PROTOCOL OF 2003 TO THE INTERNATIONAL CONVENTION ON THE ESTABLISHMENT OF AN INTERNATIONAL FUND FOR COMPENSATION FOR OIL POLLUTION DAMAGE, 1992, DONE AT LONDON ON 16 MAY 2003

[2005] ATNIF 21

Documents tabled on 28 March 2006

National Interest Analysis [2006] ATNIA 10

with attachment on consultation

Text of the proposed treaty action

Background Information:
Current Status List

NATIONAL INTEREST ANALYSIS: CATEGORY 1 TREATY

SUMMARY PAGE

Protocol of 2003 to the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, 1992, done at London on 16 May 2003

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Nature and timing of proposed treaty action

1. The proposed treaty action is accession to the Protocol of 2003 to the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, 1992 (Supplementary Fund Protocol) in accordance with article 19(2) of the Protocol. The Supplementary Fund Protocol was adopted by the International Maritime Organization (IMO) on 16 May 2003. It entered into force internationally on 3 March 2005, in accordance with article 21 of the Protocol.

2. The exact date of treaty action will be the date on which Australia accedes to the Supplementary Fund Protocol. Accession will not occur until after implementing legislation has been passed by both Houses of Parliament. The legislation is expected to be introduced into Parliament in 2006. It will enter into force for Australia three months after the deposit of an instrument of accession with the Secretary-General of the IMO pursuant to article 21(2) of the Protocol.

Overview and national interest summary

3. Australia is Party to two Conventions which establish the international liability and compensation regime for pollution damage resulting from spills of "persistent oil"[1] from an oil tanker; the International Convention on Civil Liability for Oil Pollution Damage, 1992 (Civil Liability Convention); and the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, 1992 (Fund Convention).

4. Under this regime, the burden of compensating victims for oil spills is shared in the first instance between shipowners and their insurers. If the monies recoverable are insufficient, the outstanding compensation is provided by the cargo owners.

5. After an accident, compensation to victims is initially paid pursuant to the Civil Liability Fund which provides that:

- the tanker owner is strictly liable for pollution damage resulting from a spill of persistent oil;
- the owner is able to limit liability, the liability limit depending on the size of the tanker; and
- owners of tankers registered in a Contracting State carrying more than 2,000 tons of persistent oil as cargo are required to maintain insurance to cover their liabilities under the Convention.

6. If the compensation limit of the Civil Liability Convention is reached, further compensation payments are made by the International Oil Pollution Compensation (IOPC) Fund established by the Fund Convention.

7. Following a number of high profile, high impact tanker incidents in European waters, the maximum compensation afforded by the two Conventions proved insufficient to provide full compensation for all claimants and resulted in the adoption of the Supplementary Fund Protocol by the IMO to create a further source of funds for compensation in case of oil pollution damage.

8. Implementation of the Supplementary Fund in Australia will ensure that, in the event of a major oil spill from a tanker within Australian waters, any victim will be fully compensated, thereby negating the need for victims to take legal action. Contingency planning by some marine agencies have addressed possible "worst-case" scenarios and it is envisaged that it will be possible from the outset, in practically all cases, to pay full compensation for claims in States Party to the Protocol.

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[1] "Persistent oil" is defined in the Civil Liability Convention as crude oils, including residual fuel oil, heavy diesel oil and lubricating oil.

Reasons for Australia to take the proposed treaty action

9. Where compensation available through the Civil Liability Fund exceeds the tanker owner's liability limit or full compensation is unable to be obtained from the tanker owner, compensation payments will be topped up from the IOPC Fund, which is governed by the Fund Convention, up to a total limit of 203 million "Special Drawing Rights" (SDR)[2]. This is equivalent to approximately A$396 million.

10. The IOPC Fund is funded by levies imposed on companies and individuals who receive by sea more than 150,000 tons of "contributing oil"[3] in a calendar year.

11. In the *Nakhodka* (1996), *Erika* (1999) and *Prestige* (2002) oil spills off Japan, France and Spain respectively, the IOPC Fund proved to be insufficient to provide full compensation for all claimants. As a consequence, claimants only received a pro-rata amount of the compensation claimed.

12. In Australia, given our extensive coastline and strong environmental perspective, the compensation available under the IOPC Fund may not cover a major incident such as those experienced by Japan, France or Spain.

13. The Supplementary Fund, established by the Supplementary Fund Protocol, provides additional compensation up to a total of 750 million SDR (A$1,464 million) per incident that affects States that are Party to the Protocol.

14. Accession to the Supplementary Fund Protocol would provide Australia with access to this increased amount, and would ensure that compensation to Australian victims following an oil spill from a tanker incident is maximised and provide access to adequate financial resources for clean-up and restoration costs for Australia's marine environment.

15. To date, Australia has suffered a number of incidents involving oil tankers, where part of the tanker's cargo was lost. The most notable incidents involved:

- The *Princess Anne-Marie* off the Western Australia coast in July 1975 when approximately 15,000 tons of oil was spilt; and
- The *Kirki* off the Western Coast in July 1991, when approximately 18,000 tons of crude oil was released after the bow fell off the vessel.

16. While the clean-up costs in the above incidents fell within the limit provided for under the Civil Liability Convention and were consequently paid by the ship's insurer, contingency planning by some maritime agencies have addressed possible "worst-case" scenarios of up to A$500 million which might necessitate drawing on the IOPC Fund. Such scenarios envisage a large spill of heavy crude oil in an environmentally sensitive area necessitating extensive clean-up and restoration costs. It is expected that this estimate could be substantially increased in areas involving extensive commercial fishing and tourism interests, which may seek to recover compensation for loss of income.

[2] "Special Drawing Right" (SDR) is a unit of account defined by the International Monetary Fund. The value of the SDR varies from day to day in accordance with changes in currency values. As at 13 March 2006, one SDR was worth approximately A$1.95.

[3] "Contributing oil" means crude oil and heavy fuel as defined by Article I of the 1992 Fund Convention.

17. One important effect of the Supplementary Fund Protocol is that, in almost all cases, it will be possible from the outset to pay the full amount of compensation assessed for claims in State Parties. There will, therefore, be no need to make payments pro-rata following an incident. Nor will there be any need for victims of an incident to take legal action to receive the full amount of compensation.

Obligations

18. Under article 10 of the Supplementary Fund Protocol, the Supplementary Fund will be financed by a levy on receipts of contributing oil after sea transport to port and terminal installations within a State Party to the Protocol. Contributions to the Fund will be paid by public or private entities that receive more than 150,000 tons of contributing oil per year. This will require the major Australian oil importing companies to pay a levy directly to the Supplementary Fund.

19. The levy is based on reports of oil receipts in respect of individual contributors. Articles 13 and 20 will require Contracting States to communicate every year to the Supplementary Fund the name and address of any person in that State who is liable to contribute, as well as the quantity of contributing oil received by any such person. This applies whether the oil receiver is a Government authority, a State-owned company, a private company or an individual.

20. Application of the Supplementary Fund Protocol will be by way of established procedures applied to other IMO liability and compensation conventions. The Australian Maritime Safety Authority in the course of its normal duties will ensure that relevant Australian companies complete and submit to the Supplementary Fund their contributing oil returns.

21. Article 14 deems all Contracting States to receive at least 1 million tons of contributing oil. In the event that Australia in fact receives less than 1 million tons, it is obliged to collect from Australian oil importing companies sufficient funds so as to cover the gap between oil actually received (for which contributions will have been made directly to the Supplementary Fund) and 1 million tons. There will be, however, no obligation for the government to pay any monies itself. Currently, the Australian oil companies receive approximately 30 million tons of contributing oil and it is therefore unlikely that the Australian Government will be called upon to make any collections. In the event that Australia's importing of contributing oil fell below the minimum threshold, the Australian Government would need to put in place arrangements with the Australian oil importing companies to meet this minimum payment.

22. Article 2(2) requires Parties to recognise the Supplementary Fund as a legal person and the Director of the Supplementary Fund as the legal representative of the Supplementary Fund.

23. In accordance with article 7(1):

- Australian courts must be given jurisdiction to entertain action against the Supplementary Fund for compensation; and
- the Supplementary Fund must be given the right to intervene in proceedings for compensation initiated under the Civil Liability Convention.

Implementation

24. The Supplementary Fund Protocol will be implemented by a proposed Protection of the Sea (International Oil Pollution Compensation Supplementary Fund) Bill which is expected to be introduced into Parliament in 2006.

25. Following passage of the proposed Bill, Australia will accede to the Supplementary Fund Protocol by the depositing of an instrument of accession with the Secretary-General of the IMO.

Costs

26. The costs to the Australian Government arising out of this treaty action are negligible, limited to the costs of collecting contributions in the unlikely event that the amount of oil received falls from the current 30 million tons to under 1 million tons. The Australian Government is not obliged to pay the contributions.

27. The Australian oil importing companies currently pay an annual contribution to the IOPC Fund to meet both the anticipated compensation payments and administrative expenses of the IOPC Fund during the coming year. The arrangement for payment of contributions to the Supplementary Fund Protocol is the same.

28. In the event that the clean-up costs and compensation payments of a tanker incident exceed the A$396 million available under the IOPC Fund, Australian oil importing companies will be required to make an additional payment to meet claims payable under the Supplementary Fund. Any potential liability will be dependent upon the number and severity of tanker incidents worldwide, similar to the IOPC Fund. In addition there will be a small annual contribution to cover administrative costs.

29. The cost to contributors of the IOPC Fund is spread across a wide number of IOPC Fund members and their associated oil importing companies. Costs are calculated on a per tonnage basis rather than on a per company basis.

30. Payments made by the IOPC Fund for compensation claims for oil pollution damage may vary considerably from year to year, resulting in fluctuating levels of contributions. For example, since 1997 the annual payment by Australian companies to the IOPC Fund has ranged from approximately A$2.44 million to A$5.77 million. Similarly, there will be fluctuating levels of payment to the Supplementary Fund.

31. Payments to be made to the Supplementary Fund are expected to be significantly less than the payments made to the IOPC Fund because the Supplementary Fund will pay compensation only when the IOPC Fund limit has been exceeded.

32. The Australian shipping industry will be unaffected by the Supplementary Fund Protocol's adoption as a tanker owners' liability for oil pollution damage resulting from spills of persistent oil is a function of a vessel's size under the Civil Liability Convention and will not be altered under this Protocol.

33. There will be no additional requirements imposed on State or Territory authorities.

Regulation impact statement

34. A Regulation Impact Statement is not required as advised by the Office of Regulation Review.

Future treaty action

35. Any future amendments to the Supplementary Fund Protocol would be considered in accordance with articles 23 and 24 of the Protocol.

36. Article 23 allows IMO to convene a conference for the purpose of revising or amending the Supplementary Fund Protocol at the request of no less than one-third of the Contracting States.

37. Article 24 sets out the "tacit acceptance" procedure for amending the compensation limits. In brief, an amendment to the limit previously circulated by the IMO and adopted by a meeting of the Legal Committee of the IMO will be deemed to be accepted 12 months after notification of its adoption to all State Parties, unless one quarter of those States advise that they do not accept the amendment. The amendment will come into force 12 months after it has been deemed to have been accepted.

38. There are no provisions in the Supplementary Fund Protocol dealing with reservations or declarations.

39. Any future treaty action would be subject to the Australian treaty process, including tabling and consideration by the Joint Standing Committee On Treaties.

Withdrawal or denunciation

40. Article 26 of the Supplementary Fund Protocol provides that it may be denounced by any Contracting State at any time after the date on which it comes into force for that State. Such denunciation would take effect 12 months after the deposit of the instrument of denunciation with the Secretary-General of the IMO, or on a later date, if any, specified in the instrument.

41. Under article 28 of the Supplementary Fund Protocol, the Protocol would cease to be in force if the number of Contracting States falls below seven or the total quantity of contributing oil received in the remaining Contracting States falls below 350 million tons, whichever occurs earlier.

42. Denunciation would be subject to the Australian treaty process. Termination of the Supplementary Fund Protocol would require repeal of the corresponding Australian legislation.

Contact details

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Maritime and Land Transport Division
Department of Transport and Regional Services

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CONSULTATION

1. The main parties affected by Australian accession of the Supplementary Fund Protocol will be the cargo owners – the oil importing companies. Under the auspices of the Australian Institute of Petroleum, the board of the Australian Marine Oil Spill Centre on behalf of its subscriber companies has advised that it supports accession to the Supplementary Fund Protocol. This is in line with the position of the Oil Companies International Marine Forum, which has consultative status at IMO and IOPC Fund meetings. The industry participated actively in deliberations and was a strong supporter of the conclusion of the Supplementary Fund Protocol by IMO.

2. The Australian Shipowners Association and Shipping Australia have been consulted at all stages in the development of the Supplementary Fund Protocol and provided input and briefing on a number of issues. Also, the international shipping industry has consultative status at IMO and participated actively in deliberations.

3. Consultation with State and Northern Territory transport agencies was undertaken through the Australian Transport Council, which recommended Australian accession to the Supplementary Fund Protocol during an exchange of correspondence between February and April 2004.

4. State Premiers, the Northern Territory Chief Minister and coordinating agencies have been kept informed of the Protocol's development through the Joint Standing Committee on Treaties process.

5. Consultations were also undertaken with relevant Australian Government agencies. There were no concerns raised by any stakeholders during the consultations.

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CURRENT STATUS LIST

As at 28 February 2006, the following 16 States were Party to the Protocol of 2003 to the International Convention on the Establishment of an International Fund for Compensation of Oil Pollution Damage, 1992:

- Barbados
- Belgium
- Croatia
- Denmark
- Finland
- France
- Germany
- Ireland
- Italy
- Japan
- Lithuania
- Netherlands
- Norway
- Portugal
- Spain
- Sweden