



INTERNATIONAL
OIL POLLUTION
COMPENSATION
FUND 1992

ASSEMBLY
6th session
Agenda item 6

92FUND/A.6/4/1/Add.1
9 October 2001
Original: ENGLISH

REPORT OF THE THIRD INTERSESSIONAL WORKING GROUP

DRAFT PROTOCOL ESTABLISHING A SUPPLEMENTARY COMPENSATION FUND

Note by the Director

Summary:	Since the issuance of the document 92FUND/A.6/4/1, observations have been received from a number of delegations. In order to facilitate the discussions at the Assembly, these observations and the Director's considerations are set out below.
Action to be taken:	To consider the issues dealt with in this document.

1 **Introduction**

As instructed by the Intersessional Working Group, the Director reconsidered the text of the draft Protocol establishing a Supplementary Compensation Fund which resulted from the Working Group's meeting in June 2001. The Director prepared a revised text of the draft Protocol which was circulated on 14 September 2001 as document 92FUND/A.6/4/1. Since the issuance of that document, the Director has received observations from a number of delegations. These observations have been considered by the Director. In order to facilitate the discussions at the Assembly's session, these observations and the Director's considerations are set out below.

2 **Payments by the 1992 Fund**

- 2.1 In his note relating to the draft Protocol establishing a Supplementary Compensation Fund (document 92FUND/A.6/4/1, paragraph 2.5), the Director dealt with the issue as to in what circumstances the Supplementary Fund should start making payments. The Director stated that, in his view, there were two options, namely that the Supplementary Fund would only make payments when it was established that the total amount of compensation available under the 1992 Conventions would be insufficient to meet all established claims in full or that the Supplementary Fund would start its payments when the 1992 Fund considered that there was a risk that the total

amount of the established claims would exceed the maximum amount available under the 1992 Conventions and therefore had decided to pro rate its payments. His conclusion was that, although provisions governing this issue could be inserted in the Protocol, it might be preferable to leave it to the Supplementary Fund Assembly to take the necessary decisions in this regard.

- 2.2 Several delegations which have expressed their support for the second option have considered, however, that this issue should be addressed in the Protocol in view of its importance from a political and legal point of view.
- 2.3 If the Assembly were to adopt this approach, a penultimate paragraph could be inserted in the Preamble to read as follows:

BELIEVING that the supplementary scheme should not only ensure that victims of oil pollution damage are compensated in full for their loss or damage, but should also alleviate the difficulties faced by victims in cases where there is a risk that the amount of compensation available under the 1992 Conventions will be insufficient to pay established claims in full and as a consequence the 1992 Fund has decided provisionally that it will pay only a proportion of any established claim;

- 2.4 If it were considered that this matter should be dealt with in a substantive provision in the Protocol, the Assembly may wish to consider the following text which could be inserted as a new Article 4 *bis*:

The Supplementary Fund shall pay compensation when the 1992 Fund Assembly has considered that there is a risk that the total amount of the established claims will exceed the aggregate amount of compensation available under Article 4, paragraph 4, of the 1992 Fund Convention and that as a consequence the 1992 Fund has decided provisionally or finally that payments will only be made for a proportion of any established claim. The Assembly of the Supplementary Fund shall then decide whether and to what extent the Supplementary Fund shall pay the proportion of any established claim not paid under the 1992 Liability Convention and the 1992 Fund Convention.

- 2.5 If this approach were to be taken, the Assembly may also wish to consider modifying the introductory part of Article 4, paragraph 1 of the draft Protocol to read as follows:

The Supplementary Fund shall pay compensation to any person suffering pollution damage if such person *is* unable to obtain full and adequate compensation for an established claim for such damage under the terms of the 1992 Fund Convention, because *there is a risk that* the damage exceeds the applicable limit of compensation laid down in Article 4, paragraph 4 of the 1992 Fund Convention in respect of any one incident.

3 Other issues

Article 4

- 3.1 As regards Article 4, paragraph 2 (c) of the draft Protocol, it has been suggested to state explicitly in the Protocol that the date which the 1992 Fund Assembly or Executive Committee has decided should be used for the conversion of the maximum amount available under the 1992 Conventions should be used also for conversion of the maximum amount available under the Protocol. If this proposal were accepted the paragraph would read:

The amounts mentioned in subparagraphs (a) and (b) shall be converted into national currency on the basis of the value of that currency by reference to the Special Drawing Right on the date *determined by the Assembly of the 1992 Fund for conversion of the maximum amount payable under the 1992 Conventions.*

- 3.2 Concerning the proposed Article 4, paragraph 4 of the draft Protocol, the question has been raised as to whether this provision is necessary in view of the definition of the concept of 'established claim' in Article 1, paragraph 8. Several delegations have indicated that, should this paragraph be maintained, they would prefer the alternative text proposed by the Director.

Article 7

- 3.3 With respect to Article 7, the reference in the first line to Article 4, paragraph 5 should be to Article 4, paragraph 3.

Article 10

- 3.4 If it were to be decided that the Assembly should not meet every year, the provision in Article 10, paragraph 1 that "... the Assembly shall for each calendar year make an estimate ...", should be replaced by "... the Assembly shall for *each budgetary period*" make an estimate ...".
- 3.5 However, if as it has been proposed by several delegations, the Assembly would meet every year, the text of Article 10 should be maintained as set out in document 92FUND/A.6/4/1.
- 3.6 The question has been raised as to the significance of the words "if any" in Article 10, paragraph 1, line 1. On this point, the proposed text is identical to that of Article 12, paragraph 1 of the 1971 and 1992 Fund Conventions. In the Director's view, this reference does not relate to whether individual contributors would be obliged to pay contributions but whether any contributions should be raised at all.
- 3.7 The question has also been raised as to the meaning of the expression "for the satisfaction of claims" in Article 10, paragraph 1 (i) (b) of the draft Protocol. This expression appears in Article 12, paragraph 1 (i) (b) and (c) of the 1971 and 1992 Fund Conventions. This expression has always been interpreted so as to include not only compensation payments but also incident-related expenses, whereas "costs and expenses of the administration of the Fund" referred to in paragraph 1 (i) (a) relates only to the administrative budget.

Article 14

- 3.8 As regards Article 14, paragraph 2, several delegations have indicated that they prefer the alternative text, since it is based on the geographical criterion which forms the basis of the applicability of the 1992 Conventions. It has been suggested, however, that the last sentence of the alternative text should read as follows:

The Assembly shall determine in the Internal Regulations *the circumstances under which a Contracting State shall be considered as having failed to comply with its obligations.*

Articles 15-17

- 3.9 In Article 15, paragraph 2 of the draft Protocol, reference is made to a number of Articles in the 1992 Fund Convention. However, Article 34 is of a different character from the other Articles to which reference is made, since it applies not to the Assembly, Secretariat or Director but to the Fund as an Organisation. It is proposed therefore that the reference to that Article should be made in a separate paragraph which could read:

3 Article 34 of the 1992 Fund Convention shall apply to the Supplementary Fund.

- 3.10 It has been suggested that since the additional work caused by holding a Supplementary Fund Assembly every year during the same period as the 1992 Fund Assembly would be very small, the Supplementary Fund Assembly should hold annual meetings. If this proposal were adopted, Article 16 of the draft Protocol should be deleted and Article 15, paragraph 2 could be amended to include a reference to Article 19. Furthermore, if this proposal were to be adopted, Article 17 in the draft Protocol could be deleted. Article 15 should then read:

Articles 17-20 and 28-33 of the 1992 Fund Convention shall apply to the Assembly, Secretariat and Director of the Supplementary Fund.

Article 19

- 3.11 The reference in Article 19 to Article 20, paragraph 5 should be to Article 18, paragraph 5.

4 Action to be taken by the Assembly

The Assembly is invited:

- (a) to take note of the information contained in this document; and
- (b) to consider the issues dealt with in this document.
