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THIRD INTERSESSIONAL  
WORKING GROUP

92FUND/WGR.3/3

## REPORT OF THE THIRD INTERSESSIONAL WORKING GROUP

### Note by the Director

<b>Summary:</b>	The Working Group drew up a list of issues which could merit further consideration in order to ensure that the international compensation system provided by the 1992 Civil Liability Convention and the 1992 Fund Convention meets the needs of society.
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<b>Action to be taken:</b>	Consider the Working Group's Report.
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### **1**     **Introduction**

- 1.1     The 3rd intersessional Working Group was established by the Assembly at its 4th extraordinary session to assess the adequacy of the international system of the 1992 Civil Liability Convention and the 1992 Fund Convention. The Group met on 6 July 2000.
- 1.2     In accordance with the decision of the Assembly, 1971 Fund Member States as well as States and Organisations which had observer status with the 1992 Fund were invited to participate as observers.

## 2 Participation

2.1 The following Member States were represented:

Algeria	Greece	Norway
Belgium	Grenada	Panama
Canada	Ireland	Philippines
China (Hong Kong Special Administrative Region)	Japan	Republic of Korea
Cyprus	Latvia	Spain
Denmark	Liberia	Sweden
Finland	Marshall Islands	Tunisia
France	Mexico	United Kingdom
Germany	Netherlands	Venezuela

2.2 The following non-Member States were represented as observers:

*States which have deposited instruments of ratification, acceptance, approval or accession to the 1992 Fund Convention:*

Antigua and Barbuda	India	Poland
Fiji	Italy	Trinidad and Tobago
Georgia	Malta	

*Other States*

Chile	Nigeria	Syrian Arab Republic
Ecuador	Saudi Arabia	Turkey

2.3 The following intergovernmental and international non-governmental organisations participated in the Working Group as observers:

*Intergovernmental organisations:*

International Oil Pollution Compensation Fund 1971 (1971 Fund)  
International Maritime Organization (IMO)  
European Commission (EC)

*International non-governmental organisations:*

Comité Maritime International (CMI)  
European Chemical Industry Council (CEFIC)  
Federation of European Tank Storage Associations (FETSA)  
International Association of Independent Tanker Owners (INTERTANKO)  
International Group of P & I Clubs  
International Tanker Owners Pollution Federation Limited (ITOPF)  
International Union for the Conservation of Nature and Natural Resources (IUCN)  
Oil Companies International Marine Forum (OCIMF)

## 3 Mandate

The mandate of the Working Group, as determined by the Assembly, was:

- (a) to hold a general preliminary exchange of views, without drawing any conclusions, concerning the need to improve the compensation regime provided by the 1992 Civil Liability Convention and the 1992 Fund Convention;

- (b) to draw up a list of issues which could merit further consideration in order to ensure that the compensation system meets the needs of society; and
- (c) to report to the Assembly at its 5th session, to be held in October 2000.

#### **4 Election of Chairman**

The Working Group elected Mr Alfred Popp (Canada) as its Chairman.

#### **5 Documentation submitted**

- 5.1 In the light of the difficulties which some delegations might face in attending the session in July 2000, the Assembly had decided that States and Organisations should be invited to submit proposals to the Director by 1 June 2000 of any issues they wished to be included in the list referred to in paragraph (b) of the mandate. It had been agreed that any such proposals would be included in the Working Group's list.
- 5.2 Documents containing such proposals had been submitted by the following delegations:
  - (i) Germany, Ireland and the observer delegation of INTERTANKO (document 92FUND/WGR.3/2);
  - (ii) France (document 92FUND/WGR.3/2/1);
  - (iii) Spain (document 92FUND/WGR.3/2/2); and
  - (iv) the United Kingdom (document 92FUND/WGR.3/2/3).

#### **6 Chairman's introduction**

- 6.1 In taking up his office, the Chairman reminded the Working Group that the international compensation regime established under the Civil Liability and Fund Conventions was one of the most successful compensation schemes in existence and that over the years most compensation claims covered by this regime had been settled amicably as a result of negotiations. He stated that the Working Group should not be distracted by the few major cases which had gone to court. He pointed out that as a living scheme, the regime required to be revisited for modifications in the light of experience so as to be able to adapt to the changing needs of society and to ensure the regime's survival by remaining attractive to States.
- 6.2 The Chairman also reminded the Working Group that its role was to hold a general preliminary exchange of views on the need to improve the compensation regime and to draw up a list of items which could merit further consideration, and that any decision on further action would be taken by the Assembly.
- 6.3 On the basis of proposals submitted by delegations in the documents referred to in paragraph 5.2, it was agreed to discuss the topics set out below, as proposed by the Chairman.

#### **7 Issues considered by the Working Group**

##### **7.1 Ranking of claims**

- 7.1.1 Attention was drawn to the fact that in several major incidents the total amount of the claims had exceeded the amount of compensation available, resulting in some claimants not receiving full compensation. It was suggested that it might therefore be appropriate to introduce a system of ranking claims under which certain groups of claimants would be given priority over others if the

total amount available were to be insufficient for all claimants to receive full compensation. It was mentioned that the ranking of claims existed in a number of other liability regimes.

- 7.1.2 In the view of one delegation priority could be given to personal injury claims and claims relating to private property, whereas claims by public bodies should rank last, thus giving priority to those who could not recover their losses from anywhere else. That delegation also considered it important to make it possible for the Fund to make emergency payments.
- 7.1.3 Another delegation stated that it did not oppose this topic being included in the list but emphasised that its legal system could not accept that public claims were given the lowest priority.
- 7.1.4 One delegation considered that the priority should be linked to the type of claimant, ie individual claimants first, followed by private companies, then governments or public bodies and finally third parties such as shipowners, charterers and insurers who benefit from the transport of oil.
- 7.1.5 An observer delegation considered that there had been a change of perspective. It was stated that under the Conventions originally the emphasis was on clean-up and restoration, whereas it seemed now that the trend was for governments with clean-up claims to go to the back of the queue.
- 7.1.6 A number of other delegations agreed that the ranking of claims should be included in the list of issues to be considered.
- 7.1.7 It was mentioned that the ranking of claims could create problems in less wealthy countries where public bodies could not afford to stand last in the queue, and that the payment of compensation could be slowed down if the provisions on ranking were too complicated.
- 7.1.8 One delegation considered that the risk of overpayment had led the Fund to exercise caution in making payments and suggested therefore that claimants should be obliged to present their claims within one year from the date of the damage, rather than three years as under the present text of the Conventions, and that legal actions should in any event be brought within three years of the date of the incident, rather than six as required under the 1992 Conventions. That delegation also suggested that the time bar period should be suspendable at the claimant's request which might curb the proliferation of legal proceedings. That delegation further suggested that a system whereby States acted as guarantors of advance payments made to victims could help resolve the problem.
- 7.2 Uniform application of the Conventions
  - 7.2.1 Several delegations considered that there was a great need to strengthen the uniform application of the Conventions. Attention was drawn to the difficulties which the Fund had encountered in States where compensation claims could be dealt with separately in civil and criminal proceedings.
  - 7.2.2 One delegation emphasised that national law must reflect the details of the Conventions accurately.
  - 7.2.3 A number of other delegations expressed the view that this was a very important issue but that it was difficult to find a good solution to the problem.
  - 7.2.4 The point was made that, in any event, it would be necessary to continue to rely on national courts.

- 7.2.5 An observer delegation proposed for consideration that a separate tribunal or body should be entrusted to interpret the Conventions and that national courts should be able to refer questions to this body.
- 7.2.6 One delegation suggested that international courts could be given competence with regard to the interpretation of the Conventions.
- 7.2.7 The Chairman concluded that there was a consensus that the uniform application of the Conventions was of prime importance. It was noted that it might be difficult to find an effective solution to the problem. It was suggested, however, that the uniform application could be enhanced by inserting in the Conventions a clause to the effect that certain matters should be referred to an international body and that national courts should take into account decisions of bodies such as those of the IOPC Funds.

7.3 Sanctions for failure to submit oil reports

- 7.3.1 It was recalled that the 1971 Fund had encountered significant difficulties in the operation of the contribution system due to the fact that a number of Member States did not fulfil their obligation under the 1971 Fund Convention to submit their reports on oil receipts, which had made it impossible for the Fund to issue invoices to contributors in the States concerned.
- 7.3.2 One delegation suggested that Governments should be allowed to base their oil reports on estimates in respect of oil receivers who did not fulfil their obligation to report the oil quantities received. The point was made, however, that the problem was normally not that the contributors did not report to their Governments but that Governments failed to report to the Fund.
- 7.3.3 It was suggested that the 1992 Fund Convention should be amended so as to allow the Fund to base its invoices on estimates in respect of contributors in States which did not submit their oil reports. It was recognised, however, that such a system would face difficulties in implementation, particularly where no reports had ever been submitted by a State.

7.4 Dissolution and liquidation of the Fund

- 7.4.1 The Working Group noted the difficulties faced by the 1971 Fund in respect of its winding up and liquidation.
- 7.4.2 One delegation suggested that since a minimum quantity of contributing oil was required for the Fund Convention to come into force, the Convention should perhaps cease to be in force when the total quantity of contributing oil fell below a certain figure.
- 7.4.3 It was mentioned that if a Protocol were adopted with substantive amendments to the 1992 Fund Convention, the 1992 Fund would encounter the same problems as had been experienced by the 1971 Fund, as not all 1992 Fund Member States would ratify the Protocol at the same time.
- 7.4.4 One delegation stated that the lack of participation of many Member States had caused problems for the proper functioning of the 1971 Fund, and suggested that non-participating States should not be taken into account for the determination of whether the Assembly had achieved a quorum.
- 7.4.5 It was concluded that the winding up of the Fund should logically be connected to the quantity of contributing oil.

7.5 Maximum compensation levels

- 7.5.1 The Chairman reminded the Working Group that the maximum compensation levels were to be addressed by the IMO Legal Committee in October 2000 under the simplified amendment

procedure of the 1992 Conventions and that any increases beyond the amounts allowed under that procedure could only be decided by a Diplomatic Conference.

7.5.2 One delegation expressed the view that the increase in the maximum compensation levels to be considered by the IMO Legal Committee under the tacit amendment procedure was only the first step and that further increases were necessary.

7.5.3 Several delegations supported the use of the tacit amendment procedure under the 1992 Convention to increase the limits but did not consider it necessary to discuss further increases at this stage. Some delegations considered that this issue should still be put on the list for further discussion.

7.5.4 The view was expressed that there was a link between the issue of the ranking of claims and the maximum compensation levels.

7.6 Weighting of contributions according to the quality of ships used for the transport of oil

7.6.1 It was suggested that the contribution system should be modified so as to enhance the safety of navigation by weighting the contributions to the Fund on the basis of the quality of the ships used for discharging at the respective contributor's terminal. The point was made that the international community would benefit as operators would be encouraged to use good ships.

7.6.2 One delegation considered that substandard ships were the actual polluters and that the real polluter should be made to pay.

7.6.3 Another delegation expressed the view that if such a proposal were adopted the Fund Convention would move away from its original purpose of providing compensation to those polluted and that other Conventions existed for the prevention of pollution and the safety of navigation.

7.6.4 It was stated that the application of such a system would give rise to considerable practical problems, as the charterers had to base their decisions on ships' documents and would not be able to inspect ships daily.

7.6.5 One delegation expressed its concern about a system based on cargo owner liability.

7.6.6 The view was expressed that the simplicity of the present system had been the key to its success and that the Fund should concentrate on paying compensation to victims.

7.6.7 One delegation opposed the inclusion of the item on the list. Another delegation considered that the proposed change would not improve the payment of compensation to victims. The point was also made that this was a general issue relating to all carriage by sea and that a cautious approach was therefore necessary.

7.6.8 Several other delegations expressed their hesitation as to the proposed modification of the contribution system. It was emphasised that in any event more details were needed as to how a system of weighting contributions would work.

7.7 Environmental damage

7.7.1 The Working Group recalled that under the definition of 'pollution damage' in the 1992 Conventions compensation for impairment of the environment (other than loss of profit from such impairment) was limited to the cost of reasonable measures of reinstatement actually undertaken or to be undertaken. It was also recalled that the IOPC Funds had taken a restrictive view as to the admissibility of claims relating to the cost of environmental studies (cf 1992 Fund's Claims Manual, June 1998 edition, page 27).

- 7.7.2 One delegation emphasised that it did not envisage extending the scope of the Conventions' cover to claims for pure environmental damage, but that reasonable impact assessments should be funded, if money was available after other claims had been paid. It was suggested that the cost of such assessments could be paid from the Fund's administrative budget.
- 7.7.3 Another delegation stated that in response to public expectations there was a trend in some national legislations to require more than reinstatement measures. That delegation considered that the Fund's position in respect of claims for environmental damage should be reviewed.
- 7.7.4 Two delegations stated that they were in favour of compensation being granted for environmental damage.
- 7.7.5 An observer delegation considered that any new definition should take account of developments in priorities in other fora, that the issue was linked to that of the ranking of claims and that the environment should be given priority.
- 7.7.6 Another delegation pointed out that the existing definition of environmental damage had been adopted to avoid theoretical methods being used to calculate damage. That delegation did not support the inclusion of this topic in the list.
- 7.7.7 Several delegations expressed reservations as to the need for a reconsideration of the definition of pollution damage as regards environmental damage.

## **8 Conclusions**

- 8.1 The Chairman emphasised that it would be necessary to examine carefully which issues should be retained for inclusion in a possible revision of the 1992 Conventions, in particular in order to make it possible to carry out such a revision within a reasonable period of time.
- 8.2 The point was made that it would be appropriate to distinguish between issues which could be dealt with within the framework of the texts of the 1992 Conventions (eg by agreements between Contracting States, Fund Assembly Resolutions, clarification in national law) and issues where improvements could be brought about only by formal amendments to the Conventions through a Diplomatic Conference followed by ratification by States.
- 8.3 It was agreed that the following subjects should be included in the list of issues which could merit further consideration:
- 1 Ranking of claims/priority treatment (including prescription periods)
  - 2 Uniform application of the Conventions
  - 3 Sanctions for failure to submit oil reports
  - 4 Dissolution and liquidation of the Fund
  - 5 Maximum compensation levels
  - 6 Weighting of contributions according to the quality of ships used for the transport of oil
  - 7 Environmental damage
- 8.4 It was noted that the following issues had also been proposed for consideration but due to lack of time were not discussed by the Working Group:
- Can co-operation with shipowners be improved?
- Are preventive measures inhibited by the Conventions?

Should the shipowner's limitation amount be increased for ships carrying cargoes which could cause particularly serious pollution damage?

Channelling of liability (Article III.4 of the 1992 Civil Liability Convention)

Possibility of mediation before legal actions are taken

Restricting the conditions for the shipowner's right to limit his liability

Clarification of the definition of 'ship', eg in respect of the application of the Conventions to offshore craft

Geographical scope of application of the Conventions in areas where no exclusive economic zone has been established

More precise provisions on the submission and handling of claims

Steps to reduce delays in the payment of compensation

Admissibility of claims for fixed costs

Admissibility of claims relating to the cost of salvage operations

**9 Action to be taken by the Assembly**

The Assembly is invited:

- (a) to take note of the information contained in this document;
  - (b) to consider the list of issues which could merit further consideration; and
  - (c) to decide on the organisation of further work.
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