



THIRD INTERSESSIONAL
WORKING GROUP
Agenda item 2

92FUND/WGR.3/11
5 March 2002
Original: ENGLISH

REVISED MANDATE OF THE WORKING GROUP

Note by the Director

Summary:	The document sets out the revised mandate of the Working Group and lists the issues previously retained by the Group for consideration in the longer term.
Action to be taken:	Information to be noted.

1 Introduction

- 1.1 At its 6th session, held in October 2001, the Assembly decided to approve the text of a draft Protocol to Supplement the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, 1992 which had been elaborated by the Working Group. The Assembly instructed the Director to submit the text of the draft Protocol to the Secretary-General of the International Maritime Organization requesting him to convene a Diplomatic Conference to consider the draft Protocol at the earliest opportunity (document 92FUND/A.6/28, paragraphs 6.25 and 6.26).
- 1.2 The Assembly gave the Working Group the following revised mandate (document 92FUND/A.6/28, paragraph 6.49):
 - (a) to continue an exchange of views concerning the need for and the possibilities of further improving the compensation regime established by the 1992 Civil Liability Convention and the 1992 Fund Convention, including issues mentioned in paragraph 27.3 of document 92FUND/A.6/4, which had already been identified by the Working Group, but not yet resolved; and
 - (b) to report to the next regular session of the Assembly on the progress of its work and make such recommendations as it may deem appropriate.

- 1.3 It will be recalled that the list referred to in the Assembly's decision contains the following issues which, in the Working Group's view, should be retained for consideration in the longer term ^{<1>}:
- (a) shipowner's liability (section 9)
 - (b) environmental damage (section 11)
 - (c) alternative dispute settlement procedures (section 13)
 - (d) non-submission of oil reports (section 14)
 - (e) clarification of the definition of 'ship' (section 18)
 - (f) application of the contribution system in respect of entities providing storage services (section 21.2)
 - (g) uniformity of application of the Conventions (section 25)
 - (h) various issues of a treaty law nature (section 26).

- 1.4 As regards the previous consideration by the Working Group of the various issues, reference is made to the Report on the Working Group's second and third meetings (document 92FUND/A.6/4). The Executive Summary of the Working Group's report is reproduced at the Annex to this document.
- 1.5 At the Working Group's previous meetings the main focus of the discussions was – apart from the maximum amount of compensation available - on items (a) and (b) of paragraph 1.3 above, ie shipowner's liability and environmental damage.

2 Shipowner's liability

The Working Group considered various issues relating to shipowner's liability. In this regard reference is made to section 9 of the Report on the Working Group's second and third meetings. It appears from previous discussions that there are several sub-issues to be considered, *viz*:

- (a) criterion governing the shipowner's right to limitation;
- (b) level of shipowner's limitation amount;
- (c) basis of calculation of the limitation amount ie should the limitation amount be increased for ships of low quality or cargoes representing a risk of causing serious pollution damage;
- (d) channelling of liability to the shipowner; and
- (e) relationship between the shipowner's liability and the liability funded by oil receivers.

3 Environmental damage

- 3.1 Previous discussions on environmental damage have addressed several elements, as reflected in section 11 of the above-mentioned report, namely:
- (a) damage to the environment *per se*;
 - (b) cost of measures to reinstate the environment; and
 - (c) cost of environmental studies.
- 3.2 The issues of environmental damage and environmental studies were discussed at the Assembly's 6th session on the basis of a document submitted by the delegations of Australia, Canada, Sweden

<1> References to sections relate to the Report on the Working Group's second and third meetings (document 92FUND/A.6/4).

and the United Kingdom (document 92FUND/A.6/4/5). The discussion is reflected in the Record of Decisions of that session (document 92FUND/A.6/28, paragraphs 6.27 - 6.43).

4 Other issues previously considered by the Working Group

The Working Group may also wish to continue its consideration of the other issues referred to it by the Assembly, ie those referred to in items (c) - (h) of paragraphs 1.3 above.

5 Quorum at Assembly sessions

At its 6th session, the Assembly was invited to consider a document prepared by the Director drawing attention to the risk that the Fund Assembly may in the future not be able to achieve a quorum (document 92FUND/A.6/26). The Assembly decided to postpone consideration of this issue to its next session. It was agreed that the issue could be referred to the Working Group for further discussion (document 92FUND/A.6/28, paragraph 29). The Working Group may wish to address this issue.

6 Action to be taken by the Working Group

The Working Group is invited to take note of the information contained in this document.

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ANNEX

EXECUTIVE SUMMARY

Mandate

The Working Group set up by the 1992 Fund Assembly in April 2000 has held three meetings (in July 2000 and in March and June 2001) under the Chairmanship of Mr A Popp QC (Canada). The meetings in 2001 were held on the basis of the following mandate given by the Assembly at its October 2000 session:

- (a) to hold an exchange of views concerning the need for and possibilities of improving the compensation regime established by the 1992 Civil Liability Convention and the 1992 Fund Convention; and
- (b) to continue the consideration of issues identified by the Working Group as important for the purpose of improving the compensation regime and to make appropriate recommendations in respect of these issues.

Discussions at the two meetings in 2001

At the meetings in 2001 the Working Group considered a number of issues, in particular the maximum levels of compensation, the shipowner's liability and environmental damage. It also discussed *inter alia* the admissibility of claims for fixed costs, time bar, alternative dispute settlement procedures, problems caused by States not fulfilling their obligations to submit reports on oil receipts and the uniform application of the Conventions.

At its third meeting the Working Group distinguished between three groups of issues:

- (a) issues in respect of which there was an urgent need for improvement of the compensation regime which could not be achieved within the present text of the 1992 Conventions;
- (b) issues in respect of which solutions could be found in the short term within the scope of the present Conventions, eg by Assembly Resolutions or changes of Fund policy;
- (c) issues which needed further consideration in the longer term.

Maximum level of compensation (Section 7)

A number of States maintained that in order for the international compensation system to retain credibility the maximum compensation levels should be sufficiently high to ensure full compensation to victims even in the most serious oil spill incidents. Other delegations, however, did not see the need to increase the maximum level of compensation over and above the increases adopted within the International Maritime Organization (IMO) in October 2000 which would bring the total amount available to 203 million SDR (£180 million) from 1 November 2003.

In light of this difference in views, the Working Group considered a proposal to establish an optional third tier of compensation by means of a Supplementary Compensation Fund, which would provide additional compensation over and above the compensation available under the 1992 Civil Liability Convention and the 1992 Fund Convention (ie 135 million SDR or from 1 November 2003 203 million SDR). The Supplementary Fund would be established by a Protocol to the 1992 Fund Convention. The Supplementary Fund would only pay compensation for pollution damage in States Parties to the proposed Protocol. It was suggested that, in view of the difficulties from a treaty law point of view which would arise if the third tier were to contain a layer financed by the shipowners, the third tier should be financed only by the oil receivers. The Supplementary Fund would be financed by contributions from oil receivers in the States which became Parties to the Protocol. To ensure its optional and distinct character, the Supplementary Fund would be a separate legal entity.

A draft Protocol on the establishment of such a Supplementary Fund had been prepared by a number of delegations. This draft is at Annex I.^{<1>}

<1> Document not attached.

A number of delegations expressed their support for the proposed Supplementary Fund. It was emphasised that such a supplementary scheme should preferably be set up on a global rather than a regional basis. Several delegations stated that, although their States were not interested in joining the proposed supplementary scheme, they supported the proposed scheme or did not oppose its creation.

The observer delegations representing shipping, insurance and oil interests supported the Supplementary Fund scheme in principle. It was emphasised, however, that it was important to preserve the sharing of the burden of compensating oil spills between shipping and oil interests.

The International Group of P & I Clubs informed the Working Group that the P & I Clubs, with the support of shipowners, were developing a proposal for a voluntary increase in the limit of liability for small ships under the 1992 Civil Liability Convention which would apply only in the States which ratified the proposed Supplementary Fund Protocol. It was stated that the precise level of the increase had not yet been decided.

As a result of the discussions, the Director prepared a revised draft Protocol on the establishment of a Supplementary Fund. This draft is at Annex II.^{<2>}

The Working Group decided to submit the revised draft Protocol to the Assembly for consideration at its October 2001 session.

The Director was invited to refine the text of the draft further and submit a new revised text to the Assembly. Delegations were invited to submit comments to the Director to assist him in this work.

Shipowner's liability (Section 9)

The Working Group examined the provisions in the 1992 Civil Liability Convention governing the shipowner's liability. It was considered that any attempt at this stage to include shipowners in the funding of the proposed third tier of compensation would create complications and could result in an unacceptable delay in the setting up of the Supplementary Fund. Several options for the shipowner's involvement in the supplementary compensation tier were presented, namely: voluntary increase of the shipowner's/insurer's liability at the lower end of the scale of liability under the 1992 Civil Liability Convention; a four layer system with an additional layer of shipowner's liability forming the third layer and a tier funded by oil receivers forming the fourth layer; a third tier of compensation which would be financed both by shipowners and oil receivers; and a future revision of the 1992 Civil Liability Convention.

It was agreed that the issue of whether to revise the 1992 Civil Liability Convention in respect of the shipowner's liability would have to be considered in the longer term.

Environmental damage and environmental studies (Section 11)

The Working Group considered a proposal to introduce the concept of compensation for environmental damage as a violation of collective property whereby compensation would be available to the State on the basis of international rights under other Conventions to which it was a Party, the amount of compensation to be based on the conclusions of environmental impact studies conducted in accordance with procedures adopted by the 1992 Fund. The Working Group also examined a proposal to change the 1992 Fund's policy as regards environmental damage to the effect that compensation for environmental damage would no longer be limited to cases where the claimant had suffered economic loss and to allow compensation to be calculated through theoretical models.

These proposals were not accepted since it was considered that they went beyond the present definition of 'pollution damage' in the 1992 Conventions.

^{<2>} Document not attached.

It was agreed that an examination should be made of what could be achieved within the present definition of 'pollution damage' as regards the admissibility of claims for reinstatement of the environment and for cost of environmental impact studies. A proposal to address these issues in an Assembly Resolution received considerable support.

There was also support for considering the issue of environmental damage in depth in the longer term.

Alternative dispute settlement procedures (Section 13)

It was generally felt that the 1992 Fund should make strenuous efforts to avoid court proceedings and that the Fund should continue its policy of endeavouring to settle claims out of court to the extent possible. For this reason the Working Group took the view that further consideration should be given to the possibilities for the Fund of using alternative dispute settlement procedures. The Working Group considered that there was only very limited scope for arbitration and that therefore future discussions should focus on mediation and less formal methods. It was agreed that this issue should be studied further.

Non-submission of oil reports (Section 14)

A number of Fund Member States do not fulfil their obligation to submit reports on oil receipts, and this has caused significant difficulties in the operation of the compensation system. The Working Group recognised that this was an important issue and that further consideration was required to find a solution which ensured that States fulfilled their obligation to submit these reports.

This issue has been addressed to some extent in the draft Protocol which would establish the Supplementary Fund.

Admissibility of claims for fixed costs (Section 15)

The Working Group considered a proposal under which States which had invested in craft and equipment so as to be able to control oil spills, such as sea recovery vessels, aerial spraying capacity and emergency towing vessels, should be granted additional compensation in the form of an uplift of say 10% on their annual contract costs and/or daily costs of maintaining and deploying such craft and equipment on condition that it could be demonstrated that their use had a beneficial effect in reducing the cost of the incident. The proposal received significant support. It was considered, however, that more details of the proposal were needed, in particular in respect of the conditions for awarding an uplift.

Resolution concerning the OPRC Convention (Section 16)

There was support for a proposal to the Assembly for the adoption of a Resolution urging all States to become Parties to the Convention on Oil Pollution Preparedness, Response and Co-operation 1990 (OPRC Convention).

Clarification of the definition of 'ship' in the 1992 Conventions (Section 18)

The Working Group decided to retain for examination at a later stage the issue of clarification of the definition of 'ship' in the 1992 Conventions as regards offshore craft and unladen tankers.

The contribution system (Section 21)

A proposal was made to refine the contribution system with the objective of finding an equitable solution in respect of the obligation to pay contributions to the 1992 Fund of certain oil receivers who did not have any interest in the oil received other than providing oil storage services. The Working Group considered that this issue would have to be examined at a later stage.

Uniform application of the Conventions (Section 25)

The Working Group considered that uniformity of implementation and application of the Conventions was crucial to the equitable functioning of the international compensation regime. The Working Group took note of a document presented by the Director in which he dealt with certain provisions in the Conventions in respect of which he felt that in the past the Conventions had not been applied in a uniform way or difficulties had arisen as a result of the relationship between the Conventions and national law. The Working Group concluded that the issue should be retained for further study.
