INTERNATIONAL
OIL POLLUTION
COMPENSATION
FUND 1992

THIRD INTERSESSIONAL
WORKING GROUP
Agenda item 2

92FUND/WGR.3/5/1
26 February 2001
Original: ENGLISH

REVIEW OF THE INTERNATIONAL COMPENSATION REGIME

Submitted by Australia, Canada, Denmark, the Netherlands, Norway, Sweden and the United Kingdom

Summary:	At the first meeting of the Third Intersessional Working Group, a number of issues were discussed and included in a list of items for consideration in any review of the international compensation regime. This paper examines a number of these issues and provides some information for consideration by the Working Group at its second meeting.
Action to be taken:	The Working Group is invited to consider the issues raised in this paper and decide as appropriate.

1 Introduction

1.1 At the conclusion of the first meeting of the Third Intersessional Working Group, held in July 2000, the Chairman invited delegations to consider the list of issues that had been identified as important for inclusion in any review of the international compensation regime and invited delegations to submit discussion papers which might assist the Working Group in its deliberations.

1.2 A number of delegations have informally considered issues contained in the list and added several others considered to be important. The following discussion of these issues should be regarded as an attempt to provide a basis for deliberations by the Working Group and should not be taken as representing the formal position of the sponsoring delegations or their governments on any item discussed.

1.3 The issues addressed in this paper are:

I. Environmental damage;
II. Increase of the maximum compensation level;
III. Non-submission of oil reports or "nil" reports;
IV. Uniform application of the Conventions;
V. Promoting the use of quality ships used for the transport of oil;
VI. Appeal mechanisms/mediation;
VII Contribution system; and,
VIII Ranking of claims/priority treatment;

1.4 As indicated in the paper in respect of each issue, some of the proposed solutions can probably be implemented by a **policy decision** of the Assembly while others will require the adoption of **new protocols** to the 1992 CLC/Fund regime. For the purposes of this paper, these protocols are called **Protocol "A"** and **Protocol "B"**.

1.5 The sponsors welcome any input that would further improve the understanding of the these issues in the hope that the solutions the Working Group will eventually recommend to the Assembly will be widely supported. To that end, the sponsors are prepared to continue in their efforts with the objective of updating this paper for the next session of the Working Group in June 2001.

2 Consideration of the issues

I. Environmental damage

AIM

2.1 To establish criteria for determining "reasonable measures of re-instatement" as provided for under the 1992 Protocols and to ensure uniform treatment of claims for environmental damage.

PROBLEM

2.2 The 1992 Protocols provide for "reasonable measures of reinstatement undertaken or to be undertaken", thereby covering measures to restore the environment. To date no restoration claims beyond clean-up costs have been met under the 1992 Protocols. This is because there have been relatively few incidents since the 1992 Protocols came into force. The Fund's governing bodies have consistently maintained that the conventions do not apply to claims for so-called 'pure environmental damage'. Quantifying legitimacy for such claims is invariably problematic and would be likely to lead to claims being treated differently in various jurisdictions.

2.3 Given that the 1992 Protocols explicitly provide for reasonable reinstatement measures it is appropriate to try to establish a clearer policy on environmental remedial measures. At the moment the claims manual refers to "post-spill environmental studies" and states that the Fund may contribute to the costs of such studies, provided that the studies concern damage which falls within the definition of pollution damage as interpreted by the 1992 Fund. However, it is not particularly clear whether this includes costs for specific environmental remedial measures, e.g. a project to manage the restoration of particularly sensitive flora or fauna that has been significantly damaged or harmed by the pollution.

2.4 With respect to the costs of such projects, probably arising from an Environmental Impact Assessment (EIA), the Fund policy is that the costs of these studies are permissible only if they contribute in the settlement of claims arising from the oil pollution. While some states have argued that this is too restrictive, there have also been concerns that payments of this type might distort the overall claims settlement by denying full payment to individual claimants. The majority of states have agreed that payment of claims for economic loss and pollution damage to property must always remain the first priority.

SOLUTION

2.5 A possible solution might be to agree a revision to the current policy with a view to seeking formal endorsement at the October Session of the 1992 Fund Assembly. Amending the Conventions for this purpose would seem superfluous. It may be preferable to review and widen the existing **policy** on compensation of admissible damages caused to the environment, to include, at least, costs for assessing the environmental damage incurred as a result of any incident through Environmental Impact Assessments (EIAs) and other reinstatement measures.

2.6 Any agreement to the funding for an EIA should be undertaken on the basis that such a study will provide useful 'lessons' i.e. tangible environmental restoration benefits. It may be necessary, or more appropriate, for the scope and terms of reference of any EIA to be agreed by the Fund before such an assessment begins. However, it would need to be understood that any recommended restoration measures would not necessarily be accepted by the Fund. An EIA of a damaged area will ensure that the likely benefits (or disadvantages) from any specific re-instatement projects are identified and costed for consideration by the Fund.

2.7 Consideration might need to be given to setting, within the CLC/Fund limit, an overall cap on the costs of re-instatement measures, including EIA's, and whether these claims might also be allocated lower priority.

2.8 A suitable definition of a 'measure of reinstatement', could be "any reasonable measures aiming to reinstate or restore damaged or destroyed components of the environment, or to introduce, where reasonable, the equivalent of these components into the environment."

2.9 Consideration would need to be given to the extent that reinstatement measures would apply to restoration or introduction of '*identical*' or '*equivalent*' components, and also whether it would be possible to achieve early restoration within the damaged area. Consideration will also need to be given as to the possibility of reinstatement measures into an adjacent area in cases where recovery in the damaged area cannot be expected in the short term, e.g. closure of the damaged area for a period during which remedial measures are attempted (e.g. bio-remediation, or for plant-life to recover). Alternatively remedial measures in a suitable nearby location to enable losses of a particular species to recover where the prospects are good for short term recovery. The costs or any losses associated with these measures could be admissible.

2.10 If it is accepted that the Fund's current policy on post-spill environmental studies needs to be widened, it may be necessary for the relevant member state to take responsibility for ***all*** costs relating to the EIA and for any specific environmental remedial projects recommended. This would have the advantage of ensuring that the priority can be given to settlement of claims for economic losses and pollution damage to property ***if the affected member state so chooses***.

II. Increase of the maximum compensation level

AIM

2.11 To ensure adequate compensation for claimants.

PROBLEM

2.12 The most recent incidents of major oil spills, that have occurred in Japan (the NAKHODKA incident) and in Europe, (the ERIKA incident) have demonstrated that even the new limits adopted by the Legal Committee in October 2000 might not be sufficient to ensure adequate compensation to all victims of these incidents, or similar major oil spills in the foreseeable future.

SOLUTION

2.13 The proposed solution is to:

i) modify the tacit amendment procedures in the 1992 CLC and Fund Conventions; and
ii) establish a voluntary "opt-in" third tier compensation system on top of the existing regimes.

Modifications in the existing Tacit Amendment procedure

2.14 By introducing the Tacit Amendment procedure adopted in the 1992 CLC/IOPC Protocols it was already acknowledged that there was a need to facilitate future increases of the maximum compensation limits regularly.

2.15 However the conventions are not currently sufficiently flexible and dynamic in regard to the need for adapting to new situations. The present procedure obstructs adoption of further increases in the limits for a long time. After the recently adopted 50% increase, any further increases cannot come into force for 11 years[<1>] . During discussions on last year's increase, some parts of industry expressed a preference for a more regular review of limits rather than face less frequent, but significant, increases periodically.

2.16 With the aim of improving the Tacit Amendment procedure, two modifications could be considered:

a) to shorten the period from the adoption of the decision in the Legal Committee until the changes enter into force, so this period will be less than the existing three years (today 2x18 months); and

b) to shorten or delete the time limit by which a further increase may be considered. (Today, this is five years from the date of entry into force of a previous revision.).

2.17 These amendments would be included in the new **Protocol "A"** to the Conventions. On the adoption of Protocol "A" at a diplomatic conference it should be possible to review the compensation levels in the 1992 CLC/Fund regime so that member states would not have to wait for 11 years for the next opportunity to update the limits. This will provide an important interim step for those states not able to consider for immediate adoption the new Protocol "B" (see below).

Establishment of a voluntary "opt-in" third tier on top of the existing CLC/IOPC regimes - a supra tier

2.18 While some Contracting States to the CLC/Fund Conventions might wish to maintain the new limits in the current 1992 CLC/Fund regime, updated from time to time by the new Tacit Amendment procedure, other Contracting States may find it necessary to seek a solution which will ensure much higher limits in the foreseeable future.

2.19 A new third tier opens the possibility to have higher limits for damages occurred in the Contracting States, which are willing to impose higher costs on their industry.

2.20 This third tier would be set up on top of the existing IOPC 1992 Fund. The third tier would consist of two layers:

<1> **Example:** the increase adopted by the Legal Committee in 2000 will take 3 years to come into force. Then, there will be a 5 year period before another increase can be considered. If a new increase is adopted at that point in time, it will again take 3 years for that increase to come into force. Hence, the total elapsed time between the increase adopted in 2000 and the next increase would be 11 years.

Layer 1: would establish higher limits of compensation paid by the shipowners,

Layer 2: would establish a supplementary fund paid by the receivers of oil.

2.21 The third tier would be adopted in a new **Protocol "B"** to both the CLC and the Fund Convention and would be open for ratification or accession by all Contracting States to the 1992-CLC and the 1992-Fund Conventions. Obviously, the third tier compensation would be operative only in respect of pollution damage in the Contracting States to the third tier, and where the claims exceed the 1992 Fund limits. The third tier level of compensation should be set at a relatively high level to cover the types and scale of incidents that are likely to occur in any of the Contracting States that will adopt the third tier. It will be also important in setting up the third tier to bear in mind the balance between the obligations of the shipowners and the receivers of contributing oil. This approach would effectively provide a four-layer system which would be similar to the transitional arrangement that applied in the transitional phase as states moved from the 1969/71 regime into the regime under the 1992 Protocols:

3rd Tier: **Supra 2001**	4th Layer	Receivers
	3rd Layer	Shipowners
2nd Tier: **IOPC 1992**	2nd Layer	Receivers
1st Tier: **CLC 1992**	1st Layer	Shipowners

2.22 The advantage of the new Protocol "B", establishing the third tier, is that it will create an additional level of protection without a need for denunciation of the 1992 CLC/Fund Conventions. This would allow states to participate in both the 1992 system and Protocol "B", or only in the 1992 system and possibly, in the long term, achieve the same level of protection for their claimants through the Tacit Amendment procedure. The choice would be theirs.

2.23 Inclusion for a Tacit Amendment provision for the third tier might also need to be considered to prevent erosion of the benefits of the additional cover provided over time, especially as the 1992 regime limits increase under its own Tacit Amendment provisions.

III. Non-submission of oil reports, or "nil" reports

AIM

2.24 To ensure equitable treatment of all contributors to the 1992 Fund, it is essential that all Member States fulfil their obligation as Parties to the Fund Convention and submit, on time, their reports on oil receipts.

PROBLEM

2.25 The Assembly has considered on various occasions the fact that some Member Sates do not submit their oil reports. In particular, during the 3rd Assembly, where this issue received considerable attention, the Assembly noted some of the options for possible action in respect non-reporting States (see doc. 92/Fund/A.3/27).

2.26 The list of options included:

1. inviting non-reporting States to denounce the Convention.
2. withholding compensation payments to claimants in non-reporting States.
3. removing eligibility of such States for election to Executive Committee.
4. removing voting rights of such States in the Assembly.

5. terminating the treaty or suspending its operation in whole or in part in respect of such States.[<2>]

2.27 At the end, however, the Assembly has narrowed the list of options to requesting the Director to contact these States and express the Assembly concerns. Thus, the Assembly has not yet decided on any specific course of action to be taken for the States that do not submit oil reports.

SOLUTION

2.28 This issue cannot be kept for ever as a standing item on the Assembly's agenda. While the efforts of the Director may bring about positive results in the short term, there is no guarantee that this will not become even a bigger problem at some point in the future, and the whole cycle of debate and concerns will be repeated.

2.29 Thus, a more robust solution is needed to resolve this problem. Two proposals are submitted for consideration:

a) **firstly**, as part of the amendments by the new **Protocols "A" and "B"**, all Contracting States would be required to pay an annual membership fee to the Fund. For states having imports of contributing oil in quantities which make them eligible for invoices to be issued to their contributors, the administrative fee will continue to be included in the levy for the General Fund as now occurs. For those member States having "nil reports" or failing to lodge such reports, the fee will be set by the Assembly on an annual basis having regard to the level of administrative costs required for the coming year. This fee would help to spread the administrative costs of the Fund more equitably in respect of the states that currently enjoy the protection of the Fund but do not make any financial contributions to it.

"b) **secondly**, a provision should be adopted in the new Protocols "A" and "B" to the effect that if no reports are received or membership fee remains unpaid at the end of a specified period, the Fund Convention would cease to be in force in respect of that State".

IV. Uniform application of the Conventions

AIM

2.30 Any fund set up to pay compensation for claims should seek to do so on the basis of uniform rules and procedures. This is particularly important in the case of an international fund, such as the IOPC Fund, which offers compensation in all states that are party to the Convention. It is important both for claimants and for contributors that claims are handled on a uniform basis, even though it is recognised that there may be some divergence dictated by differing notions of damages in the various jurisdictions represented in the IOPC Fund.

PROBLEM

2.31 Lack of uniformity in the treatment of claims in the various jurisdictions represented in the IOPC Fund results from two causes:

<2> This issue was considered in the context of the Vienna Convention on the Law of the Treaties to the effect that non-submission of oil reports might be a "material breach of a multilateral treaty" as it could be construed as a "violation of a provision essential to the accomplishment of the object or purpose of the treaty" (cf Article 60.3 of the Vienna Convention on the Law of Treaties) and that such non-submission could therefore be invoked as a ground for terminating the treaty or suspending its operation in whole or in part.

a) differing methods of treaty **implementation** in states that are party to the conventions; and

b) lack of uniformity in the **interpretation** of the terms of the conventions when it comes to claims settlement.

2.32 The following are examples where difficulties have arisen in the claims experience of the IOPC Fund which could, potentially, lead to unequal treatment of claims in the various jurisdictions.

Definition of Pollution Damage

2.33 The governing definition of this term for the purpose of both conventions is contained in the Civil Liability Convention (Article I). It is a general definition that leaves it largely to national courts to determine its content according to national jurisprudence. Over the years the Executive Committee of the Fund, supported by the Assembly, has developed criteria for the admissibility of claims precisely with the aim of achieving uniform treatment of claims. In some jurisdictions, however, the suggestion has been made by the courts that these criteria are irrelevant and that claims must be considered in accordance with general principle of national law. This can clearly lead to some claims being allowed in some jurisdictions but being disallowed in others.

Clean Up Operations and Preventive Measures

2.34 Costs for clean up and preventive measures will often be a big portion of claims arising out of a particular incident. It is important that they be dealt with by the Fund system on a consistent basis in all jurisdictions**.** These costs are considered by the Fund if they **are** admissible under the Conventions and if they relate to measures which are deemed reasonable and justifiable. There is some risk that this criterion will not always be accepted by national courts, and that in some jurisdictions judgements will award more than the Fund, based on this criterion, will allow.

Time Bar

2.35 The claims experience of the Fund in some of the major cases has demonstrated that differing approaches in the implementation of the time bar provisions of the conventions can lead to difficulties in the settlement of claims, leading to substantial delays. In some jurisdictions these provisions have been reworded in national legislation giving rise to ambiguity. In other jurisdictions these provisions have been interpreted in conjunction with general time provisions of national law which may lead to decisions by the courts that are at variance with the intentions of the time bar provisions in the conventions. In any event, this varied treatment of the subject can lead to differing and unacceptable results.

SOLUTION

2.36 As already noted, the problem is two-fold: lack of uniformity in implementation and lack of uniformity in interpretation of the conventions. Two solutions might be considered for adoption in Protocol "A" to address this problem in the Fund Convention:

- **firstly,** a provision might be inserted, perhaps after paragraph 1 of Article 2, to the effect that states party to the convention should implement the Civil Liability Convention and the Fund Convention in *verbatim*, without modifications, to ensure that their terms have the same force and effect in all jurisdictions, thus leading to an equal treatment of all claims admissible under the liability and compensation scheme set up under the two conventions. This provision should recognise that the national language may be different from any of the three (3) official languages of IOPC Fund and that in the case of any inconsistency, the meaning of the terms in the Convention in any of the official languages will be conclusive.

- **secondly,** consideration might be given to the insertion of a provision, perhaps after paragraph 2 of Article 7, to the effect that states party to the two conventions should by their national implementing legislation require their courts to take into account that the Conventions form part of an international regime whose purpose is to establish uniform rules and procedures and that they should, in deciding actions arising under the conventions, take into account the criteria for the admissibility of claims that have been adopted by the Assembly and Executive Committee of the IOPC Fund.

2.37 Why such amendments should be addressed in the Fund Convention rather than in the Civil Liability Convention stems from the fact that while most states that are party to the CLC are also party to the Fund Convention, in fact, there are still some states that are not party to both. The CLC makes no direct reference to the Fund Convention. The Fund Convention, on the other hand, makes ample reference to the CLC.

2.38 The work on this issue will also provide an opportunity to reflect on past experience and on possible improvements of the terms of the Conventions where these have been the source of ambiguous interpretation.

V. Promoting the use of quality ships used for the transport of oil

AIM

2.39 To explore the possibility of building in incentives - and of avoiding disincentives – in the compensation system based on the Conventions, for using quality ships for the transport of oil.

PROBLEM

2.40 During the deliberations at the WG (doc. 92 FUND/WGR.3/3, par. 7.6.1 - 7.6.8) the issue was raised whether the Conventions and the compensation system based on them could contribute more to the safety of navigation. Less incidents would mean less damage to the environment and economic interests of various types.

SOLUTION

2.41 For a clear picture, a distinction between ship and cargo should be made, to the extent that incentives of an economic nature should either relate to the shipowner's limitation amount or to the contributions by the cargo interests. The following possibilities then logically follow:

On the part of the ship:
1. to vary the shipowners limitation amount according to the quality of the ship used for the carriage and discharging of oil at the respective contributors terminal;
2. to vary the shipowners limitation amount according to the type of oil carried.

On the part of the cargo:
1. to weigh the contributions to the Fund on the basis of the type of oil carried;
2. to weigh the contributions to the Fund on the basis of the quality of the ship used for the carriage and discharging of oil at the respective contributors terminal.

2.42 How exactly the various aspects should be weighed, would be something to decide, but in general of course the combination of a low quality ship and a highly polluting cargo would result in a higher limitation amount and heavyweight contributions to the Fund. The combination of a high quality ship with a relatively low polluting cargo would result in a lower limitation amount and lightweight contributions to the Fund. The other two combinations (quality ship/highly polluting cargo and substandard ship/relatively low polluting cargo) would be somewhere in the middle.

2.43 In this way for both parties involved, i.e. the shipowner and the cargo interest, both a direct incentive (nrs. 1) and an indirect incentive would be provided, the latter because shipowner and cargo interests would have a solid economic reason to try to influence the type of oil carried and the quality of the ship used respectively. By doing so shipping interests could be discouraged from deliberately taking risks or it would at least provide a disincentive for using substandard shipping.

2.44 To make an efficient contribution to such an approach, the consideration of incentives clearly has to be seen against the background of other developments that take place on an international level. In this regard it is important to note the relationship with responsibilities that exist from an international public law point of view, as well as with the recently promoted ideas of quality shipping according to which safety might be enhanced by making better use of market mechanisms (Mareforum). Of course the safety of shipping should primarily be regulated by prescriptive international public law safety provisions. However, this does not mean that provisions on liability and compensation could not contribute to the reduction or prevention of shipping incidents. The parties that have an economic interest in the trade itself, also have responsibilities as regards the safety of shipping. Considerations of safety may therefore be served simultaneously by somehow linking the two and creating an interest for parties involved.

2.45 A concern broadly shared among member states is that the simplicity of the present system has been the key to its success and that therefore this should not be undermined by a more distinctive mechanism, unless this of course could easily be introduced. This makes it clear that the ideas developed above can only have a real value in practice if objective criteria and practicable mechanisms can be identified to make and administer the distinctions needed. It is also clear that not all of the four possibilities identified above will have to be pursued; they can each contribute to the aim individually and there will probably be differences between them as regards the feasibility in practice. In any case it will be necessary to collect the relevant information, for instance on which ships that qualify for a certain criterium have been used by a certain contributor and what cargo was carried. Such mechanisms seem to become more and more in existence for commercial purposes (Sire, CDI). It is not completely clear however whether such information will also become available for public law issues like enhancing safety and for the purpose of administering a compensation system. The conclusion might therefore be justified that more information is needed on the ongoing developments as regards quality shipping in general, before the decision can be made for the CLC/Fund system to also make use of it.

2.46 In exploring the difficult questions mentioned above it is finally important not to loose sight of a less sophisticated, simple way enhancing safety of navigation by roughly the same mechanism, namely by indirect liability in the form of recourse action. The WG could (also) investigate how better use could be made of the already existing possibilities of recourse action and how these possibilities could be extended further by possible refinements of the Conventions.

VI. Appeal/mediation mechanism

AIM

2.47 To develop an improved appeal or mediation mechanism so as to limit the need for claimants to resort to court action.

PROBLEM

2.48 The first session of the 1992 Fund Assembly noted the increasing number of cases in which the 1971 Fund had become involved in lengthy litigation, and instructed the Director to undertake a study of alternative dispute settlement procedures.

2.49 Over several following sessions, a number of papers and reports were developed and considered by the 1st Intersessional Working Group and the Assembly on this problem. These deliberations

are contained in papers 92FUND/A/ES.1/13, 92FUND/A.2/18, 92FUND/A.2/19, 92FUND/A.2/29 and 92FUND/A.3/WP.1.

2.50 The current status of this debate is that while the establishment of a formal appeals mechanism that would hear disputes and not be subject to further appeal was generally rejected, the 1992 Fund could in appropriate cases engage an independent person with legal background who would facilitate a dialogue between claimants and the 1992 Fund and promote the claimant's understanding of the compensation system. It was noted that the task of this person should not be to mediate or propose settlements on the basis of equity.

SOLUTION

2.51 The proposed solution is to introduce a provision in the new **Protocol "A"** to the 1992 Fund Convention to the effect that individual claimants can pursue their claim(s), on a case by case basis, through a formal appeal or mediation process. Such a process would need to fulfil the conditions set out in the 1996 consultant's report[<3>]:

i) it should assure potential claimants that the process will on the whole provide no less benefits than would be obtainable from their national courts;

ii) 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; and

iii) 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.

2.52 The new provision should also make it clear that the proposed appeal/mediation process is to be confined to claims issues, and that matters of broad principle, such as whether the Conventions apply to specific incidents, are matters properly left to decision in the courts. In addition the new provision should make it clear that:

if both parties (the claimant(s) and Fund) agree to mediation then that outcome will be binding on both of them. It would always be an option for any claimant to seek legal redress instead of going to arbitration

or

if both parties agree the appeal/mediation process is non-binding and that legal redress is still an option for either side.

VII Contribution system

AIM

2.53 To develop a contribution system that is better focused on the real cargo interests.

PROBLEM

2.54 A further concern as regards the future existence of the present international liability and compensation scheme is that a proper balance between the contribution by the different interests to the existing schemes has to be maintained. Some states are faced with the particular situation of certain contributors that do not have any interest in the oil received other than providing mere

<3> 92FUND/A/ES.1/13 Alternative Dispute Settlement Procedures - Annex

storage services (independent storage owners). It appears in many occasions that these particular contributors face difficulties in charging their principals for any post-event levy and therefore have to pay the levy out of their own pockets. For these companies clearly the relationship between their particular financial interest in the oil (what they can charge for the storage) and the levy is totally different from that of a regular oil company that owns the oil, sells the various refinery products and can thus pass on the levy to (in the end) the consumer. This unbalance, that was – with limited scope - already there under the 1971 Fund Convention, has deteriorated with the 1992 limits. The prospect of the raised 1992 limits entering into force in 2003 and especially a possible third tier aggravates this dramatically for the companies involved.

SOLUTION

2.55 A further refinement of the present system as a result of the work of the WG, should also be used to find a solution for these particular storage interests. A suitable and simple model here might be the HNS Convention. Under that convention contributors have the possibility to pass the levy on to their principals located in States Parties. Also the rules on transhipments in that convention might be used to solve these particular concerns.

VIII. Ranking of claims/priority treatment

AIM

2.56 To establish a legal basis for treating certain claims differently.

PROBLEM

2.57 Ranking/ priority treatment has become an issue in the wake of a number of cases where overall costs cannot be fully forecast and, as a result, claims have had to be pro-rated - at least in the early stages of the claims settlement process. This has led to hardship for some claimants, sometimes over a prolonged period, until overall cost of damages and the level of claims can be more accurately assessed. The prime objective of any ranking/ priority arrangements would be to maximise levels of payment to certain claimants/types of claim from the outset following an oil spill.

2.58 Most contracting states would probably prefer not to change the current basic policy of equal claims settlement for all types of claim. Therefore, before considering major changes to the current approach to claims settlement, some hard choices must be faced.

2.59 Options that would avoid the need for pro-rating are:

1. Setting the overall compensation limits sufficiently high so as to avoid the likelihood of exceeding the limits;
2. Changing the treaty obligation to keep within the overall limit in all circumstances;
3. Changing the treaty obligation to treat all claimants equally;
4. Change the conventions to allow the CLC and Fund to function differently.

2.60 Setting very high limits has considerable attraction for some states. The regime inevitably has to try to reflect the needs and aspirations of as many member states as possible, while taking account of the varying financial obligations under the regime, or differentials in the likely costs arising within the territories of the member states. This always makes it difficult to set limits to suit all. Those states not seeking high limits may prefer periodically reviewing the limits through some recognised 'trigger' mechanism.

2.61 It is sometimes felt that those who suffer damage/loss directly relating to the pollution from the outset after an incident tend to suffer hardest, eg fishermen affected by early fishing bans. Claims from individuals and small businesses that suffer damage/losses or from those that have

demonstrated hardship could be given priority - some P&I Clubs have made special provisions for payments on grounds of hardship. Alternatively, allowing full payment on a 'first come, first paid' basis for, say, 6-12 months after an incident could be a means of ensuring full compensation at the early stages – even if it meant that pro-rating might need to be applied later in the settlement process.

2.62 Claims for certain types of damage/loss could take second place, e.g. government claims, or clean-up claims, or environmental re-instatement costs.

2.63 Claims settlement on behalf of both the shipowner and the Fund is usually handled at the same time following a major spill – thus ensuring equal treatment within the respective limits. The Fund policy allows for separate claims settlement, with the Fund covering all claims and seeking recovery later for the CLC contribution. The Fund can operate independently where the pollution is from an unidentified ship or where, for some reason, the insurance is not paid.

2.64 An option could be to amend the conventions to allow for early settlement in full up to the applicable limit of CLC, with the Fund entering the process at a later stage to fill the remaining gap up to the overall compensation limit, if necessary, pro-rating claims. This approach would entail amending the conventions:

- The clear advantage would be to ensure full flexibility to the insurers to work towards settlement of the earliest claims.

- The obvious difficulty would come when the insurer would only be able to settle a proportion of eligible claims in full, leaving all unsettled claims to fall on the Fund at a point when they may then have to be pro-rated. This would be a recipe for considerable criticism of the regime. Many claimants may be more inclined to seek recourse to courts than through the Fund – thus delaying the later claims settlement. In addition, the legally difficult cases would also be more likely to fall exclusively to the Fund to resolve.

2.65 Finally, there is a possible *policy* option - perhaps as an interim measure, pending other more effective revisions of the regime. A number of member governments have offered to 'mortgage' their claims or 'to stand last in the queue' (generally for clean-up costs) to ensure that their claimants received a greater proportion of their claims. This could be adopted as standard practice through an Assembly Resolution. However, there would be a need for some flexibility. The policy would be open to challenge. Also, in cases where the financial burden would place unreasonable demands on the economy of the member state, or where the clean-up costs are incurred by contractors, or others that are not part of the central government, who will require prompt payment to complete their work.

SOLUTION

2.66 The need to give consideration to this issue is largely dependent on the view taken on the other agreed priorities for the Working Group, particularly, the limits of compensation. Removing either, or both, of the current treaty obligations relating to the treatment of claims is desirable *only* if the overall limits set for the regime are at a level whereby pro-rating remains likely in foreseeable circumstances.

2.67 It is therefore **recommended** that the priority for the Working Group is to address that problem before considering changes to the convention that would lose the current benefits of equal treatment for all claimants.

3 Action to be taken by the Working Group

The Working Group is invited:

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

(b) to give due consideration to the issues raised when making recommendations to the Assembly.
