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ALTERNATIVE DISPUTE SETTLEMENT PROCEDURES

Note by the Director

1 Consideration by the Assembly at its 1st session

In the light of the increasing number of cases in which the 1971 Fund had become involved in lengthy litigation in respect of incidents involving that Organisation, it was suggested at the 1st session of the Assembly that alternative dispute settlement procedures should be explored. The Assembly instructed the Director to undertake a study of alternative dispute settlement procedures (such as arbitration), and to report to the Assembly at its 1st extraordinary session (document 92FUND/A.1/34, paragraph 33.3).

2 Study of alternative dispute settlement procedures

The Director engaged a consultant, Dr T A Mensah, former Assistant Secretary-General and Director of Legal Affairs and External Relations Division of the International Maritime Organization, to make a study of possible alternative dispute settlement procedures. In view of the short time available to him, the consultant was able to make only a preliminary study of the very complex issues involved. This study, which was submitted for consideration by the Assembly at its 1st extraordinary session (document 92FUND/A/ES.1.13), is reproduced in the Annex.

3 Consideration by the Assembly at its 1st extraordinary session

3.1 At its 1st extraordinary session, the Assembly took note of the above-mentioned study and noted the three options outlined in the study, viz:

(a) claims could be presented by States on behalf of national claimants;

(b) all claims for compensation could be dealt with by a specially constituted international body (tribunal); and

(c) an independent compensation board could deal with all claims before their submission to national courts, if necessary.

3.2 A number of delegations emphasised the importance of this issue and stated that the study contained an excellent analysis of the problems involved. It was considered that any attempt to solve the problems in the present system, under which claims were dealt with only by national courts, would give rise to a number of difficult issues. A number of delegations expressed the view that it was necessary to make an ambitious attempt to improve the present system, although they recognised the difficulties involved. It was mentioned that there was a need to reconsider a system which had been created 25 years ago, so as to adapt it to present needs, in particular in view of the great increase in the number of 1971 Fund Member States and the likelihood that the 1992 Fund would soon have many Members. It was emphasised, however, that it was essential that the policy developed by the 1971 Fund to settle claims by negotiation should also be followed by the 1992 Fund. The importance of involving the P & I Clubs in any consideration of this issue was also mentioned.

3.3 The Assembly decided to set up a Working Group to study the possibilities of introducing alternative settlement procedures in the compensation system established by the 1992 Civil Liability Convention and the 1992 Fund Convention for cases in which it had not been possible to reach out-of-court settlements.

3.4 It was decided that the Working Group, which should submit its report to the Assembly for consideration at its 2nd session, would be open to all Member States and that States and intergovernmental and international non-governmental organisations which had observer status with the 1992 Fund would be invited as observers.

3.5 The Assembly invited Member States to submit written observations to the Director in order to facilitate the Working Group's consideration of this issue.

4 Consideration by the Director

The study carried out by the consultant deals with a number of complex questions. Any alternative dispute settlement procedures would require solutions to a number of legal and technical issues. In the view of the Director, however, it is important to consider at an early stage whether it could be expected that the various options would be acceptable to Member States. It should be noted that the introduction of any compulsory procedures would require amendments to the 1992 Civil Liability Convention or the 1992 Fund Convention or to both Conventions, probably in the form of Protocols. Any such Protocols would require ratification by a number of States in order to enter into force. For this reason, it appears that unless there is reasonable likelihood that a particular option would be acceptable in principle to a large number of Member States, it would not be worthwhile making detailed studies of the various technical issues involved in that option.

5 Action to be taken by the Working Group

The Working Group is invited:

(a) to take note of the information contained in the present document; and

(b) to make such recommendations to the Assembly in respect of alternative dispute settlement procedures as it may deem appropriate.

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ANNEX

ALTERNATIVE PROCEDURES FOR DEALING WITH CLAIMS FOR COMPENSATION FROM THE INTERNATIONAL OIL POLLUTION COMPENSATION FUND 1992

1 Introduction

1.1 The liability and compensation regime of the 1969 Civil Liability Convention and the 1971 International Compensation on the Establishment of an International Fund for Compensation for Oil Pollution Damage is established on the premise that claims for compensation are to be determined within the national judicial processes of the States Parties to the Conventions. The law applicable in each case is the national law of the court before which a particular claim is brought, but subject to the relevant provisions (substantive and procedural) of the Conventions which were formulated to ensure uniformity of application in all states and equality of treatment for all claimants, regardless of where their damage was caused.

1.2 This approach is markedly different from that adopted for the settlement of disputes in public international law. This relies on the traditional procedures for the "pacific settlement of disputes" as enumerated in Article 33 of Chapter VI of the Charter of the United Nations, namely:

I negotiation;
ii enquiry;
iii mediation;
iv conciliation;
v arbitration;
vi judicial settlement;
vii resort to regional agencies or arrangements; and
viii other peaceful means chosen by the parties to the dispute.

1.3 These traditional "public law" procedures were considered unsuitable for the 1969/71 regime which was intended to establish an essentially "private law" scheme. There were several reasons for this position.

1.4 In the first place the "public law" procedures were traditionally intended for disputes in which the "parties" are (or can be) identified prior to the occurrence of a dispute. In most cases the number of the parties to the dispute will be two or, at the most, several. Under the 1969/71 Conventions the identity and number of claimants cannot be determined prior to the occurrence of an incident causing pollution damage; and the number of potential claimants in respect of one incident could be in hundreds or even thousands.

1.5 Another reason why the traditional public law procedures are not suitable for the civil liability and compensation scheme of the 1969/71 Conventions is that those procedures are basically designed for disputes in which the parties are States or entities which are deemed to have "international personality". Consequently these procedures can, in most cases, be initiated only by a State or other "international person", such as an international organisation composed of States which is endowed with the capacity to act on the international plane. Where the person whose interest is involved in the dispute is not a State or an "international person", the dispute usually has to be presented by a State or other suitably eligible entity on behalf of that person.

1.6 Thirdly, under the "traditional procedures, the parties may often be obliged to utilize courts, tribunals or bodies operating in locations outside the State of residence of the parties. In many cases these tribunals operate far from the point at which the damage complained of was caused. Apart from logistic problems encountered in dealing with a body located in a foreign country, there is always the added complication that

the law (substantive and procedural) applied by in the tribunals is significantly different from the national law of the individual parties to the dispute.

1.7 Finally, under the traditional procedures, it is not always easy to determine the court or body which has the competence to deal with the dispute at any particular time. Such uncertainty may result in delays and consequential expense in having the issues in dispute determined. This would be especially so in claims for oil pollution damage arising from maritime casualties, where the ownership and nationality of the vessel or vessels involved may not always be easily identifiable by the persons who are damaged by the incident.

1.8 The claim procedure under the 1969/71 regime is different from these traditional public law dispute settlement procedures. Thus, under the 1971 Fund Conventions:

(a) Every claimant, whether it is a State, a corporate entity (public or private) or a natural or juridical person, is able to bring a claim for compensation for pollution damage against the 1971 Fund in their own name and on their own initiative, without the need for the diplomatic intervention or other forms of involvement of a government or any other authority.

(b) The victim of pollution damage is able to bring the claim for compensation before the courts of the State in which the damage was suffered.

(c) The procedure for bringing a claim for compensation is the procedure applicable under the law of the State of the court before which the claim is being brought, but subject to the applicable provisions of the Conventions.

(d) The decisions of the court dealing with the claim are recognized and enforceable not only in the State of that court but also in all other States which are Parties to the Fund Convention.

1.9 Whilst this claims procedure has certain considerable advantages, there are also a number of drawbacks.

1.10 The multiplicity of claims can result in difficulties for claimants, for example a considerable delay in the payment of compensation until all claims are settled. Furthermore, there is the possibility that different national courts will not apply the provisions of the conventions in the same way, either in deciding on the admissibility of claims or in determining the levels of compensation to be paid to individual claimants. This could seriously undermine the uniformity of interpretation and application which was one of the fundamental objectives of the whole system, and create uncertainty for claimants as to what to expect.

1.11 The Fund has to react to separate claims. As claims are brought by individual claimants, and not their States, the number of claims to which the Fund must respond may be considerable. In the second place, since claimants bring their claims before the courts of the State in which their damage was caused, there is always the possibility that the Fund will be obliged to respond to claims in respect of the same incident before the courts of two or more States, although this has not so far happened in respect of the 1971 Fund. In addition to difficulties caused by distance and time differences, the processing and presentation of defences to separate claims from different claimants in the courts of different States is bound to involve considerable time and expense for the 1971 Fund.

1.12 For these reasons the States Parties may wish to consider possible alternative claim procedures which will preserve the advantages of the present system but at the same time also help to eliminate, or at least minimize the complications and difficulties which the current procedure scheme presents.

1.13 To achieve the acceptable balance, such an alternative claim process will need to fulfil a number of necessary conditions, namely:

(a) It should assure potential claimants that the process will on the whole provide no less benefits than would be obtainable from their national courts.

(b) It should be seen as providing potential claimants with a process that is more expeditious than, or at least as expeditious as, the existing system.

(c) It should make it possible for claimants to submit and pursue their claims without having to leave the State in which the damage was caused, and without being obliged to observe legal and procedural requirements other than those applicable in their national courts or clearly provided for in international agreements duly accepted by their States.

2 The Practice Under Some Existing International Schemes

2.1 In considering possible alternative procedures for dealing with claims for compensation from the 1992 Fund, reference may be made to the procedures for dispute settlement in various international institutions as provided for in the relevant constitutive treaty instruments. These schemes generally seek to replace or supplement the traditional procedures with less cumbersome and expensive arrangements. In particular, they utilize "internal" mechanisms either as the exclusive means of dealing with certain disputes or as supplements which will hopefully avoid recourse to the formal court procedure altogether or reduce the number of claims which actually go through the court process.

2.2 The internal mechanism may be a standing body (such as an institutionalised organ of an organisation or a permanent tribunal) or it may be a body established *ad hoc* to deal with disputes as and when necessary.

2.3 Examples of such arrangements are to be found in the following organisations.

2.4 The International Civil Aviation Organization (ICAO)

Article 84 of the 1944 Convention establishing the ICAO states that "disputes between Contracting States relating to the interpretation or application of the Convention and its Annexes which cannot be settled by negotiation (between the parties) may be submitted by any of the parties concerned to the Council of the Organization for settlement". However the Convention also gives to any party to the dispute the right to appeal against the decision of the Council to an *ad hoc* tribunal agreed with the other parties or to the International Court of Justice.

2.5 The Western European Union

The Convention of December 1957 establishes a Western European Tribunal for the Protection of Private Interests Against Measures for the Control of Armaments (Article 3). The Tribunal is given the competence to determine claims for compensation against the Union by any "physical or juridical person whose private interests have been damaged by excess or abuse of authority on the part of the Union's Agency for the Control of Armaments, or official of the Agency....".

2.6 The European Nuclear Energy Tribunal

The 1957 Convention on the Establishment of a Security Control in the Field of Nuclear Energy establishes a European Nuclear Energy Tribunal with the competence to "determine the amount and the incidence of costs" of nuclear incidence within the scope of the Convention.

2.7 The Organization of Arab Petroleum Exporting Countries (OAPEC)

The 1968 Convention establishing the Arab Organization for the Petroleum Exporting Countries instituted a Judicial Board to be "attached to the Organization". Under Article 23 of the Convention the disputes which may be submitted to the Judicial Board include:

(a) disputes arising between any Member (State) and a petroleum company operating in the territory of the said Member; and

(b) disputes arising between any Member (State) and a petroleum company belonging to any other Member.

2.8 The United Nations Convention on the Law of the Sea

The United Nations Convention on the Law of the Sea establishes an International Tribunal for the Law of the Sea (Annex VI). There is a Sea-Bed Disputes Chamber within the Tribunal. Article 187 of the Convention provides that the Sea-Bed Disputes Chamber shall have jurisdiction with respect to disputes involving States, the Authority or natural or juridical persons.

3 Possible Options for Change

3.1 Based on the approach adopted in the above examples, the Member States of the 1992 Fund may wish to explore the possibility of adopting an alternative claims procedure or procedures which would reduce the complications and expense of the present system, without creating major difficulties for the claimants or States Parties.

3.2 Option One: Claims to Be Presented by States on Behalf of National Claimants

3.2.1 It could be provided that claims for compensation for damage could be brought only by the Government of the State Party in whose territory pollution damage is caused. Claims would be for all damage suffered in that State, including damage suffered by private persons or other entities which were nationals or residents of the State. As under the present arrangement, claims would be brought before the competent court of the State in which the damage was caused. Claims would be brought either by the Government of by a public body or agency designated for that purpose by the Government concerned to present claims for compensation on behalf of all claimants in that State.

3.2.2 In the event of an accident causing pollution damage in the State, every person who claims to have suffered damage as result of the incident would be required to submit his/her claim to the Government of the State or to the department or agency designated by the Government for the purpose, with all details of the damage and any other particulars which might be required under the Fund Convention or the regulations of the agency concerned or by the court before which the claim is to be brought. It would, of course, still be possible for the Fund to settle claims, within the parameters set by the Assembly (or a subsidiary body), by agreement with the Government or designated agency.

3.2.3 It would have to be determined whether the Government or designated agency should have the power to "screen" claims in order to exclude claims which it considers to be without merit, or whether all claims presented would have to be submitted to the courts.

3.2.4 If the Government of designated agency were given the power to screen claims, consideration would need to be given to whether a claimant whose claim is rejected should have the right to appeal against the decision and, if so, to which body such an appeal might be brought.

3.2.5 To discourage frivolous claims the claimants might be required to pay a deposit which would be returnable, in full or in part, depending on the outcome of their claim. The deposit might be a fixed sum or it might be graded according to the value of the claims.

3.2.6 The advantages of such an approach are:

(a) For the claimants it could reduce considerably the expenses involved in having their individual claims processed and submitted to court and prosecuted through the courts.

(b) It would reduce the number of individual claims which come before the courts in respect of any one incident and, in consequence, the number of parties whom the 1992 Fund would have to face in court.

(c) It would not require a radical departure from the original basis of the 1969/71 scheme, since claims for compensation would continue to be determined by the courts of the States Parties within whose jurisdiction the damage is caused.

3.2.7 The main disadvantage of the approach is that it may not be widely acceptable. Some States might be unwilling or unable to accept the responsibility for processing and pursuing claims for non-State persons and entities. There could also be constitutional objections in some States that a claim process involving only a State organ or agency would deprive claimants of their right to pursue their claims in their own way. In particular it might be objected that the success of individual claims would depend on the diligence and competence of the Government department or agency in processing and presenting the case, rather than on the judgement and efforts of the persons who have suffered the damage. Furthermore, Option 1 would not remove the concerns regarding the (potential) lack of uniformity in the application of the Conventions.

3.3 Option 2: All Claims for Compensation to be Dealt with by a Specially Constituted International Body (Tribunal)

3.3.1 All claims in respect of which it has not been possible for the claimant and the Fund to reach out-of-court settlements would be submitted to a specially created body (a Claims Tribunal or Commission). The Claims Tribunal would have exclusive jurisdiction to decide on claims for compensation and matters related to such claims. Every claim in respect of which a settlement has not been reached between the claimant and the Fund should be submitted to the Tribunal by either the claimant or the Director.

3.3.2 In respect of each claim the Tribunal would operate as if it were based in the State in which damage was caused. Accordingly arrangements would be made for claimants in each State to submit their claims to the Tribunal within that State. Claimants would be entitled to be represented before the tribunal by legal counsel or expert advisers of their choice. Such counsel and experts would include legal counsel and other experts from any State Party, provided that they are entitled to appear before the courts or judicial bodies in their own States.

3.3.3 The decision of the Claims Tribunal should be binding on the Fund and on the particular claimant, as well as on other persons who may be entitled to compensation from the Fund as a result of the incident.

3.3.4 As with the decisions of national courts under the 1971 Fund Convention, the decisions of the Claims Tribunal should be recognized and enforceable in the courts of all States Parties to the relevant Convention.

3.3.5 The expenses involved in the operation of the Claims Tribunal would be borne by the budget of the 1992 Fund. The Fund might also be obliged to reimburse claimants for some or all of the costs incurred by them for legal and related expert assistance, subject to well defined conditions.

3.3.6 For the claimants such a procedure would present an advantage in that all claims would be dealt with by one clearly identifiable body and the decisions of that body would be final and applicable to all other claimants. This could reduce the delay in paying compensation which often occurs under the current system because of the fact that some claims before national courts remain undecided for long periods.

3.3.7 An important aspect of this option is that it would provide a simple and uniform procedure to be applied to all claims regardless of the State in which the incident occurred. This would be an advantage to both claimants and the Fund, because it would give them a better indication of the probable outcome of particular claims. Even more importantly, it would give them a reasonable assurance that the Convention would be applied in a uniform manner.

3.3.8 The principal shortcoming of this option is that it may not be acceptable to all States. Some States may object, on constitutional grounds, to an arrangement under which their nationals are prevented from bringing claims for damage suffered within their national jurisdictions before their own national courts. This objection might be met by making it possible for claimants to appeal against decisions of the Claims Tribunal. However, if this right were to be made widely available, it could significantly negate the advantages of the option.

3.3.9 Another drawback of this option is that it would require far-reaching amendments of the 1992 Fund Convention (and also the 1992 Civil Liability Convention), since it would fundamentally alter the basis on which the current Fund scheme was established. Such a radical change might not be acceptable to some States. Moreover, even for States which decide to accept the change, securing parliamentary approval, and enacting the necessary domestic legislation, might take a long time.

3.4 Option Three: An Independent Compensation Board to Deal with All Claims as a First Step before Submission to Court, if Necessary

3.4.1 Instead of the present arrangement where every claim which is not settled by agreement between the claimant and the Fund may be submitted to court by the claimant, consideration might be given to a system under which such a claim would first have to be brought before a special adjudicating body (a Compensation Board) for consideration. The Board would be established within the framework of the Fund Convention, but it would be independent of the Director and the intergovernmental bodies of the 1992 Fund.

3.4.2 The Compensation Board would be composed of legal and appropriate technical experts selected by the Assembly (or subsidiary body) of the Fund upon nomination by the States Parties. It could be either a single body of fixed membership to deal with all claims or it could consist of a slate of members from which panels will be selected to handle claims arising from a particular incident or within a specific country. In any case, it would be provided that members would not be permitted to participate in the consideration of claims which involve the countries of their nationality.

3.4.3 The Compensation Board would be a fully-judicial or quasi-judicial body, and claimants (and the 1992 Fund) would be entitled to be represented or assisted by legal counsel or expert advisers of their choice.

3.4.4 The costs involved in running the Board would be borne by the budget of the 1992 Fund. Claimants would bear their own costs, but the Fund might be required to reimburse them in certain well defined cases. For example, there might be no right of reimbursement where the Board determines that a particular claim is wholly without merit or that the costs for which reimbursement is being sought is unreasonably high or otherwise unjustified.

3.4.5 The decisions of the Compensation Board would be final and binding on the 1992 Fund. However, a claimant who is not satisfied with the decision of the Board would have the right to submit his/her claim to the competent court of the State in which the damage was caused, as provided in the Fund Convention.

3.4.6 If accepted such an Compensation Board mechanism could reduce the number of claims which would reach the courts. This would be an advantage for claimants and also for the Fund. For the claimant it would be an improvement on the present system because it would enable decisions on claims to be reached more speedily than through the normal court process. It would also give to claimants who may be contemplating bringing their claims to the courts a reliable indication of the likely fate of such a move. Furthermore, the quick decision and payment of compensation through such a procedure would be particularly welcome to those claimants who may be in urgent need of the compensation money and for whom a delay in settlement could present serious financial problems.

3.4.7 Another advantage of a Compensation Board with such clearly limited functions is that it would not entail a major departure from the basic principle underlying the 1969/71 scheme, which is that compensation for oil pollution damage is to be determined under a "civil law" tort regime. In particular, the Compensation Board would not displace the ultimate jurisdiction of national courts, which is an essential ingredient of the scheme of the 1969, 1971 and 1992 Conventions. The role of the Board would be to simplify and expedite the settlement of claims by avoiding the formal court procedure, to the extent possible. Claimants would retain the right to bring their claims to the competent national courts, if they do not find the decision of the Compensation Board acceptable. In that sense the rationale of the Compensation Board procedure would not be much different from that behind the current arrangement of the 1971 Fund under which the Director is empowered, within the parameters set by the Assembly (or Executive Committee), to settle claims by agreement with the claimants. In both cases a claimant retains the right to submit his/her claim to the competent court if a settlement acceptable to him/her is not reached through the internal process.

3.4.8 The possible drawbacks of the procedure using an adjudicating body are:

(a) Some States may be unwilling to have their claims determined by an international judicial body operating outside their national court system. However, such an objection would not be entirely valid in this context since the operation of the Compensation Board would be without prejudice to the ultimate right of claimants, including States, to proceed to the national court, as provided for under the 1992 Fund Convention, if they are not satisfied with the decision of the Board.

(b) The procedure could, in some cases, actually delay the payment of compensation to the claimants. This would be the case where the claimant rejects the decision of the Compensation Board and decides to submit the claim to court. For such a claimant, the interposition of the Compensation Board would necessarily mean a lengthening of the time between the occurrence of damage and the payment of compensation.

(c) If many claimants reject the decisions of the Compensation Board and submit their claims to the courts, there might not be a significant decrease in the number of court cases. If that were to happen the use of the Compensation Board process could, in fact, result in more time, effort and expense for the claimants and also for the 1992 Fund.

4 Changes which would Need to be made in the 1992 Fund Convention in order to Introduce a New Claims Procedure

4.1 The adoption of any of the options indicated above would require some amendment of the 1992 Fund Convention. The revisions would be more or less radical depending on the particular option chosen. It might also be necessary to revise some of the provisions of the 1992 Civil Liability Conventions.

4.2 Option 1

This Option would require a change in the 1992 Fund Convention to stipulate that only a State Party may bring a claim for compensation against the 1992 Fund, both in respect of damage suffered by the State itself as well as for damage suffered by natural and juridical persons within the jurisdiction of the State. There would also have to be provisions regarding the rights of the victims vis-à-vis the State in the submission and prosecution of claims against the Fund. The provisions regarding the national courts competent to deal with different aspects of the claim would remain basically unchanged.

4.3 Option 2

4.3.1 Option 2 would require more substantial amendment of the 1992 Fund Convention. The main change would relate to the existing provisions which give exclusive jurisdiction to the competent national courts to decide on the validity of claims and the levels of compensation payable. These provisions would have to be amended to give jurisdiction to the Claims Tribunal in respect of all claims, regardless of where the damage is caused.

4.3.2 One of the difficulties which would arise under this Option would be in relation to the constitution of the limitation fund by the shipowner for the purposes of availing himself of the right to limit his liability under the Civil Liability Convention. The problem would be how to determine the court with which the limitation fund is to be constituted and the national currency by reference to which the unit of account is to be converted for that purpose. A solution to this problem might be to require the limitation fund to be constituted with the Claims Tribunal or with the 1992 Fund. This would, of course, require an amendment also in the Civil Liability Convention.

4.3.3 It would also be necessary to include new provisions formally establishing the Tribunal and dealing with related matters, such as the membership of the Tribunal, the method of selecting its members, and the procedure to be followed by the Tribunal.

4.3.4 There would also have to be a provision to stipulate that decisions of the Claims Tribunal should be enforceable in the courts of all States Parties, in the same way as decisions of competent national courts are recognized and enforceable under the 1992 Fund Convention.

4.3.5 Provision may have to be made to deal with the effect of the "time bar" provisions of the 1992 Fund Convention (Article 6). This might be in the form of a provision to the effect that submission of a claim to the Claims Tribunal should have the same effect as an action brought before a court under Article 4 of the Fund Convention.

4.4 Option 3

4.4.1 Option 3 would not require many changes in the 1992 Fund Convention, and none of the amendments needed would involve a major change in the basic approach of the Conventions. The main revision would be the introduction of a provision making it mandatory for every claim to be submitted first to the Compensation Board. There would also have to be appropriate provisions on the composition, jurisdiction and procedure of the Board. Provisions would also need to be included to the effect that decisions of the Board, when accepted by the claimants concerned, would have the same status as equivalent decisions of national courts and shall, as such, be recognised in the courts of all States Parties which deal with issues of compensation for damage arising from the same incident. For example, where the Compensation Board determines that compensation for damage caused by an incident is due to a claimant, that claimant would be entitled to share *pro rata* in the funds for distribution by a national court as compensation for damage arising

from that incident. In other words, a claim upheld by the Compensation Board shall be considered as an "established claim" under Article 4.5 of the 1992 Fund Convention.

4.4.2 Provision may also have to be made to deal with the effect of the "time bar" provision of the Fund Convention (Article 6 of the 1992 Fund Convention). This might be in the form of a provision to the effect that submission of a claim to the Compensation Board should have the same effect as an action brought before a court under Article 4 of the Fund Convention.

5 Means of Effecting the Necessary Changes in the 1992 Fund Convention

5.1 The introduction of any one of the options requires some amendments of the Fund Convention through the procedure for amendment as provided under Article 32 of the Final Clauses of the 1992 Fund Convention. For this purpose a conference of the State Parties would be convened either by the International Maritime Organization (IMO) on its own initiative as provided for in Article 32.1 of the Final Clauses, or, more probably, by IMO at the request of one-third of the States Parties, pursuant to Article 32.2 of the Final Clauses.

5.2 The amendments would preferably be effected by the adoption of a Protocol to the 1992 Fund Convention. Such a protocol would be a single treaty instrument to be presented to States Parties for acceptance as a whole. This procedure has so far been adopted with success for revising the 1969 Civil Liability Convention and the 1971 Fund Convention, in the form of the Protocols of 1976, 1984 and 1992.

5.3 To ensure that the chosen option will enter into force as envisaged in the Protocol, it might be expressly Stated in the final clauses of the Protocol that "no reservations" may be made to any of the Protocol's provisions. A clause prohibiting reservations to an international treaty is permitted under the 1969 Convention on the Law of Treaties.

5.4 But, even if the Protocol were to prohibit reservations, it would not necessarily avoid the possibility of conflict of treaty relations between the States Parties, if some of the State Parties refuse to accept the Protocol. If the Protocol were to enter into force with the participation of some but not all of the States Parties to the original Fund Convention, it would not be possible to apply the new claims procedure in the Protocol to cases in which damage has also been caused in the territory of a State which has not accepted the Protocol.

5.5 The only way to avoid such potential conflicts would be to make the entry into force of the Protocol conditional on its acceptance by **all the States Parties** to the 1992 Fund Convention. But such an entry into force condition would almost certainly mean that the Protocol would enter into force after an unacceptably long delay, if at all.

5.6 A more advisable approach might be to fix the number of ratifications (acceptances) needed for entry into force quite high, but such that there would be a realistic prospect of entry into force within a reasonable period. The drawback of such a solution is that there would be the risk of a conflict of treaty relations between the States Parties to the 1992 Fund Convention which accept the Protocol and those which do not accept it. Where an incident causes damage in the territories of two States, one of which has not accepted the Protocol, there might be difficulties in using the procedure provided for in the Protocol, since the decisions reached under that procedure would not be accepted in the State which has not accepted the Protocol.

6 Possible Amendment of the 1992 Civil Liability Convention

The adoption of a new claims procedure for the 1992 Fund Convention would have implications for the operation of the 1992 Civil Liability Conventions. The need for, and the extent of, amendments in the Civil Liability Convention would depend on the particular option chosen. Thus if Option 1 were to be chosen the implications for the Civil Liability Convention would not be that far-reaching. The requirement that claims should be brought by States on behalf all claimants within their jurisdiction would not have a major impact on the operation of the Civil Liability Conventions as such, although some amendments might be desirable or necessary to harmonize the procedures in the two Conventions. Option 3 would have a greater impact on the Civil Liability Convention than Option 1. In this case it may be necessary to consider what effects, if any, the introduction of the Compensation Board to deal with claims against the 1992 Fund in the first instance would have on the functioning of the Civil Liability Convention. On the other hand, the adoption of Option 2 might make it necessary to consider some amendments to the Civil Liability Convention in order remove possible conflicts resulting from the fact that claims against the shipowner under the Civil Liability Convention have to be brought in national courts.

T A Mensah
30 September 1996