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Agenda item 5

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**ADVICE AND GUIDANCE IN CONNECTION WITH THE IMPLEMENTATION  
OF IMO INSTRUMENTS**

**Consequences and concerns for the global liability and compensation regime relating  
to the increase in ship-to-ship transfers in the open ocean**

**Submitted by Australia, Canada and United States**

**SUMMARY**

<i>Executive summary:</i>	This document looks to raise awareness of the consequences and concerns for the global liability and compensation regime that exists regarding the increase in ship-to-ship transfers in the open ocean.
<i>Strategic direction, if applicable:</i>	Other work
<i>Output:</i>	OW 5
<i>Action to be taken:</i>	Paragraph 9
<i>Related documents:</i>	None

**Introduction**

1 In recent years, there has been an increase in the frequency of ship-to-ship crude oil transfers in international waters by ships using "dark operations" in order to circumvent sanctions and high insurance costs.

2 These transfers undermine the rules-based international order, increase the risk of pollution to nearby coastal States and also threaten the shared liability and compensation regime set out in the 1992 Civil Liability Convention and the 1992 Fund Convention and its Supplementary Fund Protocol. This regime shares the financial burden of compensating victims between shipowners, who are primarily liable for oil pollution damage, and the oil receivers, who pay contributions into compensation funds. They also undermine the fundamental principle of the "polluter-pays" regime if the ships and shipowners involved cannot be identified and held liable for damage caused by the oil carried on board their ships.

**Issue raised in other forums**

3 Canada, Japan and the United Kingdom submitted a document (IOPC/OCT22/4/4/1) to the October 2022 session of the Governing Bodies of the International Oil Pollution Compensation (IOPC) Funds on activities increasing the risk of oil spills, highlighting that:

- .1 ship-to-ship transfers of crude oil in the open ocean increase the risk of spills in coastal States where the transfers are taking place, increase financial exposure for the 1992 Fund and the Supplementary Fund and undermine the spirit of the regulation of these transfers prescribed by MARPOL; and
- .2 crude oil tankers that are "going dark" (i.e. turning off satellite transponders) and using other methods of obfuscation (i.e. location tampering, course deviations, etc.) increase the risk of collisions and oil spills, and further increase the risk of the IOPC Funds paying compensation from the first dollar up for a "mystery spill".

4 At the 106th session of the Maritime Safety Committee, an update was provided on the March 2022 Final Report of the UN Panel of Experts established by the UN Security Council regarding the implementation of sanctions related to the Democratic People's Republic of Korea, following the announcement of the Secretary-General at the 127th session of Council that he would inform the relevant IMO organs of the recommendations of the Panel. The report contains a number of findings and recommendations, including the following which directly ask for action by IMO:

- .1 consider the review of hardware and software security standards for preventing the tampering of AIS transponders; and
- .2 urge all flag States to ensure that the requirements for the Continuous Synopsis Records are complied with, including for such information to be updated accordingly in the IMO Global Integrated Shipping Information System (GISIS).

**Analysis and implications**

5 Ship-to-ship transfers typically take place in sheltered waters in order to reduce the risk of spills. While ship-to-ship transfers may be a legitimate practice, ship-to-ship crude oil transfers in international waters are being used to disguise the cargoes' destinations or origins or avoid oversight or regulation by flag or coastal States, as appropriate. This practice, in many cases, transfers the risk of oil pollution damage to coastal States that may not be involved in or benefitting from the oil being transferred. This means that they are bearing all the increased risk of an oil pollution incident, without accruing any of the benefits.

6 The practice of going dark (and other methods to obscure a ship's identity or ownership) should be of concern to all members of this Committee. This not only increases the risk of oil spills and collisions but also could result in a participating shipowner evading its liability under the 1992 Civil Liability Convention (CLC) and under the Bunkers Convention in the case of other ships.

7 This could leave coastal States with no party to hold liable and ultimately no recourse against the shipowner or an insurer in the case of an oil pollution incident. For a crude oil spill from a tanker under the CLC, this means the 1992 Fund would be liable from the first dollar up, which jeopardizes the balance of the shared liability and compensation regime. A recent example of this risk is the oil pollution incident that occurred in February 2021 and affected the coastline

of Israel from a yet-to-be conclusively identified passing tanker, causing the IOPC Funds to step in and provide all compensation for this incident. For a spill of bunker oil, this could mean that the polluter is not held liable and that victims are not compensated. In both cases, the inability to hold the polluter accountable undermines the polluter-pays principal, which underpins these conventions. These risky practices unjustly expose national and local governments and authorities to potentially fill the void of paying for response and clean-up costs and compensating victims where no international or domestic compensation fund can do so.

8 Flag States are called upon to ensure that tankers under their flag adhere to measures which lawfully prohibit or regulate ship-to-ship transfers, and that such vessels further adhere to the spirit of the safety requirements in IMO conventions and practice safe shipping standards to minimize the risk of oil pollution. Furthermore, flag States should consider requiring that vessels update their ship-to-ship operations manuals to include notifying their flag State when they are engaged in a mid-ocean operation. Additionally, port States should ensure enforcement of the safety and liability conventions on these vessels and ensure that ship-to-ship transfer operations are conducted in accordance with the applicable safety requirements in IMO conventions. Finally, should port States become aware of any ships "going dark", they should consider subjecting such vessels to enhanced inspections as authorized, and notifying the respective vessel's flag administration as appropriate.

#### **Action requested of the Committee**

9 The Legal Committee is invited to take note of the concerns raised in this document and recommend flag States and port States put in place the measures identified in paragraph 8.

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