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Agenda item 6

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REPORT OF THE FIRST INTERSESSIONAL WORKING GROUP

1 Introduction

1.1 The Intersessional Working Group was established by the Assembly of the 1992 Fund at its 1st extraordinary session to study alternative dispute settlement procedures to be used by the 1992 Fund. The Group held a meeting on 16 and 17 April 1997.

1.2 In accordance with the decision of the Assembly, the Working Group was open to all Member States of the 1992 Fund, and all States and intergovernmental or international non-governmental organisations which had observer status with the 1992 Fund were invited as observers.

1.3 The Working Group instructed the Director to submit to the Assembly a report of the Group's work and its conclusions.

1.4 This Report, which comprises a summary of the issues discussed and the conclusions drawn by the Working Group, has been drafted in consultation with the Working Group's Chairman.

2 Participation

2.1 The following Member States were represented:

Australia	Germany	Mexico
Denmark	Greece	Norway
Finland	Japan	Sweden
France	Liberia	United Kingdom

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

Algeria	Fiji	Panama
Argentina	Indonesia	Republic of Korea
Bahamas	Italy	Russian Federation
Belgium	Latvia	Saudi Arabia
Brazil	Malaysia	Spain
Canada	Netherlands	Tunisia
Chile	Nigeria	United States

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)
United Nations (UN)
International Maritime Organization (IMO)

International non-governmental organisations
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 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 (document 92FUND/A/ES.1/22, paragraph 14.3).

4 Election of Chairman

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

5 Documentation examined by the Working Group

The Working Group based its deliberations on a study carried out by a consultant, Dr T A Mensah, former Assistant Secretary-General and Director of Legal Affairs and External Relations Division of the International Maritime Organization, of possible alternative dispute settlement procedures, (document 92FUND/WGR.1/2, Annex), as well as on a covering note prepared by the Director.

6 Alternative dispute settlement procedures

6.1 Consultant's study

The Working Group noted that the study prepared by Dr Mensah outlined three options, viz:

(1) States would present claims for compensation on behalf of national claimants;

(2) a special international body (tribunal) should be established to deal with all claims for compensation; and

(3) an independent compensation board should be established to deal with all claims before their submission to national courts, if necessary.

6.2 Previous consideration by the 1992 Fund Assembly

The Working Group noted that, when the 1992 Fund Assembly had held a preliminary discussion at its 1st extraordinary session of the study prepared by the consultant, a number of delegations had emphasised the importance of this issue. It had been 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 had expressed the view that it was necessary to make an ambitious attempt to improve the present system, although they recognised the difficulties involved. It had been 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, particularly 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 had been emphasised, however, that it was essential that the policy developed by the 1971 Fund to settle claims by negotiation should be followed also by the 1992 Fund. The importance of involving the P & I Clubs in any consideration of this issue had also been mentioned.

6.3 Consideration by the Working Group of the options set out in the consultant's study

6.3.1 The Working Group considered that the study carried out by the consultant dealt with a number of complex questions. It was recognised that any alternative dispute settlement procedures would require solutions to a number of legal and technical issues. It was also recognised that it was important to consider at an early stage whether it could be expected that the various options would be acceptable to Member States.

Option 1

6.3.2 It was noted that under this option claims for compensation could be brought only by the Government of the State Party in whose territory pollution damage was caused. This would apply to 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. Each person who alleged that he had suffered damage as result of the incident would be required to submit his claim to the Government of the State where the damage occurred or to the department or agency designated by the Government, with all details of the damage. Under this option it would still be possible for the 1992 Fund to settle claims out of court.

6.3.3 A number of delegations stated that they did not support Option 1. Some delegations considered that it would be inappropriate to involve States in the presentation of claims made by their citizens. The view was also expressed that this option would not provide any solution to the problems which had arisen in respect of the settlement of claims out of court.

Option 2

6.3.4 Under Option 2, all claims in respect of which it had not been possible for the claimant and the 1992 Fund to reach out-of-court settlements would be submitted to a specially created body (Claims Tribunal). The Claims Tribunal would have exclusive jurisdiction to decide on claims for compensation. Each claim in respect of which a settlement had not been reached between the claimant and the 1992 Fund would be submitted to the Tribunal by either the claimant or the 1992 Fund. In respect of each claim the Tribunal would operate as if it were based in the State in which the damage was caused. 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. The decision of the Claims Tribunal would be binding on the 1992 Fund and on the particular claimant, as well as on other persons who might be entitled to compensation from the Fund as a result of the incident. As with the decisions of national courts under the 1992

Fund Convention, the decisions of the Claims Tribunal would be recognized and enforceable in the courts of all States Parties to the relevant Convention.

6.3.5 Many delegations expressed their opposition to the establishment of an international tribunal. It was pointed out by a number of delegations that the system of compensation established by the Civil Liability Conventions and the Fund Conventions was based on the fundamental principle that claims for compensation would fall within the jurisdiction of the national courts of the State where the damage occurred. Many delegations stated that it would be difficult from a constitutional point of view to accept that their citizens would be deprived of their right to pursue claims for compensation for pollution damage before their national courts. It was argued that a solution in accordance with Option 2 would be expensive and complicated.

6.3.6 A number of delegations drew attention to the fact that a solution in accordance with Option 2 would necessitate significant amendments not only to the 1992 Fund Convention but also to the 1992 Civil Liability Convention, probably in the form of two protocols. It was pointed out that, unless the entry into force of such protocols was delayed until they were ratified by all States Parties to the respective Convention, serious complications would arise as a result of only some States Parties to the Conventions being bound by the new protocols.

Option 3

6.3.7 Under Option 3, instead of the present arrangement where each claim which is not settled by agreement between the claimant and the Fund may be submitted to court by the claimant, such a claim would first have to be brought before a special adjudicating body (Compensation Board) for consideration. The Board would be established within the framework of the 1992 Fund Convention, but it would be independent of the Director and the intergovernmental bodies of the 1992 Fund. The Compensation Board would be composed of legal and appropriate technical experts nominated by Member States and selected by the Assembly (or subsidiary body) of the 1992 Fund. The Board could either be a single body of fixed membership to deal with all claims or it could consist of a list of persons from which panels would be selected to handle claims arising from a particular incident or within a specific State.

6.3.8 Some delegations expressed the view that Option 3 had some interesting features. It was generally considered, however, that Option 3 would not provide an adequate solution to the problems which had arisen. It was pointed out that, by introducing an intermediate body, the result might be that the procedures would be more time-consuming and costly, and not faster and cheaper as desired. A number of delegations stated that Option 3 would not be acceptable.

6.3.9 Attention was drawn to the fact that also Option 3 would necessitate amendments to the 1992 Fund Convention and, possibly, also to the 1992 Civil Liability Convention. A number of delegations reiterated the view that they were not in favour of a solution which would require the Conventions to be amended.

6.4 Conclusions as regards Options 1, 2 and 3

In conclusion, the Working Group considered that there was no support for Option 1, that some interest had been expressed in Option 2, but that that Option was not acceptable for many States *inter alia* for constitutional reasons, and that some interest had been shown in respect of Option 3, although there was not sufficient support to justify a further study of that Option at this stage. It was also generally considered that a cautious approach should be taken to any solution (such as Options 2 and 3) which would require amendments to the 1992 Civil Liability Convention and the 1992 Fund Convention, and that Options 2 and 3 should be considered only in the context of a general revision of the Conventions, if such a revision were to take place in the future.

6.5 Arbitration, mediation and conciliation

6.5.1 It was suggested that other methods to facilitate claims settlement, such as arbitration, mediation and conciliation, could be considered.

6.5.2 It was noted that, under Internal Regulation 7.3, the Director was authorised to agree with any claimant to submit a claim to binding arbitration. It was also noted that arbitration procedures had not been used by the 1971 Fund or by the 1992 Fund.

6.5.3 A number of delegations expressed the view that the possibility of the 1992 Fund using arbitration should be examined. It was pointed out that arbitration was widely used in commercial disputes, *inter alia* because it was normally faster than court proceedings.

6.5.4 Attention was drawn to the fact that arbitration was normally used in disputes between two or a limited number of parties. It was noted that difficulties might arise if arbitration were used in oil pollution cases involving large numbers of claimants. It was also noted that if only certain claims were submitted to arbitration, the arbitration award would not be binding on other claimants involved in the same incident. It was suggested that for this reason arbitration might not be a practicable proposition in major cases involving the 1992 Fund where the total amount of the established claims exceeded or might exceed the maximum amount of compensation available under the 1992 Civil Liability Convention and the 1992 Fund Convention.

6.5.5 A number of delegations suggested that mediation or conciliation through an independent expert might facilitate claims settlement. Whilst it was noted that a proposal made as a result of mediation or conciliation would be only a recommendation to the parties, it was considered, nevertheless, that mediation or conciliation might reduce the number of claims pursued in court against the 1992 Fund.

6.5.6 It was emphasised that, if mediation or conciliation were to be used, the mediator or conciliator had to be totally independent of all parties involved in the incident. The point was also made that any mediator or conciliator should have a thorough knowledge of the compensation system established by the Conventions. The question was raised of whether every claimant would have the right to have his claims submitted to mediation or conciliation. The question of who would pay the cost of such procedures was also raised.

6.5.7 It was noted by the Working Group that the Assembly and Executive Committee of the 1971 Fund had taken the view that a claim was admissible only if it fell within the definitions of "pollution damage" or "preventive measures" laid down in the Conventions as interpreted by the 1971 Fund bodies, and that the claimant was required to substantiate the amount of his loss by documentation or other evidence. It was also noted that the 1992 Fund Assembly had decided that the 1992 Fund should follow the policy as regards admissibility of claims for compensation which had been laid down by the 1971 Fund.

6.5.8 In this context, the question was raised of whether an arbitrator, mediator or conciliator should be permitted to assess a claim on the basis of equity. Most delegations opposed the idea that assessment might be made on the basis of equity, and emphasised that the criteria for admissibility referred to in paragraph 6.5.7 should be respected.

6.6 Claims handling by private insurers

6.6.1 A number of other delegations stated that it might be useful to study how claims were handled by commercial insurers, such as the P & I Clubs. It was also suggested that claims settlement in, for example, P & I Clubs was delegated to junior staff, and that further delegation of the authority to make decisions within the 1992 Fund should be considered.

6.6.2 Some delegations suggested that the 1992 Fund should exercise a higher degree of flexibility in its claims settlement procedures. It was mentioned that the Director had his hands tied in respect of claim settlements, since

he was obliged to follow the criteria for admissibility and the requirement of evidence laid down by the 1971 Fund Assembly and the 1971 Fund Executive Committee.

6.6.3 Many delegations made the point that commercial insurers could exercise a great degree of freedom in deciding whether to accept or reject a claim, and could take into account commercial considerations or questions of public image. These delegations emphasised that the 1992 Fund could not have such a freedom of action, since the 1992 Fund had to respect the provisions in the Conventions and the criteria for admissibility laid down by the Fund's governing bodies. It was mentioned that only by respecting the criteria laid down by the governing bodies of the Organisation could the 1992 Fund ensure the equal treatment of victims of oil pollution in Member States. A number of delegations reiterated their view that they were strongly opposed to the 1992 Fund assessing claims on the basis of equity.

6.7 Information to claimants

6.7.1 A number of delegations emphasised the importance of the 1992 Fund providing information to claimants on the compensation system established by the Conventions, on the best way to present claims and on how claims were examined. It was mentioned that such information should be provided at an early stage of an incident. It was also suggested that the 1992 Fund should make such information available in Member States before an incident occurred. Some delegations expressed the view that it was the responsibility of Member States to ensure that such information was available to victims and potential victims of oil spills.

6.7.2 It was noted that the Claims Manual issued jointly by the 1971 Fund and the 1992 Fund contained a practical guide to the system of compensation, the procedures for the submission of claims and the evidence required to substantiate losses incurred. It was suggested that it would be impossible for the 1992 Fund to make available information to potential claimants in all Member States, since the Fund could not know when and where an incident would occur.

6.7.3 One delegation suggested that following an incident, the 1992 Fund should employ a consultant to liaise with claimants and to give advice in respect of the compensation system and the procedure for presenting claims.

6.8 Conclusions as regards the issues referred to in paragraphs 6.5-6.7 above

The Working Group took the view that a further study should be made of the possibilities for the 1992 Fund to use arbitration, mediation, or conciliation to promote the out-of-court settlement of claims. It was also agreed that the 1992 Fund should examine the claims handling procedures of commercial insurers, such as the P & I Clubs, to establish whether these procedures could be used by the 1992 Fund.

6.9 Further studies by the Director

The Director undertook:

(a) to carry out a preliminary study of the possibilities of the 1992 Fund using arbitration, mediation or conciliation to promote the out-of-court settlement of disputes; and

(b) to study the claims settlement procedures of commercial insurers, such as the P & I Clubs, and to establish whether the experience gained from commercial insurers could be used to improve the claims settlement procedures applied by the 1992 Fund.

6.10 Review of the working methods of the 1971/1992 Fund Secretariat

It was recalled that the 1971 Fund Assembly had instructed the Director, at its 19th session, to carry out a review of the working methods within the joint Secretariat of the 1971 Fund and the 1992 Fund (document 71FUND/A.19/30, paragraph 12.6). Several delegations considered that this review was linked to the question of procedures to facilitate out-of-court settlements.

7 Action to be Taken by the Assembly

The Assembly is invited to:

(a) take note of the information contained in this document;

(b) take any decisions that it considers appropriate on the matters dealt with in the Report of the Working Group; and

(c) decide whether the issues considered by the Working Group should be studied further.