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REVIEW OF THE INTERNATIONAL COMPENSATION REGIME

ESTABLISHMENT OF A SUPPLEMENTARY FUND

**Submitted by Australia, Canada, Denmark, Finland, France, Germany, Ireland,
the Netherlands, Norway, Sweden and the United Kingdom**

Summary:

At its second meeting the Third Intersessional Working Group, continued its discussion of a review of the international compensation regime, in particular of the maximum levels of compensation. This document examines the possibilities of having an optional early increase in the level of compensation based on a supplement to the present 1992 Civil Liability and Fund system. The Supplementary Protocol should be open for ratification by all States which are Contracting States to these Conventions. States which wish to remain parties to the 1992 Civil Liability and Fund Conventions without ratifying the Supplementary Protocol are free to do so. A State member of the new Supplementary Compensation Fund would still be a Contracting State to the 1992 Fund Convention and would maintain the financial obligations towards the 1992 Fund.

Action to be taken:

The Working Group is invited to consider the issues raised in this document including the draft protocol set out in the Annex, and to make such recommendations to the Assembly as it deems appropriate.

1 Introduction

- 1.1 At its second meeting in March 2001 the Third Intersessional Working Group considered a proposal from a group of States to establish a third tier on top of the present 1992 Conventions (documents 92FUND/WGR.3/5/1 and 92FUND/WGR.3/6). In general the solution outlined in March related to a third tier of compensation divided into two layers – one layer consisting of higher limits to be paid by shipowners and a second layer to be paid by oil receivers in the form of a Supplementary Fund. The third tier would be established by a Protocol to the present Conventions. It was suggested that this new system and the link to the 1992 Conventions would

not have a built-in obligation to denounce the 1992 Conventions. This construction is contrary to the provisions in the 1992 Conventions vis á vis the 1969/1971 Conventions.

- 1.2 At the conclusion of the meeting the Chairman proposed that the Working Group should continue its consideration of the issues which had been retained as meriting further consideration. He also indicated that it was crucial that at the meeting in June 2001 the Working Group based its considerations on concrete proposals, preferable in the form of draft provisions for insertion in the relevant treaty instruments, if any.
- 1.3 In order to facilitate the deliberations of the Working Group, further work has been carried out to present a more detailed proposal on the increase of the compensation level. A number of States (Australia, Canada, Denmark, Finland, the Netherlands, Norway, Sweden and the United Kingdom) have assisted with technical comments to advance the work of the third Intersessional Working Group on this issue. The views expressed in this document should not be taken as representing the formal position of the sponsoring delegations or their Governments on any item discussed.

2 A possible solution for an optional early increase in compensation limits

- 2.1 At the March 2001 meeting a number of delegations expressed the view that the present maximum compensation levels in the 1992 Conventions were inadequate and would remain so even with the increases adopted by the IMO Legal Committee last October. It was maintained that in order for the international system to retain its credibility the maximum compensation levels should be sufficiently high to ensure full compensation to all victims even in the most serious oil spill incidents. It was stated that this matter was the most important and urgent one to be considered by the Working Group. Nevertheless a number of other delegations considered there was no need for a further increase in the level of compensation at this stage. On the other hand many delegations emphasised the importance of preserving the global character of the compensation system.
- 2.2 It is suggested that a solution could be to develop the third tier model described in paragraph 1.1. During the discussion in March several delegations questioned, however, whether it would be possible to include a layer of an additional shipowner liability in the third tier, as this could not be done in any practical way without changing the 1992 Civil Liability Convention. They stressed that unless the 1992 Civil Liability Convention itself was changed, that Convention would prevent States Parties to the supplementary system from imposing the higher shipowner limits on ships flying the flag of States Parties to the 1992 Civil Liability Convention which did not become parties to the new third tier. The higher limits could only be imposed on ships flying the flag of a State Party to the new supplementary system or of a State not party to the 1992 Conventions. They feared that such a solution could result in shipowners choosing to flag out their ships from registers of States Parties to the new third tier to registers in States outside that system. For these reasons they considered that a third tier should be financed only by oil receivers. Some delegations supported the proposal for a third tier as a short-term solution, but indicated their preference for general increases in the amounts laid down in the 1992 Conventions as a long-term objective.
- 2.3 It is recognised that a third tier consisting of two layers is a more complex solution than a third tier comprising only of a system similar to that of the 1992 Fund Convention. A new Supplementary Fund would not be complicated from a legal point of view, and such a fund could be established by way of a Protocol to the 1992 Fund Convention incorporating many of the Articles in the 1992 Fund Convention. A layer with shipowner liability in a supplementary system could be created in the form of a protocol to the 1992 Civil Liability Convention. The problem with the latter solution is the difference in the treatment of ships as set out in paragraph 2.2 above.
- 2.4 More than 60 States are now members of the 1992 Fund and consequently parties to the 1992 Civil Liability Convention. The discussions held so far show that many States will be satisfied with the limits in these Conventions as increased by the IMO Legal Committee in October 2000.

These States will perhaps not in the foreseeable future be interested in joining a new supplementary system, although such States could support the creation of that proposed third tier as it would provide them with an option to increase their cover immediately. It could take a considerable number of years before a new supplementary system has the same widespread support as the 1992 Conventions. It is very likely that only a limited number of States will join the new supplementary system. As it is not intended that the new supplementary system should have only a temporary link to the 1992 Conventions, it would be difficult for many of these States to accept that ships from States joining the new system would be subject to a higher limitation amount than ships from States parties to only the 1992 Civil Liability Convention. The ships from the former group of States would have to bear a heavier financial burden when causing pollution damage in States parties to the new system than ships from 1992 Convention States not joining the new system which would not be subject to the higher limits. Such a difference in treatment could perhaps be acceptable for a limited period of time, but this would not be the case for the new system.

- 2.5 It is possible to create a system under which States are allowed to impose the higher limits on all ships, even ships from States parties to the 1992 Civil Liability Convention. However such a solution would necessitate amendments to that Convention as well and would require ratification of these amendments by all States Parties to the 1992 Civil Liability Convention. Such a solution would be more complex and perhaps more difficult to accept for a majority of 1992 Convention States. Whereas States could accept that a new system should be established for those States which want higher compensation levels than under the present system, they could be more reluctant to accept a solution under which they unwillingly would participate in funding such higher limits.
- 2.6 Taking into consideration that at the meeting of the Working Group in March many States expressed the view that there was an urgent need for an increase in the limits whereas others favoured a solution which would not involve increasing the present limits in the 1992 Conventions, a way forward to obtain an early increase in the compensation limits could be to create a supplementary system comprising of only a supplementary fund financed by the receivers of oil in the States parties to the supplementary scheme. Such a supplementary scheme could be established rather rapidly, taking into account that the Protocol establishing the supplementary fund would only need a limited number of substantive articles. This option would not prevent States from addressing issues of amendments to the 1992 Civil Liability Convention at a later stage.
- 2.7 This document proposes a solution which is intended to meet the majority view of those States which favoured a supplementary scheme as well as those States which did not wish to impose any increases on their oil industry. It could also meet the concerns of those States which emphasised the importance of retaining the global character of the international compensation regime and of ensuring that adequate compensation was available to all victims of pollution damage. This solution would on the other hand not impose higher limits on States which may not wish to join such a supplementary scheme.
- 2.8 A draft Protocol establishing a new supplementary fund is reproduced in the Annex together with comments on each article. No figure has been suggested for the maximum level of compensation, as the purpose of the document is to present a concrete treaty text for consideration by the Working Group.
- 2.9 The draft Protocol is inspired by the 1992 Fund model. It is suggested that the 1992 Fund Convention should form the basis of the new instrument which would not amend the 1992 Fund Convention as such, but will be an optional supplement only. This solution would allow those States parties to the 1992 Fund Convention which wish to join the new system to do so and thereby have supplementary compensation for pollution damage caused in those States where the compensation afforded by the 1992 Civil Liability Convention and the 1992 Fund Convention is considered inadequate. Likewise, it would allow those States which do not wish to join such a Supplementary Fund to remain in the present 1992 Fund system without any changes. In other

words, the Supplementary Fund would be entirely optional and would not have any effect on the 1992 Fund Convention for those State parties to that Convention which do not wish to join the Supplementary Fund.

- 2.10 The new Supplementary Fund would be a separate legal entity with its own Assembly. The Assembly would not need to meet every year if there were no incidents to be considered within the supplementary system. It would be possible for the Supplementary Fund to have the same Secretariat and the same Director as the 1992 Fund if it so wishes and the 1992 Fund Assembly agrees thereto. The administration costs of the Supplementary Fund would be born by the new entity.
- 2.11 As for the recognition of claims the Supplementary Fund would follow the decisions taken by the 1992 Fund. With regard to the level of compensation the Supplementary Fund would take its own decisions. It is also proposed that a claim against the Supplementary Fund would be time barred if time barred against the 1992 Fund.
- 2.12 The Working Group is invited to consider whether the supplementary compensation system should provide for the tacit amendment procedure laid down in the 1992 Fund Convention. Since the proposal is based on the 1992 Fund system, it would have to be decided whether amendments to the 1992 Fund Convention could more or less automatically be incorporated to the Supplementary Protocol, e.g. by a tacit amendment procedure or by other means.
- 2.13 Some of the issues raised during the meeting of the Working Group in March 2001 have been dealt with in the draft Protocol, e.g., sanctions for the non-submission of oil reports. However the Working Group may consider that these issues should be dealt within the framework of a more general revision of the compensation system. This may also apply to the revision of the tacit amendment procedure in the 1992 Fund Conventions.
- 2.14 In order to present a complete legal instrument to the Working Group, Final Clauses have been included in the draft Protocol so as to enable the Group to examine the treaty law aspects.

3 Conclusions

The Working Group is invited to consider the issues raised above as well as the proposed text of the draft Protocol annexed to this document. It is hoped that, after a revision of the Protocol in the light of observations from other delegations, an improved draft Protocol could be presented to the Assembly for consideration at its October 2001 session, in order to enable the Assembly to find a solution on a global level to accommodate the urgent need of a number of States to increase the level of compensation in the international regime. The Assembly would then be able to submit a draft Protocol for consideration within IMO.

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ANNEX

PROTOCOL OF 2000 TO SUPPLEMENT THE INTERNATIONAL CONVENTION ON THE ESTABLISHMENT OF AN INTERNATIONAL FUND FOR COMPENSATION FOR OIL POLLUTION DAMAGE, 1992

THE PARTIES TO THE PRESENT PROTOCOL,

BEARING IN MIND the International Convention on Civil Liability for Oil Pollution Damage, 1992,

HAVING CONSIDERED the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, 1992,

AFFIRMING the importance of maintaining the viability of the international oil pollution liability and compensation system,

NOTING that the maximum compensation afforded by the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, 1992 might be insufficient to meet compensation needs in certain circumstances in some Contracting States to that Convention;

RECOGNISING that a number of States Parties to the 1992 Conventions consider it necessary as a matter of urgency to make available additional funds for compensation through the creation of a supplementary scheme to which States may accede if they so wish;

CONSIDERING that accession to the supplementary scheme should be open only to States Parties to the 1992 Fund Convention,

Have agreed as follows:

Article 1

1. This Protocol establishes a new compensation fund for oil pollution damage, to be named the "Supplementary Fund", to provide compensation in addition to that provided by the International Oil Pollution Compensation Fund, 1992.
2. For the purpose of this Protocol the "1992 Fund Convention" means the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, 1992.
3. The compensation regime established by this Protocol shall be governed by the provisions of Articles 1, 2, paragraph 2, and Articles 3, 6-10, 12-20 and 28-34 of the 1992 Fund Convention, provided however that the expression "Contracting State" means a contracting state to this Protocol, unless stated otherwise.
4. Except where otherwise specified the expression "Fund" in the 1992 Fund Convention shall for the purpose of this Protocol be construed to mean "Supplementary Fund".

Article 2

For the purpose of this Protocol, the expression "1971 Fund Convention" in Article 1 bis of the 1992 Fund Convention shall be construed to mean 1992 Fund Convention.

Article 3

An International Supplementary Fund for compensation for pollution damage, to be named “The International Oil Pollution Supplementary Compensation Fund, [2000]” and hereinafter referred to as “the Supplementary Fund”, is hereby established to provide compensation for pollution damage to the extent that the protection afforded by the 1992 Civil Liability Convention and 1992 Fund Convention is inadequate because the damage exceeds the applicable limits of compensation laid down in Article 4, paragraph 4 of the 1992 Fund Convention for any one incident.

Article 4

Supplementary Compensation

1. For the purpose of fulfilling its function under Article 3 of this Protocol, the Supplementary Fund shall pay compensation to any person suffering pollution damage if such person has been unable to obtain full and adequate compensation for an established claim for such damage under the terms of the 1992 Fund Convention, because the damage exceeds the applicable limit of compensation laid down in Article 4, paragraph 4 of the 1992 Fund Convention.
2.
 - a) The aggregate amount of compensation payable by the Supplementary Fund under this Article shall in respect of any one incident be limited, so that the total sum of that amount and the amount of compensation actually paid under the 1992 Liability Convention and the 1992 Fund Convention within the scope of application of this Protocol shall not exceed [] million units of account.
 - b) The maximum amount of compensation referred to in sub-paragraph a) shall be [] million units of account with respect to any incident occurring during any period when there are [] Parties to this Protocol in respect of which the combined relevant quantity of contributing oil received by persons in the territories of such Parties, during the preceding calendar year, equalled or exceeded [] million tons.
 - c) The amounts mentioned in subparagraphs (a) and (b) shall be converted into national currency on the basis of the value of that currency by reference to the Special Drawing Right on the date of the decision of the Assembly of the 1992 Fund as to the first date of payment of compensation.
3. Where the amount of established claims against the Supplementary Fund exceeds the aggregate amount of compensation payable under paragraph 2(a) and (b), 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 this Convention shall be the same for all claimants.
4. "Established claim" means a claim which has been recognised by the 1992 Fund or been accepted by decision binding upon the 1992 Fund by a competent court and the claim would have been fully compensated if the limit set out in Article 4, paragraph 4 of the 1992 Fund Convention had not been applied to that incident.
5. No claim may be made against the Supplementary Fund unless it is admissible in respect of the 1992 Fund.

Article 5

1. Article 6 of the 1992 Fund Convention applies to the Supplementary Fund, provided however that the word "thereunder" shall be construed to mean "under Article 4 of the 1992 Fund Convention" and the reference to Article 7, paragraph 6 of the 1992 Fund Convention shall be construed to refer to that paragraph in that Convention.
2. For the purpose of this Protocol, the words "the owner of a ship or his guarantor" in Article 7, paragraph 4 of the 1992 Fund Convention shall be construed to mean "the owner of a ship, his guarantor or the 1992 Fund" and the words "the owner or his guarantor" in Article 7, paragraph 6 of the 1992 Fund Convention shall be construed to mean "the owner, his guarantor or the 1992 Fund".
3. For the purpose of this Protocol the words "the owner or his guarantor" in Article 9, paragraph 1 of the 1992 Fund Convention shall be construed to mean "the owner or his guarantor or under the 1992 Fund Convention".

Article 6

1. Notwithstanding Article 10, paragraphs 1 and 2 of the 1992 Fund Convention any Contracting State shall for the purpose of this Protocol be considered to receive a minimum of [1.000.000] tons.
2. When the aggregate quantity of contributing oil received in a Contracting State is less than [1.000.000] tons, the Contracting State assumes the obligations that are incumbent under this Protocol on any person who is liable to contribute to the Supplementary Fund in respect of oil received within the territory of that State in so far as no liable person exists for the aggregated quantity of oil received.
3. As regards Contracting States to this Protocol, communications made to the Director of the 1992 Fund under Article 15, paragraph 3 of the 1992 Fund Convention shall be deemed to be made also under this Protocol.

Article 7

1. If in a Contracting State there is no person to be reported under in Article 15, paragraph 2 of the 1992 Fund Convention, that Contracting State shall for the purpose of this Protocol inform the Director thereof.
2. No compensation shall be paid by the Supplementary Fund to a Contracting State or any of its citizens or residents in respect of a given incident until the obligations to communicate to the Director according to Article 15, paragraph 2 of the 1992 Fund Convention and the preceding paragraph of this Article have been completed in respect of that Contracting State for all years prior to the occurrence of that incident. However, the rights of citizens or residents of a Contracting State which has fulfilled its obligations in this regard shall not be affected by this provision, even if these citizens or residents are also citizens or residents of a Contracting State which has not fulfilled its obligations.
3. Any payments of contributions due to the 1992 Fund or the Supplementary Fund shall be set off against compensation to the debtor or his agents.
4. A Contracting State which temporarily has been denied compensation in accordance with paragraph 2, shall be denied any compensation if the conditions have not been met one year after the Director has notified the State of its failure to report.

Article 8

1. With respect to Article 19 of the 1992 Fund Convention regular sessions of the Supplementary Fund Assembly shall take place every [four] years.
2. The Assembly shall decide the budgetary period and the procedure for fixing contributions.

Final clauses

Article 9

Signature, ratification, acceptance, approval and accession

1. This Protocol shall be open for signature at London from [].
2. Subject to paragraph 4, this Protocol shall be ratified, accepted or approved by States which have signed it.
3. Subject to paragraph 4, this Protocol is open for accession by States which did not sign it.
4. This Protocol may be ratified, accepted, approved or acceded to only by States which have ratified, accepted, approved or acceded to the 1992 Fund Convention.
5. Ratification, acceptance, approval or accession shall be effected by the deposit of a formal instrument to that effect with the Secretary-General of the Organization.

Article 10

Information on contributing oil

Before this Protocol comes into force for a State, that State shall, when depositing an instrument referred to in Article 11, paragraph 5, and annually thereafter at a date to be determined by the Secretary-General of the Organization, communicate to him the name and address of any person who in respect of that State would be liable to contribute to the Supplementary Fund pursuant to Article 10 of the 1992 Fund Convention as well as data on the relevant quantities of contributing oil received by any such person in the territory of that State during the preceding calendar year.

Article 11

Entry into force

1. This Protocol shall enter into force [twelve] months following the date on which the following requirements are fulfilled:
 - a) at least [eight] States have deposited instruments of ratification, acceptance, approval or accession with the Secretary-General of the Organization; and

- b) the Secretary-General of the Organization has received information in accordance with Article 29 that those persons who would be liable to contribute pursuant to Article 10 of the 1992 Fund Convention have received during the preceding calendar year a total quantity of at least [450] million tons of contributing oil, including the amounts referred to in Article 10, paragraph 3.
- 2. Regardless of Article 19 the Secretary-General of the Organization shall convene the first Assembly not before the Director of the 1992 Fund deems, that the aggregated amount of compensation for any one incident within the scope of application of this Protocol Convention may exceed the applicable limits under the 1992 Fund Convention.
- 3. For each State which ratifies, accepts, approves or accedes to this Protocol after the conditions in paragraph 1 for entry into force have been met, the Protocol shall enter into force twelve months following the date of the deposit by such State of the appropriate instrument.

Article 12

Subject to the subsequent paragraphs of this Article, Articles 32, 35 and 37 to 39 of the 1992 Protocol to Amend the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, 1971 shall apply to this Protocol.

- 2. In Article 32 “1992 Fund Convention” shall be construed to mean this Protocol.
- 3. The application of Article 38 of the 1992 Protocol to Amend the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, 1971 is subject to the following adaptations:
 - a) The reference in paragraph 1 to Article 33 shall for the purpose of this Protocol be to Articles 13 and 14.
 - b) The reference in paragraph 2, litra a), subparagraph ii) to Article 30 shall for the purpose of this Protocol be to Article 11.
 - c) Paragraph 2, litra a), subparagraph iv) shall not apply for the purpose of this Protocol.
 - d) The reference in paragraph 2, litra a), subparagraph v) to Article 33, paragraph 1 shall for the purpose of this Protocol be to Article 13, paragraph 1.
 - e) The reference in paragraph 2, litra a), subparagraph vi) to Article 33, paragraph 4 shall for the purpose of this Protocol be to Article 13, paragraph 4.
 - f) The reference in paragraph 2, litra a), subparagraph vii) to Article 33, paragraphs 7, 8 and 9 shall for the purpose of this Protocol be to Article 13, paragraphs 7, 8 and 9.
 - g) Paragraph 2, litra a), subparagraph ix) shall not apply for the purpose of this Protocol.

Article 13

Amendment of compensation limits

1. Upon the request of at least one quarter of the Contracting States, any proposal to amend the limits of amounts of compensation laid down in Article 4, paragraph 2, subparagraph (a) and (b) shall be circulated by the Secretary-General to all Members of the Organization and to all Contracting States.
2. Any amendment proposed and circulated as above shall be submitted to the Legal Committee of the Organization for consideration at a date at least six months after the date of its circulation.
3. All Contracting States to this Protocol, whether or not Members of the Organization, shall be entitled to participate in the proceedings of the Legal Committee for the consideration and adoption of amendments.
4. Amendments shall be adopted by a two-thirds majority of the Contracting States present and voting in the Legal Committee, expanded as provided for in paragraph 3, on condition that at least one-half of the Contracting States shall be present at the time of voting.
5. When acting on a proposal to amend the limits, the Legal Committee shall take into account the experience of incidents and in particular the amount of damage resulting therefrom and changes in the monetary values. It shall also take into account the relationship between the limits in Article 4, paragraph 4, of the 1992 Fund Convention and those in this Protocol.
6.
 - a) No amendment of the limits under this Article may be considered before [date of entry into force]nor less than [five years] from the date of entry into force of a previous amendment under his Article. No amendment under this Article shall be considered before this Protocol has entered into force.
 - b) No limit may be increased so as to exceed an amount which corresponds to the limit laid down in this Convention [increased by [six] per cent per year calculated on a compound basis from [the date when this Convention is opened for signature]].
 - c) No limit may be increased so as to exceed an amount which corresponds to the limit laid down in this Convention multiplied by three.
7. Any amendment adopted in accordance with paragraph 4 shall be notified by the Organization to all Contracting States. The amendment shall be deemed to have been accepted at the end of a period of [eighteen months] [after the date of notification] unless within that period not less than one-quarter of the States that were Contracting States at the time of the adoption of the amendment by the Legal Committee have communicated to the Organization that they do not accept the amendment in which case the amendment is rejected and shall have no effect.
8. An amendment deemed to have been accepted in accordance with paragraph 7 shall enter into force [eighteen months] after its acceptance.
9. All Contracting States shall be bound by the amendment, unless they denounce this Protocol in accordance with Article 15, paragraphs 1 and 2, at least six months before the amendment enters into force. Such denunciation shall take effect when the amendment enters into force.

10. When an amendment has been adopted by the Legal Committee but the [eighteen-month] period for its acceptance has not yet expired, a State which becomes a Contracting State during that period shall be bound by the amendment if it enters into force. A State which becomes a Contracting State after that period shall be bound by an amendment which has been accepted in accordance with paragraph 7. In the cases referred to in this paragraph, a State becomes bound by an amendment when that amendment enters into force, or when this Protocol enters into force for that State, if later.

Article 14

Protocols to the 1992 Fund Convention

1. If the limits laid down in the 1992 Fund Convention have been increased by a Protocol thereto, the limit laid down in Article 4, paragraph 2, subparagraph (a) and (b), may be increased by the same amount by means of the procedure set out in Article 13. The provisions of Article 13, paragraph 6 shall not apply in such cases. Where the procedure set out in Article 13 is applied at a later stage, the limits laid down in Article 13, paragraph 6, subparagraphs (b) and (c), shall be calculated on the basis of the limits laid down in the present Protocol referred to therein with the addition of any increase in the limit laid down in Article 4, paragraph 2, subparagraph (a) and (b), which is decided in accordance with the procedure of this paragraph.
2. If a provision in the 1992 Fund Convention has been amended by a protocol thereto, corresponding amendments to this instrument may also be made by means of the procedure set out in Article 13, paragraphs 1-4 and 7-10, [provided the amendment concerns:
 - (i) the contribution system
 - (ii) the limits of liability
 - (iii) definitionsetc].

Such amendments shall not enter into force before the amendments to the 1992 Fund Convention.

3. If pollution damage may be compensated both under the present Protocol and under another Protocol to the 1992 Fund Convention, any contributions due under that other Protocol in respect of Contracting States thereto which are also Contracting States to the present Protocol shall be considered as pollution damage under the present Protocol, but the pollution damage covered by the Protocol to the 1992 Fund Convention shall not otherwise be compensated under the present Protocol.

Article 15

Denunciation

1. This Protocol may be denounced by any Party at any time after the date on which it enters into force for that Party.
2. Denunciation shall be effected by the deposit of an instrument with the Secretary-General of the Organization.
3. A denunciation shall take effect twelve months, or such longer period as may be specified in the instrument of denunciation, after its deposit with the Secretary-General of the Organization.

4. Denunciation of the 1992 Protocol to amend the 1969 Liability Convention or the 1992 Protocol to amend the 1971 Fund Convention shall be deemed to be a denunciation of the present Protocol. Such denunciation shall take effect on the date on which denunciation of the 1992 Protocol to amend the 1969 Liability Convention or the 1992 Protocol to amend the 1971 Fund Convention takes effect according to Article 16 or Article 34 of the respective Protocol.
5. Notwithstanding a denunciation of the present Protocol by a Party pursuant to this Article, any provisions of this Protocol relating to the obligations to make contributions to the Supplementary Fund with respect to an incident referred to in Article 12, paragraph 2(b), of the 1992 Fund Convention and occurring before the denunciation takes effect shall continue to apply.

Article 16

Termination

1. This Protocol shall cease to be in force on the date when the number of Contracting States falls below [seven] or contributing oil fall below [250] million tons, whichever is the earliest.
2. States which are bound by this Protocol on the day before the date it ceases to be in force shall enable the Supplementary Fund to exercise its functions as described under Article 37 of the 1992 Protocol to Amend the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, 1971 as supplemented by this Protocol and shall, for that purpose only, remain bound by this Protocol.

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Comments to the draft Protocol

Article 1 The first paragraph reflects the purpose of the Supplementary Fund, namely to provide compensation in addition to that provided by the 1992 Fund.

The proposed instrument has a close connection with the 1992 Fund Convention and is entirely dependent on that Convention. For this reason it has been considered appropriate to prepare an instrument in the form of a Protocol to the 1992 Fund Convention. The new instrument would not amend the 1992 Fund Convention but would supplement it, and the 1971 Fund Convention would be left intact. A State would maintain its obligations towards the 1992 Fund regardless of its obligations under the supplementary regime.

The third paragraph refers to provisions in the 1992 Fund Convention – *inter alia* those relating to the definition of damage, the territorial scope of application, time bar and functions of the Assembly - which shall govern the Supplementary Fund in conjunction with the provisions of the proposed Protocol. To avoid misunderstanding it is emphasised that references to 'Contracting State' in the Protocol mean contracting states to the Supplementary Fund Protocol.

Article 2 replaces for the purpose of the Protocol the expression "1971 Fund Convention" by the "1992 Fund Convention".

Article 3 establishes the Supplementary Fund and specifies its purpose, namely to supplement the compensation provided by the 1992 Fund when that compensation is inadequate because the total damage exceeds the limit set out in the 1992 Fund Convention.

Article 4 is the central provision of the Protocol containing provisions corresponding to those in Article 4 of the 1992 Fund Convention. The text of the Protocol is kept as close to the language of Article 4 of the 1992 Fund Convention as possible. The first paragraph provides that the Supplementary Fund should pay compensation in cases where the maximum amount of compensation provided for in Article 4 of the 1992 Fund Convention has been exceeded.

The maximum amount of compensation payable by the Supplementary Fund in paragraph 2(a) has been left open for further discussion. Under paragraph 2(b) the maximum compensation level would be increased if a sufficient number of States with considerable quantities of contributing oil accede to the Protocol.

When a claim has been recognised by the 1992 Fund and pollution damage falls within the scope of application of the Protocol, the claim would automatically be recognised by the Supplementary Fund, i.e. the Supplementary Fund Assembly could not in this regard apply a policy different from that of the 1992 Fund Assembly or Executive Committee. This means that the criteria for admissibility applied by the 1992 Fund would be applied by the Supplementary Fund.

Paragraph 4 defines the concept of "established claim". This definition makes it clear that only claims recognised by the 1992 Fund or by a competent court in proceedings against the 1992 Fund could be compensated by the Supplementary Fund and only on the condition that the claimant would have been fully compensated if the limit set out in Article 4, paragraph 4 of the 1992 Fund Convention had not been applied.

In paragraph 5 it is stated that a claim cannot be made against the Supplementary Fund unless it is admissible in respect of the 1992 Fund.

Article 5, paragraph 1 states that a claim which is not time barred against the 1992 Fund pursuant to Article 6 of the 1992 Fund Convention would not be time barred against the Supplementary Fund.

Paragraph 2 is intended to make it possible for the Supplementary Fund to intervene in and receive notifications of proceedings against the 1992 Fund.

Under paragraph 3 the Supplementary Fund acquires by subrogation the rights of claimants compensated by the Supplementary Fund vis-à-vis the 1992 Fund. This would enable the Supplementary Fund to pay compensation to claimants before all claims have been settled in respect of the 1992 Fund.

Article 6 Since a number of States have indicated that they do not see the need for a supplementary scheme, it is likely that only a limited number of States would accede to the Supplementary Fund Protocol. It could therefore result in a heavy burden on the oil industry in the States parties to the Protocol to finance compensation payments in respect of pollution damage in a State where no contribution is paid. Against this background it is proposed to set a minimum level of contributions payable in respect of any State party to the Protocol so that all Contracting States enjoying the protection of the Supplementary Fund would also contribute to the system.

Article 7 Over the years a number of States have not fulfilled their obligation under Article 15 of the 1971 Fund Convention or the 1992 Fund Convention to submit reports on oil reports. For this reason Article 9 of the draft Protocol provides that if a State did not fulfil its obligations in this regard, compensation would not be payable to that State or to its citizens or residents.

Paragraph 3 deals with the situation where a contributor has a debt vis-à-vis the Supplementary Fund. If such a contributor has suffered pollution damage, he would only be entitled to compensation for the difference between the amount of his established claim and the amount owed to the Supplementary Fund. The same would apply in respect of a State which under Article 14 of the 1992 Fund Convention has assumed the obligations to pay contributions to the Supplementary Fund and has not fulfilled this obligation as well as in respect of a State which is liable to pay compensation to the Supplementary Fund under Article 15.4 of the 1992 Fund Convention.

Article 8 The experience of the 1992 Fund has shown that there will be very few incidents that would give rise to claims exceeding the level of compensation afforded by the 1992 Fund. It is not necessary therefore to convene the Supplementary Fund Assembly every year but only to hold Assembly sessions when decisions are required.

Article 9 Since the Protocol would establish a compensation scheme supplementary to the 1992 Fund, accession to the Protocol would only be open to Contracting States to the 1992 Fund Convention. This corresponds to the approach taken in respect of the relationship between the 1992 Fund Convention and the 1992 Civil Liability Convention, where a State only can accede to the 1992 Fund Convention if it is a Contracting State to the 1992 Civil Liability Convention.

Article 10 Since the Protocol can only be acceded to by States parties to the 1992 Fund Convention, the obligation to submit oil reports to the Secretary-General already exists in the 1992 Fund Protocol. However, Contracting States, which have not been obliged to report according to Article 29 of the 1992 Fund Protocol because there are no persons in that State liable to contribute to the 1992 Fund, might be obliged to report to the Supplementary Fund due to the proposed minimum level of contributions.

Article 11 is based on the corresponding provision in the 1992 Fund Protocol, however entry into force is postponed until the Director of the 1992 Fund deems, that the aggregated amount of compensation for a given incident within the scope of application of this Protocol may exceed the applicable limits under the 1992 Fund Convention.

Article 12 The listed Articles are not included in the reference made in Article 1 because they are not part of the 1992 Fund Convention but to the 1992 Fund Protocol.

Article 13 is also almost identical to the provisions relating to the tacit amendment procedure in Article 33 of the 1992 Fund Protocol. The procedure under Article 33 of that Protocol has been criticised as being too slow. For this reason the text has been placed within square brackets in respect of a number of points in paragraphs 6, 7 and 8 of the proposed Article.

Article 14 is a means by which the Supplementary Fund Protocol can adapt to new protocols to the 1992 Fund Convention by application of a tacit amendment procedure, bearing in mind that the 1992 Fund is

the basis of the new Supplementary Fund. It is left open whether this procedure should be limited to a listed range of issues.

Article 15 is in substance identical to Article 34 of the 1992 Fund Protocol.

Article 16 has been modelled on the 2000 Protocol to the 1971 Fund Convention.
