1992 Fund +50%
USA Tanker Spill Inflated Cost

Scenario 4	
Cost:	Actual & Inflated Costs of USA Spills
92 CLC/Fund Limits:	Existing and Increased by 50%
Period:	Enactment of OPA 90 (August 1990) to the end of 1999

Conclusion

The actual and inflated costs of all USA tanker and barge spills since the enactment of OPA 90 would have fallen within the existing 1992 Fund limit.