

ANNEX V

**TANKER OIL POLLUTION
INDEMNIFICATION AGREEMENT
(TOPIA) 2006**

EXPLANATORY NOTE

This Note explains the purpose behind the Tanker Oil Pollution Indemnification Agreement (TOPIA) 2006 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 2006 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 (CLC 92), 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 also reflects the commitment they gave to the Assembly of the International Oil Pollution Compensation Fund 1992, at its 10th Session in October 2005, to put in place binding contractual schemes to ensure that the overall costs of claims falling within this system are shared approximately equally with oil receivers. TOPIA, together with the Small Tanker Oil Pollution Indemnification Agreement (STOPIA) 2006, is designed to achieve this. It is also intended to encourage widest possible ratification of the Supplementary Fund Protocol, and has been drawn up in recognition of the potential additional burden imposed by the Protocol on receivers of oil.

TOPIA provides for shipowners to indemnify the Supplementary Fund for 50% of the compensation it pays 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 agreed between the Supplementary Fund and the International Group of P&I Clubs.

Whilst the above are the main features of the Scheme, its twelve 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.

Clause IV sets out the precise circumstances in which the Participating Owner 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 contains provisions to prevent any recourse claim being prejudiced by a technical argument that Indemnification has reduced the loss for which the Supplementary Fund may claim recovery. For these reasons it is stipulated that Indemnification does not accrue until notice is given that no recourse (or further recourse) proceedings are contemplated, and in the meantime the Supplementary Fund is entitled to receive payment or payments on account equal to the amount of Indemnification which it expects to fall due. Such payments are to be made at the same time as payment of the levies on contributors to the Supplementary Fund. Clause IV also stipulates that Indemnification shall be payable for Pollution Damage caused by terrorist risks only to the extent, if any, that such amounts are covered by any insurance or reinsurance in force at the time of the Incident. This is due to the restrictions shipowners face in obtaining liability insurance cover for risks of this type.

Clause V deals in more detail with recourse against third parties. Credit is to be given to the Participating Owner for any sums recovered, but the Supplementary Fund retains an absolute discretion as to the commencement, conduct and any settlement of such proceedings.

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 period for claims against it under the Supplementary Fund Protocol).

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 to consult with the Supplementary Fund in good time prior to any decision to amend the Scheme.

Clause VIII provides for a review to be carried out after ten years, and thereafter at five year intervals, in consultation with the 1992 Fund, the Supplementary Fund and representatives of

oil receivers, to establish the approximate proportions in which the overall cost of oil pollution claims under the international compensation system has been borne respectively by shipowners and by oil receivers, and provides for measures which may be taken (including possible amendments of TOPIA) for the purpose of maintaining an approximately equal apportionment.

Clause IX deals with the duration of the Scheme, which is to apply to any Incident occurring after noon GMT on 20 February 2006, and is to continue until the current international compensation system is materially and significantly changed. The Clause also provides for termination of the Agreement in certain circumstances which may be expected to make the Agreement no longer workable. The Clubs have agreed to consult with the Supplementary Fund prior to any decision to terminate TOPIA.

Under Clause X 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 XI sets out the legal rights of the Supplementary Fund under the Scheme, 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 XII 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) 2006

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 adopted to supplement the 1992 Fund Convention by providing for additional compensation to be available from a Supplementary Fund for Pollution Damage 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.

This indemnity is restricted in respect of Pollution Damage 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) “Recourse Conclusion Notice” has the meaning set out in Clause V(C).
- (N) “Relevant Ship” has the meaning set out in Clause III(B).
- (O) “Scheme” means the Tanker Oil Pollution Indemnification Agreement (TOPIA) 2006 as established by this Agreement.
- (P) “Supplementary Fund” means the Fund established by the Protocol.
- (Q) “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.
- (R) “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) 2006.
- (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 2006 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 insured by a Club; and
 - (2) 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 Clause III(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 X.

IV. INDEMNIFICATION OF THE SUPPLEMENTARY FUND

- (A) Where, as a result of an Incident, an Entered Ship causes Pollution Damage in respect of which (1) liability is incurred under the Liability Convention by the Participating Owner of that Ship and (2) the Supplementary Fund has paid or expects to pay compensation under the Protocol, the said Owner shall indemnify the Supplementary Fund in an amount calculated in accordance with this Clause.
- (B) 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.
- (C) The amount for which Indemnification is payable by the Participating Owner to the Supplementary Fund shall be 50% of the amount of compensation which the

Supplementary Fund has paid or expects to pay for Pollution Damage caused by the Incident.

- (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 avoidance of doubt, any such amounts shall be included in the amount of compensation referred to in Clause IV(C) above.
- (E) Unless otherwise agreed with the Supplementary Fund –
- (1) the entitlement of the Supplementary Fund to receive Indemnification from the Participating Owner accrues when it gives a Recourse Conclusion Notice as defined in Clause V(C) below;
 - (2) prior to that time the Supplementary Fund shall be entitled to receive from the Participating Owner such payment or payments on account of Indemnification as the Supplementary Fund considers to be equal to the anticipated amount of Indemnification;
 - (3) payment of any amounts which the Supplementary Fund is entitled to receive under this Agreement shall be made concurrent with payment of the levies on contributors for the Incident concerned in accordance with Articles 10 and 12 of the Protocol.
- (F) (1) Any payment on account under Clause IV(E) above is made on the conditions that –
- (i) it is credited by the Supplementary Fund to a special account relating solely to Indemnification in respect of the Incident concerned;
 - (ii) any surplus of the amount(s) paid by the Participating Owner remaining after all compensation payments by the Supplementary Fund have been made shall be refunded to the Participating Owner; and
 - (iii) in so far as a surplus consists of amounts recovered by way of recourse from third parties it shall be credited to the Participating Owner in accordance with Clause V below.
- (2) Nothing in this Clause IV(F) shall prevent the Supplementary Fund from making use of any sums paid to it under this Agreement in the payment of claims for compensation arising from the Incident concerned; nor shall it require the Supplementary Fund to hold such sums (or any balance thereof) in a separate bank account or to invest them separately from other assets of the Supplementary Fund.
- (3) Save where the Supplementary Fund has been notified to the contrary, the Club insuring the Participating Owner shall be deemed to be authorized to act on his behalf in receiving any refund under this Clause.
- (G) No Indemnification shall be payable under this Agreement for any amounts paid by the Supplementary Fund in respect of Pollution Damage caused by any act of terrorism

save to the extent, if any, that such amounts are covered by any insurance or reinsurance in force at the time of the Incident. 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.

- (H) 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) Without prejudice to Clause V(A) above –
 - (1) payment by the Participating Owner under this Agreement is made on the condition that he shall, in respect of any amount paid as Indemnification (or as payment on account thereof), acquire by subrogation any rights of recourse that the Supplementary Fund may enjoy against third parties, to the extent of the Participating Owner's interest in the benefit of any recoveries from such parties in accordance with this Agreement;
 - (2) 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;
 - (3) 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.
- (C) For the purposes of this Agreement, a Recourse Conclusion Notice is 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. Such a conclusion may include a decision by the Supplementary Fund not to take a recourse action, or to discontinue any such action already commenced.
- (D) Payment by the Participating Owner under this Agreement is made on the conditions that –
 - (1) if the Supplementary Fund decides to take recourse action against any third party it will, unless otherwise agreed, either (a) seek recovery of compensation it has paid or expects to pay without deduction of any sums paid under this Agreement by the Participating Owner, or (b) on request, execute documentation as described in Clause V(D)(2) below;

- (2) if the Supplementary Fund decides not to take a recourse action (or to discontinue any such action already commenced) against any third party in respect of the incident, the Supplementary Fund will, on request, execute such reasonable documentation as may be required to transfer (or affirm the transfer) to the Participating Owner and/or his Club, by subrogation, assignment or otherwise, any rights of recourse which the Supplementary Fund may have against that third party, to the extent of any interest which the Participating Owner and/or his Club may have in recovering from that party any amounts paid under this Agreement;
 - (3) if, after payment by the Participating Owner has been made, the Supplementary Fund recovers any sums from any third party, 50% 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 Participating Owner.
- (E) Save where the Supplementary 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 under Clause V(C) above; in receiving any sums payable to the Participating Owner under Clause V(D) 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 year 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) Subject to Clause IX(A) below, any amendment of this 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. REVIEW

- (A) During the year 2016 a review shall be carried out of the experience of claims for Pollution Damage in the ten years to 20 February 2016. The purpose of the review will be (1) to establish the approximate proportions in which the overall cost of such claims under the Liability Convention and/or the 1992 Fund Convention and/or the Protocol has been borne respectively by shipowners and by oil receivers in the period since 20 February 2006; and (2) to consider the efficiency, operation and performance of this Agreement. Such a review shall be repeated every five years thereafter.
- (B) Representatives of oil receivers, and the Secretariat of the 1992 Fund and Supplementary Fund, are to be invited to participate in any review under this Clause on a consultative basis. The Participating Owners authorize the International Group to act on their behalf in the conduct of any such review.
- (C) If a review under this Clause reveals that in the period since 20 February 2006 either shipowners or oil receivers have borne a proportion exceeding 60% of the overall cost referred to in Clause VIII(A) above, measures are to be taken to adjust the financial burden of such cost with the object of maintaining an approximately equal apportionment.
- (D) Such measures may include -
 - (1) amendment of this Agreement to provide for an increase or reduction in the amount of Indemnification payable under this Agreement;
 - (2) amendment of this Agreement to improve its efficiency, operation and performance;
 - (3) the conclusion or amendment of any other contractual agreement relating to the apportionment of the cost of oil pollution between shipowners and oil receivers; and
 - (4) any other measure or measures considered appropriate for the purpose of maintaining an approximately equal apportionment.
- (E) If a review under this Clause reveals that either shipowners or oil receivers have borne a proportion exceeding 55% but not exceeding 60% of the overall cost referred to in Clause VIII(A), measures as referred to above may be (but are not bound to be) taken.

IX. DURATION AND TERMINATION

- (A) This Agreement shall apply to any Incident occurring after noon GMT on 20 February 2006.
- (B) Unless previously terminated in accordance with the provisions set out below, this Agreement shall continue in effect until the entry into force of any international instrument which materially and significantly changes the system of compensation established by the Liability Convention, the 1992 Fund Convention and the Protocol.
- (C) Each Participating Owner agrees that the International Group shall be authorized to terminate this Agreement on behalf of all Participating Owners if -

- (1) the Clubs cease to provide Insurance of the liability of Participating Owners to pay Indemnification under this Agreement; or
 - (2) the performance of the Agreement becomes illegal in a particular State or States (in which case this Agreement may be terminated in respect of such State or States whilst remaining in effect in respect of other States); or
 - (3) the International Group's reinsurers cease to provide adequate cover against the liabilities provided for by this Agreement, and cover for this risk is not reasonably available in the world market on equivalent terms; or
 - (4) the International Group is disbanded; or
 - (5) 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) due to any event or circumstance which prevents the performance of this Agreement and which is not within the reasonable contemplation of the Participating Owners.
- (D) Termination of this Agreement shall not take effect until three months after the date on which the Supplementary Fund is notified thereof in writing by the International Group.
- (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.

X. 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 he or his Club 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.

XI. 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. Such proceedings may include an action brought by the Supplementary Fund against a Participating Owner to determine any issue relating to the construction, validity and/or performance of this Agreement.
- (B) Notwithstanding Clause XI(A) above and Clause VII(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), or proceedings to determine any issue of construction, validity and/or performance of this Agreement, 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

XII. 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.
