



INTERNATIONAL  
OIL POLLUTION  
COMPENSATION  
FUND 1992

THIRD INTERSESSIONAL  
WORKING GROUP  
Agenda item 2

92FUND/WGR.3/25/2  
4 February 2005  
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## REVIEW OF THE INTERNATIONAL COMPENSATION REGIME

### SHARING THE BURDEN

**Submitted by the International Group of P&I Clubs**

<b>Summary:</b>	This submission provides further detail of the STOPIA scheme and confirms the alternative offer made by the International Group of P&I Clubs to share in the Supplementary Fund (TOPIA).
<b>Action to be taken:</b>	The Working Group is asked to recommend the adoption of the TOPIA scheme.

### **1 Introduction**

- 1.1 The work of the Third Intersessional Working Group has reached a critical stage. In October 2004 the 1992 Fund Assembly decided that at its next meeting the Working Group should make final recommendations to the October 2005 Assembly on whether or not the Conventions should be revised and, if so, which items require revision. It may therefore be timely for the International Group to summarise the present position and make proposals for consideration by the next meeting of the 1992 Fund Working Group.
- 1.2 The debate about revision of the Conventions has concentrated on two principal issues:
  - (a) sharing the cost of compensation between shipowners and oil receivers; and
  - (b) substandard shipping.
- 1.3 This paper concentrates on the question of sharing: a further submission from the International Group will address the important but separate issue of substandard shipping.

### **2 STOPIA**

The Supplementary Fund Protocol will enter into force on 3 March 2005. In countries where the Supplementary Fund Protocol will apply oil receivers will therefore be required to shoulder the full burden of compensation in excess of the 1992 Fund Convention limit. In those same countries the STOPIA agreement will also apply, whereby shipowners and Clubs have agreed to indemnify

the 1992 Fund in respect of all claims up to SDR20million where the CLC limit would be lower. The STOPIA scheme will however, operate even if there is no claim upon the Supplementary Fund. The STOPIA agreement has been developed in consultation with the Director of the IOPC Funds and is attached at Annex I together with an explanatory note. STOPIA constitutes a binding agreement to indemnify the 1992 Fund, which will be guaranteed by the International Group of P&I Clubs in an amendment to the existing Memorandum of Understanding between the 1992 Fund and the International Group of P&I Clubs. These arrangements will be subject to formal approval by the 1992 Fund Assembly – see Item 26 of the Agenda of the Ninth Extraordinary Session of the 1992 Fund Assembly.

### **3 TOPIA**

- 3.1 Oil receivers have suggested that the commercial exposure of the oil industry following a major incident involving the Supplementary Fund is disproportionately high. Various ways have been proposed in which the Conventions may be amended so that this result may be avoided. To meet this concern in a time-effective manner all Club Boards have now agreed the alternative proposal made to the last meeting – see document 92FUND/WGR.3/22/13 - that shipowners and their Clubs should offer to maintain the existing broad sharing of the cost of claims, as established by the Secretariat's claims study, by means of a binding agreement to indemnify the Supplementary Fund. A copy of the proposed agreement (TOPIA) together with an explanatory note is attached at Annex II. TOPIA provides that shipowners and their Clubs will indemnify the Supplementary Fund in respect of 50% of the claims falling on the Supplementary Fund. The principal objective of oil receivers can therefore be met by a binding agreement which does not involve the necessity to amend the Conventions. The oil companies represented in OCIMF have not associated themselves with this proposal, but this does not affect its viability, since it adopts the same mechanism as the STOPIA agreement and would also operate without the explicit agreement of oil receivers. However, it should be noted that the TOPIA proposal is put forward as an alternative to STOPIA and is not intended as an interim measure while the revision process continues but rather as a means of addressing the issue of sharing promptly without having to revise the Conventions. It should also be noted that TOPIA will only be available where the spilling vessel is liable under CLC and to the extent that the incident is not caused by a terrorist or bio-chemical incident.
- 3.2 If the TOPIA proposal is accepted, it will be necessary to reach agreement with both the 1992 and Supplementary Fund Assemblies in order to ensure the simultaneous implementation of TOPIA and withdrawal of STOPIA .
- 3.3 It should be noted that whilst the present draft of TOPIA is closely modelled on STOPIA, no detailed discussion on the text of TOPIA has yet taken place with the Director of the IOPC Funds.

### **4 Action to be taken by the Working Group**

The Working Group is invited to consider recommending to the adoption of the TOPIA scheme.

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**ANNEX I**

**SMALL TANKER OIL POLLUTION  
INDEMNIFICATION AGREEMENT  
(STOPIA)**

HAMBURG HONG KONG LE HAVRE LONDON PARIS PIRAEUS SHANGHAI SINGAPORE

## EXPLANATORY NOTE

This Note explains the purpose behind the Small Tanker Oil Pollution Indemnification Agreement (STOPIA) and gives a short summary of its main features. It does not form part of the Agreement but is intended to serve as an informal guide for those interested in understanding how it is intended to operate.

The Agreement establishes the STOPIA Scheme, the object of which is to provide a mechanism for shipowners to pay an increased contribution to the funding of the international system of compensation for oil pollution from ships, as established by the 1992 Civil Liability Convention, the 1992 Fund Convention and the 2003 Supplementary Fund Protocol. The Scheme reflects the desire of shipowners to support efforts to ensure the continuing success of this international system. It is also intended to encourage widest possible ratification of the Protocol, and has been drawn up in recognition of the potential additional burden imposed by the Protocol on receivers of oil.

STOPIA is designed to compensate for this additional burden by adjusting the financial effect of the limitation of liability provisions in CLC 92 in respect of incidents causing pollution damage in States where the Supplementary Fund Protocol is in force. The Scheme reflects the fact that CLC 92 provides for the liability limit of the shipowner to be calculated by reference to the tonnage of the ship, subject to a minimum limit of SDR 4.51 million for ships of 5,000 gross tons or less. Given that the 1992 Fund pays compensation where claims exceed the CLC 92 limit, incidents involving small tankers may result in the 1992 Fund bearing a relatively high proportion of the compensation payable, and paying compensation in a larger number of incidents than would be the case if the minimum limit under CLC 92 were higher. Against this background the Scheme provides for shipowners to bear the cost of oil spills up to a minimum level of SDR 20 million. That amount is equivalent to the liability limit under CLC 92 for a ship of 29,548 gross tons. STOPIA therefore re-apportions the ultimate cost of oil spills involving ships up to that size.

The Scheme is established by a legally binding Agreement between the owners of ships in this category which are insured against oil pollution risks by P&I Clubs in the International Group. In all but a relatively small number of cases, ships of this description will automatically be entered in the Scheme as a condition of Club cover. Their owners will be parties to the Agreement and are referred to as "Participating Owners".

As the Scheme is contractual it does not affect the legal position under the 1992 Conventions, and the victims of oil spills continue to enjoy their existing rights against the 1992 Fund. For this reason the Scheme provides for the owner of the ship involved in an incident to pay Indemnification to the 1992 Fund, rather than to pay extra sums directly to claimants.

Although the 1992 Fund is not a party to STOPIA the Agreement is intended to confer legally enforceable rights on the 1992 Fund, and it expressly provides that the 1992 Fund may bring proceedings in its own name in respect of any claim under the Scheme. The Scheme is governed by English law, and English legislation enables legally enforceable rights to be conferred in this manner.

Insurers are not parties to the Agreement, but all Clubs in the International Group have amended (or agreed to amend) their Rules to provide shipowners with cover against liability to pay Indemnification under STOPIA. The Clubs are also authorised under the Scheme to enter into ancillary arrangements enabling the 1992 Fund to enjoy a right of direct action against the relevant Club in respect of any claim under the Scheme. It is envisaged that these and other terms supporting the operation of the Scheme will be incorporated in a revised version of the current Memorandum of Understanding between the 1992 Fund and the International Group of P&I Clubs.

Whilst the above are the main features of the Scheme, its eleven clauses address numerous matters of detail. Clause I sets out various definitions, most of which are intended to dovetail with the terminology and provisions of the relevant international conventions. Clauses II and III contain

general provisions relating to the Scheme and provide for it to apply to “Relevant Ships”. Apart from a relatively small category of ships mentioned below, all tankers will be Relevant Ships if they are of 29,548 tons or less and are insured by an International Group Club. The Scheme provides that the owner of any such ship shall become a party to the Agreement when made a party by his Club in accordance with its Rules, and normally this will result in him automatically becoming a party as a condition of cover against oil pollution risks. The Agreement also provides for any Relevant Ship which he owns to be entered automatically in the Scheme.

An exception to these arrangements relates to ships which are insured by an International Group Club but are not reinsured through the Group’s Pooling arrangements. A ship in this category is not automatically entered in the Scheme, but may nonetheless be deemed to be a Relevant Ship (and be entered in the Scheme) by written agreement between the owner and his Club. Certain Japanese coastal tankers are insured outside the International Group Pooling arrangements, but it appears that fewer than 200 of these exceed 200 gross tons. By contrast, some 6,000 tankers are expected to be entered in STOPIA.

Clause IV sets out the precise circumstances in which the Participating Owner of a Relevant Ship is liable to pay Indemnification to the 1992 Fund, and it includes detailed provisions affecting the calculation of the precise amount payable.

Clause V deals with recourse against third parties, and provides for Indemnification of the 1992 Fund to be postponed until a final conclusion has been reached in any recourse action it decides to bring against other potentially responsible parties. Credit is to be given for any sums recovered, but the 1992 Fund retains an absolute discretion as to the commencement, conduct and any settlement of such proceedings. In the event of Indemnification being paid before recourse proceedings have been completed, provision is made for it to be treated as an interest-free loan until the proceedings are over. (This is to avoid the recourse claim being prejudiced as a result of the defendant being able to argue that Indemnification has reduced the loss for which the 1992 Fund may claim recovery.)

Clause VI contains time bar provisions designed to dovetail with the 1992 Conventions (and to allow the 1992 Fund a further 12 months in which to claim Indemnification after the time limit for claims against it under the 1992 Fund Convention).

Clause VII deals with amendment of the Scheme and enables changes to be made by the International Group acting as agent for all Participating Owners. No amendment is to have retrospective effect, and the Clubs have agreed that new arrangements in a revised Memorandum of Understanding should provide for consultation with the 1992 Fund in good time prior to any decision to amend the Scheme.

Clause VIII provides for the Scheme to enter into effect simultaneously with the entry into force of the Supplementary Fund Protocol. Provision is also made for termination of the Agreement in certain circumstances, notably in the event of developments which materially and significantly change the system of compensation established by the current international regime. Again, the Clubs have agreed to consult with the 1992 Fund prior to any decision to terminate STOPIA.

Under Clause IX a Participating Owner may withdraw from the Scheme, and the terms on which he may do so are set out. However it is anticipated that the owner of a Relevant Ship will not normally be able to withdraw from STOPIA without prejudicing his Club cover in respect of oil pollution risks.

Clause X sets out the legal rights under the Scheme of the 1992 Fund, and the authority of the International Group to agree ancillary arrangements with the 1992 Fund in respect of direct actions. The Clubs have agreed to bear direct liability on a similar basis to that prescribed by CLC 92.

Finally the Agreement provides by Clause XI that it is to be governed by English law and that the English High Court of Justice shall have exclusive jurisdiction in relation to any disputes thereunder.

## **SMALL TANKER OIL POLLUTION INDEMNIFICATION AGREEMENT (STOPIA)**

### **INTRODUCTION**

The Parties to this Agreement are the Participating Owners as defined herein.

The Participating Owners recognize the success of the international system of compensation for oil pollution from ships established by the 1992 Civil Liability and Fund Conventions, and they are aware that it may need to be revised or supplemented from time to time in order to ensure that it continues to meet the needs of society.

A Protocol has been drawn up and adopted to supplement the 1992 Fund Convention by providing for additional compensation to be available from a Supplementary Fund in States which opt to accede to the Protocol. The Parties wish to encourage the widest possible ratification of the Protocol, with a view to facilitating the continuance of the existing compensation system in its current form (but as supplemented by the Protocol).

In consideration of the potential additional burden imposed by the Protocol on receivers of oil, the Participating Owners have agreed to establish the scheme set out herein, whereby the Participating Owners of tankers below a specified tonnage will indemnify the International Oil Pollution Compensation Fund 1992 ("the 1992 Fund") for a portion of its liability to pay compensation under the 1992 Fund Convention for pollution damage caused by such tankers in States in respect of which the Protocol establishing the Supplementary Fund is in force.

This Agreement is intended to create legal relations and in consideration of their mutual promises Participating Owners of each Entered Ship have agreed with one another and do agree as follows -

### **I. DEFINITIONS**

- (A) The following terms shall have the same meaning as in Article I of the Liability Convention:  
"Incident", "Oil", "Owner", "Person", "Pollution Damage", "Preventive Measures", "Ship".
- (B) "1992 Fund" means the International Oil Pollution Compensation Fund 1992 as established by the 1992 Fund Convention.
- (C) "1992 Fund Convention" means the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, 1992, as amended and/or supplemented from time to time, and any domestic legislation giving effect thereto.
- (D) "Club" means a Protection and Indemnity (P&I) Association in the International Group; "the Owner's Club" means the Club by which a Relevant Ship owned by him is insured, or to which he is applying for Insurance; "his Club", "Club Party" and similar expressions shall be construed accordingly.
- (E) "Entered Ship" means a Ship to which the Scheme applies, and "Entry" shall be construed accordingly.
- (F) "Indemnification" means the indemnity payable under Clause IV of this Agreement.
- (G) "Insurance", "insured" and related expressions refer to protection and indemnity cover against oil pollution risks.
- (H) "International Group" means the International Group of P&I Clubs.

- (I) “Liability Convention” means the International Convention on Civil Liability for Oil Pollution Damage, 1992, as amended from time to time, and any domestic legislation giving effect thereto.
- (J) “Participating Owner” means the Owner of an Entered Ship who is a Party.
- (K) “Party” means a party to this Agreement.
- (L) “Protocol” means the Protocol of 2003 to Supplement the 1992 Fund Convention, and any domestic legislation giving effect thereto; and “Protocol State” means a State in respect of which the said Protocol is in force.
- (M) “Relevant Ship” has the meaning set out in Clause III(B).
- (N) “Scheme” means the Small Tanker Oil Pollution Indemnification Agreement (STOPIA) as established by this Agreement.
- (O) “Supplementary Fund” means the Fund established by the Protocol.
- (P) “Tons” means the gross tonnage calculated in accordance with the tonnage measurement regulations contained in Annex I of the International Convention on Tonnage Measurement of Ships, 1969; the word “tonnage” shall be construed accordingly.
- (Q) “Unit of account” shall have the same meaning as that set out in Article V, paragraph 9 of the Liability Convention.

## **II. GENERAL**

- (A) This Agreement shall be known as the Small Tanker Oil Pollution Indemnification Agreement (STOPIA).
- (B) The Owner of any Relevant Ship shall be eligible to become a Party and shall do so when made a Party by the Club insuring that Ship as the Rules of that Club may provide.

## **III. THE STOPIA SCHEME**

- (A) This Agreement is made to establish STOPIA for payment of Indemnification to the 1992 Fund on the terms set out herein.
- (B) A Ship shall be eligible for Entry in the scheme if:
  - (1) it is of not more than 29,548 Tons;
  - (2) it is insured by a Club; and
  - (3) it is reinsured through the Pooling arrangements of the International Group.

Such a ship is referred to herein as a “Relevant Ship”.

- (C) Any Relevant Ship owned by a Participating Owner shall automatically be entered in the Scheme upon his becoming a Party to this Agreement in accordance with Clause II(B) above.
- (D) A Ship which is not a Relevant Ship by reason of the fact that it is reinsured independently of the said Pooling arrangements may nonetheless be deemed to be a Relevant Ship by written agreement between the Owner and his Club.

- (E) Once a Relevant Ship has been entered in the Scheme it shall remain so entered until
- (1) it ceases to be a Relevant Ship (as a result of tonnage re-measurement and/or of ceasing to be insured and reinsured as stated in Paragraph (B) above); or
  - (2) it ceases to be owned by a Participating Owner; or
  - (3) the Participating Owner has withdrawn from this Agreement in accordance with Clause IX.

#### **IV. INDEMNIFICATION OF 1992 FUND**

- (A) Where as a result of an Incident an Entered Ship causes Pollution Damage in a Protocol State in respect of which liability is incurred both under the Liability Convention by the Participating Owner of that Ship and under the 1992 Fund Convention by the 1992 Fund, the said Owner shall indemnify the 1992 Fund up to an amount calculated in accordance with Paragraph (E) below.
- (B) Pollution Damage in a Protocol State means:
- (1) Pollution Damage caused:
    - (i) in the territory, including the territorial sea, of a Protocol State; and/or
    - (ii) in the exclusive economic zone of a Protocol State, established in accordance with international law, or, if such a State has not established such a zone, in an area beyond and adjacent to the territorial sea of that State determined by that State in accordance with international law and extending not more than 200 nautical miles from the baselines from which the breadth of its territorial sea is measured; and/or
  - (2) the costs of Preventive Measures, wherever taken, to prevent or minimize such Pollution Damage.
- (C) Indemnification shall not be payable for:
- (1) the costs of any Preventive Measures to the extent that the Participating Owner is exonerated from liability under Article III, paragraph 3 of the Liability Convention, and for which the 1992 Fund is liable by virtue of Article 4, paragraph 3 of the 1992 Fund Convention;
  - (2) any other Pollution Damage to the extent that liability is incurred by the 1992 Fund but not by the Participating Owner.
- (D) Indemnification due under this Agreement shall be payable irrespective of whether any payments are made from the Supplementary Fund in respect of the Incident.
- (E) The amount for which Indemnification is payable by the Participating Owner shall be the aggregate amount of compensation paid by the 1992 Fund for Pollution Damage in a Protocol State, provided always that –
- (1) for the purpose of this Clause IV(E) the aggregate amount of compensation paid by the 1992 Fund shall be the total amount of compensation paid by the 1992 Fund less



any sums recovered by the 1992 Fund in recourse action pursuant to Clause V below (net of the costs of such recourse action);

- (2) the Indemnification amount shall not exceed in respect of any one Incident an amount equivalent to 20 million units of account less –
  - (i) the amount of the Owner's liability under the Liability Convention as limited by Article V, paragraph 1 thereof; and
  - (ii) any amounts which he or his Club is entitled to recover from the 1992 Fund in respect of the Incident, whether in their own right, by subrogation, assignment or otherwise.
- (F) The deduction referred to in Paragraph (E)(2)(i) above shall be made irrespective of whether the Participating Owner is entitled to avail himself of limitation.
- (G) For the purposes of this Agreement the conversion of units of account into national currency shall be made in accordance with Article V, paragraph 9 of the Liability Convention.

## **V. RECOURSE AGAINST THIRD PARTIES**

- (A) Any decisions as to whether the 1992 Fund is to take recourse action against any third parties, and as to the conduct of any such action, including any out-of-court settlement, are in the absolute discretion of the 1992 Fund.
- (B) Unless otherwise agreed, payment of Indemnification to the 1992 Fund shall be postponed until such time as the 1992 Fund gives notice to the Participating Owner that a final conclusion has been reached in relation to all and any recourse action taken or contemplated by the 1992 Fund against any third parties in respect of the Incident. For these purposes a final conclusion may include a decision by the 1992 Fund not to take such action, or to discontinue any such action already commenced.
- (C) Paragraph (B) above shall not prevent the 1992 Fund from commencing proceedings against the Participating Owner and the Club in order to protect its rights hereunder from becoming time-barred.

The Participating Owner and his Club agree to grant to the 1992 Fund any extension of time which the 1992 Fund may reasonably require in respect of the commencement or conduct of such proceedings in circumstances where recourse action is ongoing and/or no notice of final conclusion has been given in accordance with Paragraph (B) above.

- (D) Without prejudice to Paragraph (A) above, the 1992 Fund may consult with the Participating Owner and/or his Club in relation to any recourse action in which they are actual or potential claimants. Nothing in this Agreement shall prevent the 1992 Fund, the Owner and the Club from agreeing on any arrangements relating to such action as may be considered appropriate in the particular case, including any terms as to the apportionment of the costs of funding such action, or as to the allocation of any recoveries made.
- (E) If the 1992 Fund decides not to take recourse action against any third party or, after such action has been taken, decides not to pursue the action, Indemnification is payable on condition that the 1992 Fund will execute such reasonable documentation as may be required to transfer to the Participating Owner and/or his Club, by subrogation, assignment or otherwise, any rights of recourse which it may have against third parties, to the extent of any interest which they may have in recoveries from such parties by virtue of Indemnification paid under this Agreement.

- (F) In the event of the Participating Owner agreeing to pay Indemnification before the 1992 Fund has given notice as mentioned in Paragraph (B) above, such payment shall (unless otherwise agreed) be subject to the condition that it is to be treated as an interest-free loan repayable on demand until such notice is given, whereupon it shall cease to be repayable.
- (G) Indemnification is also paid on the condition that if, after it has been paid, the 1992 Fund for any reason recovers any sums from any third party, the 1992 Fund will account to the Participating Owner for such recoveries (net of any costs incurred by the 1992 Fund in making them), so as to reimburse the Participating Owner any Indemnification paid by him in excess of the amount which would have been payable in accordance with Clause IV(E) above.
- (H) Save where the 1992 Fund has been notified to the contrary, the Club insuring the Participating Owner shall be deemed to be authorised to act on his behalf in receiving notice from the 1992 Fund under Paragraph (B) above; in granting any time extension or extensions under Paragraph (C) above; in receiving any reimbursement pursuant to Paragraph (G) above; and in agreeing all and any other matters relating to the operation of this Clause V.

## **VI. PROCEDURE AND MISCELLANEOUS**

Any rights of the 1992 Fund to Indemnification under this Agreement shall be extinguished unless an action is brought hereunder within four years from the date when the Pollution Damage occurred. However, in no case shall an action be brought after seven years from the date of the Incident which caused the damage. Where this Incident consists of a series of occurrences, the seven years' period shall run from the date of the first such occurrence.

## **VII. AMENDMENT**

- (A) This Agreement may be amended at any time by the International Group acting as agent for all Participating Owners.

Any such amendment to this Agreement will take effect three months from the date on which written notice is given by the International Group to the 1992 Fund.

- (B) Each Participating Owner agrees that the International Group shall be authorized to agree on his behalf to an amendment of this Agreement if -
  - (1) it is so authorized by his Club, and
  - (2) his Club has approved of the amendment by the same procedure as that required for alteration of its Rules.
- (C) Any amendment to the Agreement shall not affect rights and obligations in respect of any incident which occurred prior to the date when such amendment enters into force.

## **VIII. DURATION**

- (A) This Agreement shall enter into effect simultaneously with the entry-into-force of the Protocol.
- (B) Subject to the following provisions of this Clause VIII, this Agreement may be terminated at any time by the International Group acting on behalf of all Participating Owners.

- (C) Each Participating Owner agrees that the International Group shall be authorized to terminate this Agreement on his behalf if -
- (1) the Clubs cease to provide Insurance against the liability of Participating Owners to pay Indemnification under this Agreement; or
  - (2) any international instrument is adopted or agreement is reached, or any relevant domestic or regional law is made or adopted (including any binding judicial decision or precedent), which does or will materially and significantly change the system of compensation established by the Liability Convention, the 1992 Fund Convention and the Protocol, and/or the operation of that system in any one or more Protocol States (hereinafter referred to as a “material change”); or
  - (3) termination is authorized by his Club, and his Club has approved of the termination by the same procedure as that required for alteration of its Rules.
- (D) Termination shall not take effect until three months after the date on which the 1992 Fund is notified thereof in writing by the International Group. In the event of termination on the grounds stated in Paragraph (C)(2) above, such notice may specify that termination is take effect -
- (1) at such later date, if any, on which the material change takes effect; and/or
  - (2) either entirely, or in relation only to Pollution Damage in any State or States specified in the notice as being affected by such change.
- (E) The termination of this Agreement shall not affect rights or obligations in respect of any Incident which occurs prior to the date of termination.

## **IX. WITHDRAWAL**

- (A) A Participating Owner may withdraw from this Agreement –
- (1) on giving not less than 3 months’ written notice of withdrawal to his Club; or
  - (2) by virtue of an amendment thereto, provided always –
    - (i) that he exercised any right to vote against the said amendment when his Club sought the approval thereto of its members; and
    - (ii) that within 60 days of the amendment being approved by the membership of his Club he gives written notice of withdrawal to his Club; and
    - (iii) that such withdrawal shall take effect simultaneously with the entry-into-effect of the amendment, or on the date on which his notice is received by his Club, whichever is later.
- (B) If a Participating Owner ceases to be the owner of a Relevant Ship he shall be deemed, in respect of that ship only, to withdraw from this Agreement with immediate effect and shall give written notice to the 1992 Fund that he has ceased to be the owner of that Relevant Ship.
- (C) A Participating Owner withdrawing from this Agreement shall have no further liability hereunder as from the date when his withdrawal takes effect; provided always that no withdrawal shall affect rights or obligations in respect of any Incident which occurs prior to that date.

## **X. LEGAL RIGHTS OF 1992 FUND**

(A) Though not a Party to this Agreement, the 1992 Fund is intended to enjoy legally enforceable rights of Indemnification as described herein, and accordingly the 1992 Fund shall be entitled to bring proceedings in its own name against the Participating Owner in respect of any claim it may have hereunder.

(B) Notwithstanding Paragraph (A) above, the consent of the 1992 Fund shall not be required to any amendment, termination or withdrawal made in accordance with the terms of this Agreement.

(C) The Parties to this Agreement authorize the International Group to agree terms with the 1992 Fund on which a claim for Indemnification under this Agreement in respect of an Entered Ship (or previously Entered Ship) may be brought directly against the Club insuring the Ship at the time of the Incident. They also agree that in the event of the 1992 Fund bringing proceedings to enforce a claim against a Club in respect of an Entered Ship, the Club may require the Participating Owner to be joined in such proceedings.

## **XI. LAW AND JURISDICTION**

This Agreement shall be governed by English law and the English High Court of Justice shall have exclusive jurisdiction in relation to any disputes hereunder.

**January 2005**

\* \* \*

**ANNEX II**

**TANKER OIL POLLUTION  
INDEMNIFICATION AGREEMENT  
(TOPIA)**

HAMBURG HONG KONG LE HAVRE LONDON PARIS PIRAEUS SHANGHAI SINGAPORE

## EXPLANATORY NOTE

This Note explains the purpose behind the Tanker Oil Pollution Indemnification Agreement (TOPIA) and gives a short summary of its main features. It does not form part of the Agreement but is intended to serve as an informal guide for those interested in understanding how it is intended to operate.

The Agreement establishes the TOPIA Scheme, the object of which is to provide a mechanism for shipowners to pay an increased contribution to the funding of the international system of compensation for oil pollution from ships, as established by the 1992 Civil Liability Convention, the 1992 Fund Convention and the 2003 Supplementary Fund Protocol. The Scheme reflects the desire of shipowners to support efforts to ensure the continuing success of this international system. It is also intended to encourage widest possible ratification of the Protocol, and has been drawn up in recognition of the potential additional burden imposed by the Protocol on receivers of oil.

TOPIA is designed to alleviate this additional burden by apportioning it equally with shipowning interests. The Scheme therefore provides for shipowners to indemnify the Supplementary Fund for 50% of its liability to pay compensation under the Protocol for Pollution Damage caused by tankers in Protocol States.

The Scheme is established by a legally binding Agreement between the owners of tankers which are insured against oil pollution risks by P&I Clubs in the International Group. In all but a relatively small number of cases, ships of this description will automatically be entered in the Scheme as a condition of Club cover. Their owners will be parties to the Agreement and are referred to as "Participating Owners".

As the Scheme is contractual it does not affect the legal position under the 1992 Conventions and Protocol, and the victims of oil spills continue to enjoy their existing rights against the 1992 Fund and Supplementary Fund. For this reason the Scheme provides for the owner of the ship involved in an incident to pay Indemnification to the Supplementary Fund, rather than to pay extra sums directly to claimants.

Although the Supplementary Fund is not a party to TOPIA, the Agreement is intended to confer legally enforceable rights on the Supplementary Fund, and it expressly provides that the Supplementary Fund may bring proceedings in its own name in respect of any claim under the Scheme. The Scheme is governed by English law, and English legislation enables legally enforceable rights to be conferred in this manner.

Insurers are not parties to the Agreement, but all Clubs in the International Group have amended (or agreed to amend) their Rules to provide shipowners with cover against liability to pay Indemnification under TOPIA. The Clubs are also authorised under the Scheme to enter into ancillary arrangements enabling the Supplementary Fund to enjoy a right of direct action against the relevant Club in respect of any claim under the Scheme. It is envisaged that these and other terms supporting the operation of the Scheme will be incorporated in a Memorandum of Understanding between the Supplementary Fund and the International Group of P&I Clubs.

Whilst the above are the main features of the Scheme, its eleven clauses address numerous matters of detail. Clause I sets out various definitions, most of which are intended to dovetail with the terminology and provisions of the relevant international conventions. Clauses II and III contain general provisions relating to the Scheme and provide for it to apply to "Relevant Ships". Apart from a relatively small category of ships mentioned below, all tankers will be Relevant Ships if they are insured by an International Group Club. The Scheme provides that the owner of any such ship shall become a party to the Agreement when made a party by his Club in accordance with its Rules, and normally this will result in him automatically becoming a party as a condition of cover against oil

pollution risks. The Agreement also provides for any Relevant Ship which he owns to be entered automatically in the Scheme.

An exception to these arrangements relates to ships which are insured by an International Group Club but are not reinsured through the Group's Pooling arrangements. A ship in this category is not automatically entered in the Scheme, but may nonetheless be deemed to be a Relevant Ship (and be entered in the Scheme) by written agreement between the owner and his Club. Certain Japanese coastal tankers are insured outside the International Group Pooling arrangements, but it appears that fewer than 200 of these exceed 200 gross tons. By contrast, some 6,000 tankers are expected to be entered in TOPIA.

Clause IV sets out the precise circumstances in which the Participating Owner of a Relevant Ship is liable to pay Indemnification to the Supplementary Fund, and it includes detailed provisions affecting the calculation of the precise amount payable. The Clause also stipulates that Indemnification shall not be payable for Pollution Damage proximately caused by terrorist risks. This is due to the restrictions shipowners face in obtaining liability insurance cover for risks of this type.

Clause V deals with recourse against third parties, and provides for Indemnification of the Supplementary Fund to be postponed until a final conclusion has been reached in any recourse action it decides to bring against other potentially responsible parties. Credit is to be given for any sums recovered, but the Supplementary Fund retains an absolute discretion as to the commencement, conduct and any settlement of such proceedings. In the event of Indemnification being paid before recourse proceedings have been completed, provision is made for it to be treated as an interest-free loan until the proceedings are over. (This is to avoid the recourse claim being prejudiced as a result of the defendant being able to argue that Indemnification has reduced the loss for which the Supplementary Fund may claim recovery.)

Clause VI contains time bar provisions designed to dovetail with the 1992 Conventions (and to allow the Supplementary Fund a further 12 months in which to claim Indemnification after the time limit for claims against it).

Clause VII deals with amendment of the Scheme and enables changes to be made by the International Group acting as agent for all Participating Owners. No amendment is to have retrospective effect, and the Clubs have agreed that new arrangements in a revised Memorandum of Understanding should provide for consultation with the Supplementary Fund in good time prior to any decision to amend the Scheme.

Clause VIII provides for the Scheme to enter into effect simultaneously with the entry into force of the Supplementary Fund Protocol. Provision is also made for termination of the Agreement in certain circumstances, notably in the event of developments which materially and significantly change the system of compensation established by the current international regime. Again, the Clubs have agreed to consult with the Supplementary Fund prior to any decision to terminate TOPIA.

Under Clause IX a Participating Owner may withdraw from the Scheme, and the terms on which he may do so are set out. However it is anticipated that the owner of a Relevant Ship will not normally be able to withdraw from TOPIA without prejudicing his Club cover in respect of oil pollution risks.

Clause X sets out the legal rights under the Scheme of the Supplementary Fund, and the authority of the International Group to agree ancillary arrangements with the Supplementary Fund in respect of direct actions. The Clubs have agreed to bear direct liability on a similar basis to that prescribed by CLC 92.

Finally the Agreement provides by Clause XI that it is to be governed by English law and that the English High Court of Justice shall have exclusive jurisdiction in relation to any disputes thereunder.

# **TANKER OIL POLLUTION INDEMNIFICATION AGREEMENT (TOPIA)**

## **INTRODUCTION**

The Parties to this Agreement are the Participating Owners as defined herein.

The Participating Owners recognize the success of the international system of compensation for oil pollution from ships established by the 1992 Civil Liability and Fund Conventions, and they are aware that it may need to be revised or supplemented from time to time in order to ensure that it continues to meet the needs of society.

A Protocol has been drawn up and adopted to supplement the 1992 Fund Convention by providing for additional compensation to be available from a Supplementary Fund in States which opt to accede to the Protocol. The Parties wish to encourage the widest possible ratification of the Protocol, with a view to facilitating the continuance of the existing compensation system in its current form (but as supplemented by the Protocol).

In consideration of the potential additional burden imposed by the Protocol on receivers of oil, the Participating Owners have agreed to establish the scheme set out herein, whereby the Participating Owners of tankers will indemnify the Supplementary Fund for 50% of its liability to pay compensation under the Protocol for Pollution Damage caused by tankers in Protocol States.

The sole exception to this indemnity relates to Pollution Damage proximately caused by terrorist risks, in recognition of the restrictions on cover against such risks in liability insurance available to shipowners.

This Agreement is intended to create legal relations and in consideration of their mutual promises Participating Owners of each Entered Ship have agreed with one another and do agree as follows -

### **I. DEFINITIONS**

- (A) The following terms shall have the same meaning as in Article I of the Liability Convention:  
“Incident”, “Oil”, “Owner”, “Person”, “Pollution Damage”, “Preventive Measures”, “Ship”.
- (B) “1992 Fund” means the International Oil Pollution Compensation Fund 1992 as established by the 1992 Fund Convention.
- (C) “1992 Fund Convention” means the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, 1992, as amended and/or supplemented from time to time, and any domestic legislation giving effect thereto.
- (D) “Club” means a Protection and Indemnity (P&I) Association in the International Group; “the Owner’s Club” means the Club by which a Relevant Ship owned by him is insured, or to which he is applying for Insurance; “his Club”, “Club Party” and similar expressions shall be construed accordingly.
- (E) “Entered Ship” means a Ship to which the Scheme applies, and “Entry” shall be construed accordingly.
- (F) “Indemnification” means the indemnity payable under Clause IV of this Agreement.
- (G) “Insurance”, “insured” and related expressions refer to protection and indemnity cover against oil pollution risks.



- (H) “International Group” means the International Group of P&I Clubs.
- (I) “Liability Convention” means the International Convention on Civil Liability for Oil Pollution Damage, 1992, as amended from time to time, and any domestic legislation giving effect thereto.
- (J) “Participating Owner” means the Owner of an Entered Ship who is a Party.
- (K) “Party” means a party to this Agreement.
- (L) “Protocol” means the Protocol of 2003 to Supplement the 1992 Fund Convention, and any domestic legislation giving effect thereto; and “Protocol State” means a State in respect of which the said Protocol is in force.
- (M) “Relevant Ship” has the meaning set out in Clause III(B).
- (N) “Scheme” means the Tanker Oil Pollution Indemnification Agreement (TOPIA) as established by this Agreement.
- (O) “Supplementary Fund” means the Fund established by the Protocol.
- (P) “Tons” means the gross tonnage calculated in accordance with the tonnage measurement regulations contained in Annex I of the International Convention on Tonnage Measurement of Ships, 1969; the word “tonnage” shall be construed accordingly.
- (Q) “Unit of account” shall have the same meaning as that set out in Article V, paragraph 9 of the Liability Convention.

## **II. GENERAL**

- (A) This Agreement shall be known as the Tanker Oil Pollution Indemnification Agreement (TOPIA).
- (B) The Owner of any Relevant Ship shall be eligible to become a Party and shall do so when made a Party by the Club insuring that Ship as the Rules of that Club may provide.

## **III. THE TOPIA SCHEME**

- (A) This Agreement is made to establish TOPIA for payment of Indemnification to the Supplementary Fund on the terms set out herein.
- (B) A Ship shall be eligible for Entry in the scheme if:
  - (1) it is owned by a Participating Owner; and
  - (2) it is insured by a Club; and
  - (3) it is reinsured through the Pooling arrangements of the International Group.

Such a Ship is referred to herein as a “Relevant Ship”.

- (C) Any Relevant Ship owned by a Participating Owner shall automatically be entered in the Scheme upon his becoming a Party to this Agreement in accordance with Clause II(B) above.

- (D) A Ship which is not a Relevant Ship by reason of the fact that it is reinsured independently of the said Pooling arrangements may nonetheless be deemed to be a Relevant Ship by written agreement between the Owner and his Club.
- (E) Once a Relevant Ship has been entered in the Scheme it shall remain so entered until
  - (1) it ceases to be a Relevant Ship (as a result of ceasing to be insured or reinsured as stated in Paragraph (B) above); or
  - (2) it ceases to be owned by a Participating Owner; or
  - (3) the Participating Owner has withdrawn from this Agreement in accordance with Clause IX.

#### **IV. INDEMNIFICATION OF THE SUPPLEMENTARY FUND**

- (A) Where as a result of an Incident an Entered Ship causes Pollution Damage in a Protocol State in respect of which liability is incurred both under the Liability Convention by the Participating Owner of that Ship and under the Protocol by the Supplementary Fund, the said Owner shall indemnify the Supplementary Fund for 50% of the aggregate amount of compensation which it is liable to pay and does pay for Pollution Damage caused by the Incident.
- (B) Pollution Damage in a Protocol State means:
  - (1) Pollution Damage caused:
    - (i) in the territory, including the territorial sea, of a Protocol State; and/or
    - (ii) in the exclusive economic zone of a Protocol State, established in accordance with international law, or, if such a State has not established such a zone, in an area beyond and adjacent to the territorial sea of that State determined by that State in accordance with international law and extending not more than 200 nautical miles from the baselines from which the breadth of its territorial sea is measured; and/or
  - (2) the costs of Preventive Measures, wherever taken, to prevent or minimize such Pollution Damage.
- (C) Indemnification shall not be payable for:
  - (1) the costs of any Preventive Measures to the extent that the Participating Owner is exonerated from liability under Article III, paragraph 3 of the Liability Convention, and for which the Supplementary Fund is liable by virtue of the Protocol;
  - (2) any other Pollution Damage to the extent that liability is incurred by the Supplementary Fund but not by the Participating Owner.
- (D) Liability to pay Indemnification hereunder shall not affect any rights which the Participating Owner or his Club may have to recover from the Supplementary Fund any amounts in respect of the Incident, whether in their own right, by subrogation, assignment or otherwise. For the purposes of this Agreement any such amounts shall count towards the aggregate amount of compensation paid by the Supplementary Fund.

- (E) No Indemnification shall be payable under this Agreement for any amounts paid by the Supplementary Fund in respect of Pollution Damage proximately caused by any act of terrorism. This provision shall apply irrespective of whether the Owner is exonerated from liability under the Liability Convention by virtue of Article III, paragraph 2 thereof.
- (F) In the event of any dispute as to whether or not any act constitutes an act of terrorism for the purposes of this Agreement, Indemnification by the Participating Owner hereunder shall in any event be contingent on liability being accepted or established on the part of his Club to indemnify him in respect thereof.

## **V. RECOURSE AGAINST THIRD PARTIES**

- (A) Any decisions as to whether the Supplementary Fund is to take recourse action against any third parties, and as to the conduct of any such action, including any out-of-court settlement, are in the absolute discretion of the Supplementary Fund.
- (B) Unless otherwise agreed, payment of Indemnification to the Supplementary Fund shall be postponed until such time as the Supplementary Fund gives notice to the Participating Owner that a final conclusion has been reached in relation to all and any recourse action taken or contemplated by the Supplementary Fund against any third parties in respect of the Incident. For these purposes a final conclusion may include a decision by the Supplementary Fund not to take such action, or to discontinue any such action already commenced.
- (C) Paragraph (B) above shall not prevent the Supplementary Fund from commencing proceedings against the Participating Owner and the Club in order to protect its rights hereunder from becoming time-barred.

The Participating Owner and his Club agree to grant to the Supplementary Fund any extension of time which the Supplementary Fund may reasonably require in respect of the commencement or conduct of such proceedings in circumstances where recourse action is ongoing and/or no notice of final conclusion has been given in accordance with Paragraph (B) above.

- (D) Without prejudice to Paragraph (A) above, the Supplementary Fund may consult with the Participating Owner and/or his Club in relation to any recourse action in which they are actual or potential claimants. Nothing in this Agreement shall prevent the Supplementary Fund, the Owner and the Club from agreeing on any arrangements relating to such action as may be considered appropriate in the particular case, including any terms as to the apportionment of costs of funding such action, or as to the allocation of any recoveries made.
- (E) If the Supplementary Fund decides not to take recourse action against any third party or, after such action has been taken, decides not to pursue the action, Indemnification is payable on condition that the Supplementary Fund will execute such reasonable documentation as may be required to transfer to the Participating Owner and/or his Club, by subrogation, assignment or otherwise, any rights of recourse which it may have against third parties, to the extent of any interest which they may have in recoveries from such parties by virtue of Indemnification paid under this Agreement.
- (F) In the event of the Participating Owner agreeing to pay Indemnification before the Supplementary Fund has given notice as mentioned in Paragraph (B) above, such payment shall (unless otherwise agreed) be subject to the condition that it is to be treated as an interest-free loan repayable on demand until such notice is given, whereupon it shall cease to be repayable.

- (G) Indemnification is also paid on the condition that if, after it has been paid, the Supplementary Fund for any reason recovers any sums from any third party, 50% of the aggregate of such recoveries (net of the costs incurred in making them) shall be retained by the Supplementary Fund and the remaining 50% shall be paid by the Supplementary Fund to the Owner and/or his Club.
- (H) Save where the Supplementary Fund has been notified to the contrary, the Club insuring the Participating Owner shall be deemed to be authorised to agree on his behalf in receiving notice from the Supplementary Fund under Paragraph (B) above; in granting any time extension or extensions under Paragraph (C) above; in receiving any reimbursement pursuant to Paragraph (G) above; and in agreeing all and any other matters relating to the operation of this Clause V.

## **VI. PROCEDURE AND MISCELLANEOUS**

Any rights of the Supplementary Fund to Indemnification under this Agreement shall be extinguished unless an action is brought hereunder within four years from the date when the Pollution Damage occurred. However, in no case shall an action be brought after seven years from the date of the Incident which caused the damage. Where this Incident consists of a series of occurrences, the seven years' period shall run from the date of the first such occurrence.

## **VII. AMENDMENT**

- (A) This Agreement may be amended at any time by the International Group acting as agent for all Participating Owners.

Any such amendment to this Agreement will take effect three months from the date on which written notice is given by the International Group to the Supplementary Fund.

- (B) Each Participating Owner agrees that the International Group shall be authorized to agree on his behalf to an amendment of this Agreement if -
  - (1) it is so authorized by his Club, and
  - (2) his Club has approved of the amendment by the same procedure as that required for alteration of its Rules.
- (C) Any amendment to the Agreement shall not affect rights and obligations in respect of any incident which occurred prior to the date when such amendment enters into force.

## **VIII. DURATION**

- (A) This Agreement shall enter into effect simultaneously with the entry-into-force of the Protocol.
- (B) Subject to the following provisions of this Clause VIII, this Agreement may be terminated at any time by the International Group acting on behalf of all Participating Owners.
- (C) Each Participating Owner agrees that the International Group shall be authorized to terminate this Agreement on his behalf if -
  - (1) the Clubs cease to provide Insurance against the liability of Participating Owners to pay Indemnification under this Agreement; or

- (2) any international instrument is adopted or agreement is reached, or any relevant domestic or regional law is made or adopted (including any binding judicial decision or precedent), which does or will materially and significantly change the system of compensation established by the Liability Convention, the 1992 Fund Convention, the Protocol and the Supplementary Fund, and/or the operation of that system in any one or more Protocol States (hereinafter referred to as a “material change”); or
  - (3) termination is authorized by his Club, and his Club has approved of the termination by the same procedure as that required for alteration of its Rules.
- (D) Termination shall not take effect until three months after the date on which the Supplementary Fund is notified in writing by the International Group. In the event of termination on the grounds stated in Paragraph (C)(2) above, such notice may specify that termination is to take effect –
- (1) at such later date, if any, on which the material change takes effect; and/or
  - (2) either entirely, or in relation only to Pollution Damage in any State or States specified in the notice as being affected by such change.
- (E) The termination of this Agreement shall not affect rights or obligations in respect of any Incident which occurs prior to the date of termination.

#### **IX. WITHDRAWAL**

- (A) A Participating Owner may withdraw from this Agreement –
- (1) on giving not less than 3 months’ written notice of withdrawal to his Club; or
  - (2) by virtue of an amendment thereto, provided always –
    - (i) that he exercised any right to vote against the said amendment when his Club sought the approval thereto of its members; and
    - (ii) that within 60 days of the amendment being approved by the membership of his Club he gives written notice of withdrawal to his Club; and
    - (iii) that such withdrawal shall take effect simultaneously with the entry-into-effect of the amendment, or on the date on which his notice is received by his Club, whichever is later.
- (B) If a Participating Owner ceases to be the owner of a Relevant Ship he shall be deemed, in respect of that ship only, to withdraw from this Agreement with immediate effect and shall give written notice to the Supplementary Fund that he has ceased to be the owner of that Relevant Ship.
- (C) A Participating Owner withdrawing from this Agreement shall have no further liability hereunder as from the date when his withdrawal takes effect; provided always that no withdrawal shall affect rights or obligations in respect of any Incident which occurs prior to that date.

#### **X. LEGAL RIGHTS OF SUPPLEMENTARY FUND**

- (A) Though not a Party to this Agreement, the Supplementary Fund is intended to enjoy legally enforceable rights of Indemnification as described herein, and accordingly the Supplementary

Fund shall be entitled to bring proceedings in its own name against the Participating Owner in respect of any claim it may have hereunder.

- (B) Notwithstanding Paragraph (A) above, the consent of the Supplementary Fund shall not be required to any amendment, termination or withdrawal made in accordance with the terms of this Agreement.
- (C) The Parties to this Agreement authorize the International Group to agree terms with the Supplementary Fund on which a claim for Indemnification under this Agreement in respect of an Entered Ship (or previously Entered Ship) may be brought directly against the Club insuring the Ship at the time of the Incident. They also agree that in the event of the Supplementary Fund bringing proceedings to enforce a claim against a Club in respect of an Entered Ship, the Club may require the Participating Owner to be joined in such proceedings

## **XI. LAW AND JURISDICTION**

This Agreement shall be governed by English law and the English High Court of Justice shall have exclusive jurisdiction in relation to any disputes hereunder.